IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC121/2023
SC123/2023
SC124/2023
SC125/2023
SC126/2023
SC128/2023
SC129/2023

BETWEEN **WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS), NGĀTI MURIWAI HAPŪ, KUTARERE MARAE, TE UPOKOREHE TREATY CLAIMS TRUST, THE ATTORNEY-GENERAL, NGĀTI IRA Ō WAIŌWEKA, NGĀTI PATUMOANA, NGĀTI RUATAKENGA, AND NGAI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA), NGĀTI RUATAKENGA**

Appellants

Cont.

SUBMISSIONS ON BEHALF OF CROWN REGIONAL HOLDINGS LIMITED AND ŌPŌTIKI DISTRICT COUNCIL

4 October 2024

Having made appropriate inquiries to ascertain whether these submissions contain any suppressed information, I certify that, to the best of my knowledge, these submissions are suitable for publication.

Mary Hawk Hill
Counsel for Crown Regional Holdings Limited and Ōpōtiki District Council

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AND	**TE TĀWHARAU O TE WHAKATŌHEA, NGAI TAI AND RIRIWHENUA HAPŪ, TE HAPŪ TITOKO O NGAI TAMA, TE RUNANGA O NGĀTI AWA, TE WHĀNAU A APANUI, LANDOWNERS COALITION INCORPORATED, SEAFOOD INDUSTRY REPRESENTATIVES, WHAKATĀNE DISTRICT COUNCIL, BAY OF PLENTY REGIONAL COUNCIL, CROWN REGIONAL HOLDINGS LIMITED, ŌPŌTIKI DISTRICT COUNCIL** Respondents / Interested parties / Intervenors

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MAY IT PLEASE THE COURT:

Introduction

1. These submissions are jointly made on behalf of Crown Regional Holdings Limited (**CRHL**) and Ōpōtiki District Council (**ODC**) as parties sharing similar interests in the appeals against the Court of Appeal's decision in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board*[1] (**CA Decision**).

2. Having reviewed the submissions filed by the Appellants, CRHL and ODC intend to focus on issues raised in two appeals:

    (a) The Attorney General (**AG**); and

    (b) Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (**Te Kāhui**).

3. These submissions address the following issues:

    (a) The interpretation of s58 MACA,[2] particularly the meaning of "substantial interruption"; and

    (b) Whether the beds of navigable rivers form part of the CMCA[3] and therefore subject to the grant of recognition orders under MACA.[4]

Summary of position

4. CRHL and ODC own and operate substantial community assets and infrastructure in areas of the CMCA subject to applications for recognition orders under MACA.

5. CRHL / ODC jointly submit that:

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[1] [2023] NZCA 504, [2023] 3 NZLR 252.
[2] The Marine and Coastal Area (Takutai Moana) Act 2011.
[3] Common Marine and Coastal Area, as defined in s9 MACA.
[4] "Recognition order" means a protected customary rights order or a customary marine title order, as the case requires, made under section 98(1). Defined in s9 MACA.

(a) The Court of Appeal set the bar too high for establishing substantial interruption, and developed unhelpful tests which divert from the ultimate (uncontroversial) conclusion that establishing substantial interruption involves a factual assessment, based on probative evidence, as to whether or not the plain wording of s58(1)(b)(i) has been achieved in fact – that is, whether the applicant group has exclusively used and occupied the specified area from 1940 to the present day without substantial interruption;

(b) Establishing substantial interruption, or relying on the "accommodated activities" and "accommodated infrastructure" exemptions, are not mutually exclusive. It is not axiomatic that port infrastructure (which can be accommodated infrastructure) cannot also amount to substantial interruption. These are two different pathways under MACA and might be pursued for different reasons;

(c) They do not take a position on the tikanga limb of s58 (subsection (1)(a));

(d) They endorse the submissions of Whakatāne District Council that other community assets (having less disruption than ports) can amount to substantial interruption;

(e) They endorse the High Court's finding and the AG's submissions to the effect that the beds of navigable rivers fall outside of the CMCA and are not available for recognition orders.

Background

CRHL and ODC interests

6. CRHL and ODC are both interested parties to these proceedings.[5]

7. ODC is a territorial authority having functions and powers under the Local Government Act 2002 (**LGA**). The Ōpōtiki District covers an area of 3,098km,[2] extending from Ōhiwa Harbour in the East to Pōtaka in the West.

8. The area of CMCA relevant to these proceedings falls within the eastern part of the Bay of Plenty Region and is directly adjacent to ODC's jurisdictional boundaries.[6]

9. As part of its LGA functions, ODC's role is to meet the current and future needs of its communities for good-quality local infrastructure and local public services in a way that is most cost-effective for households and businesses.[7] Examples of such infrastructure owned and operated by ODC adjacent to and within the relevant CMCA area include wastewater and stormwater network infrastructure, boat ramps, cycleways and walkways.[8]

10. In 2009, ODC was granted a suite of resource consents for the Ōpōtiki Harbour Development Project (**Harbour Project**), a significant regional infrastructure project to redevelop the Ōpōtiki harbour into a fully functional deep-water harbour, capable of supporting a large aquaculture industry.[9] Supported by more than $100 million of central and regional government funding,[10] the

[5] With rights to be heard pursuant to s104 MACA.
[6] ODC's regulatory functions do not directly involve control of the CMCA, that being within the jurisdiction of Bay of Plenty Regional Council under the Resource Management Act 1991 (**RMA**).
[7] Refer Affidavit of Aileen Lawrie dated 2 February 2022 CB Tab 277 [203.01416].
[8] Refer Affidavit of Gerard McCormack (No.2) dated 2 February 2022 CB Tab 276 [203.01410] and Affidavit of Aileen Lawrie dated 2 February 2022 CB Tab 277 [203.01416].
[9] Refer Affidavit of Gerard McCormack 18 May 2020 CB Tab 275 [203.01405].
[10] Affidavit of Gerard McCormack 18 May 2020 CB Tab 275 [203.01403].

