I TE KŌTI MANA NIU O AOTEAROA

IN THE SUPREME COURT OF NEW ZEALAND

SC 121/2023
SC 123/2023
SC 124/2023
SC 125/2023
SC 126/2023
SC 127/2023
SC 128/2023
SC 129/2023

BETWEEN

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)

NGĀTI MURIWAI HAPŪ

KURARERE MARAE

TE ŪPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE ŪPOKOREHE

ATTORNEY-GENERAL

TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA

NGĀTI RUATAKENGA

Appellants

CONT

SUBMISSIONS FOR NGA HAPU O NGATI POROU

4 October 2024

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Certfiy that, to the best of their knowledge these submissions are suitable for publication.

TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA

WHAKATŌHEA MĀORI TRUST BOARD

NGĀI TAI AND RIRIWHENUA HAPŪ

TE ŪPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE ŪPOKOREHE IWI

TE RŪNANGA O NGĀTI AWA

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)

NGĀTI RUATAKENGA

LANDOWNERS COALITION INCORPORATED

NGĀTI MURIWAI HAPŪ

KUTARERE MARAE

TE RŪNANGA O TE WHĀNAU ON BEHALF OF TE WHĀNAU-Ā-APANUI

BAY OF PLENTY REGIONAL COUNCIL

CROWN REGIONAL HOLDINGS LIMITED

ŌPŌTIKI DISTRICT COUNCIL

SEAFOOD INDUSTRY REPRESENTATIVES

WHAKATĀNE DISTRICT COUNCIL

Respondents

AND **ATTORNEY-GENERAL**

TE RŪNANGA O TE WHĀNAU ON BEHALF OF TE WHĀNAU Ā APANUI

SEAFOOD INDUSTRY REPRESENTATIVES

CROWN REGIONAL HOLDINGS LIMITED

ŌPŌTIKI DISTRICT COUNCIL

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LANDOWNERS COALITION INCORPORATED

TE RŪNANGA O NGĀTI AWA

WHAKATŌHEA MĀORI TRUST BOARD

NGA HAPU O NGATI POROU

Interested Parties

MAY IT PLEASE THE COURT

INTRODUCTION AND SUMMARY OF POSITION

1. Ngati Porou is a coastal iwi whose territory comprises the river valleys and coastal areas from Te Toka-a-Taiau (which is located in the mouth of the Turanganui River in Gisborne) to Potikirua in the eastern Bay of Plenty. Apart from the areas immediately adjacent to Gisborne, this is an isolated and largely rural stretch of coastline.

2. The Management Arrangement Trusts established under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (the **Ngati Porou Act**) represent Nga Hapu o Ngati Porou in these appeals.

3. Nga Hapu o Ngati Porou have retained the ownership of much of the coastal lands within their territory and comprise the vast majority of the resident population. Nga Hapu o Ngati Porou continue to exercise their tikanga and assert mana in respect of the takutai moana.

4. Because of the strength of their interests the leaders of Ngati Porou chose to enter into negotiations with the Crown in 2003 in respect of the takutai moana. The consistent position of Nga Hapu o Ngati Porou has been that the Nagti Porou situation must be considered on its own merits and that a nationwide approach would not achieve this.

5. The specific circumstances of Nga Hapu o Ngati Porou are reflected in the agreements entered into with the Crown and given effect through the Ngati Porou Act. The agreements provide for the legal recognition of the mana of Nga Hapu o Ngati Porou in relation to nga rohe moana o Nga Hapu o Ngati Porou (**Nga Rohe Moana**). This includes recognition of customary marine title (**CMT**) based upon an equivalent legal test to the test set out in the Marine and Coastal Area (Takutai Moana) Act 2011 (**Takutai Moana Act**).

6. To date the preference of Nga Hapu o Ngati Porou has been to engage with the Crown to agree CMT areas. High Court applications remain an option to resolve areas where agreement cannot be reached. The engagement has to date resulted in the recognition of a number of

CMT areas. These are set out in the Nga Rohe Moana o Nga Hapu o Ngati Porou (Recognition of Customary Marine Title) Order 2020.

