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

SC 121/2023
SC 123/2023
SC 124/2023
SC 125/2023
SC 126/2023
SC 128/2023
SC 129/2023
[2024] NZSC Trans 21

BETWEEN **WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)**
NGĀTI MURIWAI
KUTARERE MARAE
TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE UPOKOREHE IWI
ATTORNEY-GENERAL
NGĀTI IRA O WAIOWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA and NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ WHAKATŌHEA)
NGĀTI RUATĀKENGA
Appellants

AND **NGĀTI IRA O WAIOWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA)**
TE TĀWHARAU O TE WHAKATŌHEA (FORMERLY WHAKĀTŌHEA MĀORI TRUST BOARD)
NGĀI TAI AND RIRIWHENUA
TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE UPOKOREHE IWI
TE RŪNANGA O NGĀTI AWA
WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)
NGĀTI RUATĀKENGA
NGĀTI MURIWAI
KUTARERE MARAE

LANDOWNERS COALITION INCORPORATED
Respondents

ATTORNEY-GENERAL
TE RŪNANGA O TE WHĀNAU ON BEHALF OF TE WHĀNAU-Ā-APANUI
SEAFOOD INDUSTRY REPRESENTATIVES
CROWN REGIONAL HOLDINGS LIMITED
ŌPŌTIKI DISTRICT COUNCIL
BAY OF PLENTY REGIONAL COUNCIL
WHAKATĀNE DISTRICT COUNCIL
LANDOWNERS COALITION INCORPORATED
TE RŪNANGA O NGĀTI AWA
Interested Parties

NGĀ HAPŪ O NGĀTI POROU
Intervener

Hearing:	4–7 November 2024, 12–15 November 2024
Court:	Glazebrook J Ellen France J Williams J Kós J French J
Counsel:	R J B Fowler KC, A J Sinclair and B M Cunningham for Whakatōhea Kotahitanga Waka (Edwards) M J Sharp (via VMR) for Ngāti Muriwai and Kutarere Marae J S Cooper KC, B R Lyall and H L B Swedlund for Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe Iwi A J Williams, R L Roff and Y Moinfar-Yong for Attorney-General A T I Sykes and S W H Fletcher for Ngāti Ira o Waioweka M S Smith and T H Bennion for Ngāti Patumoana K S Feint KC and N A T Udy for Ngāti Ruatākenga C M T Panoho-Navaja for Ngai Tamahaua

J M Pou (via VMR) for Te Tāwharau o Te Whakatōhea (formerly Whakatōhea Māori Trust Board)
B R Arapere (via VMR), A E Gordon (via VMR) and E K Rongo for Ngāi Tai and Ririwhenua
D M Salmon KC, H K Irwin-Easthope and R K Douglas for Te Rūnanga o Ngāti Awa
J E Hodder KC, B E Morten and S O H Coad for Landowners Coalition Incorporated
M K Mahuika and N R Coates for Te Whānau-ā-Apanui
T D Smith and R J J Wales for Seafood Industry Representatives
M H Hill (via VMR) and J L Hollis (via VMR) for Crown Regional Holdings Limited and Ōpōtiki District Council
A M Green (via VMR) and E S Greensmith-West (via VMR) for Whakatāne District Council
M K Mahuika, T N Hauraki and H L P Ammunson for Ngā Hapū o Ngāti Porou as Intervener

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CIVIL APPEAL

KARAKIA TĪMATANGA (DR TE RIAKI AMOAMO)

MS WILLIAMS:

E ngā Kaiwhakawā tēnā koutou. Ko Williams tōku ingoa. Kei kōnei mātou ko Roff, ko Moinfar-Yong mō te Karauna. Your Honours, Ms Williams with Ms Roff and Ms Moinfar-Yong, for the Crown.

GLAZEBROOK J:

Tēnā koutou.

MS FEINT:

E ngā rau rangatira mā, tēnā koutou katoa. E ngā Kaiwhakawā o te Koti Mana Nui, tēnā koutou. E te pou tikanga, Matua Te Riaki, nāu te kaupapa i whakatūwhera te karakia, tēnā koe. Huri noa e te whare, kei ngā rangatira katoa kua tae mai ki te tautoko i te kaupapa whakahirahira o te Takutai Moana,

tēnei te mihi atu. E te Karauna, e ngā Kaipīra katoa, e mihi ana. Ā, kua tae Te Whakatōhea tohi ai. Nō reira, ko Feint ahau, ka tū mātou ko Sykes, ko Panoho-Navaja, ko Smith, ko Bennion, ko Fletcher, ko Udy. He māngai rōia mō Te Kahui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea, tēnā rā tātou katoa. May it please the Court. I registered an appearance for Te Kāhui Takutai Moana o Ngā Whānau Me Ngā Hapū o Te Whakatōhea, and I have also greeted the Court and everyone in it. I have especially acknowledged our Pou Tikanga for Te Whakatōhea, Te Riaki Amoamo, who came down especially today to open the kaupapa for this important hearing. So I will be just doing appearance for Ngāti Ruatākenga as well, myself and Ms Udy appear for Ngāti Ruatākenga, and then the counsel who appear for the other hapū are going to register their appearances for those hapū. Nō reira tēnā ra tatou.

GLAZEBROOK J:

Tēnā koutou.

MS SYKES:

Mōrena kia a tātou, e ngā Kaiwhakawā o Te Kōti Mana Nui, tēnā koutou. E te tohunga i whakatūwhera tō tātou nei hui i te rā nei, tēnā koe. Kua roa te wā i kite ai i a koe i waenganui i a tātou i tēnei wāhi o Pōneke i runga i taua tūmanako, kei te mihi atu au ki a koe e te Pāpara, i tae mai ā kanohi mai ki te whakanui te kaupapa o te rā. Ko ahau, ko Annette Sykes māua tahi ko Scott Fletcher e kīa nei ngā māngai tautoko mō te hapu o Ngāti – i rapu ai, e kī ana i mua i a koutou Ngāti Ira O Waioweka, kei te mihi ki a tātou, koutou mā o te Karauna, tātou hoki ngā rōia e whawhai tonu i tō tātou nei whakaaro i runga i tēnei kaupapa, kia ora.

GLAZEBROOK J:

Tēnā kōrua.

MS PANOHO-NAVAJA:

Tēnā e te Kōti, tēnā koutou e te Kaiwhakawā o Te Kōti Mana Nui. Ko Ms Panoho-Navaja tōku ingoa. Ko au te pou ture mō Ngāi Tamahaua hapū.

Kei te tautoko au i ngā mihi kua mihia, ki te pā whakawairua, nāna i whakatūwhera i tō tātou nei hui. Otirā, ki ngā kaitono pira katoa, ngā –

MR POU ADDRESSES THE COURT – AUDIO ISSUES (10:54:59)

GLAZEBROOK J:

You could try the lectern, perhaps. There seems to be an issue.

MS PANOHO-NAVAJA:

He pai tēnā? Kei te tautoko au i ngā mihi kua mihia, ki te pā whakawairua, nāu rā i whakatūwhera i tō tātou nei hui. Otirā, e mihi kau ana ki ngā kaitono pira, ki ngā kaiurupare katoa kua tae mai, kua tatu ki tēnei kaupapa tino whakahirahira o rātou mō te Takutai Moana te take. May it please the Court, Ms Panoho-Navaja appearing for Ngāi Tamahaua hapū, and just acknowledging my clients who will be watching on the livestream throughout the duration of the hearing, and will be in attendance during the days that Te Kāhui present. Thank you.

GLAZEBROOK J:

Tēnā koe.

MR M SMITH:

If I try this microphone. E Te Kaiwhakawā, tēnā koutou. Smith and Bennion for Ngāti Patumoana, and I think Mr Bennion gives his apologies, he's in the High Court for a hearing and hoping to get here very shortly. I don't think he's quite here at the moment.

GLAZEBROOK J:

Tēnā koe.

MS COOPER:

Tēnā e te Kōti Mana Nui, ko Cooper tōku ingoa. E tū ana mātou ko Lyall, ko Swedlund mō Te Upokorehe Treaty Claims Trust mō Te Upokorehe Iwi. May it please the Court, Cooper with Lyall and Swedlund for the Te Upokorehe

Treaty Claims Trust on behalf of Te Upokorehe Iwi. Ms Swedlund gives her apologies. She's in a High Court hearing as well today but will join later in the hearing, and –

GLAZEBROOK J:

Sorry, you seem to be fading a bit?

MS COOPER:

Oh, I beg your pardon, your Honour.

GLAZEBROOK J:

Because we have got people on VMR, it's probably –

MS COOPER:

Yes. I beg your pardon, your Honour. Cooper, Lyall, and Swedlund for Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe Iwi. And I was just giving apologies on behalf of Ms Swedlund who is in another hearing today, and apologies in advance for Mr Lyall, who will be absent on Wednesday for another hearing.

GLAZEBROOK J:

Tēnā kōrua.

MS RONGO:

Tēnā koutou, e ngā Kaiwhakawā. May it please the Court, counsel's name is Rongo. I appear today alongside my learned counsel Ms Arapere and Ms Gordon, who are on AVL at the moment. We represent Ngāi Tai and hapū Ririwhenua, and I also need to just register – seek leave to withdraw slightly early on Wednesday to present closing submissions in the High Court, but I should be back Thursday morning. Kia ora.

GLAZEBROOK J:

Tēnā koutou.

MR FOWLER:

E ngā Kaiwhakawā, tēnā koutou e te Kōti. Ko Richard Fowler ahau. Ko Tony Sinclair rāua ko Cunningham. Ōku hoa rōia, ko mātou te hunga rōia mō te kaipira. Whakatōhea Kotahitanga Waka Iwi Edwards, tēnā koutou katoa. May it please the Court, Fowler, Sinclair, and Cunningham for the Whakatōhea Kotahitanga Waka appellants.

GLAZEBROOK J:

Tēnā koutou.

MR HODDER KC:

May it please the Court, Hodder with my learned friends Ms Morten and Mr Coad for the Landowners Coalition Incorporated.

GLAZEBROOK J:

Tēnā koutou.

MR T SMITH:

E ngā Kaiwhakawā, tēnā koutou. Counsel's name is Smith and I appear with my friend Ms Wales for the Seafood Industry Representatives.

GLAZEBROOK J:

Tēnā kōrua.

1020

MR SALMON KC:

Tēnā koutou. Salmon with Ms Irwin-Easthope and Ms Douglas for Ngāti Awa.

GLAZEBROOK J:

Tēnā koutou.

MR MAHUIKA:

Tēnā koutou e ngā Kaiwhakawā o tēnei Kōti Mana Nui. Ko Mahuika taku ingoa. Kei kōnei au mō ngā rōpū e rua, tuatahi kei kōnei au hei rōia mō Te Whānau-a-Apanui, i te taha o Ms Coates. Kei te Kōti Matua a Ms Coates i

tēnei wā, engari ka haramai ia hei te Wenerei, e tū mai nei. Kei kōnei anō hoki au hei rōia mō ngā hapū o Ngāti Porou. Kei kōnei au mātou ko Ms Hauraki me Mr Ammunson hei roia mō ratou. Heoi anō tēnā, tēnā koutou, tēnā tātou. Mōhio tonu au ehara tēnei te wā mō te mihimihi engari kei te tautoko atu āwau i ngā mihi kua mihingia mō tēnei o ngā pāpā o Te Whakatōhea, Te Riaki, nāna i tau mai te mauri o te Kaihanga kei runga i tēnei tō tātou nohoanga, i tēnei tō tātou huihui nei i tēnei rangi tonu. Nā reira, e te Kōti, tēnā tātou.

GLAZEBROOK J:

Tēnā kōrua. I think that's everybody here, is it, so we have some people on VMR? Do we, who need to record an appearance. It's fine if you don't wish to, because we can take your appearances when you make your submissions.

MR POU:

Jason Pou for Te Tāwharau o Te Whakatōhea.

GLAZEBROOK J:

Tēnā koe.

MR SHARP:

If the Court pleases, Sharp for Ngāti Muriwai and Kutarere Marae.

MS HILL:

E ngā Kaiwhakawā, tēnā koutou. Ko Mary Hill ahau. Kei kōnei māua ko Jemma Hollis, mō Crown Regional Holdings Limited me te Kaunihera Ōpōtiki. Counsel's name is Ms Hill. I appear with Ms Hollis for both Crown Regional Holdings and Ōpōtiki District Council.

GLAZEBROOK J:

Tēnā korua.

MR GREEN:

If the Court pleases. Green for Whakatane District Council with Mr Greensmith-West.

GLAZEBROOK J:

Tēnā korua. So is that everyone? If that's the case, Ms Williams, is it?

MS WILLIAMS:

Yes. Tēnā koutou anō. Āe, ka tautoko au ngā mihi kua mihia. E te kaikarakia, nāu tēnei nohoanga hirahira i whakatūwhera, tēnā koe. Kia uruhau te Kōti, e ngā Kaiwhakawā e noho ana i te teepu rangatira nā, tēnā koutou. To the kaikarakia, thank you for opening this important session of the Court, and may it please the Court your Honours. Before we began your Honours we handed up a short road map for the Attorney's submissions. Now I'll begin with some introductory remarks.

Your Honours, the area at the heart of this appeal is in the Eastern Bay of Plenty, in the Whakatāne/Ōpōtiki area. The Attorney acknowledges that the subject matter, the customary rights in the Takutai Moana is of special importance to all iwi, hapū, and whānau of Aotearoa. The Attorney wishes to acknowledge the significance of this case for the particular parties before the Court.

As my learned friend has said, the history and background to the Edwards Whakatōhea proceeding is a long one, and some of the people earlier involved have now passed on. The Attorney acknowledges the work that has been done by all of the groups in getting to the point that we are at, and the responsibility that has been borne by the applicants. Some of the members of those groups are in court today, some are watching online, and I mihi to them. I also wish to make clear at the outset that the Attorney-General's appeal is solely concerned with the correct interpretation of the law. The Attorney is not taking a position on any of the factual matters that have been raised in the other parties' appeals, and will abide the Court's decision on them.

As set out in the road map handed up before, the Attorney-General's appeal concerns the correct interpretation of four issues. Issue 1 is the test for customary marine title, CMT, at section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011. Issue 2 concerns the effect of previous

extinguishing events, that's sections 11(3) and 58(4) of the Act, and issue, sorry, that's issue 2. Issue 3, the test for protected customary rights, PCR, in section 51 of the Act.

The Attorney-General responds to the other parties' submissions to the extent they touch on the above issues, as well as a discrete point raised in Te Upokorehe's appeal concerning the availability of separate, overlapping CMT under the statutory scheme.

Today I will discuss issue 1, the correct interpretation of section 58 for CMT, where we say the Court of Appeal majority misapplied section – misapplied the second limb and that the approach of Miller J is to be preferred. Ms Roff will then address you on issue 3, the correct interpretation of the test at section 51 for PCR, where we say the Court of Appeal has introduced an ambiguous "relevant connection" test, and I anticipate that our discussion on those topics may take us through until 3 o'clock today or slightly after. On the current timetable, on Tuesday next week Ms Roff will address you on issues 2 and 4.

GLAZEBROOK J:
Can I just check what issues 2 and 4 were again? I think I missed issue 4.

MS WILLIAMS:
Issue 4 has come up in Te Upokorehe's appeal. It concerns the availability of separate, overlapping CMT.

GLAZEBROOK J:
That's right, thank you.

MS WILLIAMS:
On issue 1, this is the correct interpretation of section 58, the Attorney has two pillars that I would like to address you on. Pillar 1 is the argument that the Act was enacted following a national conversation and a long policy process that had involvement from all three branches of Government and a political compact. In the Act, Parliament made deliberate choices to, as it saw, balance

the interests of Māori with the legitimate interests of all New Zealanders, including Māori. We say that is reflected in the elements of section 58.

And pillar 2 is our argument that the majority failed to undertake a genuine interpretive exercise regarding section – the second limb of the section 58 test and made a number of errors in its reasoning. Now we say the effect of the majority's approach is to undermine the deliberate choices made by Parliament and render the second limb criteria of exclusive use and occupation "from 1840 to the present day" virtually irrelevant, which does "violence" to the text of section 58.

KÓS J:

So your attack is on the majority. What's your position on the minority?

MS WILLIAMS:

We support Justice Miller's interpretation of the second limb, and we largely support the Court of Appeal's decision on the first limb.

To talk to my first pillar, and this is the appellant's submissions from paragraph 7 on, I want to outline the legislative, historic, and social context of the Act, because this shows the deliberate choices that were made by Parliament following that national conversation and the policy process.

Now your Honours will be familiar with *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) and of course prior to that government policy and legislation proceeded on the basis that Māori customary title to the foreshore and seabed had been extinguished. That was on the basis of prior case law, including the 1968 [*sic*] *Ninety-Mile Beach* [1963] NZLR 461 (CA) case.

Ngāti Apa held that the Māori Land Court had jurisdiction to determine claims of customary ownership to areas of the foreshore and seabed, and partly in response to that judgment in 2004 the Government enacted the Foreshore and Seabed Bill 2004. That 2004 Act vested all the public foreshore and seabed in the Crown as its absolute property. It provided for public rights of access and

navigation in this area, and removed the jurisdiction of the courts to consider whether land within it had the status of Māori customary law or Māori customary rights claims and instead provided for two kinds of statutory orders to be made. 1030

As referenced at paragraph 9 of the Attorney's submissions, the nature of the national debate around the foreshore and seabed issue at this time was described in the later report of the Ministerial Review Panel as highly politicised, subject to intense media scrutiny, much of it sensationalised and polarised, and seriously divisive. An urgent Waitangi Tribunal inquiry concluded the policy underpinning the 2004 Act was in breach of Treaty principles, and when a new government was elected in 2008, the confidence-and-supply agreement between the National Party and the Māori Party included an agreement to review the 2004 Act. That began with the government establishing an independent ministerial review panel which received written submissions and oral submissions and reported publicly in June 2009. The Panel recommended repeating the 2004 Act and for the Crown to have a longer conversation with stakeholders about the foreshore and seabed.

The Government then undertook a policy process including in April 2010 releasing a consultation document for its proposals. The consultation document set out the key features of the Government's proposed test for CMT and PCR and the awards it proposed for recognising proven customary interests. In the consultation document the Government's stated objective was in developing a regime that balanced the interest of all New Zealanders. The central features of the Marine and Coastal Area (Takutai Moana) Act were agreed to be Cabinet following the receipt of submissions, and the Bill was introduced to the House in September 2010. The select committee that considered the Bill received nearly 6,000 written submissions, and heard 287 oral submissions at hearings across the country.

I will just pause to set out that section 1 of the Act says it may be cited as the Marine and Coastal Area Act, or te Takutai Moana Act, and I think the parties will probably use both interchangeably.

My point from briefly outlining these is that the Act stemmed from a national conversation and a political compact. The policy development spanned several years, including several rounds of consultation with Māori and the public generally. Numerous interests and arguments were ventilated. The statutory tests that were chosen for the recognition of customary interests, the attendant rights that are conferred under the Act, and the Act's preservation of public rights of access, fishing and navigation at sections 26 to 28, are a direct reflection of that process. Parliament itself acknowledged the importance of that background by setting it out in the Preamble to the Act.

At paragraph 16 of the written submissions the balancing that the Act aims to achieve is also evident in how the Act sets out its four purposes, none of which is expressed as having priority over the others. The first in section 4(1)(a) is to "establish a durable scheme to ensure the protection of the legitimate interests of *all New Zealanders*" in the marine and coastal area. The purposes in section (4)(1)(b) and (c) are to "recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau" and at section 9(1) of the Act mana tuku iho is defined as "inherited right or authority derived in accordance with tikanga". In section (4)(1)(c), "to provide for the exercise of customary interests in the common marine and coastal area". The final purpose, in section 4(1)(d) is to "acknowledge the Treaty".

My submission on this pillar is that the words chosen in section 58 reflect the choices of Parliament, and I'd like to take your Honours to an example of this. This is the Attorney-General's bundle at 39, it's the Departmental Report from the Ministry of Justice on the Bill. The excerpt has page 276 on the bottom, and its paragraphs, from 1385 to 1389. Paragraph 1385 starts out as saying: "Some submitters support leaving it to the courts to determine whether customary title existed rather than providing a test in the Bill."

At paragraph 1387, this is the Ministry's commentary: "The Government's view is setting out the elements of the test for determining CMT will provide increased certainty and efficiency for testing customary interests. The range of outcomes

that could arise from allowing the test to be determined entirely by the courts, or applying Te Ture Whenua Māori… test 'held in accordance with tikanga', would significantly increase any uncertainty for Māori or non-Māori about the nature and extent of rights in the" – customary marine and coastal area – "CMCA. Leaving the test to the courts to develop would provide no guarantee the outcomes would balance the rights and interests of all New Zealanders."

Then at paragraph 1389 on the next page: "The current elements of the test have been designed to ensure customary interests are recognised in a way that is broadly consistent with how common law has developed internationally and with New Zealand's Tiriti and common law-based jurisprudence." And they recommended "no change" to the proposal that had been consulted on and introduced, and that is the test that we have in the statute.

If I could take your Honours to my second pillar, which is the wording of section 58 itself, and this is from the Attorney's submissions at paragraph 17 on. I've already used the terms "limb 1" and "limb 2", but to be clear, section 58 of the Act provides that customary marine title exists in a specified area of the common marine and coastal area if an applicant group "holds the specified area in accordance with tikanga", which we call limb 1, and has "exclusively used and occupied" the area "from 1840 to the present day without substantial interruption", which we say is limb 2.

There are other provisions in section 58 which regard tuku whenua, the transfer of land, and they aren't relevant to the Attorney's argument at this stage.

Now as we touched on before, on limb 1 the Attorney largely agrees with the Court of Appeal's approach that the focus should be on tikanga and that limb 1 requires the applicant group to show that as a matter or tikanga it has the authority to use and occupy the area, and to control access to and use – and the use of that area by others.

Although there has been some comment in submissions by Ngāti Muriwai and Kutarere Marae as to the correctness of the Court of Appeal's decision on

limb 1, I don't understand that the majority's approach to limb 1 is a point on appeal, and the Attorney's focus will be addressing you on the second limb, has "exclusively used and occupied" the area "from 1840 to the present day without substantial interruption".

KÓS J:

Well when you say you "largely agree" with the Attorney – with the Court of Appeal's approach, what bit are you disagreeing with?

MS WILLIAMS:

It's not necessarily a matter of substance, your Honour. We would say that at paragraph 403 of the judgment the majority has made a distinction with the Canadian cases, and we say that's somewhat unnecessary because the Canadian cases, this is in regard to how they refer to a group's "intention and ability" to exclude others from the land, are talking about the concept of exclusivity, which we say is relevant to the second limb rather than the first limb. So how the majority has set out the first limb at paragraphs 401 and 402 of the judgment, we are content with.

WILLIAMS J:

So what's the issue, then? The use of exclusivity under limb 1, is that the point you're making?

MS WILLIAMS:

Yes. If I can take your Honours to the judgment, you might have a hyperlinked copy but it's tab 16 of the Attorney's bundle.

WILLIAMS J:

Which paragraph?

MS WILLIAMS:

So our submission is that –

GLAZEBROOK J:

Yes, can you just refer us to the specific paragraphs you're talking about, please?

1040

MS WILLIAMS:

Paragraphs 402 and 403 of the majority's decision. Sorry, previously paragraph 401 where they say: "We agree with the Judge" Justice Miller "that in interpreting and applying the first limb, the focus should be on tikanga, and whether as a matter of tikanga the applicant group holds the relevant area." We agree with that. We agree with paragraph 402: "This is a contemporary inquiry: the term 'holds' is in the present tense. So the applicant group must currently use and occupy the area, in a manner consistent with the nature of that area, and must have control or authority over the area according to tikanga."

Paragraph 403, where their Honours in the majority go on to talk of the Canadian cases, and they say at the top of page 366: "… we consider it is more helpful to focus 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*." We say that is more relevant to the second limb test rather than the first.

WILLIAMS J:

Why do you say they're mutually exclusive?

MS WILLIAMS:

We think that the evidence that might be used in terms of meeting the requirement of held, could apply between limb 1 and limb 2, so there is some natural synergy in what will be considered. But that the majority – sorry, the way that Justice Miller has outlined the test at paragraph 140, is the interpretation we argue for.

WILLIAMS J:

So this is in respect of tikanga? Is it, at 140?

MS WILLIAMS:

It's how he sets out limb 1 and how that will be met, yes.

ELLEN FRANCE J:

Sorry, what do you see as the difference then between the bit in paragraph 403 that you don't agree with and Justice Miller?

MS WILLIAMS:

It's in terms of emphasis and terminology your Honour. We think that substantively the test that the majority has said in paragraph 401 and 402 is the same as what Justice Miller has set out that we support. But we hadn't understood that any of the parties to be suggesting that the Canadian cases are pertinent to the interpretation of limb 1, and so on that basis it's unnecessary to bring them into a discussion about the interpretation of limb 1.

GLAZEBROOK J:

So you're saying they shouldn't have looked at the Canadian cases for limb 1, is that what the…

MS WILLIAMS:

No, I'm not going that far. I'm saying that referring to them in the context of summarising the approach to limb 1 perhaps distracts from the approach that should be taken, which we say is a tikanga-based test.

KÓS J:

The thing is that Justice Miller doesn't really have a limb 1 or limb 2. He takes a composite approach. It's the majority that introduced the limb notion?

MS WILLIAMS:

We don't accept that it's necessarily a composite test. We think the limbs inform each other but there'd be separate tests. The limbs, we would say, have different thresholds and distinct focuses.

WILLIAMS J:

The difficulty we have here, and this is much more your substantive second limb, is that the statute clearly doesn't mean exclusive, because it says it doesn't, and then how do we make sense of that, and clearly in some areas tikanga does mean exclusive, and there's no real doubt about that. So this takes us back to the problem that this is said to be a statutory test but it leaves a massive grey area, and in fact says so at 1389 of the report that you read: "This test is consistent with the common law" it said "both internationally and locally."

MS WILLIAMS:

It's a test that is novel to New Zealand that drives – that is drawn from all three strands for the second limb. So we say limb 1 tikanga-based test, the statute clearly says that, limb 2, it's a novel concept that is in New Zealand only and that you would look to and the test has been drawn from looking at New Zealand's Treaty-based and other common law jurisdiction and overseas case law.

WILLIAMS J:

That idea of exclusivity is seen in the early Native Land Court cases too, isn't it, where there's no reference to exclusivity, the reference is only to ancient customs?

MS WILLIAMS:

Yes, your Honour, I can address you on that. I just want to clarify one point first. The Attorney isn't arguing that the interpretation of exclusive is a literal reading of exclusivity. We are saying it is in somewhat a term of art drawing from those three strands and developing them to that is New Zealand jurisprudence, and I think that is where there is a difference between the

Attorney and some of the other parties, where some of the parties would say that tikanga is the overriding criteria in second limb and another party would say that tikanga is not relevant.

WILLIAMS J:

So you sit in the middle, you say where tikanga is relevant to exclusive use and occupation, just taking a step further, how relevant when as best you can?

MS WILLIAMS:

I'll summarise the point briefly because I will address it further later in context but we would say that Miller J's approach recognises that tikanga is a part of the test of exclusivity and his application of what exclusivity means draws from tikanga. He has numerous references to the evidence that was before him where people talk about how tikanga, as you say, applied what we say as parts of the exclusivity test, ie, the ability to control the access of others and an intention to do so.

WILLIAMS J:

And yes that must be so because Justice Miller accepts the idea of shared exclusivity?

MS WILLIAMS:

Yes, and likewise when talking about the definition of an exclusivity not being literal, exclusivity within the Act is already burdened by or allows for public access, navigation and fishing to continue without that, unless it reaches a substantial interruption point being a barrier to exclusivity being met.

WILLIAMS J:

Yes, and that suggests, doesn't it, that there's much more going on in the statute than just these words?

MS WILLIAMS:

Yes.

WILLIAMS J:

Right, good, thanks.

MS WILLIAMS:

But I would also say that doesn't enable a purposive interpretation to drag us into or away from the clear meaning of section 58 and I will address you on that as well.

WILLIAMS J:

Okay.

MS WILLIAMS:

Since we're in section 58 and the judgment, this is our limb, our limb 2 argument, we say that the – sorry, this is our submissions, written submissions from paragraph 18 onwards. The approach of Justice Miller, as I've gone to paragraphs 141 and 142 and 160 of the judgment, that is that the second limb requires the applicant group to show evidence of both the intention and ability to control and exclude both Māori and non-Māori from 1840 to today, that this will be a question of fact dependent on the characteristics of the area, the kinds and frequency of use, the circumstances of the claimant group and it is to be approached from both common law and tikanga perspectives.

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The Justice Miller judgment there, I run through it at paragraph 162 of the Court of Appeal: "In my view 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. Exclusivity is a question of fact, heavily dependent on the characteristics of the specified area, the kinds, frequency and intensity of use, and the circumstances of claimant groups. The inquiry must be sensitive to the methods that were and are available to assert mana. It must also be sensitive to the practice of whanaungatanga and the existence of whakapapa linkages which mean that other groups may not have been physically excluded from the specified area but rather used its resources with permission of the applicant group."

There are two primary arguments on which I wish to address you. The first is our argument that the key error by the majority is that their interpretation ignores the tests clear and unambiguous requirement of exclusive use and occupation from 1840 to today. The second is that the majority substituted the statutory language with its assessment of "just" or Treaty-consistent outcomes by making a number of inter-related errors. The majority developed a counterfactual based on the number of errors, and as a result, chooses to substitute the statutory language.

To summarise the errors, they adopted a counterfactual of what would have happened post-*Ngāti Apa* without statutory intervention which was not supported by common law authorities. They thought few areas of the coastline would meet the test under Justice Miller's interpretation, and they characterised an applicant's failure to meet section 58 as an extinguishment of their rights, and described such as an outcome, such an outcome as inconsistent with the Treaty and the Act's purpose.

I'd like to address you on those errors in turn. Error 1, regarding ignoring elements of the test requiring exclusive use and occupation from 1840 to today without substantial interruption. Now I made the point when I discussed pillar 1, that in enacting the Takutai Moana Act, the Government was attempting to balance various interests of New Zealanders, and have engaged in national conversation and a policy process in which these interests were raised and the balance of them debated. In that context we say the inclusion of the elements of exclusive use and occupation from 1840 to today without substantial interruption, was a deliberate policy choice, and the legislative history illustrates that in the section 58 test Parliament drew from New Zealand case law, tikanga and overseas common law.

WILLIAMS J:

The conundrum is this, isn't it. That if, as you say, up until 2003 the law was these rights had no recognition, there were no such rights.

MS WILLIAMS:

Sorry, can you repeat that?

WILLIAMS J:

Up until 2003, *Ngāti Apa*, the law was these rights didn't exist, right, that's the point you made.

MS WILLIAMS:

Yes.

WILLIAMS J:

The *Ninety-Mile Beach* case put paid to them, and the Harbours Act and the executive's response to the *Kauwaeranga* judgment and so forth.

MS WILLIAMS:

Yes.

WILLIAMS J:

These rights were unenforceable. That would mean, wouldn't it on that analysis, that any Māori attempting to enforce those rights, would be acting illegally.

MS WILLIAMS:

It would…

WILLIAMS J:

Because they would have no right – they would not be entitled to control a fishery, a mussel rock, or whatever, and to the extent that they attempted to exclude anybody from that, they would be either guilty of assault, or whatever that might be, right, if they attempted to exclude them, to exercise the very control CMT says you've got to prove.

MS WILLIAMS:

I understand your point your Honour, but I would say that the…

WILLIAMS J:

Well the point is, if that were the case, then the only way you could sustain CMT was if for the last 100-odd years you behaved illegally.

MS WILLIAMS:

No I do not accept that your Honour, and I'd say that the decision in *Re Reeder* [2021] NZHC 2726 is an example where groups around a moana in Tauranga were able to prove CMT to the satisfaction of the High Court in this test.

WILLIAMS J:

Yes, but that's the happenstance of it being an enclosed area, and significant adjoining Māori land, but still technically if they walked out onto the Rangataua mudflats and said: "I'm sorry, you cannot take pipis from here, I am taking your kete," that would've been unlawful, although Justice Powell says they seem to have done it?

MS WILLIAMS:

Exactly, your Honour.

WILLIAMS J:

Right. So this is the very conundrum with reconciliation law like this and why the courts overseas have taken a very permissive approach to continuity, because otherwise you destroy the potential of the right immediately.

MS WILLIAMS:

Yes, your Honour, I understand the point you're making. What I would suggest is that what you've put is a very binary option. They either had control, which they – in your hypothetical they either had control, which they couldn't have because it was not recognised post-*Ninety Mile Beach*, or alternatively –

WILLIAMS J:

Or wasn't recognised at all post-1872.

MS WILLIAMS:

Or they attempted to enforce it, in which case – and attempted to enforce it in a legal sense, in which case we're doing something unlawful, and I would suggest to you there's a false dichotomy and shows exactly why this test needs to be fact-determinant and depending on the circumstances at the ground, the characteristics of the land, the nature of the interest that's been asserted and so forth, and I would say that the wording of section 58 allows for that to occur.

WILLIAMS J:

See, in the Ngā Pōtiki case the local tribes protested against a sewerage outfall which went ahead and the Judge says well that's an indication of control, but in fact it wasn't, was it, it was the opposite of that, because the sewerage outfall was established and 24 hectares or whatever was turned into settling ponds.

MS WILLIAMS:

Yes –

WILLIAMS J:

So is it the attempt to continue to control, is that enough, not necessarily actual control?

MS WILLIAMS:

Those assertions of mana and an attempt to indicate or to –

GLAZEBROOK J:

Indicate authority, is it?

MS WILLIAMS:

Yes, authority, thank you, your Honour, are the sort of factors that will be considered relevant to the factual consideration before the Court. The Act already recognises that there will be some activities that will continue regardless of whether CMT is issued, accommodated activities, various other aspects within the Act which attempt to recognise that there are several

statutory schemes that take place in the takutai moana where rights have been given or will be enforced by regional or Government authorities.

GLAZEBROOK J:

Isn't that the balance, though, struck in the Act? Why do we have to have a balance in section 58 if we've already got access rights, fishing rights, and other exclusions?

MS WILLIAMS:

If Parliament had intended to not have that balance built into section 58's second limb, it could have simply left the test at the first limb, it could have adopted a test similar to Te Ture Whenua Māori Act 1993 and had "held in accordance with tikanga" only, or "held in accordance as at 1840". Parliament chose not to do that.

GLAZEBROOK J:

Well it wouldn't be 1840, would it, because you have to take account of actions post-1840. Isn't that all really that's being said?

MS WILLIAMS:

I think this illustrates one of the points of the Attorney, that in attempting to identify what may have happened post-*Ngāti Apa* were it not for substantial interruption, we don't – we can't be precise, and no one knows.

GLAZEBROOK J:

Well I'm not sure, because customary title can only be extinguished either by somebody selling it, because you can, that's recognised, so a lawful alienation by the people themselves, or alternatively by unambiguous statute, and doesn't *Ngāti Apa* say there just wasn't any of that in terms of the unambiguous statute?

KÓS J:

Well just before you accept that for a second, there's a third limb which is abandonment.

GLAZEBROOK J:

Oh, yes. Sorry, yes, but I was…

MS WILLIAMS:

Sorry, your Honour, in…

GLAZEBROOK J:

Well it's lawful alienation, abandonment, or it has to be by unambiguous statute. That's what the common law on customary title says, isn't it?

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MS WILLIAMS:

Yes, and *Ngāti Apa* applied that in the judgment, but there the Court was looking at whether the jurisdiction of the Māori Land Court in regard to the definition of land and it was not making a decision about whether such – the test – what the test was in New Zealand and whether it could still be met.

GLAZEBROOK J:

But the test is clear in relation to customary land and how you extinguish it, isn't it?

MS WILLIAMS:

My friend will address you on what meets the criteria for extinguishment, and I think that's scheduled for next week, but the point that we're making is for recognising rights so what the test for customary interests and customary rights are.

GLAZEBROOK J:

I'm just – I can understand your argument on section 58, what I don't understand is your argument that the common law might have developed in a different way because the common law seems absolutely clear to me in terms of when title is extinguished and that's what *Ngāti Apa* says. I don't think *Ngāti Apa* was saying because if it's not extinguished then it subsides, it subsists, doesn't it?

MS WILLIAMS:

Again, I think that the point your Honour is making is about when that customary right is extinguished as opposed to developing what the test would have been for recognising customary rights in New Zealand. The Australian and Canadian jurisprudence are themselves different. There's no established – there's no clear joined up common law view of the test for customary rights in land let alone how that would be applied in a New Zealand context.

GLAZEBROOK J:

Well, because they didn't think they existed which comes back to Justice Williams' point but…

WILLIAMS J:

Yes. This is what makes this area so difficult. In fact, there's 60, 70 odd years of jurisprudence about customary rights in New Zealand and volumes and volumes of transcripts and judgments about those things that suggest relatively light use of land is treated as sufficiently exclusive for the grant of title in hundreds and hundreds of cases, right? And when it gets to the foreshore in the earlier cases the exclusion of the ability to grant foreshore titles was on a matter of law, not on a matter of evidence, because the fact of the matter is the foreshore was probably the primary source of protein for most coastal tribes. If any area was capable of ownership, it's likely to have been the foreshore. Let's not talk about 20 ks offshore but the foreshore is absolutely crucial to most coastal tribes' economies, right?

MS WILLIAMS:

Yes, your Honour.

WILLIAMS J:

And in the Tauranga case that you cite, the Judge does seem to accept without any contradiction from the Crown, that attempting to control is enough, is that so?

MS WILLIAMS:

Yes.

WILLIAMS J:

You give up, you lose but if you keep trying, even if you don't succeed, that's going to be enough for CMT?

MS WILLIAMS:

Well, again, to come back to Miller J's approach in the Court of Appeal he recognised that Tauranga case and how the test had been applied.

WILLIAMS J:

Right, so the point I'm driving at is that even the test of intention and ability to control is substantially compromised in the New Zealand context. It has to be or you visit quite stark injustice to tribes that have been struggling to maintain their coastal areas across generations.

MS WILLIAMS:

And, again, the Attorney's submission is not that this is a literal definition of exclusivity and that any test in its application must be fact-specific including to the nature of the area in question. I think in the cases that your Honour is referring to, the difference between dry land and how the test will be examined in that light, is very different to what happens in the coastal marine area and offshore.

WILLIAMS J:

Yes, well that's the point, insofar as the foreshore is concerned anyway, that's not correct at all. The foreshore was even more closely divided than the bush areas because there was more food in those areas. Much more shellfish than there is bird, which is why the tribes were very particular about who had rights where in that coastal fringe. The Māori Land Court says that in the early 19th century cases.

MS WILLIAMS:

And I'm not disputing that your Honour, and what we've seen is that the test that the Attorney is promoting, in which tikanga is an element, allows for that complex over layering of rights and interests of various work groups to be accommodated and examined as Justice Miller has done.

WILLIAMS J:

But my point is it's incorrect, I suggest, to say the foreshore, at least, is different to the land, because as a matter of tikanga, and as a matter of economic reality, at least in traditional times, and for many tribes continually so, that's simply not factually correct.

MS WILLIAMS:

Your Honour I would not accept that, and I think that maybe it is a matter of me expanding on my point.

WILLIAMS J:

Okay.

MS WILLIAMS:

I'm not in any way saying that the importance of the foreshore and seabed is any less than the importance of dry land. What I'm saying is the ability of – ability to evidence – the intent and ability to control access will have different indicators, and that, for example, further out from the shore, it will be harder to look – a party wouldn't be expected to show the same continuous presence that they might to on the dry land.

WILLIAMS J:

Yes, or on the literal zone, that's the – the literal zone is much more like the land than it is like the sea, is the point I'm driving at. Just understanding the

economy upon which that legal system was based demonstrates that amply, does it not?

MS WILLIAMS:

Yes I'd accept that your Honour, and I want to emphasise again that the Crown's position is not in any way that the foreshore and seabed marine area was less important to iwi and hapū than dry land.

WILLIAMS J:

Okay.

KÓS J:

So to go back to the debate that Justice Glazebrook and I were starting to have, including you, if we don't have customary title removed by legislation, or by relevant transfer, then the relevant question surely is whether in the period since 1840 the holder of that title has abandoned it, and abandonment is a pretty protean concept, but if one continues to assert, in a way that Justice Powell had in mind in Ngā Pōtiki, that doesn't look like abandonment to me.

MS WILLIAMS:

I understand the proposition that your Honour is putting forward but I would remain behind my submission that before you get to that consideration of whether there's been abandonment according to tikanga, or other things, that you still must establish whether customary marine, the customary interests are at such a level that MACA would translate them into a customary marine title under section 58.

KÓS J:

Well that's the real thrust here, isn't it, because it may be that as a matter of common law customary title has not been abandoned, but the question here is whether customary title will be recognised under section 58.

MS WILLIAMS:

Yes your Honour, yes.

GLAZEBROOK J:

All right, so what do you say is needed to recognise customary title then? Because what else other than tikanga comes into that second limb?

MS WILLIAMS:

This is the Attorney's submissions at paragraph 38 onwards. Again we draw from Miller J's approach to limb 2. We say that in line with the clear words of section 58 in the statute it needs exclusive use and occupation, and we say this draws from Canadian law.

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Now at common law that concept imports ideas of possession and control. We say that is understood as an intention and capability to retain exclusive control over land and discuss with your Honour that exclusive there allows for an understanding dependent on the type of land, the nature of the group.

WILLIAMS J:

That's really where the debate is, isn't it, because if you applied those words exclusive, the ability to control exclusive use and occupation, then there would be no customary marine title in the Rangataua mudflats, would there? So I'm trying to find how we work through the grey area where there clearly is not control, yet CMT is granted. What's my gauge that helps me work through the conceptual difficulty of that?

MS WILLIAMS:

We're not saying it would be an easy question for the Courts, your Honour. We are saying it would be fact dependent and I think that gives the flexibility.

GLAZEBROOK J:

But it's not really useful to say fact-dependent if you don't know what the actual test is that the facts are working through. So, if you say you need exclusive – I mean what do you say would take away customary title or mean that you couldn't have the fact a whole lot of people moved in and put structures up. I think that's one of the things you say, isn't it?

MS WILLIAMS:

Yes.

GLAZEBROOK J:

But they put structures up on the basis that on the understanding of the law there would have been no ability, no capability to control that?

MS WILLIAMS:

Yes, and there's a difference there between what I'm saying is the Crown's argument, which is that exclusivity allows for this consideration of the characteristics and so forth, and moving into where the majority took it which was to look at the outcomes that this – and aiming for a policy approach. So, if your Honour was, your Honours were concerned of the loss of CMT to applicant groups –

GLAZEBROOK J:

Which is extinguishment, so actually that's what I don't understand your distinction between when is a customary title recognised and when is it extinguished because if you say it's extinguished by the fact you've lawfully got, you've lawfully lost certainly at the time exclusivity because you're no longer capable of controlling it, then you in fact are extinguishing it by other than voluntary action, abandonment or – aren't you, or specific statute?

MS WILLIAMS:

Some of those actions would be enabled under section 58 which already allows for, that those things won't take away from exclusivity being met, for example, some types of fishing won't be at that level. But what our written submissions say is that we don't accept the majority's approach that section 58 creates extinguishment by a side wind.

WILLIAMS J:

So, that takes us back to when does section 58 create extinguishment, given the sorts of factual scenarios that we've suggested, or actually can be seen in the case law that demonstrate that actual control is probably not required?

There appears to be actual maintenance of connection is the key which takes us to Justice Kós' abandonment.

KÓS J:

As I understand your argument, you're drawing a distinction between extinguishment and non-recognition. There may not be an extinguishment of customary title but there may also not be a recognition of it under section 58.

MS WILLIAMS:

Yes, that is, thank you, your Honour. The Act refers to translating rights and interests that exist into three rights under the statute, CMT, PCR and participation rights in conservation. It doesn't extinguish rights and interests outside that that don't meet the tests.

WILLIAMS J:

The messiness in this is, of course, that it's perfectly able to frame substantial interruption as an extinguishing event.

MS WILLIAMS:

Sorry, can you say that again, your Honour?

WILLIAMS J:

Substantial interruption can be extinguishing. Extinguishment doesn't just occur by a fiat of Parliament. Any substantial interruption, or in Justice Kós' terms, abandonment, one version of it, will extinguish a right that existed prior to that interruption.

MS WILLIAMS:

Yes. And we get into a difficult situation here because, as will be examined next week, the test for whether something is extinguishment in common law is very clear about requiring clear words and intent to extinguish, and our submission is that is not the case with the MACA Act. It refers to extinguishment within the Act. It does not use that term within section 58, refers to substantial

interruption. My argument here is that Parliament was very clearly not regarding a failure to meet section 58 as an extinguishment.

WILLIAMS J:

Maybe that it just hadn't occurred to Parliament. It was just grappling with the underlying issues of reconciling the prior order with the new order in circumstances where the new order has become more accommodating of the continuing existence of the prior order.

MS WILLIAMS:

What Parliament was doing was being very clear as to limb 1 and limb 2, limb 2 requiring something more than limb 1 being held in tikanga, but requiring the exclusive use and occupation from 1840 to today to, as the Court of Appeal's majority has done, take an approach that ignores those criteria could not have been what was intended by Parliament. The Court might–

GLAZEBROOK J:

Well what we're really trying to do is to find out what use – I'm not sure it's that helpful to keep referring to what the Court of Appeal majority or minority did. It would be more helpful certainly to me to really understand what the Crown position is, because it doesn't seem much more certain. To say it's just on the facts when you don't know what you're actually looking for on the facts becomes even less certain to me, because exclusivity apparently doesn't mean exclusivity, capability to control doesn't mean actual capability to control, well it couldn't without extinguishing just about everything, because there was no capability to control at least legally as it was thought at the time.

MS WILLIAMS:

I understand your Honour's point, and thank you for that indication, of where you'd like me to focus. I've made the point that I think it is a factually-dependent enquiry and I know that – I'll leave that point there. But I don't think that having a test that is multi-layered in its approach, as what we are saying section – limb 2 does, creates such uncertainty that the Court should ignore the clear requirements that are there. So yes, we are saying that exclusivity is not

a literal interpretation, but we say that it can be made apparent in terms of the intention and ability to control access to an area recognising that that allows for the group to, in accordance with tikanga, invite other parties in, allow other parties to use resources in the area.

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WILLIAMS J:

But it can't stop other parties from coming in, that's clear, not even in Tauranga could it do that. In fact, that was held up by the Judge as a reason for accepting CMT, the continued engagement with officialdom as officialdom sought to encroach on what they considered to be theirs. It wasn't the ability to control that, it was the continued engagement with the State, at least that arm of the State, which was enough to keep the fires burning, to use that different metaphor, to keep the ahi kā.

MS WILLIAMS:

Yes, your Honour.

WILLIAMS J:

And does the Crown disagree with that?

MS WILLIAMS:

We agree that in those actions the Crown, the parties were showing their intention to exercise ability and control over the area.

WILLIAMS J:

Well, certainly their intention, but not their ability, that's the point.

MS WILLIAMS:

Agreed.

WILLIAMS J:

So, the maintenance of the attention to the asset, I suppose if you think of it in asset terms, constant attention to the asset in the face of a less than tolerant legal context will be enough to sustain CMT.

MS WILLIAMS:

A judge may find it to be but again I come back to in determining exclusivity they must consider whether the party has shown an intentioned ability to control access.

GLAZEBROOK J:

I guess we're having difficulty with the ability –

WILLIAMS J:

It's contradictory, yes.

GLAZEBROOK J:

The intention I don't have a problem with but ability becomes difficult.

MS WILLIAMS:

Ability might be judged on whether that group is recognised internally and externally as having mana tuku iho over the area, even if it ultimately is overridden by others' decisions.

WILLIAMS J:

How about the ability and making every effort in the factual context to exercise mana?

MS WILLIAMS:

Yes, I think the definition we are promoting would allow for that to be considered.

GLAZEBROOK J:

And what else is considered?

MS WILLIAMS:

At paragraph –

GLAZEBROOK J:

I'm trying to get it down to some practicality so I can understand –

ELLEN FRANCE J:

Well, you give some examples, don't you, at –

MS WILLIAMS:

Para 42, your Honour, yes.

ELLEN FRANCE J:

Yes.

MS WILLIAMS:

Ownership of abutting land, and in particular access over points – control over access points to the takutai moana; exercise of non-commercial customary fishing rights; the presence of fishing grounds that are considered to belong to a group and whether they may be used exclusively and kept confidential by that group; the existence of coastal marae and Tauranga waka within the area; the observance of tikanga associated with wāhi tapu as a way of restricting access; imposition of rāhui and their observance by third parties; evidence of members of the applicant group educating and correcting the way third parties carry out activities within the area; and the applicant group's involvement in resource management and other regulatory processes concerning the takutai moana.

WILLIAMS J:

Yes, they're all inarguable of course but what I'm looking for is what's the underlying value or principle that suggests these are correct, otherwise they're just a collection of stuff factually relevant in particular cases but what's the underlying ethos of this? That's the question I'm trying to drive at because it isn't actual control obviously or the ability to control, it's the intention to maintain relationship with and exercise mana to the extent that it is possible within the

law, sometimes despite the law. Isn't that what this is driving at? These are just examples of that.

MS WILLIAMS:

I understand the point your Honour is making but I don't think I can take you further on that.

WILLIAMS J:

No, okay.

KÓS J:

It's at the heart of the issue. I think you'll have to. Perhaps not now.

MS WILLIAMS:

Perhaps not now then, your Honour.

KÓS J:

I mean in some respects what you're describing seems to me to be a bit like my abandonment obsession because what we're dealing with in a lot of these cases is a situation where there's an assertion of continued interest and activity, clearly not abandonment, no extinguishing legislation and no transfer, so that would suggest that there's at least an underlying common law entitlement. I'm not sure that section 58 isn't trying to recognise that but we can deal with that after the break. I'm really interested to know about section 106 and why that sets up a burden of proof that simply requires the applicant group to show that the specified area has been used and occupied, doesn't talk about exclusivity, and so what I want to know is this. An applicant comes along and says here we are, we've used and occupied this in some way or another. No one opposes the application. Where does exclusivity come into that when the burden of proof didn't require proof of exclusivity?

MS WILLIAMS:

Your Honour, the Attorney didn't appeal on the question of the burden of proof.

WILLIAMS J:

It's very helpful, however, to – our understanding of the meaning of section 58, to understand what on earth section 106 is doing.

MS WILLIAMS:

Perhaps after the break I can talk on that further.

GLAZEBROOK J:

Would you like to take the break now to gather your thoughts?

MS WILLIAMS:

That would be helpful, thank you, your Honour.

GLAZEBROOK J:

So we'll take the adjournment slightly earlier.

MS WILLIAMS:

Thank you, Ma'am.

COURT ADJOURNS: 11.26 AM

COURT RESUMES: 11.47 AM

MS WILLIAMS:

Thank you, your Honours, and thank you again for the early intermission. Thank you also for the clear questions that you gave me before which I've had a chance to confer with my learned friends about. Your Honour Justice Kós, you asked about section 106 and the fact that the statute doesn't replicate the words of section 58 under the burden of proof requirement. Section 98, of course, where the Court may recognise protected customary rights or customary marine title at subsection (2) says: "The Court may only make an order if satisfied that the applicant – …(b) in the case of an application for recognition of customary marine title, meets the requirements of section 58." So my submission would be there that it doesn't – the words of section 106 don't take us further in terms of interpreting section 58 for this purpose.

KÓS J:

What a strange provision.

MS WILLIAMS:

A sui generis Act, your Honour.

KÓS J:

Sui generis is a fancy way of saying weird.

MS WILLIAMS:

Yes, or novel.

WILLIAMS J:

Well it just reflects that this was a political compromise.

MS WILLIAMS:

Very much, your Honour.

WILLIAMS J:

And the marks of that can be seen reasonably clearly in a number of the provisions of the Act.

MS WILLIAMS:

Yes. Your Honour, you asked about extinguishment, the Act is very clear in terms of the ongoing rights and interests that it is reviving and restoring those that were extinguished by the 2004 Act. That's at section 6 of the MACA Act. Any customary interest in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004 are restored and given legal expression in accordance with this Act.

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The scheme was not restorative to the extent that rights might have been lost by extinguishing acts or statutes post-1840. I think that is a part of where we say Miller J has departed from the majority in terms of how he understood the

context in which the Act applied and how it should affect the interpretation of section 58.

WILLIAMS J:

Is this the point at which you depart from Justice Miller's judgment? Is this your slight dissent or are you, I recall somewhere in your submissions you departed from Justice Miller, it may or may not have been this one. So, no, no –

MS WILLIAMS:

It wasn't on that point Sir.

WILLIAMS J:

I'm getting the head shake over here. Thank you.

GLAZEBROOK J:

I'm not sure that helps me terribly because I need to know what are extinguishing acts. I mean I agree with what you just said.

MS WILLIAMS:

I think for the purpose of section 58 it's more relevant to consider what we say would be a substantial interruption, because as I've said before we do not consider that that requirement introduces an extinguishment through a failure to get CMT under section 58, and again our primary argument there is that section 58 in MACA translates customary interests and rights into CMT and PCR. It's failure to obtain that doesn't extinguish the groups connection with their land, or the other ways that they may exercise those rights, other than CMT or PCR or participation in conservation processes.

KÓS J:

So that's the discussion we had before about the difference between extinguishment and non-recognition?

MS WILLIAMS:

Yes your Honour.

WILLIAMS J:

You stepping back from the wording in the statute, do you agree that substantial interruption is a pretty standard extinguishing event? In the context of aboriginal title jurisprudence. In fact it's the primary one.

MS WILLIAMS:

Yes, and that it may mean that a court – that a party cannot meet the criteria to obtain customary title.

WILLIAMS J:

Yes, but that's because it's been extinguished prior to 2004.

MS WILLIAMS:

Yes, yes.

WILLIAMS J:

That's the problem. You see how these concepts have muddled in the two provisions. One in section 106, the other in section 58.

MS WILLIAMS:

Yes, again I come back to my submission that this is not a restorative statutory framework for all rights in the customary marine title area that may have been lost or taken, and that that was part of a wider Treaty settlement process outside the scope of this Act.

WILLIAMS J:

You mean the rights extinguished prior to 2004?

MS WILLIAMS:

Yes your Honour. So for example we say that is one of the errors that the majority made in their decision. This is at subparagraph 35 of my submissions. The point we're making at paragraphs 35 and 36 is that the majority in forming their interpretation of section 58 employed a chain of reasoning that doesn't start with the statutory language, which we say is required in the statutory

interpretive exercise. Instead essentially supplanting the wording with their own normative vision of how the test ought to have been drafted. We say that at paragraph 36.1 it's of concern because it disregards the choices made by Parliament about how to reconcile and provide for Treaty principles, and it's also of concern because Treaty principles don't necessarily prescribe a particular model for the recognition of CMT.

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GLAZEBROOK J:

Can you just identify the paragraph in the majority judgment you're talking about there?

KÓS J:

Seems to be paragraphs 426 to 427 according to footnote 110.

MS WILLIAMS:

Yes Sir. Paragraphs 426 and 427, thank you.

GLAZEBROOK J:

And have you managed to articulate what you say the test is?

MS WILLIAMS:

Your Honour we consider that it is, as I said before, the omission. It's a party's ability to – intent to and ability to exclude others. I'd like to take you to *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at 21 of the bundle. I've said before that section 58 –

GLAZEBROOK J:

Have we not got ClickShare on.

MS WILLIAMS:

We'll just bring that up for your Honour.

GLAZEBROOK J:

I mean I have got some printed out, but I'm not sure what I've got printed out in terms of what you're referring to. And we've also got the screen but we need to know, frankly it's not very navigable.

MS WILLIAMS:

Yes, and I appreciate I've taken you now to two things in a row very quickly without a break. We will return to my written submissions shortly. So at paragraphs 37 and 38 the Supreme Court of Canada is looking at what sufficiency of occupation requires. Again, to reiterate my submission here is that section 58, second limb, has separate elements. That although tikanga is relevant, the drafters in Parliament were also clear about the basis in the common law, including the overseas cases, and that the concept of exclusive use and occupation has its roots in the Canadian law. In looking at sufficiency of occupation at paragraph 37: Sufficiency of occupation is a context specific inquiry. "[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resour*ces" (Delgamuukw,* at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted."

At paragraph 38: "To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group."

Now your Honours before the break we looked at the Attorney's list of factors of how the test might be demonstrated. That was at paragraph 42, I think, of the written submissions. My submission is that those are factors that –
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GLAZEBROOK J:
Can I just check, that doesn't seem to be saying that you have to show that you have controlled third-party access does it? It's more an assertion than a use? So is that what you're arguing for?

MS WILLIAMS:
I think there was some difference between myself and Justice Williams on this beforehand in terms of the ability of the party asserting the customary title to enforce it against – enforce the intention and capability against others. We accept what we have listed as relevant factors of that intention and capability. Maybe things where the group is in the word of *Tsilhqot'in* asserting its mana and its customary rights in that area. For example –

GLAZEBROOK J:
Combined with use if you're looking at the Canadian case?

MS WILLIAMS:
Yes. Similarly, for example, a group, in paragraph 42.8, the example, the applicant groups involvement in resource management and other regulatory processes concerning takutai moana. In paragraph 42.6, the imposition of rāhui and their observance by third-parties. So in those examples the applicant group is asserting its mana and authority over that area. It can't control whether the person is arrested, for example, if they break the rāhui, but in these cases that are referenced in the footnotes where those have been considered relevant elements as to whether the test was met, those were considered to be reflections of that groups control over that area.

WILLIAMS J:

So where you've got a situation which probably happened, going back to the Tauranga case because it's an easy case to work with, where the local tribes impose a rāhui because someone dies there, but the local authority purports to reclaim 74 hectares I think was the original intention, where those two events are mutually contradictory of the idea of the maintenance of control, what do you do with that?

MS WILLIAMS:

In that situation the group is asserting its, I guess its stewardship over the land, even though at that time it's not recognised as having a freehold title or proprietary right to it, and in the examples that we have cited, where that is largely respect and recognised, whether it's by the Council in its reliance or use of the parties submitting before it, or in locals who aren't members of that applicant group respecting the rāhui, it's a relevant indication that they are, we say the test is evidencing ability, intention and ability to control.

WILLIAMS J:

So would you say then that the, let's say the settling ponds were built, covered 74 hectares of the, I don't know, must be 500, 600, 700 hectares of those flats at Rangataua. Would you read those facts as limiting the extent of extinguishment, if there is any, to the extent of the encroachment and no more, as a way of reconciling those two apparently irreconcilable events?

MS WILLIAMS:

Yes your Honour, I think that is definitely an option that is available to the Judge when they take this fact-based approach to interpreting the second limb.

WILLIAMS J:

Okay.

KÓS J:

So what we know is that the iwi couldn't have fenced the flats, even if being land they still couldn't have fenced it, because their customary title wasn't

enforceable in a practical sense, or hadn't been since *Ninety-Mile Beach* and before. So, it comes down very much to assertion of interest and authority as opposed to an actual ability to control, to exclude because, as Justice Williams said before, in that situation you'd be arrested.

MS WILLIAMS:

Yes, assertion and I would submit recognition. If you assert and no one listens to you, then it's of no effect, but if the iwi was asserting, regardless of whether fences were in place and it was largely respected, that would be an indication.

KÓS J:

Respected by whom?

MS WILLIAMS:

Our submission is by people who aren't in the applicant group so both non-Māori and Māori.

GLAZEBROOK J:

But why would anybody, especially non-Māori, respect it when they're told that they're – when the legal position at the time is that there is no such right? I mean I would have thought actually that generally rāhui are respected by most people.

MS WILLIAMS:

Yes, your Honour.

GLAZEBROOK J:

So, I mean, if that's enough…

MS WILLIAMS:

That recognition, yes, as opposed to an ability to have someone arrested.

GLAZEBROOK J:

No, no, I understand but I mean maybe I'm naive but I think they do tend to be respected because they're imposed for reasons that people can understand.

MS WILLIAMS:

Yes, and I think we are promoting a practical understanding of the circumstances that are applied and how those are viewed by the Court rather than legal ability to exclude through trespass.

GLAZEBROOK J:

Okay.

ELLEN FRANCE J:

So, if on that approach, what is it about the majority that's different, that you say is incorrect in relation to that?

MS WILLIAMS:

So, in our submissions at paragraph 25, we've set out those three errors and what I've –

ELLEN FRANCE J:

I know you have. I know – I understand how you say they get to that point. I was just trying to understand what you – if you're then looking at the test, what's the difference between, do you say, between the test they're advancing and what you say should be the case?

MS WILLIAMS:

That they haven't required exclusivity about that, so they haven't required both the internal and external recognition of that group's assertion of mana in that space.

GLAZEBROOK J:

So, what if they required just internal?

MS WILLIAMS:

That would be akin to meeting the first test only and not the second limb of the test and, again, that's where we say it was a deliberate choice by Parliament and those words must be given meaning.

WILLIAMS J:

I have to say it does seem to me that the real debate is in the intestacies between these positions. These positions are often articulated starkly but in reality I doubt that these three judges would decide fact situations differently because really the question is what does exclusive mean, how far do you go with control and how much incursion creates extinguishment. I don't think any of those judges would disagree with that, or come to a different view on a result as can be seen from the decision in that case.

MS WILLIAMS:

Yes, your Honour, but they chose to articulate the test differently and the Attorney is here to speak to you about the correct interpretation of section 58 for future cases and this. So –

KÓS J:

So, if we looked at your paragraph 25 there and went through each of your three points, as to the first you seek the overlay of internal and external recognition of authority?

MS WILLIAMS:

Yes.

KÓS J:

Second, I think we can put aside because that's simply a conclusion as opposed to a test, do you agree? It's only a conclusion, isn't it?

MS WILLIAMS:

It was a key part of how the majority created a counterfactual that led them to apply so it meant other than the words of the section.

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KÓS J:

Well, that just takes us back to the first point. So, let's ignore the second point and move to the third point. They characterise a failure to meet the section 58

test as an extinguishment. Well, we've talked about that. That's this discussion you and I have had about the difference with extinguishment and non-recognition.

MS WILLIAMS:

Yes, your Honour.

KÓS J:

So, nothing really turns on that point. So, the real issue hangs around the first of those points which is met by your need to reflect recognition by other users of the assertion of authority?

MS WILLIAMS:

Yes.

KÓS J:

And that meets what you need?

MS WILLIAMS:

Yes.

KÓS J:

Good. Well, that's fine.

MS WILLIAMS:

Thank you, your Honour.

WILLIAMS J:

But you don't say that every assertion of authority must be recognised?

MS WILLIAMS:

No.

WILLIAMS J:

Nor that the submission to other authority represents a discontinuity?

MS WILLIAMS:

Sorry, can you reword the last phrase?

WILLIAMS J:

Well, the creation of a reclamation without consent of the applicant group.

MS WILLIAMS:

Or a reclamation without protest?

WILLIAMS J:

Or perhaps a reclamation without protest.

MS WILLIAMS:

Yes. My mind was dragged into the fact that the statute has a lot of provisions for reclamation.

WILLIAMS J:

It does.

MS WILLIAMS:

But I don't think they are relevant to the question that you're putting to me which is about whether that would –

WILLIAMS J:

How comprehensive does the control need to be, and I took you to be saying it needn't be comprehensive, there will be countervailing control exercises of control –

MS WILLIAMS:

Yes.

WILLIAMS J:

And the fact that they exist and do exercise control in some areas is not itself extinguishing?

MS WILLIAMS:

That is correct, your Honour.

ELLEN FRANCE J:

Yes, I understood you to accept that in the situation where there's protest about the settlement ponds et cetera but they are nonetheless – consent is granted and they're then there, that's not enough to – that doesn't necessarily mean you don't meet your test?

MS WILLIAMS:

That's right. The Judge could still consider that there are significant other indicators to find that exclusive use and occupation existed, or alternatively, for the element that is the area that is covered by the sewage ponds that had been lost in that other area but that it remained elsewhere in the rohe.

WILLIAMS J:

Right, so you would read the extinction as the minimum necessary to reconcile the existence of the old and the new?

MS WILLIAMS:

That would be consistent with a generous interpretation for the statute which I think is warranted.

WILLIAMS J:

That's really what the statute's about?

MS WILLIAMS:

Yes.

WILLIAMS J:

Reconciling the old and the new.

MS WILLIAMS:

Yes.

WILLIAMS J:

So, and you may get situations, for example, like I think Justice Powell refers to the Maungatapu Bridge, which is a pretty major piece of infrastructure, but it's not extinguishing. In fact, I suspect people fish off it now, it's probably created a fishery that didn't exist before.

MS WILLIAMS:

Yes, your Honour. Likewise, there are some existing activities that are recognised in the Act as continuing, that don't take away from the ability of the group to bring the CMT so it's a – Māori

WILLIAMS J:

Yes, that's right.

MS WILLIAMS:

– shared balancing there of those legitimate interests.

WILLIAMS J:

Yes, there's a provision in there about aquaculture consents being entitled to a re-issue I think but that seems to be on the basis that aquaculture is not itself extinguishing otherwise you wouldn't need it.

MS WILLIAMS:

And, your Honour, that goes to the point I made in my first pillar which says the Act is a balancing of many interests and several regulatory regimes in this space, and it's a very large policy exercise to reconcile how the aboriginal rights common law could apply in a New Zealand context with that complex background.

WILLIAMS J:

Yes. To be fair to the drafters, this is extraordinarily difficult everywhere in post-colonial societies, not just here.

MS WILLIAMS:

Yes, and I think that can be seen in the Cabinet paper where Cabinet made decisions and you can see the very, very many pages of recommendations, where it had to sign off on the impact of all those other regimes.

Your Honours, in a context where Justice Kós has indicated that may not need to hear from me on the second and third points of our argument – sorry.

KÓS J:

Well I was simply saying that in relation to all the work that you were seeking to correct the majority on seems to be really contained in paragraph 25.1 of your submission, which is the only operative part of it.

MS WILLIAMS:

Yes.

KÓS J:

I don't want to cut you off.

GLAZEBROOK J:

Well you – those submissions are really just backing up, aren't they, saying that they started at the wrong point?

MS WILLIAMS:

Yes, your Honour's –

GLAZEBROOK J:

And started with the wrong conceptual framework, in your submission? So what we're really interested in, as I said to you, really is – well for myself, what the test is, and I think you have now articulated that as well as it can be articulated.

MS WILLIAMS:

Yes, your Honour. I don't know if I can plumb the Attorney's interpretation any deeper. I could speak to you in our written submissions as to the interpretive approach, and maybe I will do that very briefly.

ELLEN FRANCE J:

Before you do, I was just interested in the examples that you give at your footnote 142, not so much in terms of ownership of abutting land, but what's said about particular control over access points, et cetera, and I note that in the first of those cases, for example, just in terms of our discussion that talks about exercising control to the – as the law permits, which seems to be consistent with your acceptance of you don't necessarily have to get the result that you were asserting should occur?

MS WILLIAMS:

Yes, very much.

ELLEN FRANCE J:

So you agree with the approach in that respect, in that case?

MS WILLIAMS:

That's *Ngā Hapū o Tokomaru Ākau and Te Whānau a Ruataupare ki Tokomaru* [2024] NZHC 682?

ELLEN FRANCE J:

Ngā Hapū, yes.

MS WILLIAMS:

I'll just confirm that, your Honour.

ELLEN FRANCE J:

If you look at 362, which I'll read out: "Both applicant hapū have established a territorial interest in the relevant area and have exercised their authority as kaitiaki, to protect the resource and require others, as far as the law permits, to

abide by the tikanga values practised in their area. This is supported by the other relevant considerations of abutting lands in Māori ownership and control, the exercise of non-commercial fishing rights in the area since 1840, the placement of marae above the foreshore and the continuation of customary fishing and tikanga practices to the present day." That seemed to me to be the sort of types of considerations you would accept were relevant?

MS WILLIAMS:

Yes, and that case hasn't been appealed.

ELLEN FRANCE J:

Thanks.

MS WILLIAMS:

By the Attorney, sorry.

ELLEN FRANCE J:

Yes, yes.

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MS WILLIAMS:

Your Honours, I've talked to you now about two of the three parts of the second limb. We've talked about substantial interruption, we've talked about exclusive use and occupation. I wonder if it might be useful if I briefly comment on the time continuity component which is from 1840 to the present. This is at submissions, paragraph 41. The Attorney's submission is that that does not mean that an applicant group must show in the case of every third party use the ability to exclude others and we've talked about why. The Act, in our submission, requires that that evidence of intention and capability to control from 1840 to the present is assessed in the round but also that the Court can draw reasonable inferences based on physical manifestations of occupation, drawing together evidence across both time and location to determine whether the test is met. In other words, an unbroken chain of exclusive use and occupation is not required.

And that brings us back to the test that I've discussed with you. It's the evidence of intention and capacity as against third parties. We say at paragraph 43 that that continuity requirement is not inconsistent with tikanga Māori which is borne out in the tikanga evidence that was heard in the case. As at our footnote 150 in Justice Miller's decision he quotes and paraphrases a lot of that evidence between paragraphs 147 and 172 and this is an example, we would submit, of how tikanga is a relevant consideration in the second limb and does not – and not empathetical to the Attorney's interpretation.

Your Honours, at this stage, unless you have any further questions for me, I would pass onto Ms Roff.

MS ROFF:

Tēnā koutou, e ngā Kaiwhakawā, ko Ms Roff ahau. I'm going to be covering off the issue number 3. This is the issue around the correct interpretation of the test for protective customary rights and that's provided at section 51 of the Act. There I think Ms Williams referred to the fact that within the Act there are three categories of rights that are recognised, give expression to and recognise in the Act, and that was the conservation process, the ability to participate in conservation processes, next is the protected customary rights and then, of course, the customary marine title that Ms Williams has taken your Honours to.

So, I'm going to be talking about protected customary rights. That's at subpart 2 of part 3 of the Act, and if your Honours have that open in front of you, you'll see there: "A protective customary right is a right that (a) has been exercised since 1840; and (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time." And the meaning g of a protected customary right it has a definition in section 9 of the Act. There were several definitions around protected customary rights you'll see there. The first is that a protected customary right means an activity, use or practice and that's established by a group in accordance with section 51 and then recognised by an agreement with

the Minister or by the Court in terms of issuing a recognition order, and there's definitions there as well for a protected customary rights area and then the order itself.

So protective customary rights, what they are, they are a recognition by the Act in relation to non-exclusive and non-territorial rights and that's in contrast to the customary marine title order or rights that are recognised under section 58. So while the test at section 51 doesn't require a group to show any exclusivities that's different to section 58, or control over the activities that they're exercising, there must be – the Attorney says there must be a degree of regularity in terms of that activity, use or practice in order for the Court or the Minister to reach an agreement or issue an order in respect of that.

Now, in terms of what the Attorney's ground of appeal, it was initially in respect of – a more broader, so we're taking the much narrower scope now in terms of this particular ground. Our previous position before the Court of Appeal and in the High Court up until the Court of Appeal decision was that the particular applicant group was itself required to show and exercise the right, the activity use or practice since 1840 until the current day, and that reflects as well the notice of application for leave that was filed by the Attorney but we now accept, on reflection on having and considering further the Court of Appeal's decision, that we accept that it doesn't require, the applicant group itself, that's an available reading that the Court of Appeal majority came to, sorry Justice Miller that was in this case, so it can be that the applicant group itself has exercised the right since 1840 and it can show that on the evidence, or it may also be that another group has exercised the right since 1840 but the particular applicant group seeking recognition under the Act continues to exercise the activity, practice or use right and that's just in a particular part of the common marine and coastal area.

So, what the Attorney says now in terms of the scope of the ground of appeal on this issue, issue 3, is really just focusing on the introduction we say of a relevant connection test or requirement that Justice Miller has introduced into section 51 and what we want to do is just explore that and seek clarification

from the Court in terms of what that means. What it means for a group, who's an applicant group who has in this case in particular who wasn't in existence in 1840, what that means in order for them to be able to satisfy the test.

And I am aware, your Honours will be aware, there is another Ngāti Rua has also appealed, there is an appeal before the Court, and this is in respect of the Judge's findings, the majority's findings as well in terms of Ngāti Muriwai and their granting of a protected customary right and so what that is really focused on, what the meaning, the proper meaning of in accordance with tikanga is, and the Attorney doesn't take a position on that. So, the focus of the Attorney's appeal is solely on the correct test under section 51 and, in particular, in respect of an applicant group that did not exist at 1840. This, of course, was an issue for the High Court, at first instance with Justice Churchman, who found that Ngāti Muriwai was entitled to a protected customary rights order and I think that was in respect of collecting driftwood and seashells but that was despite finding no evidence that Ngāti Muriwai as a group had a presence in the Whakatōhea rohe between 1840 and 1870.

WILLIAMS J:

Why do they need to show that?

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MS ROFF:

At that stage, Sir, the appeal that was brought by Ngāti Rua was in order to satisfy section 51 and to be able to be granted a protected customary right that has been exercised since 1840 and continues to be exercised but it required the group, the applicant group to have done that since 1840, and so if they weren't in existence in 1840 they wouldn't be able to meet the test.

WILLIAMS J:

It really thinks about hapū as if they're corporate entities, when of course they're not.

MS ROFF:

That is not the Attorney's case Sir, and that's explaining what the Attorney says now of course it is possible for a group who wasn't in existence in 1840.

WILLIAMS J:

Yes.

MS ROFF:

And that is an available reading, we accept that, of section 51.

WILLIAMS J:

Right, so what is the problem?

MS ROFF:

So what the Court, the Court of Appeal, in terms of…

WILLIAMS J:

Yes, the relevant relationship, or whatever that phrase is.

MS ROFF:

Yes, a relevant connection.

WILLIAMS J:

The relevant connection, yes.

MS ROFF:

The Judge said, as long as there's a relevant connection with the applicant group, and some other person, or some other group that was exercising that right, that has been exercising that right since 1840, that would be enough to meet the test.

WILLIAMS J:

So that could be right, or could be wrong, depending on what they meant?

MS ROFF:

That's absolutely right Sir.

WILLIAMS J:

Right so – no, carry on.

MS ROFF:

So what the Attorney's case is Sir is that yes that is right but in order to unpack and unravel and understand what relevant connection means, because it's difficult to appreciate that on the face of the judgment because the Judge doesn't go on then and carry out any sort of analysis to understand or explain why Ngāti Muriwai does have a relevant connection, and who that's with. So what the Attorney says is that in order, what that must mean, the relevant connection, what that must mean is that there is a clear and identifiable connection between the right that has been exercised since 1840, because that's what section 58(1)(a) refers to, and the right that continues to be exercised in accordance with tikanga by the applicant group today, and as well as that a clear and identifiable connection between the applicant group who is applying for the order, and the group who has or had exercised the right since 1840.

So on the Attorney's interpretation this would be of assistance because that would then link, a clear link would be able to be provided by the applicant group in terms of the continuity, I guess, in terms of the activity that has been, continued to be exercised since 1840, notwithstanding that perhaps in accordance with tikanga there may be changes, or it may evolve in terms of how that activity is exercised, because that's clearly allowed for under section 51.

GLAZEBROOK J:

So you're saying there has to be both a clear and identifiable connection between the activity that's been exercised since 1840 and is now being, and also a connection with the group that has exercised it since 1840, so it's twofold?

MS ROFF:

Yes, that's right your Honour.

GLAZEBROOK J:

Which is probably what the Court of Appeal meant anyway.

MS ROFF:

I think it probably is what the Court of Appeal meant, it's just in terms of just clarifying that and setting out that clear standard or test in order that parties who perhaps weren't in existence in 1840, that they know what is required to be met, what evidence they can bring to the Court to establish that connection.

WILLIAMS J:

You do have to remember that this is all about whakapapa. The groups are always in existence, they just don't have the name yet, and if you understand the whakapapa, you'll understand whether there's an entitlement, there's also questions about the degree of recognition.

MS ROFF:

Yes Sir.

WILLIAMS J:

The peer hapū or peer whānau or whatever, and that's a matter of fact that has to be worked through, but it seems to me a wrong way of thinking about it to ask whether the group was in existence in 1840 because their ancestors were in existence. The key question is, were their ancestors exercising that right, whatever they called themselves at the time; and is their existence, as a newly named group, an accepted norm within the community.

MS ROFF:

Yes, I agree Sir.

WILLIAMS J:

So that does seem to me what Justice Miller was saying, perhaps you might have said a relevant connection in accordance with tikanga. That would get you there.

MS ROFF:

And this is a matter Sir of being able to – as I said, this has significantly narrowed the Attorney's ground of appeal.

WILLIAMS J:

Yes, so my point is that the double-banger test that you're posing is probably slightly missing the target.

MS ROFF:

Right. I would have thought so. It's not something that would be difficult to show in terms of a particular group but you're saying that perhaps not you would say so, it's not…

WILLIAMS J:

Well, for example, a group that calls itself, gives itself a new name in 2024 but has no whakapapa connection to the group that exercised the right in 1840 would, in accordance with tikanga, have no chance of getting a right in tikanga terms unless there had been a tuku, right?

MS ROFF:

Yes, of course, yes.

WILLIAMS J:

Which is what the Act provides for so –

MS ROFF:

The Act requires –

WILLIAMS J:

So, it's a mistake to think about applicants in corporate terms because that suggests they're completely separate and in tikanga terms they never are. It's just a question of existing descendants forming and re-forming themselves, maintaining continuity of descent line from the original right holders at 1840 and that had to be, had to have been what Justice Miller meant –

MS ROFF:

I accept –

WILLIAMS J:

– because if he didn't mean that he was wrong.

MS ROFF:

The issue – I think there is a slight difference in the wording of the particular provision between section 51 and section 58, so while your Honour absolutely, referring to the concept of tuku, absolutely that's referred to explicitly in section 58. That isn't in section 51 but what the Attorney says that still should be as a matter of tikanga if those rights, in terms of the practices and activities, it should be able to accommodate those in terms of those being passed on, for example. So, even though that's not explicitly referred to in section 51, we would accept that that should be the case and that this is in the written submission, Sir, so I don't need to go through it in any detail but that is consistent as well with the legislative history of section 51 in terms of the crossover from the, I think it's section 50 under the Foreshore and Seabed Act 2004, because the intention was that in terms of those rights coming across into the new Act they were not – it wasn't the intention to substantially change them from the Foreshore and Seabed Act and there was a difference in how and what was required to be proved under the Foreshore and Seabed Act.

WILLIAMS J:

Right, so my point is it may be enough simply to say relevant connection in accordance with the requirements of tikanga. That would get you where you need to be –

MS ROFF:

Right, and then it would –

WILLIAMS J:

– which is the people exercising the right now are the true successors to the right holders in 1840.

MS ROFF:

Yes.

WILLIAMS J:

And the rest of it is a question of fact.

MS ROFF:

And then that would be in accordance with the particular group's tikanga because that may be different in different – depending on the rohe or depending on the different area. But I still think it would still be useful to have a requirement around in linking the connection or identifiable connection between the right, and I'm saying right, to encompass the practice, use or activity as well, linking that back as well to that which was exercised since 1840 because –

GLAZEBROOK J:

So the same right and the successor group in accordance with tikanga?

MS ROFF:

Yes, your Honour.

WILLIAMS J:

Well, okay, but of course tikanga wouldn't allow you any more than what was allowed before so it won't make any difference. If it was a pipi collecting right you couldn't build a wharf pursuant to it in tikanga or in western law one presumes?

MS ROFF:

No, that sounds right, Sir. There are obviously there are different, and I'm sure this is a matter for the other appeal that's going to be articulated next week I think it is, but obviously there are different rules. I've just – this is – my submission sorry is just focused purely on section 51 and there are different rules around in terms of section 58 but it is clear the Act is quite clear about who can be an applicant, an applicant group, in terms of what that means in section 9, and it does say that the applicant group is required to be an iwi, hapū or whānau and I think that's where that has led to I guess these issues coming up before the Courts in terms of trying to satisfy these tests and coming in within the definition of an applicant group and then being able to satisfy the particular section, section 51 in particular.

WILLIAMS J:

What problem are you aiming at solving?

1240

MS ROFF:

I am not aiming at solving the problem, Sir, I am just saying that's how this issue has come to be at your doorstep.

WILLIAMS J:

Right. How – my question is how has – do you have experience of it being applied in a way that would take it outside the basic proposition that the relevant connection has got to be a connection that would be recognised as appropriate in tikanga terms?

MS ROFF:

In this particular case, yes.

