IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-404-481; CIV-2017-485-193;
CIV-2017-485-220; CIV-2017-485-221;
CIV-2017-485-224; CIV-2017-485-226;
CIV-2017-485-232
Group M, Stage 1(b)
[2024] NZHC 3745

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

Continued…

Hearing:	19, 21 – 22 and 26 – 29 February 2024; 1 – 12 and 14 March 2024; 23 and 30 April 2024; and 1 – 3 May 2024 Site visits on 18 – 22 March 2024
Appearances:	C Hirschfeld and H Clatworthy for Te Hika o Pāpāuma Mandated Iwi Authority L Watson for Ngāti Kere hapū S Northey and T Hautapu for Trustees of Pāpāuma Marae J Ferguson and H Herewini for Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua R Siciliano, C Mataira, K Katipo and T Prendiville-Stowers for Rangitāne o Wairarapa and Rangitāne Tāmaki nui-ā-Rua D Naden, M Sreen, H Fletcher, A Crawford and C-R Smith for the Pirere Whānau and for Ngā Uri o Ngāi Tūmapuhia-ā-Rangi hapū B Lyall and H Swedlund for Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Inc and Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Inc B Scott and R Wales for the Seafood Industry Representatives J Prebble, D Kleinsman and F Hussain for the Attorney-General
Judgment:	10 December 2024

INTERIM JUDGMENT OF GWYN J
(CMT orders)

BY	George Ngatiamu Matthews, on behalf of Te Hika o Pāpāuma Mandated Iwi Authority (CIV-2017-404-481)
	Ngāti Kere MACA Working Party, on behalf of Ngāti Kere Hapū (CIV-2017-485-193)
	Trustees of Pāpāuma Marae (CIV-2017-485-220)
	Trustees of Ngāti Kahungunu Ki Wairarapa Tamaki-Nui-A-Rua Settlement Trust, on behalf of Ngāti Kahungunu ki Wairarapa Tamaki-nui-a-Rua (CIV-2017-485-221)
	Trustees of Rangitāne Tū Mai Rā Trust, on behalf of Rangitāne o Wairarapa and Rangitāne Tamaki nui-ā-Rua (CIV-2017-485-224)
	Rebecca Harper, on behalf of Pirere Whānau (CIV-2017-485-226)
	Ngāi Tūmapuhia-a-Rangi hapū Incorporated on behalf of Ngā Uri o Ngāi Tūmapuhia-ā-Rangi hapū (CIV-2017-485-232)
INTERESTED PARTIES	Sue Taylor, on behalf of Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Incorporated
	Sam Morris, on behalf of Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Incorporated
	Seafood Industry Representatives
	Attorney-General
	Central Hawkes' Bay District Council
	Manawatū-Whanganui District Council
	Greater Wellington Regional Council
	Hawkes' Bay Regional Council

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Whakatakinga | Introduction

[1] The Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act) recognises customary interests of Māori in the common marine and coastal area.[1]

[2] The marine and coastal area is the area between high-water springs and the 12 nautical mile limit of the territorial sea.[2] The Takutai Moana Act creates three new types of legal interest. First, a right to participate in conservation processes; second, a customary marine title; and third, a protected customary right.[3] These legal interests may be granted to iwi, hapū or whānau groups.[4]

Ngā tono | The applications

[3] In Stage 1(b) of this proceeding the Court was asked to determine whether the seven applicant groups are entitled to orders recognising customary marine title (CMT) and/or protected customary rights (PCRs) under the Takutai Moana Act in the hearing area.[5] The hearing area relates to a part of the common marine and coastal area (CMCA) in the Wairarapa, from the southern bank of the Whareama River to Aramoana, and extending from the line of mean high-water springs (MHWS), out to the territorial sea limit (the hearing area). The hearing area is depicted in Figure 1 below.[6]

[4] Stage 1(b) is the second stage of the broader Wairarapa "Group M" proceedings. In Stage 1(a), the first stage, the Court heard applications for recognition orders in the area from Tūrakirae Head to the southern boundary of the Whareama River, between the line of MHWS (generally) and out to the territorial sea limit. The Court's decision in that proceeding was issued to counsel and parties on 26 February 2024, and released to the public on 7 March 2024.[7]

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1 Marine and Coastal Area (Takutai Moana) Act 2011 [Takutai Moana Act], s 7.
2 Section 9(1).
3 Part 3.
4 Section 9(1), definition of "applicant group".
5 HC Wellington CIV-2017-485-259, 1 July 2022 (Minute of Churchman J); and see also HC Wellington CIV-2017-404-481, 9 November 2022 (Minute of Churchman J).
6 A landscape depiction of the area is at Appendix I. See also Appendix II which shows the overlapping applications.
7 *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 [*Ngāi Tūmapūhia*].

Ngā kaitono | The applicants

[5] The applicants are:

(a) Ngāi Tūmapūhia-a-Rangi hapū Incorporated on behalf of Ngā Uri o Ngāi Tūmapūhia a Rangi hapū (CIV-2017-485-232).

(b) George Ngatiamu Matthews on behalf of Te Hika o Pāpāuma (CIV-2017-404-481);

(c) Papauma Marae Trustees (CIV-2017-485-220);

(d) Trustees of Rangitāne Tū Mai Rā Trust on behalf of Rangitāne o Wairarapa and Rangitāne Tamaki nui-ā-Rua (CIV-2017-485-224);

(e) Pirere whānau (CIV-2017-485-226);

(f) Ngāti Kere (CIV-2017-485-193); and

(g) Trustees of Ngāti Kahungunu Ki Wairarapa Tamaki-Nui-Ā-Rua Settlement Trust on behalf of Ngāti Kahungunu ki Wairarapa Tamaki-nui-ā-Rua (CIV-2017-485-221);

[6] A brief summary of each of the applicant groups is set out below.

Ngāi Tūmapūhia-a-Rangi hapū

[7] Ngāi Tūmapūhia's application area runs along the coastline from the northern bank of the Whareama River, south to the southern bank of the Pāhaoa River and 12 nautical miles out to sea from all points along the coastline. The hapū's traditional rohe moana is also inclusive of the area that runs along the coastline from the southern bank of the Pāhaoa River to the southern bank of the Āwhea River and 12 nautical miles from all points along the stated coastline.

[8] Originally, the entirety of Ngāi Tūmapūhia's application area was included in the Wairarapa Group M, Stage 1(a) hearing. However, during that hearing it was

decided to include the Whareama river mouth in this Wairarapa Group M, Stage 1(b) hearing.

[9] Before the change of hearing area was agreed to the parties to the Stage 1(a) hearing reached an agreement — the mana moana agreement[8] — under which they acknowledged shared interests in six coastal rohe within the application area. One of those coastal rohe was the Whareama River mouth, where the parties agreed that Te Hika o Pāpāuma and Ngāi Tūmapūhia were the relevant hapū. The mana moana agreement is therefore relevant to my conclusion as to who should hold CMT in this rohe, as I will come to below.

Te Hika o Pāpāuma

[10] George Matthews, the named applicant for Te Hika o Pāpāuma, seeks recognition of CMT and PCRs in the CMCA between the mouth of the Whareama River (southern bank) and Poroporo, from the line of MHWS and out to the territorial sea limit.

[11] As noted above, the area from the southern bank of the Whareama River to its northern boundary, encompassing the Whareama River mouth, was originally included in the hearing area for Group M stage 1(a) (the southern Wairarapa coast), but the hearing area was amended to add it to this Stage 1(b) hearing.

[12] As above, the mana moana agreement is relevant to that part of Te Hika o Pāpāuma's application.

Pāpāuma Marae Trustees

[13] The Trustees of the Pāpāuma Marae seek recognition of CMT and PCRs in the CMCA between the southern bank of the Mataikona River and the northern bank of the Aohanga River.[9] The application area is the common marine and coastal area

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8 At [119]–[122].

9 Aohanga is also referred to as Owāhanga in various sources. In his report prepared for the Pāpāuma Marae Trustees historian Bruce Stirling notes at 1: "By way of clarification, 'Owahanga' is an earlier and incorrect spelling of Aohanga. The long-standing spelling error for the locality, river, and hill 'Owahanga' was corrected to Aohanga in 2023 under the Ngāti Kahungunu ki Wairarapa-Tamaki-nui-a Rua Claims Settlement Act." I have therefore adopted the Aohanga

contiguous to, adjoining and abutting the Mataikona 1, 2 and 3 Blocks, extending from the landward boundary from the line of MHWS and the seaward boundary being the outer limit of the territorial sea (12 nautical miles from shore).

[14] The applicant group comprises the Trustees of Pāpāuma Marae. The application is brought on behalf of the owners and beneficiaries of the Pāpāuma Marae, who are the direct descendants of the original owners of Mataikona 1, 2 and 3 Blocks.

[15] Pāpāuma Marae Trustees are established under the Proprietors of Owāhanga Station trading as Aohanga Incorporation 1972. The Directors of the Aohanga Incorporation automatically become the Trustees of the Pāpāuma Marae. The Trustees of Pāpāuma Marae are responsible for Pāpāuma Tipuna Whare and Te Aroha o Aohanga.

[16] The iwi of the Trustees of Pāpāuma Marae is Ngāti Kahungunu; their hapū is Te Hika a Pāpāuma. The Trustees of the Pāpāuma Marae cite Te Matau as their notable ancestor in respect of the application area. Te Matau descends from the union of Rakaihikuroa and Pāpāuma. Rakaihikuroa is the grandson of Kahungunu, the eponymous ancestor of the applicants' iwi.

Rangitāne

[17] Rangitāne seeks recognition of CMT and PCRs in the CMCA between the southern bank of the Whareama River and Poroporo, from the line of MHWS and out to the territorial sea limit.

[18] Rangitāne seeks joint CMT at a hapū level through specific Rangitāne hapū present along the coastline. In particular, the Rangitāne application is to ensure that their hapū Ngāti Te Rangiwhaka-ewa, Ngāti Parakiore and Ngāti Hāmua are represented in the proceeding and appropriately recognised in any orders made. Those hapū have had a strong presence in this area from prior to 1840 through to today, in accordance with their tikanga.

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spelling throughout this judgment, except where the historical context requires the use of Owāhanga.

[19] Rangitāne therefore seeks inclusion of these hapū in any CMT orders made by the Court.

[20] Rangitāne also acknowledges the continued, joint presence of Te Hika o Pāpāuma and Ngāti Kere in their respective areas. These reflect the shared whakapapa, connections and well-established arrangements these hapū have with Rangitāne over many years.

[21] While Rangitāne has filed an application relating to the whole of the area from the Whareama river mouth in the south to Poroporo in the north, it recognises the specific hapū applications before the Court along this area. Rangitāne seeks joint CMT at a hapū level, through specific Rangitāne hapū present along this coastline, based on shared exclusivity and joint use and occupation.

Pirere whānau

[22] Rebecca Harper, on behalf of the Pirere whānau, seeks recognition of CMT and PCRs in the CMCA between the southern bank of the Castlepoint Stream and the northern bank of the Ōkau Stream, from the landward boundary of the CMCA and out to the territorial sea limit.

[23] The Pirere whānau belongs to the Te Hika o Pāpāuma hapū, which has ancestral connections to the broader iwi groups of Ngāti Kahungunu ki Wairarapa and Rangitāne. The Pirere whānau have a long-held associated with the Whakataki area.

Ngāti Kere

[24] In its application of 29 March 2017 for orders under the Takutai Moana Act, Ngāti Kere sought recognition of CMT in the CMCA between the southern bank of Te Wainui Stream (Herbertville) and the northern bank of the Ouepoto Stream, from the line of MHWS and out to the territorial sea limit.

[25] Ngāti Kere's application for PCRs was for the area from the southern bank of the Akitio River in the south, to the northern bank of the Ouepoto Stream in the north.

[26] On 29 April 2024, shortly after completion of the hearing, Ngāti Kere filed an amended application seeking to amend its CMT application area, to encompass the area from the northern bank of the Ouepoto Stream in the north, to the southern bank of the Akitio River in the south, thus matching the area for which is seeks PCRs.

[27] I granted that application to amend Ngāti Kere's application area for CMT in a judgment of 5 June 2024.[10]

[28] Subsequently, the Attorney-General sought leave to appeal that interlocutory decision. In a judgment of 15 August 2024, I declined leave.[11] The Attorney-General sought leave from the Court of Appeal. As at the date of this judgment, the Attorney-General's application had not yet been determined.

[29] In light of that, in this judgment I will consider Ngāti Kere's application for CMT in two parts: first, in relation to the area contained in its originating application of 29 March 2017; second, in respect of the additional area covered by the interlocutory judgment, which I refer to as the extension area. This is the area from the southern bank of the Ākitio River to the southern bank of Te Wainui Stream (Herbertville).

[30] This application is brought on behalf of the Ngāti Kere MACA Working Party (Ngāti Kere). The Working Party members affiliate to the hapū of Ngāti Kere and carry the mandate of the Ngāti Kere hapū to progress this application.

[31] Ngāti Kere hapū include the customary interests of the following inter-related descent groups:

(a) Ngāti Kere;

(b) Ngāti Manuhiri;

(c) Ngāti Pihere; and

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10 *Re Ngāti Kere (Application to amend CMT area)* [2024] NZHC 1472.

11 *Re Ngāti Kere (Application for leave to appeal decision re CMT application area)* [2024] NZHC 2298.

(d) Ngāti Hinetewai.

[32] Ngāti Kere acknowledges the possibility of "shared exclusivity" and acknowledge all of their whanaunga of Ngāti Kahungunu ki Wairarapa, Rangitāne and Te Hika o Pāpāuma.

Ngāti Kahungunu

[33] Ngāti Kahungunu seeks recognition of CMT and PCRs in the CMCA between the southern bank of the Whareama River and Poroporo, from the line of MHWS and out to the territorial sea limit.

[34] The Ngāti Kahungunu application was filed as an overarching korowai application in order to ensure that the interests of all Ngāti Kahungunu hapū in the takutai moana of the Wairarapa and Tāmaki-nui-a-Rua could be recognised, in the event that the relevant Ngāti Kahungunu hapū did not file their own applications.

[35] Ngāti Kahungunu's position is that any rights under the Takutai Moana Act should not be recognised or held at an overarching iwi level.

[36] In light of the applications subsequently filed by Ngāti Kahungunu related groups (Ngāti Kere, Te Hika o Pāpāuma, Trustees of Pāpāuma Marae, Ngāi Tūmapūhia a Rangi and the Pirere whānau), which cover the entire Stage 1(b) hearing area, the stated purpose of Ngāti Kahungunu's participation was to support the other Ngāti Kahungunu-related applications. Also, if required, to seek recognition of the interests of relevant Ngāti Kahungunu hapū in any related groups in any areas of the takutai moana where the interests of any such hapū or group reasonably extend beyond the area of takutai moana demarcated in their filed application. And, finally, to ensure that any other Ngāti Kahungunu hapū or groups who are identified as having relevant interests alongside any of the applicants in a particular part of the takutai moana are recognised, either directly or indirectly, in any orders ultimately made by the Court.

Ngā rōpū whai pānga | Interested parties

[37] As the Court of Appeal noted,[12] there are no defendants in a proceeding under the Takutai Moana Act, only applicants and interested parties.

[38] Those interested parties who filed notices of appearance[13] in relation to the Stage 1(b) hearing were:

(a) Sue Taylor, on behalf of Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Incorporated and Jason Morris, on behalf of Ngāi Tūmapūhia-ā-Rangi ki Ōkautete Incorporated (Tūmapūhia interested parties). The Tūmapūhia interested parties called evidence.

(b) NZ Rock Lobster Industry Council Ltd, Pāua Industry Council Ltd, Fisheries Inshore New Zealand Ltd and the New Zealand Federation of Commercial Fishermen Inc (together, the Seafood Industry Representatives group or SIR) which called evidence.

(c) The Manawatū-Whanganui Regional Council, which filed legal submissions but did not file evidence and was granted leave to be excused from the hearing. The Council requested the right to maintain its watching brief and to participate in future stages of the hearing regarding the specific boundaries and form of CMT and PCR orders.

(d) The Greater Wellington Regional Council, which filed legal submissions but did not file evidence and was granted leave to be excused from the hearing. The Council requested the right to maintain its watching brief and to participate in future stages of the hearing regarding the specific boundaries and form of CMT and PCR orders.

(e) The Central Hawkes' Bay District Council, which did not file evidence or submissions and was granted leave to be excused from the hearing.

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12 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [*Re Edwards*] at [236].

13 Takutai Moana Act, s 104.

The Council wishes to maintain a watching brief and to be involved in future stages of the hearing if CMT or PCRs are granted.

(f) The Hawkes' Bay Regional Council, which did not file evidence or submissions and did not participate in the hearing. The Council wishes to maintain a watching brief and to be involved in future stages of the hearing if CMT or PCRs are granted.

[39] By minute of 11 December 2023,[14] I confirmed that the local and regional councils acting as interested parties will have the opportunity to participate in any future discussions on the boundaries and descriptions of any CMT or PCR orders to be made, including wāhi tapu protection orders.

[40] The Attorney-General also appeared as an interested party, as in all previous proceedings under the Takutai Moana Act. As I acknowledged during this case, and in my judgment in *Ngāi Tūmapūhia*, the Attorney-General is not an "interested party" in the same sense as the "tangata whenua" interested parties[15] and the SIR, each of which has a direct interest in the outcome of the applications. As Churchman J acknowledged in *Re Rihari (on behalf of Ngāti Torehina ki Mataka Hapū/Iwi of Niu Tireni)*,[16] the role of the Attorney-General is to appear in the "interests of the public" to ensure the Court has all relevant information before it and to assist in the interpretation and application of the Act through legal submissions.

[41] In this hearing, as in *Ngāi Tūmapūhia*, counsel for the Attorney-General made submissions on the approach to interpreting the legislation and applying the tests for CMT and PCRs and, at my request, provided an assessment of the evidence proffered by each of the applicants and whether it met the tests for CMT and/or PCRs.

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14 Minute of Gwyn J (Participation of local and regional councils), 11 December 2023 at [2]–[3].

15 In this proceeding, Ngāi Tūmapūhia-ā-Rangi ki Motuwairaka Inc and Ngāi Tūmapūhia-ā-Rangi ki Okautete Inc.

16 *Re Rihari (Ngāti Torehina Ki Mataka Hapū/Iwi of Niu Tireni)* [2019] NZHC 2658 at [2(f)].

Hearing; site visits

[42] The hearing took place at the Wellington High Court. It began on 19 February 2024. After four weeks, the Court took an adjournment for the preparation of the pūkenga report and closing submissions. Site visits were organised by Te Hika a Pāpāuma Mandated Iwi Authority, the Pirere whānau, the Rangitāne Tū Mai Rā Trust, Ngāti Kahungunu ki Wairarapa Tamaki Nui ā-Rua Settlement Trust, the Pāpāuma Marae Trustees and Ngāti Kere hapū. The Judge, pūkenga, High Court security staff and counsel (for those parties who wished to attend) took part in the site visits over a week, starting 18 March 2024.

[43] The pūkenga submitted his report on 19 April 2024,[17] and counsel questioned Dr Joseph on his report on 23 April 2024. Closing submissions were delivered over three days, from 1 to 3 May 2024.

Relevant background materials

[44] A number of reports have provided useful context to this hearing and were referred to in the parties' submissions. For example, the Waitangi Tribunal's report on its inquiry into the district called Wairarapa ki Tararua, which extends from the southern coast of the eastern side of the North Island up to southern Hawke's Bay.[18] In particular, the Tribunal's report highlights the dramatic loss of Māori land in Wairarapa ki Tararua, beginning in June 1853.

[45] The Waitangi Tribunal has already undertaken in two reports a national, historical and contemporary survey of customary rights in the foreshore and seabed. Conclusions from those surveys provide a useful background against which the Court can consider customary interests specific to the Wairarapa Coast.

[46] In its 2004 report, the Waitangi Tribunal said:[19]

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17 A revised report was submitted on 23 April 2024.

18 Waitangi Tribunal *The Wairarapa ki Tararua Report Volume I: The People and the Land* (Wai 863, 2010) [Wairarapa Report Volume I]; and Waitangi Tribunal *The Wairarapa ki Tararua Report Volume II: The Struggle for Control* (Wai 863, 2010) [Wairarapa Report Volume II].

19 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [2.1.8].

> The foreshore and sea were and are taonga for many hapū and iwi. Those taonga were the source of physical and spiritual sustenance. Māori communities had rights of use, management and control that equated to the full and exclusive possession promised in the English version of the Treaty. This promise applied just as much to the foreshore and seabed as, in 1848, it was found to apply to all dry land. There is in our view no logical, factual, or historical distinction to be drawn. In addition to rights and authority over whenua, Māori had a relationship with their taonga which involved guardianship, protection, and mutual nurturing.

[47] This view was confirmed in the Tribunal's 2023 report, which was published during the course of this hearing:[20]

> We accept that some parts of te takutai moana – for example, fishing grounds or areas containing wāhi tapu – are more significant to Māori than others. However, the evidence given during this inquiry demonstrates that, for the claimants, the entire takutai moana in their rohe is a taonga. That some areas within it are more significant than others does not undermine the status of te takutai moana as a whole.
>
> …
>
> In contrast, we heard no evidence to suggest that some parts of te takutai moana are not considered a taonga. On the strength of the evidence we heard, we conclude that the marine and coastal area as a whole is a taonga that has significant importance to Māori.

[48] The Tribunal's report outlines its concerns about some aspects of the Takutai Moana Act, including the statutory test for CMT. In the Stage 2 Report the Tribunal found that the statutory regime itself is not compliant with te Tiriti o Waitangi and Treaty of Waitangi principles.[21] While the Tribunal's report is not binding on the Court, it provides relevant context and, as a number of applicants submitted, highlighted the significance of the Court considering the history of the Takutai Moana Act and its purpose and preamble.[22]

[49] Of general relevance is *He Poutama*, the study paper released by Te Aka Matua o te Ture | the Law Commission, which reviews the role of tikanga concepts in state law.[23] The paper provides an account of what tikanga is and addresses how tikanga and state law might best engage.

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20 Waitangi Tribunal *Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry: Stage 2 Report* (Wai 2660, 2023) [Takutai Moana Report Stage 2] at 50.

21 At [6.5.4].

22 The Stage 2 report was issued on 4 October 2023, prior to the Court of Appeal decision in *Re Edwards*, above n 12, where the Court did undertake such a consideration.

23 Te Aka Matua o Te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).

Te ture | The law

[50] The law that applied at the time of this hearing and at the date of issue of this interim judgment, is the Takutai Moana Act, as applied by the Court of Appeal in *Re Edwards*.

[51] On 25 July 2024 the Minister of Treaty Negotiations the Hon Paul Goldsmith issued a press release advising that Cabinet had decided to propose legislation to amend the Takutai Moana Act and overturn the Court of Appeal's interpretation of s 58 in *Re Edwards*.[24] The Minister said if the proposed amendments are enacted by Parliament they will be applied retroactively from 25 July 2024.

[52] Subsequently an amending Bill was introduced into the House of Representatives. As at the date of this judgment the amending Bill had not been enacted.

[53] The constitutional principle is clear. The courts must interpret and apply the law as it currently stands, even in the face of pending legislation.[25]

[54] In *Willow Wren*, the English High Court said:[26]

> This court is not concerned with what Parliament may think it wise to do in relation to the rights of the parties, but the plaintiff is entitled to come to this court and say, 'In the normal course of events my action will very soon be ripe for hearing. I desire that the court should hear it.' If subsequently to that Parliament in its wisdom thinks it right by some enactment to affect the rights of the parties even to the extent of modifying or abrogating the effects of any judgment which the plaintiffs may be fortunate enough to obtain, no one doubts the right and power of Parliament to do so. It is plain, however, that it is not right for this court either now or at the hearing to take into account the possible effect of a Bill which is at present before Parliament and which, so far as this court is concerned, may never become law, or, if passed into law, may contain provisions which ultimately do not affect the rights of the parties before the court. In other words, it is a matter of speculation on which this court will not embark whether a Bill at present before Parliament will be passed into law in its present form.

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[24] Hon Paul Goldsmith "Test for Customary Marine Title being restored" (press release, 25 July 2024).

[25] *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 All ER 567 (CH), [1956] 1 WLR 213 at 215–216. This decision was cited by the Supreme Court with approval in *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [47].

[26] *Willow Wren Canal Carrying Co Ltd*, above n 25, at 569.

[55] That principle was reiterated, in the criminal context, in *R v Morgan*, where Mander J noted:[27]

> The courts are not permitted to pre-empt Parliament as to what the law will be, nor may they proceed in the expectation that the parliamentary process, which is pre-eminently political, will result in a particular legislative outcome.

[56] In this judgment I have applied the Takutai Moana Act as enacted and the Court of Appeal decision in *Re Edwards*.[28]

Anga whakatureture | Legislative framework

Definitions

[57] Central to the Takutai Moana Act (and replacing the term "foreshore and seabed") are the terms "marine and coastal area" and "common marine and coastal area".[29] Rights recognised under the Act apply in the CMCA, which is a subset of the marine and coastal area.

[58] The "marine and coastal area" is defined as follows:

> **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 Natural and Built Environment Act 2023); 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)

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27 *R v Morgan* [2021] NZHC 3352, [2022] NZAR 221 at [16]; and see *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (HC) at 622–623.

28 See addendum.

29 Section 9.

[59] The "coastal marine area" within the meaning of the Resource Management Act 1991 (RMA) is defined at s 2 of the RMA:

> **coastal marine area** means the foreshore, seabed, and coastal water, and the air space above the water—
>
> (a) of which the seaward boundary is the outer limits of the territorial sea:
>
> (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—
>
> (i) 1 kilometre upstream from the mouth of the river; or
>
> (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5

[60] This definition means the CMA boundary may extend up a river for a distance.

[61] The "common marine and coastal area" is defined in the Takutai Moana Act as follows:

> **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

[62] The Takutai Moana Act accords the CMCA a special status, such that neither the Crown nor any person is capable of owning it.[30] This special status does not affect the exercise of customary rights as recognised under the Takutai Moana Act, or the lawful use of, or any lawful activity in, the CMCA.[31]

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30 Section 11(1) and (2).
31 Section 11(5)(a) and (b).

Customary Marine Title (CMT)

[63] Section 58(1) of the Takutai Moana Act establishes a two-limb test for the recognition of CMT. It provides:

> (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—
>
> (a) holds the specified area in accordance with tikanga; and
>
> (b) has, in relation to the specified area,—
>
> (i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
>
> (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

[64] The rights that attach to CMT were summarised by Miller J in *Re Edwards*:[32]

> CMT is the most extensive form of statutory right provided for under MACA. CMT is a (non-alienable) interest in land.[33] It is a territorial right, not merely a usage right. A group which holds CMT over a specified area does not have the right to exclude people from that area: public rights of access, navigation and fishing are … expressly carved out and protected by ss 26–28. But the group has certain rights set out in ss 60 and 62 of MACA including permission rights under the Resource Management Act (RMA permission right),[34] and certain conservation statutes;[35] a right to protect wāhi tapu and wāhi tapu areas;[36] prima facie ownership of newly found taonga tūturu;[37] ownership of certain minerals;[38] and the right to create a planning document for the area.[39] The group may use, benefit from or develop a customary marine title area, but is not exempt from obtaining any relevant resource consent, permit, or approval that is required under another enactment for the use and development of that customary marine title area.[40]

[65] Matters that can be taken into account in determining whether CMT exists are set out in s 59:

> **59 Matters relevant to whether customary marine title exists**

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32 *Re Edwards*, above n 12, at [134] per Miller J and see also [391] per Cooper P and Goddard J.
33 Takutai Moana Act, s 60(1).
34 Sections 66–70.
35 Sections 71–75.
36 Sections 78–81.
37 Section 82.
38 Section 83.
39 Sections 85–93.
40 Section 60(2).

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

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

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

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

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

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

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

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

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

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

(i) a marginal strip (as defined in section 2(1) of the Conservation Act 1987) that directly abuts the specified area:

(ii) an esplanade reserve (as defined in section 11 of the Natural and Built Environment Act 2023), but only to the extent that it directly abuts the specified area:

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

(iv) a Māori reservation (as defined in section 2(1) of the Reserves Act 1977) that directly abuts the specified area:

(v) a road that directly abuts the specified area:

(vi) a railway line that directly abuts the specified area.

Court of Appeal decision in Re Edwards

[66] The Court of Appeal's decision in *Re Edwards*[41] is the first substantive appellate decision under the Takutai Moana Act.

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41 *Re Edwards*, above n 12, at [39]–[63] per Miller J and [384] per Cooper P and Goddard J.

[67] Both Miller J and the majority judgment of Cooper P and Goddard J traverse the legislative history and purpose of the Act in some detail.

[68] Justice Miller discusses *Attorney-General v Ngati Apa*,[42] where the Court of Appeal determined that the Māori Land Court had jurisdiction to determine claims of customary ownership to areas of the foreshore and seabed. In part to overcome that decision, the Foreshore and Seabed Act 2004 was enacted. As the Preamble to the Takutai Moana Act records, the policy underpinning the Foreshore and Seabed Act was found (by the Waitangi Tribunal, the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Special Rapporteur) to have breached te Tiriti o Waitangi/the Treaty of Waitangi and to have a discriminatory effect on whānau, hapū and iwi.[43]

[69] The Preamble to the Takutai Moana Act describes the scheme of the Act as follows:

> (4) 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:
>
> …

[70] As the majority of the Court of Appeal noted,[44] the purpose statement is central to the interpretation of s 58, which sets out the CMT test. It says:[45]

> **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

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42 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).
43 *Re Edwards*, above n 12, at [52] per Miller J.
44 At [381] per Cooper P and Goddard J.
45 Takutai Moana Act, s 4.

(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.

[71] Consistent with that purpose, s 5 repeals the Foreshore and Seabed Act and s 6 provides for the restoration of customary rights that were extinguished by the Foreshore and Seabed Act. Those customary rights are "given legal expression" in accordance with the Takutai Moana Act.

[72] Section 7 confirms that the Takutai Moana Act is intended to take account of te Tiriti/the Treaty:

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.

[73] In summarising the importance of these provisions, the majority of the Court of Appeal said:[46]

> The consistent theme of these provisions is that MACA is intended to restore customary interests in the common marine and coastal area that were extinguished by the 2004 Act. Those interests are to be "given legal expression" in accordance with MACA.[47] Or, as it is put in the Preamble, *translated 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. Section 7 expressly makes the link with the Treaty of Waitangi: MACA recognises and promotes the exercise of customary interests of Māori in the common marine and coastal area "in order to take account of the Treaty of Waitangi". It does so by providing, among other things, for PCRs to be recognised and protected and for CMT to be recognised and exercised.

Holds the specified area in accordance with tikanga

[74] The Court of Appeal confirmed that when assessing the first limb of the CMT test (s 58(1)(a)), the focus should be on "the group's intention and ability to control access to an area, and the use of resources within it, *as a matter of tikanga*."[48] So, for example, a group may hold an area in accordance with tikanga, where tikanga requires the permission of that group to be sought before others access the area or use resources within it.[49] "Holds in accordance with tikanga" reflects the Te Ture Whenua Maori Act 1993[50] definition; "[t]here is no connotation of ownership, but rather that it is retained or kept in accordance with tikanga Maori".[51]

[75] The Takutai Moana Act makes extensive use of tikanga concepts and te reo Māori terms. The assessment is expressly not focused on the group's practical ability to exclude others from entering certain areas,[52] given that Māori were increasingly deprived of this ability since the British assumed sovereignty in 1840.[53]

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46 *Re Edwards*, above n 1232, at [384] (emphasis in original).
47 Takutai Moana Act, s 6(1).
48 *Re Edwards*, above n 1232, at [403] (emphasis in original).
49 At [403].
50 Section 129(2)(a), the definition of Māori customary land.
51 *Re Edwards*, above n 12, at [397], citing *da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212 (25 TTK 212) at 217.
52 *Re Edwards*, above n 12, at [429].
53 At [426(d)] and [429].

[76] Rather, the touchstone for the first limb of the test is whether, from a tikanga perspective, the applicant group can be considered the group possessing the requisite mana to determine who may access and use the area, irrespective of whether they possess the practical means of doing so.[54] One of the Act's purposes is to "recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua".[55] In Miller J's minority judgment, he conceptualises mana tuku iho as "the inherited right or authority to speak for a specific part of the common coastal and marine area."[56] An applicant does not have to demonstrate something in the nature of a proprietorial interest, consistent with other interests in land recognised by common law or statute.[57] As Miller J put it: "Holding an area of the takutai moana in accordance with tikanga is something different to being a proprietor of that area".[58]

[77] The first limb of the test for CMT under s 58(1)(a) requires that an applicant group "holds" the specified area in accordance with tikanga. The test is whether the group currently uses and occupies the area, in a manner consistent with the nature of that area and it requires the group to have control or authority over the area according to tikanga. The majority accepted that evidence of activities that show control or authority of the area,[59] as opposed to simply carrying out a particular activity in that area,[60] will be of particular importance in distinguishing a "holding" of the area from the use of the area to the other particular resource.[61]

[78] Accordingly, in order to determine whether the first limb of the CMT test has been met, it is necessary to define the relevant tikanga of the area in question that demonstrates control or authority over the ability to access and use the area.