Harbour Project is the most significant collection of infrastructure occupying the CMCA subject to these proceedings.

11. The resource consents for the Harbour Project authorise:

11.1 Erection of 400m-500m training walls (200m within the CMCA) and dredging and deposition of more than 50,000m³ of foreshore and seabed around the Waiōweka River mouth (Consent 65563);

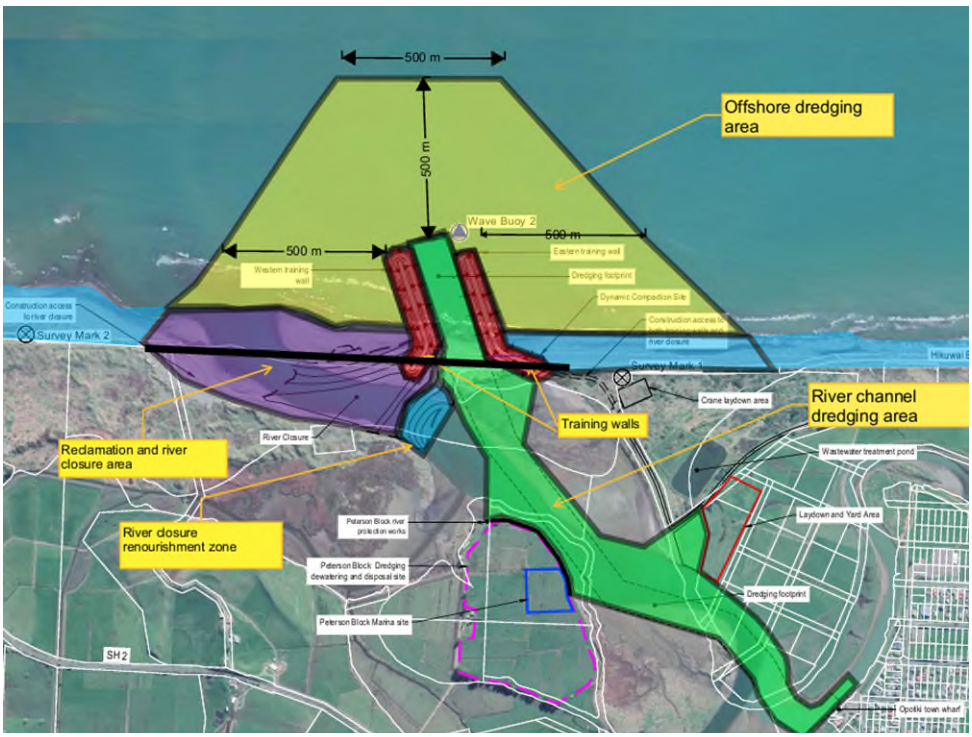
11.2 Vegetation clearance, earthworks of up to 10,000m,³ construction of two 5000m² groynes, stockpiling construction materials, cutting through an existing sandspit to create a new harbour entrance, earthworks associated with the disposal of up to 450,000m³ of dredged material to land, and associated discharge of sediment-laden water (Consents 65565, 65569);

11.3 Activities associated with constructing the harbour entrance and closing the Waiōweka River mouth including the erection, maintenance, and removal of temporary and permanent structures in, on, under and over the foreshore and seabed, removal of material, discharge of sediment and water, disturbance of the foreshore and seabed, and taking and diversion of coastal water (Consent 65566);

11.4 Activities associated with dredging 50,000m³ of material per year from the entrance channel, temporary structures in the CMCA, discharge to the CMCA, disturbance of the foreshore and seabed, taking of coastal water and depositing material in the CMCA (Consent 65567); and

11.5 Maintenance dredging and earthworks, and the associated discharge of contaminated water (Consent 65568).

12. Below is a snip showing the location and extent of the infrastructure and works for the Harbour Project:[11]



13. The black line is the CMCA boundary based on the High Court's finding, which was overturned by the Court of Appeal.

14. The green area south of the black line shows the location of consented works upstream of the mouth of the Waiōweka River and therefore within the area which the Court of Appeal has held forms part of the CMCA.[12] These works are described in the affidavit of John Galbraith for ODC (para 6.3(a)) as including:

    14.1 Part of the groynes / training walls (subject to final survey) and maintenance works for the walls, marked red (those parts south of the black line);

    14.2 Dredging of up to 50,000m^3 per year of the harbour entrance channel, marked green (that part south of the black line);

    14.3 Disturbance of the foreshore and seabed and earthworks associated with the active management of accretion and

[11] Exhibit A, Affidavit of John Galbraith CB Tab 683 [326.11763].
[12] Court of Appeal Decision, note 1 above, at [244].

erosion (renourishment) along the inner river areas marked in blue (south of the black line). Heavy machinery will be required to access these areas.

15. The resource consents for the occupation of Harbour Development infrastructure expire in 2044.[13] Consents authorising maintenance dredging to keep the harbour entrance open expire in 2038.[14]

16. The consent applications for the Harbour Project were strongly supported by the Ōpōtiki community, including some Whakatōhea iwi interests.[15] Evidence was presented at the consent hearing that the Harbour Project will result in the employment of 936 people and a contribution of $34.6 million to Ōpōtiki's local economy.[16]

17. ODC transferred the consents for the Harbour Project to CRHL on 4 August 2021.[17] CRHL took over responsibility for completing construction of the Harbour Project. The harbour walls are complete and were opened to the public in September 2024. Construction continues on the channel.