WILLIAMS J:

Or in any case?

MS ROFF:

In this case, Sir, yes, where that's – the ground of the appeal by Ngāti Rua before the Court of the Appeal was because, my understanding, but I'm accepting my friend will be able to advance their own basis for the appeal, but my understanding of the appeal by Ngāti Rua in the Court of Appeal was that Ngāti Muriwai was not able to satisfy the test at section 51 because they were not a hapū – as a hapū they were not, sorry, in existence at 1840, Sir.

WILLIAMS J:

Yes. But again that takes us back to the question of whether they are, in this context in the particular PCR, the appropriate successors in title to those that exercised it in 1840, and that's a question of tikanga and fact, but it doesn't – I don't see your suggested addition as solving that problem or necessarily throwing light on it.

MS ROFF:

Well as you say, Sir, it may be that tikanga will resolve that.

WILLIAMS J:

Okay.

MS ROFF:

That really is the narrowed-down scope of the Attorney's appeal in respect of ground – issue 3, sorry. Unless your Honours had any further questions?

GLAZEBROOK J:

No. Thank you very much, Ms Roff.

MS ROFF:

Thank you.

GLAZEBROOK J:

So is there anything further, Ms Williams?

MS WILLIAMS:

No, your Honour.

GLAZEBROOK J:

Okay. So we're now looking at Landowners and Seafood, and just to perhaps set the scene in terms of what we wish to hear from you on, we don't want anything that's repetitive of the Attorney-General. So we want the specific submissions that are different from the submissions that we've heard and that are specific to the particular groups.

Also, it looks as though we're actually well ahead of our timetable. It's – what do they say? It's you don't have to – we would still expect you to finish within the time that's been given. If that means we're finishing earlier, then that's what we're doing. So I suppose that means don't think you've got until almost lunchtime tomorrow for the two of you.

MR HODDER KC:

Thank you, Ma'am. I think Mr Smith will be able to advise that he intends to be quite short.

GLAZEBROOK J:

Sorry, can – you'll have to –

MR HODDER KC:

I think Mr Smith intends to advise you it's appropriate or that he intends to be very short, in any event, and I don't anticipate troubling your Honours through until lunchtime tomorrow.

GLAZEBROOK J:

No, well that's what we would've thought.

WILLIAMS J:

I'm sure you don't anticipate troubling us at all, Mr Hodder.

MR HODDER KC:

Of course not, your Honour. The only question about troubling is will I start before 1 pm or start after lunch?

GLAZEBROOK J:

Would you like to start after?

MR HODDER:

I may be able to refine a little bit in light of your Honour's encouragement, but I'm happy to start now and make a few helpful remarks, if I may.

GLAZEBROOK J:

Up to you, Mr Hodder. We're happy to adjourn now, or if you want to just take a few minutes too, but probably from the middle podium if you're going to take –

MR HODDER:

I understand that, your Honour. My suggestion is we start after lunch. We have ample time.

GLAZEBROOK J:

Okay, then. Well shall we come back at 2? Is it convenient to come back at 2 o'clock?

MR HODDER:

Thank you, your Honour.

GLAZEBROOK J:

Thank you, Mr Hodder. We'll adjourn for lunch.

COURT ADJOURNS: 12.44 PM

COURT RESUMES: 12.04 PM

GLAZEBROOK J:

Mr Hodder?

MR HODDER KC:

Thank you, your Honour. I am hopeful that I have used the lunch break to streamline what I was going to say and what I am proposing to do is to say something by way of introduction, which will also include where we depart from the Attorney-General's submissions, or the major points on which we depart from the Attorney-General's submissions. I do want to take the Court to some aspects of the legislative history because, in my submission, that's important and hasn't really been traversed this morning. Thirdly, and this is meant to be a compliment to my friends who have prepared the submissions for Te Kāhui, I want to respond to a number of the points they make in their respondent submissions which I think will be a useful way of teasing out the differences between the position we advance and the position that they advance and that I can't promise it will finish today but we'll make good progress today I anticipate.

So, the essential point on which the Attorney-General appeals, as I apprehend it, is that the majority which is effectively the decision of the Court of Appeal was in error. We agree but where we part is that they say that Justice Miller got it right more or less and we don't agree, and that's really where we kind of part company, and that's partly because what our friends will want to criticise is a little approach to section 58 and what we will say is a straightforward reading of section 58 in the light of the structure of the Act than the legislative history.

What I'm wanting to do by way of introduction, because again this wasn't really addressed in detail with your Honours this morning, or in the written submissions, is there's a, if I can put it this way, a democratic dimension to the issues that the Court has to deal with, and so the submissions that I'm presenting for the Landowners' Coalition, or LCI, are based on the features and dynamics of general legislation in our parliamentary democracy.

So, the starting point is that we have a national population of five million or so who with a filter provided by the electoral laws are involved in choosing representatives as legislators. Those legislators are, of course, empowered to make laws including those which resolve complex and controversial questions of social policy and those questions often, as in this case, involve

incommensurable components. The development of statutes generally involves ministerial or Cabinet consideration and decisions assisted by central government departments including often the consultation processes as a pre-introduction followed by legislative deliberation and decisions, and I'll come back to the relevance of Cabinet and ministerial papers, Ministry papers later on.

Legislative power is expressed through statutes. They are professionally drafted, they are collectively endorsed and they use the English language to communicate the legislative intention. As we all know, compliance with statutes is required of the national population and it's in force by public powers and then, to complete the circle, legislators are politically, including electorally, accountable to the national population for their work.

Now, I have no doubt that everyone in the courtroom knows that but stating it in that way underpins the points that I am seeking to make about why we should be giving respect to the statutory language itself and the point is that Parliament or the legislature is communicating to the national population through statutory language. That's why the Legislation Act 2019 says that legislation should be easy to understand, it is coherent and as straightforward as possible. *Bennion*, in a reference we have given in, I think in our submissions, but if not, it's paragraph 26.8 at page 839 of the 8th edition, is saying the same thing. It's also why we are requiring under the Legislation Act's part 3 legislation to be published and so the interpretation of legislation necessarily involves a focus on legislative intent.

Now, the Court is well aware that there's a degree of academic debate about how far one can take the concept of legislative intent. Our submission is that one does take it seriously, one strives to identify it in a principled and coherent way and that text is the primary source of identifying legislative intent. and we say we can take that from section 10 of the Legislation Act, and again we've given in our submissions references to *Bennion*, not least his paragraphs or sections 10.4 and 10.9. In a modern acceptance of pre-enactment materials by the New Zealand Courts in particular, reflects the potential for an approved

appreciation of legislative intent by having regard to the legislative history. There's nothing novel about that. Members of the Court will, I suspect, recall that as long ago as the 1980s, Sir Robin Cooke presiding in the Court of Appeal in the *Marac Finance* case, determined that Hansard should be looked at and since then, if not the floodgates at least the main door, has been relatively open to a range of materials of the kind that I wish to take.

1410

I won't read the whole of it to you, your Honours, but not more by accident than design, over the weekend I was looking at the latest edition of Pearce's text on *Statutory Interpretation in Australia*, which came out earlier this year, the 10th edition. At paragraph 1.11 there's a quote from Justice Gageler in a case called *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, in which he talks about the fundamental fact that "legislated text is the product of deliberative choice on the part of democratically elected representatives" and that is what gives us rise to intent. You contrast that with a constructional choice available to the courts. So we say that the MACA Act of 2011 can be well understood within the framework I've been attempting to describe. Does involve the reconciliation or balancing of interests of the national policy and of customary interests. That is a complex matter is social policy, and it is determined by the provisions of the MACA Act itself.

What the MACA Act is doing is establishing a new and different regime. It's one that is unique to New Zealand. It has a number of features to it which are important, but again I suspect everybody here knows that, but itemising might be useful. Firstly it repeals in the 2004 legislation. That's significant because of the grievance that that legislation has come to represent, or came to represent. In doing so it was seeking an equitable balancing of the interests within the national population. That phrase of equitable balancing appears repeatedly in the pre-legislative materials.

Included in the new regime were the concept of no ownership of the common marine and coastal area, a major change. Then there were three forms of customary interest that were to be recognised in the common marine and

coastal area, the three forms that are found in part 3 that I will come back to. One of those is a new form of title which included benefits that were not previously associated with customary interests, and that is CMT. There was explicit legislative decision on how the Treaty of Waitangi was to be taken account of. There was explicit legislative decision-making on prescribing the criteria for this new form of title, and there was, and this was a contrast with the 2004 Act, entitlement for groups to make evidence-based claims for that title, and indeed for the other aspects that are provided for by part 3. So we say that a coherent and essentially consistent sequence of pre-enactment materials foreshadows and illuminates that statutory regime.

So when we come to the question of little versus purposive, or purposive, depending on one's pronunciation, then we say that what our submissions are seeking to do is to look for the reasons, or the purpose for this legislation. But obviously that depends on the level of extraction you are using, but at a fairly useful level of extraction, was to create a new and bespoke regime for dealing with the interests affected by and in the common marine and coastal area, and in that context there is a resolution, or reconciliation prescribed in part 3, and it's three levels of expressly recognised customary interests. That is the critical part of the Act for our present purposes, in our submission, and it leads us, we say, to a straightforward renew of the operative section 51 criteria, because they are consistent with those purposes in the context of the Act as a whole, and on that we say the language isn't clear itself, but it is useful to look at some of the legislative history.

So if I can then move to what I referred to as my second area, which is to take the Court to some of those aspects of the legislative history. If I can start – we have a list of those in our appendix 1 to our written synopsis. They are scattered around the materials that you have. I'm hopeful that Ms Morten may assist us on some of it, but not all of it, and some of this may take her by surprise, which won't help her or you, but my starting point is, in fact, the 2004 report of the Waitangi Tribunal, Wai 1071. There are only two features of it that I wish to draw to attention but they're important features, and – have we got it? Probably not.

In any event, if I can just give the references. Starting on page 67 of the report which is around paragraph 3.5 or section 3.5, there's a heading: "The range of plausible approaches." And the Tribunal is considering what might have happened had Ngāti Apa been allowed to cover the ground, if I can put it that way. And what the Court says, what the Tribunal says, it has three categories it describes as being plausible approaches. One is the most permissive, one is the middle ground, and the third is the least permissive, and what it concludes is it can't be sure which of those grounds was going to cover the field, and in the light of that the Tribunal comes to the view as in, and this comes really in its conclusions at paragraph – I think at page 139, section 5.3 in its recommendations –

GLAZEBROOK J:
Paragraph what, sorry?

MR HODDER KC:
It's pages 138 to 139 in section 3.5 of the Tribunal report.

GLAZEBROOK J:
Oh, it's 3.5, I see.

MR HODDER KC:
And there's an important conclusion, if I can respectfully say so, on page 139: "In putting forward the options, we note up front that full compliance with the Treaty would require the Crown to negotiate with Māori and obtain their agreement to a settlement, as happened with respect to commercial fishing and Rotorua lakes. All the other options involve a compromise between Treaty principles, claimant preferences, and what the Government might regard as practicable. They are, to borrow Professor Mutu's phrase, 'least worst' options. We have in mind our statutory obligation to be practical and to have regard to all circumstances of the case." Now that echoes or has an echo perhaps in Justice William's reference to a political compromise before lunch, and we say that's an entirely fair description of the process we are concerned about.

If I can turn then to the main, first consultative document, which is – dates from 2009, if I got it right. I'm sorry, March 2010, and there are only two aspects of this which I will draw attention to. The first is the foreword by the Honourable Christopher Finlayson, who was Attorney-General but took a major role in the development of this legislation, along with the Honourable Tariana Turia.

If we turn please to page 1, and in the last paragraph on page 1 – have you gone past page 1? Thank you, last paragraph, the Court can read the last paragraph, but the important point is, we say, that they're working – the work that's required is a challenge "to avoid dogmatic responses to a complex issue and, instead, to seek to reconcile various interests for the benefit of all New Zealanders". So in terms of a complex problem which the political institutions were seeking to address, that, we say, is – captures the point well.

Can we turn, please, to page 37. On page 37 there's a heading: "4.6 Awards," which can be regarded as kind of the equivalent to recognition orders. Page 37.

WILLIAMS J:

So page 37 of the report, or?

MR HODDER KC:

Page 37 of the discussion document. I've moved from the report to the discussion document.

WILLIAMS J:

Right. Sorry, yes, that's what I thought.

1420

MR HODDER KC:

Yes. And so your Honours have that on the screen, hopefully. And so the awards, which as I say, are equivalent to the recognition orders that the Act provides for, "are designed to provide those coastal hapū/iwi whose customary

interests have been recognised with meaningful and tangible recognition of those interests and recognition in law of the unbroken, inalienable and enduring exercise of their mana."

"Meaningful and tangible recognition of those interests". It doesn't say equation with what might have been had Ngāti Apa been left alone. So we say that is an integral part of the compromise which the legislation represents.

KÓS J:

So where you say Ngāti Apa had been left alone, if the Foreshore and Seabed Act hadn't been passed?

MR HODDER KC:

Yes.

KÓS J:

Yes.

MR HODDER KC:

Thank you Sir. It goes on to say: "… the awards would be a combination of property rights (eg, the right to permit activities) and the ability to have input into environmental management processes… subject to the government's agreed assurances…". The relevance of that, of course, is that what's contemplated are things that go beyond property rights as traditionally understood, including anything to do with customary rights. So that's why the fact that it's a new creation, a bespoke form of interest, is important.

GLAZEBROOK J:

So what do you say – you said earlier, and I didn't ask you at that stage, that they got more than they would have done if it had just been a customary rights. What's the "more"?

MR HODDER KC:

The "more" is the input into environmental management processes et cetera, which are –

GLAZEBROOK J:

But wouldn't you have that as a customary owner, or indeed as an owner themselves?

MR HODDER KC:

No, the rights in section 60 and following in the Act are fairly extensive. As I understand it they're more than you'd get as an ordinary person with simple, an ordinary property owner.

GLAZEBROOK J:

All right, so it's section 60 –

MR HODDER KC:

Six zero of the Act itself.

GLAZEBROOK J:

Are more extensive.

MR HODDER KC:

And 62, yes. If I can turn then to what is our tab 41 I think, which is one of the regulatory impact statements which would have been published with the Bill, but it was introduced… no, it's the other one. Tab 41, and page 17 to start with please, and paragraph 59. On page 17 of what is I think the first of the regulatory impact statements. So at paragraph 59 at the top, identifies a particular aspect of the 2004 Act which was in mind as part of this consultative and advisory process. "The problem with the 2004 Act was its extinguishment, without compensation, of uninvestigated Māori property interests. No other interests were affected this way. The objective of a replacement regime is to balance the interests of all New Zealanders in the foreshore and seabed

including customary interests." So the question of balance, reconciliation, is a feature that underpins all of this.

Then at the bottom of that page is a paragraph 64 is referring to options 1B and two other tests where the test "could be calibrated as either 'hard'… or 'easy'…". It says no assumptions made in this paper, but the fact is that if the test is hard or easy, that's the choice that results from the legislative language it's chosen.

Can we turn please to page 29. Thank you. The table 7, this is summarised in the Ministry's conclusions and recommendations, but as we'll see they are endorsed through the Cabinet process and are features in the legislation. There's a helpful table and what we are focused on is particularly option 4 because option 4 is the one which finished up in the Bill and the Act but as you'll see it goes through the options across the top line and then a series of matters and principles and objectives considered down the left-hand column, and the general proposition one can see is that option 4, to put it in colloquial terms, tick many of the boxes and did better than the others, and so that's the basic analysis that's been undertaken in some detail to get to the components of the legislation that we now have.

The last document I want to take the Court to is the Departmental Report which in mine is tab 39. Now you were taken by my learned friends for the Attorney-General to paragraph 1387 and 1388 about not leaving the Court for the tests, leaving the test for the Court, I'm sorry, but I think the point that I would pick up is on the next page which is page 277, paragraph 1398. Paragraph 1398 at the bottom of the left-hand page on the screen: "It is possible the test could allow for recognition of CMT in more areas than under the 2004 Act. The test is, however, a stringent one and although its application will be on a case by case basis and dependent on the evidence, substantial activities in an area by non-members of the claimant group would likely displace claims of exclusivity." Our submission is that that captures precisely what the language of section 58(1) is seeking to achieve. There's a contrast here and elsewhere between the activities that have taken place since 1840 and the interests that applicant groups are seeking to have recognised, and so if there are no such

activities or no such activities are causing difficulties, then there should not be a major issue. If there are major activities, then there is difficulty and that's what the language is designed to convey.

WILLIAMS J:

The problem with that is that that's of course kind of obvious really and these are standard approaches across the settlor jurisdictions. The question is how big is substantial, what's a substantial activity and what's the nature of its effect on whatever either territorial or non-territorial title you claim. One way of looking at this is that in the absence of extinguishing events of any kind, the entire foreshore and seabed, title to the entire foreshore and seabed remains, that would be a very lax test.

MR HODDER KC:

Yes.

WILLIAMS J:

This says where there is high countervailing activity, it's likely to have been lost. That's not that controversial as a proposition. You'd get that in Australia and in Canada too. The question in the foreshore and seabed is what does that really mean.

MR HODDER KC:

And there's a question mark implicit in your Honour's use of the term "loss", there's a question about what the counterfactual is and if the counterfactual is what would have happened had Ngāti Apa not been overtaken by legislation, then maybe there would be something that's lost.

WILLIAMS J:

No, well my counterfactual was really if you start from the proposition, as we must, the full counterfactual it would be that Aotearoa is Māori land, right, that's how it started in 1840 and there was almost no one except the New Zealand company that disagreed with that. So a very lax system would simply recognise CMT around the entire coastline, there having been no statutory express

exclusion if that were the case, or the way to CMT can be crowded out by countervailing activity.

1430

The question is really what countervailing activity, that's really where this debate is, because if CMT can exist in eastern Tauranga then obviously the countervailing activity can be relatively extensive, at least in some circumstances, without extinguishing. So these broad statements are of course not only clear, but obvious.

MR HODDER:

Yes.

WILLIAMS J:

But applied to facts can be very difficult.

MR HODDER:

Well the submission that I'm presenting is that they are stringent, that's the point, and so there may well be crowding out by substantial activities.

WILLIAMS J:

Yes. I don't think anyone is disagreeing with that proposition. The question is really what does "crowding out" mean?

MR HODDER:

Well the – partly can I just come to one other aspect of this report, and I think it may help in terms of the language that is used there. So at paragraph 1426 –

GLAZEBROOK J:

Can you just repeat the paragraph number, because it didn't come through the –

MR HODDER:

I'm sorry, your Honour.

GLAZEBROOK J:

I know it's – well especially with people on VMR and trying to take the transcript.

MR HODDER:

Thank you, your Honour. Paragraph 1426 on page 281: "The Government's position is exclusive use and occupation is consistent with common law principles for investigating and establishing CMT. It requires the applicant to show their interest in the area has qualities akin to that of a landowner – the capacity to exclude others from the area."

The same point is made in paragraphs 1490 to 1492, which I won't take you to for present purposes, but it does refer there to a set of rights generally akin to the rights of a property owner which can co-exist with existing public rights and activities. That's what it's seeking to create, and so this idea of something akin to a landowner is one of the thoughts and themes that comes through from this document.

WILLIAMS J:

So does that mean unless it was capable of being transferred, if the Māori Land Court had that jurisdiction, into Māori freehold title, you couldn't get CMT?

MR HODDER:

Well again, I'm in no position to help your Honour in terms of testing the propositions that emerge in the Māori Land Court jurisprudence. It's simply not my area of expertise, but –

WILLIAMS J:

That was the point made in the *Ngāti Apa* decision, that just because customary title exists under section 131 or whatever it is of the Ture Whenua Māori Act does not follow that it would be translated as it usually is or usually was with terrestrial land, that it would be translated into Māori freehold title, i.e. a formal title held against the Crown. In this case, the phrase used here is akin to land ownership, so the ability to put a fence around it.

MR HODDER:

I'm not sure how far I can help your Honour by way of response, but I would observe that one of the things that is excluded from the common marine and coastal area is title of that kind, including Māori freehold title. So the extent that that's being created in these areas, and noted in other provisions of the Act, that would be a helpful indication in some cases.

WILLIAMS J:

Yes. So your – well I guess the question again is, is your argument that unless it could sustain a Māori freehold title, that is unless it was in the nature of a true terrestrial title, capable of being the subject of a formal award by a court of competent jurisdiction, it doesn't make it?

MR HODDER:

I think all that I – I know that's the key question that your Honour and the rest of the Court are concerned with. In the end, as the earlier passage said, it's going to depend on the evidence. I understood her Honour Justice Glazebrook's point about there needs to be a test, but in the sense the test has to be one of balancing, and the question here is balancing the way in which the applicant group has conducted itself in the particular area and the other activities by people who aren't part of that group have been undertaken, if they are substantial in the sense that they're not easily reconcilable with a degree of exclusivity, if we can use that word, as part of the normal rights of a landowner subject of course to legal – what the current law might be, then there will be difficulty in meeting the threshold.

It's probably an appropriate point for me to make this point at this stage because it ties back, as it did in the discussion earlier, between the distinction between extinguishment and non-recognition. Our submission on that is that it's critical to understand what part 3 does. Part 3 recognises three layers of customary interest that the Courts and everyone else will recognise if granted. The first one is environmental involvement which is based on kotahitanga, the second is the PCT, which requires exercise of rights consistent with tikanga, and the third, and these are obviously ascending orders of difficulty or degrees of difficulty, is

CMT, but if a particular interest fails to achieve satisfaction of the tests for CMT, that doesn't mean it's extinguished. It may be represented in terms of PCT, it may be represented in terms of I think it's section 46 of the environmental involvement exercise, or conceivably it simply means that it remains important in Te Ao Māori but is not recognised by what some people call the State legal system. It's not recognised under this Act and because of the Act it can't be enforced in some way through the Courts. But it's not extinguishment, it's non-recognition because it doesn't satisfy what is we say designed to be a stringent test.

KÓS J:

So, you're really arguing for a broader delta between recognised rights and extinguishment I think more than the Crown anyway?

MR HODDER KC:

Yes.

KÓS J:

That's the essence of your argument?

MR HODDER KC:

Yes.

GLAZEBROOK J:

Can I just check, what you seem to be saying is if third party activities in the area are extensive enough, that will mean that you have taken away exclusivity, is that…

MR HODDER KC:

Yes. It comes very close to it anyway, yes, your Honour. What it means is you may well be in PCT territory but you're not in CMT territory.

WILLIAMS J:

PCR.

MR HODDER KC:

PCR, I'm sorry.

GLAZEBROOK J:

PCR. But yes so you're concentrating on what has been done in the area, of course totally lawfully as the law was understood at the time so – but effectively any activity in the area that is extensive enough will mean that you can't get a CMT –

MR HODDER KC:

Yes.

GLAZEBROOK J:

– because it takes away exclusivity, is that, does that…

MR HODDER KC:

That's a real possibility in these circumstances and I say that's consistent with the general reconciliation that the legislation that has, as is to be found in the legislative materials, I think there are some that I have taken you to, that it is that balancing between the customary interests that existed as at 1840 and most of the activities and structures et cetera that have arisen since 1840.

GLAZEBROOK J:

And, I suppose I should say, that you say there are more extensive rights that you would have in terms of the customary title but, in fact, there's quite a major portion taken out of what would be a customary title because there's public access guaranteed and fishing rights guaranteed.

MR HODDER KC:

And there is no ownership entitlement. That's taken out by section 11 so you can't claim to be an owner.

GLAZEBROOK J:

Well, no, exactly, yes exactly.

MR HODDER KC:

Your Honour is exactly right. So part 2 is taking away quite a lot from the normal concept of property and ownership and then part 3 says here are some things that can be utilised that are consistent with the CMCA but you have to meet the various criteria and they are increasingly stringent as you go from the first to the third and that's –

GLAZEBROOK J:

But you still are saying what it is you're looking at, what the third party activities has been – I don't know whether that's the only thing you're saying you look at.

MR HODDER KC:

I'm not. I don't want to be exhaustive about it but I'm conscious the Court needs something tangible.

GLAZEBROOK J:

No, no, absolutely.

MR HODDER KC:

And I'm looking for something tangible that indicates that there is a presence of third party activities and without that, if you can contemplate an area where there hasn't been much in the way of activities, then the case for CMT will be so much stronger. If the entire area that you claim has had a port stuck on it with various structures associated with it for the duration since the middle of the 19th century, it will be harder.

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WILLIAMS J:

Assuming that was done lawfully of course. That's not a trick question. You'd have to qualify all incursions as being lawful in accordance with the law at the time.

MR HODDER KC:

I think – I'm happy to take that as implicit in my response, yes your Honour.

WILLIAMS J:

Yes, because some incursions are not, of course, and you'd have to say they wouldn't be extinguishing.

MR HODDER KC:

That gets into a more difficult area, which I don't have an answer to, but the easiest one is it says you've got a, you've got the Port of Auckland built on a whole lot of area that you might claim.

WILLIAMS J:

Yes.

MR HODDER KC:

Ngāti Whātua won't thank me for saying that.

WILLIAMS J:

No.

MR HODDER KC:

But that's kind of how it works. That gets hard.

WILLIAMS J:

I'll let them know.

MR HODDER KC:

I suspect they do already, but anyway. But if you have a settlement, like some of the beach areas of New Zealand where there have been baches in dozens, and maybe more, for 100-150 years, then they may not have been lawfully established in the first place, they may have been some kind of squatter, but if they were there, and they weren't removed, then they are activities that are interrupting.

WILLIAMS J:

Really so even unlawful incursions are extinguishing?

MR HODDER KC:

Well if you are to have the argument on terms of the facts you might want to explore that question and see whether that was a balancing factor.

KÓS J:

I didn't understand you to be suggesting they were extinguishing, I thought you were saying they were denied a section 58 order.

MR HODDER KC:

I'm sorry, if I meant, if I –

GLAZEBROOK J:

We're always landing up in terminology. I think it probably isn't that helpful.

MR HODDER KC:

I wasn't certainly suggesting extinguishing, I was simply saying that it's hard and… yes.

WILLIAMS J:

Yes, so the difficulty with that framing of the question is that where you have a continuity requirement.

MR HODDER KC:

Yes.

WILLIAMS J:

And continuity is interrupting something that was vested prior to the interruption, the interruption is the extinguishing event, because there was a right before that. It's not as if the right is created at the point that the application is made. The right has pre-existed 1840 and been interrupted, and that is the extinguishing event.

MR HODDER KC:

Well your Honour and I might be using "extinguishing" in different ways.

WILLIAMS J:

Well that's the way, in orthodox aboriginal title law, that's how it's understood, as I understand it.

MR HODDER KC:

Well I'm focusing on section 58 and it seems to me that if you have that kind of interruption, that it's not an extinguishing event, but it's an event which may deprive you of recognition of CMT.

WILLIAMS J:

But you had it before that.

MR HODDER KC:

You may have. I can't deny that.

WILLIAMS J:

And then it was taken away?

MR HODDER KC:

Yes.

WILLIAMS J:

That's probably extinguishing then.

MR HODDER KC:

That's, that's – well no, because extinguishing suggests it doesn't exist, and if you can get PCT *[sic]* for the same interest, then it does exist, it's just not recognised as CMT.

WILLIAMS J:

PCR?

MR HODDER KC:

PCR sorry.

WILLIAMS J:

Yes and –

FRENCH J:

You're just saying it doesn't qualify for this test.

MR HODDER KC:

Yes.

FRENCH J:

Rather than saying it ceased to exist or was extinguished.

MR HODDER KC:

Yes, I absolutely resist the idea that my argument says that this means it's an extinguishing of anything particularly. What it says is it's harder to meet the threshold for recognition in this particular case of CMT, but you may well qualify for recognition under PCR. You may very likely will – well more likely satisfy the section 46 test in terms of the environmental involvement.

WILLIAMS J:

Yes, it seems to me that PCRs can get to critical mass and really be evidence of CMT.

MR HODDER KC:

Well my only response is that there's a clearly a legislative intent that there be a distinction between those two.

WILLIAMS J:

No, but you see the exercise of rights in an area is not just the evidence of a PCR, it is also evidence of CMT, if there's enough of it, and it indicates control and so forth. So these two sets of rights are actually tightly intertwined and it becomes, at some point the PCR reaches a tipping point and demonstrates something fuller than just a usufruct.

MR HODDER KC:

Possibly your Honour. I mean obviously there's a commonality. All these are based on customary interests. As the beginning of part 3 says, these are the three ways in which this legislation recognises customary interests, and then it sets out the three of them in there, but they have ascending levels of difficulty to get the recognition. There will be obviously boundary points in relation to some factual circumstances, but what I'm contending for is that they are clearly distinguished categories of recognition and that the most difficult one, which is what section 58 is prescribing for, has to be understood as being stringent, and that's what the language achieves on its plain face.

WILLIAMS J:

Yes, again the question is what does "stringent" mean. If, for example, in an area on a beachfront that's had baches on it for, let's say 40 years or 50 years, there are rocks that are still collected from by the local iwi, there are rāhui imposed, if someone dies irrespective of their race, there is a rock further out that tētē are gathered from, that's going to be an indication not just of discrete PCRs and all of those events, well apart from the rāhui, but the rāhui is probably going to be the strongest indication that this is a matrix of PCRs bounded by a CMT which of course is the way tikanga works.

MR HODDER KC:

I don't know that I can do much by way of response except to say that that seems to me to come down to questions of fact.

WILLIAMS J:

Correct, but we have to have some sort of conceptual framework within which to assess these questions of fact because it's not always the case that the presence of a literal non-Māori community is going to affect either PCRs or CMTs.

MR HODDER KC:

I think, your Honour, I'm tempted to retreat into the nobody said this is going to be easy test but…

WILLIAMS J:

That I completely agree with.

MR HODDER KC:

But there has to be, and the Courts and the legal system has to deal continually with questions of degree, and what your Honour I think is putting to me is that there will be questions of degree which are difficult and I don't descend from that proposition.

WILLIAMS J:

So, my point is really does applying the adjective stringent help?

MR HODDER KC:

In our submission it helps in terms of understanding where the Court of Appeal majority went wrong because, as I see it, the Court of Appeal majority was allergic to the idea that the end result might look stringent, whereas essentially the legislative history says there's nothing surprising about that at all and that means stringent on an overall global basis. You know if the end result is that you can predict there might not be many instances of CMT, then that is globally stringent. That was what one of the things that caused the Court of Appeal majority to search for something other than the language of section 58 to found its reasoning on hence our support of the Attorney-General's appeal against that line of reasoning.

KÓS J:

And I take it your challenge is not just to the Court of Appeal here but, for instance, to Justice Powell's decision in Ngā Pōtiki. I mean clearly he wouldn't meet your test for stringency either.

MR HODDER KC:

I think I've only glanced at that decision, your Honour. I'm not wishing to engage beyond thinking that your Honour is probably right but I'm not in a position to respond in detail.

KÓS J:

Well the Crown had less trouble with it than you have.

MR HODDER KC:

Yes, your Honour, that's one of the reasons why our argument aligns differently as we'll see when we come – well you've seen it in our written submissions. I'm obviously going to go through it. That's really why we say that if you take the approach that I am contending for on behalf of LCI then Justice – so the Court of Appeal started, the Court of Appeal majority in our submission, putting it simplistically, started in the wrong place and finished in the wrong place. Justice Miller started in the wrong place and finished in the wrong place because he wasn't prepared to tolerate what he called a stark dichotomy between the first limb or limb (a) and limb (b)(i) and we say the logic has to follow. That's why it said –

GLAZEBROOK J:

Can you run me through your logic then? I mean apart – I've already, we've already sort of ascertained in terms of third party interests but…

MR HODDER KC:

Well that's the language. I mean this is the Court proposition that we dealt with in some detail in our written synopsis but, sorry, limb (a) explicitly refers to tikanga, limb (b)(i) conspicuously doesn't and to say that there can't be a stark dichotomy between them really denies the fact that the language has been used consciously and deliberately in that way.

GLAZEBROOK J:

All right, so what do you say limb (b) means then?

MR HODDER KC:

Limb – well it means –

GLAZEBROOK J:

Sorry, what's the test that you have for exclusivity and how does it differ from what's been discussed by the Crown and also by Justice Miller?

MR HODDER KC:

So the Crown's position and Justice Miller's position is that tikanga infuses all of (b)(i), limb (b)(i). We say that isn't the case. That what we have –

GLAZEBROOK J:

So what is there?

MR HODDER KC:

What there is, is a general recognition of the normally incidence of property in a universal sense, that is to say that there is exclusive use and occupation without substantive interruption. General property rights, rights akin to that of a land owner is the way in which it was put in the Departmental Report.

FRENCH J:

Do you accept that the term "exclusively" isn't to be interpreted in an absolute way?

MR HODDER KC:

I'm sure it doesn't, your Honour, but it's meant to come close.

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WILLIAMS J:

It's quite hard to reconcile that with the irrelevance of, by itself anyway, access, fishing, and navigation, because if you're a landowner that would be deeply problematic.

MR HODDER KC:

Yes, I agree, but the basic –

WILLIAMS J:

So we're clearly talking about something else, aren't we, and that's the essence of the reconciliation deal that was made. We're talking – we're not talking about exclusivity in the true sense of the word, nor are we talking about completely unimpaired customary interests in the true sense.

MR HODDER KC:

Well again, it's important in my submission that one bears in mind that no counterfactual is going to be absolutely exclusive, there will always be some kind of rights over any property interest at least in the New Zealand experience.

WILLIAMS J:

Yes, but this is pretty fundamental.

MR HODDER KC:

Well I agree with that, but this is if one contemplates a non-Māori property title dating from that era then it will be subject to whatever statutory requirements and impairments or impositions or qualifications there are, whether it's under rating or rabbit-fencing or whatever. I mean those rights are not absolute – there may well be requirements to give access, there may well be requirements to allow structures to be imposed in the public interest.

WILLIAMS J:

Yes, but they're exceptional aren't they, because, you know, as they say in the old sexist language, a man's home is his castle, et cetera, et cetera, even if the local authority can put pipes through your property to provide water connection somewhere else, still no one is allowed to wander across your property let alone fish in your pond, but in this case the things that are most done on the seascape are still allowed to be done even if you have CMT. That indicates there's much more going on than "these are equivalent quarter-acre sections".

MR HODDER KC:

Well there is a distinction perhaps that that raises, this is in answer to your Honour, that we would focus on the – what the test is as to what the

consequences are, are matters of distinction, that they don't – that the latter doesn't really help inform the former. When the – the clear recognition in the process that leads to this Act is that there should be a test prescribed, not left to the Courts, that test is one that is not limited to tikanga, it's meant to be tikanga plus, and the plus is a concept about property, are concepts about property, and we say that's what section 58(1)(b)(i) is addressing. And it may be that in those terms it creates obvious difficulties for an applicant group that can satisfy (1)(a) because it does hold the land in tikanga, but the point of having (b) there is something else is required. What is that something else? It's some kind of property type of connection with the land beyond just tikanga, otherwise there's no point in having (b)(i) there, and it is doing something, and that something, we say, is making the test stringent, something higher than the PCR test.

GLAZEBROOK J:

I just have trouble with this. Making the test stringent is all very well, but what does it actually say? So you say, I think, that the limb (b) means that you have to have had exclusive use as you would do as a landowner, which means that what –

MR HODDER KC:

It may be –

GLAZEBROOK J:

I mean you – let's assume you have to have continued to use it as if you owned it.

MR HODDER KC:

Yes.

GLAZEBROOK J:

And let's assume that is the case for a particular group. What else do you need to have to have done?

MR HODDER KC:

Well –

GLAZEBROOK J:

Because one of the difficulties with saying you have to have excluded people is that you had no right to do so, as the law was understood at that time.

MR HODDER KC:

Yes, I understand that, and in my submission the legislation is effectively being pragmatic about that. It's not saying that activities that took place because they couldn't be resisted by the applicant group for that reason are to be disregarded, they are the kind of activities that they're seeking to reconcile. And if those activities took place, if people were treating – if people other than the applicant groups were treating the area as if they had independent rights in relation to it and were doing so on a significant basis, that's the kind of thing that triggers (b)(i), or triggers the exceptions to (b)(i).

KÓS J:

It doesn't seem to me, Mr Hodder, that this limb (b) is really drawing very much from conventional English land law. It's drawing from aboriginal native title cases. Those concepts there are ones we see familiarly in the Canadian and Australian cases. They're about interests, not estates in land.

MR HODDER KC:

The reason that we put in the references to Professor Honoré, Professor Gray, et cetera, is that they can be extracted into concepts that apply to any legal system, and that's why we say that's what they're trying to do. They're trying to do a system which is more universal, but not specifically tikanga.

KÓS J:

Yes, but you put a lot of weight on the question of legal history here, or the legislative history.

MR HODDER KC:

Legislative history, yes.

KÓS J:

We know that much was drawn here from those reports, in those reports from the Canadian and Australian Aboriginal title and native title cases.

MR HODDER KC:

Well my reading ran into a degree of fog when I was trying to make sense of that. In the end I think what the reports say is we have drawn on Canadian stuff. We have drawn on Australian stuff. We have drawn on general principles, and in the end there's no single source. It's not as if it simply says, we have copied the Ontario Act or something. It's a general proposition. In fact it could be described as a generic proposition about property. Now of course because it's a generic proposition about property, you are going to find reflections of it in other jurisdictions. They have them. But I think I'm resistant to the idea that this is a purely Canadian, for example, proposition and therefore whatever defects or wrinkles or particular context the Canadian formulation has, needs to be applied here. We don't accept that.

FRENCH J:

Can you be a bit more specific about the extent to which you depart from the Attorney-General's formulation about what exclusive use without substantial interruption means.

MR HODDER KC:

We say there does have to be use and occupation, and it should be as exclusive as practicable and as possible. But if there has been no such use and occupation then you don't satisfy it. So as I understood the Attorney-General's position during the dialogue with the Bench this morning, or before lunch, it may go as far as saying that making your position known is sufficient. We say that doesn't satisfy the language. The focus should be on the language. It may well be that associated with exclusive use and position there is the point of making one's position known to others.

GLAZEBROOK J:

But you say if other people have encroached on that, so effectively if other people have encroached on that to a significant degree that takes away the right for a CMT, is that…

MR HODDER KC:

It removes the ability to get to the threshold. It makes it really hold to get to the threshold for CMT, yes, but there is no right to CMT apart from satisfying the statute.

GLAZEBROOK J:

Yes, so exclusivity can be taken away by other people having used the –

MR HODDER KC:

By other people's activities.

GLAZEBROOK J:

– land, to a significant degree.

MR HODDER KC:

Yes.

GLAZEBROOK J:

Whatever that means?

MR HODDER KC:

Obviously temporary tangential is not going to cut it, but if there's somebody who treats it as theirs, who isn't part of the applicant group, then it's really hard to say you satisfy the test in section 58(1)(b)(i).

FRENCH J:

But they would have to do that for a significant period of time, otherwise it wouldn't be a substantial interruption.

MR HODDER KC:

Yes, that's a question of degree in the period, what are we, 170 years or so, as to what that significant period of time is. But to go back to the examples I was giving, if you have something that's associated with a major urban centre, a port or some other kind of structure, or if you have a major settlement along the coast which has been in place for decades, if not over a century, then that makes it harder, in our submission, to satisfy section 58(1)(b)(i).

WILLIAMS J:

As to what?

MR HODDER KC:

As to whether there has been exclusive use and occupation without substantial interruption.

WILLIAMS J:

Of what?

MR HODDER KC:

As a composite phrase.

WILLIAMS J:

Of what though?

MR HODDER KC:

Of the specified area.

WILLIAMS J:

What if the specified area is much larger than the port?

MR HODDER KC:

Then that's probably a question of degree.

WILLIAMS J:

So do you agree –

GLAZEBROOK J:

And a settlement doesn't usually encroach, unless you've got jetties. In fact you've got a settlement somewhere isn't actually encroaching on the title is it?

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MR HODDER KC:

Well it's going to be a question of authority, if you like, across the whole of the specified area. You're not an applicant for half the area, or if you were you would be focussing on the half that you could satisfy the threshold on, but if there was a significant part of the area on which you could not assert exclusive use and occupation without substantial interruption, then that area needs to be either redefined or you don't satisfy the test.

WILLIAMS J:

So given that this is a reconciliation instrument, do you agree that the extent of impairment of whatever the right might be, let's say it's CMT, will be the minimum amount necessary to accommodate the countervailing use?

MR HODDER KC:

I'm not – I suspect I'm missing something in that question, I'm sorry. Could you repeat it?

WILLIAMS J:

So we're agreed that this is a reconciliation statute, reconciling –

MR HODDER KC:

Balancing or reconciliation, yes.

WILLIAMS J:

I think you used that word, that's why I've grabbed at it.

MR HODDER KC:

All right.

WILLIAMS J:

If the placing of structures within a coastal marine area impairs any right as you suggest, do you agree that the level of impairment ought to be the minimum necessary to accommodate the intrusion and not more?

MR HODDER KC:

I think so, your Honour, but I'm still – the impairment of what I think is the question still going through my head.

WILLIAMS J:

So a reclamation is extinguishing. My word.

MR HODDER KC:

Yes.

WILLIAMS J:

Interrupting, whatever word you want to use, but only to the extent of the reclamation.

MR HODDER KC:

Yes.

WILLIAMS J:

Right.

MR HODDER KC:

Well I mean that's a matter of physical logic. I don't – that's what I'm accepting. To the extent it's said that if there's only a small part of your property that's subject to a reclamation, that means that you have exclusive use and possession of the entire property and then there's a question of degree as to how much of that specified area is affected by the reclamation, and if it's a significant part, then clearly we say that section 58(1)(b)(i) isn't satisfied.

WILLIAMS J:

Well if the reclamation covered the entire area or three-quarters of it then unquestionably so, but most reclamations, most structures in the CMA don't.

MR HODDER KC:

Yes, and again, I'm struggling to provide as much assistance as I'd like because many of these things are going to depend on particular factual circumstances, but taking the words on their face as what – they mean what they say, that's the short submission, and so anything that detracts from the concept of exclusive use and occupation without substantial interruption means it's going to be harder to satisfy the CMT test, and if you don't satisfy the CMT test and you're an applicant group then you will be – fall back to PCR, but that's the structure the Act provides. That is going back to the word "reconciliation". When I'm using the word "reconciliation" that preface sounds a bit like Humpty Dumpty, but anyway, when I was using the word "reconciliation" I'm really trying to capture the idea of balancing, which is what the pre-legislative materials are talking about, they're trying to balance all these factors.

Now I should say at this point that it's conceivable, of course it's conceivable, that Parliament hasn't got it perfect. That's the nature of political compromise, but that's the imperfection that Parliament is entitled to make by the language it uses and the structure it provides, and of course in something which is trying to balance incommensurables there will be some aspects of some existing interests which aren't as fulsomely represented in the end product as people would like.

Now if the Court pleases, I had probably got to the point where I was going to respond – if I interrupt myself. The only thing that I had not touched on in the legislative history that I was going to mention is the second reading debate of the Bill itself, which has contributions from the Honourable Tariana Turia, from the Honourable Christopher Finlayson, and the Right Honourable Bill English, all of them making the basic theme points I'm going through, but emphasising the need for certainty and the extensive consultation that's been undertaken,

and it's those kind of things that indicate that these are complex social issues which have been resolved by Parliament itself in the form that we see.

KÓS J:

Are you going to take us to those?

MR HODDER KC:

To the Hansard references?

KÓS J:

Yes.

MR HODDER KC:

I'm happy to do that. I was trying to be efficient but I'm happy to take the Court there if that helps. I can give a reference, that might be useful.

KÓS J:

Well perhaps you could point to what you particularly rely on.

MR HODDER KC:

I think it's the section, in our appendix to our submissions, it's really the last item. No, try again. It's the item on page 33 of our submissions, 8 March 2011, and the page references we've given there are in the NZPD volume 670 at 16981, which is a debate between the Honourable David Parker and the Honourable Christopher Finlayson, and then the reference to the Honourable Bill English is at pages 16991 to 16992.

GLAZEBROOK J:

Do they say anything specifically about the point we're looking at, ie what exclusive use means? What exclusivity means? And what they were intending?

MR HODDER KC:

Not…

GLAZEBROOK J:

Because just saying this is a consultation process, isn't this what we've come out with, isn't actually overly helpful in trying to work out what the words actually meant, and mean now. I'm just saying is there anything in there that says what we mean is you have to be able to exclude everyone from it.

MR HODDER KC:

No, no, I don't – I haven't got any particular provisions that give a great more detail on that, and I'm not sure I could rely on them anyway, but no, there's nothing that goes through and explores in detail from the responsible Ministers that discusses in detail what's going on. What we have is the prior work which is all consistent with where we finish up with, and why the features of the new regime that I've described seem to me to be consistent with the arguments that we are making. The point about the consultation and where we finish up with, is in a sense, goes back to the responsibilities of the Court, and so the Courts' normal response to a problem is to try and fix it, whereas what we say is in this situation the fixing has been done by the establishment of the test itself. The rest of it comes down to assessing the evidence in the way that it comes up, and I appreciate Justice Glazebrook's question –

GLAZEBROOK J:

I understand, we just want the test, because if you say, well, it's been set in the test, what we need to do is to say, well what is that test, and one of the issues sometimes with these sort of things is that Parliament couldn't work out what the test was itself, and then put it in general terms, and unfortunately that does mean that the Courts then have to work out what it means.

MR HODDER KC:

And there's only so far that we can go on that, because those are concepts that have to be in language that's not absolutely precise. I'm reluctant to talk about tax statutes with your Honour, but this isn't going to have the degree of complexity and detail that one might expect in some taxation legislation.

KÓS J:

Well it could have, but we don't have it. I mean both you and Ms Williams are claiming some kind of spurious parity and certainty in the legislative words. When we use the word "exclusively" when it doesn't actually mean exclusively as we commonly would use it, and without substantial interruption when, in fact, substantial measures of interruption are permitted. So in the end we've got to work out what on earth those words actually mean and, you know, it's not enough just to say, look at the words, because they don't tell us the answer.

MR HODDER KC:

Well my response is that, as in many situations, telling the Court this, is I'm sorry to say the obvious, but in many situations when one examines the facts in detail, when applying relatively general language, the answer becomes obvious. But in the absence of the facts, it's hard to do it. So when the Court says to me, "but what do the words the statute has used mean", then I'm not going to speak for the legislator that they mean, it says, (a), (b), (c), they may mean (a), (b), (c) through to (z). All I can do is say they mean (a), (b), (c), they mean something different to the tikanga line in the first limb. They mean something akin to land ownership.

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Those are hints we can get from the materials I've taken you to, which are perfectly legitimate aids to the exercise you've got, but in terms of Justice Glazebrook's question, can we come up with another paragraph that elucidates what (b)(i) says, no, I'm not offering a paragraph like that because that's going to depend on the facts, and second-guessing what the Court has said is not something that I can do, and in our submission it's difficult for the Court to do it as well.

WILLIAMS J:

The problem is it's inevitable that the Court has to do it because the ambiguity is baked into the statute, it's been sent to the courts because it was extraordinarily difficult to provide the sort of detail one would expect of an important statute like this, it was politically difficult. This is often done in these

circumstances and you see exactly the same thing with the Native Title Act 1993 in Australia, you certainly see it with aboriginal title litigation in Canada because this reconciliation law is difficult, and these words don't obviate that difficulty. They highlight it, but they don't solve it.

MR HODDER KC:

Well the easiest response – first response to your Honour is yes, it's difficult, I'm not denying that. The second proposition, I think the response is that I can't really speak to the origins and development of the Australian or Canadian legislation apart from the most vague in general terms, and I certainly wouldn't be wishing to debate that with your Honour, but here this has been a considered effort over a long period of time to get to this legislation, and the question about leaving it to the courts to come up with a system which might have been more refined was one that was not – deliberately not chosen. That's clear enough from the legislation and the legislative history.

So what's being given is the words that we have plus the expectation that when the issue has to be tested, it's either tested by an agreement between the Crown and the applicant group, or it's tested by an application for a recognition order supported by evidence and it's a process at that point. But with respect, there's a great deal of legislation that doesn't get much more precise than this, but it is the prescription laid down by Parliament and it's the prescription which is clearly unlike the position that was taken by the Court of Appeal, both majority and minority, one which is meant to be different from (1)(a) in section 58 because it wasn't tikanga-focussed. If it was you wouldn't need to have two separate paragraphs, you wouldn't have the conspicuous absence of tikanga from (b) and presence in one. That's the essence of the appeal points, and that's why we say the Court of Appeal finished up in the wrong place, in the case of the majority, started in the wrong place.

And I'm reasonably optimistic that what I have said is pretty much entirely consistent with the legislative materials you will see. Nobody says it's easy, nobody says that every situation has been addressed in detail, in a detailed schedule or whatever it might be, if – no doubt it could have been done if one

wanted to take the time to do that, but it wasn't, but what was expected was that this was not a matter where the test would be rewritten by the Courts, this was a matter where this was to be done by matter of application to factual circumstances. I'm –

GLAZEBROOK J:

So is another difference – well one difference for the Crown, but also something other than this third-party interest is (a) is tikanga and (b) is not tikanga?

MR HODDER KC:

That's the core submission actually, your Honour. That's – I mean we've said that in some detail in our written, but I'm – yes.

GLAZEBROOK J:

Yes, and I understand that. I was just – because we had gone on to the third-party interest, but –

MR HODDER KC:

Yes.

WILLIAMS J:

Well what if tikanga provides for exclusive use and occupation, it's just a coincidence?

MR HODDER KC:

I wouldn't say it was a coincidence. I understand that's a matter of debate. My impression is, as you note in our submissions, that tikanga is not averse to exclusivity but – well not entirely, but if it were to be exclusive then fine, then that – whatever it is that can be said in support of a proposition that the relevant tikanga for the specified area in the group that's seeking recognition involves exclusivity, then that will go both to the first and the second limb, but simply saying holds according to tikanga irrespective of exclusivity doesn't help you, in our submission, with the second limb.

KÓS J:

I understand that submission but it is clear that tikanga does pop up again in (b) because it pops up in (b)(ii) and the concept of tuku whenua, the transfer, and if we track that through to section 58(3)(b) you see the transfer being in accordance with tikanga. So tikanga is baked into both parts.

MR HODDER KC:

Well…

KÓS J:

I think.

MR HODDER KC:

With respect, not quite as strongly as your Honour has put it. The point about (b)(ii) as a way of assuring that continuity is not disrupted by an exchange according to tikanga, though it gives you a degree of continuity, which continuity can then be enjoyed by the current applicants, who are the current people who hold it according to tikanga. No more and no less. It doesn't hard-bake tikanga into (b)(1).

WILLIAMS J:

The problem for myself with that proposition is that tikanga itself speaks of use and occupation which can be exclusive. The idea that they are separate is wrong in fact, and the idea that tikanga doesn't speak in (a) – sorry, in (b), and that exclusivity doesn't speak in (a) is incorrect in fact.

MR HODDER KC:

I can only say in response to your Honour that you may well be right, but what Parliament assumed they say is pretty plain on the face of it, the contrary. It assumed there was a distinction between them.

WILLIAMS J:

Well did they or – first question, did they. Second question, were they right anyway, and do we bleach (b) – sorry, bleach (a) and darken (b) because Parliament made a mistake?

MR HODDER KC:

Well no, well my submission is obviously Parliament didn't make a mistake and shouldn't be taken to make a mistake without some really overwhelming evidence, which we don't have, and there's no need to bleach. One just takes the propositions as they are. The best evidence of Parliament taking the view that I've indicated, which is that it may have taken a different view than what your Honour has just put to me, notwithstanding your Honour may be right, is that the premises of having (a) and (b) is the contrary. That there is a distinction. That's why the language is used that way.

WILLIAMS J:

So if you look at the 50 or 60 years of customary title jurisprudence in this country you'll see exclusivity, including shared exclusivity, almost everywhere, and perhaps Parliament was badly advised but it's wrong, in fact, to say that tikanga and exclusivity are completely different ideas unrelated to one another because that's not true in tikanga and exclusivity is not a thing different from tikanga either.

MR HODDER KC:

Again my response is simply that Parliament might have been badly advised, that it took a lot of advice, it did a lot of consultation, and it came up with a solution for a new regime. The new regime includes the test that we've got in section 58(1) with its two limbs of (a) and (b)(1).

WILLIAMS J:

so one more point, and that is that if you look to both the Australian and Canadian jurisprudence from which these are drawn, probably in ignorance of the fact that exactly the same points are made in the old Native Land Court decisions a century ago, is that they too say when you are assessing use and

occupation you must look at that through the lens of tikanga, not through the ordinary proprietorial law of England, and that would make sense, really, otherwise you'd really be aiming your telescope at the wrong target. That's the crossover. All the jurisprudence says that crossover is necessary otherwise the test doesn't make sense.

MR HODDER KC:

There are many areas in there which I'm loathe to tangle with your Honour about here, but I come back to where I started from. That what this Act is, is a communication with the national population about a policy solution, not necessarily a perfect solution, that has been come up with by the executive in legislative processes to deal with the interests in the common marine and coastal areas. It's addressed to the entire population and we say that the lens is the lens of anybody in that population, whether they are from well-versed in Te Ao Māori, or they're not.

WILLIAMS J:

Or well-versed in aboriginal title jurisprudence or not.

MR HODDER KC:

Yes.

WILLIAMS J:

That doesn't seem to make a lot of sense, does it?

MR HODDER KC:

It has to.

WILLIAMS J:

You would ignore the very source materials that were drawn on to produce the two-stage test because it's not obvious that it was based on those sources.

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MR HODDER KC:

No, well I'm going back, well I'm – I don't want to repeat myself, but I'm going back to the basic proposition that this is a communication to the national population and that should be read and interpreted in that way.

Now, if the Court pleases, what I was going to do then was to go to my learned friend's submissions in response with Te Kāhui to pick up a number of points that they addressed. There may be a degree of repetition but I therefore may be able to skip a range of matters.

Now, if I can start by embarrassing my friends, can I say that I really was impressed by their submissions that they had put together for their clients. They are thoughtful, they are articulate, and they're the subject of considerable disagreement on my part, but they won't be surprised about that either.

KÓS J:

That's a great compliment.

MR HODDER KC:

The core proposition as I understand it, in the Te Kāhui submissions, is that the Act, our MACA Act, is designed to give effect to tikanga as law. As will be obvious, we say that isn't what the Act is doing. The Act is designed to create a new and bespoke compromise regime. That's completely different. If the idea was to have giving effect to tikanga as law, then going back to that table I showed from the regulatory impacts statement it wouldn't be option 4 that was being applied, it would be option 1 or option 3 I think it was, but it simply isn't. Everything unravels once that proposition disappears, with respect, and the proposition simply cannot stand with the legislative history. As I will come to, one of the responses is, well you have to take only some of the legislative history, only the legislative history that's referred to in the preamble. The rest of it doesn't matter. So, you take out the Departmental Report, you take out the consultation document, you take out the second reading addresses, and we say that's simply not correct. That's not the right way to go about the statutory interpretation exercise.

The real point that underpins our submission here is that it is the Act that has created these three new forms of interest under part 3. They didn't exist in that form before, they exist only because of the Act. They are not giving effect to tikanga as law. They are giving effect to the compromise solutions that were developed through the reform process that took place beginning, really, with the Waitangi Tribunal's report, but particularly picking up pace with the change of government and the combined efforts of Minister Turia and Minister Finlayson.

Now that's why there is a mismatch, I think, because the expectation is that it's implicit in what Te Kāhui submits to the Court, is that at the end of the day you'll finish up with something that looks like customary title had Ngāti Apa been allowed to flourish, or the regime under Ngāti Apa been allowed to flourish. That isn't what happened. That isn't what the 2011 Act does.

What is done in part 3 of the Act is to undertake that balancing exercise so that various forms of customary interests can be given a particular kind of recognition by the Act itself and it's the Act's form of interest or right which is then enforceable as a matter of law, and so when one focuses particularly on section 58, that balancing exercise, the fulcrum for the balancing exercise is the language of section 58. It's an awkward fulcrum because it has two limbs, but it's still the fulcrum for the balancing exercise. Those points, we say, don't support the submissions made by Te Kāhui, and that creates a series of problems.

What I have done, and what I will do for the – most of the balance of what I'm doing, is to go to our friend's respondent submissions. That's the submissions dated the 18th of October and I will respond by reference to their paragraphs. It's not necessarily completely perfect order, but it will do for my purposes and hopefully of assistance to the Court. So the submissions for Te Kāhui Takutai Moana O Ngā Whānau Me Ngā Hapū O Te Whakatōhea as respondent dated 18 October 2024, and so starting on page 1, we see that the battlelines are drawn in paragraph –

GLAZEBROOK J:

Sorry, if you can just –

WILLIAMS J:

Just a moment. Let us just catch up with you.

MR HODDER KC:

Sorry, your Honour.

GLAZEBROOK J:

So can you tell us – I've got them out again, but can you tell us exactly which ones?

WILLIAMS J:

It's the Wednesday morning, the 18 October 2024 submissions.

GLAZEBROOK J:

Yes, thank you. Right, starting on page 1.

MR HODDER KC:

Your Honour has it? Thank you. Thank you, your Honours. So the battlelines are drawn in a way that I already indicated at paragraph 1.3: "Te Kāhui say that the Attorney-General" – and I think we're included as collateral offenders – "has failed to recognise and respect tikanga as law." And so without repeating myself entirely, that doesn't really recognise the MACA Act status' general legislation affecting the national population, creating a new and unique regime seeking to balance the interests of all New Zealanders in the common marine and coastal area, and recognising tikanga's express but limited roles in part 3, but it is of course a necessary starting point for a claim for recognition of CMT and PCR.

On page 2, the expected criticism that in paragraph 2.1(b): "LCI and" – not only LCI but my friend Mr Smith can speak for the Seafood Industry – "are insistent on a literal meaning of section 58(1)(b)." And to some extent I have to plead

guilty, yes, it is meant to be a literal meaning, but it's also consistent with the purpose, why is the matter framed in that way, it's because Parliament sought out – set out to establish a new and unique test which included tikanga, but not only tikanga, but also general property concepts which are to be found in limb (b)(i).

And so what our submissions have sought to do is to respect the language collectively enacted by the legislature, and if that's to be criticised as literal then we'd accept the criticism. To apply a straightforward reading of the language of part 3 as a whole but including section 58, and bear in mind constantly the purpose, this is to create a new regime seeking to balance the interests of everybody in the coastal – in the common marine and coastal area as well as, in our submission, seek and find consistency with the legislative history.

Turning to paragraph 2.2, there is what I understand to be the accusation of a simple error: "Equation of the Parliamentary treatment of tikanga as law as amounting to 'violence' to the statutory wording." Now obviously I'm keen to resist the idea of a simple error, but more importantly, as I've said, the MACA Act is not giving effect to tikanga as law, it's giving effect to policy decisions about inappropriate balance, and that's most obvious if we start with section 11. No one owns the common marine and coastal area.

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The reference to the violence actually comes from Justice McGrath in the *Zaoui* case which is cited by her Honour the Chief Justice in the *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 case, and then cited again by a full Court of Appeal by Justice Kós more recently. So we say that that concept of violence, doing violence is designed to reflect the need to have regard to the text itself, and to be consistent with the statutory purpose. What is the statutory purpose? It is to create a new regime which balances a whole lot of incommensurables and comes up with a solution.

Paragraph 2.3 I think is the first reference to Anglocentric property law. What our submissions did is they recall was to cite Professor Honoré,

Professor Gray and various others to say that there are some universal features of property regimes and legal systems around the world. One of the most obvious ones is the concept of exclusivity, or the ability to repel other people. Not always that, and there are many other instances, Honoré lists a large number which we've referred to in our submissions. But the point that we're making is that what CMT is being done plainly is a created form of property right, and it has a unique bundle of rights not drawn solely from customary concepts, but also drawn from the statutory regimes which are applicable to land use in New Zealand.

WILLIAMS J:

It's hard to resist the proposition though to the extent tikanga is relevant to assessing the right and then implementing it or actioning the right. It can only be tikanga as law that's in play. It can't be tikanga as anything else.

MR HODDER KC:

And I don't think I need to disagree with your Honour on that, but the proposition I'm resisting is that tikanga in law is the purpose of, and the raison d'etre of the Act.

WILLIAMS J:

Well it's one of the purposes, you'd agree with that, wouldn't you?

MR HODDER KC:

It's one of the factors that's to be balanced, yes.

WILLIAMS J:

Well it's one of the purposes, isn't it, because it's purpose is to give effect to the rights drawn from tikanga within the constraints of the legislation. There are other purposes, but that's one of them.

MR HODDER KC:

Yes, I would use the word "recognise" rather than "give effect" but recognise. To give effect implies full effect. I mean they're obviously not giving full effect.

WILLIAMS J:

No, but you're giving some effect and, in fact, at something of a price to the wider community's interests. That's the compromise.

MR HODDER KC:

So section 46 is part of my answer to your Honour, and I think I'm agreeing. Section 46 says part 3 is setting out the legal rights and interests that give expression to customary interests under the statute. So there may be legal rights and interests that precede it, but what we're focused on, and what the Act is doing, is creating a new form of customary interest, or new series of customary interests. That's the purpose of part 3. That's why I say it's the fulcrum of the Act.

WILLIAMS J:

I don't think it'd be right to say it's a new form of customary right. It's providing with a constrained implementation of pre-existing and ongoing customary rights. Statutes by definition can't create customary rights.

MR HODDER KC:

That's a fair point your Honour, I accept that. It's creating customary interests. Statutory customary interests.

WILLIAMS J:

Well interests, statutory interests that reflect, to a constrained degree, the customary interests that underpin them.

MR HODDER KC:

Yes. Your Honour could have used the word "compromised degree" but it'd be the same thing.

WILLIAMS J:

Yes.

MR HODDER KC:

Yes. This briefly picks up on my core point, but on page 4 of paragraph 2.4 you'll see in the last sentence the proposition that criticism of Justice Miller's judgment is ill-founded because treating each limb of section 58(1) as analytically distinct does not make sense because tikanga necessarily informs what is meant by "exclusive use and occupation". Well that's the submission. As you know our response is that if that were the case it is perfectly straightforward for the legislation to say tikanga in the second limb, but it doesn't, and we say that's clear, and that the legislative material supports why that is.

On the 2.5(a) the question mark about whether or not Justice Miller erred and suggested –

WILLIAMS J:

Sorry, let me – can we just have a little discussion about that because it's really at the heart of what you're saying. What sort of evidence of exclusivity would you expect?

MR HODDER KC:

For CMT?

WILLIAMS J:

Yes.

MR HODDER KC:

I would expect that there had been no other significant activities which impeded the exercise of the authority, mana, that the applicant group exercised across a specified area.

WILLIAMS J:

Right. So, the positive side of that exclusivity is the exercise of authority and mana by the claimed right holder?

MR HODDER KC:

That's what gets them under A. That's the starting point. But that's –

WILLIAMS J:

Well, I'm talking about exclusivity. You see the problem?

MR HODDER KC:

No.

WILLIAMS J:

So I said what exclusivity must be established, you say, well, the travelled exercise of authority and mana by the right holder, tell me about what the exercise of authority in mana means in practical terms?

MR HODDER KC:

It means that they had rights akin to property owner rights. They had exclusive –

WILLIAMS J:

No, no, not in the abstract, in practice.

MR HODDER KC:

In practice?

WILLIAMS J:

What would that involve?

MR HODDER KC:

In practice nobody else was living there. Nobody else was camping there.

WILLIAMS J:

What were they doing?

MR HODDER KC:

Sorry, what I'm contemplating is that there was an area. The notional area, the paradigm area, if you like, there's nobody else was having had a presence there. There were no activities by anybody else.

WILLIAMS J:

Yes, but what were the right holders doing there?

MR HODDER KC:

What were the right holders doing? Well, they've been there presumably since time immemorial in some form or other.

WILLIAMS J:

No, not –

MR HODDER KC:

Which what –

WILLIAMS J:

Beyond existing, what were they doing?

MR HODDER KC:

I presume they were living their lives in the way they already have?

WILLIAMS J:

And how would they be doing that?

MR HODDER KC:

I'm sorry, that's – I'm not quite sure that I can answer this adequately. So, following as closely as I can and directly as I can, they would be sustaining themselves in the usual ways.

WILLIAMS J:

How?

MR HODDER KC:

How?

WILLIAMS J:

Well they wouldn't be –

MR HODDER KC:

They were utilising resources to survive and prosper.

WILLIAMS J:

Yes. So they would be imposing rāhui, they would be collecting in accordance with traditional rights, they'd be allocating rights to a whānau here and a whānau there and a whānau there.

MR HODDER KC:

They'd be erecting structures, they may be changing the landscape.

WILLIAMS J:

Correct. But all, all incidents of the exercise of tikanga.

MR HODDER KC:

Yes. The –

WILLIAMS J:

So how can you suggest that exclusivity does not involve an enquiry into the exercise of tikanga?

MR HODDER KC:

Because your Honour and I are looking at it from different directions.

WILLIAMS J:

Well that's my point. We have to look at it from both directions. Try looking at it from mine.

MR HODDER KC:

Well, I think we're getting to the, we could get to the same point by accepting that all those things that your Honour is talking about may show exclusivity.

WILLIAMS J:

Yes. Which means there must by definition –

MR HODDER KC:

In the –

WILLIAMS J:

– be an enquiry into the exercise of tikanga-based rights in order to establish ongoing exclusivity.

MR HODDER KC:

The second part of my answer is in the absence of other activities.

WILLIAMS J:

Yes. So if, for example, in the exercise of tikanga-based powers others are excluded, that would be an enquiry into tikanga would it not?

MR HODDER KC:

It wouldn't necessarily be an enquiry into tikanga. The proposition that I'm putting forward is relatively basic. It simply says that if the only activities are those of the applicant groups, whether they are conducting themselves according to tikanga or they're doing something different, I'm not quite sure what that would be, but whatever it is, those activities establish that their use of the land is theirs and they're occupying the land. That's a presence. It's a physical feature of the life. They're there, they're using the land as a resource.

WILLIAMS J:

Yes, so I guess my proposition was dividing those two things from a tikanga enquiry, dividing the exclusivity enquiry from the tikanga enquiry is an unhelpful way of understanding what's going on and whether the test in section 58 is met

because you cannot determine whether exclusivity continues or not without first enquiring into the extent and nature of the exercise of rights in accordance with tikanga.

MR HODDER KC:

And my enquiry would be into whether there has been the activities that are undertaken on the specified area are being undertaken by the applicant group or their ancestors, and whether they are, have been interfered with by anybody else's activities. If there was no interference by anybody else's activities, exclusivity is shown.

WILLIAMS J:

Or if they were excluded by in the exercise of tikanga authority.
1540

MR HODDER KC:

Well that's when it gets harder, but if the interference takes place in the way we were discussing before by major structures, major settlements, then it gets harder, yes.

GLAZEBROOK J:

Well that's fine except that you just said, which I took down, nobody else was living there or camping there.

MR HODDER KC:

Well that was my paradigm. That's – the paradigm is that there's nobody else there, and I'm trying to respond to Justice Williams saying if there's nobody else there you've got exclusivity.

GLAZEBROOK J:

But you're not saying that – well…

MR HODDER KC:

But whether you call it tikanga or not doesn't change that it's exclusivity because nobody else has any activities there. That's exclusivity.

KÓS J:

But if the – we're talking about the first few decades after the Treaty, the 1840s, '50s.

MR HODDER KC:

I'm talking about something fairly notional.

KÓS J:

Well let's play with my example for a moment, okay?

MR HODDER KC:

All right, let's take the 1840s.

KÓS J:

Okay, 1840s and '50s and the other occupying group, the challenging group, is also Māori, then are we surely not bound to look at tikanga in terms of the interrelationship between the two of them to work out whether one has exclusive rights or not? What other rights are we looking at? What other legal system are we looking at?

MR HODDER KC:

We're looking at activities. If those activities are tolerated by the person that's there then that's not normally an interference of exclusivity.

KÓS J:

And the basis of toleration would be what?

MR HODDER KC:

Well if I have, going outside the, your Honour's, hypothesis, if I have a property which I lease to somebody else I haven't surrendered by exclusivity in terms of that purpose. It's still mine, I have the rights of an owner. It's not an

interference. If somebody turns up and drives me out at the point of a gun then that's a different category again. If I've sold it and moved on that's something again and all these, I hate to look like I'm side stepping the question but again it comes down to the circumstances we're addressing, and all I'm trying to do is respond to Justice Williams' proposition that you can't look at exclusivity without thinking about tikanga. Well, I'm hoping I can, and it can be done.

KÓS J:

I think it's very hard on the example I specifically gave you where the two competing interest groups are Māori. It may be so if you're, what you're dealing with is a Pākehā settlement that comes along in the 1870s.

MR HODDER KC:

It may be, but it doesn't detract from the generality, you're stuck with the generality of the language. Then you adapt it if you have a situation where you have your Honour's two Māori group scenario.

GLAZEBROOK J:

So sometimes you can take into account tikanga and other times you can't.

MR HODDER KC:

You can take –

GLAZEBROOK J:

I mean it's either a tikanga concept or it isn't or tikanga is relevant to that second concept.

MR HODDER KC:

Well in terms of Justice Kós' proposition I can, I accept that they have, because the contest is between two Māori groups that would make sense to have regard to tikanga. I don't exclude that, it'd be perfectly sensible. But the point still comes back to who has the exclusive activities on that property, on that area of land, that's all.

WILLIAMS J:

I think the problem is that if your base proposition is this a question of fact, and I tend to embrace that idea too, then you can't really look at facts without looking at tikanga, because they're the core facts. I mean, it's unhelpful to the enquirer into the outcome under s 58 to make that subdivision it creates an artificiality that is apt to lead you astray.

MR HODDER KC:

I think that's, the distance I'd go with your Honour on the proposition by way of agreement is that I would expect in any issue that arises about section 58(b)(i) that there will be a reliance on evidence of tikanga by an applicant group, probably the same evidence they used to establish the first limb, but it has to be utilised with a different purpose.

WILLIAMS J:

Yes.

MR HODDER KC:

It has to go to something more than would be sufficient to justify a PCR.

WILLIAMS J:

That's right, you have to establish the –

MR HODDER KC:

It has to go to the exclusive use and possession.

WILLIAMS J:

Yes, but the interesting closing of that circle is that's precisely the sort of evidence that was because the Native Land Court for 50 or 60 years after 1865, and titles were granted either exclusively because the right was exclusive or on a shared basis because there were multiple right holders, some with usufruct, and some with mana. So, this is not a strange or difficult exercise. In fact, the New Zealand courts are more familiar with it than overseas courts. It's just that our system seems to have forgotten.

MR HODDER KC:

And your Honour may well be right that that was overlooked, what you've just put to me was overlooked in the process of getting to the 2011 Act.

WILLIAMS J:

It's not too late.

MR HODDER KC:

Well, it is too late until they amend the Act, with respect. I think I should address the sidewind point which is raised in the Te Kāhui respondent submissions on page 6. So, Te Kāhui there repeats its point that if there is an, endorsing the view of the majority of the Court of Appeal that "if there is daylight between the 'limbs' that also risks extinguishment 'by a sidewind', which is contrary to settled law". So we take issue with both words, extinguishment and the sidewind.

Sidewind implies something accidental, something unintended, something inadvertent. There's nothing inadvertent or unintended about the MACA Act. There's the process as we've seen, as the Court well knows, a long process of consultation, deliberation and analysis.

In terms of extinguishment, that isn't what we're talking about, and I'm sorry, I don't, hope I don't need to repeat myself on that topic, our proposition is it's not extinguishment at all, it simply makes it harder to achieve the recognition test.

This is a point I think I've touched on, on page 7, paragraph 2.16, there's a discussion about the scope of the rights, the specified rights associated with CMT which are specified in the Act. I'm not sure this is a point of criticism of LCI, but it appears to be at one level. To be clear, the LCI submission is that the bundle of rights which are provided under part 3 of the Act and in particular in the CMT provide rights or aspects which are not available at customary law. That's the point about the various rights that are listed in section 60 and following. So the criteria are to be considered, in our submissions, separately from the contents of the CMT approach.

Page 10, paragraph 2.20, I was taken by the last sentence, which said: "Parliament expressly endorsed the work of the Panel", that is to say the review panel. I didn't take you to the review panel's work in the previous work, but what the review panel did was to recognise there was a troubled history, to recognise that there was a need to start again, and to recognise that there would be a need for some sort of compromise. That's based on the proposition the 2004 Act should be repealed, but those were the elements of it. So, insofar as the preamble contains a reference to the work of the panel, with respect, it isn't endorsing the whole of the panel's report, it's simply acknowledging that it was part of the expressions of concern about the 2004 Act which justified its repeal. That's why it's a preamble to the Act which repeals the 2004 Foreshore and Seabed Act. But the panel didn't provide a solution. It simply talked about balancing and starting again. That's the exercise that followed the review panel's work.

Page 13, paragraph 2.28 invokes Article 2 of Te Tiriti and the "importance of ensuring tikanga is central to the section 58 test". So, as the Court will appreciate, the submission for Landowners Coalition is that how to take account the Treaty of Waitangi in a new balancing statutory regime is a matter of policy. That's what the Act does, and so in that context, reading in or down exceeds the proper scope of interpretation.

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With reference in footnote 72 and elsewhere to the *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 judgment, so venturing onto that, we're very conscious of the authors of that judgment. What we say is that the relevant paragraph in *Trans-Tasman*, which is paragraph 151, talking about a "generous" interpretation, so it's carefully worded, and particularly relevantly it's directed to the considerations that are available to delegated decision-making, particularly where the statute is, in a sense, open ended about what can and can't be taken into account. But it simply was not concerned with an Act such as this where the Treaty has been fully considered in the legislative history and forms part of the elements which are balanced or reconciled or compromised, whichever language one

seeks, in producing a new regime. In that circumstance where the issues about the Treaty and tikanga were the front and centre of the debates that were taking place throughout the period from the Waitangi Tribunal's 1071 report through to the end of the parliamentary process, there's no room for the presumption that somehow or other Parliament overlooked aspects of the Treaty.

So, we're not challenging the *Trans-Tasman* judgment. We're saying this is a different kind of a statute, a different kind of circumstance and the creation of a regime where that has been a centrepiece of the considerations that have gone into account.

Page 14, paragraph 2.30, there's a criticism about equating the opinions of individual members of Parliament or officials with the sovereign will of Parliament. The Court may recall that when I opened I talked about the fact that in reality, legislative proposals are developed my ministers with the help of officials. That's just the reality of the parliamentary democracy we have. To ignore what is said by them in writing and which is available to Parliament when it considers a legislation is a form of wilful blindness. Why would one do that? The courts don't do that, as I mentioned earlier, as long ago in 1986 in *Marac Finance*, the Court started looking at Hansard. Why look at Hansard? Because it helps understand legislative intent. It's an aid to legislative intent. So, one does look at those things. One doesn't look at some of them in the way that Te Kāhui suggest, only the ones that are referred to in the preamble, one looks at them as a whole to see what information and elimination they can provide.

And so the preamble, which is also touched on in paragraph 2.33 on page 15 is not an exhaustive summary of the relevant political or legislative history. It's a short summary of why it was thought appropriate to repeal the legislation passed seven years earlier.

I must comment on paragraph 2.34. The second to last sentence says: "There is no evidence that Parliament agreed with the concern that tikanga was too 'uncertain'." I struggle deeply with that submission. I showed you the table

from the regulatory impact statement. Throughout the process there was a consideration of these options. Option 4 was the option chosen by Parliament, recommended by the minister, recommended by the ministry. To say that there's no evidence that Parliament agreed with it just flies in the face of that legislative history.

With what may be fortuitous timing, the last point I wanted to make is on page 20 of the submission, paragraph 2.51, where the proposition advanced by my learned friends is that: "LCI's approach attempts to deny the modern purposive approach to interpretation, arguing that 'departing from unambiguous statutory text is only permissible when necessary to yield to sufficiently obvious parliamentary purpose'." I seem to recall that's a quote from *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599, that's also supported by *Bennion*. But, I hope it's clear that our submissions accept the importance of purpose. There is a question perhaps about what level of abstraction a purpose is, but as you know, our proposition is the purpose is to create a new regime which balances all the interests of New Zealanders, including customary interests.

So we also discuss, in that context, the limits of purposive interpretation by reference to such cases as *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (HL) and *Wentworth Securities Ltd v Jones* [1980] AC 74 (HL) and also refer to parts of *Bennion*, and those matters are, again, touched on in other places in the *Urlich* decision of the Court of Appeal. And in a case such as this, this is a case where the text has been developed to achieve, expressly achieve without leaving it to the courts to develop, the particular test which form a critical part of the overall elements of the new regime.

Now, your Honours, it's, according to this clock, it's 3.56 pm. I hadn't intended to have such exquisite timing but that may well be a point where I can say I finished and discourage the Court from further questions, but I wasn't ready to do that.

GLAZEBROOK J:

Any more questions?

WILLIAMS J:

Nothing that we can do in four minutes, Mr Hodder.

MR HODDER KC:

Well, happy to come back tomorrow, Sir.

GLAZEBROOK J:

Well if we do have questions we'll let you know tomorrow morning but otherwise we'll take it as you're finished. In terms of Seafood we would not actually have expected that Seafood would need up until morning tea tomorrow, but . But should be able to finish earlier.

MR SMITH:

That's my expectation too, your Honour. I anticipate it being not much more than half an hour.

GLAZEBROOK J:

Okay, so Ms Feint, and everybody else, timings will be coming forward which will mean that I would expect we may well, Te Kāhui may well finish earlier on Wednesday than as thought. So, but anyway, until tomorrow at 10.

MR HODDER KC:

Can I, sorry Ma'am, can I just make one kind of acknowledgement. So, we have no right of reply under this hearing so we were proposing not to be here after tomorrow. I hope that's, and so we were seeking to that extent be excused. We will be here tomorrow, well certainly until lunchtime, maybe beyond that. I'll get to hear my friend's respond to my very gentle criticisms of their submissions, but subject to that, then we wouldn't be here, although we were keeping an eye on the VMR process.

GLAZEBROOK J:

Well that's certainly up to you.

MR HODDER KC:

I'm grateful.

GLAZEBROOK J:

Certainly we won't take it as a discourtesy to the Court if you're not here.

MR HODDER KC:

Grateful.

GLAZEBROOK J:

Thank you very much. We'll adjourn until tomorrow at 10.

COURT ADJOURNS: 3.58 PM

COURT RESUMES ON TUESDAY 5 NOVEMBER 2024 AT 10.03 AM

KARAKIA TĪMATANGA (TAMA HATA)

GLAZEBROOK J:

Thank you. Mr Smith?

MR T SMITH:

May it please your Honours, good morning. Hopefully overnight your Honours will have received a one-page hand up of the matters on which I propose to address you. It should be available on the hard copy, but perhaps more usefully –

GLAZEBROOK J:

We've got that, thank you very much. Very helpful.

MR T SMITH:

Excellent, thank you. Your Honours will see that it's hyperlinked and so I propose to use that to go reasonably quickly through the material. I'm very conscious of the time indications of your Honours.

What I propose to do, as indicated by the bold headings on that document, is address your Honours on three matters. The first is the position of the seafood industry representatives on this proceeding, second is the relevance of CMT orders to commercial fishing, and the third is what in our submission is the relevance of commercial fishing activities to the CMT test. So like the Landowners' Coalition, we support the appeal of the Attorney-General but we have a difference of view as to what the correct test is and what we have tried to do in paragraph 2 of our hand up is articulate the differences from the two parties that the Court has heard from to date. So we differ, we think, from the Attorney-General because we don't wholeheartedly adopt the interpretation of Justice Miller and the Court of Appeal and we differ we think from the Landowners' Coalition because we say that tikanga is relevant to the second limb of the test. As to what we say the test actually is, we address that at

paragraph 74 of our written submissions, and if I can take your Honours to that because I think that hopefully will give your Honours a road map of the matters I propose to address you on. The hyperlink is at the end of the paragraph 1.1 of the road map. If your Honours have that I'll carry on without the ClickShare.

GLAZEBROOK J:
Thank you.

ELLEN FRANCE J:
No, it's come up.

MR T SMITH:
Famous last words. So the first proposition is that we accept, as we must by virtue of section 59(3) of the Act, that evidence of fishing, navigation and access by third parties does not of itself prevent the applicant from satisfying the test for CMT orders.
1010

The second proposition is that we say that the core requirement of exclusive use and occupation are that the applicant group must show both intention and ability to control the area in question, and we say that follows from the legislative history, in particular the conscious adoption of the language from the Canadian jurisprudence and particularly the *Tsilhqot'in* case that my friend for the Attorney-General took your Honours to yesterday, and we'll elaborate that in due course.