[79] Justice Miller's judgment identifies the elements of mana over land and its occupants which can be considered historic methods of controlling an area.[62]

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54 At [429] and [434].
55 Section 4(1)(b).
56 *Re Edwards*, above n 12, at [133]; and see also Takutai Moana Act, s 9(1).
57 At [128]–[130].
58 At [130].
59 At [401].
60 At [401].
61 At [401]–[404] per Cooper P and Goddard J. To similar effect, see [140] per Miller J.
62 At [167], referring to Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016) at 303–308, and [168] where the judgment identifies further, post-colonial elements of control.

Dr Joseph's pūkenga report includes a similar list.[63] The elements referred to by Miller J include:

(a) military action taken to displace existing occupants (take raupatu, take ringa kaha and take pakihiwi kaha);

(b) occupation;

(c) intermarriage with tangata whenua women;

(d) marking out in some way a rohe which the group is capable of defending;

(e) naming of places;

(f) establishment of urupā;

(g) establishment of tūahu (shrines);

(h) establishment of kāinga;

(i) placing of wāhi tapu;

(j) adoption of a group name;

(k) approval and acceptance of neighbouring iwi.

[80] Justice Miller's judgment also refers to the relational values of tikanga.[64] Where an applicant group can provide adequate evidence of the activity set out above, their "cultural exchanges or practices" will be imbued with sufficient whanaungatanga, mana, manaakitanga, utu, kaitiakitanga and tapu to satisfy the first

63 Dr Robert Joseph *Pūkenga Report* (17 October 2023).
64 *Re Edwards*, above n 12, at [127].

limb of the s 58 test. Justice Miller confirmed that the interconnectedness encompassed by whanaungatanga is traced through whakapapa links.[65]

[81] The focus on applying tikanga to control access does not require that the tikanga is always successfully implemented in the face of third party or non-Māori activities that override or are not undertaken consistently themselves with tikanga (such as commerical fishing) where there is no ability to lawfully restrict access.[66]

[82] The Court of Appeal accepted that, in the case under appeal, it was appropriate to ask the pūkenga which groups, if any, held a specified area in accordance with tikanga. That was plainly a question of tikanga within the scope of s 99 of the Act.[67] Although, as Miller J noted, it is a question on which a Court cannot defer to the pūkenga, but must reach its own conclusion.[68] Justice Miller also added that it would have been appropriate to ask the pūkenga whether any applicant group exclusively used and occupied a specified area, as that too is in part a question of tikanga.[69]

Exclusive use and occupation without substantial interruption

[83] The second limb of the s 58 test, unlike the first limb, does not refer to tikanga. But the Court of Appeal held that s 58 establishes a "single test" which must be interpreted as a whole.[70] The concept of exclusive use and occupation, in s 58(1)(b), must be viewed through the lens of tikanga, not that of the common law alone.[71]

[84] The majority in *Re Edwards* concluded that it is "exceptionally difficult" to reconcile the text of s 58(1)(b) with the purposes of the Takutai Moana Act. The majority considered a literal reading of this limb of the test would mean that it was "likely there would be few areas of the foreshore or seabed where CMT could be made out":[72]

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65 At [127].
66 At [401]–[404], [424]–[426] and [434] per Cooper P and Goddard J.
67 At [266] per Miller J and [360] per Cooper P and Goddard J.
68 At [266] per Miller J.
69 At [266].
70 At [138].
71 At [138].
72 At [416] per Cooper P and Goddard J.

> Far from recognising and promoting customary interests, MACA would in many cases extinguish those interests. And it would do so by a side wind, by setting a threshold for recognition of CMT that could not be met as a result of matters that would not otherwise affect common law recognition of customary title.

[85] The majority considered this outcome would be inconsistent with the te Tiriti/the Treaty, as well as the purpose of the Takutai Moana Act set out in s 4 and the statement in s 7 that the Act recognises and promotes the exercise of customary rights to take account of te Tiriti/the Treaty.[73] The second limb of the CMT test is therefore in effect comprised of three elements:

(a) Whether prior to the proclamation of British soveriengty in 1840 the applicant group had sufficient control over the area to exclude others if they wished to do so (1840 assessment);

(b) Whether post-1840, that use and occupation ceased because the group's connection with the area and control over it was lost as a matter of tikanga (post-1840 assessment); and

(c) Whether post-1840, that use and occupation was substantially interrupted by lawful activities carried on in the area pursuant to statutory authority (substantial interruption).[74]

[86] The majority accepted that use of a particular resource in an area will not, without more, amount to exclusive use and occupation of that area.[75] There must be a "strong presence" in the area, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.[76]

[87] The majority also observed that the second limb of the CMT test must be approached "having regard to the substantial disruption to the operation of tikanga that

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73 At [416].
74 The burden of proof in relation to substantial interruption does not lie with the applicant group. See [101] below.
75 *Re Edwards*, above n 12, at [422].
76 At [422].

resulted from the Crown's exercise of kāwanatanga, and having regard to the scheme and purpose of MACA."[77] It identified a number of factors relevant to that assessment.[78]

[88] The majority did not accept a submission made by the Landowners Coalition Inc and SIR that an applicant group needs to demonstrate both an intention and an ability to exclude others (including non-Māori) from the relevant area, from 1840 to the present day.[79] The majority considered that such a requirement would be unjust and unprincipled, given the ability to exclude others was "taken away from Māori customary owners by the law as it was understood for most of the relevant period."[80]

[89] Justice Miller is critical of the majority's approach to the requirement in the second limb for exclusive use and occupation since 1840. The Judge characterises the majority's approach as unjustifiably discounting the literal meaning of s 58 in an attempt to give effect to the purpose in s 4,[81] and "amount[ing] to a presumption that rights in existence in 1840 have survived to the present day."[82]

[90] Justice Miller concludes that "exclusivity of use and occupation requires both an externally-manifested intention to control the area as against other groups and the capacity to do so."[83] The legal inability of the applicant group to resist trespass through force or common law must be set aside when considering capacity to exclude.[84]

"Without substantial interruption"

[91] The majority considered that third party access and uses, even substantial ones, will not demonstrate that the area was not exclusively held.[85] That was particularly so because of the "frequent and generous exercise of manaakitanga by whānau, hapū and

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77 At [426].
78 At [426].
79 At [429].
80 At [429].
81 At [189] per Miller J.
82 At [196].
83 At [162] and [165]–[172].
84 At [180] and [170].
85 At [426]–[427].

iwi in favour of other Māori groups, and in favour of European settlers".[86] The majority concluded that third party accesses and uses, even if substantial, wol dnot amount to substantial interruption unless they were "authorised by legislation capable of overturning those rights".[87]

[92] Justice Miller took a different approach, focusing on the need for exclusivity to be a clearly demonstrated quality at 1840. But Miller J also noted that the test must take into account the Crown removing traditional means to enforce it, such as through force, and not providing any legal replacement.[88]

[93] The critical requirement for Miller J is set out in the following passage:[89]

> [171] Some means of establishing control of an area do survive as a set of cultural norms which are constantly reinforced through ritual engagement between tangata whenua and manuhiri. I have noted that the acceptance or acquiescence of neighbouring tribes was identified as a feature of customary title in the Canadian cases.[90] It assumes importance under MACA because there is much evidence that groups recognise the rights of other groups to control their own areas. The record confirms that mana is constantly reinforced through ritual exchanges and the practice of manaakitanga over long periods of time. It follows that acceptance by other iwi, hapū or whānau groups of an applicant group's right to speak for a specified part of the common coastal and marine area is powerful evidence of exclusivity. In the absence of consensus, the area may have remained whenua tautohetohe (contested ground) as at 1840 or subsequently.[91]

[94] The Court's discussion of the phrase "without substantial interruption", in s 58(1)(b)(i), of the Act is traversed below in relation to each of the applicants and, in particular, to the question whether commercial fishing amounted to substantial interruption in any part of the application area.

Exclusivity/Shared CMT

[95] The Court of Appeal was unanimous that it would be inconsistent with the scheme of the Act to have two or more overlapping CMTs in the same area. However,

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86 At [426(b)].
87 At [428].
88 At [169]–[171] per Miller J.
89 At [171].
90 *Attorney-General v Ngāti Apa*, above n 42, at [41] referring to the Native Lands Act 1909, s 88 and Te Ture Whenua Maori Act, s 144. Under the latter Act such proceedings may be brought only by the Māori Trustee on behalf of the owners: s 144(2).
91 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [158] per Lamer CJ, Cory and Major JJ.

all three members of the Court had no difficulty in a single grant of recognition in favour of two or more groups of a single CMT, in respect of a particular area, noting that such a grant is most likely where the groups make a joint application, or where they make separate applications, but each acknowledges the shared rights of use and occupation of the other groups.[92]

[96] The majority took a different view from Miller J in relation to a situation where there are two applicant groups, neither of which acknowledges the rights of the other. The majority did "not see any contradiction in a finding that two applicant groups hold a specified area in accordance with tikanga vis-à-vis all other groups and individuals, and between them exclusively use and occupy the area, while at the same time vigorously contesting their mutual rights as between themselves."[93] The majority said:[94]

> A refusal to recognise CMT in those circumstances would effectively mean that areas that were unquestionably in Māori customary ownership in 1840 were taken out of Māori ownership, and customary rights and interests lost, because a currently unresolved tikanga difference between two or more hapū cannot be resolved in the High Court in the context of competing applications for CMT.

[97] In contrast, Miller J said:[95]

> … a court may not be satisfied of exclusivity in the absence of evidence that other groups recognise an applicant group's rights (or a satisfactory account of why such evidence is lacking). Consensus is even more important for shared exclusivity, which rests on evidence that the groups concerned shared control of an area to the exclusion of others.

Standard and burden of proof

[98] Section 106(2) of the Takutai Moana Act requires the applicant for CMT to prove that the specified area:

> (a) is held in accordance with tikanga; and

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92 At [439] per Cooper P and Goddard J.
93 At [440].
94 At [442].
95 At [172] per Miller J.

(b) has been used and occupied by the applicant group from 1840 to the present day.

[99] Section 106(2)(b) does not include the words "exclusively" and "without substantial interruption" contained in s 58(1)(b)(i).

[100] The Court must be satisfied that an applicant group:[96]

(a) holds the specified area in accordance with tikanga (s 58(1)(a)); and

(b) has exclusively used and occupied the specified area from 1840 to the present day, without substantial interruption (s 58(1)(b)(i)).

[101] However, as the Court of Appeal found, s 106 does not require an applicant group to prove either exclusivity from 1840 to the present day or (absence of) substantial interruption. If the applicant group proves the two aspects above, that will be sufficient for the Court to draw an inference that the s 58 test is met, unless some other party takes it on themselves to demonstrate that the customary interests of the applicant group were not sufficient to establish effective control over the relevant area as at 1840, or have ceased to have the necessary character or been substantially interrupted after 1840.[97]

Decisions since Re Edwards

[102] Since the Court of Appeal's decision in *Re Edwards* there have been two High Court decisions under the Takutai Moana Act.

Ngāi Tūmapūhia judgment

[103] *Re Ngai Tūmapūhia-a-Rangi Hapū Inc*[98] is the Stage 1(a) decision to this application.

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96 Takutai Moana Act, s 106.
97 *Re Edwards*, above n 12, at [435]–[436] per Cooper P and Goddard J.
98 *Ngai Tūmapūhia*, above n 7.

[104] In that decision the applicants identified five areas of shared exclusivity recorded in a shared agreement known as the mana moana agreement. All hapū along the coastline of the application area acknowledged each other's mana tuku iho in respect of different parts of the coastline in accordance with their shared tikanga, illustrating their shared whakapapa links to the application area. The mana moana agreement meant that when the applicants spoke of holding areas in accordance with tikanga, they did so on an agreed basis. On the basis of the mana moana agreement, I looked at the evidence collectively, holding that the statutory tests for CMT and PCRs could be satisfied on a collective basis.[99]

[105] The Court made CMT recognition orders on jointly held and exclusive bases.[100]

Tokomaru judgment

[106] *Ngā Hapū O Tokomaru Ākau v Te Whānau a Ruataupere Ki Tokomaru*,[101] is a decision of Cull J concerning two, overlapping applications. The application area wasd the land and harbour in and around Tokomaru Bay, north of Tairāwhiti (Gisborne). Due to an issue about whether Ngā Hapū o Tokomarua Ākau represented Te Whānau a Ruataupare hapū, the hearing proceeded on the basis that two applicant groups could not agree on which group should hold title and, if granted, how it should be held. After the hearing, following a marae mediation, the applicants agreed that if CMT and/or PCR recognition orders were granted they would hold the orders jointly over the recognised area by a representative entity.

[107] Justice Cull concluded that there was insufficient evidence of the applicants' exclusive use and occupation of fishing grounds and marine area out to the 12 nautical mile limit at or since 1840 to the present.[102] She concluded that the two hapū had met the test for CMT within three to four nautical miles from the MHWS from the

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99 See [152] and [153].
100 At [815].
101 *Ngā Hapū O Tokomaru Ākau v Te Whānau A Ruataupere Ki Tokomaru* [2024] NZHC 682 [*Tokomaru*].
102 At [377].

Tokomaru Bay foreshore[103] but before granting the CMT orders the second stage of the hearing of the application would determine the precise inshore boundaries.

The pūkenga report

[108] Dr Robert Joseph was appointed by the Court as pūkenga for the Group M hearings on 8 November 2022.[104] No party opposed the appointment. The Court also set down the questions for the pūkenga on that date.

[109] During the course of the Group M, Stage 1(b) hearing the questions for the pūkenga were slightly amended. The questions addressed in Dr Joseph's report were as follows:

(a) What tikanga does the evidence establish or support applies in the area that is the subject of the applications before the Court?

(b) What aspects of tikanga should influence the assessment of whether or not the area in question, or any part of it, is held in accordance with tikanga?

(c) Which applicant group or groups hold the application area, or any part of it, in accordance with tikanga?

(d) Who, in fact, are the iwi, hapū or whānau groups that comprise each applicant group or groups?

(e) What is the appropriate tikanga for identifying representation of conflicting applicant groups?

(f) Having regard to the evidence, what tikanga is relevant to the protected customary rights claimed by the applicants?

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103 At [378].
104 Minute of Churchman J (Re appointment of pūkenga), 8 November 2022.

[110] Dr Joseph delivered his final report on 23 April 2024[105] and was available for questioning by the parties on 23 April 2024.

[111] During the course of questioning Dr Joseph agreed that it was appropriate to incorporate a section of his report from the stage 1(a) hearing into this report also. That section related to take, take ahi kā, and tōku whenua.

[112] Dr Joseph's report provides an important source of expert advice for the Court, and is discussed below in the context of specific applications and issues.

What evidence is required to meet the statutory tests?

"Holds the specified area in accordance with tikanga"

[113] The first limb of the test for CMT under s 58(1)(a) requires that an applicant group "holds the specified area in accordance with tikanga".

[114] The Court of Appeal clarified that was is required is a consideration of whether the group *currently* uses and occupies the area, in a manner consistent with the nature of that area, and requires the group to have control or authority over the area according to tikanga.

[115] Accordingly, the applicants' evidence should demonstrate:

(a) the current use and occupation (consistent with the nature of the area);

(b) an intention and ability to control access to the area and use of its resources as a matter of tikanga, focusing on whakapapa, mana or rangatiratanga, manaakitanga and kaitiakitanga);[106] and

(c) activities showing control or authority, such as the implementation of rāhui, observance of wāhi tapu, the tangible exercise of rangatiratanga,

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105 The report was originally submitted to the Court on 19 April 2024, however the final version was submitted on 23 April 2024.

106 By reference to these concepts as developed in Pūkenga Report, above n 63; and *Re Edwards*, above n 12.

kaitiakitanga and manaakitanga, rather than simply carrying out a use or activity.

[116] These concepts are developed in Miller J's list of 15 elements of mana over land.

[117] In *Re Reeder*, the Court set out a list of activities which offers a useful guide to demonstrating a group's authority over the takutai moana according to tikanga:[107]

(a) exercising manaakitanga;

(b) acting as kaitiaki by protecting and looking after the takutai moana and future generations;

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

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

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

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

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

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

[118] Dr Joseph's pūkenga report also addressed this issue, setting out a list of tāhuhu he raratohu (fundamental signposts of tikanga) which are relevant to assessing whether an iwi, hapū or whānau holds an area in accordance with tikanga Māori. Dr Joseph's list is:

(a) Whakapapa identifying a cosmological connection with the takutai moana;

(b) Exercised mana or rangatiratanga over the takutai moana;

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[107] *Re Reeder* [2021] NZHC 2726, [2022] 3 NZLR 304 at [52]–[53].

(c) Exercised kaitiakitanga;

(d) It has a mauri – life force;

(e) Performance of rituals central to the spiritual life of the hapū and whānau;

(f) Identified taniwha [guardians] residing in the takutai moana;

(g) Is celebrated or referred to in waiata [songs];

(h) Is celebrated or referred to in whakatauki [proverbs];

(i) The takutai moana was relied on as a source of food;

(j) A source of textiles or other materials;

(k) For travel or trade; and

(l) There is a continuing recognized claim to land or territory in which the takutai moana is situated, and kaitiakitanga has been maintained to some, if not all of the takutai moana area.

[119] Also relevant are features of the particular application area – its geographic landscape, remoteness and environmental factors.

Mana

[120] Mana encompasses authority, control, influence, prestige or power, that is spiritual in nature, and acquired through whakapapa and personal accomplishment.[108] Dr Joseph refers to both authority and control in his description of mana: "[it] encompasses intrinsic spiritual authority as well as political influence, honour, status, control, and prestige of an individual and group".[109]

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108 *Re Edwards*, above n 12, at [127].
109 Pūkenga Report, above n 63, at [40(d)].

Marae/papakāinga

[121] Identification of marae or papakāinga demonstrates a strong association and continued occupation of the whenua.

Land ownership

[122] Ownership of land proximate to the takutai moana may indicate current use and occupation and control.[110]

Kaitiakitanga

[123] Kaitiakitanga is the obligation of stewardship and the protection of one's own.[111] Kaitiakitanga is a manifestation of mana, because without mana there is no authority for the exercise of stewardship.[112]

[124] The practice of kaitiakitanga encompasses conservation, guardianship, education and protection in relation to the takutai moana. Kaitiakitanga includes the fulfilment of obligations to conserve, nurture, and protect the takutai moana.[113] Dr Joseph confirmed that kaitiakitanga can evidence the holding of an area in accordance with tikanga, as opposed to mere use of the area.

Rāhui

[125] The imposition of rāhui (bans on the taking of resources or the entering into zones within a territory)[114] historically represented forms of stewardship, governance and management of lands and CMAs. As Dr Joseph observed during questioning on his report, a rāhui is a law and an important manifestation of whakapapa, mauri and kaitiakitanga. When a rāhui is set by hapū members, access to or the use of the marine and coastal area can be restricted.

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110 And is specifically a matter that may be taken into account under the Takutai Moana Act, s 59(1)(a)(i).
111 *Re Edwards*, above n 12, at [127].
112 At [127].
113 Pūkenga Report, above n 63, at [72].
114 At [37].

Tapu

[126] Tapu is the respect for the spiritual character of all things and is a religious observance or spiritual practice for the purposes of protecting and reinforcing mana and sanctity.[115] In his pūkenga report, Dr Joseph noted that tapu is:[116]

> a code for social conduct based upon keeping safe and avoiding risk, as well as protecting the sanctity of revered persons, places, activities and objects including rāhui and wāhi tapu over the takutai moana area.

Customary usages (fishing and kaimoana gathering)

[127] Dr Joseph's tikanga indicia of the coastal area being held in accordance with tikanga include reliance on the takutai moana for sustenance.

Manaakitanga

[128] Manaakitanga is "the reciprocal process of showing and receiving care and hospitality."[117] As Miller J noted, manaakitanga confers mana on both groups; Dr Margaret Wilkie identified manaakitanga as a dimension of mana.[118]

[129] The majority judgment in *Re Edwards* also confirmed that permitting others to access the area and utilise the resources within it is an expression of manaakitanga and doing so is a manifestation of control of the area.[119] The majority also confirmed that permitting a group to use an area's resources reflects mana or control in respect of that area and supports, rather than undermines, an application for CMT.[120]

"Exclusive use and occupation without substantial interruption"

[130] Under the second limb of the CMT test, the applicants must show first, as at 1840, use and occupation with sufficient control to exclude others if they wished. This translates into:

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115 *Re Edwards*, above n 12, at [127].
116 Pūkenga Report, above n 63, at [53(c)].
117 *Re Edwards*, above n 1232, at [127].
118 At [130].
119 At [403].
120 At [424].

(a) a strong presence manifesting in acts of occupation. For example, through the imposition of rāhui, observance of wāhi tapu, tangible exercise of rangatiratanga, kaitiakitanga and manaakitanga. Demonstrating an area belonged to, was controlled by, or was under exclusive stewardship of the applicant group;

(b) in terms of "marine areas", observation, control and regular use (for fishing/kaimoana gathering, transport, rongoā and other activities).

[131] As to continuity to the present day (that is, post-1840), what is required is:

(a) that connection or control is not lost as a matter of tikanga, in terms of ahi kā over time, or between groups, accounting for factors that substantially disrupted the operation of tikanga, and noting the exercise of manaakitanga and whanaungatanga can support rather than undermine a claim;

(b) use and occupation not being substantially interrupted by lawful activity carried on pursuant to statutory authority (for example, through permanent structures such as port facilities, provided it excludes the applicant group from accessing the area, but noting that some third-party access to fishing in an area is unlikely to constitute substantial interruption).

[132] The majority in *Re Edwards* found that rights should be recognised as they existed in the period before colonisation.[121] The customary rights must have existed as at 1840 and the applicant group must be (or be the successor of) the group that exercised those rights at that time.[122]

[133] Pre-colonisation, all of Aotearoa New Zealand, including areas covered by water, the water column and associated resources, was held by Māori according to

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121 At [105] per Miller J: the majority agreed at [360].
122 At [419] per Cooper P and Goddard J.

their tikanga and customs.[123] This "ownership" extended beyond the dry land to also include the marine and coastal area.[124]

[134] It therefore follows that the entire marine and coastal area must have been held in accordance with tikanga as at 1840 and prior to this to the time of colonisation.

[135] To satisfy the second limb of the CMT test, the applicant group "must have had the intention and ability as a matter of tikanga to control access to the relevant area by other groups", reflecting a holding of the area rather than resource or use rights only.[125] There must have been a "strong presence" in the area, manifested by acts of occupation that demonstrated the area belonged to, or was controlled by, or was under the exclusive stewardship of the applicant group as at 1840.[126]

CMT

Representation

[136] Recognition of both CMTs[127] and PCRs[128] requires an applicant group to meet the relevant statutory test.

[137] "Applicant group" is defined in s 9 of the Takutai Moana Act as "1 or more iwi, hapū or whānau groups" that seek recognition of their PCRs or CMT by a recognition order or an agreement; and includes a legal entity or natural person appointed to represent that group in its application.[129] A representative must have authority to bring the application on behalf of an applicant group.[130]

[138] An application must name the person who will be the holder of the order "as the representative of the applicant group".[131] However, there is some flexibility

123 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [37].
124 At [49]–[51].
125 *Re Edwards*, above n 12, at [421] per Cooper P and Goddard J.
126 At [422] per Cooper P and Goddard J.
127 Section 58.
128 Section 51.
129 Section 101(f).
130 *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 at [175].
131 Takutai Moana Act, s 101(f).

around drafting of the form of the order once the Court has made decisions on whether CMT and/or PCRs are granted.

[139] The question of representation arose in *Ngāti Pāhauwera* where an applicant group was challenged by other applicant groups who said they were representing the same hapū. The High Court observed that Takutai Moana Act does not prescribe any particular mandate process; nor does it require that an applicant in its application must detail the mandate it has.

[140] Nor does the Takutai Moana Act prescribe any particular process for defining the constituents of an applicant group or its representatives. A number of principles are apparent from the cases decided under the Act to date, including:

(a) There is no one way for an applicant to obtain authority to make an application for recognition orders on behalf of an applicant group.[132]

(b) The process under the Act by which an application is made and advertised is not in itself sufficient to demonstrate that the applicant group has a mandate.[133] Mandate procedures adopted by the Crown in the Treaty settlement process do not apply.[134]

(c) The applicant must show they currently have the support of the applicant group who they purport to represent.[135]

[141] Where there is a controversy about whether a named applicant has the authority to seek an order on the group's behalf, the court will need to be satisfied that the applicant does represent the applicant group.[136]

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132 *Re Tipene*, above n 130, at [45]–[56], [175] and [176].
133 *Re Clarkson* [2021] NZHC 1968 at [227].
134 *Re Edwards (Whakatōhea Stage Two)* [2022] NZHC 2644 at [230].
135 *Re Clarkson*, above n 133, at [164]; and *Re Edwards*, above n 12, at [275]–[276] per Miller J and [360] per Cooper P and Goddard J.
136 *Re Edwards*, above n 12, at [203(b)] per Miller J, with Cooper P and Goddard J agreeing at [360].

[142] There are a number of examples where the Court has encouraged parties to resolve representation issues out of court, utilising tikanga-based processes.[137] If the differences are not resolved in that way, then the Court must ultimately decide the issue.

[143] As the High Court noted in *Re Edwards*, it is important to ensure that recognition orders are designed in a way that enables a CMT group to self-manage the future, without having to further resort to the courts to resolve disputes or governance issues.[138]

[144] In this hearing questions were raised as to whether two of the applicants, the Pirere whānau and the Pāpāuma Marae Trustees, satisfied the definition of applicant group and, in the case of the latter, had authority to bring the application. For the Pirere whānau the issue is who can hold the orders (if granted), not whether the named applicant represents the applicant group. For the Pāpāuma Marae Trustees the issues are, first, whether the applicants have authority to seek orders on behalf of the named group and, second, the extent to which the Trustees' application overlaps with that of Te Hika o Pāpāuma.

[145] I discuss these questions in the context of considering their applications for CMT below.

Ngāi Tūmapūhia-a-Rangi hapū

[146] Ngāi Tūmapūhia seeks CMT in the CMCA from the southern bank of the Whareama River to its northern bank and out 12 nautical miles from all points along that coastline.

[147] Ngāi Tūmapūhia participated in the Stage 1(a) hearing, prior to the decision that the Whareama River mouth would be part of the Stage 1(b) hearing area.[139]

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137 *Te Runanga o Ngāti Whātua v Kingi* [2023] NZHC 1384 at [120] and see [222] and [228] regarding the question of representation or mandates.

138 *Re Edwards (Whakatōhea Stage Two)*, above n 134, at [229].

139 See [7]–[9] above.

[148] The evidence relating to Ngāi Tūmapūhia's application was presented during the Stage 1(a) hearing. By agreement that evidence (including the notes of evidence) was incorporated into the evidence for this hearing.

[149] In *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc*,[140] I considered Ngāi Tūmapūhia's application for exclusive CMT in the area from Te Unuunu to Whareama.

[150] I concluded that Ngāi Tūmapūhia's evidence satisfied both limbs of the test for CMT.

[151] Ngāi Tūmapūhia's application in relation to the Whareama River is for CMT on a shared exclusivity basis with Te Hika o Pāpāuma hapū.

Holds the specified area in accordance with tikanga

[152] I found that Ngāi Tūmapūhia's evidence showed regular use and occupation of sites for fishing and kaimoana gathering, all along the Wairarapa Coast, from the Whareama River.[141] The judgment also recorded the evidence of Duncan Petrie (Manager of Inshore Fisheries Central at Fisheries New Zealand, who gave evidence for the Attorney-General) who recorded that permits were being issued and fish caught and kaimoana gathered within Ngāi Tūmapūhia's gazetted rohe moana, including at Whareama.[142]

[153] The judgment referred to Mr Walzl's expert evidence for Ngāi Tūmapūhia in the Stage 1(a) hearing where he said:[143]

> Land in this northern part of the takutai moana was reserved for Ngāi Tūmapūhia-a-Rangi when coastal Whareama blocks were sold in November 1853 including at Motuwaireka, Waipupu, Whareama and Mangapokia reflecting coastal sites of particular sites to them. In the case of Whareama 884, it is notable that when the owners leased the block out in 1904, one of the conditions of the lease was that the lessors reserved fishing rights.

[154] As the judgment recorded:[144]

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140 *Ngāi Tūmapūhia*, above n 7, at [545]–[576].
141 At [547].
142 At [551].
143 Tony Walzl *Ngāi Tūmapūhia-ā-Rangi and the Takutai Moana* (27 February 2023).
144 *Ngāi Tūmapūhia*, above n 7, at [558].

> There is evidence of whakapapa that connects to this area directly through the eponymous ancestor, Tūmapūhia. In terms of cosmogeny, this connects the hapū back to Kupe. Mr Walzl's evidence demonstrated an enduring relationship and spiritual connection with the area and its resources, and with neighbouring hapū. As with the Āwhea to Te Unuunu rohe, there is also evidence of whakapapa that connects Ngāi Tūmapūhia to this part of the coastal rohe [from Te Unuunu to Whareama] directly through the eponymous ancestor, Tūmapūhia.

[155] The judgment also recorded the establishment by Ngāi Tūmapūhia's ancestors of several defensive pā along the coastline.[145] In particular, the evidence from Dr Takirirangi Smith was that in the early 1800s, when a war party was seen coming down the coast south of the Whareama River, the Ngāi Tūmapūhia wāhine dressed as tāne and, carrying weapons, performed a war haka. Their actions were enough to scare off the tauā.

Exclusive use and occupation from 1840 to the present day

[156] The findings in *Ngāi Tūmapūhia* are also relevant to the consideration of limb two in this hearing. The judgment referred to Mr Walzl's evidence which indicated that Ngāi Tūmapūhia had a strong presence in the coastal rohe from Te Unuunu to Whareama. His report referred to archaeological evidence which reflected sites and patterns of settlement by Ngāi Tūmapūhia.[146]

[157] I found that significant reserves were set aside for Ngāi Tūmapūhia during Crown purchasing in the area, including at Whareama.[147]

[158] The judgment also referred to historical evidence of the use of the area for customary fishing and kaimoana gathering and trade through selling or leasing land, "all of which is evidence of a strong presence manifesting in acts of occupation".[148]

[159] I concluded that "[a]ll of this demonstrates control and authority and the ability and intention to control access to this area, and use of its resources".[149] I found the

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145 At [508].
146 At [559]–[560].
147 At [561].
148 At [562].
149 At [563].

evidence also indicates the continuity of use and occupation of that coastal rohe on the part of Ngāi Tūmapūhia from 1840 to the present day.[150]

[160] There was extensive evidence given, including from Patrick Mason, Gary Griggs and others of contemporary use and occupation, including for fishing, kaimoana and resource gathering, swimming, recreation and camping. The judgment found that, while much of the abutting land is in the hands of private owners, members of Ngāi Tūmapūhia have arrangements and relationships with the owning families and individuals which means that land-based access to the takutai moana continues to be available.[151] This suggests that Ngāi Tūmapūhia's connection to, and control over, the coastal rohe have not been lost as a matter of tikanga.[152] There is therefore no basis to conclude that there has been substantial interruption of Ngāi Tūmapūhia's use and occupation. As to the seaward extent of that use and occupation, the Attorney-General says there is very limited evidence and that it is unclear whether there are sufficient grounds for the Court to draw inferences to extend the recognition of CMT out to 10 kilometres from the line of MHWS, which is the seaward boundary granted in *Ngāi Tūmapūhia* in respect of the Te Unuunu to Whareama coastal rohe.[153]

Te Hika o Pāpāuma

[161] Te Hika o Pāpāuma seeks CMT in the CMCA between the mouth of the Whareama River (southern bank) and Poroporo, from the line of MHWS and out to the territorial sea limit.

[162] Te Hika o Pāpāuma's application area overlaps with:

(a) Ngāi Tūmapūhia, from the southern bank of the Whareama River to its northern bank. These two applicants seek CMT on a shared exclusivity basis for this rohe.

(b) Pāpāuma Marae Trustees, in respect of the Mataikona Block/Reserve.

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150 At [564].
151 At [569].
152 At [570].
153 *Ngāi Tūmapūhia*, above n 7, at [576].

(c) Ngāti Kere in the area from Wainui to Poroporo. Ngāti Kere claims this area exclusively.

(d) The Pirere whānau in the latter's application area (between Ōkau Stream and Castlepoint Stream). These two applicants have acknowledged each other's interests and seek orders on a shared exclusive basis.

(e) Rangitāne does not seek CMT on behalf of the iwi, but for specific Rangitāne hapū. It acknowledges the shared interests of the other hapū in the area, including those with Rangitāne whakapapa. These include Te Hika o Pāpāuma.

(f) Ngāti Kahungunu makes a korowai application for the benefit of all Ngāti Kahungunu hapū, marae and whānau, which encompasses all applicant groups in the proceeding.

[163] Te Hika o Pāpāuma has challenged the mandate of the Pāpāuma Marae Trustees, as discussed below in the context of the latter's application. For that reason, I summarise here the Te Hika o Pāpāuma mandate process.