18. Following practical completion of all of the construction works (engineering sign-off) ODC will take over operation and maintenance obligations for the structures and future maintenance works under the resource consents, pursuant to contractual arrangements with CRHL.

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[13] Exhibit E to Affidavit of Gerard McCormack CB Tab 671 [326.11606 and 326.11624].

[14] Consents RC65567 and 65568 commenced when the new channel at the Waiōweka River mouth was opened in July 2023, and have a term of 15 years, from commencement CB Tab 671 [326.11682].

[15] Exhibit C to Affidavit of Gerard David McCormack (resource consent hearing decision) CB Tab 669 [325.11588]. The decisions report records (at p18) that *"The Tangata Whenua (Whakatōhea) supports this application and presented evidence in support of the applicant. The main basis on which the application is supported is that it is likely to help re-establish Whakatōhea economic base – something that has previously been significantly undermined. Also the proposal does not affect any areas of significance, such as waahi tapu, sites of cultural significance or other taonga."* CB Tab 669 [325.11596]

[16] Exhibit C to Affidavit of Gerard McCormack (resource consent hearing decision) at CB Tab 669 [325.11601].

[17] *Re Edwards (No. 6)* [2022] NZHC 1160 at [9].

Relevant High Court findings

19. In Stage 1,[18] the High Court considered whether any of the applicants had a valid claim to either Customary Marine Title (**CMT**) or Protected Customary Rights (**PCR**).[19] Stage 2 addressed the boundaries and content of CMT and PCR orders, including whether any areas were required to be excluded from the CMT or PCR orders under the Act.[20]

20. In the Stage 2 decision[21] the High Court found that the Harbour Project constituted a "substantial interruption",[22] and ordered that this area be excluded from the CMT orders.[23] No other Council-owned assets were found on the evidence to have given rise to substantial interruption. Those assets included wastewater and stormwater systems and networks, seawalls protecting property, jetties, boat ramps, roads, bridges and cycleways.[24]

21. The proceedings before this Court relate to the Stage 1 Decision. The Court of Appeal observed that the High Court ought to have considered the question of substantial interruption as part of the Stage 1 Decision, however nothing turns on the point given the High Court's subsequent finding (in the Stage 2 proceedings) that CMT was substantially interrupted by the Harbour Project.[25]

22. The finding that the Harbour Project amounts to substantial interruption has been appealed to the Court of Appeal by Ngāti Patumoana.[26] Ngāti Patumoana is represented in the current

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[18] *Re Edwards (No.2)* [2021] NZHC 1025 (Stage 1 decision) CB Tab 50 [05.00401].
[19] See Minute (No 10) of Churchman J, 30 March 2020 at [20] where the Court decided to adopt the suggestion of counsel for the Seafood Industries to split the hearing into two stages CB Tab 112 [101.00558].
[20] Stage 1 decision at [662] CB Tab 50 [05.00564].
[21] *Re Edwards (No. 7)* [2022] NZHC 2644 (Stage 2 decision) CB Tab 56 [05.00660].
[22] Under s 58(1)(b)(i) MACA.
[23] Stage 2 decision, at [23] CB Tab 56 [05.00674].
[24] Stage 2 decision, at [34] CB Tab 56 [05.00676].
[25] Court of Appeal Decision at [326].
[26] Te Ringahuia Hata on behalf of Ngāti Patumoana, CA617 /2022. Ground 1 alleges that "*... the Court erred in law and fact … In determining that the Opotiki Harbour Development Project constitutes a substantial interruption of the Appellant's holding of the relevant area, despite the project being incomplete and public exclusion from the area only in place for a short time period*."

proceedings under the Te Kāhui umbrella. Although the factual finding that the Harbour Project amounts to substantial interruption is not before this Court,[27] it is expected that any findings or observations by this Court in relation to the interpretation of s58, particularly the meaning of / threshold for "substantial interruption", would be binding or highly persuasive when the Court of Appeal considers the Ngāti Patumoana appeal.

23. For that reason, the Court of Appeal hearing of the appeals against the Stage 2 judgment have been deferred pending finalisation of that judgment, which will not occur until the present appeals have been decided and the re-hearings of the Stage 1 matters determined.[28]

24. Throughout these proceedings, neither CRHL nor ODC have taken a position in relation to whether an applicant group holds the relevant area in accordance with tikanga.

25. CRHL and ODC's interests are focussed on upholding the High Court's finding that the Harbour Project amounts to substantial interruption. That finding recognises the balancing of rights and interests that Parliament sought to achieve through the MACA and, importantly, enables CRHL and ODC to be custodians of a significant asset for the benefit of the Ōpōtiki community and wider region, which includes all peoples within those communities.

26. The issue concerning the boundaries of the CMCA, and whether it extends into the beds of navigable rivers, is related and is addressed separately in these submissions, given it will be heard

[27] That matter must first be the subject of a decision of the Court of Appeal, which may address issues of fact or law (s112 MACA).
[28] Minute of Collins J dated 10 November 2022 at [2], which advises that "*Any appeals from the Part II judgment will not be heard until the Part II judgment is finalised*." See also Minute of Churchman J dated 8 March 2024 at [108], which advises that any matters requiring re-hearing following the Court of Appeal's decision on the Part I appeals will be deferred pending the leave applications to the Supreme Court. It is not anticipated that the Part II judgment will be finalised until the re-hearings against the Part I judgment have been heard.

as a separate issue in accordance with the agreed timetable. The Harbour Project and associated works extend into this area, along with other community assets.