We of course accept that control does not mean able – an ability to exercise state law legal control, it's a practical matter that looks at the conditions on the ground, as it were, including the assertion and recognition of tikanga in the community. And so accordingly we say to the extent to which the group permitted a particular activity occurring in accordance with tikanga, manaakitanga, that's relevant, and it's also relevant whether that was recognised.

And so the point that your Honour was exploring, your Honour Justice Williams was exploring with my friend for the Attorney-General yesterday of the question of protest is probably where we depart company, because we say that evidence of protest, which we accept amounts to assertion, if it does not have an effect on the ground either through regulatory change or through change in behaviour of the third parties who are accessing the area, may amount to an interruption. Whether that amounts to a substantial interruption is the next question for the Court, and we say that the evidence of substantial – the question of substantial interruption is, to use your Honour Justice Kós' phrase, a protean concept. I wasn't quite sure whether your Honour was meaning for me to think about *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 (HL) and Lord Mustill's judgment in particular, but if that was the intention, I got that right at least.

So your Honours will be aware that – of Lord Mustill's famous judgment in *South Yorkshire Transport*, adopted by this Court in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153, typically for the proposition that certain words in the English language have protean meanings which it is appropriate to avoid a spurious degree of precision in defining, and we agree with that, and so in our submission what amounts to a substantial interruption will be context-specific, but it will – clearly evidence of occasional use will be likely to be insufficient evidence of extensive, systematic, and regular use. To use I think your Honour Justice French's language from yesterday, significant use will be relevant depending in the context, including the context of the relationship between the user and the applicant group.

So that's as succinctly as I can put it, the submission for what we say the test means. How we get there, I'll obviously elaborate on that and try and give you some practical examples when we get to the discussion of the relevance of commercial fishing to the CMT area.

WILLIAMS J:

So generally speaking, the use of the sea will be occasional because you don't live in it. How occasional, I'm sure you agree, is the question. But what if that occasional use is supplemented by the occasional imposition of rāhui?

MR T SMITH:

Yes, that's one of the examples I was going to come to, your Honour, and in our submission rāhui are – well assertion of the rāhui is clearly relevant, as is the question of it's a practical effect and there is evidence in this case, as it happens, that at least in respect of rāhui over beaches they were respected by Pākehā in the area, and so we would accept that that is a relevant assertion and a relevant recognition.

WILLIAMS J:

It's the key assertion really, isn't it? It's nothing but an assertion of control? It's not a use.

MR T SMITH:

You're right, your Honour, and the evidence will differ around different parts of the coastline.

WILLIAMS J:

Correct.

MR T SMITH:

Every – there will be a different history.

WILLIAMS J:

And different intensity of its use?

MR T SMITH:

Indeed.

WILLIAMS J:

One sees rāhui on the Ninety-Mile Beach relatively regularly, until – and in Auckland, the Ports of Auckland waterfront probably less so.

MR T SMITH:

Indeed, indeed. I'd be cautious to say that – we don't say that that's the only way in which the assertion can be made and I recognise there may be other forms that don't fall within a traditional rāhui, there may just be a protest to overfishing, for example, and that is something that would need to be worked through on a case by case basis, and there are some examples at least in *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559, which I'll come to at the end of the submission which gives an idea of where that might be affective to demonstrate an ability, both an intention and an ability to control.

WILLIAMS J:

So in cases for example where you've got an opposition to some sort of proposed use through the usual channels, a pathway that was at least available probably from 1967 in the Water and Soil Conservation Act, perhaps, where in the assertion of the right to protect the result is affected by that assertion?

MR T SMITH:

We would say that's relevant, your Honour.

WILLIAMS J:

You would say that's relevant?

MR T SMITH:

Yes.

WILLIAMS J:

But you would say if the assertion produces no discernible affect, that's relevantly interrupting?

MR T SMITH:

It's interrupting. The question of whether it's substantial will be the question of whether the extent of that interruption is such as to amount to a substantial interruption. That's the basic proposition.

KÓS J:

Sorry, what is interrupting? What is the interruption in that example?

MR T SMITH:

The interruption as to the ability and intention to control. So if –

GLAZEBROOK J:

Well probably more ability, isn't it, because –

MR T SMITH:

In practice, yes, I think that must be right, your Honour.

GLAZEBROOK J:

Well of course because if you haven't asserted control, then it's probably gone anyway.

MR T SMITH:

Quite. No, I completely accept the logic of that proposition, your Honour, and so perhaps just to make one further point of clarity, the distinction between the test that I am advancing to your Honours and what I understand the majority position in the Court of Appeal to be, is that the focus of interruption on the Court of Appeal's test at least post-1840 is on the applicant group's own use. So in the case of commercial fishing activity, what that means is that the commercial fishing activity will be effectively irrelevant unless it is to such an extent that the applicant's own use of the moana to exercise their own customary fishing practices is removed. On our preferred interpretation the question of interruption is directed to, as your Honour says, primarily the ability to control.

WILLIAMS J:

What if the activities continue without interruption, albeit in a depleted form despite incursions from outside, what do you do with that?

MR T SMITH:

Well we say that's not enough to – in the sense that the question is still whether those outside incursions by third parties amounts to a substantial interruption and to the ability to control.

WILLIAMS J:

What then do you make of the fishing navigation access not of itself being extinguishable?

MR T SMITH:

Yes. So our proposition there, and I'll take your Honour to the legislative history, is that the of itself language is important. So –

GLAZEBROOK J:

I think you're coming to that.

MR T SMITH:

Well maybe I will come to that.

GLAZEBROOK J:

So perhaps we won't divert you at this stage.

MR T SMITH:

The 30 minutes is looking tight, your Honours.

GLAZEBROOK J:

Yes.

ELLEN FRANCE J:

Sorry, could I just check. So you say intention and ability to control may be manifested by a protest over fishing, so it can – am I right that –

MR T SMITH:

A successful protest, your Honour.

ELLEN FRANCE J:

All right, a successful protest. So I just wanted to check, you're not saying it's simply limited to use?

MR T SMITH:

No.

ELLEN FRANCE J:

No.

MR T SMITH:

That's right, your Honour. So in terms of how we get to that proposition, most of this has been covered by my learned friends and I'm acutely conscious of the need not to replicate. So what we have done in paragraph 2 of the outline is to try and articulate in as succinct form as possible and with some hyperlink references the primary indicia that we draw from the legislative history to support our interpretation.

1020

Now your Honour Justice Glazebrook asked my friend Mr Hodder yesterday is there anything precise in the Hansard in particular that tells us precisely what these words mean, and I agree that the answer is no, not precisely, but in our submission there are things that are helpful and –

GLAZEBROOK J:

I certainly thought so when I had a look at it last night, so.

MR T SMITH:

Yes. And your Honour, partially because we have been accused of being selective about how we've approached that in our written submissions, let me say that we have been selective, we've selected the passages that we think are

most relevant from the Minister responsible for the Bill, or the ministers responsible for the Bill. because Minister Turia gave the first reading speech, the Attorney-General was the primary minister responsible.

So if I can take your Honour just to a few of those passages. I'm conscious that your Honours has done some reading overnight. The first passage I would take you to is paragraph 2.2 of our outline at volume 664, page 11644. So this is from questions to the House. It's in advance of the first reading and at the last question before the issue of privatisation of New Zealand Post emerges, Mr Garrett asks Minister Finlayson: "Which parts of the New Zealand coastline, if any, will not be subject to the grant of customary title," and the response is: "Huge amounts." Now again we say that's not determinative, but it's helpful in a context where the outcome of the Court of Appeal majority's judgment, which we are seeing play out in the proceedings that are working their way through the courts, is that all parts of the New Zealand coastline will be subject to a CMT order, excluding potentially some port infrastructure and some pipelines if they cause enough pollution to remove use of the area.

The second comment is again prior to the Bill being enacted at volume 665/12517. Again it's a question from Mr Garrett to the Minister, and the question is whether the proposed legislation weakens the test in the Foreshore and Seabed Act, "which requires, in order for customary title to be granted, uses or practices to have been carried on since 1840 that are integral to tikanga Māori; if so, in which way with the test for customary title be weakened?" Answer: "The overarching test will be exclusive use and occupation, without substantial interruption. The test has some emphasis on tikanga Māori" – and we agree with that – "I do not believe that the overall changes will be very great, at all."

And then perhaps more conventionally in terms of legislative history, if I can take your Honours to the first reading speech given by Minister Turia on behalf of the Attorney-General. This is on the third of the materials. The first reading speech commences a little way up. I've given you a pinpoint reference. It commences on page 13997 of the volume and there is an explanation of the

history, but the particular passage that I wanted to bring, draw your Honour's attention to, is the final two – not final, penultimate paragraph of – before the interruption by the assistant speaker on page 13999.

So: "The Bill sets out a process by which customary rights that were exercised by iwi and hapū in 1840 and continue to be exercised today in accordance with tikanga Māori will be recognised and the future exercise of such rights can be protected." We say that's a reference to PCR and I'll explain that in a moment. "The Bill also provides for the right to seek customary title to a specific part of the common coastal marine area," and obviously we emphasise the word "specific." "If that area has been used and occupied by a group according to tikanga and to the exclusion of others without substantial interruption from 1840 to the present day." We say that's a helpful paraphrasing because it indicates that the focus is, as we suggest, on the exclusion of third parties when it comes to the second limb.

Now what I –

WILLIAMS J:
I mean that repeats the Act, doesn't it?

MR T SMITH:
It paraphrases the Act, but –

WILLIAMS J:
Yes. It doesn't help us with what "exclusive use and occupation" means.

MR T SMITH:
Well I think it does, your Honour, to the extent that it talks about the exclusion of others. So to the –

WILLIAMS J:

Yes, but that's the question in this case. What does that mean in circumstances where others are accessing, navigating, and fishing in the area are not excluding events?

MR T SMITH:

I accept that is an important detail. I don't put this forward as something that determines the case for your Honour. I wish it were that simple. I just say that it's helpful.

WILLIAMS J:

So the best you've got is "huge amounts"?

MR T SMITH:

I don't – I think the best I've got is the sequence of the legislative history, some of which my friend Mr Hodder has taken you to, but I say that the combination of that sequence, including the passages that I've taken your Honour to, are telling and helpful.

If I could just take your Honour to the explanatory note, because I think that just makes the point as to where Minister Turia's commentary came from. On page 5 of that note your Honours will see there's a discussion of protected customary rights. The final sentence of which, like many other activities in the common marine coastal area, these customary rights are not exclusionary. They do not stop others from legitimately carrying out their activities, and that is then contrasted with customary marine title, which provides for the right and the first sentence effectively repeats in similar wording to the speech of the Minister.

KÓS J:

I suspect it's the other way round Mr Smith. The Minister was repeating that.

MR T SMITH:

Yes. I'm sure that's right your Honour. Your Honour what we've done in the balance of these passages is give the references to what we say are the remainder of the legislative history that is helpful, and most of that has been taken to your Honours already so I won't repeat that exercise. Just by way of explanation your Honours will see possibly a two short a reference in 2.2 to the RIS. There's a pinpoint hyperlink so there won't be confusion, but just to be clear, that is the second RIS, which is the post – there were three for this Bill. This is the post-consultation RIS, so effectively after the consultation on the Ministerial consultation document, and we've given your Honours a reference there to pages 16 and 17 which we say is a helpful explanation of the intellectual linkage between the language of exclusive use and possession, and the Canadian jurisprudence, but I won't take your Honours to it just in the interests of time.

What I would like to take your Honours to is just one final bit of the Hansard reference, which is in 2.3(a). It's the 670/16981 reference, which is a speech of the Attorney-General, and the reason for taking your Honours to this speech is because it's really to respond to a suggestion from your Honour Justice Williams that maybe this Bill is something where the politicians have got so far, and they're just leaving it to the courts to resolve. In our submission there is a reasonably clear legislative intent, particularly on the part of the Attorney-General, to try and come up with a codified test. In our submission that makes sense because of course there are two pathways to recognition. One is via the courts, the other is via direct negotiation.

So these are provisions that have to be applied by Ministers as well as courts, and what the Attorney-General is doing there is responding to a speech by Mr Parker raising the question, which Minister Finlayson describes as an issue of principle, is whether we should codify or simply send the matter back to the courts, enable the courts to work it out, and the Attorney acknowledges is a very important question, and then he expresses his preference in favour of statutory codification because: "To wait upon protracted legal arguments

developing a New Zealand jurisprudence in this respect would defeat the purpose of what many are seeking: both certainty and equity."

Now whether that's ultimately been successful is, I appreciate, a matter for debate, but certainly that was what was hoped to be achieved. Then the next paragraph is also worth drawing your Honours' attention to because there is, I think, some criticism of our, in our submissions of – sorry. There is some criticism by Te Kāhui of our submission's reliance on the Attorney-General, in the sense that well, maybe the Attorney-General was just a politician saying what he needs to, to get his Bill through, and in our submission that following sentence, which explains the care that the Attorney-General had taken, by reference to a range of material, particularly in reference to Canada, negatives that suggestion. This is a careful attempt at codification and in our submission should be given effect to in that sense.

1030

So Your Honours, very conscious of time. That was all I was proposing to say in terms of my paragraph 2 because I think much else has been dealt with by my friends, and what I was proposing then to do was to turn to the relevance of CMT to commercial fishing.

KÓS J:

Have you covered your 1.2 sufficiently because this is an important distinction between your stance and that of Mr Hodder in relation to the relevance of tikanga to the second limb?

MR T SMITH:

I think it's probably an issue in which it's helpful to do with some examples and I was proposing to do that in the third part.

KÓS J:

You're still coming to it? Thank you.

MR T SMITH:

So moving to the second issue which is the relevance of CMT to commercial fishing, we've addressed this for two reasons. One is that it is a theme of the judgments below that the CMT rights are of little impact to commercial fishers and so we think it's important that this Court have a correct understanding of the potential impact on commercial fishing which we say is uncertain but potentially material. The second point is to really emphasise a point that my friend, Mr Hodder, was making to your Honours which is that these are bespoke statutory rights in terms of their legal impact which perhaps explains why there is a bespoke statutory test.

So in terms of that impact, of course the starting point is section 28 of the Act which provides that nothing in the Act prevents the exercise of any fishing rights conferred or recognised by or under enactment or by rule of law, and we, of course, accept that that might suggest that my clients shouldn't be too worried about CMT orders. But, we say, there are three ways in which commercial fishing can be impacted and we set those out in paragraph 5 of our submissions.

So the first is via wāhi tapu conditions and that linkage is made plain in section 28(2) of the Act which provides that the position in subsection (1) is subject to section 81 of the Act. Section 81 of the Act is the compliance provision with wāhi tapu provisions, wāhi tapu conditions, which provides for various offences to be committed if a person fails to comply with a prohibition or restriction notified and then the wāhi tapu conditions may be imposed under section 79 and, importantly, in section 79(2) it provides that wāhi tapu conditions may affect the exercise of fishing right, although not to the extent that it would prevent fishers from taking their lawful entitlement to quota management. So wāhi tapu conditions can prevent fishing in the specified areas.

One of the bits that is currently uncertain about the application of the Act is how broad wāhi tapu conditions can be. What we know is that some of the applications before the Courts seek wāhi tapu conditions over the entire CMT

area and although that kind of condition has not yet been accepted by the High Courts, there is a live appeal in front of the Court of Appeal on this issue and we have cited Justice Churchman's judgment in *Re Ngāti Pāhauwera* [2021] NZHC 3599 where at paragraph 126 his Honour acknowledges that there is a possibility, depending on the evidence, that a wāhi tapu condition could be made in respect of the full CMT area, depending on the evidence.

WILLIAMS J:
That's really, well, I'm sure the arguments will be made but that's almost impossible to show in tikanga let alone what the Act says.

MR T SMITH:
And my clients would be very grateful for that indication to be –

WILLIAMS J:
If it were a wāhi tapu, then you couldn't swim in it, let alone fish out of it.

MR T SMITH:
I don't necessarily disagree, your Honour, and I'm certainly not in a position to argue that point. My point is that in terms of the uncertainty that my clients are addressing, this is one of them.

The second is permission rights for consented activities. That's section 66, where that is obviously really a matter for jetties and other infrastructure that may be required for fishing activity. And then the third aspect are the planning rights that are granted under section 85, and I just did want to take your Honours through that.

So section 85 gives the holder of a customary marine title group the right to prepare a planning document in accordance with tikanga, and then the following sections require various statutory decision-makers to take into account that planning document in their statutory processes in various ways. So for example, section 88 provides an obligation on local authorities to take the planning document into account when making decisions under the

Local Government Act 2002. There's a slightly stronger version of that obligation in respect of Heritage New Zealand Pouhere Taonga Act 2014.

In section 89 they must have particular regard to the planning document. Section 91 provides an obligation on the Ministry of Fisheries to have regard to the planning document to the extent that it's relevant to fisheries management when setting or varying sustainability measures, and section 91A provides an obligation on the Minister of Aquaculture to consider the document when making certain decisions under the Resource Management Act 1991.

In addition to those rights, section 93 provides a more, in our submission, seeming a more comprehensive regime for taking into account planning documents for regional councils when exercising powers under the RMA, and we draw your Honours' attention in particular to the scheme of subsection (2), subsection (6), subsection (8), and subsection (10), which appear to require mandatory consideration of the extent to which alterations can be made to relevant regional documents to recognise the planning documents, and a discretion not to alter but only so far – but only on the grounds that planning documents are already provided for would not achieve the purpose of the RMA and would be more effectively and efficiently addressed.

So that on the face of it looks like a reasonably meaningful right to participate in a particular way through planning documents in the RMA processes, and the relevance of that for commercial fisheries is that the Court of Appeal has determined in *Attorney-General v The Trustees of the Mōtītī Rohe Moana Trust & Ors* [2019] NZCA 532, [2019] 3 NZLR 876, I've given your Honours the reference there, that regional planning documents can prohibit fisheries, including for the purposes of promoting indigenous biodiversity. Now again the extent to which those rights are exercised is uncertain. Our point is simply that the scheme of the Act is to provide material rights which – to participate in processes which can have the effect of preventing commercial fishing activity.

WILLIAMS J:

Perhaps your difficulty is that all of those rights already exist with the exception of subsection (10) of section 93. Iwi planning documents under the RMA are documents prepared by iwi that must be taken into account in accordance with part 2, and they can be disregarded if part 2 doesn't require it.

MR T SMITH:

Yes.

WILLIAMS J:

This is adding almost nothing to the existing regime, except for the trigger provision in subsection (10).

MR T SMITH:

Yes.

WILLIAMS J:

But, you know, that's pretty marginal.

MR T SMITH:

That's again a helpful indication, your Honour, but the section –

WILLIAMS J:

Well it's a fact, and those provisions have been there since 1991.

MR T SMITH:

And I accept that, your Honour.

WILLIAMS J:

And not much has changed.

MR T SMITH:

Well in my submission, section 93 appears to change. That's presumably why Parliament enacted it, and as far as I'm aware, section 91 –

WILLIAMS J:

What it did is create CMT-based planning provisions, but of course iwi can prepare iwi plans by CMT boundaries or by tribal boundaries if they wanted to. This is just a trigger of exactly the same process in the context of CMTs. It's not adding anything.

1040

MR T SMITH:

In our submission, I'm not proposing to debate that with your Honour, that's outside my particular area of expertise, but the proposition that I'm responding to is the suggestion that the CMT rights are limited and have no real potential to impact commercial fisheries.

WILLIAMS J:

My point is no potential impact commercial fisheries beyond what already exists which hasn't set the cat amongst the pigeons it appears.

GLAZEBROOK J:

And also with an explicit indication that you can't affect quota and you can't actually stop fishing.

MR T SMITH:

Only in the case of wāhi tapu conditions, your Honour, I accept that.

GLAZEBROOK J:

Well, but generally, fishing is allowed.

MR T SMITH:

That's not the case in *Mōtītī*, your Honour, as a result –

GLAZEBROOK J:

Sorry?

MR T SMITH:

That's not the outcome of the *Mōtītī* case where fishing is prohibited under a planning document. It's an RMA case, I accept.

WILLIAMS J:

Yes, got nothing to do with this Act.

GLAZEBROOK J:

No, but we're talking – nothing to do with this though. We're talking about this particular Act.

MR T SMITH:

All those indications are comforting for my client, your Honour, I accept that –

WILLIAMS J:

Well, I didn't intend to comfort you. I'm just telling you what the state of the law is right now.

MR T SMITH:

Well, I've probably made those points. I'll move on to third point, if your Honour pleases.

So the final point which I want to address your Honours on is the relevance of commercial fishing activity to CMT tests. We have addressed that but there is some legislative history that I don't know how helpful it is but I thought in the interests of completeness I should mention it to your Honours. So obviously what we're grappling with here is section 59(3) of the Act. That was not in the Act as originally – or was not in the Bill as originally introduced. It was first inserted by a supplementary order paper number 167 which is one of the few documents that is not in the bundle and then was considered by the select committee as part of its process and so it comes into the Act as part of, or comes into the legislative process, as part of the dash 2 Bill.

There is a change to the language which I can't explain but I think that in fairness I need to alert your Honours to, which is that in the supplementary order paper version of the Bill the language is that "fishing or navigation does not, of itself, necessarily preclude the applicant group from establishing the existence of customary title", and, for reasons that I can't explain, the word "necessarily" is omitted from the bar 2 version that comes out.

WILLIAMS J:
Perhaps it wasn't necessary.

MR T SMITH:
That was going to be my submission, and just to give your Honours the references to the select committee, at page 2 of the select committee report and then again at page 30 there is – the select committee adopts the position that no change should be made, notwithstanding that they're making a change but I think that confirms that necessarily wasn't necessary.

The other passages that I wanted to take your Honours to just to explain that what we say was understood by that language is the Departmental Report which we've given your Honours the links to at the end of paragraph 6. So your Honours have been taken to the commentary on the exclusive use and occupation and consistent – piece, which is paragraphs 1425, 1426.

What I want to take your Honours to is, first, paragraph 1427 which provides: "The test provides access (ie navigation and fishing) by third parties does not necessarily preclude a finding of CMT. This allows consideration of the extent and nature of any third party access in line with the group's relationship... "If, for example," I think is the first example, "access was permitted by the group, in line with manaakitanga, and that was understood and acknowledged by both parties," so again we say this is consistent with the assertion and the recognition, then, "under the current test in the 2004 Act such access could support rather than undermine the group's claim."

The balance –

KÓS J:

But that suggests tikanga is relevant to both whether occupation or use is exclusive or whether there's been substantial interruption. Is that your point?

MR T SMITH:

Yes Sir. So the other passages that, in my submission, are helpful are at paragraph 1462 and following. So these are the specific submissions on the supplementary order paper 167, clause 61AA as it then was. Your Honour will see that there was a submission that "exclusive" should mean "exclusive" from Ms Mackenzie. There was also a submission from the Seafood Industry counsel that wanted some language that "fishing and navigation… should be a relevant but not determinative consideration…". And the response to that from the Department is to recognise that it is an important element of the test, sorry I'm reading from paragraph 1464: "It offers direction on how substantial interruption… is to be applied in practice." Don't agree with its omission.

"The requirement to demonstrate exclusive use and occupation over an area without substantial interruption since 1840 is a stringent one. The effect of the provision about third party navigation and fishing is to clarify minor interferences to exclusivity such as a boat travelling through the area sometime over the last 170 years, would not displace the customary interest. In response to the Seafood Industry counsel's submissions, the words 'does not necessarily preclude' is sufficiently clear fishing and navigation remains a relevant but non-conclusive factor." And that is the, effectively the interpretation that we are advancing to your Honours.

So in terms of just making that real and perhaps giving one further and I think perhaps final explanation of how we see tikanga being relevant to both limbs, I just, and I don't have the hyperlink to this I apologise your Honours, but paragraph 147 of her Honour Justice Mallon's judgment in *Re Tipene* is, in our submission, helpful because it specifically deals with the commercial fishing that had been dealt with – that existed in that area. So what her Honour said was: "Mr Halley says that commercial fishers have generally respected muttonbirders' customary fishing areas around the Tītī Islands. There have

been 'gentlemen's agreements'", that's in quotes in fairness to her Honour, "not to commercially fish in areas identified by birders as important for customary fishing. These 'voluntary rāhui' have now been recognised through area/species closures around specified parts of the Tītī Islands, including around" two areas in particular. So in our submission that's a good example of the way in which we see the Act working, which is that where there is an assertion and then a recognition, either informally through practice, or through regulatory steps, in this case species closures and area closures, that is the type of indicia that we say the test requires to establish an ongoing use and occupation exclusive without substantial interruption.

Now, your Honours, those were the submissions I was proposing to make, and I'm very conscious of time. I'm happy to, of course, answer any questions that your Honours have.

KÓS J:
That's very helpful thank you.

GLAZEBROOK J:
Thank you very much.

MR T SMITH:
If I can just repeat, or adopt, my learned friend's point on absences, we also don't have a right of reply, and if I can absent ourselves without disrespect that would be much appreciated.

GLAZEBROOK J:
Certainly you're excused.

MR T SMITH:
Thank you your Honours.

GLAZEBROOK J:

Ms Feint. Slightly more than the half hour but well within the timeframe, so we're ahead of ourselves.

MS FEINT KC:

Indeed. Tuatahi, tēnā koutou e ngā Kaiwhakawā. Otirā, tēnei te mihi atu ki ngā uri o ngā hapū o Te Whakatōhea i huihui mai nei i te ata nei. Tēnā rā tātou katoa It's my honour to begin presenting the submissions for Te Kāhui, and just to explain what we're going to do, I'm going to commence with what I hope is a high-level overview and then we're taking a team approach in the spirit of whanaungatanga, I am going to hand over to my tuākana Ms Sykes and Ms Panoho-Navaja, who are going to talk to the Court about tikanga, and we thought that was the most useful, the best way to use our time because that's probably the area with which the Court could do with the most help, with the exception of Justice Williams, of course.

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So I'd like to start the submissions by giving an example from the evidence about the exercise of mana, and the example that I've chosen is the eruption of Whakaari in 2019 which killed 22 people, and following that eruption Te Whakatōhea exercised their mana tuku iho by imposing a rāhui over their rohe moana, by which I mean their sea territory. The rāhui recognised the tapu state of the ocean as a result of the tragedy and it prohibited people from the area for their own spiritual protection.

Now the evidence on the tikanga that was followed in imposing the rāhui is instructive, we say. It was first placed on Whakaari, the island itself. A rāhui was placed by Ngāti Awa because they were the owners of the tour company that had taken the people to the island and the dead were on the island, but there was a second stage of rāhui imposed after there was an overnight thunderstorm which washed bodies into the sea, and following that event each of the iwi along the coast immediately imposed rāhui of their own over the moana. And so if we travel from east to west, which Matua Te Riaki says we must because the sun rises in the east, Te Whānau-ā-Apanui placed a rāhui,

Ngāi Tai placed a rāhui, the hapū of Whakatōhea placed a rāhui, and so did Ngāti Awa at Whakatāne, and those rāhui were in place for almost three weeks.

Now Te Riaki Amoamo, who is a tohunga of the Ringatū church, was responsible for leading the lifting of the rāhui by Whakatōhea, and he did that in collaboration with the tohunga from the other hapū of Whakatōhea. So in other words, there was a hapū approach taken, and the process to whakawātea te tapu, or lift the tapu, started on the beach within the Whakatōhea rohe, but then they went out to sea on a boat and conducted further karakia by the Whakatōhea mussel farm.

When Dr Amoamo was asked in cross-examination about what area the rāhui covered, his reply was that it extended over the entire ocean, stretching from the island of Whakaari back to the coast of the mainland, which is a distance of some 48 kilometres, and he said too that it included the Whakatōhea mussel farm, which is 8.5 kilometres out to sea. So it's a long way out, it's not an inshore mussel farm, and Dr Amoamo's evidence was equally clear and in fact all the tikanga evidence was clear that you can only place a rāhui in your customary area, so in other words, within your own rohe moana, and so Dr Amoamo in his brief of evidence explained that he refused to say a karakia when he was asked to do at Whakatāne before they left on the boat, because he was conscious that he was in Ngāti Awa's rohe and he did not think that was appropriate.

So if you view this incident through a tikanga lens, we say that it tells you the following about the operation of tikanga. First, it's evidence that Ngā Hapū o Te Whakatōhea exercised mana whakahaere or authority at place over a rohe moana that stretches at least as far as Whakaari, and in his evidence Dr Amoamo said it actually stretches beyond Whakaari. And we say if you put that another way and what does that mean having that rohe moana, we say it means that the whakapapa of the hapū of Te Whakatōhea to Whakaari imposes on them kaitiakitanga obligations so that when this tapu event occurred they were obliged to act to protect the mauri of the moana, and they used the ritual of rāhui to exclude all people from the ocean over the period of

the rāhui. It was enforced for almost three weeks, meaning that boats were prohibited from the area, the mussels at the mussel farm were not harvested, and people were not supposed to even walk along the beach.

So in other words, they used the strongest form of regulation in tikanga, which is tapu, to exclude others from the area and that's very much in my submission an act of control that demonstrates the authority that they exercise in the terms of tikanga over their sea territory, and so it seems to me where a lot of the submissions have gone wrong in this case is that people perhaps unconsciously thinking through a western lens are thinking that if you're physically excluding people or erecting a fence, a no trespassing sign, then you're exercising control over the area, but I would suggest that in tikanga terms tapu is a much stronger form of regulation.

Secondly, I say the other thing this incident tells you is that the fact that other iwi also exercise their mana by laying rāhui acknowledges that there are other iwi who are sharing the sea territory as you extend further out to sea from the land, and that there is mutual recognition between the iwi of this, given that they all accepted that each iwi had the mana, their own mana, to lay down rāhui. If one iwi didn't acknowledge that the others had rights then you might've expected an objection, and I direct that submission particularly to Te Whānau-ā-Apanui because they say they have primary rights at Whakaari, but Te Whānau-ā-Apanui did not object to those rāhui, they acknowledge the rights of other iwi to exercise their own mana.

And the thing that interested me like reading through the transcript of the evidence is that when Dr Amoamo was asked about the rāhui and where it extended to, he immediately went to explain the relationship between the rāhui imposed by the respective iwi and he did that on the basis that there they're iwi of the Mataatua confederation, and he named them as Ngāti Awa, Whakatōhea. He included Tūhoe and he referred to Te Whānau-ā-Apanui, although he explained that Te Whānau-ā-Apanui, they have a Mataatua bloodstream but they're also connected to other waka. So he was very much thinking about the rāhui in terms of the network of relationships between the iwi along the coast,

and he also looped Ngāi Tai into that even though they're not Mataatua, they're from the Tainui waka, and he talked about the collaboration between the iwi with the lifting of the rāhui, and as I've mentioned already, we say that that tikanga illustrates the mutual respect based on shared whanaungatanga in that space.

So the Bay of Plenty has a curved coastline and that has the effect that as you go further out to sea from each part of the coastline the rights converge, and we say that when you're that far out to sea, because Whakaari is 48 kilometres out to sea, that the rights of the iwi along this stretch of the coast from Te Whānau-ā-Apanui in the east to Ngāti Awa in the west, they converge in that area, and in fact Te Paepae o Aotea are owned in customary title for the Mataatua iwi on that basis due to their spiritual significance.

So I start the submissions with that case study because we say it's the clearest and strongest evidence that Te Whakatōhea exercise their mana tuku iho and their kaitiakitanga over a rohe moana that stretches as far out to sea as Whakaari and beyond, and also that there's what in terms of the MACA Act would be called shared exclusivity the further you travel out to sea, whereas when you're closer into shore there's very much more closely held rights at a hapū level, and I also start with that story because we say it illustrates where the Court of Appeal went awry in its judgment.

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We say that the majority were mostly on the right track with their judgment in terms of the analysis of the legal test in section 58, so we say that they were right to approach the test by recognising that customary rights are legal rights that are guaranteed protection by the Treaty of Waitangi in the common law, and therefore should – the Act should be interpreted in a rights-consistent manner. Secondly, we say that the Court of Appeal was right to recognise that CMTs are of a territorial nature. Thirdly, we say that the Court of Appeal was right that the section 58 test is a composite one. Fourthly, we say that they were right at paragraph 421 of their judgment that the second limb requires the intention and ability, at least within the limits of the law, to control an area as a

matter of tikanga. But we say that where they stray off track is from paragraph 422 onwards of their judgment, if we could bring that up on the ClickShare please.

So at paragraph 421 is where the majority sets out the test that "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." Then they go in paragraph 422 to say that: "The use of a particular resource in an area will not, without more, amount to exclusive use and occupation of that area."

Then they say: "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." And that quote there is from the Canadian Supreme Court decision of *Tsilhqot'in*. I've heard one Canadian academic say *Tsilhqot'in* and I've heard another say *Tsilhqot'in*, so I'm not sure which is right. But we say that the Court of Appeal is wrong to articulate the test this way in paragraph 422 for two main reasons. First of all, it applies the Canadian approach to aboriginal title, which is quite distinct from the New Zealand approach. The Canadians have a dual approach where they apply an amalgam of common law principles and indigenous law and custom, whereas in New Zealand there's a long-standing and very distinctive legal tradition of considering customary on the basis of tikanga. But the Canadians, because they have a focus on common law principles of possession, they thereby focus on acts of occupation, and combine that with the indigenous perspective.

So we say secondly and relatedly this error in applying this different legal test from Canada, has led the Court of Appeal into misinterpreting tikanga by focusing on physical manifestations of use and occupation, and we say that that means that they thereby fail to appreciate the significance of the tikanga evidence before them, and in particular the Court of Appeal failed to consider the cultural and spiritual relationship that Te Whakatōhea have with the takutai moana, and the authority exercised through such conceptual regulators as tapu, which in tikanga terms controls behaviour.

WILLIAMS J:

There's no doubt the Court accepts that the imposition of rāhui is an indicator of CMT like entitlements. Be hard not to conclude that.

MS FEINT KC:

They accept that it's relevant but they don't fully understand the implications of it because they don't make the connection between the extent of the area that the rāhui is exercised over, and the rohe moana. That's evidenced of the extent of that rohe moana and Justice Miller says in his judgment, well, except that the rāhui is relevant evidence for establishing CMT but he thought the rāhui that Whakatōhea imposed was only along the coast.

WILLIAMS J:

That's a question of fact, whether it's so or not is not the point. Rāhui is the ultimate expression of control.

MS FEINT KC:

Precisely.

WILLIAMS J:

But I can't imagine that a court would disagree with that. The extent of it in any given case is the question, and if Justice Miller says, well, they were only coastline based and Whakatōhea says no, that's not right, then it can be dealt with on appeal, but I can't see the point in taking the Canadian references to proof of occupation, of physical presence on the land, as being the only indicator as really applying in New Zealand. In fact, I doubt whether it applies in Canada.

MS FEINT KC:

I think that's probably true because the Canadian approach is more nuanced.

WILLIAMS J:

Correct, and much more dependent on the evidence, of course, where exercises of similar kinds of control, that would be called rāhui here, were

evident in very, you know, in country as big as the rohe moana of a tribe. That's the reason why you have these quite nuanced tests because these are continents and in many ways the rohe moana is a similar kind of resource that must be thought of in that nuanced way, not like quarter-acre sections.

MS FEINT KC:

Indeed. So I'm not disagreeing with what your Honour is saying but we say this comes in particular focus in relation to the decision the lower Courts made about the CMT over the takutai moana around Whakaari and Te Paepae o Aotea, because what we're submitting and we're appealing on the basis that the lower Courts didn't properly understand that tikanga will apply, the principles and values of tikanga, in a context-specific way, and if you look at the significance of both Whakaari and Te Paepae o Aotea as taonga tuku iho, we say that that should have been taken into consideration in the assessment of the evidence.

KÓS J:

I accept your account of what the content of tikanga is but what we have to study is whether that is what Parliament in mind, not what your clients had in mind but what Parliament had in mind.

MS FEINT KC:

Indeed, and so that question, your Honour, brings me nicely to my next point which is that we say, standing back, if you look at the statutory regime of MACA, what was intended was to apply tikanga as law and where the lower Courts have gone wrong is their failure to understand tikanga as a legal framework as opposed to merely looking for evidence of cultural practices.

So, for instance, Justice Miller in his judgment collects a series of examples of exercises of tikanga but without connecting that to the legal framework of tikanga so that you can understand what the significance of it is in tikanga terms, and if we think about what the purpose of the statutory regime of MACA was I thought it might help to use this metaphor. Te Kāhui say that MACA's an attempt to reconcile the rights of interests of Māori on the one hand and all other New Zealanders on the other hand in the takutai moana and we say that it does

that by recognising tikanga as the first law of Aotearoa. So we say that conceptually, if you think of tikanga as an independent legal system that's operating within its own sphere, entirely separately from the State legal system, we say that MACA's an attempt to reconcile the rights and interests and obligations from each sphere, so it's a way of reconciling the – Parliament is using this legislation as a way of reconciling rights and interests that Māori have under tikanga as their law with the rights and interests of other New Zealanders. 1110

So you could think of section 58 as being like a portal. It opens a portal into the separate sphere of tikanga as an independent legal system, and so in order to understand what rights Māori have in terms of tikanga as their law, you need to go through that portal, think about tikanga and what it's saying in terms of the relationship the hapū have with their takutai moana, and that's the analysis, essentially, for the CMT test.

WILLIAMS J:

So that's all you look at?

MS FEINT KC:

I will come to that. It is the test. We say that the two limbs of the test are interdependent.

WILLIAMS J:

So not tikanga as law, but tikanga as *the* law?

MS FEINT KC:

In relation to CMT because we say the balancing that's been done is not in the test, but in the rights attaching to the statutory title of CMT. So we say that because –

GLAZEBROOK J:

So the, and I think I said something to the appellants in respect of that, the Attorney-General and the interested parties, so the balancing is effectively the

rights of public access and the fishing rights, preserved, and various other rights preserved.

MS FEINT KC:

Yes, exactly right. So private property rights are preserved. Anyone who has a freehold title is protected. You've got sections 26 to 28 which protect rights of access, navigation, and fishing, and that includes access for recreational purposes without charge, and then the other part of the balancing that is being done is that CMT as a title has only the prescribed rights that are set out in section 62. So in effect rights have been – rights that would have been acknowledged in customary title as a matter of tikanga, have been stripped away from Māori as part of that balancing exercise. So we're saying it's completely unprincipled and unfair to, after that balancing has been done, which prescribes everyone's rights within the takutai moana in a very precise fashion, it's unfair to then set a high threshold for Māori to meet the test in order to get rights that are significantly less meaningful than they would have had as a matter of customary title.

WILLIAMS J:

What work does substantial interruption do on that analysis?

MS FEINT KC:

Substantial interruption we say evidently modifies the Ngāti Apa principles concerning lawful extinguishment.

WILLIAMS J:

But you said that section 58 is tikanga written down. So what work does "substantial interruption" do in section 58?

MS FEINT KC:

I was hoping to come to that tomorrow because it's quite complicated but…

WILLIAMS J:

Oh okay. Give me a taster?

MS FEINT KC:

All right. Spoiler alert. So Māori in tikanga have principles of continuity as well, that's called ahi-kā-roadway. So we would say that if you meet the test as a matter of tikanga, you've established that you've got continuity, and so substantial interruption has to have a high threshold because it's effectively extinguishing rights that would be recognised in tikanga. So it may refer to instances where as a matter of practice the relationship with the takutai moana has been substantially interfered with, such that the hapū is no longer exercising mana whakahaere in relation to that part of the takutai moana.

WILLIAMS J:

Right so and the traditional rule is a generation although that, I suspect that rule was one imposed by the Native Land Court judges rather than tikanga, because it'll depend on the resource, but that suggests to me that you're not very far away from your colleagues, it's just that you're applying the test via the tikanga concept of ahi kā roa and they're applying the test via the lens of exclusive use and occupation, but ultimately it's the same substantive test.

MS FEINT KC:

No, I don't accept that, your Honour. We're saying that substantial interruption has a very high threshold because it is extinguishing extant customary rights.

WILLIAMS J:

Well it only has the threshold that tikanga applies to it, which is the tikanga of ahi kā roa. Whether that's high or low is going to be a question of context.

MS FEINT KC:

Yes.

WILLIAMS J:

All right, so –

MS FEINT KC:

But there may be – well I think it might be right to say that we've struggled with substantial interruption because we can't think of any examples that would amount to substantial interruption that aren't already accommodated in the rights set out under the test. So for instance, the accommodated infrastructure provisions set out in exception to the permission right that CMT owners have. So we would say –

WILLIAMS J:

Yes, but if – just hold on, because if you're saying that section 58 is tikanga, and let's just stay in tikanga, so the exclusive use and occupation is a tikanga test which means that if you establish that you hold it according to tikanga, which is the first part, then your failure to maintain burning fires in accordance with the second part abates the right, as it would on land and has done on many occasions.

MS FEINT KC:

Yes, although then you wouldn't meet the test under the first limb.

WILLIAMS J:

Well that's the point really, isn't it, that they're the same.

MS FEINT KC:

We say –

WILLIAMS J:

But in fact what – it seems to me that what you're articulating is a very similar test to the abandonment test that Justice Kós raised and the too much countervailing use test that others have suggested, and that's because whether you're talking about English-based rights of property or Māori-based rights of tikanga, ongoing user is going to be a key indicator in any system?

MS FEINT KC:

But the starting point has to be the in the principle of *Ngāti Apa*, that customary rights survive post-1840 and subsist unless lawfully extinguished, so there has to be a very high threshold if the substantial interruption test is effectively modifying the lawful extinguishment principles.

KÓS J:

If you're right, why do you need section 58 at all? Isn't the work all done by section 6 which says that, notwithstanding the Foreshore and Seabed Act, rights that predate it, that legislation, are restored? That seems to me to give you exactly what you're wanting, but Parliament seem to have something else in mind by adding to that section 58. So yesterday we talked about a gap between restored rights and recognised rights, and I think you're trying to make that gap a very small one, almost a non-existent one.

MS FEINT KC:

Indeed.

KÓS J:

Whereas I suspect that's not at all what Parliament had in mind, and you'll have to persuade me that it did.

MS FEINT KC:

Yes, well that's what we intend to establish.

KÓS J:

Well you've got time to do that. You've got little a more than half an hour.

MS FEINT KC:

We say indeed that the – I mean the purpose of section 58 evidently is to provide clarity to the test, and so we're saying that the second limb is informing the nature of the customary title that's held according to tikanga, but also that it distinguishes between rights of aboriginal title, so in other words, interest in land

which the customary marine title right is and lesser rights, and that's the reason that exclusivity is used in the Canadian jurisprudence.
1120

Exclusivity is used for the purpose of distinguishing between rights which meet the test of aboriginal title which gives you a right to exclusive possession of the land, and rights of a lesser nature which are still aboriginal rights but maybe, for instance, usufructuary rights to hunt or fish or the like, and so we say that's the reason that Parliament's put that second limb in there to quote unquote "create certainty" albeit that it's a pretty clunky way of doing so.

So the second limb of the test has to be informed by tikanga because use and occupation is derived from rights that are sourced in tikanga. You can't distinguish the two, but what we want to do in our submissions is unpack what holding as a matter of tikanga looks like according to the legal framework of tikanga, and we say that if you unpack that, you're actually establishing rights based on whakapapa and occupation, and yes, and a lot of the interpretive difficulties fall away in my submission once you understand how the test operates in tikanga terms.

WILLIAMS J:
The logical flow of that gets interrupted, excuse the pun, when you say, but you should ignore the interruption of any exercises of rights that are outside what you get under section, I can't remember the section number.

GLAZEBROOK J:
Section 62 I think it was.

WILLIAMS J:
Section 62, right. That I find hard to follow, because that means you get to hunt with the hounds and run with the hares.

MS FEINT KC:
I don't quite follow your Honour.

WILLIAMS J:

Because if there's an interruption, in tikanga terms, ie if your ahi kā becomes ahi mātao, that's the traditional term, if your fire has gone cold, then that's a test in its own right, within its own cohesive system. That system had never heard of section 62. So if there is a right that is not included in section 62, the interference with which would have created a circumstance of ahi mātao, then that is just tough, it seems to me. That's the logic of it. Otherwise you are bending and stretching tikanga for rather instrumental purposes, and unless there's a good reason for doing that, it's probably better that you didn't.

MS FEINT KC:

Yes, I would accept that. I was thinking about this this morning. The reason why this is so clunky is because Parliament's taken a test in tikanga which will give a different set of rights in tikanga, but then it's bolted on, like there's a conversion of tenure into a statutory title and then it's bolted on the test ostensibly from Canada, so the test in Canada is a test of exclusivity because you're going to obtain exclusive possession of aboriginal title if you meet that test, and so they've unthinkingly, it seems to me, transplanted the test but because there are different consequences attaching to the test the test is – the title, the CMT is being stripped of rights that permit exclusivity to be exercised by CMT holders.

WILLIAMS J:

That's the compromise, isn't it?

MS FEINT KC:

Yes.

WILLIAMS J:

You say that's the entire compromise, not sure I'm with you on that, but anyway you say the compromise is seen in section 62 not section 58?

MS FEINT KC:

Precisely, and so it doesn't make any sense to uncritically import the Canadian test which is a different legal consequence in order to understand the test in the second limb of section 58.

WILLIAMS J:

The reason why I suspect that this distinction is more apparent than real, is that even in tikanga the crowding out of an ancestral right by a settlor community can create a consequences of ahi mātao, it must do. Because ahi kā is a question of fact. It doesn't really care what the race of the interloper is.

MS FEINT KC:

Except that it seems to me there's been a modification of tikanga to accept the reality of colonisation, which is that ahi kā can't necessarily be exercised now by – on land, maintaining title to the land.

WILLIAMS J:

Precisely.

MS FEINT KC:

And so therefore you need to think about other ways of exercising ahi kā, such as exercising kaitiakitanga through –

WILLIAMS J:

Through objections and – yes.

MS FEINT KC:

Objections to over-fishing or participation in RMA processes.

WILLIAMS J:

Exactly. So the structure of the legislation is one of compromise where it seems to me it would be wrong to treat either the old legal order or the new legal order as entirely controlling, and therefore it doesn't make a lot of sense to say

section 58 is only about tikanga and nothing else, because there's much more going on than that.

MS FEINT KC:

I – yes, I agree.

WILLIAMS J:

Okay.

MS FEINT KC:

And we're not saying that the second limb is – well perhaps we'll come – it might be –

WILLIAMS J:

Tomorrow?

MS FEINT KC:

Yes. No, this afternoon. We will come to that but I do accept your Honour's point that tikanga has been distorted through the compromises that have been established in the MACA Act, and that's got to be part of the interpretation exercise.

WILLIAMS J:

Yes.

MS FEINT KC:

So, just to take us to morning tea, the other comment I wanted to make before I hand over to Ms Sykes and Ms Panoho-Navaja is to say that we've referred in our submissions at 3.11, if we could bring those up please, to a metaphor that the Waitangi Tribunal has used. So I'm looking at that quote – can you scroll down please – where the Tribunal has talked about the innate territoriality of customary law, and they say that Māori are only Māori in relation to tauiwi, but in relation to other Māori they're tribal, and their tribe is connected to a rohe or a tribal territory. Their stories –

WILLIAMS J:

In fact, if you look at the clauses of He Whakaputanga in 1835 where the word "tauiwi" is used, it's actually referring to other tribes, not settlers.

MS FEINT KC:

Yes, interesting. It's like the word "iwi" in the Treaty being used in relation to Pākehā, not Māori.

WILLIAMS J:

Exactly In tikanga circa 1835, the other tribes were foreigners.

MS FEINT KC:

Indeed. And so I wanted to start with this because the idea about CMT being territorial is a little bit misleading when you think about the fact that customary rights are in fact territorial as well in the sense that they're all exercised within your ancestral territory, but we say this is a useful metaphor, that the traditional histories and whakapapa confirm the roots of the people and the places occupied by their forebears and their belonging to a particular hapū, who they are and where they come from are thus inextricably intertwined.

Whakapapa and rohe are like the weft and the warp of a whāriki or a woven flax floormat, and in our submissions we say, well, you could also use the metaphor of a kupenga, a fishing net, given the takutai moana is the subject of this hearing, but we say that idea of the interweaving of whakapapa and rohe is a helpful metaphor because it illustrates the interconnectedness of whakapapa and territory, but also the difficulty of separating one hapū from another or drawing borders as you travel across that territory.

1130

So the way we're understanding the rohe that the CMT is being awarded over, if you think about the – if you think of like a woven whāriki, the whakapapa being interwoven with the territory over which it's stretching, as you – when you're within the heartland Whakatōhea rohe it's only the hapū of Whakatōhea but then as you span across the territory you enter into the border regions where

the whakapapa's intertwined with the neighbouring hapū and iwi, and so that shows that it's difficult to define territories with any degree of precision but also that even from hapū to hapū you can't necessarily identity discrete territories because if the metaphor that Ms Sykes uses, and she explains this much better than me, is that if you think about different coloured threads representing the different hapū they will be interwoven throughout the whāriki as you span across the rohe and that makes it a much more complicated exercise in terms of identifying CMT which is why shared exclusivity is such an important concept in interpreting the MACA Act.

I see we've reached the time for the morning adjournment, so that might be a good time to break.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.51 AM

MS FEINT KC:

As I said when I started this morning we thought that the most useful thing for the Court to do would be to spend some time developing the legal framework of tikanga, so I am going to hand over to my friend shortly, but before I do I thought it would be helpful to give an overview of the Te Kāhui position on what we say the CMT test in section 58 requires and just by way of introduction to our articulation of the test I think the reason why it is difficult is because you're shoe-horning a complex taxonomy of customary rights and tikanga into just two categories of rights in terms of the MACA Act, so either CMT or PCRs, and so perhaps a better way to think about section 58 is you've got the first and second limb. We say the first limb is the primary limb that determines whether CMT is met but that it's framed or informed by the second limb, the purpose of which is to distinguish between CMTs and PCRs. So in other words it's adopting the Canadian distinction between aboriginal title and customary rights that are of a lesser nature and usufructuary nature. We don't necessarily accept that that distinction is legitimate from a tikanga point of view because fishing rights, for instance, may be evidence of customary title because it's the hapū who have

the mana over their rohe moana who are exercising those rights or they may be customary rights exercised by whanaunga who are coming and using that area as a matter of manaakitanga, so you have to understand in terms of the evidence how those rights are being exercised and why in order to interpret them, and that's another error that the Court of Appeal fell into because they said, well, there's evidence of fishing out at Whakaari but those may just be usufructuary rights and the common law might treat them as such, and we say no, no, you've got to stand back and understand how tikanga assesses those rights because identifying and naming fishing grounds and using and controlling those grounds may be an exercise of mana that is by those who hold the area according to tikanga.

So we say that the first limb of the test requires you to show that the hapū holds their rohe moana in accordance with tikanga. We say the second limb of the test is a framing provision, so it adds a qualitative dimension to the nature of the holding to impose, to make it clear that that interest must be of a territorial nature because CMT is an interest in land under section 60, and so we say that means that the hapū needs to establish that they hold authority at place or what we're calling mana whakahaere, the right to speak for the land and the people of it, and we say that as a matter of tikanga those who whakapapa to that place and who exercise that mana through being the ahi kā will have both rights and responsibilities as a matter of tikanga, so they'll have the rights to control the area and we would add the qualification subject to the limits of the law in the post-1840 world. They'd also have the right to benefit from the resources of that area, but we would say because it's their ancestor, they have responsibilities to act as kaitiaki and to speak for and protect the mauri of the takutai moana and the people that belong to it.

So another way of looking at that is in terms of in the *Custom Law* paper of Sir Edward Durie, he talks about there being hierarchies within the taxonomy of customary rights and that the highest level of the hierarchy is exercised by those people who are the ahi kā, because they occupy that place and exercise mana to control it.

Then we'd say the third limb of section 58 is that the mana whakahaere has not been substantially interrupted or lawfully extinguished. In those concepts the lawful extinguishment is a common law concept, so that's not a tikanga aspect and nor is substantial interruption. There are fundamental differences between substantial interruption and the concept of ahi mātaotao that we were talking about before the break, because ahi mātaotao are fires that are growing cool or cold but the fires can be revived in tikanga and –

WILLIAMS J:

Only if they're revived in time.

MS FEINT KC:

Yes, but –

WILLIAMS J:

Plenty of situations where you try and light your fire and it's a little late and you don't get to revive anything.

MS FEINT KC:

Yes, that –

WILLIAMS J:

It's a question of the context and the resource, of course.

MS FEINT KC:

But it can be a very long time. In the Waitangi Tribunal *Rekohu* report the Tribunal there talks about the three-generation rule that the Native Land Court applied not being an absolute rule under tikanga and saying, well, it just depends if there are still people who are able to revive those fires, their whakapapa to the land can't be extinguished. So we would –

WILLIAMS J:

That's right. Well there's a great respect for take tūpuna, for ancestral right.

MS FEINT KC:

Indeed.

WILLIAMS J:

But it can be displaced by raupatu or by abandonment, and it's a question of fact as to whether abandonment has actually happened. I'm not a great fan of the three-generation rule so I think it is a fact, a question of fact in context, but so is it with substantial interruption.

MS FEINT KC:

Yes, I think that's fair. Yes, I think the three-generation rule is a Native Land Court distortion of the tikanga.

WILLIAMS J:

Yes.

MS FEINT KC:

But, yes, again it's probably not that helpful talking about these rights in the vacuum of the context in which you're considering them, and so on that note I will ask my tuākana Ms Sykes to come and address the Court.

MS SYKES:

Kia ora, te whare. Koutou mā e whakarongo mai nā. Ko tāku nei hiahia, me tīmata ai i taku kōrero mai tētahi wāhanga o tētahi o ngā karakia i puta hei whai whakaaro mō Te Whakatōhea i runga i tō tātou, i runga i tō rātou iho ki te takutai moana. With the Court's leave, I'd just like to start my presentation by the use of a karakia that's actually quite intimately important to the peoples of Te Whakatōhea to show the continuity of consciousness and the unsevered connection that they have to the territorial space which forms the basis not just of the Kāhui claim but all of those claims that have come under the rubric of Te Whakatōhea.

1200

Maruhia atu i runga o Tirohanga te tohu Whakaari

Whakarerea atu te whaiwhaiā te mate tonu atu
Whakaihu mau tohora, tāpapa ana te rae o Kohi
Te mate te whakamā e patu
Ana Muriwai *[sic]* tōu ringa te waka

My friend, Ms Panoho, will explain that karakia in the context of a waiata as our presentation continues but I'd ask if I could put up the PowerPoint that we've prepared. It's drawn mainly from two chronologies that we think are really important in setting out the continuity of relationship, the continuity of connection, that we say is fundamental to establish. The first of them in section 58, that's holding in accordance with tikanga. The chronology that we've relied on to prepare our PowerPoint is that which was prepared by one of the historians, Mr Bruce Stirling, but he incorporated in it also the chronology that had been prepared by the Crown's historian, Mark Derby, so as a document it is really helpful and my friends will give you the particular case on appeal numbers for both of those documents.

If I go to the first slide, please, this slide shows the applications area and it transposes into it the whakapapa, and when you read the Pūkenga Report, which is the second appendix to his Honour, Justice Churchman's, decision, you will see that they constructed a poutarāwhare. I think it may have come in a metaphorical sense from this image because if you look at the whakapapa lines that are depicted in the territorial space to which the claims were made by the various applicants, you will see the whakapapa lines themselves lend themselves to figures of poupou within a whare that is placed in a virtual sense over those areas within which they have had a continuity of relationship. My friend, Mr Hodder, said since time immemorial. I think it's a little bit more limited but I would say that it's certainly in the consciousness of some of the witnesses.

One of the affidavits, for example, by our pou tikanga, Mr Rua Rakuraku, has an appendix to it which is an affidavit from the late Tamaroa Nikora, shows a whakapapa to this space for the peoples of Mātaatua from Papatūānuku and Ranginui. So there's certainly a continuity of relationship in tīpuna that was

established in a number of those pieces of evidence, but when you read the Pūkenga Report I think this particular whakapapa chart's imprinted and in the embedded relationships which whakapapa is. I just want to remind us all that "whakapapa" when translated into English means to place in layers. Quite often it's just referred to as genealogy but "papa" can also be a foundation. It can be something to create a foundation from. That's why the construct of whakapapa, when we look at what is the nature and extent of the tikanga framework which is the law which governs both the nature of the relationship between and amongst those within that framework to each other and to those gone before and yet to come, it's really important because the fact of blood relationship or kin relationship is a massive inhibitor on the nature of how you regulate behaviours between and amongst yourselves, even when there are arguments between and amongst yourselves, forgiveness becomes something over time because of the nature of the relationship that emerges, sometimes to repair where damage has occurred, perhaps by incidents of disagreement, incidents of jealousies, incidents of harm that may have been incurred between and amongst each other.

This chart which is exhibit 26 in the case on appeal is a very important understanding both of the historical, spiritual, cultural, physiological, ecological dynamics that are in play in the context of establishing the context of tikanga, and I want to start with the far right of the whakapapa chart if I can by identifying, it's quite clear from the evidence that the Nukutere waka was one of the first arrivals that was noted in the evidence. It's noted by most of the historians. This whakapapa chart, I also want to say, is really important to the people of Te Whakatōhea in a number of ways.

When the Whakatōhea Māori Trust Board was established, it was developed by two important tohunga of Te Whakatōhea, Matenga Biddle, and you met the other gentleman yesterday, Dr Te Ariki Amoamo, and they thought it was really important when they were establishing the Whakatōhea Trust Board to look at whakapapa that combined, genealogical ties, to unite, associations that had survived over time, rather than to look at separations by virtue of the process of adaptation that may have occurred, and also I think they wanted to highlight

that there is a multivariate of connections of various parts of the hapū of Te Whakatōhea, and I'll start – hopefully try and take you through the map to establish that.

So we have Nukutere waka arriving. We also see connections from that line to Tākitimu waka, which is a really important connection in understanding the whakapapa to Muriwai who I'll move to. You'll see from Tauturangi, which was a navigator of the Nukutere waka, down to Hanenepounamu, who marries Haruataimoana of the Tākitimu waka, you see an interconnection of those waka coming down to provide the Tūtāmure connection to Hine i Kauia, who is a mokopuna – who is a daughter of Tamatea Matangi in Muriwai, and there you see an earlier generation of peoples that had arrived with pre-existing relationships to the space that is claimed for the applicants by all of the applicants to an important, I think the centralism of the identity of the Whakatōhea, the arrival of the Mataatua waka, and the descendant of the hapū of Whakatōhea from the māreikura of that waka, Muriwai.

She's the elder sister and Justice Williams, I had some difficulty in suggesting that these people would be described as foreigners to each other, even though the 1835 Whakaputanga might have referred to another iwi as foreigners because –

WILLIAMS J:

It was people south of Auckland where referred to as foreigners. That scans.

MS SYKES:

I would find it very difficult in my context to accept that if you're the older sister of a younger haututū brother puhi that somehow you've severed the ties so you're now calling each other foreigners or strangers because even Ngāpuhi relocates, of course, to the northern territories of the northern isthmus, she is still his older sister, just as the descendants of Toroa, from whom Ngāti Awa come from is the younger brother, and Taneatua, the younger brother, who is also this ancestor to which the peoples of Tūhoe Ōpōtiki take a descendancy. So I hope we're not all foreigners in this boat.

WILLIAMS J:

I didn't write the Whakaputanga.

MS SYKES:

Okay. So you will see that there is an intimacy of connection and that connection is cemented by this understanding, and by – another person I think we have to mention is Tamatea Matangi, and he is described in the evidence as someone who came on his own waka to whenua, and this is in Bruce Stirling, and one of the tangata whenua witnesses, Ms Anna Kurei. Tamatea Matangi's waka Tūwhenua arrived in Ōhiwa Harbour, but of course you will see that his children, Repanga, Tanewhirinaki, Hine i Kauia, Rangikurukuru and Koau, formed the basis of the hapū that are now alive, operating as polities, operating as authorities within the complex matrix of relationship to assert the mana whakahaere of the peoples of Whakatōhea now, and you'll see those hapū in red at the bottom of the line.

1210

Te Upokorehe is the tuākana that came from Repanga. Very special tuākana status because in the emergence of Tairongo, who's a descendant of Tūhoe, and the daughter Ani i Waho, who marries Tuamutu, the oldest son of (inaudible 12:10:16) you see again a merging of the relationships, of the people of Tūhoe with the people of Te Whakatōhea, the children of Muriwai and Tamatea Matangi to create a special polity but within an interconnection both by blood, by relationship with the peoples of Whakatōhea and Tairongo. Over time, of course, each of these hapū have asserted independence, mana motuhake, in the ways that they have moderated relationships between and amongst each other but this genealogical tapestry, this building of layers, this foundational basis, forms the nature of the relationships that they seek to assert as the basis of customary rights use and obligations in the context of the MACA Act.

Another matter that I want to talk about is the question of rāhui, and even though we heard a rāhui this morning, Muriwai's two children died, the twins died, and she mourned their loss and she said a rāhui Mai ngā Kurī a Whare ki Tihirau

that lasted for 40 years. Her sons died and they drowned after an argument which is the name from which Te Whakatōhea emerges and she almost went in a self-imposed exile of grief. If you've ever visited Whakatāne, the cave of Muriwai is where she's put herself after her children died. In the evidence of Tracey Hillier we heard that her sons were actually recovered in Raurimu, which is an island outside on the Ngāti Awa territories, but it shows through the connection of grief also a tapestry of relationship that is always remembered and is part of the continuity of consciousness that gives rise for customary relationships it plays and –

WILLIAMS J:

It might be useful for you to explain the area of Ngā Kuri a Wharei and Tihirau.

MS SYKES:

Okay, it's much beyond the CMT area. It's actually the traditional boundary to I think the Mataatua waka subject to Justice Williams' family of Ngāti Pukenga and Tauranga Moana and others agreeing who came on other waka, it's all the way from there, down to the East Coast side and she, because while her children were lost and she was mourning them, she said a rāhui and that's set out in a number of the evidence. But, of course, those are the spheres of influence within which the hapū of Whakatōhea operate but those rights, interests, uses and responsibilities and obligations they claimed only fall within the territorial space of Maraetotara to Tarakeha.

Unless there's questions about that side it's really important, I'm trying to do something that witnesses took a week to do, but I do say that the evidence is pristine on this.

KÓS J:

I have one, Ms Sykes, which is can you explain the lines a little which appear to be something like boundaries but probably aren't?

MS SYKES:

They're not lines, they're just whakapapa lines that show – I think they were developed by the witnesses because this hangs as a chart in the Whakatōhea Trust Board or used to now that it's now Te Tawhero. What it showed was the various waka traditions that's sourced them and how those waka connected through whakapapa, marriage, relationships. If you go to the bottom they connect, the lines connect to each of those individuals that marry. So you come down through Rangimātoru waka to Nga Pou Pereta who marries Repanga. So you see the lines of Rangimātoru waka and ancestral connections connecting with Mataatua waka with Repanga, the oldest son.

KÓS J:

Yes, sorry, I beg your pardon, I meant what looked like geographical lines rather than whakapapa lines.

MS SYKES:

Okay, those lines were the applicant areas that were claimed by the applicants when we started in 2017. Some were amended as the case developed.

KÓS J:

Yes, but it doesn't look the chart I've been looking at –

MS SYKES:

No.

KÓS J:

– and I'm particularly interested in the oblique line that Ngai Tamahaua has just off Whakatāne and why the line travels at that oblique angle from the coast.

MS SYKES:

Ngai Tamahaua maintains the intimacy of connection to Whakatāne because of the history of Muriwai I've just described and so they saw that as a significant sphere of influence from which their territorial claim should expand. Others did not take that approach. Others, which I will develop, preferred the evidence of three significant tīpuna over the centuries, Wi Teira in 1866, the evidence of

Matua – Dr Te Riaki in the Waitangi Tribunal also had significant – and Hoera was another one who gave evidence in the Māori Land Court during a dispute with the Compensation Courts.

But we're jumping ahead, but I knew you'd ask something that was – but that's why I put it in, to show here's our whakapapa connections. Traditionally we had spheres of influence beyond which was claimed, but the centrality, the pulse of the relationships, are from Maraetōtara to Tarakeha for those hapū polities that subsist within that relationship, recognising through those two marriages I've highlighted, the first one with Upokorehe, that there are connections to Ngā Tini o Toi and to the descendants of Tūhoe in that particular whakapapa of Tairongo, and then the other relationships at the eastern end of the boundary that were cemented through the marriages from Nukutere waka and Tākitimu waka to descendants of the Mataatua waka, and those become the tapestry of relationships that are relevant, we say, in assertions of shared relationships equal to shared exclusivity and shared responsibility for these territories that have been claimed by the applicants.

WILLIAMS J:

Can you just – just a question of clarification, the two sons of Muriwai and Tamatea Matangi, which two sons were those?

MS SYKES:

Tanewhirinaki. Pardon? Koau. Sorry, Koau.

WILLIAMS J:

So Tanewhirinaki and Koau?

MS SYKES:

Yes. And they've got no children.

WILLIAMS J:

Right, I see, yes. So they argue and they are both killed in the argument?

MS SYKES:

They were stubborn.

WILLIAMS J:

Yes.

MS SYKES:

So Whakatōhea, they were stubborn. They didn't listen to Mother. She said: "Don't go out to the sea," and of course they went to the sea and they went missing and they were drowned at sea, not recovered for some significant period, and that's where the name Te Whakatōhea comes from.

WILLIAMS J:

Yes, the stubborn, the stubborning of the two boys.

MS SYKES:

Two boys.

WILLIAMS J:

Right.

MS SYKES:

And so the sea is central to the identity of Te Whakatōhea, because it sources its identity in that tragic story.

WILLIAMS J:

Thank you.

MS SYKES:

And it's a lesson about stubbornness and not listening to your mothers or women.

WILLIAMS J:

Thank you.

MS SYKES:

Kia ora. But those – there were reasons why when we did the initial application, those application areas were very taking into account those tapestry of matters.

Can I say it's not highlighted in many of the submissions, but to his credit at the High Court, the High Court Judge gave us time to work out common areas that we may assert for those polities. So there was actually a mediation after the first opening submission which went for nearly two weeks that was facilitated between and amongst the applicants for Te Whakatōhea, but also included particular meetings with peoples of Te Whānau-ā-Apanui, the peoples of Ngāti Awa, as we talked about what might be relationship arrangements that would give effect to the shared responsibilities and obligations that the whakapapa tapestry wove for them. And there were some agreements agreed in that, and that was certainly the flavour of the cross-examination that followed after those two weeks.

Next slide, that's the chart. Just so you know, we got a growling in the court from our Dr Amoamo. He didn't like the fact that we hadn't got the lines right for the Rua. You see that from Repanga you've got all the Ruamatarangi and we hadn't in the original had all the right Ruas in, so this was the corrected version that was put in by him, and that's just – I don't wish to propose to go through, but that is just to highlight how those layers are really important.

WILLIAMS J:

So does that mean the Ruas in the prior map shouldn't be relied on? Are they – 1220

MS SYKES:

No, I think it's just that this was more he was just anxious that we had – he didn't like this – he thought this was not respecting the tapu of the whakapapa.

WILLIAMS J:

Is there a difference between the Ngāti Rua line on the picture and that on the chart?

MS SYKES:
Not to me, no.

WILLIAMS J:
Okay.

MS SYKES:
But I just say if you're going to use the whakapapa chart we would prefer you use that one, that one's been sanctioned by the tohunga.

Can we go to the next slide. Now this is where we came to after mediation an agreement of the boundaries for those polities that are listed and it then became successful applicants for CMT orders with hapū from Ngāti Awa who also shared that space with us and, as I show through the next slides, you know, it's an intimacy of connection that is very much respected by the peoples of Te Whakatōhea and Ngāti Awa and Tūhoe. Even though there is a troubled history, there are battles that are significantly cause divisions and sometimes generations to heal. One of those battles was of course at Maraetōtara where Whakatōhea Tūhoe had an altercation and we use that boundary because we left heads of people there as a result of that death and that's described in Bruce Stirling's, that evidence, and you might have seen that in the original application from the people of Ngāi Tamahaua. They had originally applied much further than Tarakeha and they agreed to come back to that boundary in the application that was made.

Can I also say that Te Kāhui included whānau a Mokomoko which is a significant part of our rōpū. Mokomoko, quite obviously for the terrible things that happened to him as part of the raupatu, was also though really important as a sentinel or a protector of the western boundary and the evidence talks about that, just as Te Rupe was, who's very closely connected to Te Upokorehe and Ngāi Tama. So they're not mentioned in that but they are mentioned in the poutarāwhare structure and as part of our collective and inclusive understanding of the tapestry of relationships, they took significant roles both

in the presentation of evidence but in highlighting how rangatira acted to give mana and force to the connections to protect that for future generations.

Ngāi Tai, as you were saying, they are a unique part of the coastline. They come from Tainui waka and that is also very important in the relationships between and amongst the Whakatōhea. Te Whakatōhea is very close with the Kīngitanga also because of some of those connections that have flowed since those early arrivals.

The next slide please. This is an important slide. In the first week of the hearing his Honour Justice Churchman asked about the raupatu and what that would have had an effect on any seascape that would be claimed, and that for all of you is the raupatu that was affected by virtue of the New Zealand Settlements Act. It's discussed very carefully in evidence that was placed on a case of appeal by Tom Bennion and Anita Miles and the compensation court's discussions around there. But we just put that in to know that there is a context of raupatu. We do not accept, as your Honour suggested, that the raupatu affected an ahi mātao or an active extinguishment. In fact, it was quite the converse.

WILLIAMS J:

I don't think I suggested that.

MS SYKES:

In your discussion with Ms Feint just prior to the morning adjournment you suggested that substantial interruptions amounting to an ahi mātao might be affected by raupatu. In this particular –

WILLIAMS J:

No, well they're different things. Raupatu will by definition, in tikanga terms, as long as you maintain occupation close to raupatu will, as you know, extinguish the original take tupuna, in tikanga Māori, but this raupatu wasn't that kind of raupatu as you know.

MS SYKES:

Thank you. It was an unlawful one both in tikanga Māori and in Pākehā law terms.

WILLIAMS J:

But also the people weren't displaced.

MS SYKES:

Well they were temporarily for the peoples of Ngāti Ira. They were very clear that they were forced because Ngāti Ira and Ngāti Huri of Tamakaimoana were identified as the savage tribes protecting Te Kooti and that's in the evidence. They were displaced up the Awa o Waioweka which is a significant part of them. They actually went into the Waioweka valley, journeyed down under darkness to get food and to provide themselves with sustenance, so they were displaced for a temporary period but certainly not for any period of length, and they came – after the raupatu, of course, most of the land had been confiscated. There was a good discussion yesterday when you said bush blocks and the sea became the source of sustenance. There were the bush blocks to which most of the Whakatōhea hapū gained native land entitlements and then there was the sea which was the basis of their protein and sustenance. We only put that map in to show you the extent of the confiscation and its impact on the ways of life of the Whakatōhea.

Next slide, please. One of the key – you have a map in front of you, lots of maps. These maps were really important to the Whakatōhea and I want to pay tribute to one of the witnesses for WKW, Des Kahotea. He spent a lot of time looking at the cultivations and the pā sites. There were 122 pā sites and we were able to identify through that testimony those matters. We were actually able to cross-reference much of his work because he was relying on many modern records for his evidence, to those matters, and you will see there were midden, there were pā. What becomes important, I think, in identifying some of the, I would say, unkind claims that not all the Whakatōhea are in the Ōhiwa area. You will see that the history of settlement, the evidence of occupation, shows that the Ōhiwa area was a significant part of the heart, the central base

of which the survival of all of the hapū of Whakatōhea, indeed all of the people that had suffered raupatu, depended upon.

There was a lot of evidence around this and in the lower Court his Honour, Justice Churchman, referred to these matters and I forgot to actually remind yourselves that we are very grateful for Appendix 2 of the High Court decision. It actually got all the whakapapa relationships right. There was an inclusion of everything that I have said, set out by his Honour, Justice Churchman, which we would not displace, and that is at that Appendix B, just for your benefit, and a lot of what I have talked about, some of it is much more eloquently put by his Honour, Justice Churchman, in his efforts to receive the evidence and give mana to it in his judgment.

Can I go to the next slide? We also cross-reference the shell beds and place names and we drew from maps of Elsdon Best in the 1840s/50s period but then there was evidence of the late Dr Te Wharehuia Milroy and, or Professor Te Wharehuia Milroy, and Hirini Melbourne, in the report of Te Roi O Te Whenua which, when you compared the shell beds, the pā sites, they were almost identical even though Elsdon Best's informants, Tūtakangāhau, came from Tamakaimoana and other peoples of Tūhoe. The traditional cross-referencing of the evidence that had been provided by Mr Kahotea and evidence from many of the kaumātua that spoke was remarkable.

This map is also really helpful in identifying some of the marae that become really important in understanding the shared tapestry of relationships. Roimata Marae, for example, is a marae that Te Upokorehe sees as one of their bases. One of the claimants for Ngāti Ira, the pou tikanga for Ngāti Ira, Te Rua Rakuraku, he has an intimate connection to there. He is a descendant of Rehua Rakuraku, and this is in his whakapapa.

1230

Rehua was one of those that fought with many to keep Te Kooti safe from the invasion by the Crown and Roimata Marae was his bastion. It's also now I think the bastion of Te Upokorehe still with relationships to Ngāti Ira to that marae

still maintained. There's a modern marae, Kutarere Marae, you'll see down at the bottom there. The evidence on that marae was that even though it's a modern marae it still provides a space for the expression of tangihanga by many from Ngāti Patu and Ngāti Rua, who are – the Collier family was the evidence. They had lived there, they were farming there, because of course many of them were given only shares in the Hiwarau block, and so the Kutarere Marae in the modern context is somewhere where they carry out this continuity of relationship to place and they live around there in those raupatu blocks, and they – even though they're from Ngāti Patu where their three marae are in the east, they quite often go to those tangihanga.

This map also talks about or shows some of the places that were attacked in the invasion by the soldiers. Whakarae (inaudible 12:31:17) and others is the bastion of Rehua Rakuraku and others. Mokomoko is a marae and Ngāti Patumoana have three marae and I invite you to look at the evidence, to go through the complexity of those relationships that were sustained pre-and-post-raupatu.

What I am trying to highlight here, if I'm going to our road map, is that the whakapapa is more than relational. It's connecting things, it's spiritual. It talks about history in space. It's about the ecological realities of how they locate themselves at different places. And one of the key parts of that relational understanding was in the evidence of Pou Temara. He reminded us that the mauri of many of these spaces were protected by taniwha. So there were five taniwha identified in the evidence. Wairore is the sister of Tētahi, which is one of the taniwha in the Ōhiwa area. Whanaungakore is another of the taniwha in the Pahikura area, which was given by Tracy Hillier for Ngāi Tama, and those other two taniwha that are out at Whakaari, they are all connected by whakapapa, they all have a responsibility spiritually to protect that space because of its intrinsic value to ensure the survival of everybody.

And I started my waiata or my presentation today with the waiata Te Tapu o Muriwai, and those are the reference points, but that line by line understanding which goes back over centuries and generations to the time of Muriwai is I think

the best summary of the – since 1840 location and connection at place to ensure customary use, survival of the ways of life, the spiritual practices, and the interconnections of the obligations of kaitiakitanga and manaakitanga.

I go to para 4 in the matters, but I don't really wish to take your – the Court to that, but these were some of the matters of derivative principles which we believe give spiritual and physical integrity to our claim to the rohe. Mana tuku iho of course is incorporated in the Act, mana tīpuna, mana whakahaere, which is also intrinsic in that. I think it's a much better term than tino rangatiratanga if you want to – from a straight linguistic perspective because it's about authority at place, it's about giving effect to your understanding that because you are connected there, because you have that obligation to that place, it's not something about ownership, it's about the burden of obligation to ensure the continuity of consciousness in your relationship to that area. That ancestral connection to Tangaroa gives the right to the bounty of the sea, but those rights are conditioned by a responsibility to nurture our ancestors. So it's like aroha ki tētahi, ki tētahi is a value that comes through, and the power of mana whakahaere must be exercised with that derivative inhibitor of ensuring generosity of spirit to those that live with you.

We had some discussion this morning about ahi-kā-roa and I just wanted to just talk about the ahi test, because there was cross-examination by myself of some of the witnesses who didn't seem to understand the spectrum of ahi kā. I'll start with ahi weto. That is what I describe as extinguishment, not ahi mātaotao. Ahi weto is very rare. It may come if a tsunami occurred, there's an ecological disaster, so that the prospect of rekindling or reconnection is made impossible by forces beyond your control. Ahi mātaotao may for some reasons, and one of them in play here, some people left because of the raupatu displacement after their lands, but over a generation they became ahi teretere, which is the next step in the values of ahi kā. The ahi teretere are like urban Māori now. They return home from their urban residences back to those that maintain the ahi kā roa with the expectation of maintaining relational ties and obligations and responsibilities in that effect.

The ahi teretere are very important at a time when there is low populations in the rural areas. Quite often they bring their financial and economic support to enable the fires to be burning, and so over time they may have their own ahi tahutahu, which is fires that are burning, that they kind of cover for a little while, and then they uncover as they return home, and then there's the ahi kā roa.

Now in terms of the discussions about the second limb, I believe that it's very difficult for us to see the authority –

KÓS J:
Before you move on to that, say we talked also yesterday about tuku whenua?

MS SYKES:
Yes.

KÓS J:
So that involves I think a transfer to other interests, but that presumably involves a measure of abandonment by the first group and passage to the second?

MS SYKES:
I want to say – it may be an act of generosity.

KÓS J:
Sure.

MS SYKES:
Tuku whenua is really important and I accept that there may be an ahi weto, an extinguishment, by fact that you have, out of the generosity of your heart to cement that relationship, given land to someone else. There's certainly an example of that in the *Reeder* case, and I think there are many emerging in some of the cases before the higher courts now, but it's not like an extinguishment that severs, but it's an extinguishment that reminds of the ties that bind. So there's a nuanced understanding on the tuku for me than simple

extinguishment like what might occur with a tsunami and an ecological disaster, but no, I think it's within the framework of that.

Very rare, tuku whenua. So there must have been something significant between the parties that received the whenua and those that gave. It might have been a beautiful woman, I don't know, but, you know, those are the things that caused wars and sometimes they needed to cement them. Quite often tuku was also allied with planting of patu harakeke. Children who were taharua, who were both from the grantor and the grantee of those matters, and taharua became part of the evidence in the Whakatōhea application because of course one of the applicants died, there was an ōhākī, and he asked for Ms Hata to remain as an applicant on his deathbed. He died during the hearings, and so that was her taharua because she's also a claimant or an applicant for Ngāti Ira.

Whanaungatanga, I don't wish to talk about. Those matters will be explored in much more important detail, but can I say it's one of the most important values in the context of the compromises in the MACA Act, because there are very real compromises. Section 11 is the first compromise. Māori accepted that they did not own these lands in proprietary terms, but that did not – they did not accept they did not have mana there or relationships there which were of equal value as ownership in proprietary (inaudible 12:39:40) terms, and I think that's why section 6 is important because you look at the restorations of rights, and you must see the reconciliation in the context of those sections as well as the test in section 58.

Can I go to the next slide, please?
1240

GLAZEBROOK J:

You were going to say something about the second limb before you were diverted. Did you want to say…

MS SYKES:

On the second limb – I'd better get this right because my learned senior is meant to be – she called me a tuākana so I'd better say learned tāina – is going to be taking us through with much carefully on these matters, but I think interpreting the exclusivity of requirement to have to show ability to control in a physical sense is a misstatement of what is required if we take into account that section.

Ability to control can occur by assimilation of values because tikanga is very values based. So in the particular case the peoples in the area, non-Māori and Māori have lived together, from Maraetōtara to Tarakeha, have had shared values all the way through. The evidence is really clear. I mean my friend will take you to some of the specific examples, but helping people to navigate the entrances to harbour, ensuring that people did not have problems to gain food. Mr Armstrong's evidence is replete with references to the sharing of kaimoana right throughout the depression period for families that were suffering because of poverty, and their aroha, their generosity, extended much beyond those that have relational connections to this place. It went to Gisborne. It went to Tauranga. It went to Rotorua. So I think you need to say "ability to control" must also be nuanced with the values that actually may guide respective control without the use of force, and the rāhui is one of those, you know, that was given recently, and that is, this is maybe I think the compromise that I hoped that the Act was trying to develop in the second limb, is the recognition of Māori values based law. The understanding that there may have been some matters of intrusion into those values, but are they enough to displace the operation of those values just by the simple assertion of an interruption, I think is quite difficult to sustain in the statutory scheme, particularly when you have terms like mana tuku iho, and manaakitanga, and other values scattered throughout the legislation to guide an understanding of the values of co-existence in that place.