[164] Te Hika o Pāpāuma Mandated Iwi Authority (Iwi Authority) came about as a result of a process initiated from a hui kotahitanga held with all Te Hika o Pāpāuma entities in June 2012. One of the outcomes of the hui was the appointment from each of the Pāpāuma entities to create a Kotahitanga Working Group. This group was given the task of proposing an entity for ratification that would be suitable to represent the broader interests of Te Hika o Pāpāuma within their traditional areas.

[165] In April 2015 the first consultation hui was held by the Kotahitanga Working Group to give an opportunity for a broader base of Pāpāuma whānau to be involved. That hui proposed Te Hika o Pāpāuma Mandated Iwi Authority.

[166] In July 2015 nationwide hui were held in seven locations throughout Aotearoa with over 150 people attending. There was a 97 per cent acceptance of the votes received, to ratify the entity.

[167] On 8 August 2015 the Iwi Authority was established to represent its members within the traditional lands of Te Hika o Pāpāuma. The legal format of the Iwi Authority was by way of a deed of trust (Trust Deed).

[168] Mr Matthews' evidence was that he and Ms Broughton had both acted in accordance with tikanga principles such as ongoing kanohi ki te kanohi hui about marine issues generally, and the Takutai Moana Act case, with others of Pāpāuma.

[169] Alan Dewar, the former chair of the Iwi Authority, also discussed in his evidence the consultation and ratification process for the mandate. He said that he considered the process to be "thorough in its reach out to members around the motu".

[170] Warren Chase, Dale Coles and Alyson Bullock all confirmed their support for George Matthews as their mandated person to represent Te Hika o Pāpāuma.

[171] The specific purposes of the Iwi Authority are set out in the Trust Deed. They include to:

(a) protect, uphold, and enhance the mana of Pāpāuma;

(b) promote and revitalise the identity and well-being of Pāpāuma;

(c) establish, develop, and maintain relationships with neighbouring iwi, hapū, whānau and Māori entities;

(d) provide for the ongoing maintenance and establishment of places of cultural or spiritual significance to Pāpāuma;

(e) be representative of Pāpāuma in any engagement with the Crown; and

(f) take action for any purpose that would be considered by the Trustees is beneficial to Pāpāuma.

[172] Mr Matthews clarified in his evidence that the coming into existence of the Iwi Authority was "never designed to have any authority over any other entity ([Pāpāuma Marae Committee, Aohanga Incorporation, the Māori Committee, the Māori Trustees]). These rōpū were and remain separate entities. Rather, the Iwi Authority was to work alongside in conjunction with the existing representative entities as they largely continued on with their own specific purposes."

[173] The Iwi Authority mandate for the case for has been directly reposed in the Authority itself, first through Ms Broughton (as the first High Court applicant in joint representation with the Authority (2017-2019)) and then, later, by Mr Matthews (2019-present).

[174] Mr Matthews' evidence was that the mandate of the Authority is to advance all marine related issues that are included in the traditional Pāpāuma areas such as Wai 420 and this case in the High Court and in the Marine and Coastal Area (Takutai Moana) Act Crown engagement pathway.

Holds the specified area in accordance with tikanga

[175] The traditional Te Hika o Pāpāuma whenua, and the boundaries of Te Hika o Pāpāuma's application area, are the same as the coastal boundaries of the 1853 Castlepoint Block purchase (Castlepoint purchase). The application area extends from the north at Ākitio along the coastline down towards Whareama. Ms Broughton's evidence was that Pāpāuma has connections through to Poroporo in the north giving rise to the kōrero "Poroporo ki raro, Whareama ki runga" (from Poroporo to Whareama).

<u>Castlepoint purchase</u>

[176] The account of the Castlepoint purchase and what followed it is principally relevant to the second limb of the CMT test (exclusive use and occupation from 1840

to the present day) but also to the first limb (currently holds in accordance with tikanga). It is set out here for convenience.

[177] The Castlepoint purchase is relevant to the applications of Te Hika o Pāpāuma and the Pāpāuma Marae Trustees. It is described in some detail by both Te Hika o Pāpāuma's historical expert witness, Tony Walzl[154] and Bruce Stirling, who provided an expert historical report for Pāpāuma Marae Trustees.[155]

[178] As Mr Walzl records:[156]

> The settlement of Port Nicholson, later named Wellington, was established as early as 1839 under a scheme operated by the New Zealand Company. It was expected that in addition to a 1-acre town lot, and 10-acre suburban lot, each settler would be awarded 100 rural acres. The location and hilly geography of Port Nicholson meant that the rural acres could not be awarded to settlers as expected. The forest-clad and high hills meant that much labour and capital would need to be expended before any farming could commence. Port Nicholson, then had no rural hinterland. Settlers, and would-be runholders, began to look afield for opportunities. From late 1843 onwards, flockowners began to relocate from Wellington to the flat grasslands of the Wairarapa to farm sheep. To do so, the runholders had to enter into land dealings within the local Maori of the Wairarapa. Initial arrangements took the form of the informal payment of 'grass-money'. Gradually, runholders introduced leases as the tenure under which they farmed. Over the next ten years, an increasing number of settlers entered into arrangements with Wairarapa Māori and an informal leasehold or 'squatting' economy was established. In the early 1850s, there was an estimated 300,000 to 400,000 acres of Wairarapa land under grass lease to Europeans and there were nearly 200 Europeans living in the area.[157]

[179] As Mr Walzl records, in early 1851 Crown Land Purchase Commissioner, Donald McLean, sought to purchase extensive land areas in the Wairarapa for pākehā settlement and to prevent the spread of leasing which the Crown deemed to be an unsuitable form of settlement.

[180] In January 1851, McLean recorded in his journal that Wiremu Te Pōtangaroa (of Te Hika o Pāpāuma), the principal chief of the area, had expressed an interest in

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154 Tony Walzl *Te Hika o Pāpāuma and the Takutai Moana* (31 July 2023) at section II [Walzl Pāpāuma report].

155 Bruce Stirling *The Trustees of Pāpāuma Marae CIV-2017-485-220* (Historical Report, August 2023).

156 At 2.2.

157 Wairarapa Report Volume I, above n 18, at 23

dealing with the government in relation to an area of land stretching for Porongahau to Castlepoint.[158]

[181] By June 1853 there was agreement from both Retimana Te Korou, the resident chief at Ngaumutawa and Kaikokirikiri (identified by Mr Walzl as being linked to Te Hika o Pāpāuma), and Wiremu Paraone to include the area between Whareama and Mataikona in the sale to the Crown.

[182] The Castlepoint purchase — the first Crown purchase in the Wairarapa — was completed by McLean on 22 June 1853 for the sum of £2,500. The Waitangi Tribunal described the Castlepoint purchase deed as follows:[159]

> …'nga Rangitira me na tangata o Ngati Kahungungu' did 'sell and entirely cede our land' including trees, waters and stones (the Crown's translation called 'kohatu' - literally stones – 'minerals') within the boundaries described for a total of £2500.

[183] The Tribunal explained that the absolute cession expressed in the Deed was accompanied by what came to be referred to as a tangi clause, "where the idea of finality and permanency of the transaction is conveyed by reference to 'tangi'".[160] The tangi clause in the Castlepoint Deed, as written in English, was:

> Having held meeting to talk about this land, we have finished discussing it, greeting it, crying over it, making an absolute last and final farewell to these lands that our ancestors left as an inheritance for us. In the broad light of day we have completely yielded it up, its trees, its waters, every stone whether on or under the earth, absolutely everything pertaining to the land we have given over to Queen Victoria of England and her heirs and successors from this time forth and forever.

[184] The Waitangi Tribunal pointed out that although Māori in the Wairarapa must have known more was being asked of them than before in leasing arrangements, there was a lack of clarity around what Māori actually understood about these agreements. The Tribunal said:[161]

> What exactly they thought they were giving up is not clear. We think it likely that they understood and agreed that they would no longer control who came and went on the land. Whether they understood that transactions were

158 Walzl Pāpāuma report, above n 154, at 2.12.
159 Wairarapa Report Volume I, above n 18, at 107.
160 At 113.
161 At 178.

> complete and permanent no matter what happened in the future is less clear, however.

[185] In relation to Crown purchasing in the Wairarapa area, the Wairarapa ki Tararua Tribunal said, "[it] was partnership, not mere citizenship, that rangatira sought when they signed the deeds".[162] They also agreed:[163]

> … that the idea that this could be accomplished by 'tuku' of land - which the Crown insisted would be by 'sale' - was inherent in gift exchange, and carried the intention of creating a continuing relationship between the Crown and Maori.

[186] The Castlepoint deed was signed by 301 people, including women and children. Wiremu Te Pōtangaroa was the first name on the list of those who signed. One thousand pounds was immediately paid to the Māori owners with a plan that a further £1000 be paid the following year and the final £500 was to be paid in 1855. The northern boundary was at Waimata and excluded Porangahau, and the area extended south to Whareama.

[187] As Mr Walzl records:[164]

> At the time, the Crown surveyors estimated that the block incorporated 275,000 acres. The Tribunal noted that using the sketch map accompanying the deed and applying modem mapping techniques the actual area was almost twice that, being closer to 484,775 acres.

[188] Ultimately, the second and third instalments were paid together on 5 January 1855. Eight individuals signed the receipt for this including Wiremu Te Pōtangaroa and Te Otene Te Rangikaheke. The total purchase price was 2.18 pence per acre.

[189] At the time of signing the Castlepoint deed, 10 places were named as reserves. Only four of these were defined as to position and boundaries. The Waitangi Tribunal noted that the reserves were estimated at the time to total 27,863 acres (about 10 per cent of the total area).[165] Modern Geographic Information System (GIS)

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162 At 178.
163 At 178.
164 Walzl Pāpāuma report, above n 154, at 2.22.
165 Wairarapa Report Volume I, above n 18, at 114.

measurements indicated that the reserve provision was actually around 24,332 acres (or six per cent of the total land acquired by the Crown in this purchase).[166]

[190] The reserves agreed to from the Castlepoint purchase were Taurangawaio Reserve, Takapūai Reserve, Mataikona Reserve, Puketewai Reserve, Ngātahuna Reserve, Porotāwao Reserve, Whakataki Reserve, Ngātamatea Reserve and Waimīmiha Reserve.[167]

[191] For the purposes of this application, two of those reserves are significant, Mataikona and Whakataki.

Mana whenua of Mataikona/Mataikona Reserve

[192] The Mataikona Reserve is part of Te Hika o Pāpāuma's application area. It is also the area over which the Pāpāuma Marae Trustees seek orders under the Act. I discuss it here, and also in relation to the Pāpāuma Marae Trustees' application below, noting the historical accounts of the witnesses for each of the two applicants. Three witnesses specifically addressed the question of who had mana whenua over Mataikona, at the time of the Castlepoint Deed and at the time of the subdivision hearings in 1869 (discussed below).

[193] In addition to MrWalzl's report for Te Hika o Pāpāuma and Mr Stirling's report for the Trustees of Pāpāuma Marae, Steven Chrisp gave evidence for the Rangitāne tu Mai Ra Trust. Mr Chrisp has been involved in researching the tribal history of Rangitāne o Wairarapa, dating from 1868. The history of the area is also touched on in the evidence of Samuel Carpenter, for the Attorney-General.

[194] In his evidence for Te Hika o Pāpāuma Mr Walzl records[168] that the Mataikona Reserve was the largest Castlepoint purchase reserve by far, containing 17,768 acres. It has a coastal boundary of approximately 14 kilometres. The boundaries were relatively well-defined in the Castlepoint deed.

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166 At 115.
167 Walzl Pāpāuma report, above n 154, at 120.
168 At [2.38]–[2.53].

[195] In his historical report, Mr Stirling records that the customary owners of Mataikona were closely involved in negotiations with the Crown for the Castlepoint Purchase. Given the size of the purchase, a large number of Māori had interests within its boundaries, in addition to the owners of Mataikona. Mr Stirling records that some of them also participated in the Deed negotiations while many more joined in the signing of the Deed and the distribution of the first instalment of the purchase money. "However, these other Māori were not involved in the arrangements relating to the Mataikona Reserve, which were instead the responsibility of the customary owners of Mataikona."

[196] Samuel Carpenter notes that initially, in the 1850s, the Mataikona Reserve Block was leased by the Māori owners to the runholder John Sutherland, while the land remained under customary ownership.

[197] In January 1855, the Crown acquired 50 acres of the reserve where Sutherland's homestead was located so as to make over the freehold to the runholder. In this early period there was a dispute over the boundaries of the reserve with local Māori; the Crown eventually relinquished land it claimed was originally outside the reserve block.[169] Subsequently the 50 acres was sold to Mr Sutherland. The deed was signed by six individuals — Te Wiremu Te Pōtangaroa, Karaitiana Mahakai, Wiremu Kingi Te Matahi, Wiremu Paraone Manini, Renata Te Aopouri and Te Reitu Tahataharoa.

[198] In 1869, Karaitiana Whakarato, Hami Pōtangaroa, Wi Paraone and several others applied to the Native Land Court for a title for Mataikona. During the case, Whakarato stated that there were 12 places within the block where the claimants had settlements. There was no opposition to the claim put forward by Karaitiana, nor to the list of owners that had been agreed by them before the hearing. However, the Native Lands Act restricted the number of individual owners on a title to 10. In order to ensure all the owners could be included in the title, the owners first arranged to divide Mataikona into three titles (Mataikona 1, 2 and 3). To ensure that all owners were included, they also drew on a provision in the Native Lands Act 1867 that

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169 Samuel D Carpenter *Marine and Coastal Area (Takutai Moana) Act 2011: Third party use and occupation report* (November 2023) at [307].

provided for owners in excess of the 10 to be added on the reverse of the title. As a result, the three titles (Mataikona 1, 2 and 3) were awarded to a total of 30 grantees, with 134 additional owners on the reverse of the titles. Some of these 164 owners were on more than one of the titles.

[199] The whole of Mataikona was set aside as a reserve and made inalienable by sale, gift or mortgage for 21 years.[170]

[200] As Mr Stirling records, the customary owners selected Karaitiana Te Whakarato to "act as their mouthpiece and agent" in arranging the title and the lease. Te Whakarato had been involved in negotiations for the Castlepoint Deed and was living on the Mataikona Reserve when that Deed was arranged. Karaitiana lodged a claim to Mataikona with the Native Land Court in 1868 on behalf of the owners and presented that claim to the Court in 1869. He told the Court:

> I belong to Te Ika o Papauma [Te Hika-a-Pāpāuma] tribe and reside at Mātaikona. I recognise the land shown on the map before the Court. This land belongs to me and to some others of my tribe. We derive our title from our ancestor Te Matau. This land belonged to him in former times. His descendants have been in possession ever since, and are in possession now. We are now living on the land. Our fathers built houses on it, worked on it in their day and we have houses and cultivations on it now. We have never been disturbed. ...our title is not disputed that I am aware of.

[201] Mr Stirling records that the titles to Mataikona 1, 2 and 3 appear to have included everyone who identified as Te Hika a Pāpāuma who had customary rights at Mataikona. Many of the owners were then living on the block and continued to live on the reserves excluded from the lease.

[202] Mr Stirling notes that the uncontested title investigation in 1869 was no accident — the owners had gone to some lengths to reach agreement before they came to Court in order to ensure they got the result they sought.

[203] As Mr Stirling notes, the only difficulty with the consensus arrived at in 1869 is that it meant that there was no need for the Court to inquire into ancestral rights at Mataikona.

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170 Walzl Pāpāuma report, above n 154, at [2.38]–[2.40].

[204] During 1894 and 1895 the Mataikona subdivisions went before the Court to determine relative interests. In addition, Mataikona No 2 and No 3 were both partitioned into two subdivisions. During this hearing, the fact of Te Matau being the only ancestor recorded in 1869 presented some difficulty as it risked excluding those owners who were not descended from him. The owners clarified that while Te Matau was a significant source of rights, he was not the only source. These hearings allowed other ancestors and sources of rights to be raised and acknowledged.

[205] As Mr Walzl records, Karaitiana Te Whakaroto noted that, in 1869, he had claimed the Mataikona blocks under Te Matau, but added that there were "other claims as well which I did not mentioned [sic] at first Court."[171]

[206] Eyewitness to the events was Karaitiana Korou. He explained the dispute that had arisen which the Wairarapa Committee had resolved:[172]

> I was present when this land was before the Court in 1869. Hoera Rautu and Karaitiana Te Whakarata quarrelled about the land and intended to contest their claims to it in the Court but the people met and persuaded them to make friends which they did. List of names for title to Mataikona was then drawn up by arrangement and submitted to Court without opposition. The assessors of the Court were present at meeting. Te Matau was the ancestor set up. There was no opposition as list of names had been agreed to.

[207] The disagreement between Hoera Rautu and Te Whakaroto arose within the context of the block being leased and had centred on who should receive the rental payments. Mr Walzl notes that the inference arising from the evidence given is that the selecting of one ancestor was to keep matters simple and not provide any basis for disagreements to flare up. The selecting of one ancestor was not intended to be exclusionary:[173]

> All the principal claimants to Mataikona were also at meeting, descendants of Te Matau and others. After quarrel was settled, it was decided to set up Te Matau as the ancestor for this land, but all those not descendants from him who had rights were to be admitted. If this arrangement had not been come to other ancestors would have been set up.

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171 Evidence of Karaitiana Te Whakaroto: see Walzl Pāpāuma report, above n 154, at 80.
172 Evidence of Karaitiana Korou: see Walzl Pāpāuma report, above n 154, at 294–295.
173 Evidence of Karaitiana Te Whakaroto: see Walzl Pāpāuma report, above n 154, at 287.

[208] Mr Walzl records that Te Whakaroto was vehement that Te Matau was not set up as the ancestor because he had a better right than others. Hami Pōtangaroa also explained that the selection of Te Matau as the sole ancestor for Mataikona was an "arrangement."[174]

[209] Te Whakaroto also explained why the block was divided: "I fixed the boundaries between blocks. The Hika a Papauma agreed. It was done at suggestion of Judge."[175] Hami Pōtangaroa also later agreed that an arrangement had been made at Masterton which hapū were to be represented in the different blocks.[176] Te Whakaroto added: "Lists of names for Mataikona Nos.1,2 & 3 were arranged outside Court. It was done by the people themselves and not by me or any other individuals."[177]

[210] In Mr Stirling's report he records Karaitiana as saying:

> The old people knew that Te Matau did not own all the land… I can't say why it was decided to set up Te Matau as the ancestor for the whole of this land when he really owned very little of it. ... Te Matau was not set up as the ancestor because he had a better right than others.

[211] The Native Land Court, in its judgment, accepted that it was proper to recognise all ancestors and did not limit the recognition of legitimate interests to the descendants of Te Matau only. It noted, however, that he was a particularly important ancestor.

[212] As Mr Stirling records, another result of the unanimity of the owners that Mataikona belonged to Te Hika a Pāpāuma, in 1869, was that little evidence was given on the origins and history of Te Hika a Pāpāuma.

[213] There is much common ground in the evidence of the historical experts, but some differences in relation to the historical source of Te Hika o Pāpāuma's land rights at Mataikona. The essential difference between Te Hika o Pāpāuma and the Pāpāuma Marae Trustees (with whom Mr Chrisp agrees, in part) is the point at which Te Hika o

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174 Evidence of Hami Pōtangaroa: see Walzl Pāpāuma report, above n 154, at 309.
175 Evidence of Karaitiana Te Whakaroto: see Walzl Pāpāuma report, above n 154, at 85.
176 Evidence of Hami Pōtangaroa: see Walzl Pāpāuma report, above n 154, at 73.
177 Evidence of Karaitiana Te Whakaroto: see Walzl Pāpāuma report, above n 154, at 281.

Pāpāuma assumed mana whenua in the relevant area. In this section of the judgment, I set out Te Hika o Pāpāuma's whakapapa.

[214] Both Anita Broughton, the original applicant, and George Matthews, the current named applicant, gave evidence of Te Hika o Pāpāuma holding their own unique, sacred tatai lines of descent back to Kupe, noting that Pāpāuma herself is not a descendant of either Rangitāne or Kahungunu, although the descendants of Pāpāuma today are descendants of the tupuna Kahungunu and Rangitāne, through historical peace-making, marriages, gifts of land and through the marriage itself of Pāpāuma to Rakaihikuroa.

[215] Mr Matthews says:

> … it is from these lines that our uniqueness and whakapapa is derived, and therefore we say that Te Hika O Pāpāuma of Nga Aitanga A Kupe have held the mana whenua over our coast under tikanga from Poroporo through to the Whareama since the time of Pāpāuma.

[216] In his expert historical report for Te Hika o Pāpāuma, Mr Walzl records that Pāpāuma was born in approximately 1500 and is a direct descendant of Kupe by nine generations. As Mr Walzl notes, "her descendants hold a strong belief that she lived at Owāhanga during her life".[178] It is the case for Te Hika o Pāpāuma that there is no evidence of interruption of mana from the time of Pāpāuma through to the Te Hika o Pāpāuma tribe today.

[217] In response to Mr Chrisp's evidence for Rangitāne, Te Hika o Pāpāuma notes that it has sought to maintain a separate and distinct identity from both Ngāti Kahungunu and Rangitāne, particularly within Treaty settlement processes. George Matthews says their whakapapa shows that Pāpāuma did not directly descend from Rangitāne despite the relationship between Te Hika o Pāpāuma and Rangitāne being "very strong".

[218] Mr Stirling notes that Pāpāuma, the ancestor, was a descendant of the early explorer Kupe. She married Rakaihikuroa, a significant ancestor for Ngāti Kahungunu, and they had nine children. Rakaihikuroa and his children moved from

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178 Walzl Pāpāuma report, above n 154.

Turanganui (Gisborne) to Mahia and then to Heretaunga (Hawke's Bay). They and their descendants came into conflict there and one result of this was that only some continued to identify themselves as Te Hika a Pāpāuma, while others adopted new hapū identities based on descent from Pāpāuma or other ancestors. It was only in the Mataikona area that those descended from Pāpāuma, particularly those descended from her child Parea, identify themselves as Te Hika a Pāpāuma.

[219] A significant point in Te Hika o Pāpauma's whakapapa is the tuku whenua to Te Matau. Te Hika o Pāpāuma says the tuku was in reality from Te Rangiāmoa, and not her husband Pōkahuwai. That is significant because Te Rangiamoa was a Te Hika o Pāpāuma tupuna. It also occurred much earlier than the evidence of the Pāpāuma Marae Trustees would have it.

[220] The Pāpāuma Marae Trustees, through both Mr Stirling and Robin Pōtangaroa, say that the mana whenua of Te Hika o Pāpāuma to the Mataikona area came only from a tuku whenua from Pōkahuwai to Te Matau, in the late 1600s. Mr Chrisp's evidence was to similar effect. The Pāpāuma Marae Trustees say that what now comprises the Mataikona No 1 Block was gifted to Te Matau by Pokahuwai. The Mataikona 2 and 3 blocks were later won by Te Matau's descendants, in battle with Rangitāne.

[221] Pāpāuma and Rākaihikuroa, her husband, had left Tūranga-nui-a-Kiwa, steadily moving south, over the course of several years. At Heretaunga they secured their status as tangata whenua who held mana whenua, establishing the Kahungunu rohe and pushing Rangitāne further south.

[222] Approximately 10 generations later, Te Matau and Whakaangi (both descendants of Pāpāuma and Rāhaikuroa) carried the hapū name Te Hika a Pāpāuma from Heretaunga to Waimarama and then to Porongahau, finally reaching their destination at Aohanga, making connections with Ngāti Kere along the way.

[223] They were greeted at Aohanga by a rangatira called Pokahuwai. This occurred in the late 1600s.

[224] Mr Chrisp's evidence was to similar effect. Mr Chrisp recognises and supports the rights of Te Hika o Pāpāuma in this hearing area. He acknowledges that Pāpāuma is the eponymous ancestor of Te Hika o Pāpāuma. Mr Chrisp also acknowledges that there is no direct whakapapa line between Rangitāne and Pāpāuma, but he says that does not impact on the Rangitānetanga of Te Hika o Pāpāuma which is derived from the tuku whenua and intermarriage between the descendants of Hinematua and Te Matau.

[225] Mr Chrisp says there is agreement within Te Hika o Pāpāuma historical narratives that the Rangitāne ancestor Te Rangiāmoa and her husband, Te Pōkahuwai, made a significant tuku whenua to Te Matau and his party. This occurred about five or six generations before the lifetimes of the leading members of Te Hika o Pāpāuma who gave evidence in the Mataikona subdivision hearings in 1895. There was immediate and extensive intermarriage between the original inhabitants and the migrants (that is, Te Matau's people).

[226] Mr Chrisp's evidence was that most witnesses in the Māori Land Court Subdivision Hearing of the Mataikona Blocks in 1895 agreed that Te Hika o Pāpāuma derived its land rights at Mataikona from the tuku to Te Matau and whakapapa from the intermarriages between the original inhabitants and the migrants.

[227] The evidence for Te Hika o Pāpāuma in response is that the tuku whenua to Te Matau was in fact by Rangiamoa, who was the wife of Pokahuwai, and a Te Hika o Pāpāuma tūpuna. Mr Walzl's report refutes the suggestion that the hapū Te Hika o Pāpāuma gained mana whenua just five or six generations prior to 1900. As well as the evidence of the Te Hika o Pāpāuma applicants themselves, including Anita Broughton and George Matthews, Mr Walzl relies on evidence from Patrick Parsons, an expert in whakapapa of this general area,[179] and Angela Ballara. Drawing on those reports, Mr Walzl notes that Whatuiāpiti, a descendant of Pāpāuma, was extant four generations after Pāpāuma.

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[179] Patrick Parsons and Dorothy Ropiha *Rangitane o Tamaki Nui a Rua: Traditional History Report* (Wai 166 and Wai 68, A68, February 2003). See Walzl Pāpāuma report, above n 154, at 71.

[228] Mr Walzl also referred to a series of conflicts in Heretaunga between two groups representing the descendants of the two wives of Rakaihikuroa — one of these groups was named Te Hika o Pāpāuma and the other was named Te Hika o Ruarauhanga. The conflict took place and involved descendants who were three and four generations after Te Hika o Pāpāuma, demonstrating that the name was in use at that time.

[229] There is also a difference between the expert historical accounts as to whether Pāpāuma herself remained in occupation on the coast. Her husband, Rakaihikuroa, was expelled from the coast because of a misdeed with one of his grandchildren. He went to Turanga with seven children but, in Mr Walzl's opinion, Pāpāuma and the remaining two children (Parea and Kahukuratakapau) stayed behind. Mr Stirling, on the other hand, says Pāpāuma went to Turanga.

[230] This evidence, too, suggests that the name Te Hika o Pāpāuma predates the time of Te Matau. Mr Walzl's view is that the name Te Hika o Pāpāuma was held by both the children that remained at Mataikona, as well as those who went north to Turanga with Rakaihikuroa. On the basis of this evidence, Mr Walzl states that the name Te Hika o Pāpāuma came into use around 1600.

[231] Mr Walzl's report concludes that the mistaken view that the Te Hika o Pāpāuma tribe began in Mataikona in the time of Te Matau is drawn exclusively from the Native Land Court witness account of Wirihana Te Oioi. Other witnesses disagreed with Te Oioi's evidence.

[232] Mr Walzl records that all commentators note that after the gift to Te Matau, Pokahuwai went to the Manawatū. Te Whakaroto noted that Rangiamoa also went, but that the children remained at Mataikona.

[233] Mr Chrisp's evidence was that the entire Mataikona blocks 1 to 3 were gifted to Te Matau and that upon the arrival of Te Matau, the hapū Ngāti Tu was already in place in Mataikona block No 1. On that basis, Mr Chrisp asserts that the original hapū was Ngāti Tu and that Te Hika o Pāpāuma began at that point (consistent with the narrative of the Pāpāuma Marae Trustees).

[234] Mr Walzl points out that the name Ngāti Tu, and other hapū also in the Mataikona blocks area, were considered by all other Native Land Court witnesses to be descendants of Pāpāuma and therefore hapū of Te Hika o Pāpāuma. In the context of the smaller gift that the Court judgment ruled on, the land gifted to Te Matau, being only a part of the Mataikona block No 1, amounted to providing a space among Te Hika o Pāpāuma subtribes of Ngāti Tu, Ngāti Hinemau and Ngāti Uhinga for Te Matau.

[235] The point of difference between Mr Walzl and Mr Chrisp also concerns the gift to Te Matau. On the Rangitāne evidence, Rangiamoa, who made the gift, is from Ngāti Rangitāne. Te Hika o Pāpāuma, however, assert that Rangiamoa was from Te Hika o Pāpāuma. Therefore, they maintain that the gift to Te Matau came from Te Hika o Pāpāuma and not Rangitāne.

[236] Mr Walzl records that the Native Land Court was evenly divided on this issue. In the two instances where the affiliations of Rangiamoa are spoken of, these mirror the differences in the accounts of Rangitāne and Te Hika o Pāpāuma. Mr Walzl's considered view is that, considering that Rangiamoa was a member of Ngāti Tu, and that Ngāti Tu is a hapū of Te Hika o Pāpāuma, Rangiamoa was indeed from Te Hika o Pāpāuma.

[237] The view of most was that Rangiamoa was the rights holder to the land, while Te Pokahuwai acted as his wife's agent in making the tuku whenua. Mr Walzl says there is no evidence of where Te Pokahuwai's independent rights might have come from, whereas there is clear evidence that Rangiamoa's rights came from Parea, Pāpāuma's daughter, and one of the two children of Pāpāuma who did not go to Turanga with Rakaihikuroa.

[238] Mr Walzl's conclusion is that the origin of Te Hika o Pāpāuma's mana whenua is from Pāpāuma and there is no evidence of that mana whenua being interrupted.

[239] At some point, probably in the 1870s, the Wairarapa North County Council leased 40 acres of Mataikona No 1 block for a ferry reserve, near the mouth of the Aohanga River.[180] In 1891, the whole block was leased to Frederick Sheath (who had

[180] Carpenter, above n 169, at [309].

managed the Mataikona station of Valentine Smith, to the south) and Henry Taylor Hume (Sheath's brother in law). Evidence from the confirmation hearings suggests that 1,000 acres of the total block had been reserved for the owners' use.[181] Sutherland notes that evidence from Native Land Court hearings in the 1890s suggests that some Māori owners were still living on the block, including the rangatira Karaitiana Te Whakarato and Hami Te Pōtangaroa. There were disputes over rights to cultivate two 200 acre reserves excluded from the lease for Mataikona No 1. In 1897, a Land Court hearing to confirm alienation orders or leases to Europeans recorded that lands reserved from the leases for occupation by the owners were 340 acres in Mataikona 1 block, 350 acres in Mataikona 2 block, and 250 acres in Mataikona 3.[182]

[240] Mr Walzl records,[183] that over the early 20th century much of the Mataikona land continued to be leased and the Crown considered the acquisition of the land on several occasions.

[241] In 1909, the leases made formally to Frank Sheath (and beneficially also to Henry Taylor Hume) were made over to Hume alone and renewed for a further term of 21 years.[184]

[242] The Crown received sale offers from some Māori owners in November 1916 related to the whole block. A due diligence process was carried out. Carpenter records that in 1917 there were reports of families residing on both Mataikona 1 and Mataikona 3. The Native Department decided it would not acquire the land.

[243] There were further partitions of the Mataikona blocks in the 1920s. The lease to Hume was due to expire in February 1930. Before the lease expired, a series of inter-departmental investigations led to a Native Land Court hearing in December 1929, when it was determined on the basis of authorising legislation that the Mataikona blocks would be vested in the Native Trustee to farm on behalf of the owners. This was at the instigation of Sir Apirana Ngata as Native Minister. Several hundred acres were separated out for the occupation of a select number of owners.

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181 At [311].
182 At [313].
183 Walzl Pāpāuma report, above n 154, at [3.3].
184 Carpenter, above n 169, at [314].

[244] In November 1940, an area of about two acres in Mataikona 1E was taken under the Public Works Act 1928 for a Native School.

[245] Mr Carpenter notes that Māori Affairs department records of the 1950s record references to the owners occupying and using the land, as labourers, farmers or agar gatherers.[185] Mr Walzl's report details the continuing relationship between the Māori Trustee and Māori affairs over the management of the blocks.[186]

[246] During the 1950s and 1960s there was ongoing Māori occupation of the area and the local school operated for station children and those of the Māori settlement on the block. The collection of seaweed (agar) at the mouth of the Owāhanga River was a common occupation.

[247] In 1954, the Māori Land Court heard an application for cancellation of all partitions on the Mataikona block on the basis the property was farmed as one block and the subdivisions were of little practical significance. The Court was told that the owners approved of the application. The Court made orders cancelling all subdivisions and creating one title with 358 owners (in various shareholdings).[187]

[248] In 1957 the 400 acres occupied by Mata Rautu was partitioned out as Mataikona B and awarded solely to her, while the balance of the block, being the station land, became Mataikona A. In 1964 Henry Power applied to cut out 29 acres on which his house was located, whereupon he would surrender the remainder of his 21-year lease, with the balance of the area (approximately 200 acres) being added to the principal title of Owāhanga Station. The Court made orders accordingly, with Power's small block renamed Mataikona A1 and the Owāhanga Station property, Mataikona A2.

[249] In April 1973, the Māori Land Court made an order for incorporation. Aohanga Station remains in Māori ownership under the management of the Aohanga Incorporation, with about 1,200 shareholders.

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185 At [321].