7. The Crown, and those supporting the Crown position, are now asking the Court to read additional criteria into the test for CMT under the Takutai Moana Act. This has implications for the ongoing process of giving effect to the agreements between Nga Hapu o Ngati Porou and the Crown because the test for CMT under s 113 of the Ngati Porou Act imports the s 58 test under the Takutai Moana Act.

8. Nga Hapu o Ngati Porou consider that the articulation of the test under s 58 of the Takutai Moana Act, by the majority of the Court of Appeal, is correct and that the Crown's proposed reconstruction of that test is:

   (a) incorrect as a matter of interpretation;

   (b) will significantly and wrongly constrain the ability of the Courts to consider future applications on their individual merits; and

   (c) will significantly and wrongly constrain a future Court from properly considering the position of Nga Hapu o Ngati Porou under s 58 in light of the agreements reached between the hapu and the Crown.

RECOGNITION OF THE MANA OF NGATI POROU

9. In 2003, following the Court of Appeal decision in *Ngāti Apa*,[1] Ngati Porou entered into negotiations with the Crown in relation to the legal recognition of the customary interests of Nga Hapu o Ngati Porou in the takutai moana.[2] These negotiations were formalised with the signing of terms of negotiations in November 2004.[3] The negotiations occurred against the backdrop of the work the Crown was doing to pass what became the Foreshore and Seabed Act 2004. They

[1] *Attorney-General v Ngāti Apa* [2003] NZCA 117; [2003] 3 NZLR 643 (CA).
[2] Affidavit of Dean Ngaiwi Moana dated 27 March 2024, (**Affidavit D Moana**) **[[701.00001]]** at [22] **[[701.00007]].**
[3] Affidavit D Moana at [24] **[[701.00007]]**; Terms of Negotiation DM-1 **[[701.00014]].**

resulted in Nga Hapu o Ngati Porou[4] and the Crown signing a Deed of Agreement (**Deed of Agreement**) in October 2008.[5]

10. The Deed of Agreement recorded that Ngati Porou entered into the Deed of Agreement to: "better secure the legal expression, protection and recognition of their mana in relation to nga rohe moana o nga hapu o Ngati Porou".[6] It also recorded that Ngati Porou had never agreed to, and did not agree with, the Foreshore and Seabed Act 2004 and, in particular, section 13(1) of the Act, which made the Crown the owner of the takutaimoana.[7]

11. The Crown acknowledged in the Deed of Agreement that:[8]

> "b. the mana of nga hapu o Ngati Porou in relation to nga rohe moana o nga hapu o Ngati Porou is:
>
> i. unbroken, inalienable and enduring;
> and
>
> ii. held and exercised by nga hapu o Ngati Porou as a collective right."

12. The Deed of Agreement recorded that certain areas had been agreed with the Crown to have met the threshold to be, what the Foreshore and Seabed Act 2004 described as, territorial customary rights (**TCR**) areas.[9]

13. The seaward boundary of these TCR areas agreed in the Deed of Agreement was 3 nautical miles. However, the Deed of Agreement recorded that this could be amended within an agreed time period.[10]

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[4] Being those hapū of Ngāti Porou that ratified the Deed to Amend, see section 10 and Schedule 2 of Ngati Porou Act 2019.
[5] Deed of Agreement dated 31 October 2008, DM-2 (**Deed of Agreement) [[701.00033]]**.
[6] Deed of Agreement, cls 5 **[[701.00041]]** and 6 **[[701.00043]]**.
[7] Deed of Agreement, Background, paragraph M **[[701.00035]]**.
[8] Deed of Agreement, Crown Acknowledgements **[[701.00036]]** and cl 4.1 **[[701.00040]]**.
[9] Affidavit of D Moana, at [29] **[[701.00008]]**.
[10] Affidavit of D Moana, at [30] **[[701.00009]]**.