The principle of whanaungatanga emphasises too for me the inclusiveness and collectiveness which is contrary to the exclusion of rights which often form the basis of the common law system. If there are rights grounded in tikanga I think you need to interpret what is being asserted as a substantial interruption with

that tikanga lens which my friend Ms Feint has urged the Court to do, and I think that is just axiomatic because we're reconstructing in this context after a long time of invisabilisation of those values in the legal system they may be operating at a custom level or in practice at a location. We need to work carefully through those matters. I would say that the refusal to grant simply by the fact it was an assertion of interruption would need much, much more evidence to be persuaded that it was substantial, which my friends from the Seafood Industry has highlighted this morning, but also whether the interruption itself was sufficient to meet the determination, the definition of "interruption".

KÓS J:

Section 106 gives you some support there in terms of burden of proof, which doesn't require you to address that, at least in the first instance.

MS SYKES:

That's right. That's why I say peppered throughout this Act is the spirit of compromise, and trying to find an understanding, you know, Ngāti Apa came a long time after the original grievance was initiated, and I think we need to take that point, in the spirit of those values, to reconstruct the relationships that are contemplated to be respected and recognised. Just because they're recognised doesn't mean they're respected, but that's the difficulty in the tikanga Māori. If you're going to manaaki a place, then you must mana āki, fill with dignity, fill with respect to that place. So it's very difficult for me to sever that obligation of filling with respect if you're going to assert that you're meeting the purposes of the Act, the values of the Act and, you know, I'm not the first to say it's a very difficult to Act to interpret, it's certainly one that speaks in the minds of the greatest legal minds of our world, but also the tohunga of our world in trying to find ways to step through to maintain that continuity of consciousness so that the tikanga law that they live in still remains valid as a responsibility framework for future generations unborn.

Can I go – now this is an important slide. In understanding the nature of the rights, they're not just fisheries rights. Some of the best testimony from the tangata whenua witnesses came from a gentleman who is a schoolteacher,

Mr Warren, and from Mr Donald Kurei, who is a road worker, works for the Ministry of Works at the time, and both of them are descendants of what they all the fisher people of their own hapū but also maintainers of the mātauranga Māori of the fishing grounds, and how to read this map to make sense of it in the context, while protecting the secrecy of where the fishing grounds are, where the fish all are, how you get there, how you navigate it using the powers of astronomy and astrology, and how you use landmarks like Whakaari and other landmarks inshore to maintain your course to meet the obligations of both, one, caring for that fishing ground to ensure it's sustained, two, taking fish in accordance with tikanga for – from those grounds, but three, also identifying whether there is overfishing or any ecological upset that may prevent the fishing grounds themselves from being sustaining life forces for the longevity of the peoples that are given life from it.

So this map, which was tapu I was told by Mr Sinclair when we did the hearing, but it wasn't too tapu because we already had it at Ngāti Ira, was very much cowed, I would say, by the fisher people, and it was given in testimony to show the nature of the fishing grounds, how far out from the shore they were. One fishing ground is very close to Whakaari, how that information was coveted, respected to ensure the mātauranga relating to their fishing relationships was maintained. And it's quite a different approach than perhaps the Muriwhenua Tribunal I think or the findings in other cases where there were more fishery stocks available inshore that determined the nature of the kinds of relationships that were being asserted inshore and offshore.

Next slide, please, and we did, we asked one of our mappers to give some points to show those fishing grounds, and you'll see the names of the fishing grounds are quite significant too. There are six hapū of Te Whakatōhea. Each of those hapū had one of those fishing grounds exclusively for them, although they were shared after discussions between them. I know the Te Hira one very well. That fishing ground is Te Hira. Te Popo is – also carries that name. It's really important in the evidence, this is generations-old mātauranga that's been passed down, but in the 1860s there were 10 schooners that were

operating out of the Ōpōtiki Harbour. Many of them were being used to access these places.

In the modern context in Ranginui Walker's book he also talks about how fisheries expeditions went out. There was never any tourism expeditions, but he also talks about people being charged right of entry to Whakaari mainly to assist in the fishing that occurred. And one of the women witnesses for Ngāti Patu and Ngāti Ira also talked about her father being a fisheries operator in the 1970s and '80s, fishing using that technology not for commercial purposes, but for the needs of the people.

If we go to the next slide, and these are the CMT areas which is attached as an appendix to the decision of the Court of Appeal that were eventually agreed upon, and it was agreed that from Tarakeha to Te Rangi, the peoples from Tainui, they would have that CMT title to themselves.
1250

That CMT 1 would include the Kāhui groups, the hapū of Ngāti Awa that had relational understandings or connections to CMT 1, and then the CMT 2 boundary is the Ōhiwa Harbour, which is known as Te Kete o Tairongo. If you recall in the whakapapa Te Kete o Tairongo was one of the Tūhoe ancestors, but it's really, was known for the bounty, the kit that could actually fill, and those – the CMT 2 and CMT 1 – CMT 2 would include Ngāti Awa certainly in – to a point, and it's the boundaries that are the debates between us, and the CMT 1 is the one that we asserted as the primary relationships that should be protected and granted CMT title to from the descendants of Te Kāhui and others of Te Whakatōhea.

The occupation at Ōhiwa is an illustrative example of the overlapping whakapapa connections between the six hapū, demonstrating the relation of whāriki that my friend Ms Feint described. Now title is quite a foreign thing to the Māori mind, but whāriki is something to protect your mother. One of the key parts of the evidence of Te Whakatōhea is that there is an ubiquitous nature of the relationship of Papatūānuku as she becomes Papamoana, and that we

protect her form and those that are given, the treasures of her form in the sea, which are children of Tangaroa, to feed the children of Tāne Mahuta, and that's in the evidence of, the beginning evidence of Tama Hata.

So when Ngāti Awa comes into that relationship, and you know this is where over time there have been a wax and a wane of relationship connections. Te Whakatōhea accepted that some of the hapū of Ngāti Awa should be included in the Ōhiwa as a matter of tikanga. You can't ignore when you see place names like Taiwhakaea in the middle of Ōhiwa. You can't ignore the evidence that talks about the – you see there Te Kurī a Taiwhakaea, you can't ignore that, because they are tīpuna from the Ngāti Awa. You just can't ignore those place names, and they're not on the edge, they're in the centrality, those connections.

We did do a lot of examining in the Ihukatia split, which is up the top there, and in the evidence you will see a lot of the cross-examination was with the elders about, well you're actually taharua. The main, one of the principal kaumātua, Mr Kei O Merito from Ngāti Awa, he accepted that he's a descendant of Te Whakatōhea and Ngāti Awa. Ihukatia is a split where there was a pā site by Ngāti Ira and there was an allied pā site by Ngāti Rua, even though their marae now are on the other side of the eastern boundary, largely because of the raupatu there is no lands, they still have those relationships there. There are still, in the cross-examination which I think we set out, we show that notwithstanding no soldier's grants or no land grants or no compensation awards being made, many of the peoples of the hapū of Te Whakatōhea have brought privately to maintain the ahi kā or to keep the ahi tahutahu burning of those parts of the isthmus, and we strongly desist, or resist the suggestion that that part is now exclusively in the control of Ngāti Awa for those reasons. Ngāti Awa is claiming that their entitlement to customary marine title should actually move back from Maraetotara, because of course they were beyond that side, to either Te Horo or to the middle of the isthmus entry to the Ōhiwa Harbour, and we resist that on the basis of this customary evidence, and it's not customary, it's modern times.

One of the chapters that I would comment, if you've got time, because we put so many books on the case on appeal, is the evidence of the Dr Ranginui Walker. Early he identifies significant rangatira who were the sentinels of that area like Te Rupe, like Mokomoko, like Tawhara and he reminds of how they protected the relational understanding for the peoples, for the hapūs of Te Whakatōhea.

WILLIAMS J:

This is his book?

MS SYKES:

Yes, his book. Can I – I've got a copy here. *Ōpōtiki-Mai-Tawhiti*. It's a photocopy, a very poor version on the – and you can't have mine, this is gold, okay, but this book is photocopied, but there is a whole chapter devoted to explanations of those particular rangatira and their connections. And can I say his book is to be admired because he was on the Whakatōhea Māori Trust Board with informants like Dr Te Riaki Amoamo and his father. The repositories of knowledge they are spanned over 150 years and they're captured in much of the retelling of the Whakatōhea story by Dr Walker. I found his evidence, Bruce Stirling's evidence, and David Armstrong's evidence the best to capture it, but they are long reads, I'm sorry, but they certainly helped I think the lower court, the High Court, to come to terms with understanding these matters, and there's the reference to those matters that we've put up. How am I doing for time? Okay.

KÓS J:

Which chapter are you referring to, particularly?

MS SYKES:

The early chapter in the – it's the history of it. It starts at about page 11, chapter 1, and goes onwards.

KÓS J:

Thank you.

MS SYKES:

But there's a prologue to it, which is also good. Okay, I've got one more topic which I think is important. It's – I've only got four minutes to go. Te Whakatōhea maintained a reciprocal application with the moana through mana whakahaere and manaakitanga and kaitiakitanga, and I've used the taunga ika to show that. There's more than just user proprietary rights there. There's navigational rights that were at play. I think when we discuss tomorrow, there's medicine, medicinal rights that come through from those maps, but there's also spiritual context that we've highlighted really almost by witness after witness of that mana whakahaere and the life of that authority in the ways of life and the daily lives of everybody, and it was just as much about taking as about protecting, so it had a duality of obligation. One is to respect, one is to protect, but one is also about ensuring survival.

There was a sophisticated moana-based economy with the two schooners and seven ships, and that's in Bruce Stirling's evidence and Heremaia Warren's evidence. The relationship to the moana grew in importance as a source of survival for Te Whakatōhea following the raupatu, and there is much testimony on this from Mr Armstrong. He spent a lot of time carefully sifting through whether or not there was a tendency towards a disruption or a, you know, ahi mātaotao construct and he formed the absolute view that in fact it was quite the contrary, that because of the raupatu, there became a much more important connecting of the relationship.

During the transcript, one of the individuals, I think it was Mr Warren, was asked about whether or not the burning of the boats, the Whakatōhea schooners, because that happened as part of the invasion by the Crown, severed the relationship to the moana. That was very much denied. And then in the modern context there's been a recapturing, a reinstallation of the sense of survival from that space with the Whakatōhea mussel farm being a mana – a modern manifestation of mana whakahaere and that was very much talked about by Robert Edwards, who was the former chairperson of the Whakatōhea Māori Trust Board, and he and Ranginui Walker had spent a lot of time in developing those matters.

KÓS J:

But we can surely accept, Ms Sykes, that going back to Parliamentary intention, that Parliament's intent wouldn't have been to have regarded the raupatu as a substantial interruption. I mean I think that must – that point must be clear.

1300

MS SYKES:

I just – I hope that's what we get to but, you know, when I heard yesterday that you're protesting certain conduct and then without actually examining the nature of the legality of the conduct as something that may amount to an interruption, then might not a modern – and might not be a raupatu of that kind with extreme violence using weaponry to kill like they did at Te Tarata, 42 of Ngāti Ira were killed in the first cavalry charge, it might not be that kind of disruption, but there may be an assertion of power that would be protested against that maybe a disruption of an interruption kind which would not be countenanced, but may be seen as sufficient to bring that second limb into play, and that worries me, its intention of what that disruption is about. For instance – you know?

GLAZEBROOK J:

I think the – most of us were more concerned with the lawful actions that might disrupt, rather than unlawful actions.

MS SYKES:

Well what about a fisherperson going into a fishing ground and overfishing or taking quota that they're not meant to from there, or by-catch that they're not meant to from there? That's a disruption. They're told that that's an interference –

GLAZEBROOK J:

Well I think that that would probably be an unlawful one, which – yes.

MS SYKES:

Okay. As long as we understand that, because of course that's where Parliament must've intended that there could have been some authority to actually ensure that your assertion of mana whakahaere is not ignored in those contexts.

GLAZEBROOK J:

Well that's of course one of the issues, because before, which again we discussed yesterday, one of the issues is that if your authority isn't recognised at law, and in fact prior to *Ngāti Apa* there was a view that there was no ownership, it becomes more difficult.

MS SYKES:

So on that note, I've actually – I think I've covered most of what I've done.

WILLIAMS J:

Can I just ask a couple of questions of clarification?

MS SYKES:

Sure.

WILLIAMS J:

You refer in your summary to the evidence of Robert Edwards?

MS SYKES:

Yes.

WILLIAMS J:

And the mussel farm, the offshore mussel farm, is that farm within the CMT application?

MS SYKES:

Yes.

WILLIAMS J:

And do we have in the record a copy of the presumably regional council decision, or is it a DOC decision granting the right?

MS SYKES:

No, I don't think we do have that level of detail. Do you want to get that level of detail?

WILLIAMS J:

Well I'm just interested in the extent to which the council acknowledges any ongoing traditional rights in the context of the grant. So –

MS SYKES:

What we do have in the evidence is karakia for those matters happening and being greeted, you know?

WILLIAMS J:

Yes, I see that.

MS SYKES:

So you want more than that?

WILLIAMS J:

I'm interested in what the Bay of Plenty Regional Council, if that was the consenting authority, said about any traditional connection and its relevance to the grant.

MS SYKES:

And it's also included in the Treaty settlement now concluded with Te Whakatōhea at the time of the evidence. It's not – it was – these matters weren't included, but it's now cemented as part of that settlement arrangement as well.

WILLIAMS J:

Is Te Whakatōhea the only owner of the farm?

MS SYKES:

Yes – no, at least 51% is owned by – when you say "only owner" I was mindset Māori, but there are others in the other –

WILLIAMS J:

So the other tribes are not in, it's just Whakatōhea?

MS SYKES:

Yes, but there are developments being looked at with joint ventures with other tribes.

WILLIAMS J:

Okay, all right.

MS SYKES:

But what I'm saying is that tapestry of relationships has not prevented development. I mean on – in Ōhiwa, for example, there are oyster farms there that are owned by private Ngāti Awa owners now that are also within that space, and they kind of co-exist with the customary relationships that have long endured since 1840 there.

WILLIAMS J:

Yes. My interest is really to what extent Te Whakatōhea advances the application as a vindication of customary rights and interests, and to what extent, if that is the way it is advanced, that is accepted by the consent authority.

MS SYKES:

We'll make sure we have –

WILLIAMS J:

Also some dates would be useful.

MS SYKES:

You might hear that from Mr Pou. Those are his clients.

WILLIAMS J:

Okay, right.

MS SYKES:

He may cover those matters, but certainly Robert Edwards and Dr Amoamo worked together to ensure those matters went ahead.

WILLIAMS J:

Yes. Mr Edwards says it's the biggest aquaculture farm in the world. It may be an overstatement unless your world's, you know, Te Whakatōhea.

MS SYKES:

He is the only one in the Whakatōhea world that matters, okay. But I don't propose to take up much more time of – I've just tried to, as I said, the criminal lawyer in me wanted to bounce around the facts so that we actually see a context to which this statute operates. My friend is going to try and finish our presentation after the lunch with the framework and leave those thoughts with you, because the tikanga that is the law and custom here is very important to our position.

GLAZEBROOK J:

We'll take the adjournment and come back at 2.15.

COURT ADJOURNS: 1.05 PM

COURT RESUMES: 2.17 PM

MS PANOHO-NAVAJA:

Mai te rangi ki te papa, ka whakahōnore i ngā tātai hono kei waenganui i a tātou katoa, kua whakarauika mai ki tēnei o ngā whare kōti. Ko Ms Panoho tōku ingoa. E mihi atu nei tēnei mokopuna nō roto o Ngāti Hako, kei ngā rekereke o te maunga o Rae-o-Te-Papa me te moana o Tīkapa. Ki ngā mana reo o tēnei motu, ki a Te Ātiawa me Taranaki ki Te Upoko o Te Ika. Me mihi ka tika hoki ki ngā whānau me ngā hapū o Te Whakatōhea. Me mihi ka tika hoki ki ngā

whānau me ngā hapū o Te Whakatōhea i whakatō ai i tēnei kaupapa mō rātou ake Takutai Moana te take, mō te take mō Ngāi Māori whānui hoki.

May it please the Court, just acknowledging at the outset, as is tika, the connections and relationships that bind each of us and bring us to this auspicious occasion that we are now before the Supreme Court to hear, and also acknowledging the people of this land, Te Ātiawa, Taranaki ki Te Upoko o Te Ika, for their manaaki and having us reside on their whenua for this kaupapa. And I just want to acknowledge also the hapū and whānau of Te Whakatōhea who have been committed for several years now to this journey in the protection of their takutai moana which they hold dear to themselves not only for their betterment, but for the betterment of Ngāi Māori whānui.

Very much the tēina in terms of the Te Kāhui line-up, it's fallen to me to address your Honours on the tikanga-based framework that applies, having heard from my learned senior Ms Sykes about the historical context and the foundational relationships that subsist for the applicants, and in particular the hapū and whānau represented by Te Kāhui in respect of their customary areas.

1420

In doing so, I propose to address your Honours on three overarching matters. The first is what are the underlying tikanga values and principles relevant to understanding the customary relationships between Ngā Hapū me Ngā Whānau o Te Whakatōhea and the takutai moana. The second is what are some of the indicia showing these customary relationships exist, and the third is what are some examples of the tikanga values and principles and how they intercept with the indicia on the evidence.

Now I wanted to begin with a quote from the Waitangi Tribunal in its *Ngāti Awa Raupatu Report*, and that's appended to the affidavit evidence of Paul Harman, who was a witness put forward by Te Upokorehe, and that Tribunal, in discussing the tikanga-based understandings for tribal boundaries and relationships, concluded that: "The essence of Māori existence was founded not upon political boundaries, which serve to divide, but upon

whakapapa or genealogical ties, which serve to unite or bind. The principle was not that of exclusivity but that of associations. Indeed, the formulation of dividing lines was usually a matter of last resort." Now this whakaaro is key in my submission to understanding the Te Ao Māori framework within which rights and interests, including intercepting or overlapping interests in the takutai moana between Maraetōtara and Tarakeha, at Ōhiwa Harbour, and all the way out to Whakaari and Te Paepae o Aotea are operating.

The Court at first instance held that whakapapa is the most important tikanga value in establishing which applicant group holds a specific part of the takutai moana. Te Kāhui agrees. Where appropriate connections have been established, tikanga has and can continue to accommodate a complex web of overlapping interests. In this case the evidence shows a broad consensus by the many whānau and hapū in the claimed area for which CMT titles have been sought to be awarded. This is because of the historical, cultural, spiritual, and ecological relationships that have been woven over time into a tapestry of relationships that bind the whānau and hapū like a kupenga to treasure the taonga that are embedded within its confines. It encompasses culture, relationships, ecosystems, social systems, ways of life, spiritual practices all understood within a framework of principles and values operating as law.

The mātauranga Māori that gave force to these conclusions was rich and multi-layered, drawn from experiential learnings of the applicants. This knowledge passed down over time was durable and cemented by the values that guide tika and correct conduct, promoting intergenerational harmony between the children of Papatūānuku to balance the relationships between the children of Tangaroa and children of Tāne Mahuta, and those are all matters that I can't express more – well any better than what my learned senior Ms Sykes has already addressed you on.

If I come to the first point, which is what are those underlying tikanga values that Te Kāhui say are relevant –

KÓS J:

Can I just check with you, Ms Panoho-Navaja, whereabouts are you connecting this submission to your written submissions, or are we well away from the written submissions?

MS PANOHO-NAVAJA:

Those were introductory remarks, your Honour.

KÓS J:

Yes.

MS PANOHO-NAVAJA:

But effectively it's around the section Tūāpapa o Te Tikanga, in section 3 of the Te Kāhui submissions.

KÓS J:

Right, thank you. Just – it's always helpful to come back to the…

MS PANOHO-NAVAJA:

Yes, thank you. And so in terms of the tikanga values which we say are relevant in this context, I just refer to this PowerPoint presentation which we've set out – well as a system of law, tikanga is governed by fundamental values which act as conceptual regulators to inform behaviours. And Professor David Williams has set out these fundamental values in his evidence at paragraph 45 of his affidavit, which he describes, and it's footnoted in the submissions I think at paragraph 3.2, which he describes as the basis for the Māori jural order.

So this evidence of Professor Williams was reinforced by testimony from pou tikanga, Te Riaki Amoamo, Te Rua Rakuraku, the late Matenga and Hetaraka Biddle, who represented as ngā amorangi ki mua, the leaders at the forefront, and further supplemented by evidence from 14:26:16 ngā hāpai o ki muri), workers or the supporting tuarā, backbone, to those tohunga and pou tikanga from within Whakatōhea, and that rich evidence supported the

conclusions reached by Justice Churchman as to the applicable values in this case.

So in this slide we've identified or summarised really those values that have been referred to throughout the evidence from virtually all the witnesses irrespective of which group they represented in the lower court, and which Te Kāhui say form essential building blocks necessary to establish a group's connection to people and to place, and which gives rise to the exercise of mana whakahaere.

In navigating these tikanga values and principles, there are three points which Te Kāhui submit must be front of mind for the Court. Firstly, at all times the Court engages with matters of tikanga, it must step through a Te Ao Māori portal and consider how that tikanga is to be understood through a Māori worldview. This applies right from the point at which the relevant principle or principles are discerned to their application in context.

The second is in assessing the nature of rights under MACA, the questions of who is exercising rights and on what basis are imperative. For example, is a group exercising mana whakahaere as ahi kā when they're fishing in the takutai moana in order to manaaki their manuhiri, are they doing so based on their intimate knowledge of the locations of ngā taunga ika and the tohu, which are navigational markers as understood through mātauranga handed down as taonga tuku iho? Are they doing so as whanaunga who share in the seascape with each being able to establish their own connection to place and to each other through whakapapa, giving rise to obligations to preserve and utilise the bounty of the moana to sustain their people?

Thirdly, in assessing the evidence, the Court must take care to understand the evidence in context and in light of the complex layer of interests that are being woven together through a single Act. For example, evidence of the continued use of an area of the takutai moana by hapū and whānau to gather resources might on the face of it appear to be a user right. However, when engaging with the relevant underlying principles and values it might more properly be

understood as an expression of mana whakahaere, as it involves having intimate connection through whakapapa to place as well as knowledge of the environment, the tohu, the locations of important harvest sites, and may be done under their own mana without the permission of others.

It's also important to bear in mind the purpose for which –

KÓS J:
Is that matter of permission critical in identifying title?
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MS PANOHO-NAVAJA:
Sorry, Sir?

KÓS J:
Is permission, is that essential or critical in identifying total? You raised the idea of permission.

MS PANOHO-NAVAJA:
I think the more important question there, your Honour, is whether or not you're conducting that activity under the rubric of your own mana whakahaere, so that's the point I'm trying to make there.

KÓS J:
All right.

MS PANOHO-NAVAJA:
And I think the permission point comes in in terms of when you understand the operation of concepts such as manaakitanga and whanaungatanga intercepting with mana whakahaere in the sense of your exercising that mana whakahaere for that particular purpose, and manaakitanga, for example, is viewed as a form of enhancing your mana at place, and so that's a permissive approach to the use of that resource by other groups who are whanaunga.

WILLIAMS J:

It's the case, isn't it, that I guess a good example of that is the reciprocal holding of rights so that the coastal tribes provide access to their resources in exchange for the inland tribes providing access to theirs, with the coastal tribes accessing during the spring and summer and the inland tribes providing access to theirs in the autumn and winter when the birds are fat and the berries are ready, right?

MS PANOHO-NAVAJA:

Yes, thank you.

WILLIAMS J:

That's the sort of thing we're talking about?

MS PANOHO-NAVAJA:

Yes, that's exactly right.

WILLIAMS J:

And there is some evidence of that at Ōhiwa Harbour, for example, with Tūhoe and Whakatōhea.

MS PANOHO-NAVAJA:

With Tūhoe coming into – yes, that's correct, Sir.

WILLIAMS J:

Right, so you might on the one hand say each of them is a PCR in the other's rohe under the mana whakahaere of the host iwi, whichever one that might be, right?

MS PANOHO-NAVAJA:

Yes, that's one way of viewing it, Sir.

WILLIAMS J:

Yes, so you don't have the mana whakahaere when you're accessing the right as an outsider, albeit a related one. Someone else has that but you

nonetheless have a vested right that the person who is the mana whakahaere respects.

MS PANOHO-NAVAJA:

Yes, that's exactly right and that's why the important gateway in, if you like, is the whakapapa and ahi kā connections.

KÓS J:

But the party with the mana whakahaere nonetheless grants permission to access that area within their rohe, on that construct?

WILLIAMS J:

I think it might be said that it did once and now it's enforceable independently.

KÓS J:

Yes.

WILLIAMS J:

And often by relational, kinship constructs anyway so that at some point Tūhoe, in that case, for example, would cede the ground knowing that it had to according to tikanga and it couldn't withhold permission because the right was too vested, I suppose.

KÓS J:

That's what I was getting to, whether you could then reassert the right to grant for or withhold permission.

WILLIAMS J:

No.

KÓS J:

It becomes entrenched.

WILLIAMS J:

It's entrenched. I'm sure there's an English word for this but – becomes almost indefeasible, I suppose, unless you abuse it.

GLAZEBROOK J:

But you can have layers in any event. That's an indication of ownership even if you cede a part.

WILLIAMS J:

Yes. In fact, if you don't have layers something's wrong.

GLAZEBROOK J:

Yes, and ownership in a metaphorical sense obviously because we're looking at a MACA title.

MS PANOHO-NAVAJA:

Yes, thank you, and I don't think I can add too much to that exchange to assist any further.

WILLIAMS J:

I guess the other thing with that, I wanted to ask you about, is because the seascape is such a complex ecosystem with large areas that might be seen in resource terms desert and small areas rich in resources, in some ways very similarly to the bush, do you say that affects the application of the exclusivity test and, if so, how?

MS PANOHO-NAVAJA:

So, I think the, I mean, these are matters which my learned senior Ms Feint will come to as she starts to engage with it, this section 58 test.

WILLIAMS J:

Right, okay.

MS PANOHO-NAVAJA:

So I don't, I don't want to comment too much further beyond that the purpose of what I'm setting out are the tikanga values that are operating.

WILLIAMS J:

Yes, now, I guess this is a tikanga question.

MS PANOHO-NAVAJA:

Yes.

WILLIAMS J:

It is where, for example, you look at that old map, that old typescript map that Ms Sykes referred to, that sets out not just the fishing grounds –

MS PANOHO-NAVAJA:

Yes.

WILLIAMS J:

– but how you line them up with the shore points. I can see why Mr Sinclair thinks that's tapu. Use of those, because they're a core source of protein, might well be closely managed, but travel in areas that do not contain resources that make value in the economy of the people less so, that's my question. Is tikanga resource-focused when it's thinking of exclusion of use and occupation or exclusive use and occupation?

MS PANOHO-NAVAJA:

I think to an extent it is, but it is not the – it's not the only consideration. If you think about the spiritual aspects of tikanga Māori and the cultural aspects, particularly around identity and markers of identity, the journeying or the navigating through these areas is just as important as the ability to be able to use a resource within that area, in my submission.

WILLIAMS J:

Yes, but does identity marker create title in tikanga? Let's use "title" in a broad sense, if you say something is my maunga, does that mean I have title to it? Is identity co-extensive with the idea of exclusive use and occupation?

MS PANOHO-NAVAJA:

Yes. I think if we look at it through a tikanga lens, your Honour, there is – you need to understand all of the values in operation.

WILLIAMS J:

Right.

MS PANOHO-NAVAJA:

Not just a particular part of those values or understandings or reasons or rationale for use of an area.

WILLIAMS J:

Right, so, I guess you're saying whenua itself has whakapapa in terms of that layering, that's the original meaning of whakapapa?

MS PANOHO-NAVAJA:

Yes.

WILLIAMS J:

It has layer upon layer?

MS PANOHO-NAVAJA:

And it's belonging to that area and having that reciprocal obligation to protect and guard it as if it is part of you.

WILLIAMS J:

Okay.

MS PANOHO-NAVAJA:

And from that perspective, I think it is inherently inclusive as well in terms of drawing the threads of whakapapa together across the various groups who might be exercising rights in and using resources in an area.

So if I could return to the next of the three points I was going to address your Honours on was the indicia of customary relationships and those are indicia which Te Kāhui say support the existence of those relationships with the takutai moana and we've provided a table of indicia as an appendix to the submissions for Te Kāhui dated 24 September 2024, and it's got references to the evidence on the record which Te Kāhui say are relevant for the various matters that we've outlined in this slide of the PowerPoint. Those are for your –

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KÓS J:

Can you just identify that?

MS PANOHO-NAVAJA:

Sorry?

KÓS J:

Can we just identify the document you're referring to? I don't think I've got it. I've got three sets of submissions, none of which are dated 24 September.

MS PANOHO-NAVAJA:

Sorry, 23 September, or the date of the submissions.

ELLEN FRANCE J:

Where is the…

MS PANOHO-NAVAJA:

There was a table appended to the submissions.

WILLIAMS J:

Does the PowerPoint slide replicate that?

MS PANOHO-NAVAJA:

No actually the –

GLAZEBROOK J:

No, because it doesn't have the, I don't think it has the references does it?

MS PANOHO-NAVAJA:

No, it doesn't, and actually the PowerPoint was intending to summarise and take you through some of those points without needing to worry about taking down references while I was presenting, because they were already contained in the table.

GLAZEBROOK J:

Perhaps if you could just provide the table separately again, would be really helpful.

MS PANOHO-NAVAJA:

Yes, will do so Ma'am. Apologies for that.

GLAZEBROOK J:

I'm sure we have it somewhere, it's just that it's – as you can imagine there's an unbelievable amount of paper here.

ELLEN FRANCE J:

It's not attached to those submissions.

GLAZEBROOK J:

No, I haven't been able to find it.

MS PANOHO-NAVAJA:

We'll file that, we'll provide a copy of that.

KÓS J:

It appears to remain within your exclusive use and possession.

MS PANOHO-NAVAJA:

Okay so the slide which you have in front of you now is really seeking to locate those indicia within the framework of the various values and principles that are operating because the table that you will eventually, will eventually make its way to you, sets out in some detail the pieces of evidence that we say support each of these indicia, and I've attempted to locate those within the overall framework of the values we say are operating. It's not intended to be an exhaustive list, by any means, and that's well cautioned by Professor Williams where he talks about codification being the antithesis of tikanga Māori, but the purpose is really to provide guidance to the Court in coming to understand how the underlying tikanga values relate not only to each other in terms of being derivatives of each other, mana whakahaere in particular being a derivative of having whakapapa in ahi-kā-roa, and whanaungatanga kaitiakitanga and manaakitanga being ways of expressing or enhancing that mana whakahaere that is operating.

KÓS J:

Although for my part I am still anxious to see how you say that these thoughts were in Parliament's mind when it passed MACA, because I'm not quite sure we've yet established that they were working through the same portal, as you are.

MS PANOHO-NAVAJA:

Yes your Honour, and for my part I think the purpose of this presentation is on the basis that your Honours do buy into the Te Kāhui theory of the case regarding that.

KÓS J:

Yes, we'll probably need a bit more work on that.

MS PANOHO-NAVAJA:

Which is –

GLAZEBROOK J:

Well it's certainly relevant to the first limb anyway.

MS PANOHO-NAVAJA:

Yes, exactly your Honour, it is relevant because we can't escape the specific wording in accordance with tikanga.

GLAZEBROOK J:

And also too the Crown and Seafood have accepted that tikanga is a part, at least, of that second limb. So you're probably on some solid foundation there.

MS PANOHO-NAVAJA:

Yes, thank you.

KÓS J:

So I just don't know how much, when you open that box, how much of the box comes flying out, though, that's what I need to understand. I mean, it's very nuanced, I get that.

MS PANOHO-NAVAJA:

I'm not sure. If I continue on through my line, perhaps –

GLAZEBROOK J:

Well, can it – what you are saying, is that if you are looking at tikanga, you have to look at it through Te Ao Māori.

MS PANOHO-NAVAJA:

Yes.

GLAZEBROOK J:

And you can only do that if you're looking at it as a system of law and custom with these sort of values because it's value-based, so if you're looking at tikanga

as law, however much it's taken into account, we're going to need to look at this. I understood that to be your submission.

MS PANOHO-NAVAJA:

Yes, thank you, your Honour, yes, thank you for that assistance, because that is exactly the point I am trying to make.

So in terms of this, this slide, I just wanted to point in terms of we've talked a bit about whakapapa and ahi kā during the course of the proceedings but in terms of the exercise of mana whakahaere, for example, sheeting home the point, I guess, that that operates within a framework, as you say, of having reciprocal obligations to people and to place and that's how you need to understand the operation of whanaungatanga, kaitiakitanga and manaakitanga, and I did want to point out for your Honours further reading at your leisure the tab 51 of the Te Kāhui bundle, the late Moana Jackson in his evidence in respect of Motiti Island has some discussion at paragraphs 93 to 97 of the tikanga paradigm within which the exercise of mana is operating, and also he goes on at paragraphs 98 to 119 to set out the tikanga basis for the establishment of what he terms mana moana.

GLAZEBROOK J:

Do you say that's in the bundle of authorities, is it?

MS PANOHO-NAVAJA:

The Te Kāhui bundle at tab 51.

GLAZEBROOK J:

Okay, thank you – 59, did you say?

MS PANOHO-NAVAJA:

51.

GLAZEBROOK J:

51, I had 51, thank you.

MS PANOHO-NAVAJA:

Importantly, in the context of this case, the evidence that I've just referred to is consistent with that of pou tikanga Te Riaki Amoamo where he stated that under our tikanga we belong to our customary land and sea through a combination of our whakapapa to the land and the occupation of our ancestors keeping the home fires burning. Maintaining your ahi kā rua means that you are there permanently and you maintain your customary title.

The third point that I wanted to address your Honours on is the examples of the – going through in a bit more detail the examples provided in terms of the various indicia. So if I could go to the next slide please. Now, this is Maruhia Atu o Te Tapu o Muriwai, it was a waiata which has been adapted to a tauparapara and is commonly used to describe the rohe and whakapapa of Te Whakatōhea and my learned senior Ms Sykes opened with a part of that this morning in her opening presentation.

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We're advised by our clients that there were perhaps a few words that weren't accurately reflected in the oral presentation, and so we'd urge that this be known as the correct version of the record, and that's been provided in the affidavit of Anna-Marei Kurei of Ngāti Ira where she's set out in quite some detail actually, there's an appendix to her affidavit which explains each of the lines of the waiata and what their significance is to Te Whakatōhea, but more importantly, we say this is an indicator of not only sites of significance, whakapapa to eponymous ancestors within the rohe, but really speaks to that interconnectedness between the people of the land and area and the ecology and the environment that surrounds and nurtures and nourishes that people, and so this is a particularly important indicator of that ancient knowledge that has been passed down through the generations.

If we could go to the next slide, please. So Ms Sykes has already gone into some detail about this map, Ngā Taunga Ika o Te Whakatōhea, but in addition to what she's set out in terms of the connection to and extent of the use of the area of takutai moana within the rohe of Te Whakatōhea, the map is also an

indicator of mana whakahaere, we say, in the sense that the naming of places is one indicia of having that mātauranga and knowledge necessary to firmly root people to that place, and it's not just the naming of places or the fact that their fishing grounds are for particular uses, but the level of detail and knowledge that has gone into the preparation of this map and in particular the intimate knowledge that is set out in some of those – under some of those names includes tohu, so what were the markers or – navigational markers or location sites of those fishing grounds.

It also talks about the practice or the culture that was undertaken in visiting those sites, for example Matawiwi Tauatoru, which is a site located near Whakaari. There's an explanation there about while a party went ashore to collect tītī others would remain on the boat to fish, so it's that whole connection to place. There's parts of the hapū or whānau going onto tītī and gathering – going onto Whakaari, I beg your pardon, and collecting tītī and others remaining on the boat to fish at that site.

Rurureherehe is another site near to Whakaari, and the level of knowledge depicted there in terms of knowing that it was – that those types of fish lived in caves and knowing that it was important to pull fish away from the rock on the first strike, so that level of detail I think is worth mentioning, but also demonstrates the intimacy of connection to that place.

WILLIAMS J:

Ms Sykes might have said this, and if she did I didn't catch it, how old is this map? When was this map made?

MS PANOHO-NAVAJA:

I don't know that information off the top of my head, sorry, Sir. I'm sure we can locate it, though. Perhaps it's something we can provide with the next.

WILLIAMS J:

Sure.

MS PANOHO-NAVAJA:

I'll carry on if that's acceptable. So the next slide is an example in the modern-day context, being the Whakatōhea mussel farm, as an indicator of the continued occupation of the rohe moana by Te Whakatōhea and it was seen as an opportunity to harness a part of the rohe moana which was not taken by virtue of raupatu in order to sustain future generations, and so what you see there are the threads of ahi kā, mana whakahaere, the elements of kaitiakitanga in terms of being a key driver to sustain future generations and manaakitanga, all weaving together through this example because, of course, the mussel farm services more than just other people of Te Whakatōhea.

WILLIAMS J:

Is it all three of those locations or just the one ring black?

MS PANOHO-NAVAJA:

So the black lines, Sir, are the area that was granted which is a reference to 3,000-odd hectares. I understand the other two are proposed new areas –

WILLIAMS J:

They haven't been granted yet?

MS PANOHO-NAVAJA:

– but I don't know that they've been granted yet.

KÓS J:

What does it look like? Are we talking about physical structures or are they mussel beds or what are we doing?

WILLIAMS J:

They're physical structures.

MS PANOHO-NAVAJA:

I would anticipate they would be, Sir.

GLAZEBROOK J:

Although I think mussels are relatively less environmentally difficult compared to some other sort of aquaculture such as salmon. You need less, although I don't know about it in the open ocean. That's an interesting one.

MS PANOHO-NAVAJA:

Yes, yes.

WILLIAMS J:

Well, the great thing about them is they attract snapper.

MS PANOHO-NAVAJA:

Yes, and I think that's actually referred to in the Tauranga Ika map. There were some questions before the break for my learned senior, Ms Sykes, around the mussel farm. As far as I've been able to advance that in the time, we've located in the evidence of Te Riaki Amoamo an appendix to his affidavit in the High Court was his evidence provided in support of the application for the mussel farm and in that he goes into quite a bit of detail around the values and principles which apply, the Whakatōhea history, the rohe of Whakatōhea, and how those values and principles are of significance to the hapū of Whakatōhea and, of course, the granting of that application continued. So that's as far as I've been able to advance it.

WILLIAMS J:

Yes, well, that's helpful, but the other thing is the decision itself will record whether these connections were in any way relevant to the grant. So the Regional Council's decision may well be of some significance. I don't know. I don't know what it says.

1500

MS PANOHO-NAVAJA:

Thank you, that's noted, Sir. If I could go to the next slide, thank you. So I don't think there's any contention, having heard the exchanges earlier, regarding the prominence and importance of rāhui as an illustration or indicia of the exercise

of mana whakahaere at place, and all I've sought to do there is to outline some examples in the evidence of where those have occurred, and both of those references have been referred to by my learned seniors Ms Sykes and Ms Feint this morning. But there is where it's placed and located in the evidence.

I've been asked by clients to clarify in terms of the duration that the Muriwai rāhui was in place. It's 400 years rather than 40 years is the evidence, and also to clarify that the extent of that rāhui Mai Nga Kuri a Wharei is in Bowentown, so near Katikati ki Tihirau being near Cape Runaway. So that's the extent of that rāhui, and an indication of the immense mana that Muriwai held.

GLAZEBROOK J:
What does that mean though?

FRENCH J:
Is that said in the evidence?

MS PANOHO-NAVAJA:
Yes it is.

FRENCH J:
Right.

KÓS J:
Was that a complete rāhui. I mean did that prevent the harvesting of kaimoana for 400 years?

MS PANOHO-NAVAJA:
Yes I think the evidence is that that was the case.

GLAZEBROOK J:
Just in a specific area though presumably?

WILLIAMS J:

Well that's the entire Bay of Plenty. So there's probably a little bit of Homeric hyperbole?

GLAZEBROOK J:

Yes, exactly.

WILLIAMS J:

But the point is –

KÓS J:

Or some very hungry people.

WILLIAMS J:

Yes, who lived on pigeons for 400 years.

MS PANOHO-NAVAJA:

Yes, the bush blocks became very important at that point. I don't, yes, I don't know how, whether I can advance that any further.

GLAZEBROOK J:

That's fine.

FRENCH J:

So was the 400 year accepted by all of the expert witnesses or was it contested –

MS PANOHO-NAVAJA:

To my knowledge it was your Honour.

FRENCH J:

Right, okay.

WILLIAMS J:

The point is, that's the story. Everyone agrees that's the story.

MS PANAHO-NAVAJA:

Yes, that's the narrative.

WILLIAMS J:

And since Muriwai arrived around 1200.

MS PANOHO-NAVAJA:

Yes.

WILLIAMS J:

They were eating kaimoana by the time of Captain Cook.

MS PANOHO-NAVAJA:

Yes. The second rāhui there Ms Feint has already addressed is the more contemporary rāhui regarding the eruption of Whakaari in 2019.

Just to supplement that, I think some other important matters to highlight are that rāhui can only be placed by those who whole mana whakahaere and I don't think it's contentious but the evidence of Donnie Kurei in particular for Ngāti Ira reinforced that the reason behind that is because you'd never place a rāhui on areas that you don't govern, manage or look after, and there can be quite significant spiritual comeback if that were to occur.

You also see in the context of rāhui the various threads of tapu and noa and the idea of the protection of mauri, so those are significant spiritual rather than physical acts, which are being exercised in terms of tikanga Māori, or Te Ao Māori's understanding of the operation of mana whakahaere.

If I can go to the next slide, thank you. So a more contemporary or another version of kaitiakitanga that has – that was illustrated across the evidence for Ngā Hapū o Te Whakatōhea were the various modern-day activities being conducted by hapū and whānau in the exercise of their kaitiakitanga, and so the evidence of Tracy Hillier for Ngāi Tamahaua set out some of the examples that her hapū exercised in terms of to reflect their kaitiakitanga, and those are

supportive of the operation and existence of mana whakahaere at place. Her evidence also talked about engaging over a 20 or 30-year-period with councils to remain active in the protection of important resources within their rohe. One example in the evidence is the developments at Waiotahe where Ngāi Tamahaua supported – opposed the developments and petitioned and protested that in terms of the council approving those developments, and so did Upokorehe. So there's examples across the rohe and the evidence which we say are indicia of that continuing exercise of mana whakahaere.

The last slide is an example or an illustration of the exercise of manaakitanga, and there are many within the evidence, but in particular this example stood out, and it was in the evidence of David Armstrong where he referred to the Mokomoko whānau in particular who were renowned for their seafaring ability and for around 70 years they would pilot ships into – entering into the Ōpōtiki Harbour. And so it speaks to their navigational abilities and their intimacy of knowledge to that particular area over a significant period of time, but also members of the Mokomoko whānau operated passenger mail and cargo services between Ōpōtiki and Cape Runaway, and there is evidence of Whakatōhea witnesses owning ships, and each hapū I think had a ship. The ship for Ngāi Tamahaua was the *Mere Paora* and the Mokomoko ship referred to here was renamed the – was referred to as the *Aio* which was actually the A10 registration number, but to the people looking from the shore it looked like *Aio* which is referring to the calmness of the water, so I thought that was a nice little quote to refer to, and the fact that these ships were owned and navigating quite a vast area in terms of the seascape, not just within the harbours, is illustrated in this example where there's the weekly deliveries out to Whakaari – I think it's mail deliveries or something like that, yes, regular weekly deliveries out to Whakaari to the men working there.

The exercise of manaakitanga is also demonstrated in terms of the supply of the fish that was caught on the *Aio* to the two local fish and chip shops at Ōpōtiki and Whakatāne, so I thought that was a nice illustration of that mana whakahaere at place and that mana being enhanced by the ability to care for

and nurture the wider community in addition to just members of that whānau or hapū.

Thank you, your Honours. Unless you have any questions for me, those were the only matters that I needed to address.

GLAZEBROOK J:
Looks like no, so thank you very much.

MS PANOHO-NAVAJA:
Thank you.

MR FOWLER KC:
If it please the Court, I didn't want to interrupt the Te Kāhui presentation at all so I was just waiting for this moment to indicate that we've located the source consent decision and the assessment of effects and we can make that available to the parties and the Court.

GLAZEBROOK J:
For the mussel farm?

MR FOWLER KC:
For the mussel farm.

GLAZEBROOK J:
Thank you very much, very helpful.

MR FOWLER KC:
There's more information actually in terms of the mussel farm on the Te Tāwharau website but that would be really a matter for Mr Pou to advance if he wished to.

GLAZEBROOK J:

Thank you very much. Ms Feint, is it? Can you give us some indication of how we're going in terms of the timetable that we had because we're a bit ahead of ourselves, so it's just to check where we are.

MS FEINT KC:

I think we're pretty much on track. I wasn't anticipating we'd need the whole day tomorrow because…

GLAZEBROOK J:

No, well, that's what we were thinking. So what were you thinking in terms of how much of tomorrow because obviously the next people and potentially the people next week, although it might be that we just stop earlier this week and just start again next week, depending upon whether people have got flights and things obviously.

MS FEINT KC:

My estimates are nearly always wrong but with that caveat I would anticipate – so we've got to cover the section 58 legal test and then the Whakaari appeal, so I imagine we'd need at least until lunch time, but I wouldn't have thought we'd – we wouldn't take the whole day I don't think.

GLAZEBROOK J:

All right, so the Thursday people would be fine to start after lunch, if we got them here?

MS COOPER KC:

I'm next, your Honour, and yes, that's fine, thank you.

GLAZEBROOK J:

All right, and maybe we shouldn't get ahead of ourselves but it might be that somebody at least from next week can start, so…

MS ARAPERE:

Your Honour, Ngāi Tai, we're here, and able to go at the end after Te Whānau-ā-Apanui. I understand that counsel for Crown Regional Holdings and Whakatāne District Council have arranged flights to come on Tuesday but I suggested to them that I could leapfrog and come in on Thursday.

GLAZEBROOK J:

No, no, I understand. That's why I was saying – yes, that might be useful. Anyway, we'll see how we go.

MS FEINT KC:

So a further note about the mussel farm, Mr Pou does know the details of how that was covered in the treaty settlement because there was extensive new areas that were granted.

WILLIAMS J:

Didn't know if Whakatōhea had a treaty settlement.

MS FEINT KC:

Yes.

WILLIAMS J:

Right, so it…

MS FEINT KC:

And it's absolutely enormous size, hectares, it's…

WILLIAMS J:

That's the space allocation rather than the resource consent?

MS FEINT KC:

Indeed, and Robert Edwards said in his evidence when he was talking about the rāhui the mussels are suspended under buoys and so when they had the rāhui and the eruption was in December right before Christmas, which is sort of the prime time for the market, everyone wants mussels for Christmas, and the

mussels got so fat the buoys started to sink and they had to sort of go out there and rescue them from sinking, but they didn't harvest them for that whole period because of the tapu nature of the rāhui.

The other point I was going to add to Ms Panoho-Navaja's presentation was that another of the ships – there was a lot of evidence about the success of Whakatōhea hapū as coastal traders before the raupatu, and one of the ships whose name I particularly liked was *Hokopoaka* which means "selling the pigs", they had sold I think from memory –

WILLIAMS J:

"Bring home the bacon" or something.

MS FEINT KC:

Yes, it was 50 or 100 pigs bought a ship in those days and the chief, the evidence was, that the hapū had collaborated in order to raise the pigs and sell them and then the chief bought the ship and used that to trade to and from Auckland and when the raupatu happened and the military came in, they burnt the ships. They burnt the ocean-going waka, the coastal traders and that had a very severe impact on the Whakatōhea economy, obviously, along with the fact that they no longer had agricultural land because the land had been confiscated.

So if we turn to matters legal, I have filed a road map which should be before the Court, so it's the one headed "Road map for Te Kāhui – section 58 CMT test".

Paragraph 1 is the introduction that I went through this morning and the references to the evidence.

Paragraph 2 is Te Kāhui's best efforts at working out what the section 58 test means, so I thought I'd have another go at that. So I think everyone agrees that the first limb is holding the rohe moana, whatever that might be, in accordance with tikanga which means, as my friends have outlined to the Court

this afternoon, understanding the whakapapa, the use and occupation which is the ahi kā roa and the other take whenua that are relied on and so we say that's the primary limb because that's opens the portal into the sphere of tikanga as a legal system and then we say that the second limb, the section 58(1) or whatever the number is, is the limb that frames or qualifies, directs, the Court's attention to what needs to be proved in terms of having a territorial interest in holding the rohe moana in accordance with tikanga and we say that's – that limb is also informed by tikanga because use and occupation is on the basis of rights derived from tikanga, so necessarily it has to be seen through the lens of tikanga, but we say that the exclusivity part of it is the bolt-on from Canada which is serving the function of a drafting gate helping the Court distinguish between CMTs which are a territorial-type interest which creates an interest in land on the one hand and PCRs which are customary rights but are not an interest in land, so they're of a lesser nature and so that, that's kind of a –

GLAZEBROOK J:

Do you just get that from the Canadian jurisprudence or is there something in the Act itself that says that? Because the definitions of the different interests that you can have are in different sections of the Act, not section 58, aren't they?

MS FEINT KC:

Yes, that's true, your Honour, and the – so the problem is, like it seems from the legislative history, that you've got one part of that second limb where the wording has been taken from Canada but in a different context and the other part of the limb has been taken from Australia, also in a different context.

GLAZEBROOK J:

Yes.

MS FEINT KC:

And they've been mashed together and that creates, in effect, a unique test that doesn't neatly map onto the principles in either Canada or Australia. So that's a long-winded way of saying you need to understand that second limb in the context of the statutory regime or else it simply doesn't make any sense.

1520

KÓS J:

I should know the answer to this but I don't. You talk about CMT as an interest in land. Is a CMT caveatable?

WILLIAMS J:

It's not registerable.

MS FEINT KC:

I have no idea.

KÓS J:

Not registerable? No.

MS FEINT KC:

It can't be.

WILLIAMS J:

Unless, well, because if there is – some seabed is the subject of Torrens title, and they must be caveatable on those, but they're pretty exceptional.

FRENCH J:

Section 60 sets out the scope and effect of customary marine title.

MS FEINT KC:

Yes, because it says section 60 subsection (1)(a) "provides an interest in land, but does not include a right to alienate or otherwise dispose of".

KÓS J:

Yes, but I mean a caveatable interest is just simply an interest in land.

MS FEINT KC:

Well you wouldn't need to caveat if it can't be disposed of in any way.

KÓS J:

Well no *it* can't be.

WILLIAMS J:

The underlying title can.

KÓS J:

The underlying title can.

MS FEINT KC:

You mean the CMT?

KÓS J:

No, the legal estate that the CMT applies to.

MS FEINT KC:

Well that, yes, I can't remember off the top of my head what the Land Transfer Act 2017 provisions…

FRENCH J:

What about subsection (3) of section 60?

KÓS J:

That answers the point.

MS FEINT KC:

I wouldn't have thought that could be caveated if there's no ownership – like under section 11 –

KÓS J:

I'm not, perhaps I'm being imprecise. My point is can the holder of a CMT caveat the underlying legal title. So I'm not suggesting that the CMT is caveatable, because it's not a registered instrument.

MS FEINT KC:

But the underlying title has a special status that no one's capable of owning, so how could you caveat that.

KÓS J:

No, that's probably right isn't it.

WILLIAMS J:

But isn't there a provision that saves port company titles et cetera? And they are the subject of Torrens titles.

MS FEINT KC:

Which titles sorry Sir?

WILLIAMS J:

Torrens – Land Transfer Act titles.

GLAZEBROOK J:

Well there will be some other private ones as well I think. Not many.

MS FEINT KC:

In relation to private titles, yes, but not the CMCA, which is the common part of the territory.

KÓS J:

Correct. Quite a lot of private titles, in fact, on the CMCA. Just need to go up and down the Hokianga Harbour to see them.

MS FEINT KC:

Sorry?

KÓS J:

Just need to travel up and down the Hokianga Harbour to see them.

MS FEINT KC:

Yes, exactly. So just coming back to that second limb then. So we say the assessment of, in effect, non-exclusively using and occupying the territory requires the hapū to show it holds authority at place as a matter of tikanga, which we are defining as mana whakahaere and that that mana whakahaere, because the, that's the area that's your ancestor, you have both rights to benefit from the fruit of your ancestor, but also the obligations and responsibility to protect it as the kaitiaki. So if you turn over to –

KÓS J:

Is that repetitive of the first limb? I mean the first limb surely engages mana whakahaere?

MS FEINT KC:

Yes it does, but if you look at the legislative history the concern was that no one really understood what holding in tikanga means, that's the official advice, so it seems to me what they were thinking was that they would create certainty by framing the first limb to establish that there is a qualitative dimension to the threshold that you have to meet in order to satisfy the Court that you have rights of this territorial nature.

KÓS J:

So what work is "and" doing at the end of subsection (a), of paragraph (a)?

MS FEINT KC:

Well I mean inevitably there's going to be some crossover between the first and second limbs because you have to understand use and occupation through the lens of tikanga, but the "and" is – well we say if you turn over to paragraph 4.3 of my road map, this is where we set out what we say the purpose of the second limb is.

So first of all, it adds a qualitative dimension to the nature of the holding. It must be of a territorial nature such that you have the right to speak for the land and the people of it. We say exclusivity in itself can't be determinative because it's

not an ingredient of what you need to prove in terms of the burden of proof under section 106(2), so we say it's more provided as guidance to direct the Court to the nature of the enquiry that's required.

Then secondly we say it's acting as that drafting gate mechanism in distinguishing between CMTs and PCRs, and the flexibility in the Act is underscored by section 107 of the Act, which provides the Court flexibility in dealing with the application because it can treat an application for recognition of CMT as a PCR and vice versa so that, if it considers that the threshold has not been met, it can consider granting a PCR instead.

Then thirdly, the work that the second limb is doing is modifying, albeit we say to a very limited extent, the extinguishment principle. And that is something that both lawful extinguishment and substantial interruption we say are not tests in tikanga, albeit that tikanga also has an understanding of the need for continuity, as we discussed this morning.

WILLIAMS J:
So it's possible to read section 58(1)(b)(i) as if it is an explanation of holding, of what is meant by holding?

MS FEINT KC:
Yes, exactly. Exactly.

WILLIAMS J:
Or it's intended to add an additional Pākehā element to the test, one of those two?

MS FEINT KC:
Yes, and we say it's not the second because that's not the way that New Zealand law has approached ascertaining title.

GLAZEBROOK J:

Although you did just say that substantial interruption is not really a tikanga concept and therefore does seem to be in part at least an addition which is related to – well it's related probably to how the intersection of tikanga and common law and statute law and regulatory law because a lot of the interest that might've arisen during that period arose lawfully through, for example, resource consents, et cetera.

I'm just – that's a question. It was probably phrased as a proposition but it was meant as a question, because you did seem to accept that substantial operation had a non-Māori, non-tikanga concept, even though you said it was narrow.

MS FEINT KC:

Yes, that's right. So we're saying that – and that's part of the work that that second limb is doing. And if you think about the burden of proof, Māori applicants don't have to show, they don't have to prove either exclusivity or substantial interruption so those are matters that third parties may raise if they consider that their rights may be infringed by customary title, and then that's something that would need to be considered by the Court.

KÓS J:

Subject to section 98, I think it was, that still requires those points to be established. It's a strange way of approaching the burden of proof, but that's what Parliament has provided.

1530

ELLEN FRANCE J:

Yes, I was going to ask about that because although there may not be a burden in relation to it, if the Court's not satisfied in terms of section 98(2) then the order can't be made, can it?

MS FEINT KC:

Well, no, of course not but section 58 is the test that is doing the work. I mean it's not surprising to say the Court needs to be satisfied the requirements in section 58 are met before it can make the orders.

ELLEN FRANCE J:

The burden of proof then is not the complete answer, is it?

FRENCH J:

There'd have to be some evidence.

ELLEN FRANCE J:

The fact that you don't have a particular burden doesn't necessarily provide you with the answer that you want, that the applicant wants.

MS FEINT KC:

Well, except that – I'm not so sure about that because if you – what I was going to come onto next is a discussion of the *Ngāti Apa* principles in relation to customary rights and they subsist until they are extinguished, so the applicants need to establish that they have those customary rights and have held them mai rā ano but the Court, like section 106(3) says that in the case of every application for a recognition order, there is a presumption, in the absence of proof to the contrary, that a customary interest has not been extinguished, so you're starting from a place where the statutory regime is presuming that there are customary interests that need to be recognised and, of course, applicants need to put forward evidence of the basis upon which they say they hold the area in accordance with tikanga, but I can't see that section 98 is adding anything to that.

KÓS J:

Well, that gives you a nudge on substantial interruption if, as I think, there's a connection between substantial interruption and extinguishment or perhaps abandonment as one form of extinguishment, but it doesn't help you much with

exclusivity because it doesn't – section 106(3) is not concerned with the exclusivity element.

MS FEINT KC:

No, but section 106(1) doesn't require the applicant to prove exclusivity which…

WILLIAMS J:

Section 58 does.

KÓS J:

And in combination with section 98.

GLAZEBROOK J:

Well, I suppose how you might reconcile it is if somebody doesn't say you don't have it and you've given enough evidence of your title and the longevity and how it's been exercised. So it's not a positive proof of it. It's a – you have to give enough, which you would be doing anyway if you were saying you held it under tikanga because you can't say, well, I held it under tikanga, you know, 200 years ago without saying what the manifestation of authority, et cetera, is currently, I would have thought.

MS FEINT KC:

Except the first limb uses the present tense, holds. So it doesn't necessarily mean what was the position back in 1840.

GLAZEBROOK J:

No, well, that's probably something that the Court of Appeal wasn't right on either.

FRENCH J:

Can I just ask you, Ms Feint, did you advance the interpretation that you're advancing here in the Court of Appeal? I can't really tell from reading the judgment.

MS FEINT KC:

We tried to but not, evidently not in a very persuasive way, or at least it wasn't as sophisticated an analysis as it is now.

WILLIAMS J:

Well, those two things are not necessarily mutually exclusive.

MS FEINT KC:

Yes, we did advance that and Justice Miller refers to the argument at one point in his judgment but the majority doesn't appear to.

WILLIAMS J:

I think your argument would be much stronger if "legal extinguishment" was defined as including substantial interruption. It's not, it's a separate requirement, and it maybe that's aimed at interruption that has occurred in the interregnum between 1840 and the present day where the exclusivity has been, the claim to exclusivity at least, has been revived.

MS FEINT KC:

What do you mean. By whom?

WILLIAMS J:

By the applicant group, and the argument against that is there has been substantial interruption. Now it follows that that's extinguishment but it is – it would seem to me that PCO would normally write the – write substantial interruption into the definition of "extinguishment" by law, which is the way, it's the normal way that this issue was addressed overseas.

KÓS J:

I'm not sure what they're doing in section 106(3) otherwise. That's what's puzzling me.

WILLIAMS J:

Well my question is just whether it's, whether the reference to "substantial interruption" in section 58 is about an intervening interruption that must be addressed in its own right under section 58, separately from the question of extinguishment. Now you could have just said, I'm sorry, but it's been extinguished because you stopped for five or 10 generations. It does seem a little muddled, I agree, but your argument would be bulletproof if legal extinguishment expressly included substantial interruption. The problem, from a drafting point of view, is it doesn't. When on one view of the law there really, substantial interruption is just a subset of legal extinguishment, the other one being by statute or – yes, by statute really, that's the only other way of doing it.

MS FEINT KC:

Indeed. So just to finish off what I was saying before, so first point is requirements for section 58, the way I see it, so the applicant group has to prove the positive element, that it holds the area in accordance with tikanga, but it's clear in section 106(2) that it doesn't have to prove that it exclusively used and occupied that area, and so we're saying well that is showing you don't have to prove a negative, you don't have to prove there hasn't been substantial interruption, but if it's raised by somebody else, whether that be another iwi or hapū or third party, then it may become something that needs to be considered by the Court.

ELLEN FRANCE J:

Well would you say the Court couldn't, of itself, query whether there was substantial interruption?

MS FEINT KC:

Well if, I suppose if it considered there was evidence that raised that issue it might decide that it's not satisfied.

WILLIAMS J:

It would have to, wouldn't it, because it has to be satisfied if 58. So if it considers that the evidence leaves a gap, or demonstrates the lack of exclusivity, then it would be bound to turn it down, whether or not there's a contradictor.

MS FEINT KC:

So if we look at the third limb now, I'll have a go at this. We've been batting this around for weeks and it's incredibly awkward drafting, but it seems to us the real question is what is being substantial interrupted, so of what. Is it the use, is it the occupation, is it the exclusivity. Well we say it must be the mana whakahaere or the authority at place. So in other words is there something that displaces the mana whakahaere that has been exercised by the applicant group, and we say that in the context of the balancing regime that Parliament has undertaken in constructing the rights and interests that are conveyed under the MACA Act, and also in the context of the evident intention to give effect to the long-standing inhered mana tuku iho that the purpose section of the Act says tangata whenua have exercised for a very long period of time.

1540

I thought just to put that in context, when Te Riaki Amoamo gave evidence he attached to his evidence his whakapapa, and he went back 28 generations to the landing of the Nukutere waka and his descent from Tauturangi, who disembarked from the Nukutere waka and settled at Ōpape in Ōmarumutu, and Dr Amoamo's evidence was 28 generations, the same people, his descendants, are still in that same place, and I tried to work out how long that would be and it must be almost a millennium and I say there's a 30-generation timespan because Dr Amoamo is 87 years old now, so there would be at least three generations following him, and when you look at it in the context of that extraordinarily long span of time where these people have been occupying the same place, from a Te Ao Māori perspective substantial interruption would have to be physically moving the people out of that place so that they were no longer exercising their mana there, because they're taking a very long-term view and they're saying, well Pākehā have only been here since 1840, but they're taking the long-term approach to – trying to incrementally secure their rights from one

generation to the next, and so we say that puts substantial interruption in a context that very much allies it to the principles of lawful extinguishment that *Ngāti Apa* recognised.

We also say that when you look at the connection to place that mana whakahaere represents, that is the same concept that the Australian jurisprudence articulates in terms of the substantial interruption cases there, and they talk about the spiritual connection to country and whether that's been interrupted, whether the people still maintain that spiritual connection, and that's a good reminder that from a Te Ao Māori perspective that mana whakahaere is not only about physical use and occupation of that place, it's also about the cultural association and the spiritual connection to it.

So the examples that my friend from the Seafood Industry gave this morning are based on transitory use of the ocean for the purposes of fishing and they're all entirely focussed on physical use of the sea, but they don't disrupt in any way the mana whakahaere and kaitiakitanga that Te Whakatōhea are evidently still exercising over the takutai moana in terms of their spiritual and cultural obligations to care for that place, notwithstanding that they don't have the full authority that they used to pre-1840 because of the – because of their legal incapacity.

So if we then move on to paragraph 3, where we talk about the whakapapa –

WILLIAMS J:

Just before you do, if the maintenance of spiritual association in accordance with the Australian approach to these things is – doesn't find favour and that we need to think about what exclusive use and occupation means in physical terms, is it still not the case that exclusivity has to be assessed by reference both to the resource and the use of the resource by the so-called customary owners? Because we're not building a fence around the CMT, you don't have to establish you built a fence around the CMT and everyone is kicked out, do you?

MS FEINT KC:

No.

WILLIAMS J:

Right, so the question is what do – what level of exclusion do you need to achieve? And that, it seems to me, must obviously be by reference to the tikanga basis of the use, doesn't it?

MS FEINT KC:

Well, we're saying it's not the use at all, we're saying –

WILLIAMS J:

No, but if you don't, if you don't make it on that one –

MS FEINT KC:

Mhm.

GLAZEBROOK J:

Well, you don't say it's not the use at all, do you, you just say that's not the only aspect of it, or have I misunderstood? You're not saying use or occupation is irrelevant?

MS FEINT KC:

No, we're not saying that.

GLAZEBROOK J:

You just say there's a wider dimension to it, or a much wider dimension to it, and possibly even a more important dimension, is that – have I understood that correct?

MS FEINT KC:

Indeed. Perhaps if we could bring up Moana Jackson's evidence at tab 51, he has quite a nice explanation which I thought was helpful. So if we go to paragraph 117. So we're saying transitory use, if you're accessing or navigating

through the sea, or even fishing, we're saying, well, that's a transitory use that does not amount to substantial interruption.

WILLIAMS J:

It's not really in tikanga terms though, fishing is not transitory in tikanga terms, it's absolutely fundamental. Transiting is transitory, but if you're stopping to fish off one of those rocks, then that's absolutely core to the nature of the asset and the relationship of the people with it, surely?

GLAZEBROOK J:

Well, you were talking about third-party fishing though, weren't you, there?

WILLIAMS J:

I am too, yes, I am too.

GLAZEBROOK J:

Oh, are you? Oh, I see what you mean.

WILLIAMS J:

So, the point is that the landscape has to be seen as both a matter, a place to which there is spiritual and identity connection and a complex of resources, it's not a paddock, a very complex, nuanced complex of resources and the question is, is the relationship with and control over those resources maintained or is it substantially interrupted? That narrows your focus a great deal to those fishing places that the map identifies, to the various rocks where collection is occurring and to the stories of the imposition of rāhui for both cultural and conservation reasons, right. So even if exclusivity is in the Act, it's exclusivity with reference to the resource complex, it's not a fence. Even if a hundred ships a day are passing through this place, that's not going to effect exclusivity in terms of the use and occupation that's relevant to customary owners. Only the squeezing out of these people from aspects of the resource complex can do that, provided it's lawful, and the question is whether the evidence demonstrates that there has been, that the use of that complex and the maintenance of identity and spiritual connection has been so impaired as to be substantially interrupted.

Well, that must be why tikanga is relevant to the second part as well as the first part. Otherwise, you are requiring in the second part that you build a fence around the CMT when, in tikanga terms, that's not what's required.

MS FEINT KC:

Well, yes, of course, but I would submit it's still got – that analysis still has to be sensitive to the context of colonisation.

WILLIAMS J:

Absolutely.

MS FEINT KC:

And the legal incapacity of Māori to prevent other people who are lawfully fishing.

WILLIAMS J:

Yes, so if there remain substantial user by the 28th generation or the 30th generation, that might be relevant to whether there's substantial interruption, even if others are using it too. On the other, if some big fishing company fishes a rock out so that it is simply no longer usable, in practical terms that might be a substantial interruption. It's just that that resource complex is gone.

1550

Now, I don't think that's the case here, but I don't know, that'll be a question of evidence. That seems to me to make at least practical sense of whether mana whakahaere can continue, and of course some aspects of the resource might be compromised and others not, and some aspects of mana whakahaere may be compromised and others not. It then becomes a question of degree. How important was the imposition of the rāhui after the tragedy at Whakaari in terms of demonstrating continuity with Muriwai's original rāhui? What's the state of the fishery? How active is Te Whakatōhea in that resource complex? How often are mana whakahaere actions taken to protect the resource complex? These are all questions of fact, but it seems to me it's dangerous to

get too scared of exclusivity because it's exclusivity in a particular cultural and legal context.

MS FEINT KC:

We're not scared of it, we're just saying it's not particularly helpful because it's –

WILLIAMS J:

Yes, I guess the gymnastics required to get to that point may be unnecessary if in fact the exclusivity you're talking about is the exclusivity that tikanga would require, because that's the only kind of exclusivity that makes sense.

MS FEINT KC:

We don't accept that overuse of a resource is sufficient to amount to substantial interruption, because it –

WILLIAMS J:

Well that's overuse, but what about extinguishment of the resource?

MS FEINT KC:

Well as long as it can be rekindled, you can always nurture your fires and re-establish that connection, so –

WILLIAMS J:

But if there's been interruption, if that, you know, if that happened a long time ago and in fact the fishery is gone, that takes away in the point in the CMT, for example. That might be substantial interruption. If all the toheroa have been dug up and taken away, that might be the end of the game in practical terms.

MS FEINT KC:

Well that – but that's a very extreme example because it's almost always the case that resources are not completely exhausted like that. They may be depleted. We would say that doesn't meet the threshold for substantial interruption because that's having the legal effect of extinguishing customary rights, which are legal rights, and that's not – we say that's not consistent with

the balance that the MACA regime has set, because it's trying to give effect to the Treaty rights of tangata whenua who have had guaranteed by the Crown that their access to their fishery and their tribal properties will be protected by the Crown.

WILLIAMS J:

That really means you ignore substantial interruption, don't you?

MS FEINT KC:

Apart from very rare cases where there's a really, really substantial interruption. I mean the key is in the word "substantial". That adjective means that it's at a level where there has been a lawful extinguishment by someone, someone who has got some sort of lawful use but has not – there has not been a plain and explicit extinguishment of customary rights.

KÓS J:

Well that leaves you with two obvious possibilities, doesn't it? One is for instance the construction of an infrastructure or something over a large part of a CMT. That might have that effect probably under statutory authority. The other one is back to abandonment. If your iwi leaves, 28 generations then they go, 15 generations then they go, no intent to reassert, that's the other way in which it might be extinguished, but that would be rare and you would no doubt say well, you know, as long as there's an intent, potential assertion to return, then you can't say there's a substantial interruption in the form of an abandonment, I imagine?

MS FEINT KC:

Well I don't accept that abandonment is relevant because –

KÓS J:

Well you say you can't abandon? I mean it's one of the most fundamental ways in which you can extinguish customary rights.

MS FEINT KC:

You can lose customary rights as a matter of tikanga by not sustaining them according to the principles of tikanga, but that's not the same as the common law concept of abandonment.

KÓS J:

It's not that far away from it, is it?

MS FEINT KC:

It probably is in practice because there's a – there are very long time spans over which you have the opportunity to rekindle your fire.

KÓS J:

Sure.

MS FEINT KC:

So that three-generation rule that we were talking about earlier.

KÓS J:

Well, I don't think that's actually different from a common law approach to aboriginal title. I mean, it's not instantaneous extinction.

MS FEINT KC:

No, but aboriginal title, the common law approach says that extinguishment has to be by operation of law. That word "abandonment" is not a plain and explicit extinguishment, it doesn't add anything to the principles in Ngāti Apa.

FRENCH J:

But this test isn't – or is it – purporting to replicate extinguishment of customary interests.

GLAZEBROOK J:

It doesn't –

WILLIAMS J:

You need to bring your...

FRENCH J:

Sorry. Is, as I understood the Attorney-General's submission, that was drawing and it's saying this test wasn't purporting to replicate a test of extinguishing customary rights, so it's wrong to conflate the two. This is just creating a test for recognition of a particular type of order created by this statute.

MS FEINT KC:

Well, we say it's not a creation, we – well, we say it's giving recognition to extant customary rights and because they are extant rights, you should lean towards a rights protective interpretation of the statutory test consistently with Te Tiriti o Waitangi and the Treaty of Waitangi is referred to in section 7 not in terms of the principles but in terms of the Treaty itself which means that the Article 2 guarantees are directly relevant to this Court's consideration.

FRENCH J:

Was it the –

WILLIAMS J:

It uses "exclusive", too.

MS FEINT KC:

Yes, it does. That, well, no –

WILLIAMS J:

Sorry.

MS FEINT KC:

– it doesn't in the te reo text, it only the English text.

WILLIAMS J:

Yes, in the English text, to be fair.

MS FEINT KC:

And we would say, well, who – Māori signed the te reo version so that's the authoritative version in contra proferentem terms.

WILLIAMS J:

Except for Ngāi Tai's Waikato relations.

MS FEINT KC:

There was something else I was going to say – can't remember.

WILLIAMS J:

There is, in tikanga terms, there are – history is replete with statements that so-and-so had rights there but they've left. Ngāti Ruanui, for example, started in Kaitaia and people said: "Well, they had rights there, but they left, they're in Taranaki," and no one's suggesting they can rekindle those rights. I think they did pretty well in Taranaki, anyway, but there is clearly a tikanga of abandonment in – that's that ahi, that ahi weto, as Ms Sykes called it, that I would call ahi mātaotao, that you've let your fires go out.

MS FEINT KC:

Yes.

WILLIAMS J:

You've walked away from the resource. It does seem, you know, a system of custom – you'd expect a system of custom to have a law about that.

MS FEINT KC:

Yes, indeed, and we're not saying that it doesn't, we're –

WILLIAMS J:

Oh, I thought you were, or you couldn't have abandonment, you said.

GLAZEBROOK J:

Not the English concept, I think, you said it.

MS FEINT KC:

Yes, I'm resisting the idea that you'd import Anglo-centric property law concepts to interpreting the test. We would say, okay, the –

WILLIAMS J:

But if abandonment just means you've left without any intention of going back?

MS FEINT KC:

Yes, but sometimes they did return. You look –

WILLIAMS J:

Sure.

MS FEINT KC:

– the heke to Te Tau Ihu that we covered in the *Wakatū* case and some of those people, after they lost their land there, returned to Taranaki and other places from whence they'd come.

WILLIAMS J:

Yes, in the same lifetime?

MS FEINT KC:

Mhm.

WILLIAMS J:

If the grandchildren had gone back, there might have been a fight about it and if their great-grandchildren had gone back there definitely would have been a fight about it.

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MS FEINT KC:

I'm sure that there are examples where that has occurred but the point is we're not resisting the proposition that the principles of tikanga are relevant to the assessment. We're just saying that's not what's going on in the second limb in terms –

WILLIAMS J:

Yes, I guess the initial point I was trying to make is that we should take a Māori cultural and Māori economy centric view of what use, occupation and exclusivity is in order to make sense of this, right?

MS FEINT KC:

Indeed.

WILLIAMS J:

I think you agree with that.

MS FEINT KC:

I do agree with that, yes.

WILLIAMS J:

So if that's the case then it's probably not right to say that fishing is transitory because fishing often is the point. That's not to say, that you know, you get a fishing boat in there and then the right disappears. It's just that you need to look closely at those sorts of facts in terms of the statutory test.

MS FEINT KC:

Yes, yes, of course. Can I bring your Honour back to Moana Jackson's kōrero, because that might answer the point better than I can. He says at 117, well, let's start at 116: "Thus if the nature of mana moana depended ultimately upon the nature of the moana, it was also necessarily framed by the nature of the long-term acquaintance, use, and knowledge that made it home. For that reason, seasonal use or transit across a particular seascape does not in itself establish mana moana," but: "Just as shared or agreed pathways across the land did not equate with mana whenua or disturb the authority of the people whose land was being crossed, so navigation or access to fishing grounds by others did not disturb the authority of those holding mana moana. Mana moana is among other things a recognition of the permanent rather than the transitory," and that last sentence, recognising mana as the permanent inalienable

authority rather than transitory use is what we say is the essence of the inquiry in terms of substantial interruption.

WILLIAMS J:

So trying to focus down into the area, to the problematic area, which is where transitory use, as Moana called it, becomes so intense that it is interruptive. It's hard to argue against that, even on paragraphs 116 and 117. It's a question of fact with careful and sympathetic understanding of the economy, the culture and the importance of the rights but it's still a question of fact.

MS FEINT KC:

Perhaps, your Honour, it might be better if I answer that question in morning.

WILLIAMS J:

To me anyway it's an important question.

MS FEINT KC:

It is.

GLAZEBROOK J:

So a convenient point to adjourn until 10 am tomorrow.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON WEDNESDAY 6 NOVEMBER 2024 AT 10.04 AM

KARAKIA TĪMATANGA (WALLACE ARAMOANA)

GLAZEBROOK J:

Ms Feint? Oh, just before we start, we were sent the consent documents yesterday but not the reasons, and I wondered if anyone had found the reasons.

KÓS J:

This is the mussel farm.

GLAZEBROOK J:

For the mussel farm. So perhaps if somebody could have a look for those, if counsel could discuss that and –

MR FOWLER KC:

We'll make further enquiries, if the Court pleases, and see what we can find.

GLAZEBROOK J:

Thank you very much.

MR FOWLER KC:

We did find the assessment of effects but haven't found any reasoning yet other than what's on the face of that document that we provided, but we'll look further.

GLAZEBROOK J:

All right.

WILLIAMS J:

Well the assessment of effects will be by – is by the applicant.

MR FOWLER KC:

That's right, that's right.

WILLIAMS J:

But along with the consent and conditions, there'll be reasons. That's what seems to me to be relevant.

MR FOWLER KC:

Separate from the effects, your Honour?

WILLIAMS J:

Well the –

MR FOWLER KC:

The assessment of – the AEE is the standard RMA one.

WILLIAMS J:

But that's the applicant's RMA, yes.

MR FOWLER KC:

That's right, that's right. That's the only other document we could find.

WILLIAMS J:

Well the regional council, when it issued its consent, will have issued a set of reasons normally drafted by the planner from the regional council.

MR FOWLER KC:

Yes.

WILLIAMS J:

It's that that we're looking for.

MR FOWLER KC:

Yes. Well to the extent that there's – it's outside that document you've already got, we'll look to see if we can find something, but so far as we know –

WILLIAMS J:

That's it?

MR FOWLER KC:
That's it.

WILLIAMS J:
Okay.

MR FOWLER KC:
We'll see what we can do.

GLAZEBROOK J:
Thank you.

MR FOWLER KC:
Unless the Court also wanted the section 42A report, we could enquire about that.

WILLIAMS J:
No, no. It would be usual for there to be a relatively brief set of reasons for why the consent was granted.

MR FOWLER KC:
Well one would've thought.

WILLIAMS J:
Yes.

MS WILLIAMS:
Sir, sorry to interrupt. Perhaps the Crown can look for that. I know that during the High Court hearing the Crown did an Official Information Act 1982 request to the council, so it should be in those documents, there are a lot of consent documents, and we can assist Mr Fowler with locating those documents.

GLAZEBROOK J:
Thank you very much. Now, Ms Feint?

MS FEINT KC:

Ata mārie, e te Kōti. Otirā, tēnā koe e te kaikarakia. Huri noa e te whare, ka mihi atu kua tae mai i te ata nei. Tēnā rā tātou.

WILLIAMS J:

Tēnā koe.

MS FEINT KC:

Good morning, Court. So what we're planning to do this morning, I've got three main topics yet to cover. I was going to trot through the whakapapa of the MACA which is paragraph 3 on my road map at a fairly rapid pace, and then secondly, I wanted to address the issue of non-recognition amounting to extinguishment of customary rights under the Act, which we've set out in paragraph 4. Most of the rest of paragraph 4 we've covered already and then I was going to come to round 3 on substantial interruption and see if we can advance matters any further, and that point I'm going to hand over to my tūakana Ms Sykes to address the Court on the appeal relating to Whakaari and Te Paepae o Aotea.

So if we start at – I think we've already covered the point at 3.1, that we say that MACA is constitutional legislation that balances the rights of Māori and all New Zealanders, and we say that it does so through carefully prescribing everyone statutory rights, private individuals, the Crown, Māori, and everyone else, and it does not do so through the test, so there's no balancing required in the test. And we then lead on to say –

GLAZEBROOK J:

The test for CMT, is that – the section 58 test, is that?

MS FEINT KC:

Yes.

GLAZEBROOK J:

Yes.

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MS FEINT KC:

And then I say in 3.2, MACA is not a clean slate and that phrase comes from the Landowner Coalition submissions at 3.3. Could we bring those up please – sorry, 3.11 of their submissions. So they say, at 3.11: "As described in the Preamble and Purpose of the Act, the Act is designed to be a 'clean slate' following the controversy that surrounded the Foreshore and Seabed Act." And the Attorney-General made submissions to like effect at 25.1 of their submissions and we say that that's a significant difference between us and the Attorney-General and Landowners Coalition on the other hand, because we say that you have to interpret the test for CMT in section 58 in its constitutional context which is that customary rights are rights that are guaranteed by Te Tiriti o Waitangi and have been protected as a matter of law since 1840. The Attorney-General appears to take the approach that new rights have been created and so it is simply a matter of whether Māori meet the test or not and we say that that's fundamentally the wrong approach to interpretation.