186 Tony Walzl Wairarapa land issues overview (Wai 863, A42, November 2002) at 275–309 and 382–404.

187 Carpenter, above n 169, at [324].

[250] Subsequently, Mataikona B and Mataikona A1 were transferred back into the ownership of the parent block owners, that is Aohanga Incorporation "or the Proprietors of Owahanga Station".[188]

[251] The first management committee of the Aohanga Incorporation included Joseph Brown, Matai Broughton, Paul Douglas, George Evans, Henry Power, Tunurangi Rupuha and Golden Pōtangaroa. The current Management Committee of Aohanga Incorporation comprises: Wright Broughton, Bruce Dillon, Demetrius Pōtangaroa, Robin Pōtangaroa (Chair), Airini Power, Adele Small, and Paul Te Huki.

[252] With the exception of the 50 acres involved in the 1855 purchase and small areas taken in association with roads, schools and houses, the whole of the Mataikona Reserve continues to be held in Māori ownership.

[253] Other groups have acknowledged Te Hika o Pāpāuma's mana within the area. For example, in his evidence for Rangitāne in the 2004 Waitangi Tribunal hearings, Steven Chrisp said:

> Te Hika o Papauma maintained mana whenua over the area between Akitio and Castlepoint on the Wairarapa Coast. These people took their hapu name from their ancestor Papauma who was a descendant of Tangaroa and Kupe, and state in their narratives that Papauma married Rakaihikuroa of Ngati Kahungunu.

[254] Witnesses for Te Hika o Pāpāuma also gave evidence of customary fishing and kaimoana gathering according to their tikanga. For example, Alan Dewar talked of gathering kaimoana with his brother Paddy (Patrick Dewar) at their favourite dive spots, along the coast, off the road at Mataikona, Sandy Bay and Zanders Bay at Aohanga Station, Mary's Bay at Moanaroa Station and the reef at Akitio.

[255] Neavin Broughton, who is connected to Te Hika o Pāpāuma through his marriage to Anita Broughton (nee Dewar), gave evidence of learning how to dive and process kaimoana, with the assistance of Paddy Dewar, his father in law. Mr Broughton's evidence talked of Mr Dewar taking him to rocks where they could always find pāua, koura or kina. He learned of the crucial relationships between

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188 At [332].

aspects of the moana, for example the relationship between seaweed and pāua, from Mr Dewar.

[256] Mr Broughton's evidence was that they primarily gathered kaimoana between Rangiwhakaoma and Mataikona, but that Paddy sometimes dived and fished in other places, including the Otahome area north of the Whareama River, close to the region of the hapū Ngāi Tūmapūhia-rangi. Mr Broughton also spoke of having been diving over the years with Matthew Paku of Ngāi Tūmapūhia. Mr Broughton noted Paddy Dewar's knowledge and adherence to the tikanga involved in gathering kaimoana.

[257] Dorrie-Anne Herbert (nee Power) also spoke of her experience of collecting agar and karengo. Ms Herbert collects karengo from near Ākitio but said she knows of others such as Paul Peeti and Kura Broughton who gather it at Mataikona.

[258] Ms Herbert also gave evidence of gathering other kaimoana with her whānau, collecting mostly pāua, kina and pūpū. She also spoke of collecting fish, from the mouth of the Aohanga River where flounder and kahawai could be caught.

[259] Ms Herbert also spoke of the tikanga practised in collecting kaimoana. For example, they gathered only what was needed to eat for that day; little fish would be put back; karakia would be said and she was taught to return things to as they were. Another example was that the men always "mimi'd" onto the bags that they would put their catches in. All of those practices have been passed on to her children, who now do the same.

[260] Jean (Georgina) Pomana (nee Power) also gave evidence. She talked of living initially at Pongaroa but later her father received part of Aohanga — the name of the farm was Kapakapanui — where he was a rabbiter, a customary fisher and a gatherer of kaimoana.

[261] Ms Pomana, too, spoke of gathering karengo at Ākitio and Mataikona, having learned about it and about the sea from their mother when they were kids. Ms Pomana gave evidence of the gathering of kina, pāua, crayfish and other kai from the ocean

and how the use and use of knowledge of how to collect that kai safely and when to collect it has been passed on.

[262] While Ms Pomana spoke of her childhood experiences, she also gave evidence of living at Pongaroa since she married. She and her husband and their children would camp near the mouth of the Aohanga River for the holidays, because her husband was a shearing contractor. On other holidays they would go to Ākitio and camp in tents and caravans there. She spoke of her husband learning from her whānau about the gathering of kaimoana. As adults, they would collect kina, pāua and mussels at the reef at Ākitio, and would fish for kahawai at the river mouth in Aohanga. Sometimes they would get flounder from the mouth of the river.

[263] There was considerable evidence of Te Hika o Pāpāuma hapū acting as kaitiaki within the gazetted rohe moana under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 (Kaimoana Regulations), from Whareama to Poroporo, out to the 12 nautical mile limit. Te Hika o Pāpāuma produced in evidence representations by Te Hika o Pāpāuma (through Mr Henry Power, also known as Uncle Dubby) to the Minister of Māori Affairs. In a letter of 12 July 1999, Mr Power enclosed a Notification of Tangata Kaitiaki/Tiaki for Management of Customary Food Gathering for Te Hika o Pāpāuma in the area from Poroporo to Mataikona. The two named kaumātua for that purpose were Mr Power and Matai Broughton, with responsibility for Poroporo to Mataikona, and Aohanga River to Whareama, respectively. Subsequently, the appointment of Mr Power, Mr Broughton, William [Wright] and Pikihuia Wilton, as kaitiaki was gazetted under the Fisheries (Kaimoana Customary Fishing) Notice (No. 12) 2003 (No. F247).

[264] Te Hika o Pāpāuma submits that the Crown Notice amounts to Crown recognition of their existing customary marine interests, inclusive of customary food gathering.

[265] While the authorisation to issue permits for customary take within this area does not of itself provide conclusive evidence of Te Hika o Pāpāuma's use of and control in the application area, it does demonstrate the exercise of manaakitanga and kaitiakitanga, by permitting the customary use and gathering of resources in the area.

As Ms Broughton's evidence illustrated, permits are issued with a view to promoting sustainable practices and to influence the continuing practice. As Ms Broughton said it is about:

> …ensuring that you're collecting kaimoana correctly, and that really comes down to a lot of kaitiaki role is education, education of our whānau, how do you collect kaimoana in a way that's going to be safe and sustainable?

[266] Warren Chase gave evidence of the exercise of manaakitanga, by sharing the kaimoana gathered. Mr Broughton spoke of "sharing with reverence" and how his father in law, Paddy Dewar, held kaimoana in high regard, considering it a taonga (treasure), which instilled a sense of reverence when gifting it to others:

> … He essentially shared a part of himself whenever he shared kaimoana with someone. This sacred act of sharing symbolised the deep connection between the giver, the receiver, and the precious gift from the sea.

[267] The retention of ownership of abutting land may be relevant to determining whether CMT exists.[189] The Mataikona Block remains in Te Hika o Pāpāuma's ownership and provides members of the hapū with access to the takutai moana (subject to the Aohanga Inc's farm requirements). There are two marae on the Mataikona Block: Te Hika o Pāpāuma ki Wairarapa (Pāpāuma) Marae and Te Aroha o Aohanga (Pāpāuma) Marae, which reflect a close connection between the land and the CMCA.

[268] Considerable evidence was given by Te Hika o Pāpāuma witnesses about a claim lodged with the Waitangi Tribunal in 1992, Wai 420, on behalf of the Proprietors of Owahanga Station, in which they sought recognition of "Blue Water Title" and sought to exercise control over the area. The application was a response to an overseas oil company, Amoco, placing an oil rig off the coastline. Mr Chase and Mr Matthews gave evidence of filing the Wai 420 claim together and of it being heard as part of the Wairarapa inquiry before the Waitangi Tribunal. Although ultimately the inquiry found no evidence of Blue Water Title, by lodging the claim, Te Hika o Pāpāuma demonstrated the exercise of kaitiakitanga over the coastal area.

[269] Dale Coles gave evidence of taonga connected to the coast, demonstrating Te Hika o Pāpāuma hapū's mana in and in connection to the area. The Whatu Pokeka is

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189 Takutai Moana Act, s 59(1)(a)(i).

a precious taonga stored at Te Papa Tongarewa | Museum of New Zealand. It was brought into Court during the course of the hearing and Ms Coles spoke of the story of Whatu Pokeka. A whatu pokeka is a baby (pepe) blanket made of muka. Whatu Pokeka was woven from harakeke at Akitio, using the kete-whakawaitara, an ornamental weaving technique. The practice of collecting flax from Akitio goes back to Ms Coles' great-great grandmother Eterina Wright in 1875. Whatu Pokeka was woven in about 1875 by Eterina Wright, who was the daughter of the Wairarapa Chief Aperahama and Hera Riria from Te Hika o Pāpāuma and Ngāti Kahungunu iwi. Whatu Pokeka is a taonga to Te Hika o Pāpāuma and a link to the past. Ms Coles' evidence was that it provides a deep connection to their tīpuna and history.

[270] In Mr Walzl's historical report, he gives evidence of spiritual sites with longstanding tikanga, within the application area, including an extensive burial ground on a large hill to the south, separating Whakataki from Rangiwhakoma (Castlepoint), known as Te Wae Wae.[190]

[271] Although the application area extends as far north as Poroporo, there was little evidence of Te Hika o Pāpāuma's authority and control in the area from Wainui to Poroporo.

[272] Henare Power (Uncle Dubby) was quoted in evidence as saying:[191]

> That's what bugs me so much with the controversy over whakapapa and tangatawhenua. We, as the descendants of Papauma, must be tangatawhenua. Our rights didn't come from Rakaihikuroa [of Ngāti Kahungunu]. Our ahika was already established long before he came on the scene. A blind man can see we are Papauma from Papauma and we are the tangatawhenua, and that goes right up through Dannevirke and the whole area. And it definitely goes to Poroporo because of the Rautu family. That's where their graveyard is - Poroporo down at Wainui and Herbertville. That's where the road to the urupa is. That urupa is considered a Rangitane urupa.

[273] Counsel for the Attorney-General suggests that the reference to Poroporo may be a reference to an urupā of that name, at Wainui, or — as Mr Matthews suggested — by reference to a place wider than the immediate settlement. Mr Matthews spoke of that quote and, in cross-examination, acknowledged that the urupā referred to by

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190 Walzl Pāpāuma report, above n 154, at 56.
191 At 73.

Uncle Dubby was at Wainui, rather than Poroporo. However, Mr Matthews suggested that, nevertheless, there was a connection to Poroporo through kōiwi having been found there.

[274] Alyson Bullock said she was not aware of Te Hika o Pāpāuma having an interest in the area between Herbertville and Poroporo. Ms Bullock said she did not remember being told anything about that area by her elders.

[275] As I will come to, that absence of evidence about authority and control from Wainui to Poroporo is consistent with the case for Ngāti Kere. Dr David Tipene-Leach talked in his evidence about communications with Te Hika a Pāpāuma about Te Hika a Pāpāuma's claim as far north as Poroporo. Ngāti Kere acknowledges Te Hika a Pāpāuma's interests as far north as Wainui (shared with Ngāti Kere) but not north of Wainui and not as far north as Poroporo.

Exclusive use and occupation from 1840 to the present day

[276] Mr Walzl's evidence on behalf of Te Hika o Pāpāuma includes an account of the missionary William Colenso arriving at Mataikona in 1843.[192] Wiremu Te Pōtangaroa and approximately 120 people of Te Hika o Pāpāuma lived there at the time. Walzl also gives an account of another missionary visit in February 1848, when William Williams recorded:[193]

> Proceeded to the sea coast which we got to in about three hours, and then walked on to Rangiwhakaoma in about 2 hours more where we were abundantly supplied with potatoes and fish. We then went on to Mataikona which we reached an hour after sunset. The people of the neighbourhood are all assembled, being in number about 100 ...

[277] The 1853 Castlepoint Purchase Deed noted the boundaries of the sale from Waimata (near Poroporo), excluding Porongahau and extending south to Whareama.[194] Mr Walzl's evidence notes that the principal rangatira involved in that transaction were of Te Hika o Pāpāuma hapū, including Wiremu Te Pōtangaroa who was one of 301 signatories to the Deed.

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192 Walzl Pāpāuma report, above n 154, at 113.
193 At 114.
194 At 118.

[278] In the 1869 and 1895 Native Land Court hearings concerning the Mataikona Block, the Block was claimed by Karaitiana Te Whakaroto on behalf of Te Hika o Pāpāuma. Mr Walzl notes that the 1895 hearings provide the largest set of dedicated source material about Te Hika o Pāpāuma. While he identifies some gaps and inconsistencies, and a tendency by Karaitiana Te Korou to label various ancestors as Rangitāne, despite him claiming the land as Te Hika o Pāpāuma, Walzl notes that all participants saw the ancestors they mentioned collectively as being Te Hika o Pāpāuma.

[279] Walzl records that, according Karaitiana Te Whakaroto in 1895, there were three hapū names that were "all entitled to hapū name of Te Hika o Pāpāuma" and they each occupied one of the Mataikona Blocks: Ngāti Tu occupied No. 1, Ngāti Manuhiri No. 2, and Ngāti Pohoi No. 3. Each of these hapū had further "branches", said Te Whakaroto. Te Whakaroto noted of all these hapū and their "branches", "They are all Hika o Papauma".[195] This evidence shows that Te Hika o Pāpāuma and Te Matau were in occupation and control of the land both prior to and at the time of signing the purchase.

[280] Mr Walzl's evidence also refers to significant pā sites, including a pā site near the mouth of the Mataikona River (probably Pamaramarama Pā;[196] Matirie Pā (a defensive pā built by Whatonga on the refit Rangiwhakaoma (Castlepoint));[197] and Waiorongo Pā, near the shore on the southern bank of Whakataki estuary).[198] As Mr Walzl records, Whakataki is known to be the kāinga of Pōtangaroa (the Te Hika o Pāpāuma rangatira) and his descendants remain there today.

[281] Mr Walzl's evidence also covers urupā in the application area, with traditional burial sites including at Mataikona, between Mataikona and Whakataki, at Akitio and at Herbertville.[199] These demonstrate rangatiratanga through the establishment, and continued preservation, of traditional burial sites and practices.

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195 At 109.
196 At 48.
197 At 53.
198 At 55.
199 At 215.

[282] In terms of continuous use and occupation post-1840, continuity is demonstrated by the evidence discussed above.

[283] As above, the Castlepoint Purchase area demonstrates the extent of Te Hika o Pāpāuma's application area and the Native Land Court hearings in 1869 and 1895 are illustrative of the strength of Te Hika o Pāpāuma's claims to ownership of the Mataikona Block.

[284] As discussed above, the uncontested evidence is that the Mataikona Block was the largest Castlepoint Purchase reserve by far and how, notwithstanding the division into the Mataikona Blocks No. 1, No. 2 and No. 3, the land has remained in continuous Māori ownership, almost in its entiretyThe Mataikona Block is now administered by the Aohanga Incorporation under Te Ture Whenua Māori Act 1993.

[285] As recorded above, there are two marae on the Mataikona Block. Te Hika o Pāpāuma ki Wairarapa (Pāpāuma) Marae was built in 1905 and Te Aroha o Aohanga (Pāpāuma) Marae was built in 1995. Both are evidence of continued use and occupation of the area. Mr Walzl's report provided evidence of gatherings at the Mataikona Marae at about 1900 and also provides evidence of families working on the farm, building houses, and holding events from 1904 to the present day.

[286] Mr Walzl's report also records the significance of kaimoana as a food source throughout the relevant period. The Whareama River is cited as a place of abundant kaimoana[200] and Waimimiha is noted as having been the site of a fishing kāinga.[201] Mr Walzl also records kaimoana gathering and catching of crayfish and groper at Moana-roa,[202] north of Owahanga, and fishing at the Palisades, north of Akitio.[203]

[287] Mr Walzl also gives evidence of koiwi from urupā being discovered at Whareama and then reinterred at Waimimiha,[204] and of continued travel to and use of the Otahome and Whareama areas. Ms Coles noted that Paddy Dewar would go to

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200 At 67.
201 At 67.
202 At 191.
203 At 190.
204 At 216. The primary evidence of koiwi came from George Matthews and Dale Coles.

Otahome and other nearby areas to gather kaimoana and Mr Neavin Broughton also gave evidence of at times going to the very southern areas of the takutai moana such as Whareama Alyson Bullock spoke of a book called *The Powers of Aohanga*, compiled by Rose Griggs, which includes, for example, stories about Ms Bullock's great-great grandmother, Eterina Wright, who lived from 1886 to 1951, and of other inhabitants of Aohanga/Mataikona, covering the late 19th century to the 20th century.

[288] As to the landward boundary of Te Hika o Pāpāuma's application area, counsel had submitted it might be a significant distance upstream from the landward boundary of the CMA at the Whareama River. However, I am satisfied on the evidence of the Surveyor-General Anselm Haanen, and the concessions made by Dr Robert Bell, expert witness for Te Hika o Pāpāuma, that the designated upstream (CMA) boundary of the Whareama River is reasonably representative of the estuarine stretch of water Dr Bell did not suggest that the boundary should be altered.

Substantial interruption

[289] As noted and discussed in more detail below in relation to the application for CMT by the Trustees of Pāpāuma Marae, during the period 1931 to 1972 the Mataikona Block was run by the Māori Trustee. There was some evidence, including from George Matthews and Cheryl-Anne Broughton-Kūrei, that during that period the Station Manager would not let Te Hika o Pāpāuma whānau onto the coastline to gather kaimoana.

[290] I am satisfied that those issues regarding access, during that time period, do not of themselves indicate substantial interruption of use and occupation.

[291] The evidence for Te Hika o Pāpāuma relates predominantly to the area around Whareama and between Rangiwhakaoma / Castlepoint to Aohanga / Mataikona, rather than in the northern part of Te Hika o Pāpāuma's application area.

[292] I conclude that Te Hika o Pāpāuma has satisfied the criteria for a CMT in the area from the southern bank of the Whareama River, including the Mataikona block, to Wainui (Herbertville), but not further north.

[293] The terms of the CMT orders are set out at the end of this judgment.

[294] In relation to the Mataikona Block, as I discuss below, who is the appropriate order holder will depend on further tikanga discussions with the Pāpāuma Marae Trustees.

Pāpāuma Marae Trustees

[295] The application brought by the Trustees of the Pāpāuma Marae was brought "on behalf of the original owners of Mataikona 1, 2 and 3 Block and their descendants".

[296] The Pāpāuma Marae Trustees seek CMT between the southern bank of the Mataikona River and the northern bank of the Aohanga River. As noted above, this area is also included in Te Hika o Pāpāuma's application area.

[297] The evidence of Robin Pōtangaroa on behalf of the applicant group was:

> For the purposes of defining the applicant group, the Application is brought on behalf of a whānau group. Specifically, the Application is brought on behalf of a collection of whānau who whakapapa to the original owners of the Mataikona Blocks, and who have been associated with the blocks and this particular area of land for a long period of time. Our application was filed on 3 April 2017.

[298] During the course of the hearing Demetrius Pōtangaroa produced a list of whānau.

[299] In closing submissions, Ms Northey, counsel for the Trustees, summarised the position as follows. The Trustees do not represent a specific iwi or hapū. Their self-description as "descendants" specifically refers to people who whakapapa from the original owners. The Trustees are the authorised representative for the following whānau groups:

(a) a collection of whānau who descend from the tūpuna who are the original owners of the Mataikona 1, 2 and 3 Blocks;

(b) including, but not limited to, the following 29 whānau groups – Pōtangaroa, Broughton, Carroll, Cassidy, Fraser, Haeata, Hibbs, Horgan, Laird, Morunga, Moss, Pai, Reiri, Rīmene, Savage, Taueki, Taylor, Thompson, Thompson-Browne, Thorby, Tūmoana, Vince, Wellington, Whyte, Wikaere, Wirihana, Wirihana-Welsh, Wirihana-Pōtangaroa and Yorston (the "whānau group").[205]

[300] The Marae Trustees submit that members of these whānau groups:

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

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

[301] Counsel relies on the statutory definition of "applicant group" as one or more iwi, hapu, or whānau groups. A "whanau group" is not defined in the Takutai Moana Act. A legal entity or natural person can be appointed by one or more whānau groups to "apply for, and hold an order… on behalf of the applicant group".[206]

[302] Evidence for the Trustees was given by Robin Pōtangaroa, Demetrius Pōtangaroa, Cheryl-Anne Broughton Kurei, Wright Wiremu Broughton and Meri Te Aouru Tīpene-Walker.

[303] Some of the evidence of the Mataikona Blocks and their ownership history is set out above in relation to Te Hika o Pāpāuma's application. Of particular relevance to understanding the Pāpāuma Marae Trustees' position I summarise that history:

(a) the Mataikona Blocks were a smaller portion of the land on the Wairarapa coast which was subject to the Castlepoint Purchase in 1853.[207]

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205 This is the list of whānau provided by Demetrius Pōtangaroa.
206 Takutai Moana Act, s 9(1)(b).
207 Stirling, above n 155, at 2.

(b) in 1869 the Native Land Court inquired into who had rights in the land at the time of the sale in 1853. It was then subdivided into three separate blocks "Mataikona Blocks 1, 2 and 3". The inquiry found that the land belonged to 30 signatories with whakapapa connections to Te Hika o Pāpāuma hapū through the descendants of Te Matau.[208]

(c) In 1931 to 1972 the land was placed into the authority of the Māori Trustee and combined into one block (the Mataikona Block) and held on trust on behalf of the Māori owners during that time.

(d) In 1972, the Mataikona Block was transferred into the ownership of the Aohanga Incorporation, a Māori incorporation which owns the land and runs a farm on behalf of Māori beneficiaries who are its shareholders. This is regulated under Te Ture Whenua Māori Act 1993.

[304] Of the Trustees' witnesses, it was Robin Pōtangaroa and Demetrius Pōtangaroa who addressed the question of the Trustees' authority to bring this application. Both spoke with passion of their mandate to bring the Trustees' application.

[305] Robin Pōtangaroa gave evidence of his involvement in the Treaty settlement process since 2006. Mr Pōtangaroa also gave evidence of his expertise and knowledge of the history of the Aohanga Incorporation and associated land blocks, as well as the tribal history in the application area.

[306] The evidence from Demetrius Pōtangaroa, given in cross-examination, was that mandate was provided (in effect to Robin and Demetrius) at a meeting or meetings of the Incorporation, sometime in 2016. However, Mr Pōtangaroa was not able to identify in the minutes of the Incorporation meetings when any vote took place, or who voted to provide mandate. Nor was Mr Pōtangaroa able to identify when the application under this Act was authorised and discussed at meetings of the Trustees.

[307] Ms Northey, counsel for the Trustees, submitted a whānau group who does not wish to be represented under the Act by a hapū or iwi group and has selected its own

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[208] At 19–44.

representative entity should not be forced by the Court to accept representation by a different hapū or iwi entity. To do so would be a denial of their rights under the Act to select and appoint their own representative entity at the whānau level, as provided for by the Act. It would also be a denial of their tino rangatiratanga under Art 2 of Te Tiriti o Waitangi and therefore inconsistent with the purpose of the Takutai Moana Act (s 4(1)(d)) and a denial of tikanga Māori.

[308] I accept that an applicant group is entitled to select its own representative for the purposes of an application under the Act. However that is not the same as saying that the evidence brought for the Trustees must be accepted as prima facie evidence of the fact of appointment by the named whānau groups for the purposes of defining the applicant group under s 9(1)(b).

[309] As counsel for the Attorney-General notes, the list of whānau provided by the Trustees does not specify anything other than a list of names; nor does it indicate whether the whānau listed have provided a mandate for an application to be brought in their name. The list of names does not identify specifically who belongs to each whānau, or any information that demonstrates their distinction from the Aohanga Incorporation shareholders more generally.

[310] The Trustees of Pāpāuma Marae have provided the current list of shareholders of Aohanga Incorporation. The Trustees have also provided evidence showing that some of the shareholders are descendants of the 1853 signatories (descendants of Te Matau and Pāpāuma with whakapapa connections to Te Hika o Pāpāuma hapū).

[311] But due to sale, marriages, gifting, and succession, it is likely that shareholders include individuals who are not descendants of the signatories to the 1853 sale, and possibly non-Māori who have succeeded to shares or to whom shares have been transferred under Te Ture Whenua Māori Act or earlier legislation.

[312] Arguably, the Trustees have not defined the "collection of whānau" on whose behalf the application is brought, with enough specificity for the purposes of the Act or for the purposes of distinguishing this applicant group from that represented by Te Hika o Pāpāuma Mandated Iwi Authority, which disputes the Trustees' mandate.

[313] As Miller J said in *Re Edwards*,[209] it is implicit in s 101 and the definition of "applicant group" that the applicant must have the mandate of the applicant group. Arguably, the Trustees have not adequately demonstrated that they have a mandate to bring this application under the Takutai Moana Act; nor have they adequately demonstrated that they currently have the support of the group they purport to represent.

[314] The situation here is different from *Re Tipene*,[210] where the evidence established that Mr Tipene had the authority to bring the application on behalf of the applicant group. Justice Mallon set up three ways in which he had done so:[211]

(a) first, by the opportunity he gave throughout the process to notify interested parties of his application and to discuss it with them;

(b) second, through the majority support he had obtained from the house owners [the houses on the islands], which was consistent with the tikanga of the islands. As the Judge said, "That has also provided the opportunity for all those who may have an interest to present their views. The amendments to the application show Mr Tipene's willingness to take into account those views but in the end it is those present on the two islands that make decisions on behalf of all".

(c) third, he is a member of the applicant group and he has demonstrated a long and close association with Tamaitemioka, knowledge of the area and an understanding of the tikanga, and his efforts and long-standing commitment to the area and to this application have meant that is the first application under the Act to be substantively determined.

[315] Robin Pōtangaroa and Demetrius Pōtangaroa and the other witnesses for the Trustees have demonstrated their whakapapa connections to the application area.

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209 *Re Edwards*, above n 12, at [275].
210 *Re Tipene*, above n 130.
211 At [175].

[316] What is lacking, at least at this stage, is evidence of the applicants' authority to bring the application that was demonstrated in the first two examples in *Re Tipene* above. In saying that, I do not doubt the genuineness of those who gave evidence in support of the Trustees' application, or foreclose the possibility that the Trustees could bring sufficient evidence to establish a satisfactory mandate process (albeit, as acknowledged below, there is no one, standard way of doing so).

[317] In *Re Edwards*, the Court of Appeal confirmed that, where there is any controversy about whether a named applicant has the authority to seek an order on a group's behalf, the Court will need to be satisfied that they do represent the applicant group.[212]

[318] The Takutai Moana Act does not prescribe any particular representation process. The question has been considered in a number of cases, including *Re Tipene*,[213] *Re Clarkson*,[214] *Re Ngāti Pāhauwera*,[215] *Re Edwards (Te Whakatōhea No. 2)*[216] and *Re Edwards* (Court of Appeal).[217] It was also considered in *Te Rūnanga o Ngāti Whātua v Kingi*[218] The issue of representation was also significant in *Re Tichborne (Tokomaru Bay)*.[219]

[319] While there is a range of ways in which an applicant may have obtained authority to make an application for recognition orders on behalf of an applicant group, the process under the Act by which an application is made and advertised is not in itself sufficient to demonstrate that the applicant group has that mandate.[220] Mandate procedures adopted by the Crown in the Treaty settlement process do not have any application.[221] The applicant must show they currently have the support of the applicant group(s) they purport to represent.[222]

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212 *Re Edwards*, above n 12, at [203(b)] per Miller J and [360] per Cooper P and Goddard J.
213 *Re Tipene*, above n 130.
214 *Re Clarkson,* above n 133.
215 *Re Ngāti Pāhauwera* [2021] NZHC 3599.
216 *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025.
217 *Re Edwards* above n 216.
218 *Te Rūnanga o Ngāti Whātua v Kingi*, above n 137.
219 *Tokomaru,* above n 101.
220 *Re Clarkson,* above n 133, at [227].
221 *Re Edwards (Whakatōhea Stage 2)*, above n 134, at [230].
222 *Re Clarkson*, above n 133, at [164]; and *Re Edwards,* above n 12, at [275]–[276] per Miller J, [360] per Cooper P and Goddard J.

[320] In addition, the Trustees' mandate has been challenged by Te Hika o Pāpāuma Mandated Iwi Authority. The evidence demonstrates significant overlaps between the two applicant groups. Witnesses for both groups share lines of whakapapa to Pāpāuma; Te Hika o Pāpāuma Mandated Iwi Authority witnesses own shares in the Aohanga Incorporation, and have sat on the committee which runs it; and the evidence of the Trustees' witnesses extends outside their application area into the Te Hika o Pāpāuma Mandated Iwi Authority's application area.

[321] The grouping represented by the Trustees also sits within Te Hika o Pāpāuma hapū. As the Attorney-General submits, it is likely that their beneficial ownership of shares in the Incorporation assists their maintenance of a connection to the land and adjoining takutai moana in a practical sense.

[322] In his historical report on behalf of this applicant group, Mr Stirling states that the group is made up of Māori who signed over land in the 1853 Crown deed and the descendants of those Māori. A significant portion of those Māori and their descendants appear to belong to Te Hika o Pāpāuma.[223]

[323] While noting the reservations that the applicant group is not sufficiently clearly defined and that there is insufficient evidence of mandate, I go on to consider whether the Pāpāuma Marae Trustees have satisfied the relevant test for CMT and, if so, how issues of representation might then be addressed, before the finalisation of any orders.

Holds the specified area in accordance with tikanga

[324] For the Marae Trustees, Robin Pōtangaroa noted that Aohanga Incorporation COM (Committee of Management) members all hold dual roles. They are directors of the Aohanga Incorporation and also trustees of Pāpāuma Marae. "You can only be a trustee if you are elected as a COM member at the AGM".

[325] Mr Pōtangaroa said:

> 19. The Incorporation COM and the Pāpāuma Marae Trustees (on behalf of their owners and beneficiaries) are the ahi kā, tāngata whenua, kaitiaki and owners of the Mātaikona Blocks and associated takutai moana.

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223 Stirling, above n 155, at [6]–[22].

…

> 105. The Aohanga Incorporation have mana whakahaere (Management authority) and day-to-day responsibilities over the Aohanga land and the takutai moana. … The Aohanga Incorporation also determines the right of access, and most importantly we can exclude anyone, and block of access from everyone should we choose.

[326] Mr Potanagaroa acknowledged the mana Te Hika o Pāpāuma have under tikanga Māori to the takutai moana, and did not oppose that mana. But Mr Pōtangaroa's evidence was that the Aohanga Incorporation and its owners are the tangata whenua, the ahi ka roa (long undisturbed occupants) have mana whakahaere, and should be recognised as such.

[327] The submission for the Marae Trustees was that, in practice the Aohanga Incorporation committee of management members, in their capacity as the Pāpāuma Marae Trustees, should have the mana to manage the takutai moana on behalf of the applicant group.

[328] The "group of whānau" referred to in the opening submissions of the Trustees of Pāpāuma Marae could be described in general terms as those who whakapapa to Te Matau:

> Te Matau is the principal ancestor of the Mataikona Blocks now administered by the Aohanga Incorporation, not the entire Te Hika o Pāpāuma area. So, even though the boundary of Te Hika o Pāpāuma goes all the way down the coast to Whareama (Castlepoint), Te Matau is not the ancestor over the entire Te Hika o Pāpāuma area. It is submitted that it is in a correct to imply Te Hika a Pāpāuma and the owners of the Mataikona Blocks have the same principal ancestor.

[329] Te Matau descends from Rakaihikuroa and Pāpāuma. Rakaihikuroa is the grandson of Kahungunu, the rangatira of the iwi Ngāti Kahungunu. The evidence of Robin Pōtangaroa was that Te Matau and Whakaangi carried the hapū name "Te Hika a Pāpāuma" from the Heretaunga District through to Waimārama, then onwards to Pōrangahau. They continued to move down the island until they reached Aohanga, their final settlement, in about 1650 AD.

[330] On reaching Aohanga, Te Matau was officially welcomed and gifted the land by Pokaihuai, a local rangatira, further cementing his and his descendants' ties to the

land through tuku whenua. The Trustees say that these events are foundational to the identity and status of Te Matau's descendants as tangata whenua.

[331] The tuku whenua or "Pokaihuai's Gift" of the Mataikona Whenua is discussed in the 1895 Native Land Court case. In 1894 Karaitiana Te Whakarato said that the land had been gifted to their ancestor Te Matau by an earlier ancestor Pokahuwai (or Pokohuai), although it had "really" belonged to his wife Rangiamoa, who he said was of Ngāti Tu.

[332] As set out earlier, the 1853 Castlepoint deed provides the names of the first group of owners identified specific to the Mataikona block. The 1855 vendors were Wiremu Te Pōtangaroa, Karatiana [Te Whakarato], Wiremu Kingi Te Matahi, Wi Paraone Manini, Renata Te Ao, and Te Retiu Nohopouaka. Most of these men were later identified as owners of the Mataikona block. Wiremu Te Pōtangaroa was the great-great-grandfather of Wright Broughton, who is currently a marae trustee, and also the great-great-great-grandfather of Demetrius and Robin Pōtangaroa, who are also trustees.