27. CRHL originally filed an appeal in this Court raising certain procedural issues arising from the Court of Appeal's decision. These included the absence of a direction or recognition by the Court of Appeal that a further hearing of evidence will be required as a consequence of its finding that the CMCA includes the area one kilometre upstream of navigable rivers. The original High Court hearings proceeded on the basis that this area was outside the CMCA. The High Court has since confirmed that a hearing will be held in relation to that area and that CRHL will be entitled to be heard. On that basis CRHL's appeal was abandoned.[29]

28. If this Court overturns the Court of Appeal's finding that navigable river beds from part of the CMCA, then the issue falls away. CRHL therefore supports the AG's position on this issue, as does ODC, which also has other assets in this area.

Issue One: Substantial Interruption

29. CRHL and ODC support the position of the AG on this issue, which is aligned to the minority judgment of Miller J, to the effect that the majority significant narrowed the considerations for what may amount to substantial interruption. In summary, the following key points raised in the AG's submissions are endorsed by CRHL and ODC, and will be developed further in these submissions with specific reference to the Harbour Project:

    (a) The assessment is highly fact-sensitive, requiring consideration of the nature, extent, duration and cause of any interruption;

[29] This Court accepted the Notice of Abandonment and dismissed the appeal on 25 July 2024 CB Tab 65 [05.00877].

(b) That assessment requires an overall consideration of the evidence;

(c) While substantial interruption might arise from something authorised by legislation, which precludes an applicant group's physical use of an area, that is not the only situation which might give rise to substantial interruption.[30] Respectfully, the Court of Appeal majority erred in suggesting this is a threshold, which is arguably inconsistent with, or undermines, its finding that the issue will be an evidence based inquiry;[31]

(d) The suggestion that legislative authority is required appears to arise from the majority's consideration of the example of third-party access or fishing, which gave rise to a concern that these examples set the bar for substantial interruption too low and might lead to s 58 "*extinguish[ing] many customary rights … by a side wind*";[32]

(e) Respectfully, this concern was misguided because customary rights cannot be extinguished without clear and plain statutory wording;[33]

(f) Factors relevant to the factual inquiry in relation to substantial interruption include:

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[30] Court of Appeal Decision at [428] and [434] per Cooper P and Goddard J. The example given was the lawful construction and operation of port facilities in a manner that excludes the applicant group from access: at [433].

[31] Court of Appeal Decision at [431], per Cooper P and Goddard J, where the majority appears to accept that the issue requires a fact based inquiry: "*That question will need to be explored as and when it arises in particular cases. We can do no more than provide some broad indications based on the scenarios canvassed before us*." But the majority goes on to summarise its "*best available reading*" of s58 (at [434]) as including lawful activities carried out pursuant to statutory authority.

[32] Court of Appeal Decision at [427] per Cooper P and Goddard J.

[33] The authorities are clear that extinguishment must be "clear and plain" and unambiguously directed towards that end. See AG submissions at [48] citing *Ngāti Apa* at [154] per Keith and Anderson JJ; and *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC) at 363, both applied in *Re Reeder* [2021] NZHC 2726 at [128]-[129].

(i) Activities carried out in the area by third parties under a resource consent granted prior to 1 April 2011. The Harbour Project is an example of this;

(ii) Permanent structures in the area that are owned by third parties, such as port facilities, boat launch ramps, wharves, jetties and outfall pipes. The Harbour Project is an example of this, as are other community assets owned and operated by ODC;

(iii) Intensive and frequent use and occupation of the relevant area by third parties, for example, the use of commercial shipping lanes, commercial or recreational fishing, and other recreational activities.

30. ODC and the Crown have recently invested approximately $2.3 million of shared funding in upgrading the Ōpōtiki Wharf (in a different area to the Harbour Project), which includes a substantial wharf for mussel boats, future jetty extension and coastguard facilities. This area falls within the bed of the Waiōweka River and therefore is not subject to the High Court's findings that specific community infrastructure and assets in a different part of the CMCA do not amount to substantial interruption. It will therefore be the subject of the future hearing relating to navigable rivers, if required.[34]

31. While the Wharf facilities are the subject of resource consents granted in February 2017, after the commencement of the Act and therefore subject to s58(2),[35] ODC agrees with the submissions of Te Kāhui that the grant of consent, by itself, is not determinative of

[34] If this Court overturns the Court of Appeal's findings on this issue a further hearing will not be required.
[35] Which provides that "*there is no substantial interruption … if … a resource consent … is granted at any time between (a) the commencement of this Act; and (b) the effective date [of a rights order being sealed]*."

substantial interruption: "*What is relevant is the activity carried out pursuant to it, and the effects of that activity*."[36] Conversely, ODC does not contend that consents granted prior to the Act's commencement *must* amount to substantial interruption. It agrees with the AG that a resource consent may be one factor which could support a finding of substantial interruption.

32. While the Act provides that the structures themselves are to be regarded as personal property and not land or an interest in land, and therefore do not form part of the CMCA,[37] issues potentially arise a matter of property and resource management law if the CMCA underneath or around the structures is vested in applicant groups.