14. Under the Foreshore and Seabed Act 2004 the Deed of Agreement and TCR areas still required High Court confirmation with applications to be filed within 3 months of the date of the Deed of Agreement.[11]

15. A Bill to give effect to the Deed of Agreement was introduced into Parliament shortly after the Deed of Agreement was signed.[12]

16. In late October 2008, a new National Party led coalition government was elected. In accordance with the confidence and supply agreement between the National Party and the Maori Party the new government conducted a review of the Foreshore and Seabed Act 2004. Ngati Porou agreed to put on hold the implementation of the Deed of Agreement while the review was being undertaken.[13]

17. As a result of the review the government made the decision to repeal the Foreshore and Seabed Act 2004 and replace it with a new Act. This new Act was the Takutai Moana Act. Ngati Porou actively participated in the process of engagement on the development of the Takutai Moana Act. This included being represented on the technical advisory group for the Iwi Leaders, which negotiated the proposed content of the new Act.[14]

18. The enacting of the Takutai Moana Act meant that the terms of the Deed of Agreement needed to be renegotiated.[15] This started a further process of negotiation between Nga Hapu o Ngati Porou and the Crown.

19. In August 2017, a Deed to amend the Deed of Agreement was signed (**2017 Deed**). The 2017 Deed recorded that in order to contribute to the legal expression, protection and recognition of the rights and mana of Nga Hapu o Ngati Porou, the Crown would enact the Ngati Porou Act.[16]

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[11] Affidavit of D Moana, at [31] **[[701.00009]].**
[12] Ngā Rohe Moana o Ngā Hapu o Ngāti Porou Bill 2008.
[13] Affidavit of D Moana, at [33] **[[701.00009]].**
[14] Affidavit of D Moana, at [34] **[[701.00009]].**
[15] Affidavit of D Moana, at [36] **[[701.00009]].**
[16] Deed of Agreement, cl 5.1 **[[701.00041]]**; DM-4 Deed to Amend dated 9 August 2017, (**2017 Deed**) **[[702.00314]]**, at cl 5.1 **[[702.00331]].**

20. The 2017 Deed and the Ngai Porou Act contain significant acknowledgments by the Crown and provide for legal recognition of the mana of o Nga Hapu o Ngati Porou in relation to Nga Rohe Moana[17]. Amongst other things, the Crown continued to recognise the unbroken, inalienable and enduring mana of Nga Hapu o Ngati Porou in relation to the takutai.[18]

21. The Ngati Porou Act provides that hapu of Ngati Porou can apply for the recognition of CMT under section 111(3) of the Act. Section 111(3) applies the same CMT test as section 58 of the Takutai Moana Act. That test is:

> "(3) An application must - … (c) include evidence that the hapū – (i) hold the area in accordance with tikanga; and (ii) have, in relation to the area, - (A) exclusively used and occupied it from 1840 to the present day without substantial interruption; or (B) received it, at any time after 1840, through a customary transfer."

22. Following the passing of the Ngati Porou Act the seven Management Arrangement Trusts, established under the Ngati Porou Act to hold CMT rights on behalf of the various groupings of Ngati Porou hapu, made applications to the High Court seeking recognition of CMT over Nga Rohe Moana. The combined application area covers the entire rohe moana of Ngati Porou from Potikirua to Te Toka ā Taiau from the mean high water springs to the 12 nautical mile limit of the territorial sea (but excluding the area adjacent to Uawa (Tolaga Bay).[19]

23. Of the areas of CMT recognised throughout New Zealand under either the Ngati Porou Act or the Takutai Moana Act, 18 of these areas are within the rohe of Ngati Porou. These areas have been recognised in tranches. The first tranche came into effect in 2021.[20] The second

[17] See section 11 and Schedule 3 of the Ngati Porou Act 2019, in summary the area covered by the Act, from MHWS to 12 nautical miles
[18] 2017 Deed, Crown Acknowledgements, paragraph Y **[[702.00327]].**
[19] Affidavit of D Moana, at [39] **[[701.00011]].**
[20] DM-5 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020 **[[702.00611]]**.

tranche came into effect in 2023.[21] Remaining tranches are in the process of being considered and have now been with officials for some time. The CMT areas recognised to date are set out in the Nga Rohe Moana o Nga Hapu o Ngati Porou (Recognition of Customary Marine Title) Order 2020.