[333] The trustees say that this whakapapa connects the whānau group to their ancestor Te Matau and also anchors them deeply in the land and coastal areas they inhabit.

[334] They point to the interconnectedness of the applicant groups. For example, Robin Pōtangaroa is not only a Pāpāuma Marae Trustee and deponent for the Marae Trustees in this case, but he also provided evidence for the Ngāti Kahungunu ki Wairarapa Moana Tāmaki-nui-ā-Rua Trust. During the course of the Court's site visits, Mr Robin Pōtangaroa also assisted in providing guidance for that part of the tour visiting the Pirere whānau's rohe. This highlights how inextricably linked these groups are and the multi-layered natured of the whenua and the parties' whakapapa.

[335] As to the mana of Te Hika o Pāpāuma hapū, Robin Pōtangaroa presented a full whakapapa chart in the course of the hearing, which traces the whakapapa lines from Te Hika o Pāpāuma ancestors to the signatories of the Castlepoint Purchase /

Mataikona Block, down to some prominent whānau / shareholders in the Aohanga Incorporation today.

[336] The Mātaikona Block was the largest reserve made from any of the Crown's early land deeds in the Wairarapa District in the period 1853 to 1865, a period when the Crown acquired more than 1.5 million acres of Māori land in Wairarapa.

[337] Mātaikona is remarkable for being the only one of many occupation reserves made from those deeds which was retained almost entirely intact in Māori ownership through the colonisation of Wairarapa.

[338] As Mr Stirling notes,[224] the retention of the Mātaikona titles by the original owners of Mātaikona block and by their descendants down to today was the result of sustained efforts by generations of owners to preserve the only land remaining to them and to derive sustenance from that land for the owners.

[339] About 7,021 hectares (17,349 acres) or about 99.75 per cent of the original Mataikona block is retained in the ownership of the descendants of the original owners of the Mataikona titles, which are held by the Aohanga Incorporation (the proprietors of Aohanga Station).[225]

[340] The titles held today derived from the original Mataikona Block are Mataikona A2 (6,991 ha), Mataikona A1 (12.94 ha), Mataikona B1 (16.56 ha), (0.11 ha), Pāpāuma Marae (0.91 ha), and Section 1 SO 23044 (0.11 ha). The only area of the original Mataikona block not held by the original owners or their descendants is Section 7 Mataikona Settlement (19.425 ha/48 acres) which was purchased by the Crown from the original owners in 1855 for £40 to provide a homestead block for John Sutherland, the first pākehā to settle beside the Mataikona block in the 1850s. This title is located beside the lower Mataikona River and does not adjoin the application area.[226]

[341] The Mataikona block takes in the entirety of the costal land adjoining the application area, between the mouth of the Mataikona River in the south and the mouth

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224 Bruce Stirling *The Trustees of Pāpāuma Marae* (Historical Report, August 2023) at [2].
225 At [2].
226 At [4].

of the Aohanga River in the north. None of the land adjoining the application area has ever been alienated from the ownership of the original owners or their descendants.[227]

[342] In 1869 the Native Land Court inquired into who had rights in the land at the time of the sale in 1853. It was then subdivided into three separate blocks, "Mataikona Blocks 1, 2 and 3". The inquiry found that the land belonged to 30 signatories with whakapapa connections to Te Hika o Pāpāuma hapū through the descendants of Te Matau. The Mataikona Blocks sit within the traditional boundaries of Te Hika o Pāpāuma hapū of Ngāti Kahungunu, established by the sale of the Castlepoint Deed Block in 1853.

[343] Prior to the 1869 title investigation in the Native Land Court, there was little information about who the Mataikona reserve was for as the Crown negotiations in 1851–1853 focused on individual rangatira who engaged with it rather than on identifying the land's owners.

[344] The Trustees acknowledge Te Hika o Pāpāuma traditional boundaries as from the southern side of the Ākitio River to the Whareama River.

[345] There was a considerable body of evidence on behalf of the Marae Trustees of ownership and control of the Mataikona Blocks from 1840 to the present day. The documentary evidence indicates their uninterrupted occupation of the Mataikona Blocks. Records from the Native and Māori Land Courts, together with survey plans and Government documents consistently demonstrate that the occupation by at least some owners has been continuous enough to maintain their presence, or "keep the fires alive", from the time of the Treaty / Te Tiriti to the present day. As above, the form in which that ownership has continued has helped reinforce customary control over the land and the exercise of authority over third parties seeking to access the area.

[346] In addition, the physical contours of the land mean that exclusive access can be maintained. By way of example, Mere Te Aoru Tīpene-Walker gave evidence of the strict conventions governing who can go to the Aohanga coastline and who cannot. As Ms Tīpene-Walker said:

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[227] At [5].

> Only our whānau, with express permission from the Aohanga Incorporation, can access our seashore between the Aohanga and Mataikona rivers. Permission was given by the Aohanga Incorporation to the station manager, so you would have to sign in to get on the farm.

[347] Some of the witnesses for the Trustees of Pāpāuma Marae gave evidence of limitations on their access to the takutai moana, at various points. For example, Cheryl-Anne Broughton-Kūrei referred to the period (1931 to 1972) when the farm at Aohanga was managed by the Māori Trustee. Ms Broughton-Kūrei noted that there was also a period during World War II when the Aohanga farm was taken over by the government for war efforts, with all the agar being stripped from the seabed and some restrictions on access to the takutai moana.

[348] Meri Tipene-Walker too spoke of the Māori Trustee's station manager not allowing whānau on to the coastline to gather kaimoana and George Matthews presented a photobook, stating its purpose was to recapture the kōrero lost during the time the Māori Trustee ran the farm.

[349] Robin Pōtangaroa noted that:

> There is no access to the takutai moana other than through the Aohanga Incorporation farmland… Road access is at the Aohanga River end and stops at the farm gate. This is the only way of accessing the takutai moana. The road on the southern end does not come across the Mataikona River. You would otherwise have to come around these rivers by sea to access our takutai moana.

[350] Mr Pōtangaroa noted that the Aohanga Incorporation shareholders have the ability to exclude access to the land, reflecting their ownership, mana, tikanga and ability to control the takutai moana. Notwithstanding that, others are let in to come and gather kaimoana if needed.

[351] Demetrius Pōtangaroa also discussed access, noting that fishing along the coastline at Mataikona has never been an open access or public right. Historically, only whānau had rights to fish and had the right to exclude persons who were not permitted to fish within their coastline. Demetrius Pōtangaroa also notes that the Aohanga Station has been isolated by distance and poor roads. There was no public access at all to the beach between the Mataikona and Owahanga Rivers, and there is no public access road to the coast between Mataikona and Ākitio, a distance of nearly

20 kilometres. Those barriers of distance and poor quality roads restricted land access to the area in the mid-20th century, when European coastal settlements were developing. Access to the marine and coastal area off Mataikona by boat has been historically restricted by lack of safe landing facilities or anchorage.

[352] There was also a significant body of evidence of customary fishing and gathering of kaimoana along the coastline. For example, Demetrius Pōtangaroa noted that the moana at Mataikona is a valuable source of kaimoana, particularly pāua, kuku, koura, hapuku, kahawai and whitebait. The mouth of the Mataikona River has also always been a source of kai for Te Hika a Pāpāuma. Ms Tīpene-Walker gave evidence of her whānau collecting kaimoana from the Aohanga and Pōrangahau coastlines for many years, noting that the kai was plentiful. Ms Broughton-Kūrei, who grew up on Aohanga, on the Rautū Block, and subsequently lived in Pongaroa, gave evidence of living off the land and the sea at Aohanga, catching īnanga (whitebait), and going floundering at the Mataikona River and catching tuna. At the beach they would gather kina, pāua, crayfish, and kūtai (mussels).

[353] Demetrius Pōtangaroa also gave evidence of gathering kaimoana such as pāua, kuku and koura, as well as catching hapuku, kahawai and inanga, and gathering seaweed. Upriver, in the Aohanga River, they caught mullet, inanga and kingfish.

[354] Wright Wiremu Broughton talked of diving at "Crayfish Bay" and "Merry's Bay", the two first bays just south of Aohanga River. He also talked of gathering pāua and catching tuna. Mr Broughton taught his children and grandchildren to fish at "Pāua Flat", part of the beach that runs out of Zander's Bay.

[355] As well as evidence of customary fishing and kaimoana gathering, the witnesses for the Trustees of Pāpāuma Marae gave evidence of holding and sharing knowledge of the tikanga associated with the coastline.

[356] There was much evidence, including from Ms Tīpene-Walker and Ms Broughton-Kūrei, about how they learned about the relationship with the river and the takutai moana and the tikanga and kawa that governs that relationship. For example, Ms Tīpene-Walker said she was taught by her kaumātua how to treat

kaimoana. In particular, she was taught that, if they took from the moana then they had better not waste what they took. Other examples of tikanga included not ever turning your back on Tangaroa and women being tapu and unable to go near the sea or river when they were menstruating.

[357] Ms Tīpene-Walker talked of collecting karengo, fish, kina, pipi/pūpū, kōura and inanga (from the Aohanga River). All of the witnesses gave evidence of the exercise of kaitiakitanga. Some members hold kaitiaki positions under the Kaimoana Regulations.

[358] Wright Broughton is a kaitiaki under the Kaimoana Regulations for the area from Poroporo Stream to Mataikona River. Mr Broughton said:

> One of my main roles as kaitiaki is to ensure people were allocated the appropriate right to use the takutai moana. A right that corresponds with their needs (e.g., if there is a tangihanga, people may need more from the takutai moana). I'm also responsible for sustainability. As a kaitiaki, you need to be conscious of the area you are responsible for. I have been all up and down the Aohanga coastline time and time. If I see that some places have been depleted, while other places are just as they have been for years, this calls for rāhui to allow resources to replenish themselves.

[359] Cheryl-Anne Broughton-Kūrei noted that being a kaitiaki entails a profound knowledge of the whakapapa of kaimoana and a biological substrate of their area. Kaitiaki possess expertise in Tupuānuku (food grown in the ground), Tupuārangi (food from above ground), Waitī (freshwater), and Waitā (seafood), understanding the interconnectedness necessary for species like crayfish, pāua, and kina to thrive. They maintain the balance of whenua and moana as vital resources, ensuring sustainable use and protecting wāhi tapu, which are accessed only by whānau following tikanga, and guide those who need to access the coast.

[360] There are two marae on the Aohanga whenua belonging to Te Hika a Pāpāuma, a short distance inland on the western side of the Owāhanga River. The Pāpāuma marae is located slightly nearer the coast and was built in 1905. Te Aroha o Aohanga wharenui is located slightly further upstream. It was opened in 1995.

[361] As noted in *Ngāi Tūmapūhia*,[228] the identification of marae and papakāinga demonstrates a strong association with and continued occupation of the whenua.

[362] Dr Joseph said in his oral evidence that marae play an integral role within Te Ao Māori, being more than just a building or the land it rests on. He agreed with the Pāpāuma Marae Trust Deed which details that their marae is a repository of taonga: whakapapa, history, te reo Māori, tikanga Māori, Kawa o te Marae.

[363] The establishment of the Pāpāuma Marae also led to the establishment of an urupā at Aohanga.

[364] Attempts by the Aohanga community to establish a school at Mātaikona papakāinga were unsuccessful and, while waiting for a local school, the Pāpāuma wharenui at Mataikona became a central hub for community activities, serving multiple purposes such as being a birthplace, a polling station, and a venue for social events.

[365] The community was finally able to open the Aohanga Native School in 1941. The site was eventually reacquired by the Mātaikona owners and transformed into the Pāpāuma Marae with the modern wharenui Te Aroha o Aohanga, reflecting the cultural resilience and the pivotal role of the marae in preserving and fostering community life.

[366] The Pāpāuma Marae meeting house has been used for many things, including as a dance hall, marae, meeting place, and on Sundays the Ringatū tohunga would hold church services there alongside all other churches.

[367] The communal māra kai (garden) located north of the Pāpāuma Marae at Aohanga played a crucial role in the community's seasonal food practices.

[368] Land ownership proximate to the takutai moana may indicate current use and occupation control and is one of the factors taken into consideration when determining CMT.[229] The whānau group represented by the Pāpāuma Marae Trustees are a

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228 *Ngāi Tūmapūhia*, above n 7, at [184].
229 Takutai Moana Act, s 59.

significant portion of shareholders in the Aohanga Incorporation and in that role are the landowners of the land abutting all of the application area.

[369] As noted in the *Wai 420 Dougal Ellis (Ellis Report)*:[230]

> The claimants can demonstrate a record of continuous ownership of the Mataikona block adjacent to the foreshore and sea under discussion. The ownership of the adjacent land, in the absence of the facility in New Zealand law for Maori to 'own' their customary foreshore and seas, serves to assist the case for rights to the same. The claimants' legal ownership of the Mataikona block has already been documented by Cleaver in his report to the Tribunal 'History of the Purchase and Reserves of the Castlepoint block'.

[370] The witnesses also gave evidence of the imposition of rāhui, which historically represent forms of stewardship, governance and management of lands. Wright Broughton recounted multiple instances of rāhui in the Aohanga area, including one approximately 18 months before he gave his evidence, occasioned by a man who died of a heart attack on the beach. That rāhui lasted two weeks, shorter than usual because the body was not lost at sea. Mr Broughton noted that, in contrast, longer rāhui of about a month were enforced at Ākitio after drownings where bodies were not recovered. Mr Broughton also highlighted the role of local kaitiaki such as Paul Peeti in enforcing these protective measures.

[371] Ms Broughton-Kūrei talked, too, of the use of rāhui to conserve marine life, as well as to safeguard people, especially following deaths at sea or on the beach. There are often rāhui at significant locations such as Te Rerenga o Te Aohuruhuru (locally known as "Suicide Rock"), and Rangiwhakaoma, which is culturally sensitive due to its historical importance. Kaitiaki hold the knowledge about rāhui and their enforcement.

[372] There are tapu sites within the application area and tapu practices that the whānau group adhere to. As the Court of Appeal noted in *Re Edwards*,[231] tapu is the respect for the spiritual character of all things and is a religious observance or spiritual practice for the purposes of protecting and reinforcing mana and sanctity. Robin Pōtangaroa gave evidence of at least four urupā on Aohanga itself. He also

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230 Dougal Ellis *The Wai 420: Marine Issues Report* (December 2002).
231 *Re Edwards*, above n 12, at [127] per Miller J.

talked of Ruatūpāpaku Cave, on the Aohanga coast, which was historically used as a resting place for tūpuna, before the establishment of the current urupā on the land. That cave remains tapu as it still contains the remains of ancestors.

[373] Ms Broughton-Kūrei spoke of an instance when her brother, then aged 16, discovered a tūpuna in the sand dunes at the south end of Aohanga. Subsequent carbon testing revealed that the tūpuna was about 20 or 21 years old at the time of her death and was found sitting up, strapped on a litter, still adorned with her korowai and shell bangles, indicating her high-ranking status. Ms Broughton-Kūrei said that experience and way the tūpuna was dealt with by an archaeologist caused profound distress to her brother and her father. She understands that there are many tūpuna buried on the Aohanga land and along the coastline, particularly in the sand dunes.

[374] Examples of manaakitanga are also significant. Permitting others to access one's area and utilise the resources within it is an expression of manaakitanga and doing so is a manifestation of control of the area.[232]

[375] Robin Pōtangaroa gave evidence of examples of manaakitanga. While the Pāpāuma Marae Trustees reserve the right to restrict access based on their ownership, mana and tikanga, they generally keep their pātaka kai open for the wider members of Te Hika a Pāpāuma (from the Ākitio River to the Whareama River), as well as for their whānau and whanaunga. In addition, during events such as tangihanga in Dannevirke, the Pāpāuma Marae Trustees feel a responsibility to ensure that whānau can gather kaimoana. This reflects their role as kaitiaki, managing and maintaining resource levels, while generally permitting access with their approval. Robin Pōtangaroa also referred to whanaungatanga as a principle that emphasises the importance of fostering positive relationships within a rohe, particularly among hapū members.

Exclusive use and occupation from 1840 to the present day

[376] The witnesses for the Trustees of Pāpāuma Marae provided considerable evidence that the whānau they represent controlled and had authority in the application area as at 1840. Their evidence is that their principal ancestor, Te Matau, settled the

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232 At [403] per Cooper P and Goddard J.

land in approximately 1650 and his descendants have continued to have unfettered and undisturbed occupation since then. As at 1840, the descendants of Te Matau (the original owners of the Mataikona Blocks) were in control of this takutai moana. This whānau group have retained control of the area and possess the ability to exclude third parties from the area.

[377] While the people of Mataikona were not, generally, directly affected by the conflicts of the 1820s and 1830s, as Mr Stirling records, they were forced to seek out their own refuge from the musket-armed taua that threatened the region. They joined many others in taking refuge at Nukutaurua (Mahia) through the late 1820s and 1830s. As a result, their land at Mataikona was, like most of the region, largely unoccupied. Mr Stirling's report cites Karaitiana Te Whakarato telling the Native Land Court in 1895, in the course of providing evidence of Te Hika o Pāpāuma interests in the Castlepoint Purchase as at 1853, that Mataikona was "entirely deserted at the time of the exodus to Nukutaurua", but that "All returned together". Karaitiana said that on their return they found some Ngāti Hāmua at Mataikona who had "invited us to return". Stirling records that the customary rights of the Mataikona people were not affected by their brief absences at Waimarama and Nukutaurua, in part because their new enemies did not occupy Mataikona or do anything else there that could alter the rights the tangata whenua had established over many generations.

[378] There is evidence of pā sites, including at Te Rerenga o Te Aohuruhuru (Suicide Rock). In his evidence, Demetrius Pōtangaroa told how the rock was named after the deeds of Te Ao Huruhuru and her story. The name of the rock literally means the "leaping place of Te Ao Huruhuru". There is also a pā site on the coast of Aohanga farm, Pūtiki Papakāinga, which, as Robin Pōtangaroa described has long been a customary taonga waka (canoe landing place).

[379] There is evidence of the applicants having a "strong presence" in the application area from 1840 to the present day. As already recorded, the applicant group have had largely exclusive access to their coastline since Te Matau, partly by virtue of land ownership and partly because of the geography of the area. The Aohanga Station itself has been isolated by distance and poor roads and there was no

public access at all to the beach between the Mataikona and Aohanga Rivers. There is no public access road to the coast from the south from the Mataikona River to Ākitio.

[380] In the mid-20th century when European coastal settlements began to develop in the Wairarapa, distance and poor quality roads restricted land access to the application area. Access to the marine and coastal area off Mataikona by boat has also been restricted historically by the lack of safe landing facilities or anchorage.

[381] As noted above,[233] permission from the Aohanga Incorporation was required for visitors to access the coast.

[382] Since 1840 the owners of the Mataikona Blocks have successfully resisted any attempts to break up the blocks, or efforts from the Crown and others to acquire the land. While there have been various leasing arrangements on the blocks, in order to secure an income for the owners, whānau have continued to live on the land and use and occupy it as labourers, farmers and kaimoana gatherers.

[383] In December 1929, the owners agreed that most of Mataikona should be administered and developed by the Native Trustee, with a view to the land being handed back to their control once it was developed into a profitable farm. However, two papakāinga reserves and two small farms run by some owners, comprising a total of 907 acres, were excluded for the owners to continue to occupy. Mr Stirling records that during the 1960s, while the Mataikona Blocks were leased out, Māori Affairs officials noted that the owners and workers on Aohanga Station were the only ones who could get to the otherwise inaccessible coast. While the Māori Trustee Station Manager could threaten any owners employed on the Station with dismissal if they disobeyed any restrictions on gathering kai from the coastal area beyond the Station, as Mr Stirling notes, it is difficult to see how he could practically prevent the owners from accessing the coast from the reserves beside the rivers at either end of the Block, a point of access to the Court that Bill Wright emphasised was important to the owners. Mr Stirling's report notes that:

> The owners certainly retained an active interest in the customary resources of their coast despite the best efforts of the station manager to discourage them.

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233 At [346].

[384] While there have at times been poachers who have come to the coast to take pāua and fish, the owners locked the gate at the end of the block to restrict access by fishermen and vehicles. They would allow access to Māori visitors gathering kaimoana for hui, but if they found people were instead selling it, they would bar access to offenders while continuing to allow owners through the land.

[385] Ownership of the land abutting the Pāpāuma Marae area has supported the applicant group's ability to exclude people and exercise control over the takutai moana. This reflects the mana of the applicant group and is a manifestation of tikanga Māori. As already discussed, it does not mean they have not allowed others to access the takutai moana and gather kaimoana, but rather they reserve the right to prevent access when and if needed.

[386] As discussed already, the Te Hika o Pāpāuma ki Wairarapa (Pāpāuma) Marae was built in 1905 at Aohanga and demonstrates Te Hika o Pāpāuma members practising tikanga at that location from at least that time.

[387] There is general evidence of early urupā on the Mataikona farm. The farm itself was first established at the mouth of the Aohanga River by James Power in the 1890s for his whānau.

[388] A number of witnesses, including Cheryl-Anne Broughton-Kūrei and Meri Tīpene-Walker, gave evidence of growing up on the coast at Mataikona or of their parents or grandparents living at or visiting the coast and engaging in customary activities there.

[389] There has also been continued and extensive engagement in fishing and the gathering of kaimoana such as crayfish, pāua and kina, demonstrating a deep-rooted knowledge and practices of sustainable harvesting and use of local marine resources. The evidence also shows ongoing and extensive fishing activity, again demonstrating adherence to traditional and sustainable practices.

[390] The witnesses also gave evidence of both use of the coastline as a means of travel and for fishing up to and beyond the 12 nautical mile territorial sea limit. As to

the first, the evidence was that the coastline has been a vital transport route, including for travel and trade via waka and the migration of communities. One example, given by Demetrius Pōtangaroa, was in 1881 when Paora Pōtangaroa, his hearse was conveyed to his final resting place at Mataikona from Whakataki along the coast, over the reef at low tide to the awaiting multitude of horsemen, and he was honoured with a gun salute.

[391] Cheryl-Anne Broughton-Kūrei talked of her uncles and koroua going deep sea fishing in boats from Cape Turnagain to Cape Palliser, right along the coastline. As she noted too, during the 1820s and the invasions of Ngāpuhi, her tūpuna went to Nukutaurua on waka and that's how they travelled back and forth. They also had tītī boats and would go down to sea whānau in Kāti Māmoe (South Island) where her mother was from. Mr Broughton-Kūrei talked of seeing her whāngai father and uncles making pōhā (kelp)/seaweed kete.

[392] Examples were given of deep-sea fishing including at the Hikurangi Trench. Demetrius Pōtangaroa said:

> 15. Our Tūpuna spoke of an area off our coast which they referred to as "Hikurangi". It was described as a deep part of the ocean, in the form of a trench. The word Hikurangi was used to denote that the area was of a significantly inverted formation. Much like our Tūpuna referred to Hikurangi as an important Maunga (mountain), Hikurangi was also used to refer to a significant depression in the earth's crust in the form of an underwater trench. The kōrero of our old people was that Hikurangi was a place of abundance of kaimoana (seafood).
>
> 16. Many years after this kōrero had been told by our people, European scientific research discovered a significant underwater trench off our coastline. It is now called the Hikurangi Trench. I understand that the water flows through this trench from as far north as the Kermadecs, and carries with it significant nutrients to support an abundance of sea life. This is exactly the kōrero of our people from days of old. To me, our people must have known about this area and must have travelled to it to identify that it was a place of abundance as a food source for them. Our people exercised their customary rights and interests out to sea to the Hikurangi Trench, they were obviously very aware of the pathway Kaimoana travelled.

[393] Wright Broughton also gave evidence of deep-sea fishing. He said he had been out to Zander's Reef and to Castle Rocks to fish. Those are areas about one kilometre

off the coast. Mr Broughton also said he had been out further at sea and dived into the reefs to catch moki and groper.

[394] The Pāpāuma Marae Trustees submit the evidence shows conclusively that the whānau has historically fished up to and beyond the 12 nautical mile territorial sea limit.

[395] In summary, I am satisfied that since 1840, the whānau group's use and occupation of the takutai moana has affirmed their continuous and exclusive connection to their ancestral territory. That connection and control have been consistently upheld through tikanga Māori. The geographic isolation of the Aohanga whenua, along with natural barriers, has preserved an uninterrupted link between the whānau and their coastal and marine environments. They have continued to exercise rangatiratanga, kaitiakitanga and manaakitanga over their marine resources.

[396] I am satisfied that the evidence of restrictions on whānau access to the coastline during the period when the station was run by the Māori Trustee and the overlapping period of World War Two, does not indicate the interruption of use and occupation for such an extended period of time as to amount to substantial interruption of rights. As the Court of Appeal noted the "legal disability" of restrictions on Māori exercising their traditional method of exclusion and control must be set aside when considering capacity to exclude.[234]

Next steps

[397] As discussed earlier, the Court cannot (yet) be satisfied that the Trustees have the mandate of the named applicant group.

[398] In *Re Edwards*[235] the majority of the Court of Appeal said:

> We do not see any contradiction in a finding that two applicant groups hold a specified area in accordance with tikanga vis-à-vis all other groups and individuals, and between them exclusively use and occupy the area, while at the same time vigorously contesting their mutual rights as between themselves.

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234 *Re Edwards*, above n 12, at [170] and [180] per Miller J and [360] per Cooper P and Goddard J.
235 At [440], Cooper P and Goddard J.

[399] The Court went on to say:[236]

> [441] Suppose for example that two occupying coastal marae both make regular use of an area in the common marine and coastal area. The two hapū have close links. Each hapū considers that they have the primary connection to the area, and that the other is permitted by them to use it as a matter of manaakitanga and whanaungatanga. It is clear that no other group has any rights or interests in the area as a matter of tikanga and pre-1840 it is likely that attempted incursions by third group would have been met by the two groups putting aside their differences, if only temporarily, and together defending the area against others. If the two hapū are considered together, all the s 58 tests are met. However they do not make a joint application for CMT under MACA. Each seeks its own CMT. Each opposes a grant to the other of recognition of CMT. There is no consent to the recognition of a joint CMT. The Court is not able to be satisfied that either occupied the area to the exclusion of the other. Does that mean that each fails the s 58 test, and no CMT can be recognised?
>
> [442] A refusal to recognise CMT in those circumstances would effectively mean that the areas that were unquestionably in Māori customary ownership in 1840 were taken out of Māori ownership, and customary rights and interests lost, because a currently unresolved tikanga difference between two or more hapū cannot be resolved in the High Court in the context of competing applications for CMT.

[400] As the Court said,[237] tikanga differences of this kind can take considerable time to resolve in a tikanga-consistent manner.

> Where it would be premature or institutionally inappropriate for the High Court to seek to determine such a difference, the result should not be a permanent loss of rights. That would be a perverse outcome inconsistent with the purpose of MACA. Rather, we consider that in these circumstances the Court can grant which recognition of CMT to both groups jointly on the basis that one or other or both together meet the s 58 test, and the resolution of entitlement as between those two groups is best achieved through a tikanga process over time.

[401] In *Ngā Hapū o Tokomaru*[238] Cull J granted CMT recognition orders in favour of the two applicants, but did so subject to necessary amendments to the applications to rectify inconsistencies between them and the agreements reached. I accept it is appropriate to adopt a similar approach here, where issues of mandate or inconsistencies have arisen between applications and in respect of any agreements reached between groups sharing areas (including those that may post-date the hearing).

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236 At [441]–[442].
237 At [442].
238 *Tokomaru*, above n 101, at [62], [67] and [68].

[402] Dr Joseph, the pūkenga, endorsed that approach as being consistent with tikanga:

> Yes, it would align with tikanga, a tikanga approach in terms of securing those interests and then working out the differences later, I think that is a good approach. Of course the better approach is resolving it beforehand but that's another avenue.

[403] In his report, Dr Joseph set out extensive kōrero on tikanga dispute resolution processes. He agreed that those processes could be used by applicants post-hearing to resolve remaining disputes.

[404] As Dr Joseph noted, there have been enduring issues of mandate and representation within Treaty of Waitangi settlement processes at all levels. As Dr Joseph notes:

> The first main challenge for representation then, is determining which person or body carries the authorised voice and right to speak for a particular group in specific situations and contexts. Establishing appropriate forms of representation for Māori communities is not simply a matter of drawing up boundaries on map and nominating representatives to speak.

[405] Dr Joseph's view on the competing claims for the Mataikona Block was:

> In my opinion, there may be issues and concerns with both groups' alleged representation and mandate processes and results. For example, if whānau, hapū and/or iwi are the 'tribes' and "applicants" in contemporary Māori society, then representative Māori legal entities are not themselves whānau, hapū or iwi. Whatever institutional form the representative entity takes, it is important to remember that the entity and its subsidiaries represent the tribe, they do not replace it. The governance entity is the agent of the tribe in that it exists to serve the tribe's functions. Identity precedes representation, not the other way round.
>
> …
>
> With respect, just because a legal entity has been incorporated and is an applicant processing a MACA claim, does not mean that it has a mandate to represent a specific group's rights. In a similar manner, just because an entity is incorporated and specifies that it is a "mandated iwi or hapū authority" in its name, does not mean that it has a mandate to represent a specific group's rights. Moreover, just because a land trust or incorporation manages a land block effectively, does not mean that it has a mandate to represent a specific group's rights under MACA. In addition, just because a legal entity manages land, fisheries, and other resources effectively, does not automatically mean that it has a legitimate mandate to represent a specific group's rights under MACA.

[406] Referring to the three existing organisations — the Aohanga Incorporation, the Marae Trust and the Te Hika o Pāpāuma Mandated Iwi Authority — Dr Joseph questioned whether it would make more sense for these "amazing" organisations to aggregate and collaborate, rather than compete and litigate against each other.[239]

[407] In terms of the appropriate tikanga concepts and processes to observe and apply in identifying representation of conflicting applicant groups, so they can work together, Dr Joseph's report sets out a discussion on tikanga dispute resolution through hohou i te rongo, wahine takawaenga, tatau pounamu and hākari.

[408] Dr Joseph concluded by encouraging all of the claimant groups to "engage civilly in a number of well-advertised, well informed and well organised tikanga based hui through decision-making processes by consensus on your respective marae applying tikanga concepts of mana rangatira, mana huihui, wairuatanga, whanaungatanga, tapu, utu, mauri, mana whatu ahuru, kotahitanga and manaakitanga, allowing wahine to be involved as takawaenga, to reach a tatau pounamu agreement by consensus".

[409] Having satisfied the s 58 criteria for CMT in their application area, I urge the Pāpāuma Marae Trustees to continue their pre-hearing discussions with Te Hika o Pāpāuma as to an appropriate order holder(s) for their overlapping application area, having regard to the pūkenga's proposals.

[410] It is not for the Court to act as final arbiter defining the whakapapa of the applicants. It is preferable to resolve mandate and representation issues out of Court, through tikanga-based processes, although ultimately that may become an issue for the Court, at the time of finalising CMT orders.

Rangitāne

[411] The applicant group Rangitāne Tu Mai Rā Trust (Rangitāne) identifies itself as an iwi. It does not seek CMT on its own behalf; rather, it seeks CMT for specific hapū

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239 Pūkenga Report, above n 63, at [14].

that have interests along the coast in areas within the broader Rangitāne rohe and application area. These are:

(a) Ngāti Te Rangiwhaka-ewa, at and around Wainui, Akitio and Puketoi;

(b) Ngāti Parakiore, at and around Tautāne and Wainui; and

(c) Ngāti Hāmua at and around various locations along the coastline, including specifically Porangahau, Tautāne, Wainui, Akitio, Mataikona, Rangiwhakaoma (Castlepoint) and further south.

[412] The evidence presented by Rangitāne Tu Mai Rā related to all three hapū represented by the application.

[413] Rangitāne hapū do not purport to have exclusive or primary rights anywhere on the coast; they acknowledge their whanaunga throughout. They acknowledge shared interests, and whakapapa, with Te Hika o Pāpāuma and Ngāti Kere and seek to have their mana tuku iho and customary interests recognised, in the designated areas, through a joint CMT with those applicants.

[414] The Attorney-General queries whether any of Rangitāne's witnesses appear as direct representatives of (with whakapapa affiliations to) Ngāti Parakiore. and therefore questions whether any of the evidence demonstrates the contemporary use and occupation of areas in which CMT is claimed on the part of this hapū. The Attorney-General says that while witnesses who cite whakapapa to Ngāti Hamua and Ngāti Te Rangiwhaka-ewa at a hapū level can be said to represent Ngāti Parakiore within a wider Rangitāne iwi context, it is not clear how they can represent this hapū or provide evidence to satisfy the s 58 test on its behalf.

[415] Rangitāne refutes the Attorney-General's submission, noting it is "inappropriate" for the Crown to determine who has interests and it is for the witnesses to speak for multiple hapū. Counsel for Rangitāne also pointed to the evidence of Dr Tipene-Leach for Ngāti Kere, who acknowledges that 90 per cent of Ngāti Kere are also Ngāti Parakiore.

[416] That position is consistent with the pūkenga's observation, in cross-examination, that it was not appropriate for him to attempt to determine representation, or for the Crown to do so. Different groups emphasised different whakapapa lines, have different history and kōrero and narrative. The Court and the applicants have to navigate those differences to find a combined way forward.