33. That is because the RMA prohibits occupation of the CMCA,[38] or the carrying out of any activity in, on, under or over the CMA,[39] unless that activity is expressly authorised by a plan rule or resource consent. The ownership of a community wharf structure, for example, has limited utility for a local authority (and therefore the community) if there is significant consenting risk attached to occupying or using the area around the structure. Unlike a consent declined under the RMA, there is no right to appeal against a veto exercised by a CMT order holder.

34. Many resource consents for publicly owned wharves and jetties fulfil an important function of regulating the use of the surrounding water space (and land under the water), including the public's access to that area. Investment in and the ability to obtain funding for

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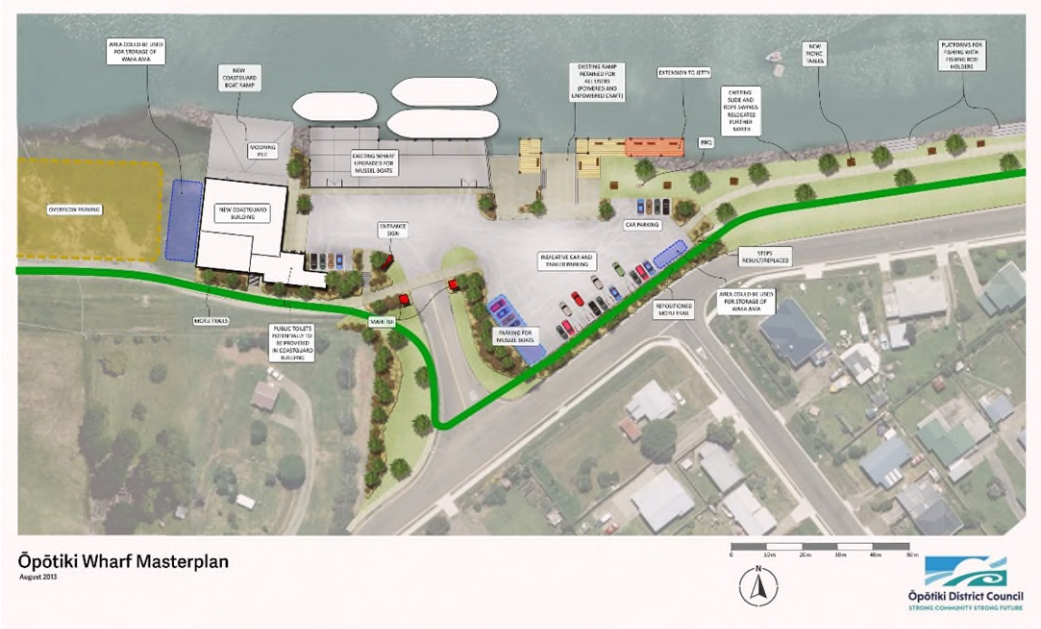
[36] Submissions for Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea appeal, dated 23 September 2024 (Te Kāhui submissions), para 4.30 and 4.31.
[37] MACA, s18.
[38] The RMA uses the s9(1) MACA definition of CMCA.
[39] The Coastal Marine Area is defined in s2 RMA as "*the foreshore, seabed, 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.*"

community facilities, such as the Ōpōtiki Wharf upgrade, become far more difficult if the ability to manage the space under and around the structure, for purposes such as maintenance and the mooring of vessels, is no longer able to be guaranteed as an incidence of owning the structure.

35. There is also a question as to whether, as a matter of property law, a structure owner could lease the structure when it does not own the land underneath or around the structure. A lease would likely be ineffective without the ability to guarantee the lessee access to and around the leased structure.

36. These are very real issues that ODC has been coming to grips with in relation to some of its structures located in the CMCA.

37. For context, the following figure provides a masterplan of the (now constructed) Ōpōtiki Wharf upgrade (a larger copy is **annexed** to these submissions).



38. This valuable community infrastructure is intended (together with the Harbour Project) to reduce Ōpōtiki's reliance on primary production and support a return to its historic roots as a thriving port and marine-based town.

39. It is important to note that this infrastructure may not meet the "regional" threshold for accommodated infrastructure or activities, if it is considered to benefit only the Ōpōtiki District rather than the wider Bay of Plenty Region. While there are arguments both ways, a finding from this Court that this type of community infrastructure axiomatically cannot amount to substantial interruption (as apparently sought by Te Kāhui) would place local authorities in the high risk situation of potentially falling into a statutory lacuna whereby the facilities could neither amount to substantial interruption nor meet the threshold for the accommodated activity exemption.

Response to Te Kāhui position

40. Te Kāhui's submissions build on the Court of Appeal majority comments that substantial interruption requires lawful extinguishment of customary title by Act of Parliament. Although, fairly, Te Kāhui does not submit this is an absolute requirement,[40] CRHL and ODC agree with the AG that such a threshold would set the bar for establishing substantial interruption too high, by equating it with concepts of statutory extinguishment.

41. Te Kāhui also focusses on legal concepts of interruption rather than the factual inquiry which the High Court and Court of Appeal minority found to be the appropriate approach when determining substantial interruption.[41] To give an example, the High Court (correctly) found that the Harbour Project amounts to substantial interruption for three main evidence-based reasons (paraphrased):[42]

[40] Te Kāhui submissions, at para 4.1(c). "This will *almost always* be as the result of lawful extinguishment of customary title by Act of Parliament."
[41] The Court of Appeal majority also appears to have accepted this, but went to on to promulgate something in the nature of a test. See footnote 31 above.
[42] Stage 2 decision at [26-29] CB Tab 56 [05.00675].