SUBMISSIONS ON APPEAL

The Law

24. The legal framework has been extensively traversed in other submissions.

25. The Court of Appeal found that there are three "limbs" to section 58(1) and the CMT test.[22] These are that:

    (a) the applicant group must hold an area "in accordance with tikanga" (**Limb One**);

    (b) the applicant group must have "exclusively used and occupied the specified area from 1840 to the present day" (**Limb Two**); and

    (c) there must not be "substantial interruption" (**Limb Three**).

26. The essence of the Crown's position (and those parties supporting the Crown) is that additional criteria should be read into the s 58 test and, in particular, Limbs Two and Three of the test. They say that what is required is evidence of an intention and capacity – as a matter of fact – to control an area as against third parties.[23] This significantly limits the circumstances in which CMT could be recognised.

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[21] DM-7 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Amendment Order 2023 **[[702.00626]].**

[22] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Maori Trust Board* [2023] NZCA 504, [2023] 2 NZLR 252 (**Court of Appeal Decision**) at [434].

[23] Submissions on behalf of the Attorney-General on appeal, dated 20 September 2024, at [42] (**Crown submissions**).

Limb One

27. Limb One has two core components. These are that the relevant area of takutai moana must be "held" and that it be held "in accordance with tikanga". Tikanga is central to the application of this limb of the test.

28. The Court of Appeal emphasised that activities that "show control or authority over the area", as opposed to simply carrying out a particular activity, will be of particular relevance.[24] The key issue therefore is whether, as a matter of fact, a group has a sufficiently strong interest to be able to say that it "holds an area in accordance with tikanga".

29. In respect of this first limb, the 2017 Deed between the Crown and Ngati Porou recognises and acknowledges the strength of the Ngati Porou interest in the takutai moana, including that the mana of Nga Hapu of Ngati Porou in relation to nga rohe moana is:[25]

    (a) unbroken, unalienable and enduring; and

    (b) held and exercised by Nga Hapu o Ngati Porou as a collective right.

30. This is an acknowledgement of a present state of affairs rather than a state of affairs that existed in the past. It is therefore the Crown's acknowledged position that Nga Hapu o Ngati Porou currently exercise mana over Nga Rohe Moana. This is effectively an acknowledgement by the Crown that Nga Hapu o Ngati Porou hold Nga Rohe Moana in accordance with tikanga and therefore meet the requirements of Limb One.

Limb Two

31. Limb Two requires "exclusive use and occupation" from 1840 to the present. It does not specifically refer to tikanga. However, tikanga must nevertheless be relevant to determining exclusive use and occupation for the reasons set out below.

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[24] The Court of Appeal Decision at [140]

[25] 2017 Deed **[[702.00314]]**, at Crown Acknowledgements, paragraph Y **[[702.00327]].**

Tikanga colours the interpretation of Limb Two

32. Tikanga colours the interpretation of the Takutai Moana Act as a whole. The relevance of tikanga is clear from the preamble to the Act, which states:

> (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:

33. Section 4 then sets out the purposes of the Takutai Moana Act. It provides, in ss 4(1)(b), (c) and (d) that the purposes include to "recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau as tangata whenua"; "provide for the exercise of customary interests in the common marine and coastal area"; and acknowledge the Treaty of Waitangi (te Tiriti o Waitangi). The nature of the rights referred to in s 4(1)(b) and (c) and the acknowledgement of Te Tiriti in s 4(1)(d) means that tikanga must necessarily be relevant to Limb Two.