[417] Ngāti Hamua, Ngāti Rangiwhaka-ewa and Ngāti Parakiore are all interconnected and closely related. I accept counsel's submission that acknowledgement of different levels of rights, different levels of mana whenua or mana whakahaere, as between hapū, are best addressed via the order holder arrangement.

[418] Counsel for Rangitāne, Ms Siciliano, submitted that although there is no mana moana agreement in this case, as there was in *Ngāi Tūmapūhia*, nevertheless the same test applies: where parties are seeking joint CMT over an area, it is the sum of the evidence of the applicant groups that must satisfy the CMT tests. There would almost never be joint CMT allowed in an area if the Court did not apply that test. Ms Siciliano used an analogy of each applicant group having to separately meet all aspects of the statutory tests in its own right and then all of those who do so are glued back together. On that approach, s 58 could not be satisfied. This requires exclusive use and occupation including as against other Māori groups. Taking the evidence as a whole is consistent with demonstrating control or authority over an area according to tikanga, as required by the Court of Appeal in *Re Edwards*.

Holds the specified area in accordance with tikanga

[419] There is good evidence of Rangitāne interests in the area from Akitio to Poroporo and of connections to groups who have interests in the area from Whareama to Mataikona (including through marriage and shared whakapapa). That is particularly evident from Dr Paewai's evidence.

[420] Evidence was also provided of the operation and observance of a system of tikanga that influences behaviours and practices across the application area. This included fishing practices and kaimoana gathering around the takutai moana. Michael Kawana, Dr Paewai and Piriniha Te Tau all gave evidence relating to Rangitāne fishing

practices. This included evidence that demonstrated the exercise of kaitiakitanga and manaakitanga within the area. Dr Paewai's evidence, for example, talked of those practices being learned from, and continuing to be taught by, the grandparents and elders of the hapū groups.

[421] Rangitāne provided evidence of a letter from Henry Power (Uncle Dubby) of Ngāti Hamua and Ngāti Parakiore, in which Uncle Dubby endorsed the authority of Te Hika o Pāpāuma members as kaitiaki over the area from Whareama to Poroporo. This recognition was later formalised in the Te Hika o Pāpāuma rohe moana, gazetted under the Fisheries (Kaimoana Customary Fishing) Regulations 1998. Dr Paewai's evidence was that this authority sits with, and is exercised by, a number of hapū, including Rangitāne hapū. That further demonstrates the kaitiakitanga of Rangitāne hapū over customary fishing within the application area.

[422] The exercise of kaitiakitanga was also demonstrated by the evidence of a marine protection role carried out by members of Rangitāne hapū. For example, Piriniha Te Tau of Ngāti Hamua observed that mātauranga moana (Māori marine knowledge) is still part of their life at the coast. This entails the implementation of sustainable fishing and kaimoana practices by those who customarily fish in the area, to protect the marine life and maintain kaimoana supplies.

[423] There is also evidence, including from Mr Te Tau, of kaitiakitanga through the placement of rāhui when there are drownings or when koiwi are discovered. Dr Paewai also gave evidence that at Tautāne, Ngāti Hamua commonly placed rāhui when drownings take place to restrict access to the moana. This demonstrates authority that prevents people, both hapū members and third parties, from entering the sea. Mr Te Tau also gave evidence that kaumātua of Rangitāne are, among others, to be contacted by public authorities when koiwi are discovered.

[424] The evidence for Rangitāne also discussed the observance of spiritual beliefs and restrictions in relation to "Suicide Rock" as a wāhi tapu. This site is located north of Whaktaki Beach and is considered a sacred site on the basis that Te Aohuruhuru took her life there in the 15th century.

Exclusive use and occupation from 1840 to the present day

[425] The evidence given for Rangitāne demonstrated continued use and occupation of some degree, dating back to 1840.

[426] Mr Chrisp referred to mid-19th century Native Land Court decisions regarding land abutting the Rangitāne application area, stating:

> Karitiana Te Korou was describing the whakapapa and take whenua of Te Hika o Pāpāuma that derived from their Rangitāne ancestors. This was not a denial of the mana whenua and mana moana of Te Hika o Pāpāuma, but an affirmation of the connections between Te Hika o Pāpāuma and Rangitāne.

[427] These hearings established Te Hika o Pāpāuma's use and occupation of the relevant coastal land, pre-dating the 1853 Castlepoint Purchase.

[428] Mr Chrisp also gave evidence that Rangitāne share Te Hika o Pāpāuma's narrative to the land, through shared whakapapa and intermarriage. He noted that "in subsequent succession cases, several Te Hika o Pāpāuma people continued to trace their whakapapa from Rangitāne ancestors, as well as Te Matau".

[429] Mr Chrisp's evidence also noted that, during the conflicts in the 1820s and 1830s, while others migrated away to Nukutaurua, some members of Ngāti Hāmua remained on the coast to keep the home fires burning. Mr Chrisp also pointed to evidence from the Mataikona subdivision hearing in 1895 that indicated that Te Hika o Pāpāuma people continued to acknowledge and value their Rangitāne whakapapa and take whenua, together with other whakapapa and take whenua.

[430] Further, Mr Chrisp, in discussing Ngāti Hāmua, noted that hapū which do not have ownership of land can show their control over an area through relationships and connection to those who do have ownership in land abutting the takutai moana.

[431] There is evidence of continued use and occupation of the relevant coastal areas. This includes that Rangitāne were part of the Tautāne land sales of 1850. The Native Land Court investigated this in 1866 and 1867 and granted the reserve to the Rangitāne and Ngāti Hāmua tipuna Henare Matua and Hoera Rutu.

[432] There is evidence on the coast at Mataikona of a number of members of Rangitāne (also related to Te Hika o Pāpāuma) having been there since the Castlepoint Purchase in 1853, until the present day. These whānau include Rimene, Pōtangaroa, Kawana, Himona, Makaera, Karaitiana, Te Korou, Maka and Wi Waaka.

[433] While the Attorney-General says that sufficient control of the area on the part of Rangitāne hapū to exclude others as at 1840 is less discernible, in my view it is possible to infer that from the evidence given.

[434] Much of the evidence for Rangitāne addressed other groups who recognise their shared whakapapa and their connection to Rangitāne. For example, the evidence showed strong whakapapa connections between members of Rangitāne hapū and Te Hika o Pāpāuma hapū. This was further evidenced by the letter of Henare Power (Uncle Dubby), with whakapapa connections to both Rangitāne and Te Hika o Pāpāuma hapū.

[435] Dr Paewai's evidence noted that Rangitāne have associated claims to Te Hika o Pāpāuma interests in the Mataikona Block through their ahi kaa, deriving from: whakapapa through Hinematua of Rangitāne; a tuku whenua given by Te Rangiamoa and Te Pōkahuwai, of Rangitāne, to Te Matau (who led a migration from the Hawkes' Bay about six generations prior to 1895);[240] and extensive intermarriage between the descendants of the original occupants of Mataikona and Te Matau's children, as discussed in Dr Paewai's evidence.

Conclusion

[436] In conclusion, I am satisfied that the evidence for Rangitāne, taken together with the evidence of other applicants, meets the criteria for shared CMT to be held by the named Rangitāne hapū with Te Hika o Pāpāuma and Ngāti Kere.

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[240] The differing accounts of the tuku whenua to Te Matau are discussed in detail in relation to the applications of Te Hika o Pāpāuma and the Pāpāuma Marae Trustees.

Pirere whānau

[437] The Pirere whānau's application area runs along the coastline from Ōkau Stream to Castlepoint Stream and 12 nautical miles out to sea from all points along that coastline.

[438] The Pirere whānau identifies itself as a whānau that sits within Te Hika o Pāpāuma hapū. It seeks to hold orders under the Act at a whānau level.

[439] The Attorney-General questioned whether it is possible for a whānau applicant to hold CMT or PCRs.

[440] However, as counsel for the Pirere whānau observed, the Takutai Moana Act expressly refers to the rights of whānau. For example, the Preamble refers to "intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on the connection with the foreshore and seabed". In addition, the purpose of the Act seeks to "recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapu, and whānau as tangata whenua".

[441] More specifically the definition of "applicant group" means "1 or more iwi, hapū, or whānau groups that seek recognition under Part 4 of their protected customary rights or customary marine title ….".[241]

[442] It is clear, as above, that the Takutai Moana Act does allow for the possibility for CMT or PCRs being held at whānau level. Examples of where such orders have been considered are *Re Tipene*,[242] *Re Ngāti Pāhauwera*,[243] *Re Clarkson*,[244] and *Re Edwards*.[245]

[443] It is clear from the above that it is possible under the Takutai Moana Act for CMT and/or PCRs to be held at whānau level. However, the Attorney-General flagged

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241 Takutai Moana Act, s 9(1).
242 *Re Tipene*, above n 130.
243 *Re Ngāti Pāhauwera*, above n 215.
244 *Re Clarkson*, above n 133.
245 *Re Edwards*, above n 12.

an additional question whether it is possible for a whānau applicant to hold an area in according with tikanga, or whether that is only the domain of hapū and iwi.

[444] The Attorney-General points to factors that suggest CMT should, according to tikanga, be held at hapū level. For example, in *Ngāi Tūmapūhia*,[246] the Court found on the evidence that the areas of the takutai moana in question were held, according to tikanga, at the hapū level.

[445] While it was the case in *Ngāi Tūmapūhia,* that CMT was ordered at a hapū level, that was (as recorded in the judgment) by way of the mana moana agreement and was specific to the five coastal rohe within that application area. It had no broader significance.

[446] The Attorney-General also observes that Dr Joseph, in his pūkenga report, refrained from commenting on which hapū or whānau holds an area in this hearing. Nor did the pūkenga comment on whether the hearing area is capable of being held by a whānau in accordance with tikanga. In cross-examination, Dr Joseph did say that hapū are generally best placed to hold representative rights. Reference was also made to Dr Angela Ballara, who said:[247]

> It was hard to express ownership of land in hapū terms for another reason. Such matters as hapū membership belonged to the ideal, conceptual or categoric dimension rather than to the everyday concrete reality.

[447] For those reasons, counsel suggested it was unclear whether whānau can in fact hold a specified area "in accordance with tikanga".

[448] Counsel for the Pirere whānau however noted Dr Joseph saying that it is "dangerous" to conceive of hapū as the primary rights holders in the takutai moana — there is "no one entity for everything", and noted the importance of "acknowledging space for whānau too" because "at the end of the day, the hapū and the iwi aren't strong if the whānau aren't strong". Dr Joseph did conclude it is possible for a whānau to hold an area in accordance with tikanga.

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246 *Ngāi Tūmapūhia*, above n 7, at [125], [129] and [141].

247 Angela Ballara *Iwi: The dynamics of Māori tribal organisation from c 1769 to c 1945* (Wellington, Victoria University Press, 1998) at 200.

[449] David Alexander responded in cross-examination to the suggestion that, while particular rights to interests could rest by descent lines at a whānau level, it was the role of the hapū to allocate and maintain those rights in accordance with tikanga. In Mr Alexander's view, that was "quite bald and quite simplistic":

> I think that it comes down to what the decision is about. If the decision is about local use of land, then it is the local rangatira who has the weight of responsibility for deciding about it. That wouldn't be – you wouldn't be looking, if that was the case, in relation to a particular piece of land at Whakataki, you wouldn't be looking to someone at the northern end of the Te Hika o Pāpāuma hapū rohe to be saying 'well, I'm going to interfere with you as a local, as a local rangatira, and try and assert my thing'. That would not be the Māori way of doing things.

[450] The Pirere whānau also relied on the evidence of witnesses for other applicants, such as George Matthews, Dr Manahi Paewai, Piri Te Tau and Robin Pōtangaroa, as to different whānau having connections to different areas of the takutai moana and as holding rights. Counsel also referred to the evidence of Dr Tipene-Leach, for Ngāti Kere, who said:

> So, yes there are still recognised areas of the coast that belong to particular whānau, and that's not predicated upon those three hapū, so there is no, we don't divide this coastline up by those hapū, the coastline is divided up by the families who have fished those areas, and no doubt they go back to the older hapū as well, who have fished those areas over the last 100, 150 years.

[451] The Pirere whānau's application area overlaps with that of Te Hika o Pāpāuma, Ngāti Kahungunu ki Wairarapa Tāmaki-nui-ā-Rua and Rangitāne Tū Mai Rā Trust. The Pirere whānau expressed their willingness to share the takutai moana, not only with Te Hika o Pāpāuma, but also other whānau of Whakataki, and they acknowledge the presence of the Rangitāne iwi along the coast in this area. The Pirere whānau and Te Hika o Pāpāuma have entered into a document of understanding where they agree that they will seek shared CMT orders over the CMCA between Ōkau Stream and Castlepoint Stream, 12 nautical miles out to sea from all points along the stated coastline. The parties have agreed that if the Court grants the CMT orders sought, they will hold any such order on a joint and equal basis.

[452] It is also significant that the other applicants acknowledge the rights of the Pirere whānau, including their right to hold CMT in relation to their particular application area. Ngāti Kahungunu notes that the applicant groups in this area include

incorporations, marae trustees and whānau, who are not necessarily hapū-based entities. Ngāti Kahungunu says that does not inhibit appropriate recognition of tikanga-based collective descent groups, that expressly or implicitly sit behind those applications.

[453] Finally, on this question, counsel for the Pirere Whānau also submitted that Whakataki tikanga allows for a whānau to hold CMT. The evidence establishes that Whakataki tikanga emphasises the primacy of whānau interests in land. Counsel says it follows that the same approach should apply with regard to whānau interests in the takutai moana. In cross-examination Dr Joseph agreed that it appeared that whānau-based ownership of land blocks, such as Whakataki No. 10, was the tikanga of that Whakataki area.

Holds the specified area in accordance with tikanga

[454] Mr Alexander has provided an historical report to support the application by the Pirere whānau.[248] The Pirere whānau is a family of Te Hika o Pāpāuma hapū. Te Hika o Pāpāuma is, in turn, a hapū that has ancestral links to the wider iwi groupings of Ngāti Kahungunu ki Wairarapa and Rangitāne. However, as discussed above, within that wider setting, Te Hika o Pāpāuma distinguishes itself from other hapū of those iwi groupings, by reasons of its ancestral connection to Pāpāuma, who lived in the 16th century and did not descend from either of those iwi groupings' eponymous ancestors, Kahungunu or Rangitāne, instead descending from Tangaroa and Kupe.

[455] Mr Alexander's report canvasses (as do Mr Walzl and Mr Stirling's reports) that the Castlepoint Purchase Deed in 1853 excluded from the sale a number of Reserves that would remain in Māori ownership. Two of these reserves, Waihiharori (later known as Ngātamatea) and Whakataki, had coastal frontage to the Pirere whānau's application area.

[456] The Crown purchased the Whakataki Reserve in 1855, but with a buy-back option. Mr Alexander notes that Thomas Guthrie probably continued his leasing

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248 David Alexander *Okau Stream to Castlepoint Stream Historical Report: A report to support the Claim of the Pirere Whanau to Customary Marine Title and Protected Customary Rights under the Marine and Coastal Area (Takutai Moana) Act 2011* (August 2023).

arrangement with respect to the Whakataki Reserve, albeit with an understanding that Māori also occupied parts of the Reserve.

[457] Alexander records that, within nine years of the Crown's purchase of Whakataki Reserve, the Crown had made promises to return almost all of the Reserve to Māori. During this period, Whakataki Māori had continued to occupy the Reserve and lease it to Guthrie. It took another 17 years, from 1864 to 1881, for the Crown to fulfil its promises and issue title to the Reserve. During that period from 1855 to 1874, the legal status of Whakataki Reserve was considered to be Crown Land, as a consequence of its purchase in 1855. This status debarred consideration of the Reserve by the Native Land Court, once it started operating in the Wairarapa District in 1865. This stymied efforts by Whakataki Māori to involve the Court in 1867, 1868, 1871 and 1872.

[458] In 1858 about 249 acres was purchased back by Wiremu Paraone, Hori Karaka, Pane Taroro and others.

[459] The Pirere whānau relies for its standing with respect to the stretch of coast that is the application area on descent from their tupuna and their traditional residence and occupation of Whakataki Native Reserve up to the present day, including through occupation by notable tīpuna such as Te Whareaute and Te Matakorihi (also known as Te Koroneho o Mata te Korihi). During the 19th century Native Land Court hearings, Te Whareaute was identified as the ancestor of the applicant group and as the original owner of the Whakataki No 10 Block.

[460] Mr Alexander provided a whakapapa chart based on whakapapa evidence given at Native Land Court hearings in 1894 and 1903, supplemented by contemporary tangata whenua evidence, which traces the Pirere whānau's whakapapa back to Te Whareaute.

[461] Te Whareaute's prominence at Whakataki is also recorded in Mr Walzl's historical report for Te Hika o Pāpāuma where he said:

> Te Whareaute came to be a tupuna who was associated with Whakataki and while some, such as Te Wirihana Te Oioi and Meri Te Ahirakau claimed that

> it was Tahitokura who gave Te Whareaute or Ngati Ruatapu the land there, others specifically rejected this proposition.

[462] The submissions for the Trustees of the Pāpāuma Marae also recorded that the reserves made from the Castlepoint Deed of 1853, Whakataki and Ngātamatea, have the same principal ancestor, Whareaute. Robin Pōtangaroa, in his evidence for the Trustees of the Pāpāuma Marae, acknowledged that the Whakataki and Ngātamatea Reserves, made under the Castlepoint Deed of 1853, have the same principal ancestor, Whareaute.

[463] Rebecca Harper, the applicant on behalf of the Pirere whānau, also gave evidence of the whānau's ties to the adjacent area, stemming from her great-grandfather Te Matakorihi. Lisa Pirere's evidence also supports the whānau's whakapapa links to Te Matakorihi.

[464] In accordance with tikanga, rights and interests in land were established through whakapapa at Whakataki. This was clear through the Native Land Court processes documenting the ownership of Whakataki 10. As Mr Alexander records, Whakataki No. 10 was the remainder of the Reserve that was returned to Māori following McLean's recommendation in 1862. It was all of the Reserve apart from those Lots granted to individuals (and apart from Thomas Pickett's 1860 grant). Its area was 6,298 acres (94 per cent) of a total for the Whakataki Reserve (as surveyed in 1874) of 6,704 acres.

[465] The Whakataki No. 10 was granted to 20 individuals under the Whakataki Grants Act 1874, all but five of whom were descendants of Te Whareaute.

[466] As Mr Alexander records, when title was reinvestigated in relation to a proposed partition in 1894, grantees sought to describe their association to the block through whakapapa to Whareaute. This was apparent from the statements of Ihipera Patuwai (Nanny Paku), Maraea Te Ngaru, Karitiana Te Whakarautau, Meri Ahirakau and Wirihana and Mihi Te Oioi who refer to the Block as being theirs through their descent lines, rather than being held by or on behalf the relevant hapū of the area, they being Te Hika o Pāpāuma and Ngāti Hāmua.

[467] Counsel also points to the example of the Castlepoint Deed itself, which was not signed on behalf of particular hapū, but rather by individuals with associations to the whenua through their whakapapa and occupation. The fact that the grantees specifically refer to Te Matakorihi and Te Whareaute as giving them rights in Whakataki 10, rather than referring to the eponymous tīpuna of Te Hika o Pāpāuma and Ngāti Hāmua, Pāpāuma and Hāuma respectively, supports Karaitiana Te Whakaroto's contention that "this land belonged to Te Whareaute alone. No other ancestors had any right to it."

[468] Mr Alexander's report also discusses the circumstances surrounding the creation of the Ngātamatea Reserve. Hori Karaka made an application for an investigation of title and his evidence as to his association with Ngātamatea was unchallenged; it specifically relied upon his descent from Te Whareaute. The grantees to that Reserve also were not identified through reference to the hapū Te Hika o Pāpāuma and/or Ngāti Hāmua, nor to the eponymous tīpuna of Pāpāuma and Hāmua.

[469] As to mana, Mr Alexander's report refers to archaeological evidence which demonstrates that the coastal district between Whareama and Ākitio, and more particularly between Castlepoint and Mataikona, had been occupied for at least four centuries before the arrival of Europeans. While military threats from Te Āti Awa and Ngāpuhi war parties in the early 19th century caused some members of Te Hika o Pāpāuma to migrate away from the hearing area, the Waitangi Tribunal has confirmed that some members of Te Hika o Pāpāuma almost certainly remained behind to maintain the rights of continuous occupation (ahi kā roa).[249]

[470] Whakapapa evidence provided in the Native Land Court hearings in 1894 and 1903 indicates that Te Whareaute lived about five generations (about 100-125 years) before Te Matakorihi. Te Matakorihi was extant at 1855.

[471] The presence of Māori at Whakataki was reported by missionaries in 1843, as recorded by Mr Alexander, demonstrating links to the takutai moana through reports of kaimoana being caught in large quantities. William Colenso's account in 1851 also describes tangata whenua as being present on Whakataki 10.

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[249] Wairarapa Report Volume I, above n 18, at [1.7.2], pages 12–13.

[472] In addition to their presence on the land, the 1894 and 1903 Native Land Court hearings also illustrate Te Matakorihi's mana as at 1840. His permission was required for the sale of the Whakataki Reserve to the Crown in 1855, from which it can be inferred that he was the senior rangatira at 1840, holding mana at Whakataki. The Pirere whānau's whakapapa to and kōrero regarding Te Whareaute and Te Matakorihi draws together the unbroken mana whenua of the Pirere whānau from the 1700's through to the mid-19th century in Whakataki.

[473] The Pirere whānau acknowledge that Wiremu Te Pōtangaroa was the paramount rangatira of Mataikona in the mid-19th century, and that he had influence over the wider area, demonstrated when he led the sale of Castlepoint Block to the Crown in 1853, and in 1842 when he accepted Te Wharepouri's peace settlement on the beach at Whakataki. However, based on Mr Alexander's evidence, they say that does not detract from Te Matakorihi's mana. The Pirere whānau's mana in the area from Okau Stream to Castlepoint Stream was established for over a century prior to 1840 and continued after the signing of the Castlepoint purchase in the mid-19th century.

[474] Native Land Court records of the 1870s show that Whakataki 10 was granted to 10 individuals, all but five of whom were descendants of Te Whareaute. The coastal element of this block remained in Pirere whānau ownership, despite multiple subdivisions in the early part of the 20th century until 1929, when the Crown took the coastal land for the construction of the Mataikona Road, in the face of local resistance.

[475] Hori Karaka and his sister Pane Taroro (great-great grandfather of Rebecca Harper and Faye Pirere) were granted the Whakataki No 2 Block in 1874. These shares were inherited by Pane's children, Renata Whiti and Hāmi Pōtangaroa, and later by Renata Whiti Pirere, by 1895. This continued until the 1980s when part of the Whakataki No. 2 Block (Whakataki 2) was sold to Ralph Wilton.

[476] Shares in Whakataki 2 have remained in the Pirere whānau's ownership through to the present day.

[477] The Pirere whānau urupā is in close proximity to the takutai moana, on the hill across the road from Whakataki 2. Notable tīpuna, including Ihipera Patuwai (Nanny Paku) and Larry Piware are buried there. Richard Pirere gave evidence of other Whakataki residents recognising that they require the require the whānau's permission to bury their ancestors in the urupā.

[478] The Pirere whānau's marae, Matira Rangiwhakaoma (also known as Whakataki Marae) is across the road from the Whakataki Hotel, less than a kilometre from the takutai moana. There was a fire at the marae in the 1970s, and the means are still being accumulated to rebuild the marae.

[479] When offshore oil drilling was proposed in the 1990s, Ihaia Whakamairu Pirere and Rebecca Harper were among individuals approached and consulted with, reflecting the whānau's mana at Whakataki.

[480] Many of the witnesses for the Pirere Whānau discussed their role as kaitiaki. Faye Pirere noted that there was always a designated kaitiaki from the whānau overseeing the rohe. James Davidson talked of his grandfather passing on the practice of kaitiakitanga to his children and grandchildren. Many examples were given of how kaitiakitanga manifests itself in everyday activities – such as harvesting kaimoana responsibly to ensure that resources aren't depleted; picking up litter on the beach; being involved in a predator-trapping campaign; and contributing to the revitalisation of eroding sand dunes by protecting them from vehicles and replanting reeds.

[481] Kaitiaki responsibilities also include addressing individuals who do not adhere to the whānau's tikanga regarding the takutai moana. All of James Davidson, Peter Davidson, Dianne Sutherland and Lisa Pirere noted that they will approach and intervene with anyone they see who is gathering excessive amounts of kaimoana or not respecting the environment.

[482] Many of the Pirere whānau witnesses also gave evidence of the kawa they follow when they are at the coast, as another manifestation of their kaitiaki responsibilities. This has been handed down to them as kōrero tuku iho, which they pass on to their tamariki in turn. The kawa includes always respecting the sea, giving

your first catch back Tangaroa, not turning your back on the sea, always performing a karakia before fishing and diving, not swearing, shouting or yelling by the sea, not eating until everyone is out of the water, only taking what you need, leaving things as you found them, fishing according to the tide and only catching certain kaimoana at particular times, protecting the moko (children) before you protect yourself, not deshelling or cleaning kaimoana on the beach, not diving alone, not collecting reproducing kaimoana (breeders), and menstruating women not coming to the sea.

[483] The Pirere whānau urupā is situated near the takutai moana and witnesses spoke of the tikanga observed during visits to the urupā, including reciting karakia and the practice of handwashing before and after paying respects.

[484] A number of witnesses spoke of the significance of Te Wharepouri's Mark and the healing properties of the waterfall located directly across the road. The Mark and the waterfall hold great significance as sacred places for the whānau. The Mark is associated with the ancestral practices of healing, carried on by generations of tohunga, including Materoa Hamuera, Faye Pirere's great-grandfather. The waterfall served as a site for cleansing rituals to cleanse the sick and unwell and the waters are believed to possess healing powers.

[485] Witnesses also spoke of the mouth of the Whakataki Stream as a wāhi tapu, because of the presence of the whānau's kaitiaki, with rules passed down about not going near the river mouth of the stream (Faye Pirere, James Davidson, Richard Pirere, Peter Davidson, Rebecca Harper). Both Rebecca Harper and Lisa Pirere spoke of the bodies of their tupuna being cleansed near the Whakataki River mouth. Faye Pirere confirmed that the Pirere whānau have never swam in the river mouth. James Davidson and Faye Pirere also emphasised that the river mouth should be protected at least two to three metres either side of it. Richard Pirere emphasised the danger of the river mouth for the public because of the flow of the river and the currents. In his view, the wāhi tapu should extend 30 to 40 metres out to sea.

[486] As to customary usages (fishing and kaimoana gathering), the witnesses for the Pirere whānau all gave evidence of how the takutai moana has in the past and continues to be relied on for sustenance. Through their korua and kuia, aunts and uncles, parents

and grandparents, they have learned how to fish, collect kaimoana and understand their rohe moana.

[487] Faye Pirere talked of her lifetime of gathering kaimoana since the age of five, primarily in the Castlepoint and Whakataki areas. Nowadays, she participates less regularly, but her younger family members continue to gather kaimoana.

[488] Peter Davidson talked of his upbringing and of diving with his father, uncles and grandfather within the application area and beyond. There has been a family tradition of camping near Nanny Paku's cottage and the art of diving and fishing has been passed down through generations. Peter Davidson talked of imparting his knowledge to his children and grandchildren in turn. He highlighted exceptional diving spots near the Whakataki Stream in Nancy Bay. He also gave evidence of gathering tuna and flounder from the bridge at the back of the Whakataki Hotel. James Davidson gave evidence of fishing for hapuku up to 12 nautical miles offshore, and up to seven km from the shore to gather crayfish from the reefs.

[489] Rebecca Harper's evidence was of how abundant kaimoana characterises their rohe. Traditionally her father and his brothers, sometimes assisted by her sister Faye, would gather various seafood like kina, pipi and pāua.

[490] Richard Pirere talked of the significance for his whānau of gathering kaimoana during his family visits to Castlepoint. Often it was to provide food for tangi. Richard learned from his grandfather, Ihaia (Mackie) Whakamairu Pirere, about how to dive and fish.

[491] James Davidson also talked about his family fishing and diving along the entire Wairarapa coastline as he grew up and of passing down his knowledge of the techniques for doing so to the next generation.

[492] Lisa Pirere talked of her whānau frequenting Castlepoint and Whakataki, visiting five to six times per year, with the gathering of kina and pāua in the Whakataki to Okau Stream area and fishing with nets and lines for crayfish in the Castlepoint to Whakataki stretch of the coast.

[493] Diane Sutherland, too, talked of collecting kaimoana at Whakataki since the 1980s and of continuing to do so on a monthly basis. Her mokopuna follow the tikanga passed down in the whānau, with intimate knowledge of where to find pipi, kina, pāua, booboos, crayfish and mussels. Ms Sutherland emphasised that all of those activities were undertaken with a strong awareness of the need for conservation of the kaimoana stocks in this area.

[494] In 2003 Pikihuia ("Pixie") Wilton was appointed tangata kaitiaki for the area from Mataikona to Whareama and out to 12 nautical miles, under reg 11 of the Fisheries (Kaimoana Customary Fishing) Regulations 1998. Although her authorisation was for Te Hika o Pāpāuma, she has very close ties to the Pirere whānau.

[495] The whānau's willingness to lease and gift various parts of the whenua in the vicinity of the takutai moana, over the period from 1874 to 1964, also demonstrates the whānau's practice to extend manaakitanga to both Māori and Pākehā.

[496] Rangitāne witness Tipene Chrisp agree that the Pirere whānau evidence demonstrated continuous occupation and use of areas adjacent to the marine and coastal area.

Exclusive use and occupation from 1840 to the present day

[497] As discussed above, Te Whareaute, a Pirere whānau tipuna, played a central role in major land transactions at Whakataki.

[498] Mr Alexander notes that the return of Wairarapa Māori from Nukutaurua took place over a number of years, from the late 1830s to the early 1840s and the year 1840 was thus a year of transition. At that time, Te Hika o Pāpāuma had started reoccupying their coastal lands between Ākitio and Whareama, but had not completed that process. He notes: "Despite the return being incomplete, there was no argument that Te Hika o Pāpāuma were the rightful tangata whenua".

[499] As to the 1840 assessment, Mr Alexander's report notes a record by missionary Willian Colenso of local Māori making extensive use of the beach to travel between

settlements, including between Waioronga[250] (Castlepoint Stream), Whakataki and Mataikona. However, as the Attorney-General remarks, it is unclear if this evidence relates to ancestors of the Pirere whānau or, more broadly, to ancestors belonging to the wider Te Hika o Pāpāuma hapū.

[500] At 1840 it can be inferred that Te Matakorihi had inherited the control of Whakataki as it was passed down through his ancestors from Te Whareaute. Te Matakorehi's permission was required for the sale of the Whakataki Reserve to the Crown in 1855 and counsel says, it follows that either Te Matakorehi and/or another Pirere whānau tipuna would have been a senior adult at 1840, holding mana at Whakataki.

[501] Counsel also says that the local people referred to in Colenso's report of the settlement at Whakataki at 1843 are likely to have included the tipuna of the Pirere whānau, who would have been one of only a handful of whānau present in the area at 1840.

[502] On that basis, as at 1840, the Pirere whānau, alongside Te Hika o Pāpāuma, possessed the ability to exclude third parties from the application area and were in control of the takutai moana.

[503] The evidence relating to Ihipera Patuwai (Nanny Paku) living her whole life at Whakataki is also relevant to continued use and occupation from 1840. Nanny Paku was a Pirere whānau, and a Te Hika o Pāpāuma hapū, member. She recorded as living at Whakataki from 1835 to 1952. There is a record of Nanny Paku customarily fishing at Whakataki in 1840. As Mr Alexander records, Nanny Paku was the majority shareholder in Whakataki 10B6A2, which after 1922 was the only Whakataki 10 Block land with a coastal frontage still in Māori ownership. As Mr Alexander records, in her old age, Nanny Paku lived alone on the papakāinga reserve, Whakataki 10B1. He refers to a book about the history of Castlepoint Station which records that Nanny Paku could remember William Colenso's visit in 1843. Mr Alexander cites another publication written by a European school teacher at Whakataki in the 1940s who described Nanny Paku as:

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[250] Also referred to as Waiorongo.

> … the tiny person who still chopped her manuka firewood, grew her own vegetables, in haphazard fashion, among her flowers, still searched the beach, half a mile away, for the treasures that beachcombers loved to find.
>
> … From the rocks, the sand and the water, Paku obtained edible seaweed, crayfish and sea eggs.
>
> She dragged ashore… the karengo, and dried it on the hot sand until the specks of white salt showed up against its purple background.
>
> … Crayfish were to be found under the sheltering rocks. When Paku's weight of years prevented her diving for them, it was left to her friends to supply them.

[504] Mr Alexander records that Nanny Paku died on 24 April 1951. He says: "By continuing to live on the land of her hapū, even at some personal cost in her later years, she was the embodiment of ahi kaa roa under conditions".

[505] As to the post-1840 assessment, Mr Alexander gave evidence of approximately 43 people from "Te Ika-o-Papaumu" hapū of Ngāti Kahungunu tribe recorded at Whakataki in the 1874 census, 33 in 1878, and 15 in 1881.