KÓS J:

This whole argument turns on the matter we talked about before, which is whether section 6 creates a gap between what is restored and what is recognised. If you take the view, as I do, that there is a gap between the two and that much may have been restored that may not be recognised in MACA, then there's – your point is robbed of force, I think, because it may well be that section 58 creates rights which are effectively new rights, different rights from what's been restored and to that, as Mr Hodder pointed out, there are some new rights created in section 66 and on which may not, well, said did not attach to what were the restored rights because the restored rights were inchoate.

MS FEINT KC:

Well, that's a very important question, your Honour, and with the Court's leave what I want to do is step through my points about *Ngāti Apa* and the statutory regime before we get to that because that is a critical point.

KÓS J:

Absolutely.

GLAZEBROOK J:

Well, is also a point as to whether there are any new rights that wouldn't attach to what would be actually an ordinary title or alternatively that aren't included in the RMA anyway in terms of the points that Justice Williams was making yesterday.

MS FEINT KC:

Indeed and we say that the CMT rights are actually reductive of the rights that would have been recognised in the common law through the customary title.

WILLIAMS J:

Well, it says they are, doesn't it.

MS FEINT KC:

Indeed, and so –

WILLIAMS J:

Just how reductive, is the question.

MS FEINT KC:

So our submission is that MACA is effecting a partial extinguishment of customary title rights through stripping the substance of those rights in terms of what's granted under CMT and we're further submitting that if a high threshold is set in the section 58 test then that, in effect, further extinguishes customary title rights by making the extent of them very insignificant indeed and we say that Parliament cannot have been so cynical as to have intended to restore customary rights, restore the access of Māori to the courts, but then intended that Māori would not be able to realise any rights in other than a very small areas of the country.

KÓS J:

Unless those customary rights are restored by section 6 and await explication, perhaps in future legislation, perhaps in future litigation, outside of the framework of sections 51 and 58.

MS FEINT KC:

Well, the High Court's jurisdiction is completely replaced, so there's no possibility of having those rights recognised other than through this Act, so that's what I want to come to, but it's very important that we first step through the principles in *Ngāti Apa* because we say that's fundamental to the analysis.

So if I can do that now, and I will just do that quickly because it's all set out in *Ngāti Apa* very quickly, and we say that *Ngāti Apa* is settled law and the principles have been considered and confirmed since, by this Court, in decisions like *Wakatū*, in particular the Chief Justice's judgment which went through the legal history, and *Peter Hugh McGregor Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 which has confirmed tikanga as part of the common law.

So first of all the principle in *Ngāti Apa* is that the acquisition of sovereignty by the Crown in 1840 did not displace the pre-existing and independent property rights of Māori or the tikanga from whence they were derived, and so those rights subsist unless and until they're lawfully extinguished. So they don't evaporate over the course of time, and, as the Chief Justice's judgment in *Ngāti Apa* points out, that confirmation was both as a matter of the earlier constitutional arrangements, including the guarantees in the Treaty of Waitangi, but also in the 1840 charter which was the early constitutional document which required the Governor to respect the right and enjoyment of Māori to their customary lands and held that the Crown has no property in lands in Aotearoa until they are validly acquired from Māori, and it was also confirmed in the common law as early as *R v Symonds* (1847) NZPCC 387 (SC) in 1847 where Justice Chapman said that the Treaty did not assert anything new or unsettled in practice.

GLAZEBROOK J:

Well, it's also been the approach to customary law in all colonised countries, in any event, through Africa, et cetera.

MS FEINT KC:

Indeed, and actually Dr Ned Fletcher's book on the Treaty of Waitangi is really interesting in that regard because he argues that recognition of plurality by the British Empire was the norm rather than the exception as occurred in Australia with the terra nullius doctrine there.

Secondly, we acknowledge that there was a deviation from those common law principles for a period following the infamous *Wi Parata v. Bishop of Wellington*, 3 N. Z. J. R. (N.S.) S. C. 72 decision in 1877. The Privy Council emphatically said *Wi Parata* was wrong in *Tāmaki v Baker* [1901] AC 561 (PC) in 1901 and said that it was rather late in the day for anyone to be questioning the existence of Māori customary law or property, and we submit that it's even later in the day for such submissions to be made in 2024, and I was also interested to note that the former Chief Justice Elias' judgment in *Ngāti Apa*, she notes that *Wi Parata* cast a long shadow in terms of the *Ninety-Mile Beach* decision. Her point was that it wrongly influenced the thinking of the Court of Appeal, and the fallacy in the thinking there was that they had considered the common law as imported from England and the English common law concepts in relation to the foreshore but, of course, here from the beginning, the legal principle was that the common law was imported from England only so far as applicable to the circumstances of New Zealand and that was confirmed in the English Laws Act.

Thirdly, *Ngāti Apa* is authority for the proposition that customary rights survive until extinguished as a matter of law and that extinguishment must be plain and explicit. So in *Ngāti Apa* itself the vesting of the seabed in the Crown under the Territorial Sea Act was insufficient to extinguish customary title because there was no explicit extinguishment on the face of the statute and the purpose of it was to extend New Zealand's territorial seas, and by contrast the only legislation we could think of that has a very plain extinguishment clause is the 1926 Act that extinguished title to Lake Taupō and the upper Waikato River

which said that it extinguished customary title, if any, plus the rights to use the waters.

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WILLIAMS J:

Did the Rotorua Lakes legislation do the same thing? Presumably it did, because those extinguishments happened at the same time following, what's the case, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA)?

MS FEINT KC:

Yes – oh, or was that done through purchasing the lakebed? I can't quite recall. I know the Tūwharetoa history much better than the Te Arawa one.

WILLIAMS J:

Right, yes. Well they were triggered by the *Tamihana Korokai* case in respect of Lake Rotorua rather than Lake Taupō.

MS FEINT KC:

Indeed.

WILLIAMS J:

It led to the creation of the Te Arawa Trust Board the Tūwharetoa Trust Board.

MS FEINT KC:

Indeed.

WILLIAMS J:

Yes.

MS FEINT KC:

And allied to the principle of extinguishment as a matter of law, I would refer to the international legal norms too in the United Nations Declaration of the Rights of Indigenous Peoples. Article 28 provides that you need free, prior, and informed consent of indigenous peoples to extinguish their property rights.

Fourthly, we say that from the beginning it was accepted in Aotearoa that the entire country was owned by Māori according to their customs. So that's set out paragraph 37 of *Ngāti Apa*. And fifthly, *Ngāti Apa* sets out that the existence and content of customary property is determined as a matter of custom and usage of the community, so in other words, the test is a test based in tikanga because that's the legal system from whence those rights and responsibilities are derived. So to that extent we say that –

KÓS J:

What's the reference to that, Ms Feint?

MS FEINT KC:

Paragraph 32 in *Ngāti Apa.*

KÓS J:

Thank you.

MS FEINT KC:

So we say that the Attorney-General was wrong to submit that *Ngāti Apa* did not determine what the test is. We say the proper position is that *Ngāti Apa* confirmed that that was the test and had been the test since the 19th century.

GLAZEBROOK J:

You mean that the test is according to tikanga, is that the – yes.

MS FEINT KC:

Yes. So of course in the Native Land –

GLAZEBROOK J:

So whatever that means, it's determined according to tikanga, is that right?

MS FEINT KC:

Indeed.

WILLIAMS J:

That's the establishment. Of course the establishment of the right is determined in accordance with tikanga. I think it's pretty much consistent with Australia and Canada. The practical manifestation of that requires some sort of arbitrage with the common law, but extinguishment is by those authorities not a question of tikanga, but a question of the common law rules, right?

MS FEINT KC:

Correct.

WILLIAMS J:

And that's the issue – that's why substantial interruption is deeply problematic, because substantial interruption is a factual form of extinguishment. You can have extinguishment by legal fiat, which the cases are very clear needs to be clear and unambiguous, and then you can have factual extinguishment, and the cases are much more ambivalent about how you do that.

GLAZEBROOK J:

Though I don't think factual extinguishment is actually at law – it might be under the statute but not at law accepted as being extinguishment presumably unless it would be under tikanga, which I think is your argument?

MS FEINT KC:

Yes. Yes, your Honour is correct.

GLAZEBROOK J:

So that, yes, you can have factual extinguishment, but it has to be whatever would've been under tikanga and not something imposed from outside. Of course the difficulty is that we have the colonial overlay and the misapprehension about it already having been extinguished in the Foreshore and Seabed for – arriving from *Ninety-Mile* up to *Ngāti Apa*, and that is probably where we're looking at substantial interruption and what that means in that context. I know you would say that wasn't the case because it should just be done according to tikanga.

MS FEINT KC:

Indeed, and –

WILLIAMS J:

So an example of – sorry to interrupt, but *Wik* is an example of impairment that's not in accordance with tikanga, right? That's the pastoral leases in, was it Queensland or wherever they were, where the Court finds that that's not extinguishing but it is impairing and it is impairing both because of the grant of the pastoral lease and because of the countervailing use, the fact of the countervailing use.

MS FEINT KC:

Yes.

WILLIAMS J:

Now if the pastoral leases had been leases to establish towns, for example, how would the law work?

MS FEINT KC:

Well, my submission is that the Australian approach would not be followed here, and I say that I was going to refer to *Commonwealth of Australia v Yarmirr* [2001] HCA 56, (2001) 208 CLR 1 in that regard, which is the Australian High Court case about sea country and it's notable that that case was decided on the basis that the common law rights of navigation, access and fishing had displaced customary right –

WILLIAMS J:

Well, they actually said international law had – even the common law could not take away international law rights, which seems to be right, but my question is what kind of intrusion can be extinguishing or impairing to the point of the extinguishment of the characteristic of exclusivity if, for example, in *Wik* the leases were not pastoral leases but leases in perpetuity to build towns and infrastructure and so on and they had been built, what's the effect? That's kind

of and will lead us in a conceptual level the territory we are in. That's where the rubber hits the road.

MS FEINT KC:

Yes, perhaps. I don't accept that that approach would be followed here because –

WILLIAMS J:

But which approach? My question is what would have been the effect of that? *Wik* doesn't tell us because it doesn't deal with that situation. It says that the rights continue, albeit impaired to the extent of the countervailing lawful rights to run your stock, right, but that wasn't enough to extinguish the aboriginal title or right depending on the extent of it. But what if the right granted was not unambiguously extinguishing, it didn't say native title is extinguished and this is placed in its place, such as effectively the Land Transfer Act, subject to the rule in *Tamaki v Baker*, but what if the limited right granted had expected substantial intrusion, would that have been extinguishing or not because that's really – these are the difficult issues that have to be worked through. These things are very easy to state in the abstract but factual situations bring to the fore where the friction really happens.

GLAZEBROOK J:

I think you were, however, going to deal with extinguishment a bit later so maybe we should let you think about that and deal with it under your third point because at the moment weren't you just – sorry, I had a note of what you were doing, just sailing through the whakapapa of MACA.

MS FEINT KC:

Can I just say what I'm thinking now before I forget?

GLAZEBROOK J:

Exactly.

MS FEINT KC:

We did have the situation with perpetual leases here and the situation – I mean the way that was dealt with was the Crown accepted that customary title had not been – well indigenous property rights had not been extinguished and there needed to be a way of returning the leasehold land to the owners.

WILLIAMS J:

Yes, but those were perpetual leases of Māori land. The *Wik* case is a lease granted by the Crown as if it were the owner and the High Court of Australia said that's not enough to extinguish. What if the right granted had been a right which factually crowded out the indigenous usage, do you say that would have been extinguishing or not?

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MS FEINT KC:

I would say in principle no, and one thing I would point to is the principle in *Guerin* which was adopted in the *Wakatu* case was that where the Crown is dealing with the rights of indigenous peoples and potentially extinguishing aboriginal title, there's a fiduciary obligation that arises on the Crown to protect their sui generis interests, so that would lean against the interpretation that any rights have been extinguished as a matter of fact, or at least –

WILLIAMS J:

Reconcile them then.

MS FEINT KC:

We would say –

WILLIAMS J:

In fact on the ground.

MS FEINT KC:

– the responsibility would have to be on the Crown to somehow resolve that situation because in principle customary title would not have been extinguished.

WILLIAMS J:

So it's the Crown's job to move them off?

MS FEINT KC:

Yes, potentially or to negotiate a resolution.

WILLIAMS J:

Okay.

MS FEINT KC:

I'd also point to the fact that in *Ngāti Apa* it was found that any rights or activities that had been consented under the RMA did not affect aboriginal property, and there can be infrastructure built using rights under the RMA that could exist for a long period of time, or activities that could occur for decades.

WILLIAMS J:

It depends on what the activity is though, doesn't it? You've got to get down to quite a bit of detail to understand what that bold proposition means because, if your CMT area is 100 square kilometres and the infrastructure is half a square kilometre, you can see why that would be a pretty easy conclusion to reach. If, however, your claimed area is half a square kilometre, it would be difficult to see how aboriginal title had not been substantially interrupted by the creation of the reclamation, or bridge, or whatever it might be, if it were in that narrow area.

MS FEINT KC:

Well, that's a question of substantial interruption being authorised under the MACA Act as opposed to the common law principles of extinguishment.

WILLIAMS J:

But the common law principles of extinguishment would be very similar because the fact of the matter is in areas where aboriginal title is argued to exist elsewhere and it's the settler colonies, cities exist and roads, power stations, hydroelectric facilities and so on, all of which are taken into account in deciding how much of the right remains and how impaired the remaining right is. It has to otherwise you're not reconciling the two realities, you're destroying one to replace it by the other, in reverse colonisation if you like, and that's clearly not either the purpose of the common law or MACA.

MS FEINT KC:

Indeed, and I am aware there are cases that have covered those sorts of issues in North America.

WILLIAMS J:

This is the case about that very issue. That's why I'm asking you these questions.

MS FEINT KC:

Can I come back to that when we get to substantial interruption? Just to finish off the point, I would say it seems to me our law is closer to the dissenting judgment of Justice Kirby in *Yarmirr* than the majority decision, and it may be that that's partly because the Native Title Act includes a reference to common law in the statutory provision but Justice Kirby found that customary title could subsist, but it was qualified by those rights of navigation that had been recognised, and his Honour's point was that that was the most rights-consistent accommodation or reconciliation of those competing rights and, in my submission, that's the approach that a New Zealand Court would take and, indeed, that's the approach we're asking you to take in this case.

So, just coming back to what I was saying about there being a longstanding approach in New Zealand in determining customary title according to tikanga, I just wanted to give the Court a reference in relation to the way these issues were dealt with under the Native Land Act of 1865, which provided that the

Native Land Court should determine property according to the ancient customs and usages of Māori.

1035

Your Honour Justice Williams asked about the discussions in the Native Land Court of exclusivity, and there's some discussion in Professor Boast's Native Land Court volume 1 at pages 154 to 157, where he talks about the Native Land Court needing to effectively pick winners by determining who in the complex (inaudible 10:35:23) customary rights had the strongest rights to possession and therefore had what the Native Land Court would term as exclusivity. We submit we are a little wary of that comparison because we say that the Native Land Court distorted tikanga in the way that it excluded lesser rights holders. So, we submit that there should be caution in the way that those precedents are approached.

WILLIAMS J:

I wonder whether that's true of probably some of the Judges but lots of them simply gave multiple hapū rights with the lesser right holders receiving less undivided interests according to English law as their rough and ready way of doing that.

MS FEINT KC:

Sometimes, or sometimes they excluded them all together.

WILLIAMS J:

Yes, it seemed to me it sometimes depended on the Judge.

MS FEINT KC:

Yes, and also whether the customary owners were drawing up the lists themselves or whether the Judge was determining the rights. Certainly, if you think of a case like in Te Tau Ihu, the Kurahaupō peoples were excluded from the native land lists –

WILLIAMS J:

Yes.

MS FEINT KC:

– which the Tribunal found was wrong. I have to admit, your Honour Justice Williams, you did make a good point yesterday in referring to the Treaty of Waitangi and its reference in the English version to exclusive possession, because it seems to me that is relevant to the extent that that explains what the colonial government, well the imperial government was thinking in terms of acknowledging indigenous rights and interests, albeit that it was acknowledging, or later on it acknowledged them in order to alienate them and that was the purpose of the native land legislation but arguably that wasn't the intention in 1840.

Sixthly, and this is at 3.2.3 of my road map, I submit that it was well understood that in the Māori legal tradition there's not a conceptual distinction between land and water, which is in contrast to the way the common law approached land on the one hand, and seas, lakes and rivers on the other, and there are multiple cases that talk about that. There's quite a good discussion, a helpful discussion in *Ngāti Apa* which covers Kauwaeranga which was about patiki grounds and mudflats. Judge Fenton in the 1880s gave evidence to a select committee about his understanding of Māori rights to fishing grounds and there's that famous quote of Hori Ngāti which is referred to in the *Reeder* judgment. Could we bring that up please? It's at tab 13 of the Attorney-General's bundle of authorities at paragraph 54. So this is a very famous quote, a rangatira in Tauranga Moana of Ngāi Tukairangi and Ngāti Tapu who said: "Now with regard to the land below the high water mark immediately in front of where I live, I consider that as part and parcel of my own land…part of my own garden. From time immemorial I have had this land, and had authority over all the food in the sea." And he goes on to talk about his various fishing grounds and so on and he's complaining that people are intruding on his grounds.

1040

The next reference I wanted to quickly look at is Moana Jackson's affidavit at tab 51 of our bundle of authorities at paragraphs 99 to 101, and I refer to this because Dr Moana Jackson is making the point that conceptually this is not just about resource use, this is about in the legal system but how in conceptual thought Māori framed their rights in relation to lands and waters. So he says that: "Fundamental to that framing is the inseparability of land and water. Unlike the common law compartmentalisation of land and water into separate components like the foreshore and seabed… the Māori legal and intellectual tradition has always seen fresh and sea waters as part of the land. Every body of water has its own unique characteristics and life cycles but they are all part of the life blood and the sustaining, purifying body fluids of Papatuanuku. It is a truism in all iwi that riverbeds and lakebeds and the seabed are simply 'land with water flowing over theme'. Within that intellectual construct a rohe moana is the area of sea-covered land recognised by a particular iwi or hapū as part of its cultural, legal and political territory. It extends to recognised paepaeroa or markers of jurisdiction within which an iwi or hapū has authority and responsibility for all of its geographical and marine feathers as well as all of the species… That authority is part of the overarching mana or tino rangatiratanga asserted by the iwi or hapū and the concomitant duties to care for and protect the area of a rohe moana. The duty of care is most directly exercised through the obligations of kaitiakitanga which are in turn sanctioned through and by the authority of mana or tino rangatiratanga."

So in a nutshell that encapsulates the theory of the case, and much more eloquently than we have been able to do ourselves.

WILLIAMS J:

What's that document number?

MS FEINT KC:

Tab 51 in the Te Kāhui bundle.

WILLIAMS J:

Oh it's in your authorities. Right, thank you.

MS FEINT KC:

Yes, it's from a different proceeding. It's from the Tauranga moana proceeding, because it was about Motiti Island.

WILLIAMS J:

Oh, Motītī.

MS FEINT KC:

Then in the – perhaps we won't – could we go to our submissions please. So we've collected in our submissions at 3.15 a collection of some of the Waitangi Tribunal findings about the mana exercise by Māori. The Muriwhenua Tribunal, Ngāi Tahu and the foreshore and seabed report, and interestingly they all concluded that Māori exercised mana over very extensive areas extending at least as far out as the 12 nautical mile territorial limit and beyond, and they also quote Sir Edward Durie's remark that "fishing grounds were as much 'restricted, apportioned, and defined as the land'." They also seem to indicate that there were rights of navigation recognised as a matter of tikanga as well.

Then while we're in the submissions, can we just go to 3.18 please. So I just draw the Court's attention to the Waitangi Tribunal's summary of the types of evidence that will encapsulate the nature of the relationship that's exercised for the takutai moana as a matter of tikanga, noting not only the physical dimension in terms of exercising control and resource use, but also the spiritual relationship and the use of tapu and karakia as conceptual regulators of behaviour.

Right, now if we turn to – with that background in mind in terms of the knowledge that Parliament had of the nature of the relationship that Māori have with the foreshore and seabed, if we turn to the Act directly itself. So at 3.2.1 we say that the preamble sets out the relevant legislative history and that it's an emphatic rejection of the injustice caused by the Foreshore and Seabed Act, which multiple bodies have found not only is it a breach of the Article 2 guarantee in Te Tiriti o Waitangi to maintaining exclusive possession of

customary property, but also it was severely discriminatory as both the Waitangi Tribunal and the United Nations Committee on the Elimination of Racial Discrimination found, because it only extinguished Māori property rights, not the rights of a New Zealander.

And I wanted to refer briefly to the Ministerial Panel report, tab 1 at page 13. So the Ministerial Panel comprised the former Justice Durie, Professor Boast, and Hana O'Regan, and you can see in that highlighted extract this was the recommendation that the panel made: "We propose a new Act based on the Treaty of Waitangi principle of providing for both Māori and Pākehā world views. It would provide that hapū and iwi, and the general public, both have interests in the coastal marine area, that both interests must be respected and provided for but that both must be limited by that which is reasonably necessary to accommodate the other." And we say that that encapsulates the approach that Parliament has taken to the MACA Act, and for that reason this Court should resist the efforts of those parties that don't like the balancing that was undertaken by Parliament to try and read down the rights that have been recognised.

ELLEN FRANCE J:

Just in terms of that, going back to the wording of the preamble?

MS FEINT KC:

Mhm.

ELLEN FRANCE J:

In paragraph 4, the reference is to taking account "of the intrinsic, inherited rights", et cetera, and then it refers to "translates those inherited rights into legal rights and interests", et cetera.

MS FEINT KC:

Yes, so we say there was effectively a conversion of tenure. In some ways it's a little like what happened with the Native Land legislation where you had a test for determining customary rights based on tikanga, but then the title that you're

granted at the end of it has been converted into a new form of title. In the Native Land legislation it was for the purpose of assimilation. In fact I think it even says that in the preamble to the Native Lands Act of 1865, and we say here the purpose is the very opposite, not to assimilate Māori, but rather to respect their mana tuku iho and what are called their intrinsic, inherited rights according to tikanga. So it's sort of – you can see it as part of the project of reconciling the tikanga as the first law of Aotearoa and the state legal system.

And I point out too that section 4(2)(b) says that the Act "contributes to the continuing exercise of mana tuku iho in the marine and coastal area", so it is premised on Parliament recognising that interests exist, and what this Act is doing is giving legal expression to them.

1050

I wanted to briefly comment on the legislative history to say our submission is that the most important history is that identified in the preamble. Other parties like my learned friend Mr Hodder have referred to various aspects of the preparatory material, such as the Departmental Report and in our submission the Court should be cautious about what those reports and various materials say, because while we're not saying they're irrelevant, we are saying they're both confusing and contradictory, and all the parties before this Court can cherry-pick elements of various statements made at various places that support their case, and they're all contradicting each other, which we say only underscores the politicisation of the debate, and the fact that the politicians were speaking to their audiences in terms of what was said at various points, and in that note there is a line in Justice Kirby's dissenting judgment in *Yarmirr* which I thought was very apt in this context, which is that he, his Honour never uses the term "parliamentary intent" because that carries connotations of the subjective intentions of the Minister who is promoting the legislation. His Honour says parliamentary purpose is what the Court must discern, and I thought that's a helpful framing in this context.

So then in our submissions we set out in quite a lot of detail our analysis of the interplay of section 4, which is the purpose section. Section 6 restoring the

customary interests that had been extinguished by the Foreshore and Seabed Act in 2004, and section 7. So it's notable that section 4, the purpose is highlighted as being to "establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders" but the other three elements of section 4 all relate to the mana tuku iho and customary interests of iwi, hapū, and whānau as tangata whenua, and the Treaty of Waitangi is explicitly acknowledged as part of the purpose of this Act. So it may be that Parliament was careful about the way it referred to the Treaty, but as I said yesterday, it's notable that it's not referring to the principles of the Treaty, although they are undoubtedly relevant, and in particular the duty of act of protection. But it's referencing the Treaty directly itself, and then as we've discussed, it's translating those rights and interests into a new form of tenure.

My learned friend Mr Hodder made a valiant attempt to distinguish *Trans-Tasman Resources* in relation to section 7, which we submit is not persuasive. We submit that the direct incorporation of Te Tiriti into the Act is directly relevant and supports our submission that the Act needs to be interpreted in a rights-consistent manner, so that Māori rights are not being, in effect, extinguished.

At paragraph 3.3 of my road map I say the Act is a truly indigenous regime that incorporates tikanga as law throughout, and reconciles tikanga-based rights with common law rights, and I say that's important because the Landowners Coalition approach to the second limb of section 58 is to interpret it as if it's in a hermetically sealed box, which is not affected by the rest of the regime, and we say that's a fundamentally wrong approach to statutory interpretation because if you step through the Act there's direct incorporation of concepts that come from tikanga such as the reference to manaakitanga in the preamble, which I presume is Parliament acknowledging that tangata whenua have accepted the right of all New Zealanders to enjoy and access the takutai moana and acknowledging the spirit of generosity.

Section 4 refers to the mana tuku iho, which is defined as the inherent authority of Māori as tangata whenua over the takutai moana. I have included section 7

which sets out the special status of the MACA Act. Because it seems to me that the section – it says that there's a special status held by the common marine and coastal area, and that neither the Crown nor any other person owns it or is capable of owning it, and that's closer in a lot of ways to tikanga than it is to Anglocentric concepts of property because Māori would say they don't own the land, they belong to it through whakapapa, and when there's been innovative Treaty settlements like Te Urewera and Te Awa Tupua, that create a new regime for holding Te Urewera on the one hand, and the Whanganui River on the other, those are likewise not owned by anybody, I think from memory the land is said to own itself, but what they then do is set up tangata whenua as managing the land in terms of their kaitiakitanga, and so there is some resonance in terms of the solution in sections 11 with tikanga principles. So too the provision that customary marine title rights are inalienable.

Section 47 refers to kaitiakitanga, and then there are tests, a test for both CMT and PCRs in sections 51 and 58 directly incorporate tikanga and the concept of tuku whenua.

WILLIAMS J:

Which suggests it is alienable. These are the factors replete with contradictions like that.

MS FEINT KC:

That's – well…

WILLIAMS J:

Tuku is alienation. That's what it means.

MS FEINT KC:

Not entirely. So if your Honour thinks of Te Kāhui maunga, that Waitangi Tribunal report looked at the tuku taonga that was made by the Ariki Te Heuheu in relation to the Tongariro maunga, and the evidence there was that a reciprocal relationship was created by the tuku so that Ariki was not surrendering his rights to the land, but he was bringing the Queen in to stand

alongside him. So tuku, it can be, it can end up being a permanent alienation if you think of the tuku to Ngāti Porou on the tip of the Coromandel at Kennedy Bay, or the tuku of Ngāti Pūkenga, which your Honour will be familiar with, at Ngapeke, and that can end up being a long-term alienation, but nonetheless there's a reciprocal relationship created through the principles of utu between the donor tribe and recipient.

WILLIAMS J:

Yes, so the alienation that occurs is an alienation within tikanga, but there's no suggestion that in the circumstances such at Harataunga where the land was tuku'd by Ngāti Tamaterā I think to a couple of hapū of Ngāti Porou to provide them with a place to stage their coastal vessels selling into Auckland. No suggestion that Ngāti Porou haven't got a secure title there, but of course as with all relational legal systems, there is a maintenance of a relationship, but Ngāti Tamaterā doesn't say "that's ours". He wouldn't dare.

MS FEINT KC:

Indeed, but then think of *Wi Parata* itself, the tuku that was made for the purposes of building a school was revoked by the donors because the school was –

WILLIAMS J:

Never built.

MS FEINT KC:

– no it's a university I think –because it was never built.

WILLIAMS J:

That's right.

MS FEINT KC:

And they turned up to court and said: "We'd like our land back now."

WILLIAMS J:

Yes, and that's what would have happened in Harataunga, in Kennedy Bay if Ngāti Porou had vacated. They wouldn't have been able to sell it, they'd have to give it back. That's the relational nature of Māori forms of alienation. There's no such thing as a single one-off absolutely transaction, the legal system doesn't work that way. But within that system, that's a complete alienation.

1100

MS FEINT KC:

Indeed. Indeed. So I suppose conceptually the whakapapa in historical lingers near the seven.

WILLIAMS J:

That's right, yes. There's always a residual remainder right, if you like, as the original mana whenua holder.

MS FEINT KC:

Indeed. Then the final reference I wanted to make in terms of the Act, is to section 62 and the right acknowledged to protect wāhi tapu. So their right to prohibit access to those areas, the –

KÓS J:

That debate a moment ago is really interesting to me because if there's the idea of a reversion, then that could mean that during a period of effectively no occupation or use by one iwi, and occupation or use by another, nonetheless the former tribe, the one that's responsible for the tuku, still has an expectation of that reversion.

WILLIAMS J:

Correct.

KÓS J:

And in terms of exclusive use and occupation one would not think that expression in the Act was designed to override that.

WILLIAMS J:

Correct.

KÓS J:

Yes.

MS FEINT KC:

Indeed, and I think that's why yesterday I was resisting your Honours attempts to raise Anglocentric concepts of property law such as exclusivity or abandonment, because we're saying why would you think about those when clearly you need to see these concepts through the lens of tikanga, and we say there's something lost in translation here because the Act is drafted in English, so it's a pretty awkward effort at capturing tikanga concepts, and it doesn't do it in a neat way.

KÓS J:

Well I mean my reason I suppose for pursuing that theory is that the lens I am trying to look through is the lens of Parliament, and the question is whether Parliament put its tikanga filter into the telescope, and that's what you've got to persuade me of.

MS FEINT KC:

Indeed, and that's why I'm saying if you – tikanga is infused throughout the Act at multiple places, so it clearly is an attempt to reconcile both tikanga and the English law rights and interests that the rest of New Zealand would like to have protected.

KÓS J:

And while we're on that point, it doesn't seem to be that abandonment is necessarily purely an Anglocentric idea, but in that whole series sequence of ahi kā, ahi-kā-roa, ahi teretere, ahi mātaotao, ahi whetu.

WILLIAMS J:

Weto.

KÓS J:

Whetu?

WILLIAMS J:

Weto.

KÓS J:

There is a process, a recognition of abandonment in tikanga as well.

MS FEINT KC:

Indeed. So I'm not saying there aren't commonalities between the different legal systems. All we're saying is, you know, why would you look at Anglocentric concepts to understand the position in tikanga. It would be the equivalent of looking at Chinese law to inform you as to what tikanga meant. The other interesting part of the Act is the particular rights in relation to permission and planning, and I thought those were interesting because in some ways they are recognising the right to speak for the land. So although they're not purely the right to speak for the land that would be recognised in tikanga, because in tikanga your mana would give you the right to make decisions for the land, they are at least a nod to the interests that Māori have in acting as kaitiaki, and that's seen not only in section 47, but also in the various provisions that include the right to create a planning document, the conservation permission right, and the RMA permission right.

I wanted to turn now to an article that Professor Richard boast wrote, and it's in the Attorney-General's bundle of authorities at tab 25, and if we go first to

page 278, this is Professor Boast's commentary on the 2011 Act having had that very intimate involvement as part of the Ministerial Review Panel, and he says on this page – can you scroll down, please? In that final paragraph he's very kind to Parliament in saying that the new Act is "much clearer and better-structured" than the old Act: "The more bizarre and meaningless aspects of the Foreshore and Seabed Act have been dispensed with." But he also describes MACA as being "conceptually innovative, indeed radical, in demonstrating a willingness to depart from the usual principles of property law in order to experiment with new ideas", and so he's very much in the discussion that follows setting up his understanding that MACA is very much intended to be a fresh start that departs radically from where the Foreshore and Seabed Act got to.

KÓS J:
What page is that, please?

MS FEINT KC:
Page 278.

KÓS J:
Thank you.

MS FEINT KC:
Then if we go over to page 281, I thought this comment was even more interesting. In the – can you just scroll down please – so that last paragraph again, he says that customary marine title is "substantially more worth having" than what you got under the Foreshore and Seabed Act, and then he says, down the bottom he refers to those rights to participate in planning and the like and permission rights and the rights protect wāhi tapu. He says: "These could be really valuable and might appeal to at least some strategically placed coastal iwi. It can be said that the Act facilitates the continuing recasting of iwi as partners in local and regional government that is also developing under historic claims settlement legislation and other special-purpose statutes."

And I thought that idea was really interesting, because what Professor Boast is saying is that this MACA regime is continuing the journey that New Zealand started back when it started to recognise various rights of tangata whenua in the RMA 1991, and the various arrangements that have been entered into through various historical Treaty settlements that have made iwi in effect partners in local and regional government processes.

So seen in that light, it follows, it seems to me, that the – it wasn't intended to be a difficult test that would only apply in very small and remote areas of the country. Read purposively, the purpose of the legislation is to recognise the intrinsic inherited rights of tangata whenua, long-standing rights in the takutai moana in their regions, and so we submit that this Court should strain to interpret the Act to promote those rights that tangata whenua are increasingly recognised as having.

And it seems to me the criticism of the Seafood Industry Reps yesterday is – in substance amounts to a submission that they don't like the Act. So section 28 doesn't prevent them exercising any fishing rights except as relate to wāhi tapu areas, but otherwise they don't agree that Māori should be treated as partners in terms of local and regional resource management planning processes, which is really a complaint that should be directed to Parliament rather than to this Court.

1110

I also say, in terms of the balancing exercise that's been undertaken, it's relevant that Māori property rights in substance have been significantly compromised by the Act in terms of what's actually granted in the CMT, and so if we unpack that, the first point, if we can go to section 62 of the Act please, Nerys. So the first point is that private property rights are not affected at all by the Act because the definition of the "common marine and coastal area" is that it excludes any freehold titles that are currently held by private individuals, although not by the Crown, and therefore any Pākehā or Māori who have freehold title in the foreshore can keep that, but to the extent that Māori have

customary title rights, those rights we say are very much lesser than customary title.

Now if we start at paragraph – sorry, if we start at section 60. It says in section 60(2)(a) that a customary marine title group "may use, benefit from, or develop" a CMT area provided that they have the relevant resource consent and they are entitled to derive commercial benefit, but if we then go to section 62 to look at what the potentially valuable rights are, it seems to me the main ones are potentially ownership of minerals. It's not minerals that have been nationalised such as petroleum and gold and so on within the meaning of the Crown Minerals Act 1991, or pounamu, but if there are other minerals then the CMT holders will be entitled to those.

There are culturally significant rights such as recognition of wāhi tapu and taonga tūturu and so on, but in terms of commercial benefit, the only other commercial benefit that could be derived it seems to me is – if we go back up, please – is in relation to the RMA permission rights, because potentially there might be some sort of agreement reached between the CMT holders and someone who wants to exercise activities for which they need a resource consent in the takutai moana area. And then if we think about what's potentially – what has been stripped away, it's the rights to control access, navigation, and fishing, the right to alienate, the right – albeit that under tikanga there wouldn't be a right to alienate except for in specific circumstances, and the right to quiet enjoyment.

Now I wanted to go now to a useful discussion in *The Whanganui River Report* which is in the Te Kāhui bundle of authorities at tab 40, and if we go to pages 49 and 50. There's a useful discussion –

GLAZEBROOK J:

Sorry, what was the page? Oh, no, it's all right.

MS FEINT KC:

Page 49 and 50. There's a useful discussion in this Tribunal report. It's one of the earlier ones. Justice Durie was the presiding officer and Dame Sian Elias was counsel for the claimant, and there's an interesting discussion here about the differences between concepts of ownership as a matter of English common law and the concepts of belonging to the land under tikanga Māori and what commonality there is between them, and the Tribunal in that second paragraph that has "possession and control" at the side of the paragraph, it equates possession and control with the authority that Māori saw themselves as having over the land, noting that they didn't think in terms of ownership, and then they go on below to say that they think it's obvious and sensible to equate English "ownership" with the idea of Māori "possession", referring to the Treaty which they have quoted there.

Then if we go down over the page, at the top, Crown counsel questioned what rights might be included in the incidences of possession in terms of tikanga and they say in that fourth line: "The answer is that they are more than use rights and include the incidences of English ownership, save those of free transferability or escheat to the State. But they are also more, for there exists in the hapū and descent group as a whole, the right to manage and control in according to tribal preference and to be left in quiet possession."

So and that's interesting because, you know, in terms of that to manage and control Parliament and MACA has at least made some attempt to introduce that right to speak for the land into the rights it's attached to CMT.

The other part of this extract I thought was relevant is on the fourth paragraph down: "Crown counsel next asked whether it is appropriate in terms of the principles of the Treaty, to value these interests [that Māori have] in the river in their component parts; for example, to treat fishing interests as separate from spiritual interests in the water." And the Tribunal says: "The answer is no. Though they may be severally seen, there is a spiritual element to all parts of life. Though some things are tapu and some things are noa, all are spiritual in origin."

And that's really important in terms of the legal framework that we're urging this Court to adopt, because in terms of the discussions that I had yesterday with Justice Williams, although one of the most visible uses of the takutai moana is fishing, for obvious reasons, because it is an important part of the economy, we say nonetheless in terms of tikanga as law the spiritual relationship with the takutai moana is part of that legal framework that needs to be respected and so therefore it is relevant as part of the section 58 test.

WILLIAMS J:

I don't think anyone would disagree with that. Where I part company, not with you, but it is with those who say that spiritual connection is all you need, because that's wrong. There is much more to tikanga-based rights than just spiritual connection. You just have to understand that spiritual connection is your beginning point.

MS FEINT KC:

Indeed. So you –

GLAZEBROOK J:

I don't think you were arguing that that was the only thing.

WILLIAMS J:

You weren't saying that, no.

MS FEINT KC:

No. No, no.

GLAZEBROOK J:

You were saying that you had to make sure that you saw them as including that, because if you didn't, you didn't have the full range of right.

MS FEINT KC:

Indeed. So we're saying you have to establish your continuing to exercise ahi kā as part of your rights in tikanga, but you can do that not only through physical occupation but also through, in the modern context, for instance, opposing a resource consent because that's you acting as kaitiaki to protect the takutai moana, or through imposing a rāhui, so in other words it's not just physical manifestations of occupation and we say that's where the Court of Appeal went awry in not having a fully-rounded view of what represents the relationship in tikanga terms.

Now, so we're up to, we're making good progress, we're up to section 4 of my road map where we come to talk about the section 58 test and I think I submitted yesterday that it's a composite test and we say that the limbs are interdependent and determined by tikanga, given that those rights are derived from tikanga we say that's axiomatic.

1120

Now here we come to the point that I've been asked to discuss, 4.1.1, logically if there is daylight between the first and second limbs, in effect you are extinguishing customary rights by a sidewind, as we say the Court of Appeal majority correctly recognising at 416 of its judgment, and we say that's inconsistent with both the purpose expressed in section 4 to provide for, recognise and provide for the exercise customary interests in the Treaty of Waitangi.

We say that the MACA Act is indeed a complete statutory regime to the common marine coastal area which you can see if you step through several provisions of the Act. So at section 11(2) first of all states that no one owns or is capable of owing the common marine coastal area, so in other words customary title cannot be recognised other than this Act, and then if you go to section 98(4) and (5), this is where the jurisdiction of the Courts to consider any aboriginal rights claim is removed. So in subsection (4) the jurisdiction of the High Court to hear and determine any –

KÓS J:

Just to go back to your premise there about section 11(2). I'm not sure I see a prescription on the ownership as necessarily inconsistent with other rights. I mean what does Parliament mean by the use of the word "owns" in that context? Why – after we also have section 6 which says at the same time what was there before is restored.

MS FEINT KC:

Indeed, but if you, under Te Ture Whenua Māori Act, if you claim you have customary title to land, and you persuade the Māori Land Court that that customary title is indeed held according to tikanga, then you're able to acquire a title to that land, and you would not be able to do that under the MACA Act, because now no one can be capable of owing that, and if you –

KÓS J:

Well that eliminates the right to title, apart from the rights that are prescribed under section 51 and 58, particularly the latter. But how does that eliminate customary rights in the way you say, and I don't know why you'd want to make that argument.

MS FEINT KC:

I'm not sure I'm following your Honour.

KÓS J:

Well it's going to be difficult because I wasn't following you.

WILLIAMS J:

Perhaps there should be a side conversation.

KÓS J:

All right, well let's see how it develops, but you're taking a view that section 11 eliminates all customary interests. I think.

GLAZEBROOK J:
No, just saying that it…

MS FEINT KC:
It can't be recognised.

GLAZEBROOK J:
Yes.

KÓS J:
Right, okay. Well that's different, I think. That's the point I'm making about the difference between restoration and recognition. So let's see where this goes.

GLAZEBROOK J:
But I think you do accept that the rights are lesser than you would have got if you had a recognition of title. So I think you're possibly on the same page, but expressing it in different ways.

MS FEINT KC:
Yes, perhaps.

WILLIAMS J:
It's the story of this Act.

MS FEINT KC:
Yes.

GLAZEBROOK J:
Because what's restored is not full customary title, because it's less than full customary title, for the very reason that you can't own it and you have to let the public in, and you have to accept fishing.

MS FEINT KC:
Well I do agree with Justice Kós that section 6 has the effect of restoring full customary rights, but then the killer is of section 2, because it then says but any

application to have those rights given legal expression must be considered and determined as if the Foreshore and Seabed Act had not been enacted, and then you go to section 98 and it's extinguishing the jurisdiction of the Courts to consider any other claim for any other type of right.

KÓS J:

Sure, but I mean that's extinction of the jurisdictional claim. It doesn't necessarily destroy the right, which may subsist despite the Court's inability to declare it, and which of course may change as Parliament over time changes the approach of tax in the Act.

WILLIAMS J:

Isn't it the case that section 6 demonstrates the political deal, which is we will stop extinguishing your rights, and we're not going to say they don't exist anymore because that has produced a firestorm that this country does not need. But what you get now is only what's provided in the Act. It's, this is the political deal writ small.

MS FEINT KC:

I think that's right your Honour. It is the conversion of tenure. That was the deal that was brokered between the Māori Party and the National government at that time.

WILLIAMS J:

This is the reconciliation.

MS FEINT KC:

Yes.

WILLIAMS J:

Section 6 and it's full of barnacles, of course, because working out what that means is practice is not straightforward at all.

MS FEINT KC:

Indeed.

WILLIAMS J:

It would have been extraordinarily difficult to codify that in sufficient detail to exclude judicial discretion, because you're squaring a circle.

MS FEINT KC:

Yes, and if I apprehend correctly what you're asking Justice Kós' do those rights still exist in tikanga, and I think we would say the answer is yes, but we would also say if they can't be legally enforced because they're not recognised in the State legal system, then in effect you're back in the same position as you were after *Ninety-Mile Beach* was delivered, because you can't protect or enforce those rights in any way, and the expression we use in our submissions is a right without a remedy is a vain thing indeed. It becomes –

KÓS J:

Vain but not extinguished, I think.

MS FEINT KC:

Becomes emotional right.

GLAZEBROOK J:

Well it's, the point Justice Kós trying to make, that Parliament a later Parliament could decide that those rights that haven't been extinguished actually will be able to be exercised in full.

MS FEINT KC:

Indeed.

GLAZEBROOK J:

But – and presumably they could, but then presumably they could recreate the rights if they have been extinguished anyway, because Parliament is supreme

and can decide what it likes, well subject to the constitutional constraints that they would be under in terms of perhaps depriving other people of property.

MS FEINT KC:

So yes, so if you repeal the legislation then it's like removing the rug off the floor, the rights and tikanga would still subsist. So perhaps we are on the same page. But nonetheless we say that non-recognition under this Act – perhaps I'll come back to that after the morning adjournment, so someone smarter than me can tell me what the answer is.

WILLIAMS J:

We'll remind you what the question was.

GLAZEBROOK J:

Sorry, is that a convenient point?

MS FEINT KC:

Just before we break can I just finish what I was going to say about section 98(4), just to note that under subsection (4) the jurisdiction of the Court to hear and determine any aboriginal rights claim is replaced fully by the jurisdiction of the High Court under this Act, and then it refers to a defined aboriginal rights claim very broadly indeed in subsection (5), by referring to any claim based on not only customary title or customary rights, but fiduciary duties of the Crown or any other rights, titles, or duties of a similar manner, no matter where they arise from. So that's a very, very broad, broadly drafted definition of "aboriginal rights claim" which means that there really is, as long as this Act is in force, there's nowhere else to go with these rights. So that is a convenient place to break your Honour.

GLAZEBROOK J:

Thank you. We'll take the adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.54 AM

MS FEINT KC:

Before I forget, we checked the status of the table of evidence that we filed yesterday and I understand it had been filed in the wrong directory or something but it should be with the Court now, so the purpose of that table was to set out a helpful summary of references to the evidence or different indicia of the exercise of mana.

The second thing I have been asked to say is to acknowledge the taonga that's on the podium before me. Our clients, Ms Panoho-Navaja's clients, Ngāi Tamahaua, brought it down with them to watch over us and protect us during the hearing. It's called Te Mana Motuhake o Muriwai.

GLAZEBROOK J:

Thank you, and thank them as well.

MS FEINT KC:

Thank you. So to return to the discussion we were having before the break, the last of the trilogy of provisions that we refer to in support of our submission that non-recognition – I think it may be more accurate to say is tantamount to extinguishment since we established before the adjournment that we agree with Justice Kós' point that as a matter of tikanga those rights are not extinguished, but nonetheless we say if they can't be given legal expression through the Act that's inappropriate in this constitutional setting –

KÓS J:

I should say, I don't think they're extinguished as a matter of common law either, but that doesn't matter for present purposes.

MS FEINT KC:

Yes, but they –

KÓS J:

Can't be enforced, different point.

MS FEINT KC:

Yes, yes, I think that must be right. So the third provision that's relevant is section 100, and it provides a statutory deadline for filing an application which – can we scroll down, please? So Māori had six years after the commencement of the Act in 2011 to file their application orders, and so that means that there's a prove it or lose it regime. If the statutory deadline is missed then it's too late to have any rights recognised under the MACA Act and there's no ability to go to either the High Court or the Māori Land Court or anywhere else to seek to prove the existence of those rights that we say would subsist in tikanga, and that's deeply problematic when there's no prospect of enforcing those rights and there's no prospect of that changing unless and until the legislation was repealed.

If we move now to paragraph 4.2 of my road map. Holding in accordance with tikanga requires an enquiry into who belongs to that place through whakapapa and ahi-kā-roa, which really just means occupation and use and the corresponding mana or authority, rights, and obligations of kaitiakitanga.

We stepped through this yesterday so I don't think I need to revisit it, but I'll just refer the Court to some further references that may be helpful. At paragraph 363 of the Court of Appeal judgment they cite – oh, they cite from the *Turanga Tangata* report of the Waitangi Tribunal, with which Justice Williams will be familiar as the presiding officer. So it had an analysis of resource rights in the customary network of rights and connections in tikanga and – oh, I've written down the wrong reference. Oh, yes, no, that's correct. So it says half way down that most resource – so it says rights "almost never phased cleanly from hapū to hapū as one panned across the customary landscape", which was the point we were making yesterday about the different-coloured threads of the whāriki and how, you know, a hapū like Ngāi Tamahaua has rights right across the landscape from Maraetōtora to Tarakeha and indeed beyond, but also that most resource complexes had

primary, secondary, and even tertiary rights holders from different hapū communities which were vested and sustained by the currency of whakapapa, and I thought that idea of there being a hierarchy of rights in terms of the taxonomy of customary rights was helpful in the sense that, albeit bluntly, MACA is trying to divide customary rights between a tier 1 set of rights, which is the CMT, and the tier 2 of PCRs.

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The next authority, which I don't think we need to go to, but I urge the Court to read in full is Moana Jackson's evidence, which I included in our bundle of authorities, because I thought it was a very thoughtful exposition of the concept of mana as a constitutional source of power and he explains it through a comparative analysis with the doctrine of sovereignty and how that arose in European nation-states and I thought that was a very helpful way of understanding conceptually where mana sits in the legal framework of tikanga.

The third reference is the evidence of Professor David Williams which we say is helpful for underscoring that common law lawyers often make the mistake of approaching tikanga as if it's a set of rules which one must divine and then apply, which is a very prescriptive approach, and he explains that tikanga is much more sensitive to context and that you can't rigidly apply rules, because that's not the way tikanga works, it depends on how the values should be expressed in any particular context in terms of what the answer might be, so that you might get a different answer in relation to other rights holders at a particular place depending on what the nature of the issue is.

One of the submissions we make in our submissions in response to Te Upokorehe's appeal is that it seems to us that tikanga is better at navigating complex relationships within and between hapū than the law as applied by the MACA Act would be and therefore it makes sense, as the pūkenga recognise and Justice Churchman recognise, to have the six hapū within one title and to leave delineation of territories for them to navigate in terms of the ongoing relationship they have with the takutai moana, rather than asking the Court to do it in terms of defining where the CMT should apply to and we say that

because you just – you can't necessarily identify discreet territories and if you went through the exercise that Justice Miller suggested would be necessary, of doing a place-by-place, site-by-site analysis, you would end up with a very messy landscape in practice, where you would have multiple CMT orders across the landscape between Maraetōtara and Tarakeha and you'd have multiple hapū in each of those multiple areas and administering that, in practice, would be a nightmare. So, we say the better solution is to have this broader CMT, you have the hapū within it and then they navigate, according to tikanga, how they determine who the rights holders are in relation to any particular place within those boundaries.

Then lastly, we've included a reference to the Waitangi Tribunal *Rekohu* report, which we've put into the bundle of authorities, and we included that because of the analysis in that Tribunal report about the concept of mana whenua being an invention of the 19th century, in the sense that in traditional Māori society mana was personal and held by rangatira and by tāngata and by the environment rather than attaching to land and there's a discussion in that Tribunal report about mana whenua being conceptually incorrect because it reflects an attempt to render imperium and dominium in common law terms to tikanga. I don't accept that it's become a shorthand for expressing that idea that you're exercising mana whakahaere over a territory, but nonetheless we have chosen to use the term mana whakahaere for that reason. Ms Sykes had pointed out that the Whakaputanga uses the phrase "mana i te whenua" rather than mana whenua to express the relationship between mana and whenua.

So if we move on to paragraph 4.3, we went through that yesterday, what we say the purpose of that subsidiary second limb of the section 58 test is. I think that's all fairly clear.

We've talked about the Canadian case law in 4.4 as well. I just wanted to make a couple of additional points in relation to our submission that the Canadian jurisprudence uses the concept of exclusivity to distinguish between exclusive title, which they render as aboriginal title, and lesser customary rights such as hunting and fishing rights. That is most clearly seen in the Supreme Court of

Canada decision of *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at paragraph 159, which we weren't clever enough to put that in our bundle of authorities, so I can't bring it up unfortunately but the Supreme Court there says that if it's not exclusive aboriginal communities can still get customary rights short of aboriginal title, but those customary rights would not be a right to the land itself, so that's the distinction they're drawing, and that distinction translates over to the MACA Act because section, I think it's section 60 says that CMT represents an interest in land.

The only other point I wanted to make about the Canadian jurisprudence, oh it is in the bundle of authorities, it's just I couldn't find it, 157 it was. Sorry, paragraph 159. So that's just articulating the principle that I've just explained.

I wanted to also point out that the Canadian jurisprudence is a lot more nuanced and sensitive to context than the Attorney-General submits, and that's more clearly seen in the *Tsilhqot'in* case because there it was in a remote valley in the mountains in British Columbia, and the Court of Appeal had held that pockets of intensive use were within the valley were the only areas that could sustain aboriginal titles. So in other words, it was a very sparsely populated area. It was harsh land so it only supported a small community, and they had different sites around that area that they used intensively in the sense of occupying them, and the Court of Appeal thought that meant they could only sustain aboriginal title over those sites, specific pockets of intensive use, and that decision was overturned by the Supreme Court on the basis that aboriginal title had to be granted to the entire territory where they exercised those rights, and they emphasised the need to be sensitive to context in terms of the way of life of the people. They were semi-nomadic but also their customs and traditions in relation to those territories. So in other words although the Canadians are using a term derived from Anglocentric property law of exclusivity, the way they're applying it is very much attuned to the indigenous way of life and their customs. So I'll move on to paragraph 4.5.

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WILLIAMS J:

You say that – you really cite *Tsilhqot'in* and distinguish it in that note. Can you explain to me the distinguishing point that you're referring to there?

MS FEINT KC:

Yes, so that's the – where I say it's distinct from the New Zealand approach because they employ a dual common law and custom law test. If we go to – can we go back to *Tsilhqot'in* please, at paragraph 34? So this is what I was saying yesterday. In New Zealand from the time of the Native Lands legislation onwards we've had a test that customary title is determined according to Māori custom, but the Canadians say that you have to have a dual approach where you say at – you see at paragraph 34 they say you must approach the question of sufficient occupation "from both the common law perspective and the aboriginal perspective". Then if we keep scrolling through, so at paragraph 36 they say: "The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised." So that's the common law that's approach that's developed in Canada and I don't really understand why they see the need to like take that dual approach, but –

WILLIAMS J:

Because it's a common law system, it's not a statutory system. So whatever exists has to be accommodated within the common law because that's the platform on which it exists. That's not the case here because there's a statutory platform, well not necessarily the case unless exclusive and – sorry, exclusive use and occupation is seen as importing the common law frame which may or may not be the case, but doesn't this case really demonstrate that the difference is more imagined than real? Because what the Supreme Court of Canada came up with there is exactly what the Native Land Court would've come up with here.

MS FEINT KC:

Yes, I think there's force in that view, and that's why I was submitting that it was more nuanced than it appears.

GLAZEBROOK J:

There's also – sorry, carry on?

MS FEINT KC:

Sorry, no, I'm finished.

GLAZEBROOK J:

I was just going to say that the issue in Canada as well is that although there are differences in tikanga in New Zealand and differences in language and dialect, it does tend to be much less so than in Canada where you actually have a wide variety not only of languages, but also of systems.

MS FEINT KC:

Yes.

GLAZEBROOK J:

So it's more difficult to say it's looked at in accordance with whatever the aboriginal law is in that particular area than it is in New Zealand, I think.

MS FEINT KC:

Yes, that's a good point, your Honour. Although, as I understand it, this common law mainly applies to British Columbia because eastern Canada was subject to treaties that extinguished a lot of aboriginal title.

GLAZEBROOK J:

Yes.

WILLIAMS J:

Even there, though, there are multiple linguistic groups, and multiple systems of law.

MS FEINT KC:

Yes, it's an enormous country. If we scroll back to paragraph 15 –

KÓS J:

But if this represents the common law approach as well, what is it about dualism that you're afraid of? Because the position might be just as Justice Williams suggests, that actually there's not a great deal of difference.

MS FEINT KC:

I wouldn't say that we're afraid of it, but in terms of the metaphor that I expressed yesterday, we are saying that section 58 opens a portal into tikanga as a separate sphere, and our concern is not to distort concepts of tikanga by importing an Anglocentric property law analysis, which is why we bridle at the expression "exclusive use and occupation" although we say that the Court can approach that sensitively by seeing it through the lens of tikanga, so understanding it in the way that tikanga would express it and that paragraph –

KÓS J:

Why aren't we using binoculars? I mean, it seems to me that's what *Tsilhqot'in* did and we can do and it also seems to me that's very likely what Parliament thought. If you're looking at parliamentary purpose, I expect that a speech made in the House along the lines you made before of opening a portal under section 58 to tikanga would have caused a conniption, including amongst some of those parliamentarians who are party to the passage of the legislation.

MS FEINT KC:

Well, perhaps, but at the same time we would be anxious not to repeat some of the mistakes that the Native Land Court made in terms of the way it approached tikanga and some of the erroneous assumptions that it sometimes operated on. As Justice Williams said, it often depended on the judge but, for instance, the Native Land Court is criticised for having an over-emphasis on raupatu and not understanding that people who have been conquered may still, nonetheless, retain their take tīpuna, their ancestral connection. I do yield to the extent that, so as paragraph 15 of *Tsilhqot'in* says, the – or maybe this is not the paragraph I am thinking of, but there's a paragraph somewhere in this judgment where it's – yes, it's right here, the second sentence: "[A]boriginal title encompasses the right to exclusive use and occupation of the land," and so it explains this

judgment that that's why it imposes the test of exclusivity and doubtless that is why, as I have submitted, Parliament thought that concept of exclusive use and occupation was relevant, because it helps the courts distinguish between rights that are equivalent to CMT and rights that only attract a PCR and then what we have attempted to do in the presentation yesterday was unpack, I don't know whether we'd see it through binoculars, I think we would still say you start with the lens of tikanga and say if you unpack what looks like from a tikanga perspective that's where you're looking at the exercise of mana whakahaere, because that's identifying who the hapū are that have the territorial rights.

KÓS J:

Well, you're clearly on safe ground on limb one. The question is, how much, having grown limb one, how much does limb two invite to be cut off from limb one? I mean, you use limb two as explicative of limb 1, Mr Hodder uses limb 2 as controlling and reductive of limb 1. The question here is simply how much does limb 2 trim off limb 1? Maybe it doesn't trim very much off at all?

MS FEINT KC:

I don't consider it trims anything off.

KÓS J:

No.

MS FEINT KC:

I mean, you've got to think about this in the context that the rights of these communities, hapū and iwi, are very long-standing. It's not like we don't know who is where along the coast. Everyone knows that Ngāti Porou is in the east coast, that Ngāi Tūrangi in Tauranga, like these relationships are long-standing and well-understood by the community. So, it's not supposed to be a really complicated test. It seems to me what Parliament was trying to achieve was just simply go through a process of identifying who has customary title, where.

GLAZEBROOK J:

And just on the point of the evidence that's put forward, evidence would never be put forward without, I think you said, the 28 generations actually explained, because that's the whole basis of the title anyway, so exclusivity and long standing and continuous would actually, of its very nature, be the sort of evidence that's put forward.

MS FEINT KC:

Indeed.

GLAZEBROOK J:

Because otherwise, you couldn't establish that you have the title according to tikanga.

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MS FEINT KC:

Exactly, because take tupuna or whakapapa is the starting point for considering your legal rights in tikanga as a legal framework.

WILLIAMS J:

So it looks the Supreme Court in Canada in *Tsilhqot'in* started by looking at the Tsilhqot'in's people tikanga to determine what rights appeared to exist, within what system of law, and there seems to have been a great deal of evidence about that in considerable detail, and then running a common law lens over that and saying that's sufficient to establish title. A territorial right, not just a non-territorial right. Now that seems instinctively right, from my point of view, but it does indicate that there's not a lot of friction between the common law in a common law-based system of enquiry, and the tikanga. Common law will do all it can to accommodate the tikanga, at least in this sort of situation where you've got relatively light use, and small places of intense use, which is kind of like the seascape. If you look at the equivalent in New Zealand, say, there are some people here I'm sure who are involved in it, the enquiry into the Kaingaroa lands in, what, the 1880s, something like that. Relatively lightly used. A court

had no difficulty at all awarding territorial titles. So these, in these two places we seem to be doing the same thing.

MS FEINT KC:

Exactly.

WILLIAMS J:

So going back to Justice Kós' binoculars, is this really something really dying in a ditch over if it's not actually going to make a difference.

MS FEINT KC:

I wouldn't say I'm dying in a ditch.

WILLIAMS J:

My hyperbole.

MS FEINT KC:

It's a slight difference in emphasis I think.

WILLIAMS J:

Okay.

MS FEINT KC:

And as I said, our concern is not distorting concepts of tikanga, but as long as it's sensitively done, then I agree with your Honour. One metaphor we used in our submission was it's a drafting gate, exclusive use and occupation, like with the sheep, they either go left into CMT or right into PCR, depending on whether you can establish that exclusive use that amounts to an interest in the land.

KÓS J:

The other thing is that Justice Williams' description of *Tsilhqot'in* sounds a little bit like what the operation of section 58 might be like as well, starting with the tikanga interests, the holding according to tikanga, and then running a common law lens, the second lens of the binocular, over it.

WILLIAMS J:

By asking the question, is there exclusive use and occupation.

KÓS J:

And in particular also the substantial interruption point, which is probably the biggest – it seems to me possibly the part of limb 2 that makes the biggest difference potentially. Which is to say that when there has been ahi mātaotao, then it may well be that the claim is lost.

MS FEINT KC:

Yes, I think that's right, and you're looking at the same evidence for both enquiries, that's why there's degree of artificiality about it, and that's why I said yesterday, it seems to me like part of the concern in the Departmental Report was this anxiety that no one really knows what tikanga is, and so we've got to create some certainty by putting this second limb in. But actually what you need to establish in terms of whakapapa and ahi kā and the exercise of mana as a matter of tikanga gets you over the line in terms of exclusive use and occupation anyway.

WILLIAMS J:

Yes, and Professor Boast and Justice Durie were the two perhaps most knowledgeable, apart from Professor Williams, on the subject of what tikanga says and does with respect to land, and they are right in the middle of this process.

MS FEINT KC:

Indeed, and it was, in terms of the point your Honour made just before, it was always understood, and from the beginning New Zealand was treated as if the entire country was owned by Māori and so from that context it's not really surprising that there were sea territories in relation to the entire coastline, because as we discussed earlier, in Māori intellectual tradition you don't distinguish between the land and the water. So I think Matua Te Riaki says the sea is as naturally part of the territory as the land, and one of the reasons why

Te Whakatōhea goes so far out to sea is because Whakaari is so prominent from the coastline.

WILLIAMS J:

But isn't the point that the – one of the reasons it goes so – anyone goes so far out to sea, however far that is, is because they do? That's a question of fact?

MS FEINT KC:

Indeed. I think Ms Sykes will tell you this afternoon about the rangatira who went out to meet Captain Cook and they met him off Whakaari, so you could see that as patrolling their territory.

So it seems to me we've sorted out the section 58 test now apart from substantial interruption.

WILLIAMS J:

Well that's a big "apart from".

MS FEINT KC:

Well no, we've figured it out overnight, you'll be glad to know. So just to finish off, section 4 we've submitted that the Landowners Coalition's literal approach to the second limb elevates English common law over the legislative text and purpose of MACA, and we say in some ways you could see that as being the same error that the Court of Appeal made in this court's recent *Nikora v Kruger* [2024] NZSC 130 judgment relating to Te Ture Whenua Māori Act 1993, and this Court was very much emphasising the need to understand the purpose and context of the statutory regime in interpreting – even in that case the term at issue was "owned", which is a quintessentially Anglocentric property law term but nonetheless had to be viewed through a tikanga lens.

Right, substantial interruption. So as we say at paragraph 5.1, we submit that section – that as a matter of construction it's clear that substantial interruption is a concept that's allied to the concept of lawful extinguishment but it's not the same, and we've drawn attention to subsections (2) and (4) of section 58 which

talk interchangeably about extinguishment as a matter of law and substantial interruption, and so the way we understand it, extinguishment by law will be included within substantial interruption conceptually, and so if you think about it as a Venn diagram with a circle we would say the lawful extinguishment would be within that circle and there might be a very thin boundary around the outside, which is whatever is left over that's not covered through lawful extinguishment.

KÓS J:

Sorry, just describe the sets again? The superset is what, and what's the subset?

MS FEINT KC:

The superset is substantial interruption, so that's the new concept.

KÓS J:

Yes.

MS FEINT KC:

And then we're saying within it is extinguishment as a matter of law, and –

KÓS J:

A very large subset.

MS FEINT KC:

A very large subset.

KÓS J:

Yes, right, got it.

MS FEINT KC:

And then there might be a very thin boundary that's around the outside.

ELLEN FRANCE J:

You mean a gap around the outside?

MS FEINT KC:

Potentially, where there might've been extinguishment through practical interference with the relationship that Māori have with the takutai moana. But we're saying that in the context that Parliament's been very careful to delineate everyone's rights and interests through the MACA regime itself so that what you might think might otherwise be matters that would attract an analysis of substantial interruption, like for instance a port, are covered for in relation to the provisions on accommodated infrastructure and accommodated activities.

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And we say that because there are provisions that carefully set out a whole range of matters including that wharves and jetties and the like are treated as personal property, so they're not part of the common marine and coastal area. Private property and the land itself is not part of the common marine and coastal area either. So you don't have any concerns about private property rights being impacted. Then Parliament's made a series of policy decisions about accommodated infrastructure, which it defines, if can we go back to the legislation please, to section 63, you can see the definition of "accommodated infrastructure" refers to infrastructure that's lawfully established and owned by a Crown, a local authority, network utility operator, port company and the like and then it says: "[And is] reasonably necessary for (i) the national social or economic well-being; or (ii) the social or economic well-being of the region in which the infrastructure is located." And then what that means, if you have national or regionally significant infrastructure, is that that's given an exception to the operation of the RMA permission right.

So if we go to section 66(4), section 66(4) says: "An RMA permission right does not apply to the grant or exercise of a resource consent for an accommodated activity." So, "accommodated activities" are defined back in section 64, scroll back please, so accommodated activities include accommodated infrastructure but include a whole lot of other activities, including such things as marine reserves, wildlife sanctuaries, activities carried out relating to petroleum, certain aquaculture activities, emergencies and scientific research, and so on. So, all

those activities, as well as the accommodated infrastructure, are exempt from the RMA permission rights. So that –

WILLIAMS J:

These are new ones?

MS FEINT KC:

No, they're – no, no, they can already be established.

WILLIAMS J:

So how does this work if the permission provision is excluded with respect to petroleum and some aquacultures and lots of infrastructure and so forth, what's the trigger for obtaining permission where the infrastructure already exists and has been consented?

MS FEINT KC:

It, so, the Minister has the right to make the decision. That's section 64(5) – sorry, subsection (4), so if there's a dispute, I assume that refers to a dispute about whether activity is an accommodated one.

WILLIAMS J:

Not about whether permission should be granted, isn't it? But that's about, isn't that prospective in effect rather retrospective?

GLAZEBROOK J:

If it's already accommodated and you've got a new consent to do something, maybe it excludes permission in respect of that as long as it's accommodated.

WILLIAMS J:

It's just, my question is, is the underlying regime that substantial interruption can be established by lawful excluding occupations of MACA but going forward anything of that nature either requires consent or must be in the national interest, or regionally essential, which is basically the New Zealand Coastal Policy Statement, anyway.

MS FEINT KC:

I, no, I understood that this applied to any new national or regional infrastructure as well.

WILLIAMS J:

No, I understand it, obviously, it applies to new, but in terms of substantial interruption what's the regime with respect to pre-existing incursions of that nature?

MS FEINT KC:

Well, these are, these provisions cover existing infrastructure as well.

WILLIAMS J:

Can you explain how that works? Does that mean that the owner of the infrastructure has to go and get retrospective permission for its existing –

GLAZEBROOK J:

No, because you don't.

MS FEINT KC:

No.

GLAZEBROOK J:

Because that's what it says, you don't have to.

MS FEINT KC:

No, no, because so the accommodated infrastructure has been given an exemption by Parliament from being subject to the RMA permission right.

WILLIAMS J:

Yes.

MS FEINT KC:

But having said that, I thought I had it in my head that the Minister could make a decision if there was a dispute about whether you meet the test for being nationally or regionally significant infrastructure.

WILLIAMS J:

That suggests that the permission requirement is – if permission requirement is retrospective and you'd have to convince me of that, because that would be surprising, but if it is, then a number of implications and consequences follow from that, that wouldn't follow if it was new infrastructure and new special aquaculture and new petrol drilling.

MS FEINT KC:

I think we're talking at cross-purposes. So what I'm saying is that the – if you fall within the definition of accommodated activities and that includes accommodated infrastructure, and if that accommodated infrastructure, or to meet the definition of accommodated infrastructure you have to be nationally or regionally significant, an infrastructure of that nature is not subject to the RMA permission rights. So, in other words, the CMT group cannot veto that infrastructure.

WILLIAMS J:

Yes, I understand that.

MS FEINT KC:

And so section 66(4) says that the: "... RMA permission right does not apply to the grant or exercise of a resource consent for an accommodated activity."

WILLIAMS J:

Yes, but you see the different sets of implications, depending on whether that is prospective or retrospective?

MS FEINT KC:

Well, it's both, isn't it, if it applies to the grant or exercise of a resource consent?

GLAZEBROOK J:

You certainly wouldn't want them being able to complain about existing infrastructure or require any permission, the exercise of infrastructure, is that your point?

MS FEINT KC:

Yes, and so our –

GLAZEBROOK J:

And so it does both?

MS FEINT KC:

So our point is that if Parliament has determined that these – that accommodated infrastructure is exempt from the RMA permission right, it must have contemplated that customary title could nonetheless still be granted in that area and it's made the policy decision that only nationally and regionally significant infrastructure will be exempt, but not local infrastructure.

WILLIAMS J:

But that's true only if it's retrospective in effect. If it's prospective in effect, it doesn't help.

MS FEINT KC:

Well, we're saying that it's both.

WILLIAMS J:

Yes, so that's what you have to dig into.

MS FEINT KC:

Now, we might need to come back to that, because –

WILLIAMS J:

Yes, it's potentially a biggie, isn't it, because you're right, if that's retrospective then it must imply that big infrastructure is not substantially interrupting.

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MS FEINT KC:

Correct.

WILLIAMS J:

Is there anything in the preparatory materials that says anything about prospectivity and retrospectivity?

MS FEINT KC:

Not to my knowledge. I might – that might be something – can we come back to you after lunch on this? Because these are quite technical provisions and I don't want to say the wrong thing.

WILLIAMS J:

Yes, they are. Yes.

MS FEINT KC:

They're very boring to read so it's quite hard to concentrate.

GLAZEBROOK J:

"Accommodated activity" in subsection (2) is defined as "an activity authorised under a resource consent, whenever granted".

WILLIAMS J:

Where is that?

GLAZEBROOK J:

Subsection (2)(a) of section 64.

WILLIAMS J:

Oh, so if "first accepted by the consent authority before the effective date", that suggests it's prospective.

MS FEINT KC:

Although that's separate from accommodated infrastructure in subsection (c).

FRENCH J:

How does subsection (2) of section 58 relate to this?

MS FEINT KC:

So my understanding of subsection (2) of section 58 from the preparatory materials is that it was thought that they didn't want there to be resource consents held up by ongoing applications for CMT, so they decided to –

FRENCH J:

But isn't arguably that an indication, a clue as to what was considered to be a substantial interruption? So the need to sort of carve out things that were being processed during this period?

MS FEINT KC:

Well not necessarily, because this has got –

GLAZEBROOK J:

I think they did say something about that in the preparatory materials because they didn't want – they had a scramble for resource consents being put in just because it was going to make a difference. So I think – I seem to remember a comment on that specifically.

MS FEINT KC:

Yes, I remember that too. Yes, I think that's right.

GLAZEBROOK J:

I can't remember where the comment was.

MS FEINT KC:

And we think subsection (2) is unhappy drafting, because we don't think it follows that there necessarily is substantial interruption in relation to a resource consent granted prior to the effective date.

GLAZEBROOK J:

Well it depends, I suppose, what it does.

MS FEINT KC:

What it is, yes, exactly. But maybe what – can I propose that we park this particular issue up and return to it after lunch, and that gives me time to take your Honours to the Australian authorities because –

WILLIAMS J:

Just before you do, you'll need to think about section 65(1)(b)(i) and (c)(i). Don't bother doing it now, but just make a mental note of that.

MS FEINT KC:

Ka pai.

ELLEN FRANCE J:

And sorry, did you say the preparatory material makes it clear that the interrelationship between the regime for accommodated activities and substantial interruption is as you put it?

MS FEINT KC:

No, no. I was saying that the preparatory materials explain the need for section 58(2).

ELLEN FRANCE J:

Right, but not – because I was just going to ask, does it necessarily follow from the interaction between the two that it tells you something about substantial interruption?

MS FEINT KC:

Well in our submission it does to the extent that it's contemplating that there may be accommodated infrastructure within the CMT area.

ELLEN FRANCE J:

Yes, but that may –

MS FEINT KC:

Because otherwise they wouldn't need to grant an exemption.

ELLEN FRANCE J:

That may not take you anywhere – well I suppose my question is does that necessarily mean that as a matter of fact that could never be substantial interruption?

MS FEINT KC:

No, potentially not.

ELLEN FRANCE J:

You know, if the interrelationship was so close, that might – the answer might be yes, but I'm just testing whether as a matter of fact that's necessarily so, thinking about it in tikanga terms.

MS FEINT KC:

We would say potentially not. So, maybe the best example is the harbour redevelopment at Ōpōtiki, which I don't think would meet the test for being regionally significant but is certainly locally significant, so what they've done is where the Waioeka and Ōtara Rivers converge and they meet the sea, they're constructing a new harbour entrance and the reason is to construct a deepwater port and Te Whakatōhea supported that being constructed because it's facilitating their mussel farm production, so there was a grant under the Provincial Growth Fund to build a mussel processing factory at –

ELLEN FRANCE J:

Oh, yes, I saw something about that.

MS FEINT KC:

– Ōpōtiki, and so the mussels from the Whakatōhea mussel farm are processed at the factory and the deepwater port was needed to bring the ocean-going boats in and so I'm sure Matua Te Riaki was the one who he gave his consent to is because it's supporting the economic development of Te Whakatōhea.

WILLIAMS J:

He gave evidence about that, in fact.

MS FEINT KC:

Yes. Yes, he did.

WILLIAMS J:

In the consent application process.

MS FEINT KC:

Or is that – are you referring to the one that was appended to his evidence, because that was about the mussel farm itself, wasn't it? Rather than deepwater port?

WILLIAMS J:

Oh, I see, all right, sorry, yes, you're right.

MS FEINT KC:

Mhm, so we would say, well, that port does not substantially interrupt – the harbour redevelopment does not substantially interrupt Te Whakatōhea's relationship with the takutai moana because it's facilitating their economic development through use of the moana. But in the *Re Edwards (Whakatōhea Stage Two) No 7* [2022] NZHC 2644 judgment Justice Churchman found that it was substantial interruption on the basis that it excluded Te Whakatōhea from the area which is being redeveloped and it's very significant infrastructure that requires dredging and new walls and the like and he says because people are excluded by the resource consents, that amounts to substantial interruption which is a point that we have appealed on.

So, and we say that example and that's the only example of substantial interruption that was found as a matter of fact by Justice Churchman in relation to this CMT and we say the issue there shows that the real question is substantial interruption of what? So, the way that his *Stage Two* judgment is drafted, it says it interrupts the use and occupation of the area but we're submitting, on the basis of the Australian authorities, that the relevant enquiry is whether it interrupts their mana whakahaere or connection to country and so we're saying, as a matter of fact, that example shows that the opposite is true.

If we move now to talk about the Australian authorities, so –

GLAZEBROOK J:

This your point, I think, but section 58, that second limb, talks about use and occupation.

MS FEINT KC:

Yes, but we're saying that the focus should be on the word "exclusively", because we're saying it's not the occupation, the use itself that is being interrupted and so one submission we make in support of that is that if you go back to section 51 on protected customary rights, there's no substantial interruption included in that section which would suggest that using the area is not the issue, it's something more substantial than that.

1250

GLAZEBROOK J:

Somebody else using it, is that, sorry?

MS FEINT KC:

So we're saying, no, the use by the applicant group of the area in terms of exercising their customary rights cannot be substantially interrupted, so it must be something else that's being interrupted, which we say is the exclusivity part and we say that becomes clearer if you look at the Australian jurisprudence on this issue.

WILLIAMS J:

Although it does require –

GLAZEBROOK J:

Maybe it will become clearer. At the moment I'm not quite understanding the point. But go through the Australian legislation and then perhaps try again.

MS FEINT KC:

Yes, so one of the great mysteries of my life is why the authorities you want to refer to are never in the bundle of authorities, so –

WILLIAMS J:

Welcome to our world.

GLAZEBROOK J:

Have you read –

KÓS J:

Justice Sedley's Laws of Documents?

GLAZEBROOK J:

Yes.

KÓS J:

Yes.

MS FEINT KC:

So we've handed up, this morning, the *Members of the Yorta Yorta Aboriginal Community v Victoria and Others* [2002] HCA 58 decision in hard copy and if we take, if your Honour's have that before you.

WILLIAMS J:

Do we have it?

KÓS J:

Yes.

GLAZEBROOK J:

Yes, it was handed up this morning. So it should be somewhere in your pile.

WILLIAMS J:

Oh.

GLAZEBROOK J:
Yes, I know.

WILLIAMS J:
Oh, yes.

MS FEINT KC:
And if we go over to page 562, starting from paragraph 83, this is the clearest articulation we can find of the concept of substantial interruption and you can see they start discussing at paragraph 83 that the context of the enquiry is whether there is a: "... change to, or adaptation of traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present ..."

And then if we go down to paragraph 86, they say: "It is important to bear steadily in mind that the rights and interests which are said not to be possessed but nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the people in question."

And in 87 they go on to say: "For exactly the same reasons, acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not be properly be described as *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the bodies of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or waters concerned."

And then down at 89 they sum up by saying: "In the proposition that acknowledgement and observance must have continued substantially uninterrupted, the qualification 'substantially' is not unimportant. It is a

qualification that must be made in order to recognise that proof of continuous acknowledgement and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgement and observance of the laws and customs."

So in other words, that's support for our proposition that the interruption, the focus of the enquiry, is not on what the third-party users are doing, but whether the tikanga of the hapū itself has been substantially interrupted in terms of its exercise of mana whakahaere over its takutai moana, but having regard to the qualification that there must be some sensitivity because of the impact of colonisation.

KÓS J:

Can you draw support from the legislative materials for that interpretation?

MS FEINT KC:

The legislative materials were not very illuminating, on point.

GLAZEBROOK J:

I suppose you draw, you would draw support though for the fact that they were relying on the Canadian and the Australian jurisprudence and so –

MS FEINT KC:

Yes.

GLAZEBROOK J:

And, explicitly so. If you look at the earlier material, the – sorry I'm really going to just be quiet now.

MS FEINT KC:

Yes, I think that's right, the legislative history does at least establish that that's where the phrase came from, from Australia. So we say to that extent that's helpful.

That means that the focus of the enquiry is very much different, and so if we return to our deepwater port example, that's why we're saying well, far from interrupting Te Whakatōhea's relationship with the takutai moana, this port is actually facilitating their economic development, and so – which is, you know, in the exercise of their mana motuhake, so it's – it can't be counted as a substantial interruption.

WILLIAMS J:

So you ignore physical presence, even permanent physical presence, as non-impairing and non-interrupting?

MS FEINT KC:

Yes.

GLAZEBROOK J:

Well, ignore it except to the extent that it has affected – so it's looked at through the lens not of the third party but through the group that's claiming a CMT?

MS FEINT KC:

Exactly. Yes, exactly that. So it's not ignored but you assess the presence of that physical structure in light of the relevant enquiry being the exercise of mana whakahaere.

Justice Churchman in his *Stage Two* judgment in fact says that navigational aids such as the – oh, what are those buoys called, the red and green ones that, the navigation buoys that –

KÓS J:
Navigation lights.

MS FEINT KC:
Yes, the navigation lights, the jetties and other things that facilitate the use of the sea he did not regard as being substantial interruption because they facilitated people's ability to get out on the sea.

I should make the point too that in fact no one – there weren't any, apart from that deepwater port in stage 2 there were no findings that there had been any substantial interruption as a matter of fact, so the Crown raised the issue about whether raupatu, confiscation of all the adjoining land could be sufficient. I think my friend Ms Sykes said yesterday at what – at the beginning of the hearing they were asking questions about whether the military burning all the ocean-going waka amounted to a substantial interruption of their use of the sea, and the answer by witness after witness was no because we would have starved if we hadn't been able to use the sea, so they still had their inshore waka and like smaller craft but not their big trading vessels which had been destroyed.

But in the end, and the Crown did not advance the argument in closings submissions that raupatu was sufficient, and my recollection of the legislative history is that that was one of the reasons why the requirement of owning adjoining land in the Foreshore and Seabed Act of 2004 was removed because of the concern raised that it would unfairly prejudice Māori and have their land confiscated.

1300

Secondly, in terms of the fishing activity the Seafood Industry Representatives put on, put in one brief of evidence that didn't actually refer to any detailed evidence at all about fishing in the area, so their submissions were made more as a matter or principle and relying on the evidence of the Crown historian Mark Derby about protests about overfishing in the area. So, there weren't any factual findings made out of substantial interruption through the use of fishing. As we've submitted, we don't consider that that can amount to substantial interruption anyway.

I see it's just turned 1 o'clock. That might be a suitable time to rise for the lunch adjournment.