34. Although Limb One and Limb Two are to be satisfied separately, there is clear overlap between the two limbs. Miller J found that the two limbs are not independent but that "the section establishes a single test which must be interpreted as a whole".[26] Limb Two elaborates on Limb One by requiring that, in holding an application area in accordance with tikanga the interest must be sufficiently strong that it amounts to exclusive use and occupation. However, this does not detract from the tikanga basis upon which the interest is derived and so tikanga must therefore remain relevant in making the exclusive use and occupation assessment under Limb Two.

[26] The Court of Appeal Decision at [137] – [138].

35. Including tikanga as a consideration in the application of Limb Two is consistent with the general common law approach to customary title, which explicitly directs a Court to avoid making assumptions about the nature of customary property, but instead be concerned "with the facts as to the native property".[27]

36. In New Zealand there is a presumption that legislation should be interpreted consistently with Te Tiriti o Waitangi.[28] A similar presumption exists in relation to tikanga.[29] In the context of legislation which has, as one of its purposes, an objective to preserve and recognise Te Tiriti and tikanga based rights, the Takutai Moana Act should be read in a manner that is consistent with both.

37. This requirement is made explicit in the Ngati Porou context. Clause 4.2 of the 2017 Deed records:

> "The undertakings set out in this deed have been agreed in good faith in order to contribute to the legal expression, protection and recognition of the continued exercise of mana by nga hapu o Ngati Porou over nga rohe moana o nga hapu o Ngati Porou where nga hapu o Ngati Porou have, and continue to, exercise mana through their activities in accordance with their tikanga."

38. Further, the principles underlying the 2017 Deed include:[30]

    (a) Toitū te mana atua (principle 1): "It is acknowledged that nga hapu o Ngati Porou have, in accordance with their tikanga, an

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[27] See *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at [54]; *Re the Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41; and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA).

[28] See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at [223]; *NZ Māori Council v Attorney General* [1987] 1 NZLR 641 (CA) at [655] ;*Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151]; *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [55]; and *Students for Climate Solutions Incorporated v Minister of Energy and Resources* [2022] NZHC 2116 at [90] – [93].

[29] For example, in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 at [148] and [154] the Court held that legislation will not be interpreted to have extinguished native title rights of Māori unless this is made explicit through 'clear and plain intention'. The general place of tikanga as part of the common law has also recently being affirmed by the Supreme Court in *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [19]

[30] 2017 Deed, cl 1.1 **[[702.00328]].**

unbroken, inalienable and enduring relationship with nga rohe moana o nga hapu o Ngati Porou. This deed will contribute to the legal expression, protection and recognition of the ability of nga hapu o Ngati Porou to continue to regulate and undertake activities on, over or within nga rohe moana o nga hapu o Ngati Porou in accordance with their tikanga."

(b) Toitu te mana whenua me te mana moana (principle 2): "This deed contributes to the legal expression, protection and recognition of the unbroken, inalienable and enduring mana of nga hapu o Ngati Porou in relation to nga rohe moana o nga hapu o Ngati Porou."

(c) Toitu te mana tangata (principle 3): "This deed contributes to the legal expression, protection and recognition of the rights of nga hapu o Ngati Porou to exercise influence over persons carrying out activities within, or impacting upon, nga rohe moana o nga hapu o Ngati Porou."

(d) Toitū te Tiriti o Waitangi (principle 4): "Consistent with the partnership principle underlying te Tiriti o Waitangi/the Treaty of Waitangi, nga hapu o Ngati Porou and the Crown have entered into this deed in good faith and as equals. The parties acknowledge that they are obliged to give effect to this deed (in the manner described in this deed) and to act in good faith, fairly, reasonably and honourably towards each other."

39. The 2017 Deed states that "any issue of interpretation relating to how this deed contributes to the legal expression, protection and recognition of the mana of Nga Hapu o Ngati Porou shall be resolved after *taking into account* the principles in clause 1.1".[31]

[31] 2017 Deed, cl 1.2 **[[702.00329]].**

40. The undertakings and principles set out in the 2017 Deed, including the relevance of tikanga and te Tiriti, are therefore directly relevant to how the section 58 test must be interpreted in the Ngati Porou context.