[506] Mr Alexander's report also includes evidence of Pirere whānau members placing a rāhui over the takutai moana when two women drowned at Whakataki in 1905, prohibiting fishing for the season or until the bodies were found (although it is not clear whether the rāhui was imposed on the authority of the Pirere whānau itself, or that of Te Hika o Pāpāuma hapū).

[507] The Whakataki Marae, called Matira Rangiwhakaoma, although burning down in 1960 (some witnesses said the 1970s), remains a significant symbolic site of tikanga, as described in their evidence by both Rebecca Harper and Faye Pirere. There is evidence of the Whakataki Marae Committee continuing to meet there after the marae burnt down and of keeping alive the memory of use of the marae to this day.

[508] Rebecca Harper talked of the American who showed up at Te Ore Ore Marae in Masterton, saying that he was going to drill for oil over the Wairarapa Coast. Ms Harper noted they had a pōwhiri for him at the marae. This demonstrates manaakitanga, even in the face of potentially adverse third party use of the coastal area.

[509] As previously discussed, the Whakataki Reserve was part of the Castlepoint Deed of 1853 and Pirere whānau ownership in Whakataki continues to connect this group to the land that was the subject of the sale. The Whakataki Grants Act 1974 further records Whakataki lands vested in Māori all the way to recordings of ownership in 1988.

[510] As already described, the continued customary fishing and kaimoana gathering by members of the whānau evidence their use and occupation from 1840 until the present.

[511] Similarly, their urupā and those wāhi tapu referred to by the Pirere whānau witnesses indicate their ongoing use and occupation. For example, witnesses gave evidence about Te Wharepouri's Mark and the waterfall near the Mark which, as previously described, hold great significance as sacred places for the whānau. The Mark is associated with the ancestral practices of healing; the waterfall served as a site for cleansing rituals to cleanse the sick and unwell and the waters are believed to possess healing powers. The site has been used for generations as a place of spiritual and physical restoration. The area around the waterfall is considered tapu.

[512] Witnesses also gave evidence of the sacredness of the mouth of the Whakataki Stream where ancestral practices involved cleansing the bodies of the deceased, releasing negative energy into the river that flows to the sea. The tapu extends from the river mouth to the waterfall outlet with strict prohibitions on walking or swimming in the area and even walking on the beach allowed only on horseback.

[513] Rebecca Harper gave evidence of the presence of a taniwha, taking the form of a white eel or stingray, which is believed to protect the river and its spirits, particularly those prepared for tangi. The presence of quicksand near the river mouth serves as a practical warning and a symbol of the tapu nature of the site.

[514] Ongoing land ownership is also relevant. Members of the Pirere whānau own Whakataki 2, which is in close proximity to the takutai moana. In cross-examination, Samuel Carpenter confirmed that the Whakataki Reserve is an example of an area in which a Māori presence was maintained throughout the 19th and 20th centuries.

[515] As previously discussed, the Pirere whānau have had land interests adjacent to or in close proximity to the application area over a long period, including at the Ngatamatea Reserve, at Whakataki 10, and at Whakataki 2.

Conclusion

[516] It is clear that, as a matter of law, the Takutai Moana Act allows for the possibility of CMTs and PCRs being held at whānau level. Nor is there any evident impediment in tikanga to that possibility.

[517] I am satisfied that the Pirere whānau have met the criteria for CMT under s 58 of the Act and should have an order in relation to their application area on the terms set out at the end of this judgment.

Ngāti Kere

[518] In my judgment of 5 June 2024[251] I granted Ngāti Kere's application to extend the southern boundary of the CMT application area to the southern bank of the Akitio River in the south.

[519] As discussed above, I consider Ngāti Kere's application in two parts - the original application area (between the southern bank of Te Wainui Stream (Herbertville) and the northern bank of the Ouepoto Stream, from the line of MHWS and out to the territorial sea limit, and then the extension area.

[520] The Ngāti Kere application covers four specified descent groups. Dr Tipene-Leach's evidence was:

> Ngāti Kere have four primary constituent hapū – Ngāti Kere, Ngāti Manuhiri, Ngāti Pihere and Ngāti Hinetewai which are commonly known by the label Ngāti Kere. Within this Ngāti Kere conglomeration, there were also other local hapū as listed here (from the north of our rohe to the south)
>
> (a) Ngāti Maru
>
> (b) Ngāti Pakiua
>
> (c) Ngāti Wharenui

[251] *Re Ngāti Kere*, above n 10. ….

(d) Ngāti Tamatea

(e) Ngāti Tanehimoa

(f) Ngāti Te Rangiwawahia

(g) Ngāti Hineraru

(h) Ngāti Hinepare

i Ngāti Te Rino

j. Ngāti Te Wheeki.

[521] The witnesses for Ngāti Kere were Morehu Smith, Professor Piri Sciascia[252] and Dr Tipene-Leach. In addition to Ngāti Kere affiliations, Mrs Smith cites affiliations to Ngāti Pihere and Ngāti Hinetewai; Dr Tipene-Leach cites whakapapa affiliations to Ngāti Manuhiri.

Holds the specified area in accordance with tikanga

[522] Ngāti Kere and their ancestors living on the land who have carried various hapū/iwi names, in an unbroken chain through to when Ngāti Kere became the predominant nomenclature, have actively occupied, utilised and cared for the coastline for at least 25 generations, and accordance with Ngāti Kere tikanga.

[523] Dr Tipene-Leach's evidence was:

> The name of our hapū is taken from our ancestor, Kere from whom our mana derives through whakapapa. Kere was a son of Te Rangiwāwāhia, who was a son of Te Whatuiāpiti. We can specifically trace the mana whenua of our lines of descent to the application area from the late I7th Century, during which there occurred "feasting duels" between Te Whatuiāpiti (our ancestor) and Te Angiangi (our ancestor who was in possession of the lands in the Pōrangahau area at the time). This is known locally as Te Uaua Tamariki a Te Rangiwāwāhia.

[524] The evidence for Ngāti Kere addressed some of the examples given by Miller J in *Re Edwards* of how mana to determine who could access and use their area might be demonstrated.[253] Those elements include the following.

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252 Sadly Professor Sciascia died before the hearing and his evidence was contained in his affidavit.

253 *Re Edwards*, above n 12, at [167].

[525] Dr Tipene-Leach gave evidence of military action to displace existing occupants. He talked of battles that occurred along the coast, where the land had once belonged to Rangitāne and where warfare and marriages from the 1500s onwards culminated in the mana of Ngarangiwhakaupoko consolidating the hapū interests under a Ngāti Kere banner. Dr Manahi Paewai of Rangitāne acknowledged that the area has been undisputed in terms of the mana exercised by the descendants Ngarangiwhakaupoko.

[526] Dr Tipene-Leach's evidence was that the name of the Ngāti Kere hapū is taken from their ancestor, Kere from whom their mana derives through whakapapa. Kere was a son of Te Rangi Wāwāhia, who was a son of Te Whatuiāpiti. Dr Tipene-Leach talked of being able to trace the mana whenua of Ngāti Kere lines of descent to the application area from the late 17th century, during which there were whakatiki, or feasting duels, between Whatuiāpiti (an ancestor), Te Angiangi (another ancestor who was in possession of the lands at Pōrangahau at the time). This is known locally as Te Uaua Tamariki a te rangi whawhahia. Dr Tipene-Leach explained whakatike:

> …in these feasts there were three feasts and they were kind of like big competitions. And the idea was you were able to reply to this feast and the person who gave the biggest feast won. The final feast te uaua tamariki the third, a te rangi whawhahia one was given by Te Whatuiāpiti and Te Angiangi, he tried to reply to that feast, in fact his father went all the to the South Island to get tītī but his canoe overturned in the Cook Straight and he drowned. So, Te Angiangi had to give land. The word whakatike, in that feast was put together by te rangi whawhahia, the son of Te Whatuiāpiti and all his people, there were four distinct piles of food, and these were called tihi. The first one happens to be called whakaararamati, the second is called toreopuanga, the third is called rurupo, and then the two other piles, there is a discussion about whether it was one pile with two entrances or there was two separate piles, were called rurea and taiwha.

[527] The explanation was illustrated by a map of the Ngāti Kere coastline, showing the location of the feasts, which had been complied by Professor Piri Sciascia in 1992, in preparation for Ngāti Kere's Taiāpure application.

[528] Another of the indicators of mana set out by Miller J is occupation. Ngāti Kere say they have continuously occupied the application area from the 1700s through to the present day. Although Ngāti Kere temporarily relocated to Nukutaurua on the Māhia Peninsular during the musket wars**,** a number of Ngāti Kere remained behind

and returned a few years later to take up their exercise of mana. Dr Paewai for Rangitāne agreed that Ngāti Hāmua filled a "caretaker" role during that time and did not usurp the mana of Ngārangiwhakaupoko to those lands. Dr Paewai agreed that Ngāti Kere should be recognised as having CMT in the Pōrangahau area on the basis that the wider history of Ngāti Hāmua and the interrelationships be acknowledged by them.

[529] Rangitāne hapū were predominantly inland-based and relied on their relationships and historical associations for access to and use of the coastal areas, held under the mana of the Ngāti Kere hapū. On the coastline between Wainui and Ākitio, these were the hapū of Ngāi Te Rino and Ngāi Te Wheeki and others. Dr Tipene-Leach's evidence was that Te Hika o Pāpāuma's influence had moved further south, principally focussed on the area from Ākitio down to Rangiwhakaoma.

[530] Another indicator is intermarriage with tangata whenua women. The whakapapa charts produced in evidence by Dr Tipene-Leach illustrate this point. In particular, the marriage of Te Rangihirawea (the immigrant son of Te Rangiwāwāhia) to Hinemate (the mana whenua). A second example is the marriage of Kere's granddaughter, Hinemate Kitawhiti (the mana whenua) to Ngarangi Whakaupoko (who was the grandson of Te Rangi Hirawea and a great grandson of Arikinui Te Huki).

[531] All of the witnesses for Ngāti Kere, particularly Prof Sciascia and Dr Tipene-Leach, provided evidence of the carve-out of the rohe, through battle and marriage and then cemented through the gift from Te Angiangi (grandson of Te Aomatarahi) of the Pōrangahau region to Te Whatuiapiti (of Te Hika o Pāpāuma). The gift had come about because of the feasting competition and the provision of food by Te Rangiwāwāhia and his people, a manifestation of tikanga. Kere (the eponymous ancestor of Ngāti Kere) was the surviving son who remained in the district.

[532] This defence of the rohe was apparent again, some generations later, when in 1865 Henare Matua decreed an area from Ākitio up to Pōrangahau to be "Te Pootiririkore" — an area where no anger shall be vented, to prevent the Hauhau

affiliates at Wairarapa from crossing through the area. The Hauhau were moving north to fight with the Hauhau of the Gisborne area against Crown forces.

[533] Dr Tipene-Leach's evidence covered Ngāti Kere's longstanding practice of burial of their dead within the rohe. There are urupā at Paerahi, Pōrangahau and at Wainui.

[534] Establishing a group name is also an indicator of mana. Ngāti Kere is a confederation of some fifteen hapū as noted above.

[535] In the context of the investigation of land titles and the acquisition of land by Crown agents, it was Ngāti Kere and their whanaunga, Ngāti Manuhiri who were claiming in the Porongahau block, without challenge from neighbouring iwi.

[536] Finally, counsel for Ngāti Kere notes the significance of approval and acceptance of neighbouring iwi. There has been no specific challenge to the Ngāti Kere claim to have exercised mana in the area from Ākitio to Ouepoto. As counsel acknowledges, there does continue to be a debate as to the nature of the shared interests in that area. Counsel also notes that both of the iwi entities holding Post Settlement Governance roles on behalf of Rangitāne and Ngāti Kahungunu were supportive of the Ngāti Kere claim and see themselves in a korowai (or cloak) role.

[537] The Ngāti Kere witnesses gave evidence of customary fishing activity. In particular, Morehu Smith talked of her whānau gathering pāua and kina at Aramoana/Blackhead and of the extensive reef at Parimahu, where pāua, pupu and crayfish are taken in October, as well as kina at the southern end of the reef. At Ouepoto kina was taken in November. In cross-examination, Dr Tipene-Leach gave evidence of imposing rāhui to reduce the maximum pāua take from 10 to three. Dr Tipene-Leach talked of imposing a rāhui at Parimahu when it was clear that the fish stocks were going down. There was also evidence of traditional fishing in the area between Poroporo and Ākitio. There was also evidence of Ngāti Kere acting as kaitiaki in promoting conservation and Dr Tipene-Leach talked about working with DOC and NIWA on research about fish stocks in Ngāti Kere's various areas. Ngāti Kere supported the creation of the Te Angiangi Marine Reserve at Pōrangahau, when

it ws initially proposed in 1993 and is involved, with DOC, in the ongoing protection of the Marine Reserve.

[538] Other examples were provided of Ngāti Kere's exercise of kaitiakitanga, such as issuing permits as appointed kaitiaki in relation to Ngāti Kere's rohe moana, gazetted under the Kaimoana Regulations, and extending to Ākitio. Although as the Attorney-General notes, there is a lack of evidence as to where or how often permits are issued.

[539] Dr Tipene-Leach gave an example of his uncle Rangitāne Tipene Matua of Ngāti Kere being called if kōiwi are washed up on the coast. He then organises their reinternment in accordance with tikanga. This generally also involves the placement of rāhui.

[540] There was also some evidence — although lacking detail — of whānau of Ngāti Kere hapū owning land on a number of properties abutting the application area. This is a matter that may be taken into account in determining whether this CMT exists.[254]

Exclusive use and occupation from 1840 to the present day

[541] There was clear evidence to show that, as at 1840, Ngāti Kere had the authority to exclude others from the application area, had it wished to do so. This included evidence of Ngāti Kere rangatira Henare Matua being born at Pakuku (near Ākitio) in 1824, together with evidence of a pā site at Tainui, between Aramoana and Blackhead Beach, which indicated a larger degree of use and occupation on the part of the wider hapū.

[542] There was also evidence of Ngāti Kere ancestors being buried in the area, reflecting sustained and organised use and occupation by the hapū. Piri Sciascia in his affidavit said:

> Uncle Henare Hokianga and Henare Petuha went to not only 'sort out' the bones that were revealed by flooding at Wainui, but also to reinter the same with due ritual. This action was spoken about, following the reburial on Marae

[254] Takutai Moana Act, s 59(1)(a)(i).

> at Porangahau, where it was disclosed by Te Rehuka Tutaki that indeed Hineraru, the daughter of Te Huki, was buried at Wainui. She was the grandmother of Ngarangiwhakaupoko. This knowledge, authority and responsibility remains with Ngāti Kere to this day.

[543] And, as above, there was evidence of feasting taking place in the late 1600s on the coast, within or close to, the application area. This is a practice based in tikanga in giving expression to manaakitanga. As Dr Tipene-Leach explained, this practice sometimes meant that whoever gave the biggest feast was gifted land. The exact locations of that activity and proximity to the CMCA are not clear.

[544] In terms of evidence demonstrating Ngāti Kere's use and occupation of the application area from 1840 to the present day, as above, there was evidence of long-term land ownership, including of land abutting the application area, although not specific as to exact parcels of land, location, or proximity to the CMCA.

[545] Also as noted above, Morehu Smith gave evidence of customary fishing throughout the application area with some specific examples of fishing and types of fish caught.

[546] Morehu Smith's evidence also discussed customary fishing in her lifetime, from which the Court can infer continuity of use and occupation.

[547] At a site visit to the Ngāti Kere rohe, after the hearing, some further evidence was given, particularly of offshore fishing. Nicholas Sciascia, Jim Hutcheson, Alan Wakefield, Paora Sciascia, and John Black all spoke of their own experience as fishermen. A number of them spoke of a history of fishing offshore out to the North and South Madden Rocks/ Madden Banks. Mr Wakefield noted that it was recorded by Captain Cook that he saw Ngāti Kere flax fishing nets, two km long, out in deep waters. Mr Black talked of his Uncle Pop and Uncle Burt taking him to an offshore groper hole. He observed that the old people went to specific spots, eight or nine miles off shore.

[548] While I granted leave to adduce this evidence, it is necessarily of limited weight given the other parties did not have the opportunity to cross-examine the witnesses or to call evidence in reply.

[549] Donald Tipene spoke generally of the need for Ngāti Kere to preserve their knowledge. Jenny Mauger talked of collating the knowledge and experience of Ngāti Kere kaumatua and their life on the coast.

[550] Dr Tipene-Leach talked of Ngāti Kere's continued use and occupation of the coastal area according to tikanga when he noted: "the Wainui floods of the 1980s involved Ngāti Kere elders Henare Petuha and Henare Te Atua going down to conduct the reburial of human remains, along with others."

[551] Dr Tipene-Leach's evidence was that by the time of the 1880s Pōrangahau Block hearings, the only hapū making claims in the Wainui to Ākitio stretch of coastline, were Ngāti Kere and Ngāti Manuhiri, together.

[552] However, Ngāti Kere acknowledges shared interests in some parts of the application area, with other hapū and iwi, including Rangitāne and Te Hika o Pāpāuma.

[553] Dr Tipene-Leach acknowledged the shared whakapapa of his Ngāti Kere ancestors with Rangitāne and Te Hika o Pāpāuma in the area south of Wainui (Herbertville) (the extension area). One example is Parakiore, who was a rangatira of Rangitāne and whose three sons all married Ngāti Kere women and are the tīpuna of the local families of Ngāti Kere, namely the Kuru, Tipene Matua and Ropiha whānau. Ngāti Kere explicitly acknowledged the interests of Ngāti Parakiore in the extension area. Dr Tipene-Leach also gave examples of Hoera Rautu, Paora Te Pōtangaroa and Henare Matua, who identified in land cases with various whakapapa lines, but where the claim for land ownership was on the basis of their Ngāti Kere descent.

[554] Ngāti Kere proposes that it would be appropriate to make an order of "shared exclusivity" with Te Hika o Pāpāuma and Rangitāne in the area from Ākitio in the south to Wainui in the north. However in the area north, from Wainui to Poroporo, Ngāti Kere does not consider that Rangitāne and Te Hika o Pāpāuma can justify a claim.

[555] Ngāti Kere acknowledges the historical association by whakapapa and the use of the coast north of Wainui by Rangitāne and Te Hika o Pāpāuma, but says the mana of that area was taken over by Ngāti Kere before 1840 and has continued to this day.

[556] Ngāti Kere points to the evidence of Dr Paewai who acknowledged that mana whenua "resides in the most permanent inhabitant". This is the essence of ahi kaa – keeping the home fires burning.

[557] In relation to Te Hika o Pāpāuma's case for mana interests north of Wainui, Ngāti Kere notes that the evidence of the witnesses called for the Authority all relate to their experiences in the areas on the coast up as far north as Ākitio, but not further north.

[558] A reliance on Kupe as the relevant ancestor is not sufficient in itself. Kupe is generally regarded as the earliest discoverer of Aotearoa, to whom most Māori can show descent. Further, the evidence relied on shows that the ancestors of Te Hika o Pāpāuma "traversed and settled within the area referred to as the Castlepoint Purchase Block". The northern boundary of that Block was at Waimata Stream, which is south of Wainui. Counsel submits that the Castlepoint Block has been wrongly conflated with Poroporo, referring to the Walzl report.[255]

[559] Nor can Te Hika o Pāpāuma rely on a customary fishing Gazette which stretches up to Poroporo. This is not an expression of mana tuku iho. Rather, Ngāti Kere regarded this as an expression of their own mana, in that they acknowledged Uncle Dubby Power and his standing as a kaumatua at the time. They were consulted and allowed it to happen. In fact, Ngāti Kere have a gazetted customary fishing regulation for the full area from Ouepoto Stream in the north down to Ākitio River in the south.

[560] Ngāti Kere also refers to Te Hika o Pāpauma's reliance on what Uncle Dubby Power said about the extent of their status as tangata whenua: "it definitely goes to Poroporo because of the Rautu family". Dr Tipene-Leach's evidence was that the Rautu whanau were of Ngāti Kere descent when they were making claims to lands

[255] Walzl Pāpāuma report, above n 154, at 120.

north of the Castlepoint Block, or north of Wainui and up into Poroporo. Ngāti Kere refer to Mr Power saying "Poroporo down at Wainui and Herbertville". Plainly "Poroporo" did not refer to Cape Turnagain, but rather the conventional understanding of the boundary south at Wainui.

[561] Ngāti Kere say the same conflation of Wainui with Poroporo is also evident in George Matthews' evidence concerning the urupā of Hoera Rautu. The Walzl report refers to[256] the interment of Hoera Rautu at Poroporo around 1926, noting the right of Te Hika o Pāpāuma to bury him there, as he had requested.

[562] Ngāti Kere concludes that Te Hika o Pāpāuma's sphere of influence is primarily from Castlepoint to Whareama, with a focus on the Mataikona Block; there are some shared interests north of Ākitio up to Wainui; in the oral tradition of Dubby Power, Poroporo is referring to Wainui, not Cape Turnagain.

[563] Ngāti Kahungunu recognise the mana, rights and interests of Ngāti Kere "in the northern end of the application area". The Settlement Trust acknowledges that the Ngāti Kere MACA Working Party speaks for Ngāti Kere in respect of its interest under the Takutai Moana Act.

[564] In *Ngāi Tūmapūhia*,[257] I summarised the test to establish "substantial interruption" citing the Court of Appeal decision in *Re Edwards*. In respect of Ngāti Kere none of the examples of port activities, significant harbour development, wastewater pipes reducing the gathering of kaimoana, are present in this rohe.

[565] As discussed below, SIR submitted that commercial fishing in the whole of the application area has had a significant impact on customary activities and has resulted in substantial interruption of the exclusive use and occupation of the applicants. As I have concluded, I do not accept that is the case on the evidence in the application area.

[566] I conclude that Ngāti Kere has met the s 58 criteria in relation to the area from Ouepoto in the north, to the southern bank of the Wainui Stream. The evidence was

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256 At [4.195].
257 *Ngāi Tūmapūhia*, above 7, at [629] and following.

not sufficiently strong or consistent to show satisfaction of the criteria in the extension area, at least in the absence of acknowledgment by Rangitāne and Te Hika o Pāpāuma of shared interests in that rohe.

Ngāti Kahungunu

[567] Ngāti Kahungunu made an overarching, korowai application for the benefit of all Ngāti Kahungunu hapū, marae and whānau with interests in the takutai moana of the Wairarapa and Tāmaki nui-a-Rua. The application was filed in order to ensure that the interests of all Ngāti Kahungunu hapū in the takutai moana of the Wairarapa and Tāmaki nui-a-Rua could be recognised, in the event they did not file their own applications.

[568] All of the applicant groups in this proceeding affiliate to Ngāti Kahungunu and are recognised either directly or through affiliated hapū in the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act 2022.

[569] Robin Pōtangaroa was the only witness for Ngāti Kahungunu.[258] Mr Pōtangaroa suggested in cross examination that the end result in respect of the overlapping applications of Ngāti Kahungunu, Rangitāne, Te Hika o Pāpāuma Mandated Iwi Authority, Pirere whānau and Trustees of Pāpāuma Marae, will be a CMT order at hapū level, in favour of Te Hika o Pāpāuma, with "an acknowledgement of all the different groups through their whakapapa linkages". Mr Pōtangaroa suggested this might reflect the manner in which customary owners in the Mataikona Block asserted their interests in 1895, through Te Matau, but also through the relevant descent lines. Ngāti Kahungunu's position is that any rights under the Takutai Moana Act in this application area should not be recognised and held at an overarching iwi level.

[570] In light of the applications subsequently filed by or on behalf of various Ngāti Kahungunu-related groups, it is not necessary to assess Ngāti Kahungunu's evidence against the s 58 criteria.

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[258] Mr Pōtangaroa also gave evidence for the Trustees of Pāpāuma Marae.

Does commercial fishing amount to substantial interruption?

[571] As in a number of other cases under the Takutai Moana Act, the SIRs participated in this hearing as an interested party.

[572] The SIRs' evidence and submissions questioned whether the applicants have retained exclusive use and occupation of their application areas and whether the extent of commercial fishing in the application areas amounts to substantial interruption of the applicants' rights, in terms of s 58(1)(b)(i) of the Act.

[573] The Court of Appeal's approach to what constitutes substantial interruption is set out at [91]–[94] above.

[574] The SIRs submit that (following the Court of Appeal decision in *Re Edwards*) third party activities authorised by an act of Parliament (such as fishing) without the permission of the customary owner may substantially interrupt the use and occupation of the area.

[575] The SIRs say that three aspects of legislative regulation of the coastal and marine area are relevant:

(a) There is a regulatory framework which authorises commercial and recreational fishers to fish.

(b) The applicants are restricted in fishing for sale and their customary fishing rights may also be exercised only pursuant to a regulatory regime, under the Fisheries (Kaimoana Customary Fishing) Regulations 1989, which restricts fishing by quantity and species and location and imposes reporting obligations.

(c) Section 89(1) of the Fisheries Act 1996 is also relevant. It provides that no person shall take any fish, aquatic life, or seaweed for sale by any method unless in possession of a current fishing permit. Under s 91(3) a fishing permit authorises the taking of stocks.

[576] The effect is that all lawful fishing in New Zealand is therefore undertaken pursuant to a statutory authorisation.

[577] The evidence for the SIRs focussed on the nature and extent of commercial fishing operations along the north Wairarapa coast, over an extended period of time. Daryl Sykes gave evidence for the SIRs. As Mr Sykes noted, a significant commercial inshore fishery has operated within the application area since at least the 1930s. Larger inshore vessels operate from Wellington and Napier and trawl up and down the East Coast. Over the decades many thousands of tonnes of fish have been caught and over 700 tonnes per annum are still caught within the application area.

[578] Mr Sykes' evidence particularly emphasised the rock lobster and pāua fisheries within the application area. In relation to rock lobster, fishers live along the coast and launch their vessels across the beach. Rock lobster pots sit constantly on the seabed. In the 43 years between 1979 and 2021 there were approximately 6.4 million pot lifts within Statistical Area 913 alone. On average over the last 43 years, approximately 135 tonnes of rock lobster have been caught per annum. The substantial pāua fishery operating within the application area results in average catches of approximately eight tonnes per annum, with vessels launching over the beach.

[579] In each case whether there has been substantial interruption will depend on the intensity, nature and terms of the interruption. Evidence of fishing, navigation and access by third parties is not of itself fatal to an application for CMT. Nor is the fact that fishing has occurred without the consent of the applicant group, or shows a current inability to control the third party use of the application area, in itself fatal to an application for CMT.

[580] In cross-examination, witnesses for the applicants confirmed that the commercial fishing activity evidenced by SIRs had always been undertaken without their approval or consent and was not approved as an act of manaakitanga on their part.

[581] The thrust of the SIRs' questioning of many applicant witnesses was that tangata whenua had not exercised manaakitanga in the context of the introduction

and/or operation of commercial fishing in the rohe, and that this undermined in some way their exercise of mana and was a factor establishing substantial interruption.

[582] But, as counsel for Ngāti Kere put it, the argument made by the SIRs represents a fundamental misinterpretation of the concept of manaakitanga. The Court of Appeal included manaakitanga in a suite of activities that may demonstrate control or authority and show that it is a reciprocal relationship of care and hospitality.[259] The SIRs' evidence did not demonstrate what care or hospitality was reciprocated to tangata whenua. Furthermore, manaakitanga is a manifestation of tikanga that has validity when those expressing manaakitanga are able to do so within their broad suite of customary practices, including mana, tapu, kaitiakitanga and rangatiratanga, and not when their customary practices have been ignored and impeded by the imposition of a Western-based fishing regulatory system.

[583] Counsel for Ngāti Kere also disputed the logic of the distinction between "commercial fishing" and "Māori interests". The quota management system was introduced in contravention of Te Tiriti of Waitangi, resulting in a significant settlement and transfer of commercial fishing assets to iwi. Mr Sykes, for the SIRs, and the pūkenga, Dr Joseph, agreed that the basis of that settlement was a recognition that the rights lay with whānau and hapū, and this was also the position revealed through questioning by counsel for Ngāti Kahungunu.

[584] In *Ngāi Tūmapūhia*,[260] I addressed the same question, whether commercial fishing on the southern Wairarapa coast amounted to a substantial interruption. I concluded that the evidence of commercial fishing in the application area was insufficient to amount to a substantial disruption of the applicants' exclusive use and occupation.[261]

[585] In the case before me Mr Scott, counsel for the SIRs, submitted that the nature and scale of commercial fishing in this application area grounded an even stronger claim than in *Ngāi Tūmapūhia* that it amounted to substantial interruption.

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259 *Re Edwards*, above n 12, at [127]; see also *Ngai Tūmapūhia*, above n 7, at [181] and [191].
260 *Ngāi Tūmapūhia*, above n 7, at [632]–[662].
261 At [662].

[586] Since the *Ngai Tūmapūhia* decision, the same question has been considered by the Court in *Ngāi Hapū o Tokomaru Akau*.[262] In that case the SIRs submitted that the applicants did not have the legal or practical ability to exclude third party use of the specified area since 1840 and that this, combined with commercial fishing in Tokomaru Bay, amounted to a substantial interruption of the applicants' exclusive use and control. As in this case and in *Ngāi Tūmapūhia*, the SIRs called evidence of the material impact of commercial fishing on the size of the fish stocks, leading to depletion of those stocks.

[587] The evidence for the SIRs is that commercial fishing has had a material impact on the size of the fish stocks (biomass or abundance), with that biomass now well below [30–40 per cent] that which existed when commercial fishing commenced. There is no doubt that commercial fishing has had an impact on the applicants. Many witnesses for the applicants acknowledged the depletion of fisheries resources on their coast, with a consequent impact on their ability to fish and gather kaimoana. Nevertheless, they have continued to assert their customary rights and to fish and gather kaimoana in their rohe moana in accordance with custom. They have also protested for the preservation of kaimoana in the application area to the fullest extent of the law.

[588] I note Miller J's comment in *Re Edwards* where he said:[263]

> Even regular commercial fishing is a transitory use. If the resource is properly managed, it seems unlikely that fishing would so deplete the resource as to cause an applicant group to abandon the area.

[589] As I found in *Ngāi Tūmapūhia*, and as Cull J concluded in *Tokomaru*, the applicants have continued to access the application areas to fish and gather kaimoana. Justice Cull observed:[264]

> I consider the Seafood Industry's submission confuses depletion of fishery stock with the applicants' ability to continue their customary fishing practices as part of their use and occupation of the application area. The "substantial interruption" relied on by the Industry relates to how much fish or fish stocks can be obtained, not that they can no longer use those parts of the area that were historically used for fishing. Those areas are still accessed by the hapū

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262 *Tokomaru*, above n 101.
263 *Re Edwards*, above n 12, at [182].
264 *Tokomaru*, above n 101, at [394].

> members and they have taken what measures they can, lawfully, to prevent further depletion.

[590] I agree with that observation and conclude that commercial fishing has not amounted to substantial interruption of the applicants' rights in this application area.

Seaward boundary of CMT

[591] The Takutai Moana Act defines the area within which the Court can recognise Māori customary rights. The seaward boundary of the marine and coastal area is defined in the Act as being "… the outer limits of the territorial sea". This is commonly referred to as the "12 mile limit" which extends from the baseline of the territorial sea. The seaward boundary of the territorial sea is "…every point of which line is distant 12 nautical miles from the nearest point of the baseline". The baseline of the territorial sea is the low-water mark along the coast of New Zealand.[265]

[592] All applicants have applied for CMT out to the 12 nautical mile limit.

[593] Orders in those terms are opposed by the SIRs. Mr Scott pointed to the small and scattered Māori population in the application area as at 1840, the weather and sea conditions offshore, and the availability and abundance of seafood in the intertidal area and close coastal waters (encompassing any adjacent reefs) to submit that the seaward boundary of the applications must be limited. That, counsel said, is consistent with the historical evidence indicating seaward boundaries close to shore and incorporating the rocks and reefs immediately adjacent to the land.[266] In counsel's submission, the contemporary evidence given by most of the applicants' witnesses was in turn consistent with that historical evidence.

[594] Counsel pointed to the absence of maps provided by the applicant witnesses showing fishing grounds or fishing locations, either close to shore or offshore and submitted that absence is consistent with any fishing grounds further from the

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265 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 5.

266 Dr Foss Leach "Depletion and loss of the customary fishery of Ngāti Hinewaka" (2003), Paper given on behalf of Ngāti Hinewaka to the Waitangi Tribunal; and Waitangi Tribunal *The Wairarapa ki Tararua Report Volume III: Powerlessness and Displacement* (Wai 863, 2010) [Wairarapa Report Volume III] at 983.

coastline being used less regularly and not viewed as a territorial area where access was able to be, or was in fact, controlled.

[595] Counsel also noted that, apart from the Mataikona block, most of the coastal land adjacent to the application area is in private ownership and has been since the latter part of the 1800s. Under s 59(1)(a), whether the applicant group or any of its members own land abutting all or part of the specified area and have done so, without substantial interruption, from 1840 to the present day, is a matter that may be taken into account in determining whether CMT exists in a specified area.