(a) Exclusion of the general public from the project area for an extended period (several years) during construction;

(b) Regular temporary exclusions for ongoing maintenance of the harbour works (involving the use of heavy machinery) following completion, for as long as the harbour exists;

(c) The scale of the project is substantial, and would fundamentally change the landscape of this part of the takutai moana, with a major consequential impact on the use and occupation of this area by applicant groups.

42. Although not determinative of the High Court's findings on this issue, the High Court observed that Te Whakatōhea have supported the project.[43]

43. Although the *source* of the statutory authority for excluding the public arises under the Health and Safety at Work Act 2015, the High Court's finding of substantial interruption was not premised solely on the legal ability to exclude the public (and applicant groups) from part of the CMT area applied for. Rather, it was the combination of the ability to exclude, the exclusion in fact, and the substantial scale of the activities and the area. The Court observed:

> [29] The goal of the project is to allow larger boats access to Ōpōtiki Harbour, so as to allow for a fully functioning deep-water port, through which the aquaculture industry is expected to grow. The area over which the consent holder will be legally obliged to ensure the safe operation of the port under the Health and Safety at Work Act 2015, **is large enough to disrupt the exercise of customary interests**. [emphasis added][44]

44. In the absence of clear guidance in the Act about what amounts to substantial interruption, short of extinguishment "*as a matter of law*"

[43] Stage 2 decision at [28] CB Tab 56 [05.00675].
[44] Stage 2 decision at [29] CB Tab 56 [05.00675].

(s58(4)), Te Kāhui submit that guidance is provided by the range of activities that are either expressly or inferentially excluded by the statutory scheme.[45]

45. Te Kāhui argue that, because "*accommodated activities*" and "*accommodated infrastructure*" are exempted from the CMT "veto" or permission right, Parliament considered such activities could *not* amount to substantial interruption. For that reason, Te Kāhui say such activities require a special pathway under the Act.[46] The exemption for port infrastructure (as "*accommodated infrastructure*"[47]) is said to be instructive. Te Kāhui appears to challenge the Court of Appeal's suggestion that a busy port (operating pursuant to resource consents and lawful authority), which excluded an applicant group from the CMT area, would amount to substantial interruption within the port areas. They argue that "*if that were axiomatically true*", there would be no need for an exemption for port activities because they would be excluded from the CMT area by virtue of substantial interruption.

46. Te Kāhui's argument is further rationalised by the observation that Parliament did not provide a blanket exemption from the veto right for all ports, exempting only ports which reach a threshold of regional or national significance. They say this recognises a public interest in some ports, which are deserving of a public interest exemption from the rights attaching to CMT orders.

47. Respectfully, this line of reasoning does not withstand close scrutiny. It is submitted that the ability to establish substantial interruption provides one pathway for public entities undertaking activities within the CMCA. Reliance on the accommodated infrastructure or accommodated activity exemption provides

[45] Te Kāhui Submissions, para 4.29.
[46] Te Kāhui Submissions, para 4.33.
[47] "*Accommodated infrastructure*" is defined in s 63 to include infrastructure operated by the Crown, local authorities, utility operators and ports; and which is reasonably necessary for national or regional social or economic well-being.

another pathway. The two are materially different and not mutually exclusive. The differences are summarised below:

(a) Substantial interruption pathway

(i) If established, removes a particular area from the ambit of a CMT order;

(ii) Must be established through an evidential finding of the High Court at the time a CMT order is being sought from the High Court;

(iii) Relies on proof of a factual, substantial, interruption to the exclusive use and occupation of an area by an applicant group, rather than on a "public interest" test;

(iv) Could be at a localised, rather than regional or national, scale; provided that the localised effects are substantial.

(b) Accommodated infrastructure / activity pathway

(i) If established, the infrastructure or activity are able to co-exist with the CMT order holder's rights;[48]

(ii) Entitlement to the accommodated activity exemption cannot be declared by the High Court, but must be determined by the Minister;[49]

[48] Section 64(1) MACA. "*An accommodated activity (a) may be carried out in a part of the common marine and coastal area despite customary marine title being recognised in respect of that part under subpart 1 or 2 of Part 4*."

[49] Stage 2 decision at [81] CB Tab 56 [05.00688]. The High Court found that ss64(3) and (4) of the MACA, which contain a dispute resolution mechanism for disputes about whether an activity falls within the accommodated activity exemption, "*clearly grants to the Minister [for Land Information] exclusive jurisdiction to determine*" such disputes "*and the Court has no jurisdiction in relation to this question*."

(iii) An entitlement can arise or be established after the effective date of a CMT order;[50]

(iv) Relies on the assertion of a public interest which has a national or regional threshold.[51]

48. In support of their argument that port infrastructure should not be treated as a substantial interruption, Te Kāhui refer to an observation of the Panel appointed to review the Foreshore and Seabed Act to the effect that customary title should be available "*within the area of Tauranga Moana covered by the port there (the largest port in the country)*."[52] Respectfully, that is not what the Panel said. It makes no mention of Port infrastructure. Rather, the Panel observes that *"… under Te Ture Whenua Māori/Māori Land Act 1993, Tauranga Māori would certainly have been able to obtain status orders for most of the harbour, and maybe vesting orders for parts of it, without being required to demonstrate exclusivity … or continuous title to contiguous land*."[53]

49. It seems unlikely that such orders would be made over an area affected by a working Port without giving notice to the Port of Tauranga as a materially affected party under Te Ture Whenua Māori Act.