GLAZEBROOK J:
We'll take the adjournment and come back at 2.15 thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.17 PM

MS FEINT KC:
So we've spent the lunch hour looking at the accommodated activity provisions and I think we can step through this relatively quickly. Can we bring the Act up, please, and go to subsection (9), and just note there that the definition of privilege – can you scroll down please to privilege? Has a precise meaning in relation to minerals under the Crown Minerals Act. If we just hold that thought, and then we scroll down to section 20.

So, section 20(a) provides that: "Nothing in this Act limits or affects— (a) any resource consent granted before the commencement of this Act." So, that's all protected, and then if we go through to section 63, and the definition of accommodated infrastructure, which we looked at this morning, I'll just make the point that that clearly refers to existing infrastructure because it says infrastructure that is "lawfully established" and "owned, operated" and so on by those bodies. So, we say that refers to infrastructure that's already in

place, and then there's a further place in the Act for infrastructure that is going to be created in the future.

WILLIAMS J:

What was the last section? I was trying to keep up with you.

MS FEINT KC:

Sorry?

WILLIAMS J:

The section you just referred to after 20?

MS FEINT KC:

Section 20(a).

WILLIAMS J:

20, then (a).

MS FEINT KC:

20(a) says that nothing affects any resource consents granted before the Act.

WILLIAMS J:

Oh I see, the section, subsection, then you referred to another section.

MS FEINT KC:

Section 63. So we're just establishing that the definition of accommodated infrastructure applies to existing infrastructure, and then if we go through to section 64 –

1420

WILLIAMS J:

Just woah woah woah. And what, you say that infrastructure means infrastructure that is lawfully established. Where's the existing?

MS FEINT KC:

Well it doesn't say existing, but it's in the present tense. So, the natural meaning of that would be that it's already established.

WILLIAMS J:

Right, okay.

MS FEINT KC:

And there's a separate process for new infrastructure.

So, then, this is a big confusing because accommodated infrastructure is included within the definition of accommodated activities, which is dealt with at section 64(2), and that seeks out the breadth of activities which I think we looked at before lunch, so it covers activities in relation to, for instance, "accommodated infrastructure", activities relating to petroleum, the "management activities". Over the page, "activity carried out under a coastal permit", (f) is "emergency activities", (g), "scientific research", and (h), "a deemed accommodated activity". So, (h) is referring to the fresh process, but before we get to that, looking at subsection (3), so this "applies if, in relation to whether an activity is an accommodated activity, there is a dispute", so that's between the CMT and "person who owns, operates, or carries out the activity". Which would suggest that the CMT order has already been granted and if there's a dispute about whether that activity falls within the definition of accommodated activity then you refer that dispute under subsection (4) to the Minister for Land Information. Under subsection (5): "The decision of the Minister is final."

Then if we move to section 65 –

GLAZEBROOK J:

So, just so that I'm sure I understand what you're saying, what you're saying is that accommodated infrastructure includes infrastructure that's already there, which in any event, you can't challenge any resource consents, that's

accommodated activities. They have to be accommodated within the CMT. If there's a dispute as to whether it is or it isn't one, and that's accommodated activities and infrastructure whenever, whenever they were put forward the Minister decides and that's it. If it's an accommodated infrastructure or accommodated activity then your CMT is subject to that.

MS FEINT KC:

Yes, exactly right, and so and then – and you don't have the ability to exercise a RMA permission right in relation to it.

Then in section 65, that sets out the process for deemed accommodated activities. So, it relates to, so you see in (a): "the construction or operation of any proposed infrastructure" that falls "within the meaning of the definition of accommodated infrastructure cannot practicably be constructure or operated in any other location other than within the customary marine title area", essential for national or regional "social or "economic well-being".

GLAZEBROOK J:

So you say that's the one that's dealing with anything new, and equally, you can't use your – there are no permission rights in relation to it. Is that right?

MS FEINT KC:

Correct.

GLAZEBROOK J:

Okay.

MS FEINT KC:

Correct, and then if you go through to schedule 2 of the Act, that sets out the process for deciding whether that becomes deemed accommodated infrastructure.

1425

So that, you can see in subsection (1), it says "prior to the application being lodged under the Resource Management Act 1991…in a customary marine title area", it may become a deemed accommodated activity if you follow the process in this schedule to the Act. So, well, clause 3 requires the applicant to provide to the Minister all the information that's set out, and then the Minister can decide.

GLAZEBROOK J:
The terminology could be better, couldn't it?

MS FEINT KC:
Yes. It's pretty turgid drafting, isn't it?

Then so clause 4, Minister can consider and decision to make an initial decision, seek more information, decline the application, and so on.

Then under clause 8 the Minister can make a decision including: "(a) whether to waive the customary marine title group's permission rights; and (b) whether there are any other affected rights…(c) what compensation to provide; and (d) whether to classify the matter as a deemed accommodated activity under section 64.

Then going back to section 65, the questions that Justice Williams asked about was subsection (b) and (c), and they relate to mining operations.

WILLIAMS J:
No, it was 2(a) and –

MS FEINT KC:
Oh, 2(a)…

WILLIAMS J:
Then under 65 – sorry, that was 64, and then under 65 it was – sorry, yes, 65(1)(b), that's right, 1(b)(i).

MS FEINT KC:

That relates to respecting explorational mining operations.

WILLIAMS J:

Yes, and (c).

MS FEINT KC:

And (c) relates to any activity that's "necessary for, or reasonably related to, the exercise of a privilege", and remember back at section 9 we saw the definition of privilege related to the minerals under the Crown Minerals Act.

WILLIAMS J:

Right. So how do you – what's the effect of section 20 on that, on all of that thing?

MS FEINT KC:

Well section 65 only refers to deemed accommodated activities which are prospective activities, and section 20 is looking at existing resource consent.

GLAZEBROOK J:

Well would it always be existing, or does it just mean generally? So if you get through that process and have a resource consent, would section 20 –

WILLIAMS J:

Well section 20 doesn't speak to that.

GLAZEBROOK J:

Oh no, it's existing, you're right.

WILLIAMS J:

The point is if you have a consent prior to the Act this Act is irrelevant, and if you could have done it without a consent at any stage, even after the Act, this Act is irrelevant.

MS FEINT KC:

Correct.

WILLIAMS J:

So unless your argument is that the consent is one thing but the implementing of it is another thing it does seem that section 20 tells us that the Act is prospective.

MS FEINT KC:

No, because section 20 refers to resource consents granted before the commencement of the Act.

WILLIAMS J:

Yes, and if there's a resource consent granted before the commencement of the Act, this Act doesn't speak to it. So, any rights under this Act cannot affect a consent granted before the enactment of it.

MS FEINT KC:

But they can still be accommodated activities which means they're exempt from the RMA permission right.

WILLIAMS J:

Well, but they won't be just accommodated activities will they? They'll be anything. Accommodated activities have quite a narrow definition, whereas the section 20(a) –

MS FEINT KC:

Is broader.

WILLIAMS J:

Are everything that either required a consent or didn't require a consent. The key filter is before the commencement of the Act. As to section 20(a), and at any time, as to (b).

1430

MS FEINT KC:

Yes, indeed.

KÓS J:

The permission right must apply to an active or future application, not one that's already been granted.

MS FEINT KC:

Yes, but there is a process for becoming deemed accommodated activities so that you can essentially secure yourself an exemption from the RMA permission right.

WILLIAMS J:

Doesn't that suggest that to the extent that that is the case it is prospective.

KÓS J:

Exactly.

WILLIAMS J:

Because you don't need a permission retrospectively, section 20 says you don't.

MS FEINT KC:

Yes, well I suppose that must be right.

WILLIAMS J:

It's not beautifully worded.

MS FEINT KC:

No, it certainly isn't. I suppose our broader point is that there's not a problem that needs to be fixed in terms of the test for substantial interruption because Parliament has already worked out exactly how to accommodate all existing activities.

WILLIAMS J:

Well Parliament hasn't presumed, section 20 says so, Parliament hasn't presumed that activities pursuant to an existing consent, i.e. existing potential interferences, are extinguishing. Nor is it presumed they are not. It has left that to the exclusive use and occupation and held according to tikanga test that would have been applied in Canada and, although slightly differently in Australia as well.

MS FEINT KC:

But Parliament has decided what it needs to carve out of –

WILLIAMS J:

Correct.

MS FEINT KC:

– what can be subject to CMT.

WILLIAMS J:

Yes. Prospectively.

MS FEINT KC:

So private property is not being affected, accommodated infrastructure is being given an exemption from the RMA permission right. So it follows by a process of construction that other activities, it's comfortable with them co-existing within the common marine coastal area and with a customary marine title being granted, subject to very narrowing exceptions being recognised if there substantial interruption found in relation to any one part of that CMCA within the application area.

WILLIAMS J:

Right. It think the only flaw in that reasoning is that if you have a title, and this is a prospective provision, of course it can't be extinguishing because you have a title, and the reason you need a permission is that you're subject to the burden of that title.

MS FEINT KC:

You mean the CMT title, or?

WILLIAMS J:

Yes, yes. So you're an accommodated –

MS FEINT KC:

So, sorry, say that again?

WILLIAMS J:

You're an accommodated activity.

MS FEINT KC:

Mhm.

WILLIAMS J:

For which if you meet the special requitements a permission is not required.

MS FEINT KC:

Mhm.

WILLIAMS J:

That filter is there because if you weren't such an exception you would require permission.

MS FEINT KC:

Mhm.

WILLIAMS J:

So the granting of permission is itself an exercise of exclusive use and occupation.

MS FEINT KC:

Mhm.

WILLIAMS J:

The extraction of the ability to grant permission in these narrow circumstances can't possibly be an impairment of CMT because that's the whole structure of the statute, right? But that works perfectly well prospectively, and section 20 says any such incursion, retrospectively, has to be measured against the test of held in accordance with tikanga, exclusive use and occupation per the overseas authorities and *Ngāti Apa*.

MS FEINT KC:

Yes, I think that's right.

WILLIAMS J:

Yes, okay.

MS FEINT KC:

Oh, I just had a note handed to me. I missed one important part of the provisions in my trot through the Act.

1435

Section 64(1)(a), and this is quite important I shouldn't have jumped over this: "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 that part of the CMCA. So, that's recognising that Parliament has reconciled those activities occurring in the CMT, in the CMT area.

Then the final reference was to the legislative history and this is in the Attorney-General's bundle of authorities at tab 36. This is a Cabinet minute, and if we go to paragraph 83, this sets out Cabinet's agreement about what activities are protected from the right to permit, which is the RMA permission right, and it sets out the list which coincides with what's set out in the definition of the accommodated activities in section 64.

WILLIAMS J:

Except for (a) and (b), which are section 20 – sorry, 83.1 and 83.2, which are section 20.

MS FEINT KC:

Yes. So just to summarise then, in conclusion it's Te Kāhui's submission that the Court should be slow to recognise substantial interruption because it has a significant impact on customary rights in that areas may be carved out of the CMT order. We say if you look at things in terms of the time scales we're talking about here, 30 generations of occupation, even if there's an interruption, that's only a matter of decades of the duration of the resource consent, say 30 years, it could still, if that activity is shifted or stopped or changes, so for example the example of the sewage scheme in Rangataua Harbour, if that sewage scheme ended up being moved then that area would recover and the customary rights could be revived in relation to that area that's been affected. Because of that, we say the Court should be very cautious about finding that substantial interruption would be affected unless there's a very high threshold.

So I think having gone round and round on the subject of substantial interruption I can't think of a single thing more to say about it, unless the Court has any questions.

I meant to mention, as well, I think we've handed up a list of some further case law references to Australian jurisprudence on substantial interruption that follow the *Yorta Yorta* decision.

Now, we move to the appeal concerning Whakaari and Te Paepae o Aotea, so I'll ask Ms Sykes to come and address the Court.

GLAZEBROOK J:

Thank you, Ms Sykes.

MS SYKES:

Kia ora, te whare. Ko te tuatahi, kei te mihi atu au ki ngā whānau me ngā hapū e kiia nei me te iwi o Te Upokorehe i tae mai i te ahiahi nei. Kei te tino mōhio au kua poto te wā pea, ko tāku nei hiahia me tīmata ai rātou i te ahiahi nei i runga i taua tūmanako, kei te mihi atu ki a rātou mō a rātou nei tatari.

1440

I'm just very conscious that a good ope from the peoples, the iwi of Te Upokorehe have arrived and I was meant to start a little bit earlier. I'm hoping to finish so that they do get started this afternoon, and please do not be shy to give me a nudge, because I really am conscious that they've taken significant time and travel to be here and I don't want to eat into their time.

So on that note and perhaps to help me get through the submission in a cogent way, I'd like to ask if you could have the chronology of Mr Bruce Stirling, which is the bundle of authorities 501.00082 in front of you, and his principal report which is bundle of authorities 307.027683. I won't speak to lots of the references in those matters but there are some significant issues relating to the control and use at Whakaari which I don't believe were grappled at all by the High Court or the Court of Appeal, which is set out in quite considerable discussions by Mr Stirling.

WILLIAMS J:

307.02683?

MS SYKES:

307.027683.

WILLIAMS J:

02683. Yes.

MS SYKES:

And just to orient ourselves, because I'm working from a – I'm hard copy, I'm not this modern technology person from the High Court, if you could go to page 123 of the main report.

ELLEN FRANCE J:

Sorry, I'm not quite there.

GLAZEBROOK J:

You'll need to wait a little bit because I'm just – so what is it, 307?

WILLIAMS J:

There's only one 307 document.

GLAZEBROOK J:

Sorry?

WILLIAMS J:

There's only one 307 document.

MS SYKES:

.027683.

GLAZEBROOK J:

Okay. I hate our silly numbering system, it drives me insane.

MS SYKES:

I confess, I never use computers. I tend to be – I'm blind in my left eye so I love paper, so I'm sorry to the trees as a child of – and my cousins, I use them up all the time.

WILLIAMS J:

What paragraph are you at?

MS SYKES:

I'm not actually taking us, just to orient ourselves to the diagram at page 125 of the main report. I'm not going to use the numbers. My volume, they come from the High Court, and it's a map of Whakaari.

WILLIAMS J:

Yes.

MS SYKES:

And she's known by our people as Te Puia o Whakaari and in Mr Stirling's report he highlights – and I'm going back now to page 119 and I'm taking us to paragraph 345, that is early in the 1830s Joel Plack was writing about the "links between Whakatōhea and Whakaari, from whom he learned something of the legends associated with it. He also observed the use of its fisheries was becalmed in the waters off Whakaari for six days", which I'm saying is not an unusual event, even in the modern context. "Polack wrote of a large reef that extends about five kilometres from Whakaari towards the mainland. He saw the abundance of the fisheries close to its beach, which he said 'was almost alive with the subsultive leaping of the innumerable shoals of fish of unequalled variety'. On their visits to Whakaari, Māori fishing parties hauled their waka above the steep shingle banks that formed the few beaches on the land."

The next paragraphs and following are significant discussions about tītī, which I'm not going to take the Court to, it's a very incisive discussion about notwithstanding the fact that this, what has been described by Professor Boast as uninhabited space as early as the 1830s was used as a place of physical occupation and use, I say, for the purposes of meeting the needs for survival of the peoples of Te Whakatōhea and that continues to today.

I also want to emphasise that Whakaari and Te Paepae o Aotea are immensely significant taunga for the hapū and iwi of the eastern Bay of Plenty, and it locates itself in Te Moana o Toi. So, Toi is Toi-kai-rākau, I didn't take you to that to the whakapapa chart yesterday. I took you to a number of other tīpuna. But he, the moana, Te Moana-o-Toi is named after Toi Kairakau who is also

known in Te Arawa as Toi Te Huatahi, so he's got a transforming name, and he was an early voyager before some of the Maatatua, the main migrations that are often reflected.

1445

The name, Te Moana-o-Toi takes his name from that, and that's why there is a location, I think of relationships, much broader than those within the applicant groups for Te Whakatōhea and Whānau-ā-Apanui and Ngāti Awa who bring claims to this court.

In our submissions –

WILLIAMS J:

Sorry, can you just give me the page? 319 – 119 did you say?

MS SYKES:

Which one's this one for?

WILLIAMS J:

This is the Polack diary?

MS SYKES:

Polack, yes, it's paragraph 345.

WILLIAMS J:

Thank you.

MS SYKES:

At page 119 of his main report, and I'm not reading from the case on appeal bundle numbers.

WILLIAMS J:

It's all right, I've got it.

MS SYKES:

But that sets out the fishing discussion. There is significant discussion in this whole chapter on the tītī and the development of regulations and the, what I called yesterday, the continuity of relationship between the peoples of Te Whakatōhea, Ngā Hapū o Te Whakatōhea with Whakaari in the physical use. I apprehend that my friends suggested that our relationship is only through fishing or was only through a spiritual connection. I want to be very clear, our evidence from the outset was always based on that understand that was part of our seascape. That was part of what we had mana whakahaere over and we enjoyed the bounty of that for the survival, the mutual survival of ourselves.

I do want to continue with the term mana whakahaere even though control in the Waitangi Tribunal report, which I also want to take us to, is expressed in terms of tino rangatiratanga. I think the sense of authority of sourcing yourself in mana and linking it to mana tuku iho is fundamental to the paradigm of law which operates in Whakatōhea.

All hapū of Whakatōhea have a significant relationship with Whakaari. For the Court's benefit, you may know about the footprints as you step after you pass away and you go back to your earliest reaches of where you've come from, Hawaiki. In the traditions of Te Whakatōhea, Te Paepae o Aotea is one such place, that after the dead have been mourned at their marae or their places of kāinga, the spiritual being will go through to Te Paepae o Aotea and venture back to Hawaiki. So that's why it's such a significant spiritual context for all of the hapu.

The relationships are based in mutual recognition of the shared rights and responsibilities between the hapū and iwi, reflecting the whakapapa connections, and the influence that the sheer physical presence that Whakaari has in the seascape, in the mindscapes of those that grow up between Tarakeha and Maraetōtara. But it's something that also extends right across to the entire Bay of Plenty coast.

There are reciprocal obligations of kaitiakitanga and manaakitanga that are highlighted in the evidence, in the chronology of Mr Stirling, which is the 501 document. You'll see that as early as 1769 he and Mr Derby, who was the Crown expert on this, noted that there was an encounter with James Cook at sea after challenging him briefly about the trading matters, but there was an also an explanation given that, by one of our witnesses, Ms Tracy Hillier, saying that it was actually a waka flotilla going out to see this new arrival, making sure that they had come in peace, or as she said, "checking them out", and then making sure that he was aware that that authority that they maintained in their landscapes and their seascapes was understood by this new arrival.

"Cook observed fortified pā and extensive cultivations on the coastal land." You saw the archaeological research of those matters yesterday, and Mr Stirling sets out quite significantly it's not just his testimony but the testimony of others that noted those matters.

If I maintain the chronology, and I want to jump a little bit, I want to show that in 1968, and unfortunately mine's not numbered, but it's the second to last page of the chronology, that kind of authorities is transformed in the modern terms of Whakatōhea Tribal Authority reducing bag limits for tītī on Whakaari to 50 tītī per person. So, you've got authority transforming from assertion of mana to ensuring conservation effort and restoration of your relation to the birds, the manu, the children of Tāwhirimātea, your obligation to maintain in 1968.

1450

In 1998, if you go to the last page of Mr Stirling's chronology, you'll see that there's a Whakaari Marine Protection Steering Committee formed, which includes Te Whakatōhea representatives, and that emerges from the Crown evidence done by Mr Derby. So I've quickly tried to show that there is that continuity of relationship since 1840, or prior to 1840 to the present day and those practices, those rituals, the physical practices of tai gathering, medicinal gathering, medicinal gathering of particular matters. One I want to highlight is red ochre from the brambled shark liver oil. That is mentioned in the evidence of Ms Anna-Marei Kurei. That's at 202.00566. It just showed that they were

actually using these things for not just fishing purposes but creating like Māori perfumes, if I could use it that way. Māori medicinal purposes, to actually heal the body.

These concepts and practices collectively intertwine and give rise to mana whakahaere in the takutai and papamoana around Whakaari. Each element should be viewed as part of the bigger picture created by the whāriki of rights at place. It is artificial to seek to analyse mana in the unique context of Whakaari by seeking to identify each individual stream of the whāriki, and I don't wish to be pejorative of some of the others that suggest that they are the primary rights holders there, but that's what I see, is that we're being asked in their construction of the authority that's at place to only look at one strand of the complex tapestry of woven rights and relationships that subsists there.

You'll recall the waiata that I took us too yesterday which, again, is in Anna-Marei Kurei's affidavit. It starts in the opening line with a reference to Whakaari, indicating the central significance of the island and acting as a mechanism for the transmission of the knowledge of the traditional hapū territories which emanate from Te Whakaari looking back.

Accounts of Whakaari's origin are also set out in her discussions. She reminds that Whakaari in the traditions of her peoples of Ngāti Ira rose from the deep after Māui touched the fire for the first time and plunged his hands into the ocean to relieve the insufferable pain "in the place where he shook the fire from him, and arose Whakaari". There are other narratives that we are all aware of came from in the evidence. Te Arawa for example, talks about how the sisters of Ngātoroirangi came from the Pacific. Their names are Hoata and Pupu, I know them much better than the stories of Whakatōhea, came through Whakaari to Kaingaroa and eventually down to Tongariro. It's a beautiful love story in the creation, histories of Ngāti Awa. Pūtauaki leaves his wife, Tarawera, and is located at Kawerau where he sees the flumes of Whakaari, his lover, calling to him. Those traditional stories all show in the mindscapes, in the pūrākau, of our peoples, the significant context of her whakapapa to the local identities of all of those that claim relationships along that coast.

Other iwis have different – other iwi have different explanations. Richard Boast sets that out. I think his evidence is very important but I won't take you to it, it's on the case of appeal at 319.08470.

Whakaari also prominently features in the more recent history of the hapū of Te Whakatōhea, and Tracy Hillier's discussion around Ngāi Tamahaua tīpuna Punahamoa taking a double-hulled canoe, a waka, to intercept Captain Hook – Cook sorry, at Whakaari, an expression of guardianship of the territorial boundaries while also exchanging, so the manaakitanga was there was there as well. In her account, she talks about sussing him out then giving fish to him because it was obvious that she thought, or the tīpuna thought that he came with some sense of reciprocity for the expressions of this new traveller.

The spiritual relationship, which certainly was focused on by a majority of our witnesses, is fundamental in the assertion of the relationships by the hapū of Te Whakatōhea. She is seen as a tupua, a supernatural entity. She is a sister maunga to the Ngāti Ira maunga Mātītī and that's in the evidence of Ms Te Ringahuia Hata. She, or Whakaari, plays an important role in practices such as the manifestation of kaitiakitanga.

I don't wish to take you through the matters I've raised at paragraph 10 but I'm trying to locate the controlling use and the multi-dimensional way that the kōrero pūrākau and the practices that are sustained have been passed down. She's a tīpuna who we can look at to the cloud and smoke patterns over Whakaari is tohu around the weather. This testimony came from one of our most elderly witnesses Hemaima Hughes. She is at 201.00489. I liked her testimony, because her dad was a Pākehā but he had used his boat to help the whānau maintain the relationships with Whakaari. Quite often there were fishing trips out there to gather fish for marae backgrounds, but meetings and obligations, but also to make sure that there hadn't been over-fishing in some of the fishing spots, so that they could signal maybe the need to replenish those spots.

WILLIAMS J:

So on the evidence that you've got there, are you arguing that whoever else had rights, there is no doubt Whakatōhea has rights? Is that your point?

MS SYKES:

Yes and it's a bit like the *Ngāti Whātua* case, if I suggest that some have claimed –

WILLIAMS J:

Don't really want to go there.

MS SYKES:

– pre-emptive rights, priority rights, to the exclusion of others and I'm saying that's not the position, we all have mana there and it's not just rights, it's mana. There are particular –

WILLIAMS J:

So what have you, with the, you know, the rostering of access to Whakaari, which I was rather impressed with, I hadn't seen that before...

MS SYKES:

Are you familiar with Rua Kēnana's spades, clubs, diamonds and hearts in his –

WILLIAMS J:

I don't think that would have worked back then.

MS SYKES:

No, but are you familiar with the idea?

WILLIAMS J:

Yes.

MS SYKES:

That the person that travels the furthest is the first that is, meets the manaaki of those that are hosting. So –

WILLIAMS J:

Is, but my question is really, is there kōrero about how that priority of access was worked through?

MS SYKES:

The kōrero that we were told is that they were the furthest away so they were given the right to go first. That's Whānau-ā-Apanui.

WILLIAMS J:

But, yes, but –

MS SYKES:

And those closest were –

WILLIAMS J:

– where, when and how? Is that – is there kōrero about that?

MS SYKES:

It's about the seasonal taking of tītī.

WILLIAMS J:

No, I mean when was the decision made and who was involved in the decision?

MS SYKES:

That's discussed in the evidence of Mr Stirling and how those regulations came to be in and in the evidence of Mr Walzl.

WILLIAMS J:

Oh, so are these post – that roster, is that post-colonial?

MS SYKES:

Yes, post-1950.

WILLIAMS J:

Ah, do you know what happened before that?

MS SYKES:

I think there was sufficient, as I tried to explain in my introduction, there was so much bounty there, there wasn't a need for a conservation or an allocation of rights process, because over-fishing, modernisation, and this was not just by non-Māori fishers, Māori fishers, had not taken a more conservation approach or conservative approach to the extraction of the resource. These regulations were cemented by regulations and the consent of kāwanatanga to put them in place.

WILLIAMS J:

And where is that in the Stirling report?

MS SYKES:

That's in –

WILLIAMS J:

119 "Tītī on Whakaari", is that the?

MS SYKES:

Yes, that's the whole section in there. It's set out at page 126 at paragraph 360: "As the tītī numbers on Moutohora plummeted towards local extinction, the Government and the Ngāti Awa Tribal Committee agreed the island should be closed to birders," and then there were certain authorities set out. There was "Whakatōhea authority, to allowing Whakaari birding permits to be issued as of right to Ngāti Awa". There's an evolution of this understanding between 1950 and to that period. Does that answer your Honour's question?

1500

WILLIAMS J:

Yes. And so is there any kōrero given in the evidence about what the regime was before that?

MS SYKES:

I'm going to take it to you. Some of the kōrero is that there's no sign that says: "You are now entering Whānau-ā-Apanui territories." There's signs saying that – there's nothing like that. There is towards the end of our – the submission when they talk about – and this is at paragraph 24, what I was going to talk to later, the witnesses referred to shared interests in Whakaari in this way: "When I go up to the Whānau-ā-Apanui there's a sign on the road that says: 'You are now entering Whānau-ā-Apanui.' When I went to Whakaari I never saw any signs." "So I maintain Whakaari has shared interests. There's nobody to say: 'Where's your passport?'" "There were no battles over Whakaari. We never fought each other over Whakaari." And: "I've never heard any battles at White Island between iwi." This is our tohunga, our knowledge keeper Dr Amoamo reminding us. He also is taharua, Whānau-ā-Apanui and Whakatōhea, so he brings quite a different lens to others to the nature of the shared interests at that place.

Te Whakatōhea witnesses did not concede that Te Whānau-ā-Apanui have exclusive authority in relation to Whakaari. The witnesses acknowledge that Te Whānau-ā-Apanui have mana there but also asserted their own parallel mana, and we set those matters out in – at the end. I think what was highlighted was that this is a significant part of the seascape. It's a significant part of the historical connections for all peoples in that area. It has a prominence. Each have their own mana. I think Dr Amoamo also said: "When I wake up in the morning I look out and Whakaari is in front of me. It's not to my left, it's right in front of me." So he located himself as seeing that as part of his world. That was his world. That was a natural extension of his ways of life, protection, territory, and he made sure that their tikanga followed those protections.

The rāhui is also really important, and when my friend Ms Coates questioned Dr Amoamo on this there's a suggestion that he didn't lay the rāhui, he only lifted the rāhui. I think that's quite a reductive view of his responses to her to – during the hearings. What the rāhui, and I'm talking about the most recent one after the 2019 eruption discloses, is that Whakatōhea strongly supported the rāhui regardless of the different kaupapa that were happening on the whenua

at the time. Mr Te Rua Rakuraku, who was also a pou tikanga: “We did not sway from our tikanga. We held true to what had been taught. If we look after the moana, the moana will always take care of us.” “The placing of rāhui are part of the matrix of understandings that arise from our whakapapa relationships to Tangaroa and Tāne Mahuta and the deep respect we have to ensure there is a balance in these relationships for the mutual survival of us that are protected by these deities both in the physical and spiritual realms that we live.”

Donald Kurei, and I said he’s one of our most important witnesses for Ngā Hapū, he’s the fisherman, he’s the one that’s the conservationist. He identifies and tells the whānau and the leadership, the rangatira at home when changes need to happen and their behaviours, and he said: “We could never place a rāhui on an area we do not govern, manage, or look after. Te Whānau-ā-Apanui suggests Te Riaki Amoamo only lifted the rāhui. It did not set the rāhui following the eruption of Whakaari in 2019. That assertion is incorrect and a narrow reading of the evidence.”

Te Whānau-ā-Apanui submissions at paragraph 52 and footnote 104 is what we’re referring to, and we take the Court to the evidence in the transcript itself of what Dr Amoamo actually said.

Where I'd like to conclude my submission, given the question of time, I'd like to take the Tribunal to the Waitangi Tribunal *Foreshore and Seabed* decision at pages 25 to 26, that is the early foreshore and seabed discussion, and in that chapter they looked at the tikanga that were indicia of controlling use, and they noted that there is a spiritual dimension we say by their rāhui, Māori communities made places and species tapu, preventing access and use. So we met the spiritual dimension of the indicia of control and use. That’s set out by the Waitangi Tribunal.

The second dimension is a physical dimension. Rāhui could be enforced by the community, and I also took you to the evidence of Polack to show some of the closeness and dynamics of that physical space and understanding.

WILLIAMS J:
What's your page number there?

MS SYKES:
For Polack?

WILLIAMS J:
No, for the Tribunal report.

MS SYKES:
Pages 25 and 26, and these indicia set out by the panel who is led by Judge Wainwright at that time after consideration of something like 274 affidavits that had been filed in other inquiries as early as the inception of the Waitangi Tribunal and a summary of those indicia have been brought together and this is what the Tribunal panel determined as the key indicators of control and use. I'm saying shortly my submission is that we meet all the indicia, so therefore both the High Court and the Court of Appeal were wrong to limit our relationship to something like fishing.

The other dimension of reciprocal guardianship, I think the passage I took you to of Mr Rua Rakuraku's evidence clearly shows that they are tangata whenua and kaitiaki of the taonga, and he says spiritual sustenance from the taonga caring for him by being able to read the weather signs and being fed by the nurturing of those so that he can fulfil any – forego any activity if there is a likelihood of harm coming to his people. There's a dimension of use. It's quite clear from all the testimony that we set out the rangatira and the community had rights to fish, to take seaweed, to hunt seabirds, to use sandstones and bitumen, mimihā, to travel by waka and to exclude others from those practices as they saw it. I think the evidence of the flotillas going out to Captain Cook, and again to Ngāpuhi when they came out, are examples of them seeing whether or not people are going to come in kindness, or with other – some other motive, so they are trying to assert their authority to exclude, and in the modern context, of course the conversation examples that I've taken you, are showing how they want their own people to be minimised in their use of those resources

to ensure their relationships to the children of Tane, of Tāwhirimātea and the children of Tangaroa are maintained.

Manaakitanga in the Waitangi Tribunal recorded highlights sharing the bounty of the sea by invitation. I think that regulation scheme shows that quite clearly in the way that it was implemented by the marae committees themselves I think is testimony to that being dealt with, and then I use the Captain Cook example as granting access to manuhiri, unlike other parts of Aotearoa when he arrived Te Whakatōhea saw him as coming with a mutuality of understanding with some reciprocity arising from that arrangement after they'd gone out from the shore to see him.

The last matter that I think I need to deal with is the suggestion that this purported sale by Hans Tapsell, which occurred without the full engagement of Ngāti Awa and Te Whakatōhea, and the Native Land Court, did not adequately examine the circumstances of the tuku to Ngāti Awa, nor explore the rights and interests of others at Whakaari, and we rely on Professor Richard Boast's testimony at 319.08492 to 08494 for those conclusions.

1510

Ngāti Awa and Whakatōhea were never consulted, never engaged with that purported sale, which we say is erroneous in tikanga but also erroneous in Pākehā law. Te Whānau-ā-Apanui rely on a customary tuku of Ngāti Awa's interest in Whakaari to Te Whānau a Te Ehutu to overcome the fact that, notwithstanding that's an illegal sale, that tuku has precedence in some way, but the tuku itself fails for the same reasons that the sale fails. There was no facilitated discussions between and amongst the rangatira of Te Whakatōhea to that tuku.

WILLIAMS J:

When was the tuku?

MS SYKES:

You'd have to go Richard Boast's evidence for the date. It's around –

FRENCH J:

The Court of Appeal decision says 1820s.

MS SYKES:

1830, I've got, yes, 1820s.

FRENCH J:

Twenties, yes.

MS SYKES:

Yes. 1820.

WILLIAMS J:

Hans Tapsell was in the Bay of Plenty in 1820?

MS SYKES:

Yes, doing his thing, finding Māori wives.

WILLIAMS J:

Yes, so of course he became a part of Ngāti Whakaue, did he not?

MS SYKES:

He was Ngāti Pikiao as well.

WILLIAMS J:

Well, there you go.

MS SYKES:

He had lots of wives along the coast, customary wives.

WILLIAMS J:

Perhaps you own Whakaari, Ms Sykes.

MS SYKES:

I know, he sold it, too.

WILLIAMS J:

Oh, did he?

MS SYKES:

So, no, I'm not related to him. But, you know, that's – we laugh about it, but that is really what is being relied upon.

WILLIAMS J:

Well, I guess the point is, this is a replay, really, of the Muriwhenua land claim, isn't it, this is a pre-Treaty transaction, who's law applied? The law of tuku or the law of sale?

MS SYKES:

But in either law, those that had mana at place –

WILLIAMS J:

Yes.

MS SYKES:

– are required to have consent. Kia whakaaehia, kua tuku ēnei kaupapa, anei te mana i whakaaehia. That didn't happen for Te Whakatōhea.

WILLIAMS J:

Right, so not all the owners consented, you say?

MS SYKES:

Yes.

WILLIAMS J:

So sometimes the common law can be useful?

MS SYKES:

I prefer the word "rangatira", were engaged with the decision, because a tuku is appropriate in appropriate cases. This is not one, I suggest, is one that should be given force, mainly because of the individuals that are involved that

excludes significant rangatira of the period, and I'm not trying to be pejorative to those that are making assertions of rights. What is clear, is there is no representation from any iwi to the east of Ngāti Awa at the hearing in the land court when that proceeds and this, as Richard Boast criticises, says it was unlikely there was any awareness of the hearing in Ōpōtiki and beyond.

Finally: "A modern study of property rights in the islands, bringing to the task a modern and sophisticated approach to the intricacies of Māori land tenure, would in all probability conclude that there were varying and overlapping interests in respect of the islands, not all of which would have been extinguished because of transactions made with Tapsell."

And to offer, you know, a conclusion to these statements, in no way are we trying to deny the rights of Te Whānau-ā-Apanui, Te Whānau a Te Ehutu, Ngāti Awa that claim interests, Te Upokorehe claims interests. We say that this particular unique feature of the landscape here is something that is shared and there are relationships to it that arise from different contexts but those relationships are sacred and should be given force to in a customary marine title order around the island.

I don't think I've got any other – and Te Paepae o Aotea, I keep forgetting that one because it's just a natural place that should be given its own sacred recognition.

Āe, so I'm just being reminded at footnote 187 of our submission, it's a wāhi tapu, Paepae o Aotea, and a reserve for Mataatua as a whole and that's, if we look at parallel relationships to the CMT whāriki, that's already recognised, of the shared relationships. So this is for Paepae Aotea, a similar whāriki under this Act, we say should also be recognised as part of the operation of the Act, and it provides a precedent of argument that we say whāriki, why Whakaari falls into the same conceptual understandings as Te Paepae O Aotea has already been agreed to by way of consensus for the peoples of Mataatua.

I thought you would ask me about the distance away from shore, because it's 48 ks from the shore, and you'll recall the decision of the – what is an iwi, and lots of discussions in the Muriwhenua fishing Tribunal report and the Ngāi Tahu Sea Fisheries report around control and use where things are off the shore. I think both the Ngāi Tahu Sea Fisheries report, and recent obiter statements of her Honour Justice Gwyn show that if you look at the actual geography of the particular spaces where you are seeking a CMT to be engaged with or imposed or created, that you have to look at the terrain, and here we clearly have, yes, lots of fisheries inshore, but we have the fishing grounds going out, we've got a mussel factory at eight kilometres. We've got fisheries going out as much as 16 to 24 kilometres, and we've got fishing grounds around this. We're saying that that unique topography also lends itself for the flexibility of the kind contemplated where control and use would be found. Ka pai. Thank you.

I'm really honoured to have had Te Mana Motuhake o Muriwai brought to us. I think I might ask if I can remove it now for the benefit of allowing the next group to have it. I hope I don't – I'm not causing harm to anybody by this but I'm only doing so because we have a person that brought this treasure down to us, and she has to catch a plane, and she might have to leave early. But I think we're very privileged to have had it brought to us today. Kia ora.

WILLIAMS J:

Tēnā koe.

MS FEINT KC:

So we have a third ground of appeal, and I'm content for our submissions to be taken as read on that. They're only two paragraphs long anyway. I'm conscious of time and the need for Te Upokorehe to start today. That does not need to be a long farewell as we'll be back next week. Tēnā ra tatou.

MS COOPER KC:

We've had some technical problems with the ClickShare, so I was going to ask if we could just have five minutes to resolve those before we start?

GLAZEBROOK J:

We'll adjourn for five minutes and let us know when you've sort the problem.

MS COOPER KC:

That's greatly appreciated. Thank you your Honours.

COURT ADJOURNS: 3.18 PM

COURT RESUMES: 3.25 PM

MS COOPER KC:

Tēnā koutou, e ngā Kaiwhakawā. Before I begin, I just want to acknowledge the representatives of my client Te Upokorehe, who have travelled to be here today. They have been watching the hearing online until now but wanted to come down to show how important this hearing is to them. I also want to acknowledge there are other representatives of Te Upokorehe who are still watching online and several who have been too unwell to travel, unfortunately. But this is certainly a very important hearing for Te Upokorehe. It's an important opportunity for it to have its voice heard and to express its own mana, whakapapa, and tikanga, and that is what I will attempt to do in my submissions.

Now we have provided a road map which we will be working through and hopefully that will be an efficient way to cover the territory. I am going to very briefly make some remarks about issue 1 largely to explain why I don't have much to say about issue 1, and then I am going to concentrate on issue 2, which is whether the Court of Appeal should have remitted the CMT 2 order, being the order in respect of Ōhiwa Harbour, back to the High Court for re-hearing alongside CMT 1. So that will form the bulk of my submissions and then Mr Lyall is going to address our third issue on appeal, which is whether overlapping CMT orders are an available outcome under the Act.

So starting first of all with the first issue, being the test under section 58. I'm not going to address your Honours on that because we are content to adopt the submissions of Te Kāhui about the way the – what we say is a composite test

operates under the Act, and I don't think I can add anything to the extensive discussions your Honours have had with my learned friends on that.

But where we do certainly have a very strong disagreement with Te Kāhui is when it comes to the application and outcomes that that test leads to, and really the key departure or the key area of difference between us is that we say that Te Kāhui evidence and submissions fail to distinguish between Te Upokorehe on the one hand and the hapū to Te Whakatōhea on the other, and that was evident we say throughout the High Court and it's been evident in the submissions we've heard from my learned friends for the Te Kāhui grouping of Te Whakatōhea hapū. There were several references in my learned friend's submissions or at least, certainly at least one I noted, to the six hapū of Te Whakatōhea, and his Honour Justice Powell [*sic*] in the High Court also referred to the six hapū of Te Whakatōhea and indeed he made a CMT order in favour of the six hapū of Te Whakatōhea. Now there are only six –

WILLIAMS J:

You mean Justice Churchman?

MS COOPER KC:

Oh, I beg your pardon. Justice Churchman, yes. Thank you.

WILLIAMS J:

Sorry, I was have I read the wrong judgments?

GLAZEBROOK J:

Yes, I was getting a bit worried.

MS COOPER KC:

I'm so sorry. I misspoke. Justice Williams, thank you for – thank you, your Honour, for correcting me. Yes, of course, Justice Churchman.

Yes, so the CMT order was in fact made to the six hapū of Te Whakatōhea despite the fact that Te Upokorehe does not accept that it is a hapū of

Te Whakatōhea. It says it stands on its own mana and as its own iwi, and I will come shortly to the whakapapa evidence that supports that. But the upshot of this is that there has been a tendency to refer collectively throughout evidence and submissions to Te Whakatōhea without adequate acknowledgement or care being taken to identify who exactly is being referred to, and a lot of the evidence which, on its face, refers broadly to Te Whakatōhea, we say in actual fact it's evidence that relates to Te Upokorehe, and therefore there does need to be some very careful analysis done.

1530

We see that when we go through things like the chronology in I think it was Bruce Stirling's evidence that my learned friend just took us to. It's replete with references to the presence to Te Whakatōhea, people noting what Te Whakatōhea were doing at certain times. Often times that will include, that will either be referring to Te Upokorehe, or it will at least include Te Upokorehe. So really there does need to be quite a careful and detailed reference back to the underlying sources for a lot of those summary materials, to understand what is actually being said in them.

Now the outcome, as I've already said, of this approach is that in the High Court the result was that both CMT titles were awarded on a shared basis, and they were ordered across the entire combined rohe of Te Upokorehe and the Te Whakatōhea hapū without, we say, weighing the merits of each application individually. Now what my learned friend Ms Feint said about that just earlier today, she made the comment that, in Te Whakatōhea's submission, tikanga is better at navigating the relationships between and among hapū, and therefore it makes sense to have the six hapū within one CMT and then have them use tikanga to work out the territories and boundaries between them, rather than doing that under the Act.

Well, there is a fundamental disconnect, in my submission, between that approach and the other submissions and evidence given on behalf of Te Kāhui about how tikanga works, because we have heard from many witnesses and in submissions that mana is held at the hapū level, and that that is part of the

tikanga of Te Whakatōhea, and it's certainly Te Upokorehe say that they hold the mana over their rohe. They do not share it with Te Whakatōhea, and that's irrespective of whether they are regarded as a hapū or an iwi.

Further, I think it's been accepted, and it was certainly emphasised in the submissions made by my learned friend Ms Panoho-Navaja yesterday, that sort of, that question of who has the mana tuku iho to act as kaitiaki of an area, sits with the hapū who holds ahi kā.

So that, I say, is really at the heart of the disagreement between Te Upokorehe and Te Whakatōhea.

WILLIAMS J:

So the question is not whether Upokorehe has an iwi or hapū, but whether Upokorehe has separate rights unconnected to the other five groupings that say they have rights.

MS COOPER KC:

That's right your Honour. So Te Upokorehe do say they are an independent iwi, but even if that were not to be accepted, they're clearly a distinct group, and they say as such they are entitled to hold – they do hold and they're entitled to assert their own mana, and there has been no suggestion that the Te Kāhui group holds any mandate for Te Upokorehe. It's accepted that they bring this application in their own right with their own representation.

So coming on then to why we say the Court of Appeal should have remitted CMT 2. As I've already said, Te Upokorehe took the firm position in the High Court that it was the only applicant group entitled to CMT within its rohe, and it didn't consent at any stage to a joint CMT, and if we could go to the passages of the High Court judgment that I've linked in the outline. This is recorded in the judgment. So one of the issues discussed in the High Court, that was raised by the Crown, was whether it was possible to have a shared title in circumstances where not all participants accepted each other's entitlement, and at paragraph 158 the judgment refers to counsel for the

Attorney-General relying "…on the evidence by Felicity Kahukore Baker on behalf of Te Upokorehe which asserted that Te Upokorehe held mana over Ōhiwa Harbour, and that any rights other groups claims… under the mana of Te Upokorehe."

Now that's a firm position taken throughout all of the evidence on behalf of Te Upokorehe, and noting "…there was no recognition or acceptance by Ms Baker that groups other than Te Upokorehe held mana in that area."

So that's recorded in the judgment there, and then if we go to paragraphs 183 to 184 of the judgment. Again this is a discussion on shared exclusivity, again refers to the fact that Te Upokorehe has a different view, and the Judge essentially said, well, that's fine, but "… it is open to both the pūkenga and the Court to come to a different view…".

So then the question is, well, implicitly then the Court rejected Te Upokorehe's view, but then the question is why? Where is the reasoning. On what evidence. If we go to paragraph 187. Sorry, we appear to have lost the connection. While we're bringing that back, essentially in the judgment its, you won't find any reasoning as to why the submission of Te Upokorehe's separate independent mana is rejected, other than essentially the reference to reliance on the Pūkenga Report and the finding in the Pūkenga Report. Well, what the Judge understood to be a finding in the Pūkenga Report, that each of the applicants held customary interests in the areas for which they had sought CMT.

Now, I apologise your Honour, I will come back to that. But if your Honours no doubt will have looked at the Pūkenga Report, and the Judge essentially put a series of questions to the pūkenga, one of which are which groups are entitled – which groups hold customary interests in the application areas. The pūkenga provided a list of the groups, the applicant groups, and the areas over which they held customary interests, but didn't comment on those interests, and those were, in effect – ah, here we go. So at paragraph 187 there's just a reference there to the Pūkenga Report noting "… the issue of how any CMT is to be held is a matter for future discussion… The pūkenga were

hopeful that the poutarāwhare adopted by them might allow for the recognition of different interests as between the hapū."

So the pūkenga proposed a poutarāwhare, a construct as a way of resolving the competing groups. It didn't actually purport to reach a determination as between those competing interests. It simply said, well what we propose is that we have this construct whereby a joint CMT is allocated, and then we're hopeful that everybody will just be able to reach agreement. Well Te Upokorehe did not accept that approach. They, in fact, left discussions rather than continue to participate because they did not agree with the approach, and as noted here they did not accept the Court's adoption of the pūkenga findings or the joint CMT.

So, in effect, there was no determination of Te Upokorehe's claim to hold the mana over its rohe. It was really parked for a further discussion on the basis that we'll put everyone in, and everyone can just work it out amongst themselves.

1540

I'll come back to the Pūkenga Report later, but I think perhaps just to go next, having established Te Upokorehe's position in the High Court, I'll go next to the affidavit of Lance Reha for Te Upokorehe. So this was an affidavit that was given in reply to evidence from the other applicants and it really does I think express very well – I'll just find my copy. It expresses Te Upokorehe's position extremely well. I'm sorry, I'm just going to find my copy of it here. Sorry, your Honours, find the right one.

So if we just start at paragraph 4. So he's responding there to evidence that proposes Te Upokorehe is a hapū of Te Whakatōhea and he's trying to set out how Te Upokorehe sees itself, and the first point he makes is it stands alone in its own mana. Traditionally it didn't sit within an iwi: "Rather the mana whakahaere for land, water, even for people was with the hapū." And then he goes on to say today the labels have become political.

Then if we go down to paragraph 8, so at paragraph 8 he sort of acknowledges that there are some whakapapa links for some of the whānau back to Tūhoe, Ngāti Kahungunu, back to Whakatōhea, but traditionally he says: "As people moved in and out of the Ōhiwa Harbour there was an agreement to meet with Upokorehe and discuss how they travelled, how they acted and behaved within the Ōhiwa domains, as well as within our rohe. Yes, there was conflict. I agree that not all battles were won by Upokorehe. But no one was able to extinguish our rights of occupation."

Then he makes the point where another witness was talking about "we are the only iwi": "And by 'we' I think he means Whakatōhea, I think more careful language is needed. Others have always been here, but the underlying mana rests with Te Upokorehe."

Then he does give – later on in his evidence, if we just go to paragraph 29, so there's a whakapapa at paragraph 28 but I'm going to come back to whakapapa. At paragraph 29 there's a reference to Wī Akeake who was a tūpuna of Upokorehe, signing the Treaty, and then at paragraph 30: "The history of Upokorehe dates back to Te Hapūoneone," and I'm going to come back to Te Hapūoneone, but they are the original inhabitants of the area. "After time it shifted into te Whānau a Tairongo. Then it morphed," and so on, and it was only later that the name changed to Upokorehe, "but we are the same people".

And then there's – if we go on to paragraph 40 I think that's an important point here, and this is really why this is so important to my clients: "Upokorehe need to be left to keep doing what they do – looking after the rohe and protecting our wāhi tapu." And I'm going to take your Honours to some of the evidence of the extensive role that Te Upokorehe perform currently and have done for many years within the rohe: "It's about kaitiakitanga for me. It must not be about money, but instead be about the mana." And that's Te Upokorehe's real concern here, is they have exercised the obligations of kaitiakitanga in the rohe for decades, if not centuries, and they are very concerned that this process may disrupt that.

WILLIAMS J:

Do they say that the other hapū have not in these areas?

MS COOPER KC:

Not – no, not in these areas. That's correct, your Honour. So they say they are the kaitiakitanga. They acknowledge that there are links and that others have the right to come and use the resources, but under the mana of Te Upokorehe. So when it comes to – well I'll take your Honour through some of the examples shortly.

So at paragraph 43, for example, Mr Reha agrees that the moana, "our moana was a food basket not just for Upokorehe but for other iwi", and he acknowledges there were some temporary occupation sites that Ngāti Ira and others stayed on: "There's no denying that. But there is a difference in the relationship." And then he goes on from paragraph 45, he gives the analogy of going to a restaurant: "If I go out to a restaurant, it doesn't become mine."

1545

So at paragraph 45 he says: "I do not own it, and I have no mana or authority over it to change the menu." And he goes on and compares that to Ōhiwa Harbour, they "come and dine, and when they finish they get to return home. That is the relationship a lot of whānau have with the harbour".

WILLIAMS J:

So is there evidence of the other hapū accepting that position?

MS COOPER KC:

There is, your Honour, and I am going to take you to that.

WILLIAMS J:

So that seems to me to be key.

MS COOPER KC:

Indeed, yes. I will come to that, your Honour. Before I do, I do want to talk though first about whakapapa, if that's all right with your Honour. So if we go to the High Court judgment, appendix B. So my learned friend Ms Sykes also applauded or thanked the Judge for the – this is appendix B to the High Court judgment of Justice Churchman – and thanked him for the good work he did on this appendix setting out the whakapapa or the links, the history of the different applicants, and Te Upokorehe also accepts that it is a fair characterisation here.

And that, as your Honours see at paragraph 63, that refers to Mr Aramoana's report, Mr Aramoana who is here today, talking about the three lines of descent for Te Upokorehe. Firstly descent back to Hapūoneone, the early peoples living in the – well what the Judge calls the Whakatōhea rohe, but particularly the Ōhiwa Harbour area, and those as I said were the original inhabitants. And then secondly at paragraph 65, if we could just scroll down, the second line of descent is from the Rangimatoru waka, and then thirdly if we just go down a bit further, maybe a bit further, sorry, I'm just looking for the reference to – I'm looking for the reference to the Ōtūrereao – oh, paragraph 66, yes. So that's the third strand, the Ōtūrereao waka. So these are all distinct from the Mataatua waka and predate it, and those are the lines of descent that Te Upokorehe draw on.

And then we can go to the Te Upokorehe whakapapa which was in evidence, and here we see it's starting with Tairongo, then Ani i Waho, and I can't speak to this, I can't do this justice, your Honours, but what I can do is, you know, this shows it going all the way down to Wī Akeake who signed Te Tiriti, and then down to Charles Aramoana, who is a very – plays a – looms large in the evidence in this application.

And then we can compare that to the Te Whakatōhea whakapapa that my learned friends took you to, and here we can see that they have included Te Upokorehe under the mantel of the Mataatua waka sort of sitting off to the side there, and my clients do not accept that this is how their whakapapa should

be presented or that this is a fair reflection of their whakapapa. There are some common ancestors –

KÓS J:

I've lost it. Where have they done that?

MS COOPER KC:

So on the left, far left-hand side at the bottom you can see Te Upokorehe.

KÓS J:

Oh, yes. Yes, thank you.

MS COOPER KC:

So what this is doing is really emphasising the Mataatua waka and it completely leaves out the Ōtūrereao waka, and as I say, they don't accept that they should be brought under the mantle of Te Whakatōhea in this way.

1550

WILLIAMS J:

I don't know where that gets you, though. They've got – there's an old waka whakapapa, an older waka than Mataatua that's all powerful and well, and no doubt those other hapū can point to their toi lines, which are probably as old, but that whakapapa doesn't establish mana motuhake, that just establishes that their whakapapa in Aotearoa is old.

MS COOPER KC:

Well the whakapapa in the Ōhiwa area is old.

WILLIAMS J:

Yes. But if you take the Mataatua lines, you jump back to the Mataatua lines to Awanuiārangi and Toi-kai-rākau it just is old.

MS COOPER KC:

Well I think it's important your Honour that what it does do is it shows a distinctiveness of Te Upokorehe.

WILLIAMS J:

Yes, there's no doubt about that.

MS COOPER KC:

And the reasons why they say that they have their whole separate mana, and –

WILLIAMS J:

Does Te Upokorehe have Mataatua lines?

MS COOPER KC:

Only to the extent that there is some connection through Ani i Waho to the other, to Te Whakatōhea. So there are clearly some connections. Sorry, to clarify, we're not suggesting that Te Whakatōhea, that the whakapapa presented by Te Whakatōhea is wrong. It's that it's not their primary lines of descent.

WILLIAMS J:

Right, they prefer to take the older line.

MS COOPER KC:

Yes.

WILLIAMS J:

But they're not arguing that they're not of Mataatua descent?

MS COOPER KC:

I think that not the primary, it's not the primary line of descent they identify with your Honour.

WILLIAMS J:

Yes, right, so the question is really, does that separate and older line that they apply, is that evidence of political and legal separation for the purposes of resource rights. That's the question and that's a question of fact.

MS COOPER KC:

Well I accept that your Honour, and so no, not on its own. But I am going –

WILLIAMS J:

That's why I'm interested in what are the other hapū historically say about this.

MS COOPER KC:

Yes, no I completely understand. All right, and I am coming to that, but I do want to set the context before I come to it, because I think it helps to explain the comments and the statements that other witnesses have made when there's an appreciation of the context and the history.

So I want to turn now to rohe, and the place to start with this is the map that was attached to Te Upokorehe's application for CMT, and if we can just expand this. So this map shows the Te Upokorehe rohe, and you'll see, the green line, they've identified as the borders of their rohe. So you see it runs from Waioweka River mouth to Maraetōtara, and encompasses the Ōhiwa Harbour, and the outlet of the Waiotahe River. So Ōhiwa Harbour is obviously the area we're concerned with in respect of CMT 2. The pipi beds at Waiotahe are also important, and then I also just want to note on this map the small red house shapes are Te Upokorehe Marae. So the only marae around, immediately adjacent to Ōhiwa are Te Upokorehe. Then…

WILLIAMS J:

Again, is this a matter of – not a matter of controversy?

MS COOPER KC:

No, it's not controversial your Honour. There is some controversy about obviously Kutarere, there is a group who have made a separate application on behalf of Kutarere Marae, but Te Upokorehe say that – well Kutarere Marae is a marae of Te Upokorehe.

WILLIAMS J:

The other, apart from, who did you say was a Mokomoko. No…

MS COOPER KC:

I'm not sure sorry.

WILLIAMS J:

The group you just mentioned that's popped up.

MS COOPER KC:

Oh Kutarere?

WILLIAMS J:

Yes, apart from the Kutarere people themselves, do the other hapū, the five hapū that you disassociate yourself from, do they disagree that these marae are Upokorehe marae.

MS COOPER KC:

Not as far as I'm aware your Honour.

WILLIAMS J:

Okay.

KÓS J:

Are there other –

1555

MS COOPER KC:

Am I wrong? Okay, well I was not aware of any challenge to them being Te Upokorehe marae, your Honour. I can check the position on the record overnight, but that was certainly my understanding, and then in support of that –

KÓS J:

Just before you do, are there other marae in that rohe that are not shown?

MS COOPER KC:

No, your Honour.

KÓS J:

That's all the marae?

MS COOPER KC:

Yes. I then – just on the marae, if we go to – I will skip over the next item on the road map which is just a reference to the evidence of Dr Des Kahotea which talks about Upokorehe being the original people at Ōhiwa, but I think I just want to go to the evidence of Tony Walzl who gave evidence, was an expert for WKW, and that talks about – in his report he talks about the marae. If we go to 301.00039, so this was not a report for Te Upokorehe, this was, as I say, for WKW.

So he talks about the marae that are on the – near the coast. Talks first about Roimata, that is one of the ones on the map located on the shores of Ōhiwa Harbour as the westernmost marae, and he says in the rohe of Whakatōhea, but he says: "The primary hapū is Te Upokorehe." Then at the next bullet point, Kutarere Marae, "principal hapū is Te Upokorehe". Then we've got Maromahue Marae located at the mouth of the – sorry – Waiotahe Valley, "hapū is Te Upokorehe". And I think –

WILLIAMS J:

My recollection is that during the *Takamore v Clarke* [2011] NZCA 587 case the – it was Tūhoe that was claiming Kutarere?

MS COOPER KC:

Well I think the history of Kutarere is a little bit complex. It is a new, a newer marae. It is – when was it founded?

WILLIAMS J:

1930s?

MS COOPER KC:

Excuse me, your Honour. Your Honour, I'm going to suggest that we come back to this topic because there is a lot on the record and I'm concerned about putting you wrong, so we'll perhaps move on in the few minutes remaining to talk about Te Upokorehe exercises of exclusivity in its rohe. And so when I say "exercising exclusivity" I'm referring here to the various indicia of exercises of

exclusivity as we've been talking about, so things like exercising kaitiakitanga and rāhui and so on.

So in terms of – the first thing I want to draw attention to is the extensive involvement of Te Upokorehe with local authorities on environmental and developmental issues. So that has been ongoing for a very long time and Te Upokorehe established its own resource management team to facilitate that in the 1980s, and so what we have here is this is part of a report that was filed by Te Upokorehe in support of its application, and it refers to the creation of the resource management team, and in particular the section here – could you just scroll up a little bit please Bryce – so this is talking about in the 1960s there was a classification or attempt to classify the shellfish beds with various classifications for use, and then if we just scroll down, there was a meeting to discuss the matter with the classification being objected to on the grounds the entire Ōhiwa Harbour should be classified with the highest classification for maintaining the water quality.

Then in 1965 the Ōpōtiki News published a map of the Ōhiwa Harbour calling for members of the public to identify where they gathered shellfish, and the Upokorehe provided maps for the purpose, including a map by Patrick Aramoana who is the father of Wallace Aramoana who gave the karakia today, identifying all of the shellfish beds in Ōhiwa, and that was used by the local authorities for the purposes of the water quality survey.'

1600

WILLIAMS J:

Did anyone else provide a map or was the Upokorehe, shall we call it, stocktake the only one in respect of Ōhiwa?

MS COOPER KC:

As far as I know your Honour, yes, and those maps are in evidence, and I think it's interesting to compare that. So that is a map which, as I say, is in evidence and we can take your Honours to tomorrow, which is very clearly draws on, was created by Te Upokorehe, whereas I think the map of shellfish beds that my

learned friends took you to yesterday, came from evidence that was provided by Tūhoe and the origins of which are a little unclear. So again this is why I say there needs to be great care taken in what is the source material, and what is this actually telling you about where the knowledge and the mana lies, and your Honours it is now 4 o'clock so I wonder if I should finish there and come back to this tomorrow.

GLAZEBROOK J:
If that's a convenient point we'll reconvene tomorrow, and I think if you finish early we'd obviously then have Ngāti Awa I think, is that right?

MS COOPER KC:
Yes your Honour.

GLAZEBROOK J:
And then if there is, if we do have some extra time, I think we had an offer to leapfrog from next week. Thank you. I'm not sure whether we will be doing that, so until tomorrow at 10 thank you.

WILLIAMS J:
Sorry, just before we do, just because it might help you tomorrow, certainly from my point of view what I'm interested in seeing is the evidence that indicated control, and the acceptance from others, either by ceding the ground, or by saying so, that that control vests in Upokorehe with respect to Ōhiwa.

MS COOPER KC:
Yes, understood your Honour.

WILLIAMS J:
Thank you.

COURT ADJOURNS: 4.02 PM

COURT RESUMES ON THURSDAY 7 NOVEMBER 2024 AT 10.11 AM

KARAKIA TĪMATANGA (JOE HARAWERA)

MS COOPER KC:

Mōrena your Honours. Before I continue with the outline, I just wanted to come back to a couple of points from yesterday, very briefly. So first of all I've been asked by my clients just to briefly come back to the subject of whakapapa, and I think the key thing there is that it is clearly something of great spiritual importance, and something that is self-defined, and the point of distinction I think is that – or the point emphasised about the unique whakapapa of Te Upokorehe is the long and unbroken lines of descent since the very first occupation of Ōhiwa, and I did just want to mention the archaeological site at Tokitoki, which is within the Ōhiwa Harbour, and we've just brought up here on the screen, this is a hand-drawn map prepared by Patrick Aramoana, who is the father of Wallace Aramoana who is here today for Te Upokorehe. This was the map that he drew in I think 1965 and provided to the Council in response to the request for information about the location of shellfish beds in Ōhiwa Harbour, and you can see the key on the left identifies the different types of shellfish, and locations have been identified all over the Ōhiwa Harbour.

It took me a moment to orientate myself with this map. It's upside down to some of the other maps, so you can see the entrance to the harbour at the bottom, and I did just want to draw your Honour's attention to the place on the left-hand side about a third of the way in from the harbour entrance, which is Tokitoki. Now Tokitoki since has become, was a site identified by Te Upokorehe and has since been excavated, and Upokorehe guided the dig and it is I believe one of the oldest sites of human occupation in the area. So that – and there is a lot more evidence and if we have time I may come to it, but there may not be time, but there is plenty of evidence about Te Upokorehe's involvement at Tokitoki and the archaeological importance of that site. And so what Te Upokorehe say are that their taonga tuku iho practices that they carry out today in the area date right back to the very earliest occupation of it.

WILLIAMS J:

Can you just help me with – I was trying to pick up the image and drop it into my notes.

MS COOPER KC:

Oh, with the reference –

WILLIAMS J:

Tokitoki, yes, I've got the reference. Where did you say Tokitoki was?

MS COOPER KC:

So it's on the – I'd have to orientate myself I'm sorry, your Honour –

WILLIAMS J:

Oh, yes, I see it. Thank you, yes, I've got it.

MS COOPER KC:

Yes. So just on the shore of the Ōhiwa there on the eastern side, and then the second point I just wanted to come back to –

WILLIAMS J:

Sorry, can you help me out with one more thing?

MS COOPER KC:

Certainly, your Honour.

WILLIAMS J:

Did you say Patrick Aramoana?

MS COOPER KC:

Patrick Aramoana, yes.

WILLIAMS J:

And he's the father of?

MS COOPER KC:

Wallace Aramoana.

WILLIAMS J:

Wallace, right, thank you.

MS COOPER KC:

Who of course is the kaumātua who gave the karakia yesterday.

WILLIAMS J:

Yes, yes.

MS COOPER KC:

Now I've managed to, rather annoyingly, misplaced the notes I've prepared about marae, but if you just give me a moment, your Honours. I think I can still speak to that. So there was some questions yesterday about the marae, and if we just go back perhaps to the application map which shows the location of the marae.

KÓS J:

Is this Kutatere [*sic*]?

MS COOPER KC:

Yes, in particular Kutatere [*sic*] – Kutarere, I'm sorry, Kutarere.

KÓS J:

Kutarere, sorry.

MS COOPER KC:

So if we just bring that up a little larger. So as I was saying yesterday, so there are these five marae which sit under the maru, the umbrella, and the mana of Te Upokorehe but it is true that some of them do have wider whakapapa links, and I'll just explain that a little bit. So Roimata in the middle is Te Upokorehe and that I suppose is –

WILLIAMS J:

Sorry, just a moment. This is not your fault. My keyboard is typing in Russian.

MS COOPER KC:

Oh.

KÓS J:

Well that was inevitable, wasn't it?

MS COOPER KC:

That would be –

WILLIAMS J:

It's no reflection of counsel. Can someone from IT fix this, please? This may sound strange, but it's true. Carry on.

DISCUSSION

GLAZEBROOK J:

So we'll adjourn while somebody –

WILLIAMS J:

I'm sorry, it's…

GLAZEBROOK J:

Well it's –

MS COOPER KC:

It's giving me time to find my notes, so it's been a…

GLAZEBROOK J:

Yes. It may be some of this, it would be useful just to do, rather than us taking notes or relying on the transcript, if you could just do a note?

MS COOPER KC:

Yes, your Honour, I certainly can. I won't share with you the rough notes I made last night.

GLAZEBROOK J:

No, no, of course not.

MS COOPER KC:

But I can work them up and include the references.

GLAZEBROOK J:

I think that would be helpful, because otherwise we're trawling through the transcript, which doesn't necessarily pick them up as well as it could, and so that would be helpful.

MS COOPER KC:

Of course, no, I'm very happy to do that.

GLAZEBROOK J:

But we'll adjourn for five minutes.

COURT ADJOURNS: 10.20 AM

COURT RESUMES: 10.23 AM

MS COOPER KC:

I hope your problem is resolved your Honour.

WILLIAMS J:

Yes, it was Justice French's fault.

MS COOPER KC:

I was speaking about the marae, and as I was saying, Roimata there was really no issue, that is straightforward, the hapū there is Upokorehe. Then there is Kutarere. Now Kutarere is a marae that was built in the 1940s, and its origins

are interesting. So they go back to when Te Kooti was living on Hokianga Island. Now Hokianga Island is an island within the Ōhiwa Harbour. Unfortunately you can't really see it on this map, but it's sort of in front of Roimata, and Hokianga Island was one of two reserves vested in Te Upokorehe following the raupatu. So they were vested in Upokorehe in I think 1874 or 1875, and these details are all in the evidence in reference, but I will just give the high level story now perhaps and we can go back to it and I can provide the references.

So Hokianga was a Te Upokorehe reserve following the allocation of reserves after the raupatu. Te Kooti went to live there towards the end of his life and he, in fact, died there in 1893, and one of his followers, who in some parts of the record is called Ihaia, and in some parts Purei, but I believe it's the same person, was of Ngāti Ruapani ki Waikaremoana origin, did not want to return to Waikaremoana after the death of Te Kooti. He stayed with Te Upokorehe at Roimata for some years, and then, and again I'm not quite sure whether he bought or was gifted a section, but he obtained a section at Kutarere to build a whare. This was with the permission of Upokorehe, but the whare – so the whare was within the rohe of Te Upokorehe, but it did not –

WILLIAMS J:

When you say "whare" do you mean a house or a traditional house?

MS COOPER KC:

I believe a traditional house. Excuse me your Honour. Yes, I think it was always intended it would be a marae your Honour.

WILLIAMS J:

A marae.

MS COOPER KC:

So a wharenui. So Upokorehe, in order to give mana to the marae, gifted the name of Ani i Waho to the wharekai at Kutarere, and Ani i Waho is, of course, an important tupuna of Upokorehe as one of, a daughter of Tairongo.

WILLIAMS J:

What's the name of the wharenui?

MS COOPER KC:

I don't know the name of the wharenui your Honour, I can find that out. But the wharekai is Ani i Waho.

WILLIAMS J:

So that's the connection to Upokorehe and it recognises the tuku to Ihaia.

MS COOPER KC:

That's right your Honour.

WILLIAMS J:

Right.

MS COOPER KC:

And I will give you the references, but that is set out in the evidence of Kahukore Baker, and also there is a description of the history of Kutarere in a Te Upokorehe sites of significance report, and I'll make sure that you have those references your Honour. I'm not sure – I can take you to them now, but I'm not sure I need to.

Then I think it's also worth then mentioning maro mahue briefly. So that was built on land that Upokorehe say was confiscated in the raupatu and given to loyalists, and so it does – has been settled by people from other hapū, but they have intermarried with Upokorehe and –

WILLIAMS J:

When you say “loyalists” what do you mean?

MS COOPER KC:

Well I'm assuming to the Crown your Honour.

WILLIAMS J:

You mean people who fought for the Crown, or people who did not carry arms?

MS COOPER KC:

I don’t know your Honour, I'm sorry.

WILLIAMS J:

So these loyalists were not Te Upokorehe?

MS COOPER KC:

Correct.

WILLIAMS J:

Does anyone know the reason it’s called maro mahue, because that’s a fairly spectacular name.

MS COOPER KC:

I'll need to take instructions on that your Honour.

WILLIAMS J:

Okay.

KÓS J:

In what way?

WILLIAMS J:

Well it means to rip off your – how do you, he aha te kupu Pākehā mo te maro – to rip off your skirt. So it’s a reference to passion and anger, I'm just wondering what the story is behind that, it might help.

MS COOPER KC:

Well I'm afraid I can't assist you with that at the moment your Honour, I'll have to make enquiries and come back to you, but my understanding is that the marae is recognised as a marae of Te Upokorehe, and then Tūrangapikitoi is also very interesting. That marae was built for the Waimana Kaaku people to stay at when they came to visit the harbour to collect kai, and that comes from a reciprocal arrangement between Upokorehe and Waimana Kaaku whereby each could travel to each other's rohe to get kai on the basis that they would not stay, but would return home afterwards. So that was a long-standing arrangement of reciprocity between Te Upokorehe and a neighbouring hapū or iwi, and it was reinforced following a battle. There was a battle in 1823 between Tūhoe and Te Upokorehe at Maraetōtara, and that reinforced the reciprocal arrangement, and so Tūrangapikitoi Marae was built to accommodate the Waimana Kaaku people during their visits to Ōhiwa.

1030

WILLIAMS J:

And there's no contention that the exchange was between Te Upokorehe alone and Waimana Kaaku?

MS COOPER KC:

There may be contention about that, your Honour. Certainly the evidence –

WILLIAMS J:

It's crucial.

MS COOPER KC:

Well my instructions are, your Honour, and the evidence from my clients is that it's between Te Upokorehe and Waimana Kaaku.

WILLIAMS J:

Okay, thank you. And – but that is contested, or is it not?

MS COOPER KC:

I don't understand that they were cross-examined on this issue, your Honour. I can't speak for –

WILLIAMS J:

Okay. As far as you know, not contested?

MS COOPER KC:

That's right. There may well be submissions to the contrary made, but…

WILLIAMS J:

Thank you.

MS COOPER KC:

And there's no whare there currently at Tūrangapikitoi, but it remains recognised as a marae.

WILLIAMS J:

Sorry to labour this, is it a Māori reservation?

MS COOPER KC:

I don't know, your Honour.

WILLIAMS J:

It might be helpful to know if it's a Māori reservation.

MS COOPER KC:

All right.

WILLIAMS J:

It'll be in favour of a set of named beneficiaries.

MS COOPER KC:

All right.

WILLIAMS J:

I'd be interested to know who those named beneficiaries are or the community that's the beneficiary.

MS COOPER KC:

We'll check that, your Honour.

WILLIAMS J:

And then finally there's Rongopopoia, and I don't understand that there is controversy about Rongopopoia being Te Upokorehe, and –

WILLIAMS J:

Well Rongopopoia was the son of Rongowhakaata, who is not Upokorehe. Rongowhakaata is from Gisborne.

MS COOPER KC:

Well I can't – I'm sorry your Honour, I can't speak to that. Those are my instructions.

WILLIAMS J:

Okay.

MS COOPER KC:

So that's all I wanted to say about the marae. Just a little further on the rohe, so if we go back to the road map, I've put in a reference there to the Tony Walzl report where he talks about the Upokorehe reserves at Ōhiwa. So if we could just go to 301.061. So if we just go down to the paragraph, you can just see there the Upokorehe reserves. This is from the evidence of Tony Walzl. The Upokorehe reserves at Ōhiwa were gazetted in November 1874. Hokianga, that's the island in Ōhiwa, one of the islands in Ōhiwa, was granted four trustees on behalf of 38 Upokorehe members, and then it talks about the Crown grant of Hiwarau which I understand, your Honour, Hiwarau is approximately in the sort of same area as the Roimata Marae, so also on the edge of the Ōhiwa Harbour, and there were – there's more details obviously

there. There were some disputes over the actual identified particular people, named people who were put on the grants and whether they were all Te Upokorehe, but it's clearly recorded that it's – they're both grants to Te Upokorehe.

Then I won't go to them, your Honours, I've put in the outline some references to the parts of Mr Walzl's report where he talks about the Census data from 1874, 1878, and 1881. And what they show, they show the Census in those times identified the – actually maybe we will go to the first one, sorry Bryce, just so I can show you what it – how they're set out.

So here we see the figures from the 1874 Census of Māori and it sets out the different hapū and shows Upokorehe at Ōhiwa 48, and that essentially carried on throughout the 1874, 1878 and 1881 Census with Upokorehe being the only hapū identified at Ōhiwa in those years.

Also on the subject of rohe, and also this is coming to the other question that your Honour Justice Williams had for me yesterday about recognition by other parties, it's not in the road map but we will add it to the material, the notes to be handed up. There is a memorandum of understanding between Upokorehe and the Bay of Plenty Regional Council for an area at Onekawa Te Mawhai and that memorandum of understanding, if we could bring that up, that is 314 –

WILLIAMS J:
It's a modern, it's under the modern examples or is it an older –

MS COOPER KC:
Yes, so it's a modern – it's not under, unfortunately it's not listed on the road map under modern examples but it is a modern example.

WILLIAMS J:
Yes.

MS COOPER KC:

So here we have it. So this was from 2012. So the Onekawa Te Mawhai lands are sort of at the spit on the eastern side of the entrance to Ōhiwa Harbour and as it says: "The purpose of the Memorandum of Understanding is to formalise the existing relationship between Bay of Plenty Regional Council and Upokorehe" and at paragraph 3 it talks about both parties working together in relation to the management and protection of the Onekawa Te Mawhai property, and then if we go down to paragraph 10: "…the Partners agree that the manawhenua status of Upokorehe provides them with kaitiakitanga over the park…". So –

GLAZEBROOK J:

I'm just getting slightly worried about timing because in fact you did have time last night, yes, and so one would have expected that you would be finished by morning tea, except I gather we've got Mr Lyall as well?

MS COOPER KC:

Yes, your Honour. Well…

GLAZEBROOK J:

I mean some of this, it would be fine if you wanted to put it in your memorandum rather than necessarily taking us to matters just to give us – just give us the overview?

MS COOPER KC:

Yes.

KÓS J:

I mean may I just say in relation to this, some of this – a lot of this is covered in your written submissions as well.

MS COOPER KC:

Much of it is, your Honour, yes.

KÓS J:

So I mean I'm not sure I want it three times.

GLAZEBROOK J:

No, no, the memorandum is dealing with things that weren't covered in the written submissions.

KÓS J:

Yes, thank you.

MS COOPER KC:

Yes, I think that's right, your Honour. There are some things that were not covered in the written submissions. So, Mr Lyall is going to address the issue of the overlapping versus single –

GLAZEBROOK J:

It's really just reminding you of timing that we would have expected you to finish by morning tea. It's fairly obvious possibly that you won't but really not encroaching too much into the time after morning tea.

MS COOPER KC:

Well, I appreciate that, your Honour, and I'm very mindful of the need to allow enough time, sufficient time, for my learned friends and I realise I am taking your Honours into the evidence but I think it's important so –

GLAZEBROOK J:

I'm not trying to – I'm just trying to say just be mindful of the time and therefore perhaps not – just take us to the really important parts is really probably what –

MS COOPER KC:

Thank you, your Honour. Thank you for the guidance and, look, the reality is there is just so much evidence and it is very complex and so each piece of evidence raises further questions of course.

So, I suppose, the broader point to make is that really sort of what Te Upokorehe is seeking is not to have this Court resolve the issue of who has exclusivity at Ōhiwa, or to find that Te Upokorehe is in fact entitled to hold its own CMT for that area. What we are seeking is to have a re-hearing of the issue on the record in the High Court because we say it was not properly addressed.

1040

So the purpose of taking your Honours to this evidence is really to show that this is not a fanciful request, this is not – Te Upokorehe's claim to hold ahi kā and to be kaitiakitanga over this rohe was supported by a very great deal of evidence and it wasn't properly addressed. So that essentially is the purpose, yes.

GLAZEBROOK J:

We certainly have understood that as being the context in which this is proffered, so.

MS COOPER KC:

Yes. So perhaps with that in mind, I will – I will skip perhaps to just a couple of points. If I look through the modern examples in the road map, I think we've already spoken about – I've already spoken about the Upokorehe Resource Management Team. There was a protest over the Whakatōhea mussel farm. There's a reference there, there has been a lot of work on conservation of mussel and pipi beds.

And just on the access and placement of rāhui at the pipi beds, I think it is perhaps worth just briefly going to the affidavit of Amber Rakuraku, who was a witness for – she is of Ngāti Ira hapū so she was not a witness for Te Upokorehe, and in her evidence she talked about – if we just go back to the previous paragraph sorry, Bryce.

So she is referring to numerous conversations with her late father-in-law Charles Aramoana who was a rangatira of Te Upokorehe, and then in

paragraph 20 she says: "It has always been my understanding from conversations with my father-in-law" – being Charles Aramoana – "that, for the most part, a mutually respectful cohabitation existed between Te Upokorehe and surrounding hapū/iwi. During his time as the rangatira of the Te Upokorehe, he was always the first point of contact with respect to any activity within the rohe of Te Upokorehe such as gathering of kai moana from Ōhiwa and Te Ahi Aua…for which he issued permits, resource consent applications for statutory authorities, consultation on traditional tribal boundaries, et cetera. He maintained close connections with his Tūhoe, Te Whakatōhea, Ngāti Awa, and Ngāpuhi whanaunga but always there remained an especially amicable relationship with Te Waimana Kaaku" – being the hapū with whom there was a reciprocal arrangement – "and Ngāti Ira." Then if we go on: "The foundation of which was both whakapapa and reciprocal manaakitanga."

So that's just an example, your Honour, and there's other examples provided in the handout of recognition by other – witnesses from other iwi and hapū of the role of Upokorehe at Ōhiwa, and their ability in particular to act as kaitiakitanga.

WILLIAMS J:

So just to clarify, that list of people who are not Upokorehe, Leonie Simpson, Muriel Kelly, Hetaraka Biddle and so forth, these are people who are on the record accepting Upokorehe's mana in Ōhiwa, are they?

MS COOPER KC:

Yes, yes, your Honour. Not invariably exclusive mana but they refer to – they accept that – most of them are acceptances that Te Upokorehe holds ahi kā, exercises ahi kā, and –

WILLIAMS J:

What is "the" ahi kā?

MS COOPER KC:

Well this – it's difficult. I can't generalise without taking your Honours to each of the passages, so –

WILLIAMS J:

So better check, yes?

MS COOPER KC:

Yes.

WILLIAMS J:

Okay.

MS COOPER KC:

I think they each need to be read because I don't want to misquote them, but they're there because we say they support, they clearly recognise the status of Te Upokorehe, not always the sole status, but in some cases, yes, they do acknowledge that they would – for example I think several of them, I think Muriel Kelly is one of the ones who says well she would always recognise a rāhui placed by Te Upokorehe over its rohe.

WILLIAMS J:

I mean you'd accept – you'd have to accept, wouldn't you, that the only evidence that's going to help you here is clear evidence of exclusivity? Evidence that it's shared with others is completely consistent with what the High Court concluded.

MS COOPER KC:

Well I think it depends on what you're talking about, your Honour. So when – this is why it's so difficult, because clearly there are other hapū who are allowed to use the resources within Te Upokorehe's rohe. Nobody is disputing that. The question is the basis on which they do that and whether that is under the mana of Te Upokorehe, and we say that many of these witnesses acknowledge that that is the case. Where I think they depart, and the reason

this becomes so difficult, is because we are trying to apply this concept of exclusivity which nobody really, there isn't a clearly accepted and understood meaning of and how it relates to existing concepts of ahi ka and kaitiakitanga and rohe. And so that's why I can't point, and it would be surprising if I could point you to a clear concession by, and add the other parties to this, that Te Upokorehe holds exclusive rights over Ōhiwa because that is the reason we're here.

WILLIAMS J:

No, I didn't – yes, that's a fair point but you say there are witnesses from other hapū who say that they acknowledge that Te Upokorehe has the mana and that they use the area subject to that?

MS COOPER KC:

Correct, your Honour.