Limb Two contemplates some interruption

41. It is also relevant to the application of Limb Two that the Takutai Moana Act expressly contemplates that certain third-party uses do not preclude the existence of CMT. These uses cover most activities commonly undertaken in the marine and coastal area including: activities authorised by a resource consent (section 58(2)); fishing (section 59(3)); and navigation (section59(3)). Section 64(1)(a) also assumes that "accommodated activities", such as significant infrastructure activities,[32] can occur alongside CMT.

42. The level of exclusivity contemplated by Limb Two is therefore highly qualified and does not require that an applicant show the complete absence of use or occupation by third parties. Instead, exclusivity for the purposes of the Takutai Moana Act can be found to exist alongside a wide range of third party uses.

43. Further, tikanga itself does not contemplate "exclusive use and occupation" in the sense that all third-party use is precluded. Some third-party use can occur at the discretion of the iwi and therefore with their consent (either express or implied).

44. The Canadian cases and tests referred to be the Crown do not take us much further on this point. While the Canadian Courts have noted that exclusivity needs to be understood as the "intention and capacity to retain exclusive control over the land", [33] they have emphasised that the requirement "must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society".[34] In saying this the Canadian cases are effectively acknowledging that exclusivity must be

[32]Section 64(2) provides a very broad definition of accommodated activities that can be read alongside CMT.
[33] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [38]; and [48]; and *Chippewas of Nawash v Canada* [2023] ONCA 565 at [15.8].
[34] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [49].

approached through a lens that is cognisant of the customary (or tikanga) perspective.

45. The Supreme Court of Canada, urging caution in making this assessment, put it this way:[35]

> "the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established."

46. The Crown's position ultimately becomes circular. This is because to the extent that common law concepts can be said to have been imported into New Zealand, they must have regard to local custom.[36] In the Takutai Moana context, where the interest protected under the Act stems from and is required to be expressed in terms of tikanga (under Limb One), it is not possible to divorce tikanga from the evaluation made under Limbs Two and Three of the s 58 test.

47. An intention and capacity to exclude may therefore be a relevant inquiry to shed light on whether CMT exists, but it could not be determinative in and of itself. This would depend upon the specific context, the relevant tikanga at play, the characteristics of the applicant group and the area in question.[37] In the case of Ngati Porou this must also include the Crown's prior agreements with Nga Hapu o Ngati Porou as now set out in the 2017 Deed and the Ngati Porou Act.

Limb Three

48. The majority in the Court of Appeal held that a substantial interruption might occur where a group's use and occupation ceases or is

[35] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [32].
[36] *Takamore v Clarke* [2012] 1 NZLR 573 [2011] NZCA 587, at [112]
[37] *Chippewas of Nawash v Canada* [2023] ONCA 565 at [9].

interrupted because the group's connection with and control over the area was lost as a matter of tikanga.[38] Third-party use would amount to a substantial interruption where it is authorised by legislation capable of overriding customary rights and precludes a group's physical use of an area.[39] The Court of Appeal rejected the argument that substantial third-party access to or fishing in an area could amount to substantial interruption.[40]

49. The Crown submits that the effect of the Court of Appeal's approach is that there is no requirement for an applicant to prove exclusive use and occupation from 1840 to the present day without substantial interruption. Rather, an applicant group must only establish its use and occupation has been continuous.[41] This, the Crown submits, fails to give effect to the clear statutory language.[42]

50. The Takutai Moana Act does not define "substantial interruption". However, the starting point is that the inquiry as to what constitutes a substantial interruption must be sensitive to context and it must take into account the duration and extent of the alleged interruption. It must also be interpreted in light of the activities that s 58 and s 59 say do not preclude the existence of CMT.

51. To the extent that there is a public interest to protect that is already provided for through the accommodated activities and the acceptance of recreational use, navigation and fishing within the marine and coastal area.