50. The Harbour Development is a "port" as defined under the Maritime Transport Act 1994[54] and therefore is subject to regulation by the

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[50] If consent applications were lodged prior to the effective date (i.e. sealing of a recognition order) the "*accommodated activity*" exemption is available (s64(2)(a)). For new activities, the "*deemed accommodated infrastructure*" pathway is available. This requires an application to the Minister of Land Information for a declaration demonstrating (among other matters) that the proposed infrastructure cannot reasonably be accommodated outside of the CMCA and that negotiations to obtain permission of the CMT order holder have been unsuccessful (Sch 2 cl 2 MACA).

[51] Section 63 MACA. ***Accommodated infrastructure*** *means infrastructure (including structures and associated operations) that is … (c) reasonably necessary for— the national social or economic well-being; or the social or economic well-being of the region in which the infrastructure is located.*

[52] Te Kāhui Submissions, Footnote 130, p35, citing the Panel Report (cited at footnote 53 below) at [6.3.3].

[53] Taihākurei Edward Durie, Richard Boast and Hana O'Regan Pākia ki uta, pākia ki tai: Report of the Ministerial Review Panel (2 July 2009) at [6.3.3].

[54] Section 2 definition of "*Port - (a)* ***means an area of land and water intended or designed to be used either wholly or partly for the berthing, departure, movement,***

Harbourmaster to ensure its safe operation. CRHL and ODC also require the ongoing ability, through resource consents for occupation of space for the structures and maintenance dredging (which will need to be renewed on expiry in 2044 and 2038), to restrict public access to that part of the CMCA where appropriate to ensure the protection of the health and safety of users of the facilities.[55] Although the Regional Coastal Plan now includes a "Harbour Development Zone" (**HDZ**), within which the Harbour Project infrastructure is situated, reconsenting any lawful structures and maintenance dredging activities in the HDZ will require consent as a controlled activity.[56] The MACA permission right applies to controlled activities (s66(1), MACA).

51. Therefore CRHL and ODC have an interest in opposing any argument which suggests that port infrastructure cannot amount to substantial interruption because it is captured by the definition of "accommodated infrastructure". As explained above, that provides a separate but alternative pathway. CRHL / ODC have obtained a finding that the Harbour Project amounts to substantial interruption and are therefore concerned to ensure that finding is not undermined.

52. Ultimately, neither the Court of Appeal (nor the High Court in finding the Harbour Project meets the test for substantial interruption) were establishing an "axiomatic" proposition in relation to whether port activities will always amount to substantial interruption. It is clear this will require an evidence based inquiry.

***and servicing of ships**; and (b) includes any place in or at which ships can or do— (i) load or unload goods: (ii) embark or disembark passengers; and (c) **also includes a harbour**."* [emphasis added].

[55] The current consent for the occupation of space in the CMA (65569) allows the consent holder to restrict public access to the structures where necessary to protect dotterel breeding and nesting areas or protect public health and safety (Conditions 5.1 and 5.2). CB Tab 671 [326.11695].

[56] Regional Coastal Environment Plan, Rules HD4 and HD5.

Third party structures

53. The AG submits that permanent third party structures, such as port facilities, boat launch ramps, wharves, jetties, and outfall pipes, may constitute a substantial interruption.[57]

54. ODC agrees with this submission. It also endorses the submissions by Whakatāne District Council on this issue.

55. The High Court has correctly identified that structures themselves are covered by s18 of the Act, which provides that they do not form part of the CMCA. Similarly, roads (formed or unformed) within the CMCA on the commencement of the MACA are deemed not to form part of the CMCA (s14).

56. However, it does not follow that the RMA permission (veto) right does not apply to such structures and roads. Although the ownership of the structures does not change, and the roads themselves would not form part of the CMCA, they would still be located <u>within</u> the CMCA and therefore the permission right would apply.

57. That is because an RMA permission right applies to activities that are to be carried out under a resource consent, including for a controlled activity, to the extent that the resource consent is for an activity to be <u>carried out within</u> a CMT area (s66 MACA).

58. The effect of an RMA permission right is to prevent the holder of a resource consent for an activity "*<u>in</u> a customary marine title area to which an RMA permission right applies*" from commencing the activity to which the consent applies without the permission of the CMT order holder (s68 MACA). There is no remedy under the RMA for a failure to obtain permission (no appeal or objection rights are available).

[57] AG submissions at para 45.2.

59. It follows, for example, that consent to renew ODC's existing wastewater treatment plant, where part of that infrastructure (pipes) are located within the CMCA (the bed of the Waiōweka River), would require the permission of the CMT order holders[58] given that infrastructure (although owned by ODC) is located within the CMCA (assuming the Court of Appeal's finding on that boundary issue is upheld).

60. It is important to note that local authority infrastructure, such as a wastewater treatment plant that serves only a very localised catchment, is unlikely meet the "regional" (or national) threshold for the accommodated infrastructure exemption.

61. ODC accepts that the High Court has made certain findings that some local infrastructure has not satisfied the evidentiary requirements to establish substantial interruption as matter of fact.[59]

62. However, ODC is concerned to ensure that any findings or observations of this Court in relation to substantial interruption do not preclude the ability for local authorities to argue as a matter of fact that local community infrastructure has substantially interrupted the exclusive use and occupation by an applicant group of a specified part of the CMCA.