[596] Counsel for the Attorney-General also expressed doubt that the applicants' evidence was sufficient to demonstrate patterns of observation, control or regular use to the 12 nautical mile boundary sought. Few witnesses gave evidence of fishing and navigating out towards the 12 nautical mile limit. The evidence was general and patterns of observation, control and regular use remained focussed on the inshore fishery or at the coastline.

[597] SIRs was critical of the fact that all applicants sought CMT out to 12 nautical miles, without explanation as to why that distance was used as the seaward limit of their application area, or how that limit was defined in terms of their tikanga, either in the present day or as at 1840.

[598] The answer was plain from the applicants' evidence and submissions.

[599] In her evidence, Anita Broughton noted that the Te Hika o Pāpāuma Mandated Iwi Authority Trust Deed records "the extent of the seaward line is 200 nautical miles". Counsel for Te Hika o Pāpāuma notes that the 12 nautical miles outer limit, advanced by all applicants, may be termed "arbitrary", but as the Waitangi Tribunal observed:[267]

> A difficulty occurs today when people, both Māori and Pākehā, try to translate this customary network of rights and connections into an environment of 'straight line' boundaries.

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[267] Waitangi Tribunal *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 18.

[600] Mr Watson, counsel for Ngāti Kere, also observed the 12 nautical mile limit in the Takutai Moana Act is a limit set by territorial zones, not by tikanga. As counsel notes, there is no evidence of a tikanga-based territorial limit. That is not part of the tikanga approach. What was tikanga should dictate.

[601] The Attorney-General acknowledged the inherent difficulty associated with recording and conveying definitive evidence of a strong presence in particular parts of the offshore application areas, as noted by the Court of Appeal in *Re Edwards*,[268] but submitted the Court should nevertheless expect to see some evidence of specific and repeated travel to measurable distances or identifiable locations, to substantiate CMT beyond the inshore area.

[602] The majority of the Court of Appeal in *Re Edwards* said that an applicant for CMT does not have to demonstrate the practical ability to prevent access to the area in question.[269] But, as canvassed earlier in this judgment, use of a particular resource in an area will not in and of itself be sufficient to amount to exclusive use and occupation. The applicant must show a "strong presence", which will be "more difficult to demonstrate in relation to marine areas than in relation to coastal areas", because of "their nature and the different ways in which such areas can in practice be used".[270]

[603] The majority concluded:[271]

> The result may be that it is more difficult to establish CMT in respect of marine areas other than inlets and shallow coastal waters. That is because the ways in which such areas are used is often more akin to a use/resource right than a right of exclusive occupation of the kind that founds customary title of a territorial nature. At common law those rights could have been translated into strong (non-territorial) rights exercisable against third parties to protect access to the resource. But MACA precludes this: only territorial rights translate into CMT, with other rights protected through PCRs (or other mechanisms, for example in relation to customary and commercial fishing).

[604] Although the Court of Appeal did not appear to apply tikanga, or "ancient custom and usage", in in its brief discussion of assessing the appropriate level of use

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268 *Re Edwards*, above n 12, at [422] per Cooper P and Goddard J.
269 At [429] and [434].
270 At [422].
271 At [423].

and occupation of to establish CMT in a marine area, the Court did apply tikanga elsewhere. Justice Miller's judgment said:[272]

> MACA employs tikanga in connection with both PCRs and CMT: … in s 58(1)(a) it provides that CMT exists in a specified area if the applicant group holds the area in accordance with tikanga. So a court must ascertain what tikanga applies to that part of the rohe moana which is the subject of an application for a recognition order.

[605] Justice Miller went on to say:[273]

> MACA does not speak of mana whenua or mana moana. But it is expressly concerned with mana tuku iho over defined parts of the common coastal and marine area, and mana unmistakeably lies at the heart of this case for the iwi and hapu parties.

[606] Although Miller J concluded that the evidence in that case did not justify a CMT recognition out to the 12 nautical mile limit, he went on to say:[274]

> This is not to suggest that CMT is confined to specific fishing grounds or other resources. It may extend to all the rohe moana exclusively occupied and used by an applicant group for purposes such as passage and navigation as well as resource-gathering. I have noted evidence that a group's takutai moana includes areas adjacent to their land. There is also evidence that in Māori customary law, rights of control are also linked to resources, and most of the evidence about offshore use in this case concerns resources; in particular, fish. So the inquiry into CMT must recognise resource boundaries.

[607] The majority in *Re Edwards* did not differentiate between incidences of use and occupation on land and incidences of use and occupation at sea. But as Miller J noted, "The legislation envisages that case-by-case inquiries will establish the intensity of use and occupation required for exclusivity by reference to the particular circumstances of applicant groups and the particular characteristics of specified areas".[275] That must be so both in relation to the whenua and to the moana. The indicia of use and occupation will vary.

[608] The starting point is that, pre-colonisation, all of Aotearoa New Zealand was held by Māori according to their tikanga and customs.[276] As Elias CJ said in *Ngāti*

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272 At [124].
273 At [133].
274 At [320].
275 At [193].
276 *Attorney-General v Ngāti Apa,* at [51].

Apa, that "ownership" extended beyond the dry land to include the marine and coastal area also.

[609] Andrew Erueti and Joshua Pietras have observed:[277]

> … while land rights may not have received formal recognition domestically (eg through some grant of title), provided there are rights grounded in customary ownership, use and occupation then international law will recognise the right.[278] In the Report on the Crown's Foreshore and Seabed Policy (Foreshore Report), the Waitangi Tribunal noted, "[i]t has been Crown policy from 1848 to the present day to recognise that Māori, according to their own customs and usages, had rights equating to ownership of the entire land surface of New Zealand".[279] The Tribunal could, therefore, see "no reason why Māori custom should stop where or when the tide comes in".[280] Māori did not draw a sharp distinction between rights in land and water adjacent to their communities. In fact, the Waitangi Tribunal has gathered extensive evidence documenting Māori interests in the off-shore area. The Ngāi Tahu and Muri Whenua Fishing Reports, for example, noted how as at 1840 hapū fishing grounds were often located well off-shore – at the very least within a 12-mile zone, and sometimes much further out.[281] In the Foreshore Report, the Tribunal concluded Māori tribes exercised *te tino rangatiratanga* over the foreshore and sea in 1840.[282] Furthermore, the rights held by Māori at 1840 were not frozen as at 1840. The Tribunal noted the need to recognise that Māori rights could evolve and develop – so, for example, the development of a deep-sea commercial fishing resource was available to Māori under the Treaty. And, according to the Tribunal, nothing could foreclose the right to development in relation to "Māori te tino rangatiratanga over the seabed (and its minerals)".[283]

[610] Mr Ferguson, counsel for Ngāti Kahungunu, referred the Court to *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board*,[284] a case where the appellant sought marine consents and marine discharge consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act), to undertake offshore seabed mining for iron sands. The proposed

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277 "Extractive industry, human rights and indigenous rights in New Zealand's Exclusive Economic Zone" (2013) 11 New Zealand Yearbook of International Law 37 at 66, cited in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [155], n 249 where Ellen France J appeared to approve that statement.

278 *Sara Maka People v Suriname (Judgment – preliminary objections, merits, reparations, and costs)* Inter-American Court of Human Rights SER C No 172, 28 November 2007 at [129]–[134].

279 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 18.

280 At 18.

281 Waitangi Tribunal *The Ngāi Tahu Sea Fisheries Report* (Wai 27, 1992); Waitangi Tribunal *Report of the Waitangi Tribunal on the Muri Whenua Fishing Claim* (Wai 22, 1998).

282 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 27.

283 At 28. See also, the Waitangi Tribunal *Ahu Moana: the Aquaculture and Marine Farming Report* (Wai 953, 2002) at 54–77.

284 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 277.

mining area was adjacent to, but not within, the Coastal Marine Area (CMA), governed by the Resource Management Act 1991 and the New Zealand Coastal Policy Statement.

[611] Of relevance to this case, the Supreme Court there recognised that the relevant iwi at the coast around Taranaki held existing interests under customary law in the form of mana moana and kaitiakitanga responsibilities in the area subject to the resource consent application. The application was in New Zealand's EEZ, adjacent to the takutai moana, and beyond the boundary of the territorial sea / 12 nautical miles.

[612] One aspect of the appeal concerned the effect of s 12 of the EEZ Act, which sets out the way in which the Crown's responsibilities in terms of the principles of the Treaty of Waitangi are to be given effect, and the interrelated question of the of the requirement that the Decision-Making Committee of the Environmental Protection Authority must take into account any effect on existing interests of allowing the activity the subject of the application for a marine consent.

[613] In this context Williams J said:[285]

> As to what is meant by "existing interests" and "other applicable law", I would merely add that this question must not only be viewed through a Pākehā lens… As the Court of Appeal rightly pointed out, the interests of iwi with mana moana in the consent area are the longest-standing human-related interests in that place. As with all interests, they reflect the relevant values of the interest-holder. Those values - mana, whanaungatanga and kaitiakitanga - are relational. They are also principles of law that predate the arrival of the common law in 1840.

[614] Justice Williams cross-referenced parts of the judgment given by William Young and Ellen France JJ. In particular:[286]

> In challenging the Court of Appeal's approach, TTR [Trans-Tasman Resources Ltd] emphasises that existing interests in the EEZ Act reflect the interests a person has in any lawfully established activity rather than the relationship a person has with a particular resource. However, as the iwi parties submit, practice and principle in this respect are intertwined. Kaitiakitanga manifests itself in an activity. Nor do we find persuasive TTR's submission that New Zealand's limited 'sovereign rights' in the EEZ, where the proposed seabed mining will take place, means that case law on how the

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285 At [297].
286 At [155].

> principles of the Treaty are to be recognised by decision-makers under other environmental legislation has little relevance. The nature of New Zealand's rights does not dictate the scope of existing interests in the EEZ Act.

[615] In similar vein, Ngāi Tūmapūhia and the Pirere whānau advocate for a broad approach to evaluating intensity of use and occupation in relation to the outer sea, in the same way that Judge Acheson did in *Re Lake Ōmapere*, a decision of the Native Land Court, where the Judge relied on "ancient custom and usage" for his evaluation of Māori ownership in a lake.

[616] Judge Acheson doubted whether Māori customary interests in features such as rivers and lakes was adequately rendered by concepts more familiar to English property law.[287] As the Judge said:[288]

> [Māori] … would see no more reason for separating the lake from its bed (as to the ownership thereof) than he would see from separating the rocks and the soil that comprise a mountain.

[617] In conclusion Judge Acheson observed that:

> … the Ngapuhis used and occupied Lake Omapere for all purpose for which a lake could reasonably be used and occupied by them, and [that] the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all.

[618] In *Ōmapere* the "signs of ownership" identified by the Court were use rights. In terms of occupation, nearby human habitation was identified, as opposed to occupation of the body of water itself.

[619] Judge Acheson held that the court could grant titles to the beds of lakes. Subsequently, in 1955, Lake Ōmapere was vested in trustees on behalf of all persons of the Ngāpuhi tribe" by an order of the Land Court.

[620] The cases cited above reinforce that tikanga (Māori "custom and usage") forms a core part of the CMT test and point to the necessity of a tikanga approach when evaluating intensity of use and occupation in relation to the outer sea.

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287 *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at [70].
288 *Lake Omapere* (1929) 11 Bay of Islands MB 253 at 259.

[621] Witnesses in this hearing, from across the applicant groups, described themselves as being a part of the takutai moana and it forming an integral part of their identity, with no defined boundary on this connection to the sea.

[622] The witnesses gave kōrero about their elders fishing for deep-water fish. The applicants are people who have lived near, with and on the moana; they descend from deep-sea voyagers such as Kupe and are a "sea people".

[623] That is consistent with the Supreme Court's statements in *Trans-Tasman Resources Ltd* and the Waitangi Tribunal's comments in its *Wairarapa ki Tararua Report*:[289]

> ***(2) Mana extended offshore***
>
> Māori conceived their mana as extending to fishing rocks, submerged rock pinnacles, and fishing holes offshore. Such places were identified and named in the minutes of the Wairarapa and Te Maipi Native Land Court hearings in the 1880s and 1890s. Dr Leach gave as examples Te Ruaara, an offshore fishing rock where hāpuku congregate, and Te Hohonu, a fishing hole where kōura are caught off Te Hūmenga. Takirirangi Smith, using the records of the Te Maipi hearings in September 1888, described a number of rua kōura and rua hāpuku (crayfish and groper holes) owned by those giving evidence. These were located not within the land area claimed but offshore.

[624] The applicants also gave evidence of asserting their mana through the practice of tikanga values — such as identification and naming of places and the placing of rahui. Hana Riddell, Langdale Rolls and Dr Smith all gave evidence of the imposition of rāhui.

[625] Mr Alexander, the witness who provided an historical report for the Pirere whānau, observed that rāhui in the case of drowning would extend to "anywhere where there was a concern that the bodies might have been swept to by the currents and tides." In cross-examination, Mr Alexander referred to a rāhui that was placed in 1905 after two Māori women who were fishing at Castlepoint were swept off the rocks and drowned. The rāhui was placed over the "surrounding seas". When asked about the particular area that the rāhui covered, Mr Alexander suggested that "it would be anywhere where there was a concern that the bodies might have been swept to by the

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289 Wairarapa Report Volume III, above n 266, at 955 (citations omitted).

currents and tides". Mr Alexander's evidence was that "[l]ocal residents, both European and Māori, respected the rāhui…".

[626] There is no evidence of a limit on the seaward extent of the prohibition or ban that applies in the event of rāhui.

[627] Ngāi Tūmapūhia also provided evidence of their presence further out to sea. For example, Hana Riddell gave evidence of her father's voyages to the Hikurangi Trench, which lies 65/125 kilometres southeast of the Wairarapa Coast. Her father, together with other hapū members, would fish there for important hapū occasions such as weddings. Ms Riddell also spoke of hapū members taking fishing trips to the Pinnacles. Leaving from Uriti or Whareama, those trips could take up to two to three days.

[628] Ngāi Tūmapūhia also provided evidence of whānau catching many types of fish, including orange roughy, species which can generally only be found in deeper waters.

[629] Dr Takirirangi Smith gave evidence of traditional methods of deep-sea fishing known to Ngāi Tūmapūhia which are prevalent in a wider discourse of whakapapa korero narratives discussed by Nepia Pōhūhū and others.

[630] For the Pirere whānau, James Davidson gave written evidence of fishing for hāpuku up to 12 nautical miles offshore. While there was some confusion about exactly how far out he went, Mr Davidson confirmed that he went out "very deep" and "out a long way" for hapuku. Mr Davidson also gave evidence about going out about seven kilometres from the shore to the reefs, to get crayfish.

[631] There is also other evidence of fishing in and around the Pāpāuma Coast beyond the 12 nautical mile limit, with reference to the Hikurangi Trench and the Uriti Bank, the naming of the seabed, the archaeological recovery of hapuka bones and the current catching of fish — hapuka, groper, blue cod — at the Uriti Bank, beyond the 12 nautical mile limit.

[632] The importance of the Hikurangi Trench was discussed by Demetrius Pōtangaroa, in his evidence for the Pāpāuma Marae Trustees, noting that his people had exercised their customary rights all the way out to the Trench seeking kaimoana.

[633] In other evidence, Cheryl-Anne Brought-Kūrei told of her uncles and koroua going deep-sea fishing in boats from Cape Turnagain to Cape Palliser, right along the coastline.

[634] Paul Peeti, for Te Hika o Pāpāuma, noted that to catch fish species such as groper/hapuka, "you probably have to go five kilometres off some of those, on some of those reefs", which equates to approximately 2.69 nautical miles offshore.

[635] Mr Broughton, also a witness for Te Hika o Pāpāuma, did not have direct evidence of his own involvement offshore, but considered his father in law would have gone out to approximately 25 to 30 kilometres (13.5-16.1 nautical miles) offshore when he used to deepwater fish within their application area.

[636] Demetrius Pōtangaroa, for the Pāpāuma Marae Trustees gave evidence that he fished out to the Hikurangi Trench.

[637] In counsel's submission, the evidence shows conclusively that the Pāpāuma Marae Trustees whānau have historically fished up to and beyond the 12 nautical mile territorial sea limit.

[638] A number of applicant groups also gave evidence about the exercise of kaitiakitanga in the outer sea, including in their role as tangata kaitiaki/tiaki under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 (Kaimoana Regulations), which specifically outlines their authority to issue customary fishing permits extending out to 12 nautical miles.

[639] Ngāi Tūmapūhia members, including Gary Griggs, are responsible for permitting customary take. They are designated tangata kaitiaki under the Fisheries (Notification of Ngāi Tumapuhia-ā-Rangi Māori Marae Committee Tāngata Kaitiaki) Notice 2015, which extends out to 12 nautical miles. The 2015 Notice was issued

pursuant to reg 11 of the Kaimoana Regulations; the regulations are promulgated under s 186 of the Fisheries Act 1996. That is, their control of customary take is statutorily authorised. Counsel submits this is further evidence of a "strong presence" out to the 12 nautical mile territorial sea limit from Whareama River.

[640] In the case of Ngāi Tūmapūhia, as kaitiaki, Ngāi Tūmapūhia members Phillip Paku and Hana Riddell both referred to holding commercial fishers to account regarding their catch amounts, including reporting overfishing to Te Tai Whenua. Counsel submits that those acts of inspection indicate a "strong presence" throughout the application area. Nor is this a new role. Hana Riddell was taught to do so by her uncles and inherited the role of a voluntary inspector as a young adult.

[641] Pikihuia Wilton was appointed tangata kaitiaki in 2003, for the area from Mataikona to Whareama and out perpendicular to the 12 nautical mile limit (the kaitiaki jurisdictional area). Ms Wilton was appointed pursuant to reg 11 of the Kaimoana Regulations, which gave her the power to authorise the taking of fisheries resources for customary food gathering. Rebecca Harper referred to Ms Wilton in her evidence, saying Ms Wilton "signed permits and then her son Tommy took over". Counsel notes that although Ms Wilton's statutory authorisation was on behalf of Te Hika o Pāpāuma, it is evident that she had close ties to the Pirere whānau. It is through their Pirere whānau membership that they are Te Hika o Pāpāuma hapū members and so integral to their permit authorisation is their being members of the Pirere whānau.

[642] Counsel submits that the granting of permits by Pirere whānau members for customary take gave the whānau a "strong presence" in the entire application area, since the kaitiaki's jurisdictional area wholly encompasses the application area out to 12 nautical miles. Today, Tommy Davidson will seek customary kaimoana gathering permits from Dane Rimene, Rose Broughton or Mike Kawana.

[643] As with Ngāi Tūmapūhia and the Pirere whānau, Te Hika o Pāpāuma also refers to the Fishing Gazette Notice which provides for the named Tangata Kaitiaki, to manage customary food gathering within the rohe moana by the issue of permits. As counsel submits, the Fisheries Notice is grounded on mana, occupation, usage,

tikanga-based practice, and tino rangatiratanga. The law follows tikanga, by confirming representation for customary food gathering.

[644] The Fisheries Gazette Notice, which was first issued in 2003, has been updated periodically since then and remains current. Te Hika o Pāpāuma has for over 20 years operated tikanga over their coastline under legally sanctioned authority.

[645] Ngāti Kere gave evidence of fishing far offshore and of exercising kaitiaki responsibilities under the Kaimoana Regulations.

[646] Ngāti Kahungunu also referred to Māori active involvement in the fisheries quota management regime through the 1992 Fisheries Settlement. As a consequence of the Fisheries Settlement and as a development of their customary interest in fisheries, iwi are allocated quota for both inshore and deepwater stocks, reflecting their rights and interests out to sea. Deepwater stocks are allocated based on both coastline interests and relative iwi population. Although these quota allocations are fished and/or leased out at the iwi level, the basis on which they were allocated the quotas along the Wairarapa coastline was because of the customary interests of hapū on the coastline. These hapū are now represented by the applicant groups in Stage 1(b).

[647] In conclusion, counsel for Ngāti Kahungunu submitted it is not necessary for applicant groups to give specific examples of fishing out to 12 nautical miles across the whole of the Stage 1(b) hearing area. All applicants say that the evidence is sufficient for the Court to draw inferences that the applicant groups have held, used and occupied the takutai moana out to 12 nautical miles in accordance with tikanga. The practice of tikanga values can itself found legal recognition.[290]

Conclusion

[648] In *Ngāi Tūmapūhia*,[291] I observed that a "strong presence" inevitably looks different in the marine area than on land. It is necessary to look at different ways of measuring and assessing that presence. Intensity of use will inevitably — by the very nature of the outer sea — be different, likely less. Applying tikanga to the evaluation,

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290 Relying on *Ngāi Tūmapūhia*, above n 7, at [611].
291 At [610]–[612].

the identification and naming of significant landmarks, the imposition of rāhui, and the exercise of kaitiakitanga, might all constitute a manifestation of mana and control. A rāhui is proclaimed by those with sufficient mana to do so: the placing or declaration of a rāhui is a right reserved to the group controlling the area concerned;[292] evidence of the exercise of kaitiakitanga and the imposition of rāhui, by way of example, are evidence of a continued presence and stewardship over those marine areas.

[649] In cross-examination, the pūkenga agreed that the incidences of use and occupation required to demonstrate stewardship over waterways are different from those that demonstrate ownership of whenua and the applicable tikanga is such that "much less use and occupation would be ample" for a water body such as the marine area.

[650] As is plain from the discussion above, I agree with the applicants that it might be possible to grant CMT out to 12 nautical miles for the whole of the application area, allowing for less intensive use and occupation than would be required in other parts of the common marine and coastal area. That point could be reached on the basis of the combined effect of evidence about fishing, exercising the role of kaitiaki, using the sea as a place of passage, and exercises of mana in various forms. Holding in accordance with tikanga out to that distance can be readily inferred as at 1840 and for some time after.

[651] But even allowing that the extent and indicia of use will be less in the outer sea area, ultimately I have concluded that the evidence, even taken as a whole and allowing for inference, is patchy and not sufficiently consistent to demonstrate that the applicants do presently hold the outer sea area — have a "strong presence" — out to 12 nautical miles in the manner required by the Takutai Moana Act.

[652] While the evidence varied from applicant to applicant, there were consistent elements (detailed above and discussed separately in relation to each applicant) which enable me to conclude that that the sea area is held according to tikanga out to a distance of five kilometres from the low water mark along the coastline of the application area.

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[292] *Re Edwards*, above n 12, at [165] per Miller J.

Wāhi tapu

[653] An applicant group to which a CMT order applies may seek to include recognition of a wāhi tapu or a wāhi tapu area in a CMT order.[293] A wāhi tapu protection right may be recognised if the evidence establishes the criteria set out at s 78 (2) of the Takutai Moana Act.

[654] Hearing of the applicants' wāhi tapu evidence, and related submissions, are separately timetabled to follow release of this judgment.

PCRs

[655] The parties' applications for PCRs will be considered in the final judgment.

Orders

[656] While there was no equivalent of the *Ngai Tūmapūhia* mana moana agreement between the applicants in this Stage 1(b) hearing, nevertheless, the evidence was of interconnected relationships through whakapapa and whanaungatanga. There is a shared tikanga in relation to the use and occupation of the takutai moana along the Northern Wairarapa coast, as there was in the South Wairarapa coast. In many parts of the application area, there is an explicit acknowledgement by the applicants of the rights of other within the relevant parts of the application area. Where there is that acknowledgement it is appropriate, as in the earlier case, to consider the sum of the evidence put forward by the applicants in that application area, or in a particular rohe within the application area.

[657] For the reasons set out above, I have concluded that CMT orders should be made recognising the rights established in the following areas. The applicants will need to confer and agree as to how the CMT orders are formulated to incorporate the rights acknowledged below by way of joint CMTs and, in each case, who is the appropriate order holder. Subject to that further clarification, the CMT rights recognised are:

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[293] Takutai Moana Act, s 78(1)(a).

(a) Ngāi Tūmapūhia, in the area from the southern bank of the Whareama River to the northern bank of the Whareama River, from the mean high-water springs out to a line parallel to mean high-water springs five kilometres out to sea.

(b) Te Hika o Pāpāuma in the area from the southern bank of the Whareama River to Wainui/Herbertville, from the mean high-water springs out to a line parallel to mean high-water springs five kilometres out to sea.

(c) Pāpāuma Mare Trustees in the area from the Mataikona River in the south to the Owāhanga/Aohanga River in the north, from the mean high-water springs out to a line parallel to mean high-water springs five kilometres out to sea.

(d) Rangitāne in the areas specified at [411] above, from the mean high-water springs out to a line parallel to mean high-water springs five kilometres out to sea, and in right of the Rangitāne hapū specified at [411] above.

(e) The Pirere whānau from the southern bank of the Castlepoint Stream to the northern bank of the Ōkau Stream, from the mean high-water springs out to a line parallel to mean high-water springs five kilometres out to sea.

(f) Ngāti Kere from Wainui to Ouepoto, from the mean high-water springs out to a line parallel to mean high-water springs five kilometres out to sea.

Addendum

[658] After I had very substantially completed this judgment the Supreme Court issued its judgment on an appeal from the Court of Appeal's decision in *Re Edwards* (Supreme Court decision).[294]

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[294] *Combined Marine and Coastal Area (Takutai Moana) Act 2011 proceedings* [2024] NZSC 164.

[659] In those circumstances I have issued this judgment as an Interim Judgment. It was provided to the parties before public release and, as a result, has been corrected to deal with some minor errors, pursuant to r 11.10 of the High Court Rules 2016. The parties will now make submissions to the Court on whether and how the Supreme Court decision affects the law as it is relevant to this case. A final judgment will then be issued. The factual findings contained in this interim judgment will be incorporated in the final judgment and the date of that final judgment will be the determinative appeal date for all purposes..

Gwyn J

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APPENDIX I – Application area map

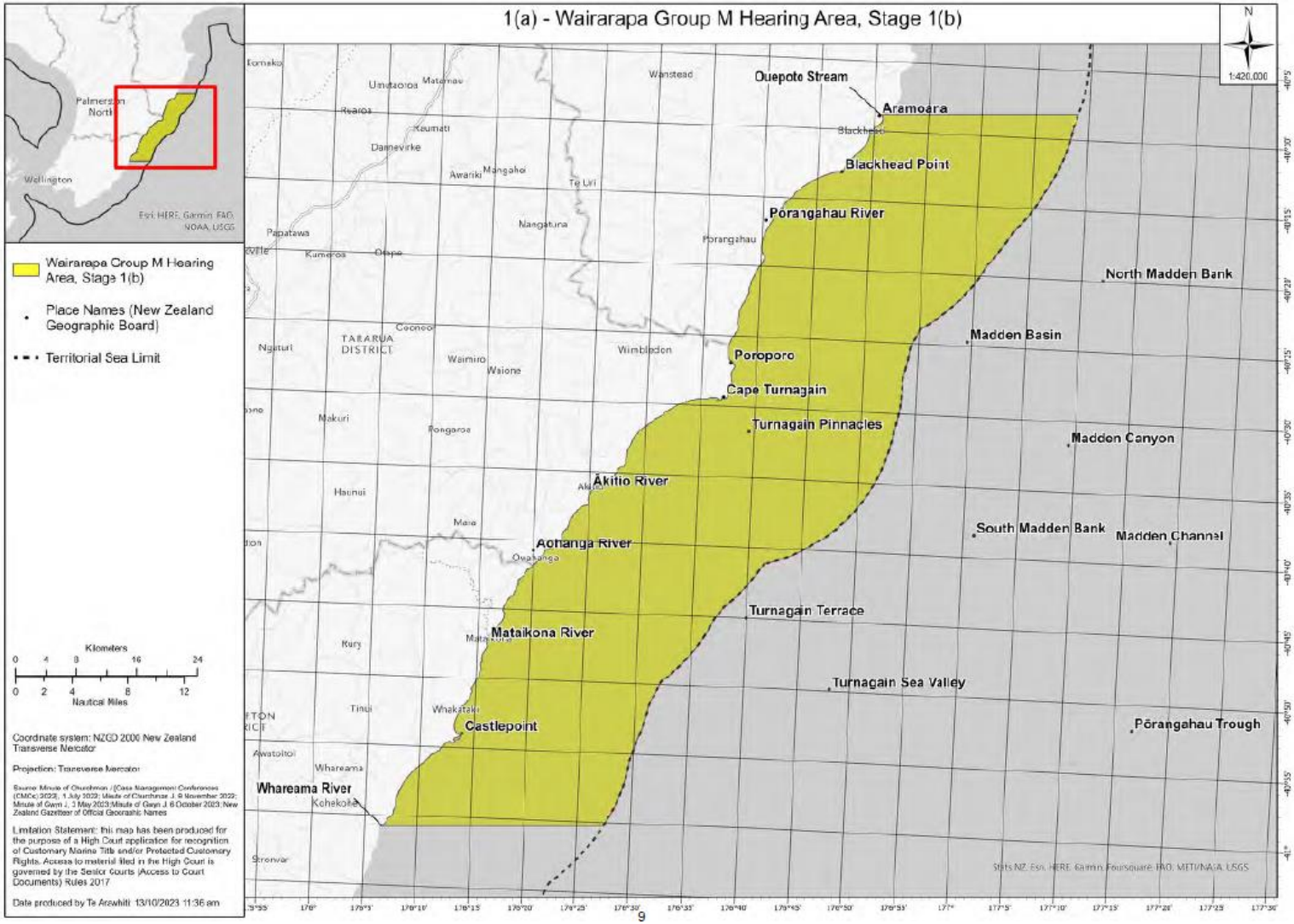

Figure 1: Application area map

APPENDIX II – Overlapping High Court applications map

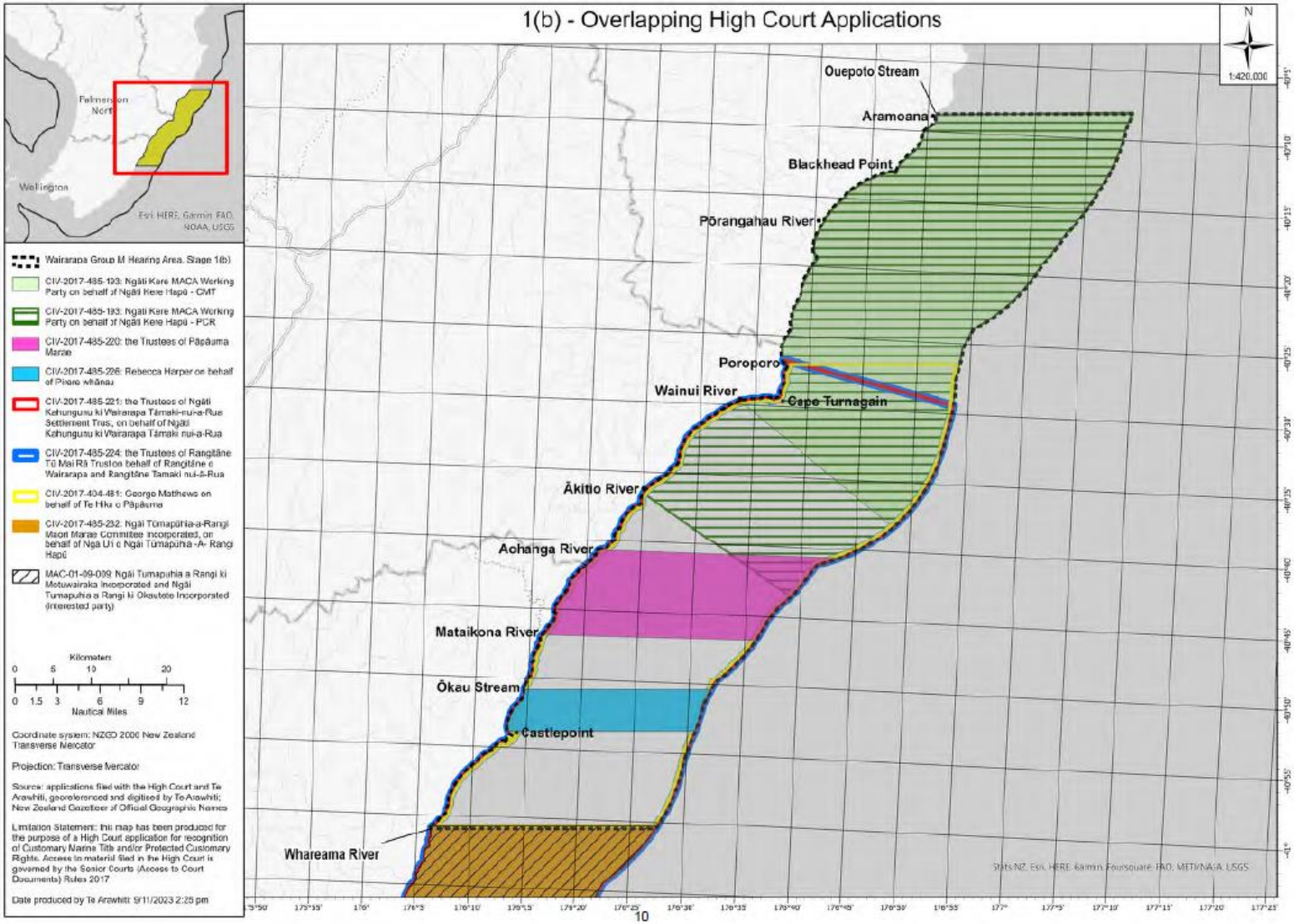

Figure II: Overlapping High Court applications map