WILLIAMS J:

And not just Waimana but these other Ngāti – these other Whakatōhea hapū members?

MS COOPER KC:

Correct.

WILLIAMS J:

Right, okay, thank you.

MS COOPER KC:

And one of the examples that my learned friends gave yesterday, speaking on behalf of the Te Kāhui applicants, for exercising exclusivity was of course the placement of rāhui, and my learned friend Ms Feint said well that's the clearest expression and you can't place a rāhui unless it's over your own rohe and that the rāhui were placed following Whakaari and no one objected to anyone's rāhui.

Now, it is true there were a number of rāhui placed and one of them was by Te Upokorehe and again the references to that are in the handout. It was not a secret that Te Upokorehe had placed a rāhui. It was covered on the radio, in the news and we've given a link as well to the RNZ report about the rāhui, and so we say that is also an expression of Te Upokorehe's mana, just in the same way that the rāhui placed by other iwi and hapū were an expression of their mana, and again there was no objection to Te Upokorehe's placement of a rāhui, and we've set out in the notes examples of earlier rāhui placed by Te Upokorehe and, in particular, over its kaimoana resources.

So, I think then that probably brings me to where the – coming back to where the High Court went wrong. So what we say is that the High Court really, because it took this inclusive approach, which it was of course urged to do by the Te Kāhui applicants, it really failed to address the question of the different layers of rights that exist within this area and it didn't attempt to understand or assess whether the rights of other applicants were equal to or subordinate to those of Te Upokorehe in either all or parts of its rohe.

If we go to the High Court's judgment at paragraphs 176, in fact if we could start at 175, I think this is useful. The judgment cited the evidence of Mr Te Riaki Amoamo for Ngāti Ruatākenga which emphasises that the customary areas are not rigid and that other Whakatōhea hapū can come into a sector. "The tikanga is that we share the kai because our hapū of Whakatōhea are related to each other…" But what it goes on to say, it talks about a tribal collective and at paragraph 176, the Judge doesn't set out the following paragraph of Mr Amoamo's evidence but it does accurately summarise it, that the following paragraph of his evidence talks about the different hapū having different rights and responsibilities and having mana over different parts of the rohe.

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So – and he gave an example that: "Ngāti Rua would go to Ōhiwa to gather kaimoana, but the other hapū performed the role of kaitiaki in this area." So that is the point, your Honour, that even amongst the applicants there was

recognition that while there was sharing and reciprocity, there were different layers of rights held in different areas by the hapū.

Then in paragraph 177 the Judge goes on to say: "The evidence before the Court was that the sharing of access to resources was not limited just to the six hapū of Whakatōhea but in certain areas…extended to other iwi." Now there he's talking about the six hapū of Whakatōhea, and as I said yesterday, that – he's including in that Te Upokorehe.

Then if we go on to – so I'm trying to take your Honour to the parts of the judgment where we're trying to discern the reason he gave the joint CMT. So that's really as close as you get to an analysis by the Judge, and then if we go on to the next section – actually if we go to paragraph 324, I think is the next important part of the judgment. So this is the part of the judgment where the Judge is discussing the pūkenga's findings, and he says at paragraph 324: "The pūkenga did not accept the claim that Upokorehe's interests were exclusive to them but considered that they were interests shared with the other five Whakatōhea hapū…although the Court is not bound by the findings of pūkenga, where the recommendations of pūkenga directly relate to questions of tikanga, they are likely to be highly influential."

And then at – further down at paragraph 331 he says: "For the reasons set out…below, I am satisfied that the evidence supports such a conclusion," as in shared CMT. "I also accept the pūkenga's poutarāwhare approach and their conclusions that, in accordance with tikanga the six Whakatōhea hapū hold the area from Maraetōtara to Tarakeha."

I should just note, your Honours, I think yesterday I might've suggested that the poutarāwhare was suggested before Te Upokorehe left the tikanga discussions. That's actually not correct. The tikanga discussions, Te Upokorehe left subsequently. The pūkenga proposed the poutarāwhare without going back to the parties, is my understanding.

So – and then if we go to the operative part of the judgment at paragraph 660 we see the orders that were made, and we see there the Judge makes a jointly-held order for the five hapū of Whakatōhea and Upokorehe. He identifies each of them and then for the seaward side, and then – well at least the eastern side, and then secondly in relation to the western part of Ōhiwa Harbour a jointly-held CMT between the six Whakatōhea hapū and Ngāti Awa, and again he is including Te Upokorehe there as within the six Whakatōhea hapū. So there is no discussion in the judgment about who actually exercises kaitiakitanga in a specific way over specific parts of those areas.

Then if we go to the Pūkenga Report, so it's clear I say that the Judge was relying heavily on the Pūkenga Report for his finding about who held the area. So if we go to the Pūkenga Report. So here we have the Pūkenga Report, and if we just scroll through to where they address the specific question of who holds the application area in accordance with tikanga. So that's at 538, so the Judge put a series of questions to the pūkenga, one of which was: "Which applicant group or groups hold the application area or any part of it in accordance with tikanga?" And this is a sort of a bit of a non-answer by the pūkenga which is: "All groups consider their right according to the tikanga they feel applies. However, and with more hui between them being essential to determine and agree on tikanga, it is only sufficient for us to make a commentary on this question." Then they go on to say: "However, and from the papers available to us the following applies." And then they set out each of the applicants in the areas, and you can see that they're very widely described. So for Upokorehe it just has customary interests in Maraetōtara East, Cheddar Valley, Ōhiwa Harbour, Waiotahe et cetera, and so on for each of the applicants.

If we scroll down. Then if we then go to – there was then some – there was a very brief opportunity for the parties to ask questions to the pūkenga, which was very circumscribed, and so some parties put further questions in writing to the pūkenga following the hearing, and if we can just go to those from the hand out.

So before we have to go back up to the questions actually to see. So these were questions put to the pūkenga by Ngāti Awa. Perhaps it's going to take too

long. Perhaps just go back to the answer. One of the questions was essentially whether the pūkenga had actually made an independent assessment of who held the areas according to tikanga, and the answer they gave to that question at paragraph 4 there is that: "The list the followed the introductory wording" that we just looked at in the Pūkenga Report, "is simply descriptive of the interests" – sorry, this is the question. So the question is: "The list that followed the introductory wording is simply descriptive of the interests claims by the respective groups?" Their answer is: "They were included in an email from my colleague Dr Hape… She can confirm her sources separately but I am certain they were taken from the daily notes she typed up and therefore your assumptions in respect of the last two questions are correct." And one of those assumptions is are they simply descriptive, are they simply setting out what the applicants had applied for.

"The closest we got to researching the actual interests were as outlined in paragraph 4.c.iv. Buta gain this was taken from an email provided by registrar Mr Tom Roughan dated 28 September 2020." So paragraph 4.c.iv is the paragraph we looked at. So that appears to confirm that the pūkenga was simply setting out a description of the areas claimed by each group.

Then if we go then to what the Court of Appeal said about this. So in his judgment Justice Miller accepted that the pūkenga did not answer the question of who held the area in accordance with tikanga, so that's at paragraph 267. "However, the pūkenga did not answer questions three and four at all. Rather, they acknowledged the claims of applicant groups and looked for ways in which those claims could be reconciled. Specifically, they did not conclude either that the six hapū hold the specified area in accordance with tikanga or that the WKW parties do not hold an area in accordance with tikanga. They recognised that Te Upokorehe were unwilling to participate (representatives left a hui…) but they did not examine Te Upokorehe's claim to hold areas independently of the other hapū. Nor did the pūkenga address exclusivity of use and occupation, or continuity since 1840. They were not asked to do so. Instead, they looked forward to a structure in which CMT could be held and governed to include all members of Whakatōhea."

1100

That's exactly, we completely agree with that description of what occurred. That was essentially the basis on which Justice Miller held that CMT 1 should be sent back for re-hearing, and there was a particular issue with CMT 1 because Te Upokorehe, 71 includes an area outside the rohe of Te Upokorehe which they do not seek CMT over, and so that was a specific issue to that CMT but, in my submission, it's clear from the reasoning of Justice Miller that the issues that he identified with the judgment applied to both the orders that were made.

So Te Upokorehe apply for a recall of the judgment. Well, perhaps before we go to that can we just go to paragraph 324 of the Court of Appeal's judgment? Just by way of context, the appeal in the Court of Appeal, one of the appellants was obviously the Landowners Coalition and they appealed both CMT orders in their entirety.

So at paragraph 324 the Judge is referring to LCI's argument about Order 2. So having already decided that Order 1 needed to go back for re-hearing, the Judge says: "As I see if, that is in a different category [to Order 1]. Ōhiwa Harbour is a shallow estuary surrounded by lands held by applicant groups and the evidence shows that the waters and the surrounding land are replete with sites of significance … My reservations about the adequacy of evidence … do not extend to this area …"

Then he goes on to say: "The applicant groups generally have recognised one another's mana over specific local areas and sites. I am sufficiently satisfied that the applicant groups have together occupied the area to the exclusion of others." He is "not persuaded that there has been substantial interruption". "Lastly, the tikanga process which has been followed in the High Court to achieve consensus among applicant groups and interested parties is appropriate for the reasons I have given earlier."

So what we say there is that this was an error because, of course, there hadn't been consensus reached that included Te Upokorehe. So for that reason the concerns the Judge had identified in relation to the other CMT area also apply to the Ōhiwa area.

So Te Upokorehe applied for a re-call of the judgment on the basis that we said there was an illogicality between the decision to have a re-hearing of CMT 1 but not CMT 2, because the reasoning, we say, Te Upokorehe's claim to exclusivity is in fact stronger in relation to the Ōhiwa Harbour than it is in relation to the eastern CMT area and particularly out to sea. We accept, as do, I think, most of the other applicants, that the case for exclusivity becomes weaker the further out from shore you go because there is more room for competing exercises of rights. So we say it was an error and illogical not to also make the same order that a re-hearing was necessary of Te Upokorehe's claim in relation to the Ōhiwa.

Now on the re-call, the Court of Appeal said that they hadn't overlooked CMT 2. They had rejected Te Upokorehe's appeal about the inclusion of Ngāti Ngāhere, so Te Upokorehe had specifically appealed the inclusion of Ngāti Ngāhere in both CMT orders on the basis that Te Upokorehe says there was simply no evidence to support Ngāti Ngāhere having rights in either area.

So the Court of Appeal had rejected that, but what the re-call judgment does say is that the question of whether the Court of Appeal made a factual error in finding there was consensus over the shared rights in the CMT 2 issue was an issue for appeal and we say, your Honours, that there was such a factual error and for that reason we say that it should be sent back.

Now I do need to address an issue raised by Te Kāhui in their submissions and that is whether Te Upokorehe is barred by previous concessions from seeking to have Ōhiwa, the CMT 2 order, re-heard. So, we say that there is no resiling. Te Upokorehe always sought to have both CMTs in their existing form set aside so their notice of cross appeal, if we could just perhaps bring that up briefly, the notice of cross appeal I think also needs to be seen in the context where

Landowners' Coalition were seeking to have both CMT orders in their entirety set aside, so the entire question of both CMTs and whether they should remain was clearly an issue.

KÓS J:

Can you just scroll down and show us the judgment sought?

MS COOPER KC:

Yes, your Honour.

KÓS J:

Thank you.

MS COOPER KC:

So, I accept, as I must, your Honour, that it doesn't explicitly say that we're seeking to have the CMT set aside on this issue. The argument though that was made in oral submissions was squarely along these lines and that's acknowledged in the judgment, which refers to Te Upokorehe submitting that the Judge didn't address the competing claims with a sufficient degree of granularity and assess who held rights in respect of what specific areas.

So, I say that the wider issues, so in order for Te Upokorehe's cross appeal on the question of overlapping CMTs to be upheld, that would of necessity require the orders to be, existing orders to be replaced and then the more specific argument I say was clearly made at the hearing, and I say in a context where both orders were clearly an issue, both under the landowners' notice of appeal which challenged the finding of the shared exclusivity, and also under Ngāti Awa's notice of appeal which also challenged the finding of shared exclusivity for CMT 2.

I also need to deal with the fact there was a concession made by Te Upokorehe in its submissions that it was no longer pursuing its appeal in respect of the inclusion of Ngāti Awa, and again I say, your Honour, well that does not preclude the relief that Te Upokorehe is seeking before your Honours because

again it left open the question of what should happen to those CMT and it's not inconsistent, we say, with this appeal seeking a re-hearing of both CMT which of necessity re-opens all issues.

So, in any event, your Honour, I would say of course that the Court may permit a party to resile from a concession to the extent your Honours did find that there was one where the interests of justice so require, and I do submit it is in the interests of justice that CMT, both CMTs, be re-heard because of the deficiencies in the way the applications were addressed. There is no prejudice to any other party from Te Upokorehe being permitted to advance its appeal on this basis, so the cases where parties have not been permitted to resile are generally cases where it would affect the evidence and approach of a party at trial and that is not the case. So, Te Upokorehe's position very firmly throughout the trial was that it was solely entitled to rights over its rohe and so there was no evidence that any other party might have called, if they had known that was Te Upokorehe's position because they did know it and they had the opportunity to call it, so there is no prejudice. Equally the other parties obviously had the opportunity to respond to Te Upokorehe's appeal in this Court.

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WILLIAMS J:

So you conceded, in respect of Ngāti Awa, over which CMT?

MS COOPER KC:

CMT, it's the Ōhiwa CMT your Honour, CMT 2. We had said we were not pursuing our appeal against their inclusion.

WILLIAMS J:

Isn't that really an injury to your case?

MS COOPER KC:

Well…

WILLIAMS J:

It suggests that this is an internal political dispute within Te Whakatōhea over who's boss and, Ngāti Awa being irrelevant to that, it was okay if they got rights.

MS COOPER KC:

Well, I don't think that's the case your Honour. There was a fair amount – I think perhaps the – there were a lot of issues to contend with, and it was – the view was taken that it was better to focus on broader issues rather than specifically identifying one entity or another, and that is why the appeal –

ELLEN FRANCE J:

It's not without consequence though, is it, in terms of what your argument is?

MS COOPER KC:

Well it may not be without consequence your Honour.

ELLEN FRANCE J:

In the sense of the logic of the argument I mean.

MS COOPER KC:

Well I think it comes back to the point that these issues cannot be, and should not be, unpicked in an appeal context. They need to be addressed in the light of the full record, and the position of Ngāti Awa, there are different historical interactions. Different assertions of right. It's too simplistic, in my submission, to say well if you're going to accept one, you have to accept all. I think it is a far more complex situation, and really I think my main submission is that it just needs to go back and be considered in light of the full evidence.

Unless so your Honours unless you have any further questions on that, I will hand over to Mr Lyall to address your Honours on the third issue.

GLAZEBROOK J:

Mr Lyall, how long do you anticipate you'll need? And I'll tell you whether you can have it or not.

MR LYALL:

Your Honour, I don't see me going past the morning break. We may not even get there.

GLAZEBROOK J:

If you need to go just slightly past the morning break, we're obviously not going to require you to truncate, thank you.

MR LYALL:

In large part it will depend on your Honours as to how long I go.

GLAZEBROOK J:

Exactly, which is why…

MR LYALL:

E ngā Kaiwhakawā, tēnā koutou. The specific issue that I'm here to address today is where it has been accepted that orders may issue on the basis of shared exclusivity by all courts. What that actually looks like at a practical level when those orders are set down, and that exclusivity is expressed. Te Upokorehe accept that at least for the area that concerns customary marine title 1, orders after a re-hearing may issue on that shared exclusivity basis. However, I should say they do still consider that a re-hearing is needed on CMT 1 due to the lack of assessment of individual claims and, as my learned senior has mentioned, inclusion of Te Upokorehe in an area which is outside of its rohe.

While Te Upokorehe accept that orders may issue on the basis of shared exclusivity, they say that the section 58 test should be interpreted in a way that allows their shared exclusivity and their tikanga to be recognised and while orders have issued so far, and I'm thinking of the case of *Re Tipene* and as CMT 1 may ultimately issue where there's a joint order with multiple parties on it, and that doesn't seem controversial. Te Upokorehe say there should be two further possibilities for the way in which orders are structured. The first is for multiple orders to be granted over the same area to different parties which

overlap, and then second, a hybrid approach of the shared exclusive titles with multiple parties and then those overlapping titles.

ELLEN FRANCE J:

Sorry, could you just repeat that? What are the two possibilities?

MR LYALL:

So either Te Upokorehe say that we can have the – what seems to be accepted by all parties as the idea of one title which includes multiple parties, or they say that parties where they so choose, if it better reflects their tikanga, ought to be able to opt for their own order which overlaps with orders from other parties, and of course there could be a hybrid of the two.

WILLIAMS J:

What would the hybrid look like?

MR LYALL:

Well it's just where there are some orders that have multiple parties and some orders that have single parties which overlap, that's all the – the only point I'm seeking to make there.

WILLIAMS J:

Wouldn't your concern be met if there was a single order subject to appropriate conditions recognising, if you're right, the priority of Te Upokorehe?

MR LYALL:

Possibly, your Honour, but when we get to the way in which the bundle of rights has to be held on those terms, then we reach – we encounter issues as to whether it's possible among those, that group to reach those sorts of agreements within themselves.

GLAZEBROOK J:

But wouldn't there be the same difficulty if you had overlapping orders, because you have to know who is going to exercise whatever the rights are, don't you?

MR LYALL:

Well this is one of the points that we raised in our appeal. The – one of the reasons that the Attorney-General and the Court of Appeal itself thought that these types of orders would be unavailable was an unworkability because issues as between those groups and the use of the customary marine title bundle would arise, but we say that it does arise in these circumstances equally, and the way in which we think that it can be navigated is by the Court having some close oversight in the way that these orders are drafted, and perhaps even having a hand in setting the rights within those overlapping but separate titles.

WILLIAMS J:

You see, it seems fairly – the problem with the Native Land Court was that it took these complex, convoluted rights and dumbed them down into individual, undivided interests as tenancies in common no matter how they were derived, because the English common law didn't really have a way of addressing that. But if this is being true to tikanga and your evidence establishes that any access to Ōhiwa was under your mana, then whoever were the right holders in that area, even if they were title holders, there could be a condition requiring that access is subject to the mana of Te Upokorehe. Of course, you would have to prove it. That's where the rubber meets the road. And if you can't, well you can't possibly get one.

MR LYALL:

The problem as Te Upokorehe see it, is as things stand for the Ōhiwa Harbour CMT 2 which is the western part of Ōhiwa Harbour, for instance, all of the parties are bundled together within that order and on paper as things stand, all would have equal rights in that area and there's no way for –

WILLIAMS J:

Yes, I understand that. My question is really the relief you seek. You say there should be multiple CMTs or some mix of multiple CMTs and collectivised individual CMTs were appropriate.

MR LYALL:

That's right, your Honour.

WILLIAMS J:

But if you're right that Te Upokorehe has the mana over this area and anyone's access is subject to it, then that should be the condition of the CMT held by the multiple parties. But you have to be right first, that's the big – that's the hard thing for you to prove.

MR LYALL:

Well then the question also becomes how do we enforce that right within the title if other parties want to – well "weaponise" isn't the right word but want to use these legal processes in a way that advances their interests in an area that's outside of their traditional rohe.

WILLIAMS J:

Well you'd have a title you could enforce?

MR LYALL:

But if the parties are all included in that CMT 2, as they are, that becomes the status quo and they all share equal rights unless and until they can –

WILLIAMS J:

But their rights are conditional, that's the point.

MR LYALL:

But how would they – your Honour, Te Upokorehe seek a way for them to be conditioned. There doesn't seem to be a process by which in the current setup that those parties, once they're added to the order, can be conditioned, and with the lack of –

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WILLIAMS J:

But isn't that – again, taking it a back, isn't that a matter of if the title is conditional, the right holders have conditional rights, subject to priority according to tikanga of a particular group, then that's the way it's got to run.

MR LYALL:

And would your Honour see that that arises through the Court, or through a tikanga process, or – this is where –

WILLIAMS J:

Well that's for tomorrow. For today it's what a CMT should look like.

KÓS J:

I think you've got to be careful what you wish for her Mr Lyall. The more complicated you make this, the more that lends weight to an argument that under section 58 exclusive…

WILLIAMS J:

Yes, you don't have it.

KÓS J:

Actually becomes a physical exclusiveness.

MR LYALL:

We tried to deal with that in our submissions by saying that really we think that parties should prove their claims under section 58 as a gateway, and only those that can make it through that gateway are then in a position to work together, or work with the Court on the way in which they wish to structure their orders, and if their tikanga favours it then perhaps a shared order could issue, and if parties preferred to have a separate but overlapping title at that point, then they've already met the tests with those that will be in the area alongside them, and that's just the way in which they choose to have their, share the exclusivity expressed in Aotearoa, and that's novel, but so is this Act.

KÓS J:

Well we better start recruiting a few High Court judges then.

WILLIAMS J:

See the problem is that if you say that we had access, that we controlled access, you have to prove that as a matter of evidence. Any countervailing evidence that says that other hapū are accessing without your consent really ends that argument and suggests that the CMT is shared. If you can prove it, then that drives the nature of the CMT you get. The real problem is can you prove it, not the structure of the remedy.

MR LYALL:

Yes and that's where we do struggle a little because there's an arbitrary distinction, I think, here between arguing about who meets the test, and then the way in which that's expressed, which is why I've tried to begin at the point of the Court has found that –

WILLIAMS J:

No, it's a question of who has the exclusivity, right?

MR LYALL:

Yes.

WILLIAMS J:

Who has the exclusive right. The smaller group because it controls access, or if the evidence is, it never controlled access, then the larger group has the exclusivity. It comes down to evidence, doesn't it?

MR LYALL:

Yes, but when we reach the point where the Court is minded to grant orders to groups X, Y and Z, we say that it should be up to groups X, Y and Z to then choose how they wish to have that exclusivity expressed through orders, and if that is better expressed, in their view, by holding an order in their own name, which may be subject to conditions –

WILLIAMS J:

But you see the problem with that is logically if you haven't proved exclusivity as a subgroup, let's call it a subgroup without any pejorative intent, then you're not entitled to an order. You can only grant an order to the group that has proved exclusivity, and if there are multiple groups taking access without seeking permission of other members of the group, then the exclusivity applies to the wider group as a matter of fact. If, however, on the evidence the smaller group controls access, then the exclusivity either belongs to the smaller group, or there is a broader exclusivity of access subject to permission.

MR LYALL:

Yes, and it's not Te Upokorehe's view that there needs to be – that entire group which is able to meet the test and show exclusivity need to be just restricted to that one order which may issue. That exclusivity could be recognised by having a layered approach to those orders.

WILLIAMS J:

Again, just to repeat this because we're using time, your problem is how difficult it is for you to prove exclusivity if you've already conceded there's a whole lot of other groups that have rights in the same area similar to yours.

MR LYALL:

Ka pai.

WILLIAMS J:

So you've kind of, it seems to me, logically shot yourself in the foot.

MR LYALL:

Well, without wishing to repeat myself, all I can say is that the view of Te Upokorehe certainly is that their tikanga, and the way that they hold the area, Waiotahe or from Maraetōtara through to Pakihikura, which is the centre of the Waioweka River, is best expressed by them having their own order, and then allowing them to work in with other groups who hold orders. So that's the position that I'm putting.

GLAZEBROOK J:

I'm just having some difficulty with what's meant by "overlapping". I can understand a separate order that excludes everybody else over the Ōhiwa Harbour. What I can't understand is a separate order that might actually be shared with a whole lot of other people over that because if it's agreed that it's shared with others then you can't show exclusivity, can you? I mean I can't understand territorial orders that overlap in terms of territory. I can understand: "I own this and I get an order for that and everybody else gets an order for something else." It's just how is it exclusive if it's shared and accepted to be shared by an overlapping order, unless I've misunderstood what your submission is.

MR LYALL:

Yes, so my submission is that the groups which are represented on those orders, for a particular area, whether they be part of a shared order or perhaps a separate order which overlaps that, would be made up of those groups who have collectively met the test. So the orders, stacked on top of each other perhaps, would be reflective of those groups who hold the area exclusively to the exclusion of others who aren't on those orders.

GLAZEBROOK J:

And then how do you navigate between the overlapping orders?

MR LYALL:

Well, the submissions that were filed, we did go through the bundle of rights to show that Te Upokorehe say that the rights are able and capable of being used by multiple parties, whether they are party to the same order or whether there's overlapping orders, and the second point, I think that or what I think would need to be undertaken by the parties and by the Courts is structuring the order, so it may be that there's a *Stage Two* process, and similar to what we've seen in the High Court certainly, where draft orders are to be presented for the Court's approval and judges may make orders that some of the issues that do pop up, like ownership of minerals perhaps, those types of issues, need to be addressed, so there may need to be some apportionment of those, agreement

reached on those separate orders, and I think that's sort of relativity as between groups.

GLAZEBROOK J:

I'm just not sure why that can't occur under a joint order, or do you say it can but it's not as easy or what's the…

MR LYALL:

We say that there is prejudice to applicants who have met the test and who are awaiting orders to be sealed and come into effect because, well, obvious reasons, there's resource consents being granted in the meantime, those sorts of things. So the smoothest pathway perhaps to these orders being sealed and coming into force relies on all parties agreeing on things like how those rights are going to be held and managed, who the order holder will be. Where there's a dispute at tikanga about that, it may be that there isn't a resolution and your Honours in the Court of Appeal decision discussion the possibility even that the Māori Trustee might be called on to hold an order on behalf of groups who can't reach agreement which is –

WILLIAMS J:

Get someone from Tūwharetoa to run it.

MR LYALL:

Well, I did wonder if the Māori Trustee had been contacted for their views on that in advance, but the –

WILLIAMS J:

They don't even have any coastline.

MR LYALL:

But obviously that's unsatisfactory to the parties, that sort of outcome, but then we also have the situation, and I don't think this is in the bundle but we can supply this, the *Hart v Department of Conservation* High Court decision, *Hart v Director-General of Conservation* [2023] NZHC 1011, where taonga was held

by the Department of Conservation until groups could work through a tikanga process in order to see who would have that taonga returned to them and the Court noted that that may carry on indefinitely, so they may never gain the benefit of that taonga, and these tikanga processes, I mean there may not be resolution to them so we have a –

WILLIAMS J:

But that's a challenge of leadership, isn't it? Ko te mana tonu tēnei te rangatiratanga, te mana whakahaere. That's what – you know, leaders have to reach agreements.

MR LYALL:

Certainly it's best –

WILLIAMS J:

Of course they do. History is replete with that. If they fail, then that's on them.

MR LYALL:

Well, it's to be aspired to but for those that may be seeking to reach agreement or just seeking to get on with walking the walk in their rohe as we say Te Upokorehe do, these separate orders which may overlay others might be an issue or a path.

1130

WILLIAMS J:

The price – sure. The price you pay is that you are subdividing the whakapapa matrix, the very thing throughout these hearings has been said to be the underpinning of the entire tikanga legal system. You're choosing to subdivide and separate in order to avoid having to engage in the very leadership discussions mana requires. At some point the humans have to either front up or fail and leave it to the next generation and the generation after that. That's what mana is about. Judges can't solve that, the leaders have to.

GLAZEBROOK J:

Well is your submission that as far as possible, the court orders should not be made until the tikanga process or whatever process it is has been finalised, or is the submission that the court orders should just ride over that and say: "Well we're going to subdivide it this way"?

MR LYALL:

The latter, your Honour. Te Upokorehe would wish to see orders.

GLAZEBROOK J:

So the courts have to sort it out before they make orders?

MR LYALL:

Yes, and whether that's through –

GLAZEBROOK J:

Whether it's a joint order with –

MR LYALL:

Or a separate order.

GLAZEBROOK J:

Or overlapping. All right.

MR LYALL:

And of course that would come with some possibly fairly stern directions from the Court to all parties about reaching agreement on those rights like customary marine – that issue from customary marine title like resource – sorry, mineral ownership, marine mammal permits is what I was trying to get out, your Honour.

GLAZEBROOK J:

Sorry, you're – that was mixing up a tikanga process and the Court deciding. Because you said the courts could tell people they've got to come to an agreement on minerals and then the Court will put it into practice, which is the first of mine, they can't – the court orders can't happen until you've had a

tikanga process. I mean obviously if you have a whole tikanga process and it can't be resolved then somebody has to resolve it, and I can see the argument is the courts, but I'm just trying – maybe you think about that over the morning adjournment.

MR LYALL:

Well I'd just say, your Honour, we've already seen the Court doing exactly that in the circumstances before you where Justice Churchman has pleaded with parties to reach agreement on who would hold the orders, and in the absence of that over the years since his judgment has issued has said, well, the Court will appoint one person per applicant group and the Court will choose. So that's the fastest pathway through. If that was to happen then Te Upokorehe would have to support that.

GLAZEBROOK J:

But as I understand it, you say that that has to be sorted out before the orders rather than just making a general order including everybody, is that…

MR LYALL:

I think that might be a point that I could ponder over the break and come back to you on.

GLAZEBROOK J:

That's what I think perhaps you do.

WILLIAMS J:

Coffee will help.

GLAZEBROOK J:

So we'll take the morning adjournment. Thank you.

MR LYALL:

As your Honour pleases.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.53 AM

GLAZEBROOK J:

Mr Lyall?

MR LYALL:

Before the break we were discussing whether the Court ought to be proactive in reaching decisions about orders or whether it ought to step back and allow a tikanga process to unfold before orders will be confirmed. Your Honour, Te Upokorehe do say that in these circumstances on the facts here it is for the Court to make those determinations and that's largely because it's apparent that tikanga processes have been tried and are not and have not produced results. So, you will have heard my learned friends earlier in the week talking about a tikanga process that took place and when we look at the hearing record there was one week of hearings and then a break and that's when that tikanga process took place. That was facilitated by the pūkenga and this is the process which is discussed by His Honour Justice Miller at 257 of the Court of Appeal decision where he notes half way through that paragraph that Te Upokorehe were unwilling to participate in that tikanga process and in fact they had left the hui rather than continue.

Now in these circumstances Te Upokorehe say that it is appropriate for the Court to make determinations to put timeframes on orders being confirmed and to be proactive in that way. Now it might not be a one size fits all approach and I think it's not a cop-out here to say that it should be a case by case basis, but here at least they say the Court had some eight weeks of evidence in front of it. We've seen this morning in trying to explain the history of Te Upokorehe, the place in which it holds mana, how complex and difficult that is to summarise in the course of one morning, and there are conflicting views of course and that's seen throughout the record, but the Court had the benefit of that evidence and then rather than making decisions about which hapū, which iwi hold rights in specific areas, really this was passed back to the groups to try to resolve at tikanga in the face of evidence that had been tried and it had failed.

The second point I wish to cover off, and this is the last point that I do wish to raise today, is paragraph 87 of our submissions we talk about the right to protect wāhi tapu, which is one of the rights that is part of the customary marine title bundle. This is an important right and it's the only example in the Marine and Coastal Area Act where access may be denied to sites completely by customary marine title groups. It's also the only mechanism by which under the Act rāhui are able to be given legal effect.

The circumstances that Te Upokorehe find themselves in, because of the nature of these shared orders as opposed to a separate order which might overlap with those other groups who can meet the test, is that wāhi tapu and wāhi tapu protection rights are only able to be recognised where they're agreed by all parties to those orders.

From – at our paragraph 91 we set out the passage from the *Re Edwards (Whakatōhea Stage 2) No.8* [2023] NZHC 1618 judgment of his Honour Justice Churchman where he addressed this specifically, and he reminds Te Upokorehe "that the right to identify and protect wāhi tapu flows from the award of CMT". They were not awarded their own CMT, but a joint one. There was "no agreement between all of those applicants who were jointly awarded CMT as to what areas are wāhi tapu and as to the protections that might be required to preserve and protect those wāhi tapu", and "one of the joint CMT holders cannot impose their views unilaterally on the others". So a consensus is needed by – between all groups before one of those groups can have their wāhi tapu, which may be unique to that group given those very strong and necessary protections.

So as a final point, that was a way of raising a practical issue that these shared orders have, that if separate but overlapping titles were granted wouldn't arise because groups would be able to have their own wāhi tapu protected under the Act, and over and above that, their own protections or ways of protecting added onto those rights.

WILLIAMS J:

What if Te Upokorehe, in order to reclaim back their claimed exclusivity to Ōhiwa, declared Ōhiwa Harbour a wāhi tapu?

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MR LYALL:

One of the wāhi tapu sought by Upokorehe in the *Stage Two* hearing is the entirety of the Ōhiwa Harbour as a wāhi tapu area.

WILLIAMS J:

So that would freeze out all of the other co-owners if there was a separate CMT?

MR LYALL:

Well, I think that goes back to the Court needing to be prescriptive about the terms that it could be granted on, so the way in which the protections sought there were for rāhui at times of a death, so it's not a 24/7 wāhi tapu protection.

WILLIAMS J:

I see. Not the declaration of a wāhi tapu because rāhui is a different thing. You don't need a wāhi tapu to impose a rāhui.

MR LYALL:

No, but if you have a wāhi tapu protection right and the rāhui is one of the ways in which that is a, one of the protections that you've put over the wāhi tapu area, or wāhi tapu, then it has legal enforceability in a way that a rāhui currently doesn't. So the way in which the Act allows recognition of wāhi tapu protection rights is that a CMT holder must then meet a further test and – I'm conscious of time – that's set out at section 78. So it's an incident of customary marine title and then the customary marine title holder needs to set out the protections specifically that are sought and show that they are necessary, so it's not a case that where a wāhi tapu protection right is recognised that it becomes a wāhi tapu and is closed permanently. It can be like a rāhui or a more transient type of protection that's offered to those areas, and, your Honours, there not being

a wāhi tapu protection right that has come into force with – I'm not able to offer an example of one that's currently in place, but certainly there's been a wide variety of wāhi tapu protection rights sought so far and what we are seeing granted are the more discrete wāhi tapu sites and the more transient types of protection rights or protections over and above them.

So all of this to say there's a real problem for groups like Te Upokorehe who, as they have done, have applied for the whole of the Ōhiwa Harbour as a wāhi tapu protection area under the Act but also for discrete wāhi tapu within the Ōhiwa Harbour and surrounds but then having to have each and every group agree to those and each and every group agree to the protections that they seek, that simply wouldn't be encountered if they were entitled to their own order.

As I've said, we have gone through the other rights that are part of that customary marine title bundle in our submissions and I don't think we gain much by me trawling through those today. So unless your Honours do have any questions, that was all I was intending to add after the break.

GLAZEBROOK J:

Thank you very much. Mr Salmon.

MR SALMON KC:

Good afternoon. The Court has a concern about timing so I thought I'd address that first and give you comfort. You should have an outline of argument from us which will indicate to you that I will be brief and need to be because you've heard a lot about the legislation and that's really all I intend to address you on, allowing more time for Ms Irwin-Easthope to deal with the factual issues. We nevertheless will be well on track in terms of the original timetable and to get our friends following out of here this afternoon. So that's really to give you comfort that as I start to talk about a few aspects of the legislation I'm not going to spend a lot of time on it but rather just identify a few complementary points and observations to build on Ms Feint's very thoughtful submissions which we adopt.

Before getting into that, just to say of saying it at the end, a point of housekeeping as well, like others we don't have a right of reply and so with the Court's leave not all of us will stay through to the end of the hearing, so I just note that now.

In terms of context for interpretation, just a few additional or supplementary emphases from our perspective and I don't think I'll need to go to many of the materials to these, I'll deal with in reasonably short order. The first is that this Act can only be interpreted as one that restored all customary rights. So while there is a question as to whether the balance that Mr Hodder spoke of throttled which customary rights survive in terms of section 58, or whether in fact that political balance throttled which, how big the bundle of rights were for those rights. What is clear is that this was a piece of legislation that fully restored rights and treated them as if they had not been taken away, and that has an important implication for the way in which legislation like this is to be interpreted. It is trite that legislation which purports to, or does take or diminish property rights, should be read down absent clear legislative language, and read as not taking away those rights, and in that respect we've an important difference in the starting point of interpretation for this legislation than the Foreshore and Seabed Act. The Foreshore and Seabed Act abolished all rights, so its statutory machinery was then interpreted as ones which absent applying harmed no property rights. They were gone. They're to be interpreted on their face in one way.

By contrast this net, the concern the Courts have, and I'm really just summarising what's said in *Carter* in a statutory interpretation text at 435, but the Courts will not adopt a construction that takes away existing property rights more than the Act and its proper purpose require, which the author italicises to emphasise the words "criteria". I would add this is particularly so where there is no compensation, which is where we are.

Now I note that Justice Glazebrook I think it was observed that in theory this might not be taking away rights because although they're not subject to a section 58 order, restored rights might somehow exist. But I think that's –

GLAZEBROOK J:

I think that was Justice Kós actually.

MR SALMON KC:

My apologies.

KÓS J:

We're often mistaken for each other.

WILLIAMS J:

It's the hair.

MR SALMON KC:

I can't comment on that Sir. The simple point I was going to make is that of course a right without a remedy is no right at all and –

KÓS J:

That's super trite.

MR SALMON KC:

Yes.

KÓS J:

And simply wrong.

MR SALMON KC:

Your Honour understands my point though, that the effect of this Act is to re-enliven all customary rights. Any that don't pass through the gateway of section 58 are effectively extinguished.

KÓS J:

No they're not. Not remotely.

MR SALMON KC:

They don't have force in law, if I can put it that way.

KÓS J:

At present, under this legislation.

MR SALMON KC:

That's right.

KÓS J:

They remain latent and their potential remains to be recognised at a later point.

MR SALMON KC:

But that would be true –

KÓS J:

Potentially.

MR SALMON KC:

That would be true with abolition too, because of course one can make that observation about the Foreshore and Seabed Act. They remained latent and could be re-enlivened by statute, but the practical effect of the supposed balance of –

KÓS J:

Tremendous difference.

MR SALMON KC:

Well, perhaps I can put it this way Sir. This reestablishes rights which have effect in common law, and then says, in only the following ways, and only the following cases can they be enforceable.

KÓS J:

Mhm, so back to jurisdiction which is the classic trick in dealing with these rights. Legislation after legislation deals with it on the jurisdictional basis.

MR SALMON KC:

Yes, and where I'm leading is that as a matter of construction one needs to read an Act that is reducing the force of property rights more strictly, and I think that's trite, and right, with respect. In this regard, although I don't have the article yet, but it just occurred to me the timing was poignant for this case. I was reminded of a seminar in which Mr Hodder wasn't the only speaker actually, there was another speaker at the time, but that took place on public law with a focus on property rights in February 2011. The then Attorney-General introduced Mr Hodder's speech which was on the topic, and I just haven't been able to get the paper because it's out of print in time, but it was informative and I remember it well touching on these issues. His paper was entitled *Public Law Property Rights and Principles for Legislative Quality*. My point here being this Act came in when these concerns were live. I think one of Mr Hodder's suggestions was we actually needed a right in the Bill of Rights which we've occasionally had people putting forward that protected property rights and we need legislative discipline before taking them away, especially accident compensation, so that's really just framing this as a context in which having restored the rights, in my submission clear language is needed to erode them.

1210

Against that background, I adopt what Ms Feint said about the way in which the balance was struck. There are multiple indicia in the legislation to suggest that that balance between public concern about access and so on and the fact that the Foreshore and Seabed wrongly extinguished rights was met at the second stage in terms of which rights survive and not the first. I would point in particular to the language of the preamble, the language of the last part of the purpose section, and the Treaty clause, Treaty provision section 7 as all confirming and underscoring not that there was a selective resurrection of rights that could be had regard to, but that the balance was at that second stage.

GLAZEBROOK J:

When you say "second stage", what does that mean? What are you talking about, "the second stage"?

MR SALMON KC:

The balance was struck in terms of what were the residual parts of the customary right that had legal effect.

GLAZEBROOK J:

Oh, okay.

MR SALMON KC:

So in other words, the nature of rights that flow from customary marine title was the balance.

WILLIAMS J:

Not at the judicial discretion stage?

MR SALMON KC:

Correct, correct. And that's both as a matter of inferring purpose from those introductory sections to the Act, the preamble, the purpose section, and the Treaty clause and because, as has been said I think by Ms Feint, we should presumptively assume that Parliament wasn't terribly cynical about this, and I think it's right what the majority said, that if the Landowners interpretation is applied it's really a pointless set of provisions because the test set that high was unmeetable. But it was unmeetable because of the Crown's sustained breaches of the Article 2 guarantees under the Treaty and it was unmeetable because of the trauma of colonialisation, the raupatu, and a history in which what I'll call judicial activism in the 19th and 20th century regarded customary title as gone and unenforceable, wrongly, with the result that the sort of control and exclusive occupation that the Landowners might suggest is required would have required risking imprisonment or earlier on death, and Parliament cannot have intended that a resurrection of rights have such a high standard for the maintenance of those rights, and I don't think that's really contested.

WILLIAMS J:

But the logic of that is that you simply disregard whatever has happened since 1840?

MR SALMON KC:

Not disregard it. Can I – I've –

WILLIAMS J:

Then what do you do with it?

MR SALMON KC:

Well reading the Act, and I'll come to a couple of reasons why I think this is supported by the literal text, because what I'm really going to urge on the Court is that conventional principles of statutory interpretation support and indeed mandate the approach taken by my client and the others who take the same line. It's implicit in the Act and indeed express in the preamble and so on that there has been a historic injustice that has limited the iwi and hapū's ability to manoeuvre and ability to assert their rights, and it must be implicit, and I think this is common ground, that a severe act like the raupatu cannot be regarded as somehow collapsing the level of customary interest so as to render it void. That would make a wrong convert into a double-wrong. It's a small step in fact in logic to take the analysis applied to the raupatu and apply that to other inabilities to fully exert what would have been all facets of customary title in tikanga given the practical restraints, one of history, but in particular history where there are breaches of Article 2.

So the way I would put it, if I might, is the interruption of colonialism limited the room to move. It was not possible to prevent commercial fishing boats passing through waters. To do so would have been at personal risk in all sorts of ways. It was not possible to stop the Crown forcing people off their land and so on. The Act recognises that those things aren't disqualifying. It recognises that in terms of the express provision about fisheries and the express provision about navigation. It also removes as a mandatory requirement the adjoining land aspect which was a mandatory requirement of the Foreshore and Seabed Act,

and a very unfair one in this particular case with the raupatu. Those are all clear statutory indications that we don't take the full brunt of colonialism and its impact on the ability to exercise mana over the customary interests as somehow depriving them, and again that would be on a policy level surprising, because the Act was designed to, and the Treaty clause makes this clear, to recognise and give effect to these rights in a context where they have been harmed by a breach. So whether it's adopting the majority's language about the intention and efforts to exercise the customary rights in the ways still available, and that probably is a useful way of putting it, or otherwise it is not right that the Act can be read as looking at all history and regarding it without context. Putting it another way, if the raupatu is to be disregarded, so too must other aspects of historic breaches of the guarantee that have prevented the exercise of customary rights.

A couple of other points, and these are brief –

WILLIAMS J:

I get the logic of that is you disregard 1840, what happened after that. So how do you –

MR SALMON KC:

Well, perhaps not.

WILLIAMS J:

So how do you – help me with some nuance in that proposition, would you?

MR SALMON KC:

Yes, certainly Sir. The way that the Act might be read is one that recognises that once there is complete disconnection with place and with the interests, that would be out, and so a large consequence of 1840 is following is the displacement, complete displacement and disconnection of, for example, urban Māori. Clearly the Act is drawing some line somewhere, but it's not drawing a line that says, those who have remained connected to place, and to their

tikanga, are somehow deprived because they simply could not stop local fishermen.

WILLIAMS J:

Yes, I get that. That's the, the rhetoric is fine, now help me with what is…

MR SALMON KC:

What is in the second limb?

WILLIAMS J:

Yes.

MR SALMON KC:

Before I come to that can I finish on context, because it's brief and I'm on context and I'm trying to keep to my promise to be quick, and that's the real question, I will come to it, but just very briefly on context. Two concepts of Hansard that I thought I would note just for completeness, one which we might bring up is at 11878 to 9, and we've had quite a few departmental papers before the Court, but I just wanted to note in a context where we might forget what the real public concern was at the time, which I think was more about access than perhaps other things than we're now more focused on as a public.

We've lost the link but I'll tell you what it is that is on those pages, no here we go. You will see part way down the page that one of the members is putting to the Attorney-General a statement made in the media that 2,000 kilometres of coastline would be given away. We might not be quite on the right spot. I'll find my copy there. Of course the comfort was given that of course access remains for the public. If we just go up a little bit, if we might, to the prior page. Yes, that's it. You'll see Mr Anderton asking the Attorney-General if he stands by his statement that 2,000 kilometres of coastline would be put into customary title. The Attorney-General notes that this was a question put to him, or a number put to him in an interview, but then over the page confirms effectively that, on that page and over the page, that that figure is right and that is his, at the bottom of page 11878, that is his in the round guestimate of the extent of

coastline. Now that's nearly 15% of New Zealand's coastline on my calculation, that the House understood might be the result of customary marine title. That's the backdrop to the House's understanding of what was being dealt with, and underscores that this wasn't the obscure backwaters that the Landowners' interpretation would have. This wasn't the few places that had so little fisheries or recreational value that effectively no one had been here. It was a meaningful proportion.

ELLEN FRANCE J:

Sorry, what was your figure?

MR SALMON KC:

My Googling of our coastline was 15,000 kilometres, but the figure that the Attorney-General adopted, to be fair as a guestimate, was 2,000.

WILLIAMS J:

About half of that is in Kaipara Harbour.

MR SALMON KC:

Possibly. I'm not assuming anything about where any of these things are Sir. 1220

WILLIAMS J:

It was just coastlines. The harbour coastlines are the areas of greatest coastline length.

MR SALMON KC:

I see. I thought your Honour was saying where there would be title established. I understand what your Honour's saying.

WILLIAMS J:

No, no, no. I'm talking about the…

MR SALMON KC:

Yes. Well, I suspect half of it might be in Fiordland rather than in Kaipara, but a lot would be in the Kaipara. But in percentage terms, what is being talked about in this case is relatively small because the coastline is not fjord-like or tidal harbour-like on the whole. The harbour is but the coastline itself is not.

WILLIAMS J:

That's my point. Perhaps that factual proposition is incorrect. It may be that 15% of New Zealand's coastline is in its harbours. Maybe. I don't know.

MR SALMON KC:

We don't know. We don't know. What we do know is what Parliament was talking about which is the number 2,000 and they weren't even talking in proportional terms, so we just have that. My point there is it wasn't regarded as an extremely high threshold in fact and so when either Seafood or the Landowners refer to a suggestion it's a high threshold, there was some degree of political comfort being given in some of the wording here but this was a real amount of coastline that was envisaged might be affected.

The second point, I won't go to the page but I'll just note the reference, relates to an observation by Justice Kós several days ago to, I forget now who but I think it might have been Ms Feint, that if the second limb under section 58 was a, I think the words were "a portal into tikanga", the House would have been shocked. I'm not sure on reading the transcript that tikanga and the concept of tikanga in the Act was viewed with shock at that time. I know that it's a hotter topic now in certain circles but in reading the House debate, and just one page example is 1257, I think, but generally on reading it the fact that tikanga is a consideration was just there in the debate, because it's in the first limb, of course, and the Attorney-General noted it specifically and there was not shock or alarm. So I just note that as contextualising context as well.

Then in terms of the second limb and section 58 and Justice Williams' question, *the* question really, and what I intend to do is deal briefly with 58 and 59 and then a few brief comments on the onus section and its dovetailing with

section 98, addressing some of the questions from Justice France several days ago.

Dealing with section 58, as the Court will know our position adopts Ms Feint's position that it's a composite test and that the second limb is explicatory really of the first limb. One could say that that gives it no work to do or one could see it as a piece of legislation that's explicatory but also that carries over some language from the Foreshore and Seabed Act but in a very different way. If it's not that it is explicatory and, indeed, it adds something, I think the difficult rhetorical question for all parties is if it's not informed by our common law which includes tikanga what is the standard that we apply to exclusiveness or substantial interruption? We know, as the Court has noted to other counsel, we know that "exclusive" doesn't mean literally exclusive because the Act isn't set up that way, so it's some other standard. We know that "substantial interruption" could mean any number of things in the abstract and we know that foreign legal analysis of "substantial interruption" for the reasons Justice Miller identified is not substantially helpful here. Our common law, of course, came into New Zealand subject to tikanga and thus a common law analysis of customary rights and what is extinguishment by substantial interruption or what "substantial interruption" might mean in our common law world inevitably carries with it a tikanga facet. It must or it's not the common law.

So if not the common law, which includes tikanga, the rhetorical question, the hard to answer rhetorical question for the fishers is what does it mean? It can't mean all the things that have happened that disqualify all that, and that, I think, is an important point. There isn't a coherent standard other than the common law and tikanga. So while Justice Williams' question to me is a hard one for me to answer, it's even harder to deal with the question from the other direction and say what it means if not something that is explicatory or complementary to the first limb of the test, all of which is a long way of adopting really your Honour's comments to Ms Feint yesterday, or the day before, which is there that much of a difference, and that, I think, is the answer to the case.

The first and second limbs, whether seen as one test where the second limb is explicatory or a composite test, or whether seen as two limbs that, in fact, on analysis mean the same thing, makes ultimately little difference. In my submission they're coherently read as a composite test with some explication, but either way I do adopt the observation that there is not much difference in it, because the second limb must carry historically, contextually, sensible and reasonable parliamentary expectations of what is interruption and tikanga.

KÓS J:

If you look at that passage in 12517, which you were about to look at but skipped over, it does put around the other way a little bit. The Attorney says: "The overarching test will be exclusive use and occupation without substantial interruption. The test has some emphasis on tikanga Māori." So he, there, seems to reverse on the two limbs.

MR SALMON KC:

He does, yes Sir, and I accept that. It's said in a number of different ways actually, and to the point here I didn't feel I couldn't construe anything really usefully from, about the interplay of those two limbs to help us understand what the House as a whole thought. The reason I was pointing to that is just the reference to there being a tikanga component of the test, was not – did not result in parliamentary uproar.

KÓS J:

Well I mean it's the words of the statute. They used it, there it is. I mean the difficulty we have is we have to got work out what on earth limb 2 does to limb 1. Limb 1 is relatively uncontroversial in this case, relatively so, but limb 2, according to some people, does no work at all, and according to others, who seem to have departed the Court, it does an awful lot of work and means that we we're not going to be dishing out many prizes.

MR SALMON KC:

Well according to some of those views it involves a very cynical Parliament that restored rights only to give them no application under the Act in a context where the Act says they're going to be giving a lot back.

KÓS J:

I understand your submission.

MR SALMON KC:

And where Parliament was told 2,000 kilometres, so I think on any view the extreme in that direction must be wrong. We cannot assume Parliament was that cynical and the materials show it wasn't. In terms of the suggestion that giving it no work to do is somehow abhorrent or uncomfortable. If one views this in the way that Ms Feint very courteously described the House as looking at, which is one where not everyone there is probably that nuanced in their understanding of tikanga, I say that with respect, it's new to a lot of people, it makes more sense to see this as explicatory, and it does so as well if one considers that if it's voicing a view of the common law of ways in which customary title might be lost, it's really just seeking to say something that in New Zealand's common law, and Parliament was of course aware of Ngāti Awa at the time, brings us back to our common law infused by tikanga.

To put it another way, it's not that odd that Parliament in this slightly brave new world would say the same thing twice, and because we can rule out the extreme harsh, unfair, and cynical result, we can entertain that possibility, and I would ask the rhetorical question, what's the midground that makes coherent sense as a matter of orthodox statutory interpretation, and respectfully I don't think there is one that doesn't end with Justice Williams' observation that there's not a lot of difference between the two. It's either explicatory or it's a common law infused by tikanga approach to, on my reading of tikanga, to abandonment and the like. Conquest, abandonment, and that makes sense, that makes coherent sense.

Can I build on that briefly by just dealing with some aspects of section 59 that are not determinative but might involve clues here as to approach. Section 59 sets out some permissive considerations when determining where the customary marine title exists, and it's different from the set of considerations in the Foreshore and Seabed Act, and so it's to some degree bespoke. But it's notable in my submission that the permissive considerations do not adopt views on – or positions on exclusivity or on interruption, and that just might be a little signal that Parliament didn't see them as controlling as the fishers and the Landowners' interpretation of the second limb suggests. So rather than saying the Courts must take into account exclusivity or substantial interruption, which of course one would say is part of the test, it is may take account of the owning of abutting land, or exercise of non-commercial customary fishing rights, and if there's exercise, the extent to which there's been exercise.

1230

That, coupled with the subsection (3) acknowledgment that other people fishing and navigating doesn't preclude customary title rather suggests that there was a Parliamentary intention that exclusivity not be read in any way remotely like how the Landowners have read it. In other words, we are dealing with a more nuanced and historically-contextualised analysis of exclusivity.

So that's just an observation about that section with one additional observation about what's not in it, which is the Foreshore and Seabed Act you'll recall in section 32(3) specifically prohibited the courts from considering cultural or spiritual associations with land and that's not in here, and I would ask why is that? And one answer might be that in that approach to the tikanga-infused analysis of both limbs of the test, or the single test if it's composite, Parliament was expecting that that would be part of the answer to Justice Williams' question, how do you analyse whether someone has continued to occupy in a post-colonial world, and in my submission part of that would be recognising that when one can't forcibly prevent fishing boats and one can't close a beach, that one might retain in every way still available safely and as a matter of law cultural and spiritual connections, whether by way of rāhui or engagement over assets or the like.

KÓS J:

I don't know how you'd do limb 1 without taking into account cultural and spiritual associations.

MR SALMON KC:

Agreed.

KÓS J:

I mean you have to remove it.

MR SALMON KC:

Yes, but I'm building on that to say one struggles to see how we – we know we can't interpret "exclusive" or "substantial interruption" harshly and literally. Once that's acknowledged, one starts to see that Parliament is anticipating that it would involve consideration of those facets there as well to give shape to what "exclusive" means in this post-colonial context.

The final point I wanted to touch upon is a point that interested me when it came up, which is – and which I recall Justice France asking questions about or making observations about, which is the interplay between the section 106 onus points and that in section 98, section 98 of course requiring that the Court *shall* be satisfied that all the elements of section 58 are met, and section 106 seeming on one reading to be an incomplete articulation of what's presumed and what is not. And I just want to have a little go at arguing that it's in fact complete, section 106, and it addresses all of the limbs in terms of burdens and presumptions. And this is a fairly short submission, but I will focus on subsection (2) and subsection (3).

Subsection (2) sets out what must be proven by the applicant and it's silent of course on exclusivity or substantial interruption, as we know, which – from which we can take that there's not an onus to prove those but rather an onus that the land is held in accordance with tikanga and that there's that continuity back to 1840. Now that leaves potentially the air gap that Justice France is pointing to that the Court still nevertheless needs to be satisfied that there has

not been substantial interruption, et cetera. The point I'm going to urge upon the Court is that that's in fact answered by subsection (3).

Subsection (3) says that the Court can presume "in the absence of proof to the contrary, that a customary interest has not been extinguished". And I think the air gap exists perhaps if one reads "extinguished" as extinguished by operation of law or as a matter of law, but there's a linguistic difference here between section 106, it has not been extinguished, and section 51 and section 58 which refer to extinguishment "as a matter of law", and I think that distinction might be the answer. So to try to give that some shape –

ELLEN FRANCE J:

Sorry, so what's the distinction?

MR SALMON KC:

The point I'm seeking to make is that the presumption that there has not been extinguishment includes a presumption that there has not been substantial interruption, which is a form of extinguishment, and that –

GLAZEBROOK J:

So the submission is it's not extinguishment necessarily as a matter of law, it's extinguishment as a matter of law or practice?

MR SALMON KC:

Correct, correct. And that's supported by section 51(1)(c) and section 58(4), which only relate to extinguishment as matter of law. So I'm pointing to the lack of the additional words "as a matter of law" in section 106 to suggest that subsection (3) is designed to presume that once one has established one holds tikanga now and has the continuity back to 1840 the applicant doesn't have a burden of proving that there was no substantial interruption or exclusivity, and I think we seem to be agreed on that, but also that the Court isn't put in that difficult lacuna that Justice France identified of needing to be satisfied because the subsection (3) presumption tidies that up.

I think that's –

WILLIAMS J:

I don't get that. Help me out here. Explain it again. That's a good start.

MR SALMON KC:

So I'm seeking to read section 106 as if it's not an incomplete set of rules about burdens and presumptions but rather completely addressing the set of burdens and proof obligations that arise under section 58, and what I'm seeking to say, Sir, is that if one reads section 58 as saying that proving that there is a customary title now as a matter of tikanga and that it has been continuous since 1840 or transferred from someone who had it in 1840 is the only positive burden the party has and that the other limbs of the test are properly interpreted in this Act as being extinguishing features.

WILLIAMS J:

How does a presumption, if you separate between "extinguishment as a matter of law", which has been the subject of a great deal of litigation that culminated in *Ngāti Apa*, and "substantial interruption" which seems to me to be extinguishment as a matter of fact –

MR SALMON KC:

And I agree with that, Sir?

WILLIAMS J:

– how does a presumption about fact help, because it either is or it isn't?

MR SALMON KC:

Well, I think it only really works with facts, doesn't it, Sir, respectfully, because we don't really have presumptions about law because they're not a question of proof?

WILLIAMS J:

No, it's – well, you see you have presumptions – it's really the BORA. It's the BORA clause, right, which is effectively what *Ngāti Apa* says. You presume that the law is not extinguishing unless it explicitly says so. Now you're saying you presume the facts are not extinguishing unless what? They explicitly say so?

MR SALMON KC:

Well, it's clear about that. It's presumed unless proven to the contrary. So it's presumed –

WILLIAMS J:

So you have to presume continuity?

MR SALMON KC:

Well, you don't – not quite continuity.

GLAZEBROOK J:

Isn't what you're saying that 106 says you don't have to prove – well, you do have to prove continuity actually because it says so.

MR SALMON KC:

It's part of the – yes.

GLAZEBROOK J:

But you don't have to prove a lack of substantial interruption –

MR SALMON KC:

Correct.

GLAZEBROOK J:

– unless somebody says there has been substantial interruption.

MR SALMON KC:

Yes, and I undertook that to be common ground that one doesn't have to prove it but Justice France's point to be that leaves the Court in a position where while the applicant doesn't have to prove lack of substantial interruption the Court nevertheless has to be satisfied and ends up calling evidence on it which I think was the point being made.

ELLEN FRANCE J:

Yes.

MR SALMON KC:

And that's right unless I'm right about subsection (3). So to answer your point, Justice Williams, I'm not saying you don't have to prove continuity because subsection 2(b) requires proof of continuity. What I'm pointing to in this, this I'm about to seek to use as something that reifies the earlier submission about how high the standard was, you do not have to prove that you did so exclusively and you do not have to prove that you did so without substantial interruption except to the extent those are necessary as a matter of tikanga. One doesn't have to prove that because it's presumed that you haven't lost those characters under subsection (3) absent proof by the Crown or otherwise that there has been extinguishment by lack of exclusivity.

KÓS J:

I don't see where 106(3) deals with exclusivity. I take your point about substantial interruption.

MR SALMON KC:

I understand the point, Sir. The way I would read it, seeking to read the Act as a coherent whole, is that it is viewing a lack of exclusivity or a substantial interruption as extinguishing. That's not a stretch to read it that way because when one looks at the Canadian and Australian law which said the original approach, those are treated and described as extinguishing features of the common law landscape.

1240

So we have extinguishment as a matter of law, as Justice Williams has said, but we also can have extinguishment because in Australia lack of exclusivity or substantial interruption, so those are literally understood to be factual causes of extinguishment. I think that's right. With the result that a factual presumption at section 106(3) mustn't be about legal extinguishment. There's no burden of proof for an act of Parliament. It is or it isn't. It must be about some form of factual extinguishment.

WILLIAMS J:

Well it's the same, the provision in BORA that says you will strive to read statutes as rights-protective, seems to me is the equivalent of section 106(3), but what you do with, it does seem to me there's quite an important distinction between factual extinguishment and legal extinguishment. Ngāti Apa put paid to legal extinguishment as a general proposition. Didn't put paid to factual extinguishment, didn't have any facts. The question is really, the context of the preamble in the Treaty clause, what ought substantial interruption to be, but I'd be surprised if Parliament accepted that it didn't have to be proved positively, unless someone questioned it in a case that doesn't require a respondent.

MR SALMON KC:

Can I have one more attempt at persuading you Sir. Firstly, I don't think respectfully subsection (3) can be read as dealing with legal extinguishment because if dealing with proof, and we don't prove New Zealand law, it's dealing with evidence here. So it must be dealing with, and it's under a heading "Burden of proof" so it's quite distinctively about evidence. That's the first proposition. The second is that it is right that extinguishment captures in the common law generally, and in Parliament's understanding, or at least the Departmental Reports suggest it was understood as capturing lack of exclusivity and substantial interruption. So we can confidently I think take Parliament as regarding the word "extinguished" used here without as a matter of law, and it is significant that in section 51 and 54 the phrases "extinguished as a matter of law". That's separately dealt with there as just completely disqualifying. This must be dealing with evidence about extinguishment.

WILLIAMS J:

Or you see if it was going to be clear on that it would use, would have used do not presume, unless there's proof to the contrary, substantial interruption.

GLAZEBROOK J:

I think it's – there's no point continuing to debate. The submission has been put –

WILLIAMS J:

Actually I'm finding it helpful because this is really the, this is the key issue. So why wouldn't it have used substantial interruption?

MR SALMON KC:

It didn't need to because they're forms of extinguishment. It also, if it had tried to list all of the ways in which extinguishment might –

WILLIAMS J:

Well there are only two ways.

MR SALMON KC:

Well I don't know that because I'm not an expert in tikanga, that's not me seeking to dodge it, but this Act was written by people more like me, Sir, who were somewhat open-minded and leaving to the Court to work out how a customary right might be extinguished. That was an adventure that the country had to undertake through the courts. So I would suggest it's sensible drafting to talk about extinguishment in a broad sense, which captures the ways in which extinguishment can expressly happen under the Act, and whatever else might arise in tikanga. So I would view it as a safe and sensible way of drafting it, but also given it can't mean that there's a presumption, absence proof to the contrary, given that can't be extinguishment by law, it must mean those concepts.

WILLIAMS J:

Thanks.

MR SALMON KC:

So I apologise Justice Glazebrook for going around in circles.

WILLIAMS J:

You were dragged round in circles to be fair.

MR SALMON KC:

We're all reeling a bit today, I suspect, for other reasons, so I hope I wasn't sounding too Russian. That's all I had really to say on that beyond that that analysis of section 98 and 106 does, in my submission, support that more measured view weather, as a result of a composite test or as a result of explication, a more measured view of section 58, not one that was intended to strike down most of the restored rights, but instead one that was intended to strike the balance the public was concerned about, and I'll close on that observation.

When one reads the transcript of Hansard, what one sees is concern about, and it's a while ago now, but concern about access to the beaches, and access to the seas, not about the threshold for customary rights per se, but about that balance between different sectors of the public, and that balance shouldn't control an interpretation of the test for customary title where the Act brought all customary title back, but rather be viewed as reflected in the bundle of rights that successful applicants were to have, which is measured and preserves those public concerns about access. There were –

KÓS J:

I mean, one of the real problems here is that there is such a lack of public understanding as to what "customary title" means, "customary rights" means, such a fundamental failure to understand.

MR SALMON KC:

Yes, it makes the debate – and not just the public, I think, when one reads, somewhat said in Departmental Reports, it's just designed to be a SOP or a comfort to people who are reacting in an immediate way, not understanding

that, and I – we've had more Departmental Report focus than we usually do in statutory interpretation cases. In my submission, we don't need it. We as a matter of law understand what those points mean, but we can read them in a conventional way applying conventional standards of statutory interpretation to reach a result which is not discordant with the bargain struck politically, but in fact effects it and aligns with it and aligns with the one thing we know the House understood, which is that quite a bit of coastline might be covered by these orders, or it might not.

So those were my submissions on interpretation, unless I can help you further. I took slightly longer than planned, but I'll hand over to Ms Irwin-Easthope now.

GLAZEBROOK J:
Thank you.

MS IRWIN-EASTHOPE:
E aku rangatira, Ngā Toka Tūmoana o te Ture, ngā Kaiwhakawā, tēnā koutou. Otirā, tēnā koutou katoa ngā uri o te waka o Mātaatua, Ngāti Awa, Awanuiārangi, Te Whakatōhea, Te Whānau-a-Apanui, ngā hononga ki Te Upokorehe, Rangimātoru, ki a koutou o Ngāi Tai, Tainui waka, mai tēnei mokopuna o Te Ruāwai a (inaudible 12:47:12) maunga. E kore e mutu ngā whakaaro rangatira ki a koutou katoa mō ōu koutou ū, mō ōu koutou māia ki tēnei kaupapa, ki tēnei taonga o tātou katoa. Ki a koe, e taku rangatira, e taku pāpā, e te kaikarakia, tēnā hoki koe.

Your Honours, good afternoon. I have acknowledged all of the parties that are here before you and make special acknowledgement to my clients, Ngāti Awa, who are here in court today and who are listening online, tēnā koutou, and of course acknowledge the kaikarakia, Joe Harawera, who opened our day, and Ngāti Awa sees itself here and is coming to court as another step along the journey to protecting its customary interests.

Now Mr Salmon's referred to our road map. You've seen it now. I just want to clarify that you have two sets of substantive submissions before you for

Ngāti Awa, one as a respondent and that those submissions are dated 18 October, and one as interested parties dated 4 October. The road map refers to both. The hyperlinks will take you to the right place, but I just wanted to make sure that you had both sets.

Just by way of signposting, I'm going to address your Honours on three matters today. And to let you know where I'm heading, Ngāti Awa's position in a nutshell on each of those matters is in relation to the matter at paragraph (b), CMT 2 which is Ōhiwa Harbour, Ngāti Awa say the Court of Appeal was correct to uphold the grant of CMT on a joint basis to Ngāti Awa, Te Whakatōhea, and Te Upokorehe. At paragraph (c), this is CMT 1 which we refer to as the coastline CMT, we say the Court of Appeal was correct to uphold that at least what Ngāti Awa term as the "disputed area" which I'll orientate us to shortly should be remitted back to the High Court as Ngāti Awa's interests in this area were not recognised, and at paragraph (d), Whakaari and Te Paepae o Aotea, Ngāti Awa's evidence is that Ngā Iwi o Mataatua, Te Whakatōhea, Te Whānauā-Apanui, Ngāti Awa share the seascape in and around Whakaari and Te Paepae o Aotea and meet the test for CMT around that area jointly. So that's where we'll be going. I probably will be coming back after lunch but I am conscious of time, your Honour, so we'll move through as quickly as possible.

1250

Before we get to the grounds that I'll be addressing, I just want to orientate us to where we're talking about, and as we set out in our respondent submissions at paragraph 5, the disputed and the contested areas, at least for Ngāti Awa's purposes, are largely in and around Ōhiwa Harbour and Whakaari and Te Paepae o Aotea. So I'll just ask Ms Douglas to move us to the end of our submissions as a respondent where we include a map as an appendix, and so I'm very mindful of my friend, Ms Feint's, directions relaying Dr Amoamo's view that you go from the east to the west, and as a woman from Ngāti Porou I take no issue with that. We've been in the east and we're going to the west. So at the left-hand side of this map we have Ōhiwa Harbour and we have what

Ngāti Awa terms as the “disputed area”, and so that is where Ngāti Awa’s interests are and that is why Ngāti Awa is here.

Final preliminary point, I’m mindful of your Honour’s comments to my friend, Ms Cooper, about taking, sort of going through evidence. There are a few points that as a result of the presentation this morning I do want to take your Honours to but the submissions themselves and the road map deal with all of the references that we want your Honours to have, so I’ll just step through that, just being mindful of your Honour’s comments to my friend.

GLAZEBROOK J:

Well, it was really a matter of timing in relation to your friend rather than not going to the evidence because obviously you take us to the bits of the evidence as Ms Cooper did but support the position but…

MS IRWIN-EASTHOPE:

Yes.

GLAZEBROOK J:

Just make sure that in doing that you’re mindful of the time.

MS IRWIN-EASTHOPE:

Absolutely, your Honour. What I do want to say before we get into CMT 2 is that Ngāti Awa’s evidence in this proceeding was drawn upon from its own pūkenga, from its own expert, so the primary evidence in this case for Ngāti Awa was given by Tā Hirini Moko Mead, Dr Joe Mason and Dr Te Kei Merito. Me hoki ngā whakaaro ki a rāua tahi ko Dr Mason rāua ko Dr Merito kua wehe ki te pō. Since the 2020 hearing Dr Mason and Dr Merito have both sadly passed away but where you will find, I guess, the whāriki or the platform for Ngāti Awa’s position is in the evidence of those koroua supported by the evidence of the previous Manahautu of Te Rūnanga o Ngāti Awa, Leonie Simpson, which steps through much of the modern day examples that actually my friend referred to this morning for Te Upokorehe, so most of her evidence deals with some of that modern day practices that at least in

Ōhiwa Harbour are undertaken with Te Upokorehe. So that's where the evidence is for Ngāti Awa.

So moving back to the road map, and I am at paragraph B now, so we're back in Ōhiwa Harbour and we say the Court of Appeal was correct to uphold the joint CMT there and what we say at paragraph 2 is that fundamentally Ngāti Awa's position in terms of the evidence is that the natural coalescing point of these groups before you who claim interests in and around Ōhiwa is Ōhiwa, is Ōhiwa Harbour, and so sort of get into what we say is the rich tapestry of evidence that was given in relation to Ōhiwa Harbour, if we could – and part of why Ngāti Awa say that other than the evidence itself, evidence that was given to the Waitangi Tribunal, at least in the Ngāti Awa inquiry which then led to the raupatu report, the Tribunal there says sort of broadly speaking to the east of the Ngāti Awa heartlands Ngāti Awa merged with Te Whakatōhea and Tūhoe at Ōhiwa Harbour and that the harbour itself was shared by all three, and so when Ngāti Awa looks at its own historical evidence, its own narratives, its own kōrero, and we'll come to some of how that kōrero intertwines with Te Whakatōhea and Te Upokorehe and what I would submit are quite beautiful examples of tatau pounamu over the years, that's where it says the interests of the different groups coalesce, in Ōhiwa Harbour.

So if I could just move back to the road map at paragraph 3, and addressing the submissions of my friend, Ms Cooper, this morning in relation to Te Upokorehe's CMT appeal in relation to CMT 2. Before I do so, I'd just like to say that my clients – I want to be particularly sensitive with these submissions. My client recognises the interests of Te Upokorehe in Ōhiwa Harbour, it recognises the interests of the other Whakatōhea hapū in Ōhiwa Harbour, and it recognises, of course, and upholds, its own interests. So I don't want to be taken to be saying that other groups don't have interests at Ōhiwa Harbour that are claiming them. What Ngāti Awa says is that it is at Ōhiwa Harbour because of its own mana and it is not under anybody else's mana, and we'll get to some examples of that shortly.

One thing that we haven't gone to, I'm not going to take your Honours back to Te Upokorehe's notice of cross-appeal in the Court of Appeal that my friend Ms Cooper took you to this morning, but if my friend Ms Douglas could bring up what I understand your Honours now have, which are Te Upokorehe's submissions in the Court of Appeal on this point. And so your Honours will recall in Te Upokorehe's notice of cross-appeal to the Court of Appeal they had the various grounds and then the relief sought. What Te Upokorehe chose to do in the Court of Appeal is at paragraph 4: "For clarity, the Trust no longer pursue the ground of appeal relating to Te Rūnanga o Ngāti Awa being included in a joint grant of CMT in relation to the western part of Ōhiwa Harbour, or the ground of appeal concerning the Waioweka River."

Now sort of working through what that might mean, and I'm conscious of my friend's submission about concessions and what the Court may or may not do with that, without wanting to really traverse that detail, what Ngāti Awa's position is that evidence is so clear, I think my friend said there is just so much evidence about Ōhiwa Harbour, I absolutely agree, and all of that evidence points to all of these three tribal groupings sharing that space. And so my submission to you is that I'm not wanting to sort of be particularly procedural about this, I mean I think Justice Miller landed where he landed because of the way in which it was argued in the Court of Appeal where the landowners were the only party opposing Ngāti Awa's inclusion in CMT 2, actually Ngāti Awa's position properly understood is that on the evidence it meets the test alongside Te Whakatōhea and Te Upokorehe.

And if I could go to – perhaps just to respond to one point on that, and it is in the Upokorehe road map at page 2, and this is really responding or wanting to drill down into your Honour Justice Williams' point about yes, but where do the other groups accept that you are the only holder of mana in the way in which you describe. There's a bullet point there right at the end: "Acceptance by other groups of Te Upokorehe as holder of ahi kā/kaitiakitanga," and the final bullet point is a reference to Leonie Simpson and that is one of Ngāti Awa's witnesses.

That pinpoint reference takes you to Te Riaki Amoamo's evidence, but I have overnight just looked again through the cross-examination of Ms Simpson, and if we could go to 108 – and just for the record – 108.04245. This is the part of the transcript where Ms Simpson is giving evidence, and this is the evidence-in-chief. If we could scroll down to 108.04333. We might need to wordsearch because it's a bit further along. What I would say to your Honours there is Ms Simpson is by no means saying that Ngāti Awa's view is that it can access Ōhiwa through the mana of Te Upokorehe. That is not what Ms Simpson is saying at all. What this cross-examination exchange shows is what I would submit Ms Simpson being mindful of whakapapa connections and being respectful, but in no way and certainly before this Court does Ngāti Awa accept that it is at Ōhiwa Harbour via anybody else, and I do want to take your Honours to some maps that show some Māori land blocks right on the harbour, Ngāti Awa Māori land blocks, in an area of land where a Ngāti Awa community still lives.

1300

That's 1 pm, your Honour. I am at paragraph 4, so I think making good time. I'm in your hands as to what you'd like to do but I certainly will be some time after lunch but I'm mindful of my friends and think we will – not running into issues there.

GLAZEBROOK J:

That's a reasonable point to break for lunch?

MS IRWIN-EASTHOPE:

Yes.

MR MAHUIKA:

Ma'am, if it would help, I don't expect to be more than 45 minutes to an hour for Te Whānau-ā-Apanui. A lot of it will depend on questions I don't propose to – the Whānau-ā-Apanui issue is really what is the evidence shown so far as Te Whakatōhea's interest is concerned. I will only touch very briefly on the legal test and a good deal of what I will be making submissions on will be around

how I consider the Court should treat the evidence. So if that would help in terms of time?

GLAZEBROOK J:

So how long after lunch do you think you'll be?

MS IRWIN-EASTHOPE:

I don't want to be longer than 30 minutes and I'll give myself maybe 35, 40.

GLAZEBROOK J:

All right. Well, it looks as though we've got time after lunch.

WILLIAMS J:

You'll give yourself 35, 40?

MS IRWIN-EASTHOPE:

If your Honours please. There are some things that I need to do. I'm mindful that Ngāi Tai are here also. If Mr Mahuika takes an hour I'm not sure that we will get through Ngāi Tai but obviously that's in your Honours' hands. I'm happy to come back at two if that would suit your Honours better.

GLAZEBROOK J:

We actually have a seminar commitment so it'll have to be 2.15.

MS IRWIN-EASTHOPE:

Thank you.

GLAZEBROOK J:

So 2.15.

UNIDENTIFIED SPEAKER:

Ma'am, I was just going to say I'll be here on Tuesday and I'm happy to resume my position on the timetable.

GLAZEBROOK J:
Yes.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.20 PM

MS IRWIN-EASTHOPE:
Tēnā no koutou. Where we left we were at paragraph 4 following from the discussion around the interests of Te Upokorehe and Ngāti Awa at Ōhiwa Harbour and I'd taken you to some cross-examination of Ms Leonie Simpson.

What I'd like to do now is move to the cross-examination of Ms Maude Edwards who was one of the witnesses for Te Upokorehe during the High Court trial, and the reference to the evidence that I will take you to is at footnote 112 of our submissions as a respondent and here there are a range of references which, much like Te Upokorehe did, we say, Ngāti Awa, they are Te Upokorehe and Te Whakatōhea witnesses accepting Ngāti Awa's interests in Ōhiwa Harbour, so those are there at footnote 112, but this particular footnote goes to the question or the interchange that your Honour, Justice Williams, had with my friend, Mr Lyall, about the acceptance of Te Upokorehe's position in this proceeding, and the question there from myself is: "Being at Ōhiwa under the mana of Te Upokorehe," and this is in relation to Ngāti Awa, and I say, "and certainly Ngāti Awa does not accept that they are at Ōhiwa under the mana of Te Upokorehe. So acknowledging what you have heard over the previous few days, you certainly wouldn't be suggesting that Ngāti Awa is at Ōhiwa on that western side under the mana of Te Upokorehe are you?" "No, I don't accept that Ngāti Awa is there under the mana of Upokorehe. Because, as I said in my affidavit, our relationship with Ngāti Awa, and I am speaking purely for Upokorehe, – was built on respect and trust and I would expect that relationship to continue into the future. So I respect the mana of Ngāti Awa on that western boundary and Upokorehe would be open to talking with them about how we can [continue to work in those areas]."

Now obviously your Honours have heard parts of evidence that supports the person that's on their feet's client's case and I accept that but why I wanted to highlight that is just because it goes to that exact point that your Honour was addressing with Mr Lyall.

What I'd like to do now is connected to that point is the examples that Te Upokorehe give in relation to the exercise of kaitiakitanga at Ōhiwa Harbour which again Ngāti Awa respects but what Ngāti Awa says is the examples that Te Upokorehe give of doing different things in Ōhiwa Harbour, Ngāti Awa often does them alongside Te Upokorehe or also does them at Ōhiwa Harbour.

Now I won't step through all of the examples but I will just give you a reference to paragraph 47 of our submissions as a respondent, just picking up on a few points in relation to whale strandings in particular, and this is a particular perhaps sensitivity for my client but certainly they want to highlight that the work that Upokorehe does there is accepted, respected and is often led by and done with Ms Ramari Stewart who is an expert in whales and she is of Ngāti Hokopū descent. She is Ngāti Awa.

Similarly at paragraph 47(d), Ngāti Awa's membership to the Bay of Plenty Regional Iwi Fisheries Forum and the Ōhiwa Implementation Forum which is the forum that is made up of representatives of the Bay of Plenty Regional Council, Te Upokorehe, Te Whakatōhea and Ngāti Awa, and at (e) in particular Ngāti Awa's involvement in the mussel restoration project led by Dr Kura Bourke who is also of Ngāti Awa descent.

WILLIAMS J:

Are they also Whakatōhea?

MS IRWIN-EASTHOPE:

Kura? Sorry, Dr Bourke?

WILLIAMS J:

Yes.

MS IRWIN-EASTHOPE:

I'm not sure, your Honour. I'm not sure whether she has Whakatōhea whakapapa, but certainly Te Upokorehe were leading that project but Ngāti Awa's point is often it's done alongside Ngāti Awa which isn't always recognised in their present day narrative.

The second point I wanted to pick up on is ahi kā and so if we could go to – and this is really just a reference but I'll ask Ms Douglas to bring it up on the screen, Ms Simpson's affidavit, which is 203.01167, and at paragraphs 82 to around 88 Ms Simpson works through particular things that have come back through the Treaty settlement, but where I want to get to is paragraph 88 where Ms Simpson details the multiple and extensive Māori land titles in and around Ōhiwa Harbour that are Ngāti Awa land titles.

So I'm not going to take your Honours to all of these, but just a few examples in particular which illustrate the point that I hope, I hope it illustrates the point I'm trying to make. If we could go to, we filed a map overnight which is in your bundle, but in reflection looking at it, it wasn't particularly clear. These maps, of course, are all available online through Pātaka Whenua. This map is showing the Māori land block at or near Ihukatia. So where we are here is you'll see that this is the Ōhiwa Harbour. We're at the Ōhope Spit, for those of you that know the area, perhaps if we draw it along. So can we see the end of the Spit in the map? Yes, ka pai. So that's the Ōhiwa Harbour mouth, and then this highlighted area in grey, that is Māori land that is governed by a trust called the Ihukatia Trust, and that is made up of Ngāti Awa descendants, and that road that runs through from Harbour Road, sorry, Ms Douglas, I was meaning the road that comes from Harbour down, yes, I'm pretty sure, though I can doublecheck that, one of those roads is Te Rangitūkehu Road, who is a Ngāti Awa chief, so that land remains in Ngāti Awa ownership.