63. ODC also has the ability through the proposed hearing of the navigable rivers area to seek leave to call evidence in relation to structures and activities within that area which were not previously the subject of evidence (such as the Ōpōtiki wharf) because at the time of filing evidence the legal position was that the CMCA did not include that area.[60] This is the procedural point raised by CRHL in

[58] Depending on the timing of any consents granted relative to the CMT orders being perfected.
[59] Stage 2 decision at [34]-[36] CB Tab 56 [05.00676] relating principally to activities which enhance the use of the CMCA for recreational activities and environmental protection.
[60] The High Court found it was bound to follow the decision of the Supreme Court in *Paki v Attorney-General* [2012] NZSC 50, and concluded if a river was navigable as at 1903 then its bed is deemed to have been vested in the Crown. Stage 1 decision CB Tab 50 [05.00501].

relation to the Court of Appeal's decision, which did not directly order a hearing of evidence arising from its finding that the beds of rivers form part of the CMCA. CRHL's appeal has been withdrawn because the High Court subsequently confirmed that it will hold a hearing on this issue.

Issue Two: Navigable Rivers

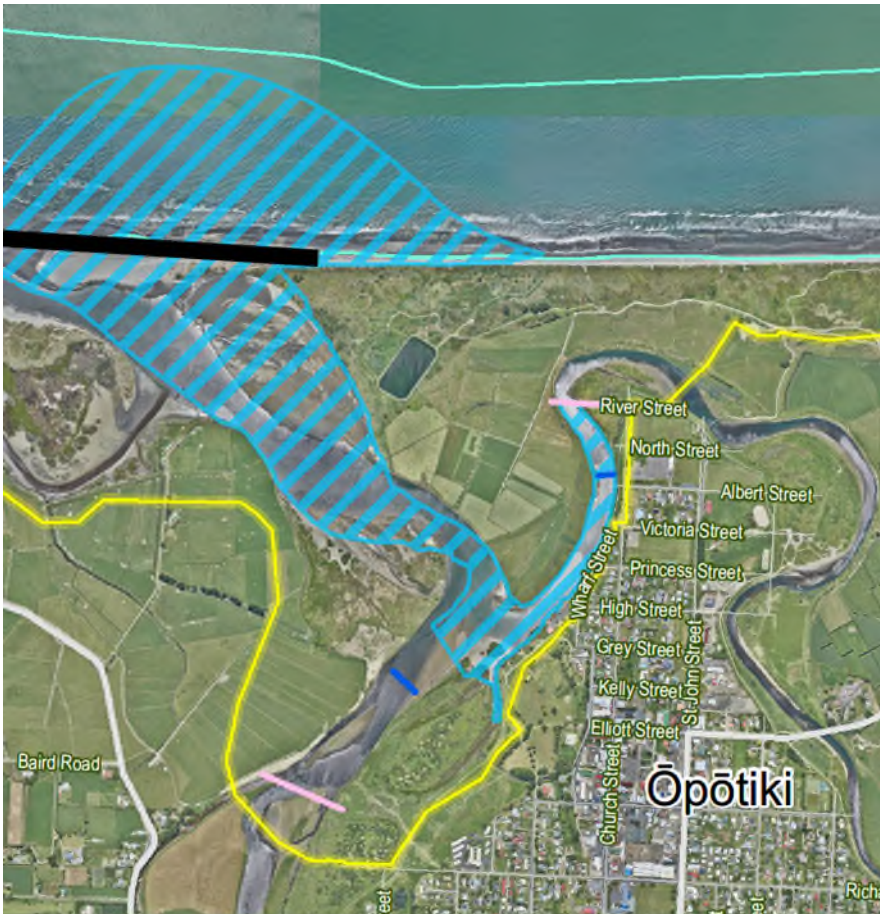
64. CRHL and ODC have important community assets which extend into the area 1 km upstream from the mouth of navigable rivers (principally the Waiōweka River). They support the finding of the High Court and the submissions of the AG that vesting of customary title to navigable rivers in the Crown, under Coal Mine Amendment Act 1903 (**CMAA**), had the effect of extinguishing customary title to that area.

65. The High Court found on the evidence that the Waiōweka River was navigable as at 1903 when the CMAA came into force. The High Court concluded:[61]

> *The mouth of the Waiōweka River has therefore become vested in the Crown and is not available for a grant of CMT. The boundary of the CMT at the Waiōweka/Otara river mouths therefore runs in a straight line across the mouth of the river representing a continuation of the mean high-water springs on each side of the mouth of the river.*

66. The figure below (based on the relevant Regional Coastal Environment Plan Map[62]) shows the High Court's CMCA or CMT boundary line in black, being a continuation of the mean high-water springs line on each side of the mouth of the river. This is based on the High Court's finding that CMT in the beds of navigable rivers was extinguished.[63]

[61] Stage 1 decision at [361] CB Tab 50 [05.00501].
[62] Bay of Plenty Regional Coastal Environment Plan, Map reference - 28c_Ōpōtiki.
[63] Stage 1 decision at [361] CB Tab 50 [05.00501].



67. The dark blue lines are the river mouth and the pink lines are the CMA boundary as these are identified in the Regional Coastal Environment Plan (based on the RMA definition). The Court of Appeal's CMCA (or CMT boundary) line aligns with the pink line. The blue hatched area shows the Harbour Development Zone.

68. If the Court of Appeal's finding on this issue is overturned, then those parts of the Harbour Project and associated works, and other community infrastructure such as the Ōpōtiki Wharf, will not be the subject of CMT orders. Therefore CRHL and ODC's concerns about the future consenting risk or leasing opportunities for those assets and activities within this particular would be alleviated.

Dated at Tauranga this 4th day of October 2024

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M H Hill / J L Hollis
Counsel for Crown Regional Holdings Limited and Ōpōtiki District Council

Appendix – Ōpōtiki Wharf Master Plan