CONCLUSION

52. Nga hapu o Ngati Porou have in good faith entered into agreements with the Crown in relation to the recognition of customary rights in the takutai moana. These agreements are set out in the Deed of

[38] Court of Appeal Decision at [432] per Cooper P and Goddard J.
[39] Court of Appeal Decision at [428] and [434] per Cooper P and Goddard J.
[40] Court of Appeal Decision at [427] per Cooper P and Goddard J.
[41] Crown submissions at [19].
[42] Crown submissions at [20].

Agreement and the 2017 Deed and given effect by the Ngati Porou Act.

53. Section 58 of the Takutai Moana Act must be interpreted in a manner that is consistent with the Crown's commitments in respect of Ngati Porou. The approach now proposed by the Crown would have the effect of imposing criteria in respect of the s 58 test devoid of context and where those criteria do not follow as a matter of course from a plain reading of s 58.

54. This puts at risk the Crown's previous commitments to Ngati Porou. At the very least it places constraints on the Court, which do not follow as a matter of course from a plain reading of s 58, and which would constrain the Court in considering the specific context and circumstances of Nga Hapu o Ngati Porou. That context is that the Crown has acknowledged the ongoing strength of the Ngati Porou interest. If any of Nga Hapu o Ngati Porou is required to go to the Court to determine whether it has CMT the Court will need to have the freedom to approach s 58 in a manner that recognises those agreements.

55. For the reasons set out in these submissions Nga Hapu o Ngati Porou say that the Crown appeal should be dismissed.

DATED this 4th day of October 2024

Matanuku Mahuika / Tara Hauraki /Herewini Ammunson
Counsel for Nga Hapu o Ngati Porou

TO: The Registrar of the Supreme Court of New Zealand

AND TO: The parties listed above.

CHRONOLOGY

19 June 2003	Court of Appeal's decision in *Attorney-General v Ngāti Apa* delivered.
August 2003	A series of hui-a-iwi are held and support is given for Te Runanga o Ngati Porou to enter into discussions with the Crown.
April 2004	Foreshore and Seabed Bill introduced into the House.
1 November 2004	Te Runanga o Ngati Porou signs Terms of Negotiation with Crown.
24 November 2004	Foreshore and Seabed Act comes into force.
30 September 2005	The Crown and Te Runanga o Ngati Porou signed a statement of position and intent.
31 October 2008	Crown and Nga Hapu o Ngati Porou sign Deed of Agreement.
October 2008	A Bill to give effect to Deed of Agreement is introduced into Parliament.
November 2008	Government decides to review the Foreshore and Seabed Act; implementation of Deed of Agreement is paused.
June 2009	Ministerial Review Panel's report *Pākia ki uta pākia ki tai* delivered.
September 2010	Marine and Coastal Area (Takutai Moana) Bill introduced into the House.
1 April 2011	Marine and Coastal Area (Takutai Moana) Act 2011 comes into force.
9 August 2017	Crown and nga hapu o Ngati Porou sign a Deed to amend the Deed of Agreement.
12 April 2018	Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill is introduced into the House.
30 May 2019	Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act comes into force.
21 September 2020	Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020 was made (**First Order**).
1 February 2021	The First Order comes into force.
13 March 2023	Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Amendment Order 2023) was made (Second Order).

LIST OF AUTHORITIES

Legislation

1. Foreshore and Seabed Act 2004
2. Marine and Coastal Area (Takutai Moana) Act 2011
3. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019

Cases

New Zealand

4. *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA)
5. *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239
6. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC)
7. *NZ Māori Council v Attorney General* [1987] 1 NZLR 641 (CA)
8. *Re the Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41
9. *Students for Climate Solutions Incorporated v Minister of Energy and Resources* [2022] NZHC 2116, (2022) 24 ELRNZ
10. *Takamore v Clarke* [2012] 1 NZLR 573 [2011] NZCA 587
11. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 *(*CA)
12. *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801
13. *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599

Canada

14. *Chippewas of Nawash v Canada* [2023] ONCA 565
15. *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257