Just to the east of that land block, there is a nohoanga, so if you could highlight that perhaps where it is Ms Douglas. There's a nohoanga there that came back to Ngāti Awa Treaty settlement, and so what that does is it enables Ngāti Awa to exclusively visit that area. It's, my understanding is it's incorporated within the reserve, and it's used for camping for Ngāti Awa descendants. So if we could just bring up the, for completeness, the map that shows the nohoanga, or the title. It's a little bit unclear because it sort of aligns without being overlaid onto a map, but that's at exhibit YY in your bundle. So those are areas where Ngāti Awa are, but particularly in relation to that Māori land block, and that area in and around the Māori land block, that's where houses of Ngāti Awa people are. So living there, descendants, my understanding is a number of them from Te Rangitūkehu, but others also, living at Ōhiwa.

If we could go back to Ms Simpson's affidavit at paragraph 88.

WILLIAMS J:
What's the document number of that evidence?

MS IRWIN-EASTHOPE:
The nohoanga?

GLAZEBROOK J:
It'll come up when it comes up.

WILLIAMS J:
203.

MS IRWIN-EASTHOPE:
These Waimana Parishes if I could – this is Ōhiwa Harbour, they are to the west of the harbour. So again if you go to these various annexures, they show the titles. Some of them are quite extensive. The Ngāti Awa farms are further west along, towards – well within Ōhope, but there is an urupā in particular that I'll take you to shortly that sits on the eastern side of the Maraetōtara Stream also,

and when you look at the Pukenga Report they specifically acknowledge all of the Ngāti Awa land in and around Ōhiwa Harbour.

So from that point about ahi kā, I'd like to move to the final point on paragraph 4 which is the tatau pounamu that have been achieved over the years, and if I could ask my friend Ms Douglas to take us to the part in our submissions that talks about these, which I think is at paragraph 18(b), and my apologies your Honours, the hyperlink wasn't included for that first 1840. So in the evidence at 18(b)(i) there's what we say is evidence of tatau pounamu in the 1840s, and then 18(b)(ii) the 1860s, and then 18(b)(iii) the 1990s. So we've excluded those examples there, but for some reason the hyperlink didn't carry over.

Just to contextualise this, when your Honour was talking with my friend Mr Lyall I just noted the exchange you had about the role of leaders and rangatiratanga, and so what we say in these examples is quite perhaps contrary to the submission of my friends for Upokorehe. These are the examples of the tikanga process working over generations, and rangatira exercising their rangatiratanga to obtain peace, essentially. So the first example there, which is the one that I want to highlight, is the example of Te Keepa Toihau and Kape Tautini. So Te Keepa Toihau was a rangatira of Ngāti Awa. Kape Tautini, aroha mai, Tautini was a Whakatōhea chief who married Te Keepa's daughter Mereaira. So Kape disappeared one day, the story goes, and Mereaira knew something was up, and he was essentially gathering his people to come back and attack Ngāti Awa at Ōhiwa Harbour. They had a son, Mereaira and Kape, and when Kape came back with Whakatōhea, with his soldiers essentially, she said to her father, Keepa, what are we going to do here. He says, we're not strong enough to defeat them. She goes out on the beach, holds up their son and says, this child will die if there is any further fighting at this time. So that is – and my understanding is that most, or certainly Te Whakatōhea parties before the Court, recount this story as one of the tatau pounamu over the years, and the role of Mereaira in that tatau pounamu. So that's the one in 1847.

WILLIAMS J:
What paragraph is that?

MS IRWIN-EASTHOPE:
Paragraph 18(b)(i) and there's –

WILLIAMS J:
It's in your submission is it? Right.

MS IRWIN-EASTHOPE:
Yes it's in our submission, but then it's also in the joint brief of Tā Hirini mā, and also recounted in Bruce Stirling's report, which Ms Sykes took you to a few days ago, and that's at footnote 56 of our submissions, the references to that.

So we say that's one example of a tatau pounamu, a peace-making in that area over Ōhiwa Harbour. The second we've listed at (b)(ii), which is Te Keepa Toihau again and Titoko in the 1860s, and finally the agreement in the 1990s, and I'd just like Ms Douglas to bring that agreement up. That was between rangatira of Ngāti Awa and Te Whakatōhea, and my understanding is that aside from Tā Hirini, all of those rangatira have now passed. But for those, if you could come down Ms Douglas, so that talks about those rangatira saying, okay, the boundary between us is the line at Te Rae o Kanawa, which Te Kei Merito put at the mouth of the Ōhiwa Harbour, and that is why Ngāti Awa to this day say, well, we are at the mouth of the Ōhiwa Harbour. When you come out of the mouth, Te Whakatōhea go left – sorry, Te Whakatōhea go right, I'm very right with east and west and left and right – Te Whakatōhea go east, Ngāti Awa go west, and when you come down – and the significance for Ngāti Awa of this agreement is those rangatira who signed it. So you have Tā Hirini Moko Mead, Charles Aramoana for Te Whakatōhea, all descendants who were in the court earlier this morning, and then other rangatira such as Joe Mason, Te Hau Tutua, and others. Now in fairness to my friends for Upokorehe, they say that they never particularly accepted this agreement, and Ngāti Awa accepts that. However, what Ngāti Awa says is that this agreement

for them, signed by descendants of Te Whakatōhea, Upokorehe who are rangatira in their own right, does mean something at Ōhiwa Harbour.

Finally on this point – sorry, on this ground, at paragraph 5 of our road map we just say, look, in terms of relief we seek for the Court of Appeal judgment to be upheld, and conscious of my friends' submissions this morning that say no, you should sent it back, calls for pause certainly for my clients at the thought of having to do this again, and what that means I think for your Honours, or at least the submission is, is that if there are areas, notwithstanding whether your Honours are not on complete all fours with Justice Churchman or the Court of Appeal about the test, if there are areas that so clearly meet the test that your Honours determine is available under the Act, and Ōhiwa Harbour in particular being a harbour, being a bountiful place of food, being a place where all of these tribes coalesced, can be upheld, that certainly is my client's preference.

If there are no questions on that ground, I'm happy to move to the second ground about the disputed area. Thank you. Now since filing our submissions as a respondent my friend Ms Feint said that she was content to leave their submissions as they are written on this point. But I just want to clarify, Ngāti Awa approached this ground on the basis that there was a live appeal by Te Kāhui to set aside CMT 1. That position is now, at least my understanding, and I'll ask Ms Douglas to bring up Te Kāhui's submissions as a respondent, these are the submissions dated 21 October 2024, and if we come down to the response – or clarification of position concerning Ngāti Awa.

Ngāti Awa assert exclusive interests in their appeal, and I'm at 6.2, against remedying CMT 1 Te Kāhui overlook clarifying they accept a re-hearing will be necessary in relation to this disputed area in CMT 1 as the Court ordered. So if that is the case, and that's my understanding, then what we say is all affected parties before the Court now agree that CMT 1 needs to be, needs to go back to the High Court. So that would be upholding the Court of Appeal's decision in relation to CMT 1, noting what the Court of Appeal said about Ngāti Awa's interests in the disputed area.

Now for completeness in the road map, we have still detailed at paragraph 8 what we say the Court could do by way of relief if it doesn't determine that it will send it back. So I won't get there just yet, just a few more minutes, but I just wanted to make sure that that was clear in relation to CMT 1.

The points at our road map at paragraph 7 are really points of clarification, and I only want to focus on two in particular, and these points of clarification arise from the slides of – the slides that my friend Ms Sykes went to in the Te Kāhui presentation. If slide 2 of that presentation could be brought up please. This is in relation to a question your Honour Justice Kós asked about the red line sort of jotting out from Maraetōtara, and importantly for my client that area includes Moutohorā Island, and so what – I mean the short way I think to perhaps tidy up the point, to the extent that it's untidy, is that these claims by Ngāi Tamahaua only were dismissed by the High Court. So the area that's before your Honour is the area between what Whakatōhea say is Maraetōtara and we call Toatoa and further beyond to the east and CMT 1. So this is not live before the Court, this little area, and you can see that clearly from his Honour Justice Churchman's judgment No 3 where Ngāi Tamahaua queried whether or not that, or they had been successful in relation to that triangle, and certainly that judgment wasn't appealed, and we just say it's just not in play before this Court.

1440

Then in relation to slide 4, my recollection is that Ms Sykes was drawing on Mr Stirling's report at paragraph 7 and 8, which we have linked there, and I'll just ask my friend Ms Douglas to bring that up, to essentially make the point that despite Ngāti Awa's position that the interests of Te Whakatōhea extend to Maraetōtara and therefore disagreeing with the point that the interests converge at Ōhiwa Harbour, and so if you look at paragraph 7 and 8 of Mr Stirling's report he is there referring to the evidence of Wi Teria in the context of the tribal boundaries, so Wi Teria of Ngāti Ira Whakatōhea: "Tarakeha is the eastern boundary, Ōhiwa is the western." Although he did not then refer to the more precise western boundary marker of Maraetōtara, Wi Teria elsewhere indicated

that when he referred to Ōhiwa as the boundary, he was referring to the western side of the harbour and went on to say that Ihukatia was a pā of the Ngāti Ira and Ngāi Tama. Ihukatia is located on the western spit of Ōhiwa Harbour, just west of not – now the Port Ohope Reserve boat ramp.

Now we say that location is about right, that Ngāti Awa were there too, but you'll recall that I took your Honours there about 10 minutes ago and if we could bring up our map at the back of our submissions again just so we can be clear about where we are – so if, Ms Douglas, you could sort of wave your cursor around the end of the Ohope Spit on this side – so that was where we were for Ihukatia and Maraetōtara is a point that is about from the – from that, the end of the spit to Maraetōtara is about six kilometres of coastline, so we are not talking about an insignificant area here.

So my submission is that when Mr Stirling is talking about that old historic evidence given by those rangatira he is drawing on Ōhiwa Harbour, not Maraetōtara, and he's actually clear about that.

Then if we could go over the page of our road map, 7(d), and this picks up on the point or the discussion that was had about the marine farm, so the existing Te Whakatōhea Marine Farm and the new space that has been granted through the Treaty settlement. Now I'll just ask Ms Douglas to bring them up side by side. So what my friend, Ms Sykes, showed you was an accurate depiction of that space as at the date of the trial which was 2020 which was my recollection when the Whakatōhea AIP (agreement in principle) had been agreed. That's on the left. So that's what was in the slide show. On the right is what was ultimately given to Te Whakatōhea. The purple areas are the new space. The orange square is the existing farm. What you'll see in the difference in B is that the triangular part that sort of overhangs the mouth of the Ōhiwa Harbour more, that's been moved over to C. It's about 1,000 hectares of that space. That move was because Ngāti Awa opposed that area of the space. So this map on the right is the deed of settlement and what I've – sorry, is there a question?

ELLEN FRANCE J:

I was just going to ask if you just repeat which is the bit that's moved?

MS IRWIN-EASTHOPE:

Yes. So if you see, your Honour, C, see the new space, C?

ELLEN FRANCE J:

Yes.

MS IRWIN-EASTHOPE:

That has come off the corner of B.

WILLIAMS J:

Old B?

MS IRWIN-EASTHOPE:

Old B. Now these are not consented areas which I think, your Honour, sort of we were drawing the distinction between yesterday or the day before. These are space. This is space in the purple. But I just wanted to be clear that we've linked the Deed of Settlement, because obviously it wasn't before the High Court, in the road map.

And what we've done at 8 in terms of the road map and the paragraph is refer to our section on relief which, as I indicated, anticipated perhaps a slightly different situation with respect to CMT 1, and so what we've done there is provided the Court with options. So we were successful in our, Ngāti Awa's view, in terms of having this CMT 1 or at least the disputed area referred back to the High Court. The Court of Appeal did that. Our submissions say we're content for that to stand. If your Honours are minded to step into the shoes of the High Court or the Court of Appeal, which part of the reason why we're here is, my recollection of the appeal ground is that should the Court of Appeal have stepped into the shoes, that's not the words of the appeal ground, but should they have made a decision about this area rather than sending it back, and we say there's two options if you're minded to do that. That Ngāti Awa is awarded

sole exclusive rights in that disputed area, based on the evidence that is before you which is included in our submissions, or that Ngāti Awa is included in the title. All parties, though, are agreed that if this is an area that is – well, all parties are agreed now in their submissions that this should be referred back to the High Court, this area.

So just moving on to my final ground, which is about Whakaari and Te Paepae o Aotea. Now these submissions are included in the submissions for TRONA as an interested party, and Ngāti Awa is on all fours with Te Kāhui here in terms of the sharing at Whakaari and Te Paepae o Aotea, save for the inclusion of Ngāi Tai, which I'll come to. So Ngāti Awa's position is that the iwi of Mataatua, Te Whakatōhea, Ngāti Awa, and Te Whānau-ā-Apanui have mana in the seascapes surrounding Whakaari and Te Paepae o Aotea, and meet the test for CMT on a joint basis. So what we've done there is included references to our evidence, and I only want to pick up on two points. The first is the rāhui. The rāhui that followed the tragedy at Whakaari, and certainly if we could bring up the releases that Te Rūnanga o Ngāti Awa put out following that eruption, the placement of rāhui by Te Kei Merito and Ngāti Awa was not because Ngāti Awa owned the tour company. I just want to be clear about that in terms of why rāhui were placed. Rāhui was placed because of the obligations that Ngāti Awa have to those people and just taking the text of the press release there, Matua Te Kei is talking about the purpose of rāhui, and their importance. "It is a very Māori – and in this case a very Ngāti Awa – way of expressing respect, sympathy and aroha in harrowing times such as these. Neighbouring iwi including Te Whakatōhea and Te Whanau a Apanui, have also placed rahui over their customary coastal areas. This .effectively represents a customary prohibition… Mr Merito says he hopes the mana of the rāhui – and the iwi who have placed them – will be respected."

Why I'm highlighting this is because I think that it's a very useful way to understand at least the thinking of Dr Merito at that time, that those rāhui that were placed were mutually respectful, and mutually mana enhancing. So he's not saying here that there's a sort of a hierarchy of mana within the rāhui. That there is rāhui that have been placed by a number of iwi along the coastline.

If we could scroll down please Ms Douglas, there's just one other point in particular that I wanted to highlight. Perhaps further down. It might be in the next one. Yes. So here you have Dr Mason who at that time was the chair of Te Rūnanga o Ngāti Awa, so Dr Mason was one of the other authors of the joint brief who was talking about the importance of maintaining the respect for the rāhui and also acknowledging that there remains a rāhui at a time where this was sort of in and around Christmas. So he's emphasising there that it "remains under rāhui and should be respectfully avoided at this time".

So then if we move to, and I won't take your Honours here, but just to confirm the position with respect to Te Paepae o Aotea, that is now Māori land, and that application was made in the 90s by Te Rūnanga o Ngāti Awa for the entirety of Mataatua. So an example of Ngāti Awa leading in that regard a process for the benefit of all iwi of Mataatua.

1450

Now given that we are on all fours with Te Kāhui in relation to at least sharing of Whakaari, that means that we are not in the same boat as Te Whānau-ā-Apanui. We recognise their interests, but Ngāti Awa does not accept that there was a tuku of a kind that severed Ngāti Awa's connection to the area in and around Whakaari, and one reflection that I take from this area is that, yes, Whakaari is the island, but we're talking about the seascape around it. It's a trite submission to make, but what do I mean by that. I mean that when one looks at the way in which Whakaari is positioned along the coastline for all of these iwi, one can see why there are claims being made by at least three parties before this Court. Te Whakatōhea, Te Whānau-ā-Apanui, Ngāti Awa, and that's set out in our evidence.

Finally in relation to Ngāi Tai, and of course Ngāi Tai will confirm this, but Ngāi Tai, at least my understanding is no longer pursuing CMT over Whakaari and Te Paepae o Aotea. Didn't appeal the Court of Appeal judgment and hasn't made submissions on Whakaari, and so in that regard that aligns with Ngāti Awa's tribal kōrero, that this is, and was, a space for Ngā Iwi o Mataatua.

Finally on relief for Whakaari we say that there are three options at paragraph 16 of our submissions – sorry, paragraph 17. One is to allow the appeal and make orders for CMT now, and Ngāti Awa says that if the Court is minded to do this then the evidence shows that Ngāti Awa should be included in any such CMT. The second option at 17(b) is to allow the appeal and remit the matter back to the High Court, and Ngāti Awa's interests will be preserved through this option and would seek to participate in any re-hearing.

The final option we say is to dismiss the appeal, but Ngāti Awa's position is that its interests, as was the case following the Court of Appeal's decision, would be preserved. Now to be clear Ngāti Awa doesn't agree that with the Court of Appeal's comment that there's a primacy of rights for Te Whānau-ā-Apanui. That is not Ngāti Awa's position. Ngāti Awa's position is that that area is shared. But what we've attempted to do there is provide your Honours with options depending on what you are minded to do.

Finally just to finish with, if we could bring up the joint brief, and the last page. So these are the words of Tā Hirini, Dr Mason and Dr Merito, and the kaumātua there, at least in my submission, when they say "Te kākahoroa tū taratahi ka whati I te hau, Te Kākahoroa tū pāhekoheko e kore e whati. The Toetoe that stands in isolation will be destroyed by the elements with ease, however, the Toetoe that grows in mass will withstand the wind's destructive forces."

That evidence to me speaks to the strength that the iwi of Mataatua have standing before the Court and asserting its claims, but also the strength when they're united, and those are the submissions for Ngāti Awa unless there are any questions.

GLAZEBROOK J:

Thank you.

MS IRWIN-EASTHOPE:

Thank you your Honours.

MR MAHUIKA:

Tēnā koutou e ngā Kaiwhakawā. Heoi anō rā, tēnā tātou e te Kōti. Ka tino tautoko awau e ngā mihi kua mihingia, ki ngā iwi o Mātaatua. Kua haramai i mua i te aroaro o tēnei Kōti. He whai haere i tēnei kaupapa nui mō rātou, otirā mō tātou anō hoki. Nā reira, koinei te mihi atu o tēnei tangata me kī nō roto i te (inaudible 14:54:31) o Waiapū anō tēnā koutou, kua haramai te tautoko atu i ōku whanaunga nō roto i Te Whānau-ā-Apanui, ana, neke atu ki Te Whakatōhea me a rātou o ngā pānga kua haramai kei mua i te aroaro i tēnei rangi tonu. Nā reira, tēnā koutou, tēnā tatou katoa. Greetings. I've acknowledged the people who have come before this Court, and the importance of the subject matter of this hearing before your Honours today. I might start with a couple of preliminary matters before going into the road map. If I deal first of all perhaps with the final submission by my friend on behalf of Ngāti Awa. So there is take as between Ngāti Awa and Te Whānau-ā-Apanui in respect of Whakaari. That is a matter that will need to be addressed and resolved, and as of yet has not been heard. The difference of position as between Te Whānau-ā-Apanui and Ngāti Awa is on the nature and extent of the interests of Te Whakatōhea and based on my friend's submission, the other iwi of Mataatua in and around Whakaari. So while Te Whānau-ā-Apanui, and it's evident from the take that Te Whānau-ā-Apanui references as the origin of its interest in Whakaari, which is a tuku, from a Chief of Ngāti Awa to Te Whānau a Te Ehutu, for avenging the murder of that rangatira's son, Te Whakapākina. So there was obviously a Ngāti Awa connection in origin in that association, and there is a matter there to be resolved as between those two iwi. However, what Te Whānau-ā-Apanui says is that while there may be an association between Te Whakatōhea and Whakaari, that association does not equate to customary marine title, and I did not want to get into the test, you've heard a lot about the test, but in that regard Te Whānau-ā-Apanui, I agree with the submission by my friend for Ngāti Awa, for Mr Salmon, when he describes section 58(1)(b)(i), so limb 2 of the test, that as being explicatory. So in other words explaining, or perhaps even emphasising the first limb of that test.

So the first limb talks about holding an area in accordance with tikanga, and the second limb talks about that amounting to exclusive use and occupation without

substantial interruption, and in my submission what that means is that holding in accordance with tikanga could cover a broad range of interests. By including the second limb where you talk about exclusive use and occupation, that is talking about the nature of interests in respect of which customary marine title can be obtained. So in other words, not all interests, not all associations. Your Honour Justice Kós referred earlier to spiritual and other connections, not in and of themselves giving rise to customary marine title.

I think his Honour Justice Williams said a similar thing either yesterday or the day before. What that means is that there are, of course, a wide range of different ways in which Māori people can associate with a particular place, and it's understandable that you could have a spiritual or other connection with an area such as Whakaari because it is a prominent feature on that landscape. But that doesn't mean that every association will give rise to the existence of customary marine title. So the second limb is explicatory in the sense that it explains further that not only do you have to hold it in accordance with tikanga, if you like it explains what holding in accordance to tikanga needs to amount to in order for customary title to issue.

KÓS J:

So to that extent is it limiting? The first limb?

MR MAHUIKA:

I wouldn't call it as limiting. What it's saying is that the – so to your Honours' earlier discussion. If you take the view, and I'm not taking a view one way or another, but if you take the view that what the Act does it is restores customary rights, and then it provides a limited jurisdiction for the recognition of those rights. So if you take that to the next step, what it is doing is it's recognising that you need to have rights that are at a particular level in order to get the benefit of the Act. It's not cancelling, it's not destroying, it's not necessarily extinguishing those other rights, but what it's saying is that you have to have a particular type of interest in order to be able to benefit from the legal recognition and protection that the marine and coastal area provides.

1500

KÓS J:

Well at least for the highest order right recognised, which is CMT?

MR MAHUIKA:

Yes, that's correct, Sir. Yes.

KÓS J:

Yes.

MR MAHUIKA:

And I'm not here to argue about the application of the test beyond the comment that I've just made, but if you follow that logic through it would be a better position for Te Whānau-ā-Apanui to take the view that all rights have been restored, these are simply the ones that you can recognise from a legal point of view, because that means that all of them exist, even though they're latent. The question is, what jurisdiction does the Court have to then provide for their – it's not so much provide for their recognition, but to enable the holder of those rights to exercise certain legal – or for there to be specific legal consequences or legal entitlements that flow from the existence of those rights.

So an example would be that even if you don't have CMT and if your Honours find that there is no customary marine title in respect of that Bay of Plenty area out as far as Whakaari, even if that hadn't happened it would not have stopped the rāhui from being imposed following the tragic events at Whakaari. So that tikanga would still have played out. There would still have been an expectation that it be respected. It certainly would have been amongst the Māori population, I think. That right doesn't subsist. That exercise of tikanga doesn't cease to exist, it continues to be there.

So I think his Honour Justice Williams talked about this, that there are limited legal mechanisms through which you can if you like enforce or protect your rights, but from a Whānau-ā-Apanui point of view, because it believes it has strong rights that exist in respect of the takutai, it would not concede that the Act is an extinguishment of those rights. All it is, all it would concede is that

there is, at it currently stands, a limited way in respect of which the law enables them to have teeth in terms of their exercise.

WILLIAMS J:

But rāhui is an exercise of power.

MR MAHUIKA:

Yes, it is. Yes.

WILLIAMS J:

And therefore it's, by definition, an indication of an underpinning and powerful right.

MR MAHUIKA:

Yes, yes, I would agree with that. The –

WILLIAMS J:

And it's – it's not merely symbolic, in which case it must be relevant to whether – it's got to be relevant to whether CMT exists. Whether it's completely decisive, I don't know, though it must get there if you're actually exercising jurisdiction, which is the control by way of rāhui is.

MR MAHUIKA:

Well I think that's a slightly different point. My point was that even if there wasn't CMT, that right would exist and –

WILLIAMS J:

Well it certainly would in tikanga, yes.

MR MAHUIKA:

Yes, and would continue to be – you would still place the rāhui, you would still have expectations around its enforcement. You may not have the same legal abilities to enforce that right against third parties. You would be relying on the observants of that rāhui by others, and actually as a matter of practice in New Zealand it is very common. But to your point, Sir, if you bring evidence of

imposing rāhui, of those rāhui being respected by third parties, then I would agree that that is evidence of the exercise of authority in respect of an area.

WILLIAMS J:

And that's relevant to CMT, surely.

MR MAHUIKA:

And that's – and that is relevant to the grant of CMT. But that's what I mean, it was a different point. I was illustrating the fact that tikanga continues to exist, but I agree with your Honour's point that –

WILLIAMS J:

That's the latent point that Justice Kós talked about.

MR MAHUIKA:

Yes, yes. So even if it's not there, that tikanga, that right, will continue to be exercised no matter what the outcome, and it's to my point that the idea that you do have these latent rights that actually – this is a limited means by which those rights are able to be given legal expression but it's not an extinguishment of those rights. They continue to exist whether or not the law provides them with particular teeth.

WILLIAMS J:

But the question for us is, what does the successful imposition of rāhui mean for the purposes of CMT?

MR MAHUIKA:

Yes, yes.

WILLIAMS J:

And it's a potent indicator, isn't it?

MR MAHUIKA:

Yes, yes.

FRENCH J:

But CMT is not a condition precedent, necessarily.

WILLIAMS J:

No.

MR MAHUIKA:

No, no. That's the point that I'm making, yes. And I'm making that point – I'm not wanting to detract from my friend's very thoughtful argument around the extinguishment and around threshold, but I'm making the point because I need to make it on behalf of Te Whānau-ā-Apanui, is that they would not concede that there had been an extinguishment of their rights even though the Act might not enable their full sort of legal exercise, if you like, or give teeth to every aspect of a tikanga that might apply. They would consider that those rights remain latent and they may be exercised at some future moment in time or there may be a legal mechanism that allows for their exercise.

WILLIAMS J:

Did Te Whānau-ā-Apanui join the imposition of the rāhui?

MR MAHUIKA:

Yes.

WILLIAMS J:

Right. Isn't that relatively strong evidence of shared mana over the water?

MR MAHUIKA:

Well, I would say no and the reason that Te Whānau-ā-Apanui would say no is that the events at Whakaari were exceptional events. It's not something that was put to Mr Gage under cross-examination. We did put the nature of the rāhui to Mr Amoamo. If it had been put to Mr Gage, and my friends are not in a position to question this so we would have to treat this with a grain of salt, I suppose, but he would say that this is not the time for having an argument about mana.

WILLIAMS J:

Yes, there's something in that.

MR MAHUIKA:

That actually the focus in times like this must be on doing, acting in a way which is respectful and Ngāti Awa had imposed the rāhui at that point. There's no need to be having a debate with Ngāti Awa about whether they should impose it or someone else. As a matter of tikanga there should be a rāhui. There were bodies in the water. The reason that they imposed them by Te Whānau-ā-Apanui, Te Whakatōhea is that we saw that with the *Rena*, the current (inaudible 15:06:28) to that coast, and if there are bodies in the water that's the direction of travel of those two pāpaku. So, that is a matter that perhaps needs to be ventilated further and it would be debated some more perhaps in the event that, or in the event that the appeals are either dismissed or the matter is remitted to being debated further. That's helpfully dealt with one of the things I had to cover.

WILLIAMS J:

Why do you –

MR MAHUIKA:

So, the point is the exceptional events mean that you can, although the rāhui is potent and important, it needs to be seen in context. Sorry, Sir, I interrupted you.

WILLIAMS J:

But you want to have the debate now?

MR MAHUIKA:

No, no, I thought you were going to ask me something Sir.

WILLIAMS J:

No, no, the events are exceptional and then wasn't the time to have the debate but you want to have it now?

MR MAHUIKA:

No, I'm – then was not the time to have the debate around who has mana at Whakaari is the point. So if you had said at that time "no you don't have the mana to place that rāhui at that place we do," that's a distasteful thing to do.

WILLIAMS J:

But you now say they did not have mana to do that?

MR MAHUIKA:

I think what I am saying is that that is not evidence of who has mana at and around Whakaari so I'm not going so far as to say that Ngāti Awa don't. That matter is an unresolved matter if I refer to my comment at the start.

WILLIAMS J:

Don't you have to say that if…

MR MAHUIKA:

No, I don't think I do because the Ngāti Awa and Whānau-ā-Apanui applications have not been heard in full. This was the first of these types of matters to be dealt with. Te Whānau-ā-Apanui participated, if you like, in a defensive way in order to ensure that its ability to have its particular application in respect of the area around Whakaari heard. As things have developed with these types of applications, maybe you wouldn't do it this way now but that was the way it was done. So my point is there is a time to have that discussion properly with Ngāti Awa. We disagree with the position that Ngāti Awa take but the respective interests of Ngāti Awa and Te Whānau-ā-Apanui in and around Whakaari have not really been, in my submission, fully ventilated and fully dealt with.

FRENCH J:

So this is a timing issue of the hearing of the respective applications really?

MR MAHUIKA:

Yes, yes. This was the first of these applications and I think people were still trying to navigate their way through these sorts of matters. Te Whānau-ā-Apanui at that stage was in Treaty settlement negotiations which included matters in relation to the takutai moana. The preference was to try and deal with Whakaari through that mechanism as opposed to through this mechanism and so the participation in the hearing was to ensure that that opportunity remained available to them.

WILLIAMS J:

Doe that remain the position?

MR MAHUIKA:

Well, that's certainly the position right now but the Ngāti Awa applications, including an application in respect of Whakaari, are currently set down for hearing next year and Te Whānau-ā-Apanui has indicated its intention to participate in full in respect of Whakaari for the purposes of those applications. 1510

I think there's only so many times you can do this particular dance, but as Ngāti Awa we do accept that there was a Ngāti Awa take in respect of Whakaari. It really just needs to be dealt with and in my submission that's the right place to deal with it.

WILLIAMS J:

So Whakaari is not yet right for resolution you say?

MR MAHUIKA:

As between Te Whānau-ā-Apanui and Ngāti Awa.

WILLIAMS J:

What about Te Whakatōhea?

MR MAHUIKA:

That will be, I hope, the focus of the rest of my submissions. So I'll just check my road map. So I'm at paragraph 2, we shouldn't be too distressed about that because we've dealt with the later matters, it's just that we've picked them up in the preliminary parts of it, and we agree with the views that have been expressed by various members of the Bench, that this is ultimately a factual inquiry.

The position of Te Whānau-ā-Apanui in respect of Whakaari is that based on the evidence, and based on the associations, Te Whakatōhea are not able to establish that they hold Whakaari in accordance with tikanga. So Te Whānau-ā-Apanui says that while there might be a tikanga association, it does not reach that level.

There is quite a lot of evidence, we have tried to set the evidence out in our submissions. We've included a chronology with the road map to try and situate some of these events in time. We probably should have done that when we did the submissions, and we have tried to give your Honours the references in the bundle and in the evidence. What I will then try and do with, this is just, give a flavour as to why it is that Te Whānau-ā-Apanui takes the view that it takes. This is not an easy submission to make on behalf of Te Whānau-ā-Apanui, as your Honours will have heard, and there is no dispute over this. There is a whakapapa connection, and a strong whakapapa connection as between the iwi of Mataatua. But nevertheless the view of Te Whānau-ā-Apanui is that notwithstanding those whakapapa connections and the importance different people were at different places, and exercise ahi-kā-roa, mana, or mana whakahaere, or whatever description you wish to choose, over those places. For example, there is evidence from Mr Gage where he talks about Te Whakatōhea going as far east as Cape Runaway to fish for mohi. Fishing for kahawai in the mouth of the Motu River, which are areas that are squarely within the territory of Te Whānau-ā-Apanui and that would not be something that would be disputed, but because of whakapapa connections resources are shared in those places, but that doesn't displace the mana or the ahi-kā-roa of

the people at those different places, and they would say that Whakaari is the same.

So at paragraph 5 of my road map, the first point I was going to make is that, and my friend Ms Sykes yesterday talked about the priority order, and said that those furthest away should go first. Actually, Te Kaha is the closest landward point to Whakaari. In fact I understand it's the Te Kaha Golf Club. It's 48 kilometres more or less. Ōpōtiki is more than 50 kilometres from Whakaari, so it is, because of the curvature of the bay, it is the closest landward point to Whakaari.

Te Whānau-ā-Apanui have a clear tuku in respect of Whakaari. So in other words Whakaari – sorry, a clear take. My assumption is that the Ngāti Awa take is probably take tūpuna. So in other words it is a right that was established first of all by occupation, and then by the rights in respect of Whakaari being handed down. But Te Whānau-ā-Apanui then say that there was the murder of a young man from Ngāti Awa called Te Whakapākina and someone needed to exact utu, so in other words, avenge the death of Te Whakapākina, and that was done by Te Whānau a Te Ehutu, which is the hapū from Te Kaha. In return for them exacting utu for the killing of Te Whakapākina, the evidence of Te Whānau-ā-Apanui is that Whakaari was then gifted to them or given as a tuku as utu, so as a – "payment" makes it sound quite mercenary, I'm not sure that it was quite intended to be that way, but it was an exchange for them having avenged the death of this chief's son, he gave them Whakaari. So they would say that is their take to Whakaari, it's take tuku from the original holder of take tūpuna in respect of the island.

The island is then sold. It's a – if you look at the chronology that we've attached, we think it was sold some time in the 1830s to Hans Tapsell in return for a couple of hogsheads of rum, and – but the sale itself wasn't actually given effect though until the 1860s when it was then dealt with by the Native Land Court. And you then see in the chronology a series of pieces of correspondence that go from Te Whānau-ā-Apanui and in particular Te Whānau a Te Ehutu first of all opposing the award of title and the sale of the island.

Now what's notable during this period, and it's a period of some 40-odd years, is that there is only group that's protesting about the sale of Whakaari, and that is Te Whānau a te Ehutu from Te Kaha. So consistent with their view that there was a tuku of this, of Whakaari to them, when Whakaari is sold and it then goes through the Native Land Court and it's transferred to Retireti Tapsell, it is Te Whānau-ā-Apanui who consistently oppose the sale and who seek to have the matter reheard. And the way that Mr Gage described that in his evidence is he said that if you look throughout this period where if everybody has a strong interest in Whakaari you would expect a lot of protest, "there is only one tui singing in the bush".

So we – there was a discussion I think on the first day around how you manifest a connection with a place if you no longer have title to it. One of it is continuing to protest, continuing to try and assert your interest in respect of it, and so Te Whānau-ā-Apanui would say that it's not only notable that they were the ones who were protesting, it's equally notable that nobody else was throughout an extensive period of time.

WILLIAMS J:

So is your case that the tuku of the area above mean high in that island extinguishes any possibility of holding in terms of limb 1 or exclusive use and occupation in terms of limb 2 of the surrounding seascape out to 12 miles?

MR MAHUIKA:

I'm – are you talking about the sale of that land?

WILLIAMS J:

No, the tuku.

MR MAHUIKA:

What I'm saying about the tuku is the tuku was a transfer of customary control, authority over that area, but –

WILLIAMS J:

Is this why – is this why – right.

MR MAHUIKA:

And as has been submitted to your Honour that the mean high-water springs, so a point of transition from dry land to foreshore and seabed, is not a thing in – as matter of tikanga Māori. You exercise authority over that area, you necessarily will exercise authority over the surrounding seascape. There may be an issue as to the extent of that authority but it hasn't been determined, and in any event if you look at the evidence there is very little, if any, evidence of Te Whakatōhea utilising or exercising authority themselves over that area. I mean my friend Ms –

1520

WILLIAMS J:

Anyway the tuku was from Ngāti Awa to Te Ehutu?

MR MAHUIKA:

Yes.

WILLIAMS J:

Right, so that's why you set Ngāti Awa to one side and say we'll deal with them at some other stage?

MR MAHUIKA:

Well Ngāti Awa's application also wasn't heard in full in respect of Whakaari during that stage 1 hearing. So, the point is that that matter hasn't been addressed as between Ngāti Awa and Te Whānau-ā-Apanui and I'm not prepared to say in the context of this that Ngāti Awa don't have an interest.

WILLIAMS J:

Right, I understand. We've had that discussion.

MR MAHUIKA:

Yes.

WILLIAMS J:

So, we can leave the question of whether tuku is extinguishing for the hapū/iwi that has take tūpuna and therefore the ability to tuku, and what you're left with is you as the tuku-ee at least or Te Ehutu as the tuku-ee protesting about the loss?

MR MAHUIKA:

Yes.

WILLIAMS J:

Right.

KÓS J:

This is the tuku to, is it the ancient one that's referred to at the first step?

MR MAHUIKA:

Yes, that's correct, Sir, yes, and the fact of the tuku, and if I reference the earlier discussion that occurred around the nature of a tuku, whether it's absolute, whether there is a reversionary interest, I think your Honour may have said during the course of that, you'll correct me I'm sure if I've got this wrong, but that tuku are not necessarily absolute, that they have actually – and the terms of the tuku itself might depend on the context as to whether or not it's intended to be a permanent or, for example, the discussion around the tuku of Paora Te Putu of Ngāti Tamaterā at Heretaunga, there is an ongoing debate there that I think is quite public as to whether or not it was intended to persist for as long as it has persisted, whether it was a permanent right of occupation, or whether it was there to temporarily allow Ngāti Porou a place of harbour on

their way to Auckland. I mean those are all things which are specific to the type of tuku and the absence of the evidence on that is why –

WILLIAMS J:

Ngāti Porou was still there.

MR MAHUIKA:

Yes, I'm very aware of that.

WILLIAMS J:

And in fact they're pretty interbred with Ngāti Tamaterā anyway.

MR MAHUIKA:

And as your Honour knows often that's the way in the same discussion about raupatu. Often these things are not – when there's a raupatu you don't necessarily alienate the people being conquered. You will concur them, exert authority, then there is –

WILLIAMS J:

And swap DNA.

MR MAHUIKA:

Yes. I was going to say inter-marriage but that's a much more scientific way of describing it. But yes and so these are things that happen over time and perhaps some of the issues that currently exist around raupatu is that they happen very close to the period of colonisation. That process is not a process that completed itself in the way that it ordinarily would have completed itself.

I wanted to refer briefly to the question of the priority order that occurred in relation to the taking of tītī because we say that this is another indication of –

WILLIAMS J:

Sorry, I have one more question I meant to ask and got distracted. In the 1860s the matter goes to the Courts by which time the so-called sale to Tapsell had occurred?

MR MAHUIKA:

Yes, the sale occurred I think in –

WILLIAMS J:

1830s.

MR MAHUIKA:

1830s, yes.

WILLIAMS J:

Yes.

MR MAHUIKA:

But isn't given effect to the Courts, and actually one thing I'd forgotten is that in the course of the hearing, and it is in the evidence and I think in the table, Te Rangitūkehu from Ngāti Awa talks about the tuku being made to the descendants of I think it's Apanui and Te Keepa Toihau of –

WILLIAMS J:

Apanui the?

MR MAHUIKA:

Apanui as a person, not the iwi, from Te Ehutu.

WILLIAMS J:

Which Apanui? Was that his name?

MR MAHUIKA:

Yes.

WILLIAMS J:

Not Apanui Ringamutu?

MR MAHUIKA:

No, no, it's later than that.

WILLIAMS J:

Right.

MR MAHUIKA:

And Te Rangitūkehu says in the course of this, he acknowledges the fact of the tuku and that's why they have the ability to sell because their ancestors were given that land hei utu for avenging the murder of Te Whakapākina. So this is –

WILLIAMS J:

How did the Court address the application?

MR MAHUIKA:

Well, there are some further complications that arise. So first of all the Court makes the order to Tapsell. There are further complaints by Te Whānau-ā-Apanui. By the time it gets back to the Court in – I'm skipping over some stages – the Judge had acquired 50% of Whakaari and somewhat –

WILLIAMS J:

So the usual.

MR MAHUIKA:

Yes, so somewhat unsurprisingly was reluctant to overturn the original sale, and that led to further correspondence by Te Whānau-ā-Apanui.

WILLIAMS J:

All right, thank you.

MR MAHUIKA:

There is the Māori text, Sir, that you might be interested in because there's a letter that's written to Fenton on behalf of Te Whānau-ā-Apanui and the letter I think calls the sale "he hokonga tahaetanga", so a fraudulent sale, expressing the view that this was not something that Te Kepa Toihau or Apanui were entitled to do, that it was something that was held on behalf of Te Whānau a Te Ehutu and these two particular individuals should not have been selling it themselves.

WILLIAMS J:

Right, it wasn't theirs to sell?

MR MAHUIKA:

Yes. But the important point, however, is that if you look at it based on the exchange that occurs in the Court, you have Te Rangitukehu who, as your Honour knows, was a very significant chief of Ngāti Awa, acknowledging their entitlement based on the tuku.

WILLIAMS J:

Yes, I understand.

MR MAHUIKA:

So he independently verifies. This is not Te Whānau-ā-Apanui saying it. This is the rangatira of Ngāti Awa talking about the tuku of this land to avenge the death of Te Whakapākina.

WILLIAMS J:

At court?

MR MAHUIKA:

At court. It's in the minute, Sir.

WILLIAMS J:

So he's called to give that evidence by?

MR MAHUIKA:

I imagine by Retireti.

WILLIAMS J:

Right.

MR MAHUIKA:

I don't know what the connection was there, Sir.

WILLIAMS J:

Who is claiming the title?

MR MAHUIKA:

Who is claiming the title from –

WILLIAMS J:

Who's saying the adverse claim by Tapsell is fraudulent?

MR MAHUIKA:

Well, Retireti is Tapsell's son, I think.

WILLIAMS J:

Ah, Retireti Tapsell.

MR MAHUIKA:

Retireti Tapsell, yes, yes.

WILLIAMS J:

Right, yes.

MR MAHUIKA:

So it's Retireti making the claim on the basis that the land was purchased by his father, although I think, interestingly, to avoid pre-emption related issues it was acquired by his wife, Katerina. She was – formally went on the title to the

land but that was the basis of the claim was that his father had acquired it from Apanui and Te Kepa Toihau.

WILLIAMS J:
That's Katerina Te Atirau?

MR MAHUIKA:
Yes. Now I was going to go to the question of priority order and I was going to simply take your Honours – so the first question was where did the priority originate? So the first document is – the reference I have is – so it's 333.15390 and this is in the report, I think, from Mr Jennings. So this is the Crown's report, and there are two paragraphs that I will take your Honours to. If we could go just up to paragraph 39 first.

So he had been going through the Crown files. He came across a reference in the 1860s and it says that: "White Island is owned by the Ngāti Awa at Whakatāne. Te Whānau-ā-Apanui and," he describes it as, "Ngaitawairere" – and I think it's, is it Ngai Tawarere. It's a name for the people at Te Kaha. It's an old name and it's referred to in Mr Gage's evidence – "living in the eastern area of the Bay of Plenty. Mr Fullem tells me that about two years ago the native owners were willing to lease White Island, and may be so still. If required the owners can be communicated with." So the relevance of that is, first of all, in the 1860s they're talking in terms of Te Whānau-ā-Apanui and admittedly Ngāti Awa being the owners of the island.
1530

Then if we go to paragraph 44, now this is an exchange that occurs in 1865. It involves Captain Cellern communicating with Mr Clarke who is the Native Secretary. Mr Clarke replies to him in paragraph 44 and we have the text there which says: "Whakaari (White Island) is claimed principally to Kepa Tamarangi and Apanui of Whakatane (Ngatiawa)" and then it becomes illegible, and this is the group from Te Kaha, and also from Raukokore near Cape Runaway. "Apanui sold his right to [Mr] Tapsall [sic] many years ago but as far as I remember it was never brought before the Land Commissioner Court.

Although the natives have never permanently resided on the island they have visited periodically for the purpose of catching birds, for which the island is famous. [No] native [tribe ever visits] the island for the purposes of bird catching without first [obtaining] the consent of the [Chiefs above mentioned]."

There are some letters missing there for some reason, but it should say: "The Green Lake is a wāhi tapu and the burying place of their chiefs. It has often been the cause of fighting." So we have a reference there from the 1860s in crown communications around consent being required by the four other iwi to go to Whakaari to catch tītī.

Then if we go to document 302.00531, and this is the evidence of Mr Heremaia Warren.

GLAZEBROOK J:

I might have missed it, but did you comment on paragraph 45?

MR MAHUIKA:

Sorry Ma'am.

GLAZEBROOK J:

About the ownership, far from settled.

MR MAHUIKA:

Yes, well my understanding of that, when I looked at it, and I wasn't trying to avoid going through it.

GLAZEBROOK J:

No, no, I understand. I just didn't know whether I'd missed it.

MR MAHUIKA:

Is that it does refer to a number of different groups. So it refers to Ngāti Awa, it refers to at least two groups from Te Whānau-ā-Apanui. So Raukokore is a different hapū to Te Whānau a Te Ehutu. It's further along the coast, and so

that suggests to me that there is ongoing dispute, and despite that Ma'am, the fact of the matter is that there does appear to be a practice of seeking consent before going to the island that Mr Clarke refers to. The other possibility –

WILLIAMS J:

This is before the Land Court, it's established.

MR MAHUIKA:

Yes.

WILLIAMS J:

When does it go to the Land Court?

MR MAHUIKA:

I will tell your Honour in a second. I think it's in the chronology.

WILLIAMS J:

1867, yes. Read on.

MR MAHUIKA:

So actually it's only a couple of years after that, and that was the other possibility I was going to refer to Ma'am, is that there is the ongoing matter as to whether or not a sale had occurred. What's interesting about this, however, is despite the sale allegedly having occurred in the 1830s, you still have the iwi exercising authority in relation to parties that are going to Whakaari.

So I was coming back to document 302.00531. This is the affidavit of Mr Heremaia Warren. You might have recalled, I can't remember if it was my friend Ms Sykes or Ms Feint, referred to Mr Warren as an important witness of Te Whakatōhea because of his knowledge of fishing activities, and what I'd like us to do is to go to 302.00540, and paragraphs 46 to 48. I won't read all of that. The most relevant part of it is paragraph 46 and this is – so this is Mr Warren from Te Whakatōhea saying this. He says: "The tikanga for using White Island used to be (when the season was ready to be opened), that the people who

had first claim on White Island was Te Whānau-ā-Apanui. To the Māori around here, that was their island. I do not know why, but it was always known that Te Whānau-ā-Apanui had first rights."

So I'm not sure exactly what the origin of that was Sir. I know that the Horouta and the Whakatōhea Māori committees were involved in the permitting regime, but based on Mr Warren's evidence, and there are other parts of – of the other references in the evidence to this situation. There was a priority that they never really supplied, and Te Whānau-ā-Apanui went first, not because they were furthest away, in fact as I've just said, they were the closest, but also it was because the iwi in that area regarded Whakaari as theirs.

I won't take your Honours to these, but there are – in our submissions at paragraph 56 we refer to a number of the witnesses from Te Whakatōhea and Ngāi Tai acknowledging the Ngāti Awa interest at Whakaari – sorry, Te Whānau-ā-Apanui. Very easy to get yourself confused here.

So what I was then going to do is, because we do set this out in a lot of detail, I'm conscious that your Honours don't want me to go through every piece of evidence because I need to be finished by 4 o'clock, but the purpose of me going through those was to give you if you like an explanation based on the evidence as to why it is that Te Whānau-ā-Apanui takes the view that it says about the nature of the Te Whakatōhea interest.

We don't have a right of reply, but it is useful for us to also touch on some of the matters that were raised by my friends for Te Kāhui in respect of Whakaari.

GLAZEBROOK J:
You have the floor.

MR MAHUIKA:
Yes. So I'm going to do that now, is what I was going to say, I was really just warming myself up to it, Ma'am, is in our submission the counsel for Te Kāhui overstate the nature and strength of the Whakatōhea interest. We say it is

relevant, I'm not going to make too much of it, but it is relevant that actually not all of the Whakatōhea applications in their initial stages included Whakaari. Some did but some didn't, and that's dealt with in his Honour Justice Churchman's judgment in the High Court. Why do we say that it's relevant? Well we say it's relevant because if Whakaari is so important, surely you wouldn't omit it from your MACA application.

We say further that the complex tapestry that links people to Whakaari requires some further scrutiny. So I'm over the page now at paragraph 8(a) of my road map. So we say that using Whakaari as a tohu does not provide evidence of the exercise of mana in respect of that place. It is a prominent landscape – a prominent feature on the landscape. Using the plume to come from Whakaari is possible from 50 kilometres away on the mainland. That in and of itself is not evidence of the exercise of mana. Certainly it may be the exercise, it may be the evidence of a broader association that it's regarded as a special feature on the landscape. That in and of itself does not equate to having and being able to exercise mana in respect of that place.

There is an account of the Whakaari creation narrative in the evidence of Mr Stirling and we have the reference there. Actually, that is unattributed. That is a general statement about the origins of Whakaari. It's not specific to Te Whakatōhea and Mr Stirling accepted that in cross-examination by Ms Coates.

In our submission, there is in fact very limited evidence about the exercise of kaitiakitanga. There is some evidence of involvement in the reserve, which is much more recent. That has to be weighed against all of the other evidence about the nature and extent of Te Whakatōhea's historical associations with that area.

We've dealt with the gathering of tītī on Whakaari, which is relevant because the one fishing ground that was identified at Whakaari was used when people were catching tītī. Again we say that's not evidence of any authority being exercised in that place, it's a practical matter that if you're catching tītī on

Whakaari you need to get some food from somewhere and you fish off the island, and what is more important is the priority order, and I've already taken your Honours through the evidence insofar as that's concerned.

1540

One thing my friends talked about quite a, I won't say quite a bit, but put an emphasis on, was the encounter with Captain Cook when he came to New Zealand in 1869 I think it was – 79, okay, I had him here much sooner than he was. When he came here in 1879, and – when he came here. I'm just going to cut the year out. Clearly I'm bad with dates. But we know he came here, we know that he came here before the turn of the 18th century.

WILLIAMS J:

19th.

MR MAHUIKA:

Yes, that one too. So I should definitely stay away from dates. Anyway, a lot was made about the visit of Captain Cook and the encounter that he had as he was travelling through the Bay of Plenty, and there are two documents that I'll take your Honours to. The first is, this is 107.03478, which is already on the screen, this is the evidence of Ms Hillier. This is evidence-in-chief, with Te Kani Williams leading him, and the relevant passage is at line 30 of that page running into the next page. So he's talking about the encounter with Cook. He said: " That pā site is where Punahamoa, our tīpuna that went out in 1769 to first 30 – the challenge of Cook's arrival at round Whakaari on the 1st of November 1769. A waka went out, double-hulled waka went out and met Cook off Whakaari. In that exchange they shared ika, a conger eel and a number of other fish. The relationship ended with Cook actually firing above the waka."

So we assume that that's the origin or the basis of that claim. So the claim that was made is that this was about patrolling the territory, and that territory must have extended to Whakaari because that's where it said that exchange occurred.

First of all, the evidence doesn't actually talk about patrolling. It says that Cook was seen and a double-hulled waka went out to meet him, and then these other events occurred. There is actually a reference to this exchange in the evidence of Mr Boast, it's probably Professor Boast I think, at 319.08479. Sorry, this will be the last thing I'll take you to and then I'll wrap up Ma'am. I'm very conscious of time. But this is important however because of the emphasis that was placed on this exchange, and the idea that Te Whakatōhea might be patrolling an area at or around Whakaari.

So this is a record of European visits and it says in that paragraph, your Honours can read it: "The name 'White Island' was given to Whakaari by Captain Cook in 1769 during his first voyage. As he proceeded down the coast from Cape Runaway…" so he's going, Cape Runaway is towards East Cape, so it sits between Ōpōtiki and East Cape, so he would be coming east to west travelling in that direction. "As he proceeded down the coast from Cape Runaway (Whangaparaoa) Cook noticed the island in the distance and name it '*white island* because as such it always appeared to us'. He did not get close enough to it for its volcanic origin to be apparent." So he doesn't actually get close to the island on that account.

"On the same day, 1 November 1769, Cook made contact with Māori people of the Bay of Plenty Coast and must have learned of the name of the island from them, for he recorded the name of the island as…" and I'm not sure how you would say that but Professor Boast interprets that as Ko Whakaari is what he was trying to say. "This meeting took place somewhere close inshore on the eastern Bay of Plenty Coast. It was not one of Cook's happier encounters with Māori people."

Then there is a quote, and I was trying to find where that came from, but the reference that's given there is Beaglehole. What's interesting, however, is that if you look at the last three lines of that extract, what it says is that: "We kept our course along shore having a light breeze at east-south-east. At noon we were in the latitude of 37 degrees 45, White Island bearing north 29 degrees.

West distance eight leagues." So a league is I think somewhere between two and a half and four and a half miles, so you're somewhere between about sort of 20 and 30 miles away from the island based on that reference point. Interestingly to the west as well, so you're not quite adjacent to Ōpōtiki I wouldn't have thought at that point, you're still coming down the coast from Cape Runaway.

The point, however, is that based on that reference actually the encounter didn't occur around Whakaari. It certainly occurred within that seascape, but on that account from Cook's records it was something which occurred not surprisingly as Cook was travelling along the coast, and based on the reference at the end of that quote, some distance from Whakaari.

KÓS J:
Three nautical miles?

MR MAHUIKA:
Is a league, Sir, yes. So that's 24 nautical miles, which is –

WILLIAMS J:
A lot more miles. Miles?

MR MAHUIKA:
Yes. I can't do the conversion from nautical miles to kilometres, but my guess is more than 30. So –

KÓS J:
It's about five, it's just under five kilometres per league.

MR MAHUIKA:
Yes. So – yes, so that's a long way from Whakaari, is the point. Certainly not close to Whakaari, certainly not close enough for it to be within a CMT type of range of that particular piece of the landscape.

I've – we deal with very briefly that one of the witnesses for Te Whakatōhea mentions Whakaari being a tupua. Again that's very similar, that's a very general description of it and unsurprising, and in our submission not an expression of mana. And I have dealt with the events that occurred in relation to the rāhui which I think do need to be seen in the very, very specific context in which they occurred.

So what we conclude is that the Court of Appeal was correct, in our submission, to find that although it did not determine that Te Whānau-ā-Apanui has mana whakahaere, ahi-kā-roa, mana whenua, whichever description we choose to use to describe that exercise of authority, that Apanui do have mana over Whakaari to the extent that it precludes others from sharing CMT, or at least precludes Te Whakatōhea from sharing CMT based on the position that we have taken in these submissions.

In terms of the outcome, I'm on paragraph 11 now of the outline, the options are well-covered by my friends for Ngāti Awa and we agree that there are the three.

KÓS J:

What's the reference you're – I couldn't find paragraph 1.7.

MR MAHUIKA:

Sorry, Sir? I'm not sure where you're –

KÓS J:

Well you – this is your paragraph 11.

MR MAHUIKA:

Yes.

KÓS J:

"Options are well-covered at paragraph 1.7."

MR MAHUIKA:

Oh –

ELLEN FRANCE J:

Ngāti Awa's submissions.

MR MAHUIKA:

Ngāti Awa's submissions, Sir.

KÓS J:

Ngāti Awa. Have you – you can find it? That's fine.

GLAZEBROOK J:

They're the interested party submissions.

KÓS J:

Okay.

GLAZEBROOK J:

Not their submissions as respondent, I think.

ELLEN FRANCE J:

Not the other one, yes.

MR MAHUIKA:

So those were the – those were the last submissions that my friend Ms Irwin-Easthope was giving.

KÓS J:

Right, thank you.

MR MAHUIKA:

I'm sorry, Sir, I should have put that reference in there. I'll take responsibility for that.

KÓS J:

That's all right.

MR MAHUIKA:

But the three options that were given, Sir, were to –

KÓS J:

Oh, it's paragraph – paragraph 17. That's –

MR MAHUIKA:

Sorry, Sir, yes.

KÓS J:

Got it, thank you.

MR MAHUIKA:

Well that's definitely my fault in that case.

KÓS J:

It wasn't a date, at least.

1550

MR MAHUIKA:

Yes. I need some practice there, don't I? I'm going to put it down to the long week, Sir. So Te Whānau-ā-Apanui's view is that the appeal should be dismissed and for the reason that I have given is that Te Whānau-ā-Apanui say that the Court of Appeal was correct. There is the matter of the situation as between Ngāti Awa and Te Whānau-ā-Apanui. That will be dealt with when Ngāti Awa's applications are heard and Te Whānau-ā-Apanui are participating in full in order to have their interests there determined as well.

For obvious reasons we do not support the other two options. We don't support the appeal being allowed. If the appeal is allowed then effectively we will be having this debate a second time and, in our submission, Te Whakatōhea have

put their case and have asked for it to be determined and, in our submission, it can be determined and should be in the terms that we have suggested which is that Te Whakatōhea have not been able to meet the CMT threshold in respect of Whakaari.

We do not agree that CMT should be granted for a similar sort of reason and what we would say further is that because of the view that Te Whānau-ā-Apanui take in respect of the interests of Te Whakatōhea at Whakaari granting CMT in favour of Te Whakatōhea would be to, first of all, it would be inconsistent with all of the evidence, as I've outlined it, but secondly would – and be elevating the nature of that interest to a level of equivalence with Te Whānau-ā-Apanui which is not consistent with the evidence or appropriate.

I said at the start it's not an easy submission to make, that submission. It's not a position that Te Whānau-ā-Apanui would want to be in as having to take that view in respect of its relatives from Te Whakatōhea. There are perhaps better ways of resolving these matters but nevertheless here we are and Te Whānau-ā-Apanui is obliged to put its case and put its views in respect of Whakaari.

So unless there are any questions from your Honours, those are the submissions on behalf of Te Whānau-ā-Apanui.

GLAZEBROOK J:

Thank you. I think given the hour we won't trouble you to go on with the submissions and I think what we'll do is keep the order that had been agreed. Thank you very much for provisionally agreeing to come out of order but I think we might as well just stick to the timetable once your friends are here on Tuesday.

MS ARAPERE:

That's fine, Ma'am, Tuesday. Thank you, Ma'am.

GLAZEBROOK J:

Thank you counsel.

MR MAHUIKA:

Sorry, Ma'am, if I could, I'm not able to be here on Tuesday and possibly Wednesday. I think the focus of the submissions is on river mouths, according to the timetable at least, and Ms Coates will be here on Tuesday but possibly not on Wednesday. I was proposing to attend by VMR and then be here in person again on Thursday with your Honour's leave. Ms Hauraki will be here throughout as well.

The second matter, Ma'am, is that I'm not sure if you wanted to finish the week with a karakia. I was looking around because Mr Harawera had started the proceedings and I thought that he might be able to finish them and then I looked at Mr Gage to see whether or not he agreed to doing it or not but I think there's perhaps one of Ngāti Awa, Ngāti Awa having started, that Ngāti Awa could finish our day for us, again with your Honour's leave.

GLAZEBROOK J:

Certainly.

KARAKIA WHAKAMUTUNGA

COURT ADJOURNS: 4.55 PM

COURT RESUMES ON TUESDAY 12 NOVEMBER 2024 AT 10.05 AM

KARAKIA TĪMATANGA (MAC REWIRI)

MS FEINT KC:

Ata mārie e ngā Kaiwhakawā, tēnā koe e te kaikarakia. Huri noa e te whare, tēnā koutou kua tae mai i te ata nei. Ma'am, just two matters I have to raise. The first is that Te Riaki Amoamo has decided to return for the closing of the hearing, because he considers that having opened it's tika that he closes with a karakia as well, so we're seeking the Court's leave to be able to do that on the final day. He's going to come down on Thursday in case we finish early.

WILLIAMS J:

Not Wednesday in case we finish early.

GLAZEBROOK J:

Wishful thinking from my colleague I think.

MS FEINT KC:

We'll see how we go. He's booked for Thursday at the moment but we'll monitor that closely.

The second matter is that on the 31st of October we filed an application for indemnity costs following this Court's judgment on the prospective costs award. We had hoped to be able to negotiate with the Crown some reasonable resolution of the costs issues. We've been unable to do that. We've approached both the Solicitor-General and Te Arawhiti and been told that the Minister has considered the judgment of this Court and decided there's, no further funding will be made available. So we filed an application for an indemnity costs award. I understand from my friends that the other parties wish to do the same, and I'm raising it now because I thought perhaps if we have time this week, we might be able to address that matter later in the week.

GLAZEBROOK J:

We certainly would expect that people in the course of their submissions, or reply in terms of the Crown, would address that assuming there's, as you say, time to do so.

1010

MS FEINT KC:

Thank you Ma'am, we'll endeavour to address that during our reply. I understand my –

KÓS J:

It might depend, of course, on the outcome, which you'll not know this week.

MS FEINT KC:

Indeed. We have applied for indemnity costs on the basis that the outcome should not affect the cost awards.

KÓS J:

I know what you've applied for.

MS FEINT KC:

My learned friend from the Crown has indicated to me that the Crown considers that we should await the judgment before costs are dealt with.

GLAZEBROOK J:

We usually like them dealt with without people knowing the outcome, because it's always very interesting how people's views can change when they do know the outcome, but it will only be if there's time to deal with it properly. If people don't feel they've had time to put the arguments properly, then of course we'll reserve costs for later.

MS FEINT KC:

May it please the Court.

GLAZEBROOK J:

Now I think we, Crown Regional Holdings, is that where we're at? Sorry, have we got…

MS WILLIAMS:

E te Kooti, it might say, I understand your Honours indication that we should address it in the course of our reply if there's time. One of the arguments for the Crown will be that it should be – it's a matter to be determined after the judgment has been issued.

GLAZEBROOK J:

Well certainly you can put that view as well.

MS WILLIAMS:

Thank you your Honour.

GLAZEBROOK J:

As I say, I'm not saying that we will necessarily decide before the judgment.

MS WILLIAMS:

Thank you, and if it assists in terms of timetabling, I can indicate that there's a slot put down for the Attorney on Thursday morning. That's to respond to Whakatōhea Kotahitanga Waka and their appeal, and the Crown does not anticipate that we will need that slot.

GLAZEBROOK J:

You *will* need it?

MS WILLIAMS:

That we *don't* need the slot put aside on Thursday morning.

GLAZEBROOK J:

Perhaps counsel can discuss among themselves and file an amended timetable then, if there's anybody else who doesn't feel they need their slot, or there's too

long. We're certainly happy for people to truncate as much as can be done, and make sure that everybody has felt that they've put their arguments properly.

MS WILLIAMS:

Thank you your Honour.

GLAZEBROOK J:

So can counsel work that through, or would we just slot people up on Thursday?

MS FEINT KC:

We're happy to work that through Ma'am. Another glitch in the timetable, which is my fault, is that we didn't include time for ourself to respond to the appeal by Te Upokorehe. So we were proposing to do that at the same time as responding to the WKW appeal.

GLAZEBROOK J:

That makes sense.

MS FEINT KC:

Thank you.

GLAZEBROOK J:

Thank you. Ms Hill is it?

MS HILL:

It is Ma'am. E ngā Kaiwhakawā tēnā koutou. Ko Mary Hill ahau. Kei kōnei māua ko Jemma Hollis, mō Crown Regional Holdings and Te Kaunihere o Ōpōtiki. May it please the Court. Mary Hill and Jemma Hollis for Crown Regional Holdings Limited and Ōpōtiki District Council. Originally Crown Regional Holdings Limited was an appellant. That appeal was abandoned because it raised procedural issues which have been addressed subsequently by the High Court, and now both Crown Regional Holdings Limited and Ōpōtiki District Council are interested parties, largely to the appeal by Te Kāhui.

There's an oral outline which we've handed up that the Court should have available, and I am going to go through that. The position between my two clients is very similar, and therefore the submissions that I'm making can be taken as submissions on behalf of both of those parties. Just to recap, the inter-relationship is that the consents were originally granted to Ōpōtiki District Council and then Crown Regional Holdings is an entity that took over the consents because it was a significant funder of the project, and now that the harbour project has been substantially constructed, the Council is starting to take over some of the operation and maintenance obligations in relation to the project, and will ultimately potentially have those consents transferred back to the Council.

So at the start of my outline, just to recap, so I guess the objective today is to provide some practical understanding of a real-life example of substantial interruption. The High Court has found that the harbour projects do amount to substantial interruption. That finding, that factual finding is not before this Court. It arose out of the stage 2 High Court appeals and there is an appeal against that finding by Ngāti Patumoana, which is one of the Te Kāhui entities, and that appeal to the Court of Appeal is currently on hold pending the outcome of this and then the referral back of the stage 1 High Court proceedings.

So the project consents were granted in 2009, so that is pre-commencement of the MACA, therefore a significant regional infrastructure project, so 100 million or more than 100 million of central and regional government funding. And I've emphasised the regional point because I understand my friend Ms Feint made a submission that potentially the harbour project would not meet the regional definition of accommodated infrastructure, and I say that that creates an issue because if the harbour project – Mr Registrar, we would like to show some photos. Is it possible to have the ClickShare up and going? Or does that only appear on – only appears on the Court's –

WILLIAMS J:

It's going.

ELLEN FRANCE J:

It's going.

WILLIAMS J:

You're live.

MS HILL:

Okay. That's fine, Sir. So are the photos appearing?

ELLEN FRANCE J:

Yes.

FRENCH J:

Yes.

MS HILL:

Great, all right. So these are photographs showing the two groynes which form part of the harbour project, and to your right you will see some construction activities and that is the area where the original mouth of the Waioweka River has been closed and the new harbour mouth created next to it. If my friend will just move through to another photo. So you can see there the area where the river mouth has been closed off, and then just to place that in context of a map –

WILLIAMS J:

Which is the area to the bottom of that photo, is it?

MS HILL:

What was that, Sir?

WILLIAMS J:

The enclosing – the area closed off?

MS HILL:

Yes, that's right. It might be helpful to just move to the next photo and then we can go back to this one just to place it in context, which is a map included in the

written submissions. So the purple area is the area to the left where you'll see underlying that the original mouth of the river.

WILLIAMS J:

Right.

MS HILL:

That has been closed off and you'll see the new mouth, the two groynes there in red. And the area below that in green I'll be dealing with later this afternoon, but that is the area one-kilometre upstream of the mouth of the river, and so that is the area that the Court of Appeal has found now falls within the common marine and coastal area. So we'll be addressing that issue this afternoon, but –

KÓS J:

Where does the masterplan map, paragraph – page 25 of your submissions, where does that map fit in which shows the wharf area?

MS HILL:

Just bear with me, Sir. Which page of my written submissions?

KÓS J:

The final page.

MS HILL:

Oh, right. So that, are you – is your Honour referring to the Ōpōtiki Wharf Masterplan?

KÓS J:

Mhm.

MS HILL:

Yes, so that is a separate project. The wharf is not part of the harbour project. It's a substantial new development within the river area and –

KÓS J:

So is that the bit marked: "Ōpōtiki town wharf"?

MS HILL:

That's right, Sir. Yes.

KÓS J:

Right, thank you.

MS HILL:

So just coming back to the issue that I was raising, which is that if the harbour project is – does not meet the regional test then it would not fall within the accommodated activity exemption. And if it does also not amount to substantial interruption as Ms Feint has submitted then the effect of that is that when the consents come up for renewal, so that's in 2044 in 20 years' time and 2038 for the maintenance and dredging, so in 14 years' time, bearing in mind that this is a project, the structures have an asset life of 100 years, that there'll be several renewals of those consents potentially within the life of the asset and at that point in time the project would be subject to the RMA permission or veto right. And so –

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WILLIAMS J:

Can you tell me what are the other permissions or authorisations this is subject to other than resource consents?

MS HILL:

So we say, Sir, that it isn't subject to any because of the substantial interruption finding but –

WILLIAMS J:

No, no, no, I'm not talking about under this Act, I'm talking about under any other Act.

MS HILL:

There's an archaeological authority that's been granted, obviously the resource management consents which are a suite of consents. In relation to the purple area which is Crown land, my understanding is that there are also conservation permits that have been granted.

WILLIAMS J:

So that's vested Crown land?

MS HILL:

That's my understanding, yes. So those would be the three pieces of legislation that the project would be subject to.

WILLIAMS J:

So you wouldn't need a renewal so – okay, thank you.

MS HILL:

So, yes, so the point being that if this isn't substantial interruption and if it falls outside of the accommodated activity exemption, then upon the various renewals of the existing consents they would be subject to the veto right. We do, as I've said, have a finding that the project does amount to substantial interruption and it is the only example of infrastructure and assets that have met that threshold under these *Edwards* proceedings. We have other examples in other proceedings such as the Pan Pac outfall in the *Ngāti Pāhauwera* decision.

But I wanted to just take the Court briefly to Justice Churchman's reasons for finding that the harbour project does amount to substantial interruption and these are summarised in my written submissions and I just want to address them briefly. The first point made was that there is an exclusion of the general public from the project area for an extended period during construction so that was several years and the Court will have observed that they are substantial structures and construction work so the public was excluded during that period and is still excluded from aspects of the construction works that are ongoing. There will also be regular temporary exclusions for ongoing maintenance of the

works throughout the life of the consents and indeed the asset and some of those works involve the use of heavy machinery and so there'll be regular ongoing exclusions. Then the third point was that the scale of the project itself is substantial and his Honour referred to it as fundamentally changing 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.

So those were the three key reasons. His Honour did refer to the fact that Te Whakatōhea had supported the project but, in my submission, that wasn't determinative of the finding of substantial interruption but it was a point that was mentioned by his Honour.

ELLEN FRANCE J:

So is that something you are making any submission on, the effect of that support?

MS HILL:

In my submission it has to be a factual inquiry because the support of the iwi, it doesn't necessarily follow that the support of each of the hapū is forthcoming and, in fact, in relation to this project, there were particular hapū that opposed the project and indeed the archaeological authorities were appealed to the Environment Court and the High Court by one of the hapū. So Te Whakatōhea, as the Court is aware, supported the project because of its particular interest in the aquaculture industry that would follow from the project. So that's a particular example on the evidence and it's quite nuanced. There may be other situations where the support or opposition by tangata whenua groups might mean something different so I don't think it can be a test. I submit that it would be something to consider based on the particular evidence and circumstances.

WILLIAMS J:

What was the extent of the interruption? Is that how the Judge framed it or was it framed as an extinguishment?

MS HILL:

No, it was framed as a substantial interruption.

WILLIAMS J:

What was the extent of the substantial interruption?

MS HILL:

The physical interruption?

WILLIAMS J:

Well, that's the key, isn't it?

MS HILL:

It is, it is. So the High Court focused on the physical interruption to use and occupation.

WILLIAMS J:

Yes. No, I mean the geographic, how big on the map? Just the outline of these works, or did he have his own around it? How did he deal with that?

MS HILL:

He dealt with it on the affidavit evidence which explained what the physical extent of the structures were and then the physical extent of the dredging activities.

WILLIAMS J:

So it was the works?

MS HILL:

Associated works were included.

WILLIAMS J:

So the extent of the dredging works, reclamations, the groynes, et cetera?

MS HILL:

That's right, Sir. Yes, and that's quite an important point and it is included in the concepts of the Act which is that it isn't just structures but associated activities are included –

WILLIAMS J:

Yes, but my question is a really practical one. What did that mean? Did that mean – well, explain to me the physical extent of that interruption and its interrupting effect, or extinguishing effect, depending on your perspective.

MS HILL:

So I submit that it's not extinguishing and I do deal with that further in my submissions, that the Act develops a specific concept of interruption.

WILLIAMS J:

Yes, anyway, I'm interested in the physical right now.

MS HILL:

So I'm just referring to my written submissions, Sir, so I can give you some specifics.

KÓS J:

But you're accepting it's not extinguishing?

MS HILL:

I accept it's not extinguishing. It's substantially interrupting the use and occupation and that's what, in my submission, the test in the Act directs us to consider, directs the Court to consider.

KÓS J:

When –

WILLIAMS J:

Can I get the extent answer, please?

KÓS J:

Yes.

MS HILL:

Yes, so I want to give you some figures but I don't want to get them wrong, Sir, so just…

WILLIAMS J:

I don't mean the extent of the activity for the consent. I mean the extent of the crowding out.

MS HILL:

So the extent of the crowding out, quite aside from the physical groyne structure, relates to the requirement for the dredging and maintenance. So there's both capital dredging which was required to change the harbour mouth and enable the groynes and then the separate consent provides for the ongoing maintenance dredging which will be a regular thing which is –

WILLIAMS J:

So that's the green area on the photo?

MS HILL:

That's right, so –

WILLIAMS J:

The light-green area?

MS HILL:

Yes, that's right, so it's on both sides of the black line which is Justice Churchman's CMCA line, but if we move that line a kilometre upstream then it includes the area to the bottom. So all of that –

WILLIAMS J:

So Justice Churchman took the crowding out through to the dark green?

MS HILL:

Justice Churchman only included the area to the north of the black line because that was his understanding of what the –

WILLIAMS J:

The crowding out?

MS HILL:

That's right. Jurisdictionally, because he didn't consider the area upstream of the river –

WILLIAMS J:

I see. Of course, yes.

MS HILL:

– so he only – although there was evidence relating to the area below because of that finding and that black line shows the jurisdiction from his Honour's perspective, and then –

WILLIAMS J:

So what was the – and your client argued that the darker green, the different green area, the upstream area, was also crowding out on the evidence?

MS HILL:

That's correct. So you're talking about the green to the north of the black line?

KÓS J:

I think you were going south, weren't you?

WILLIAMS J:

Well, yes, south-east. The upstream area.

MS HILL:

Sorry, Sir. Yes, it's looking – is that you talking about the area with the arrow pointing to "River closure nourishment zone"? I've been struggling with your dark-green reference. Are you talking about the yellow area to the north?

WILLIAMS J:

So you've got the groyne mouth.

MS HILL:

Yes.

WILLIAMS J:

And then it goes up-river on that new route, which I'm looking at as some kind of fluorescent greeny colour.

MS HILL:

Yes.

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WILLIAMS J:

That traces the path of – the new path of the river, is that right?

MS HILL:

That's right, Sir. So my client's submission at hearing was aligned with his Honour Justice Churchman's, which is that the area one kilometre upstream of rivers is not part of the common marine and coastal area.

WILLIAMS J:

Oh, I see, right. So you didn't call evidence about any crowding out in that area?

MS HILL:

There is evidence, because we weren't sure that his Honour was going to agree.

WILLIAMS J:

Okay.

MS HILL:

And so the evidence does include the entire consented area, so that also includes the dredging and maintenance. And there are significant works to be undertaken within that area, and that is why my –

WILLIAMS J:

Are they referred to in Justice Churchman's judgment?

MS HILL:

Not in any detail, because his Honour found that that area was excluded from the jurisdiction of the Act.

WILLIAMS J:

So if he's wrong on the black line, that'll become important?

MS HILL:

That's right, Sir. And our submission, and his Honour Justice Churchman has accepted it, is that there will need to be a hearing of evidence in relation to that new area if the Court of Appeal's finding that it's included is overturned by this Court.

WILLIAMS J:

Right.

KÓS J:

As to the crowding out, those groynes that you show are not secure areas that are fenced off from the public?

MS HILL:

No. And indeed, Sir, the public is entitled to have access to them.

KÓS J:

Yes.

MS HILL:

But the point is that at any point in time public access can be restricted, so that is something that would need to be actively managed by the council, as with any significant public structure.

KÓS J:

Well that's an intermittent, temporal exclusion, isn't it?

MS HILL:

And a legal, potentially a legal exclusion.

KÓS J:

Yes.

ELLEN FRANCE J:

And there's no requirement for, in terms of the resource consent, for any consultation before members of the public are excluded?

MS HILL:

No, that's right, Ma'am. That would –

ELLEN FRANCE J:

What I was asking, I –

MS HILL:

Yes. That wouldn't arise under the resource consent, but rather under health and safety legislation.

ELLEN FRANCE J:

Right.

MS HILL:

So the reason why we're here is because the substantial interruption aspect of the test has been put at issue from an interpretation perspective. My clients are keen, wish to ensure that any findings or comments from this Court on that issue do not then undermine the factual finding of substantial interruption in relation to the harbour project, because if that finding is ultimately overturned then they will be in a position of having to argue that the accommodated activity exemption applies, and I'm about to take the Court through what – in my submission these are different pathways. So the substantial interruption pathway and the accommodated activity pathway are different things and I say deliberately from a policy perspective they do different things, and I'll take you through my arguments on that now.

But I did want to just briefly set the scene, because I've been following along a little bit in terms of the discussion last week and some questions sort of around the interaction between resource consents and the Marine and Coastal Area Act and whether things are prospective or retrospective, and how that framework applies. And so just at a high level, and this isn't in my outline, but my interpretation of the framework of the Act is that it's not retrospective in the sense that it's very clear that it doesn't affect existing resource consents and the harbour project is an example of an existing resource consent because it was granted before the Act, but that retrospective – sorry, non-retrospective element doesn't apply to the activity that is consented, it applies to the life of the consent.

So what that means is when that consent comes up for renewal, and renewal isn't actually a concept under the RMA, consents expire and then you have to make your case to have them have a new one granted, so when these consents expire and need to be regranted, at that point the Act engages in relation to those existing consents, and –

WILLIAMS J:

That's true on terra firma as well.

MS HILL:

That's right, Sir.

WILLIAMS J:

There's nothing new about that.

MS HILL:

No.

WILLIAMS J:

If you don't own the land then you have to get a lease before you can renew your consent if it needs renewal. You have to get an extension on your lease.

MS HILL:

That's exactly right and yes, land ownership and consenting are divorced from one another under the RMA, as your Honour is aware. Also there is a grandparenting-type concept in the Act because when they come up for renewal the Act then kicks in at that point. So section 20 is the carve-out that says the Act doesn't affect existing consents and then section 64(2)(a) is the accommodated activity exemption and that includes an exemption for consents that were applied for before the effective date and the effective date is the date when an order is sealed. So at the moment under *Edwards* none of the orders have been sealed because they're subject to appeal, so that effective date hasn't occurred yet. But if they're applied for before the effective date then they are accommodated. So there's an exemption that applies to protect those but again, once the consent comes up for renewal, then they are –

GLAZEBROOK J:

And you are talking about, this is the – your shorthand "renewal" is applying for a new consent, is that –

MS HILL:

That's right, Ma'am, yes, applying for a new consent.

GLAZEBROOK J:

That's all right. I'm just double-checking.

MS HILL:

No, and you're quite right. That's a better term to use. Then at that point in time the grandparenting no longer applies and they would potentially be subject to the RMA permission right unless they can show that they come within one of the other limbs of the accommodated activity exemption. So in that sense the Act's not retrospective and it is prospective in the sense that it engages upon having to apply for a new consent, unless –

WILLIAMS J:

But you don't have to prove regional significance for that protection?

MS HILL:

You would have to prove regional significance for that protection. So once you're –

WILLIAMS J:

For the 64(2)(a) protection?

MS HILL:

Once you come for your new consent, Sir.

WILLIAMS J:

Yes, I see. Yes, I get that.

GLAZEBROOK J:

New consents, yes.

MS HILL:

So you have protection until it expires and then it – so the grandparenting, if you like, ends and then the prospective aspect of the Act engages. That particular carve-out for exempting past consents no longer applies and you'd have to show you came within another exemption and the most relevant

one is the one that Justice Williams has just referred to which is if it is a public-benefit type infrastructure, but, as we've heard, that only applies to regional or national activities, not to local ones, and in my submission there is a real debate around that where you have a significant local project like the Ōpōtiki Wharf which I'm going to address you on later this afternoon, but that's a significant project, $2.5 million investment, and it will provide for to support marine industry in Ōpōtiki but not of the scale of the $100 million harbour project which had significant regional and national funding. So in my submission it's clear that the harbour project meets a regional test. It's less clear whether a project like the Ōpōtiki Marina would meet that test because Parliament has decided to use the terms "regional" and "national" benefit but not something less than that.

So that was just briefly explaining the grandparenting concept and the reminder that upon the need to obtain a new consent, if substantial interruption doesn't apply and you haven't had the foresight potentially to argue that now because we only get one opportunity to argue that when the orders are being first considered by the High Court, then you are left to rely on the accommodated activity exemptions in order for the RMA and other permission rights to not apply, and I'm really speaking about these in the context of local authorities. The types of projects that local authority is concerned about are public projects and traditionally the land underlying the structures has been owned by the Crown or by local authorities but because of the Act it's now they are no longer invested in those and so nobody owns them and so it is creating a situation of something new and I'm certain for local authorities because they are not sure when it comes to having to apply for new consents for these important assets whether that RMA permission right would be granted and if so how long it would take, and if so on what terms, and in simple terms that creates significant consenting uncertainty, and associated things such as funding.

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Often Ōpōtiki is a good example of a local authority with a very low rating base. It isn't a wealthy authority and regularly has to rely on national and regional

funding, and a lot of that funding is often conditional on consentability and the ability to obtain the necessary resource consents for a project.

GLAZEBROOK J:

I suppose some, I mean it really depends on what "regional" means in that context, doesn't it?

MS HILL:

That's right Ma'am.

GLAZEBROOK J:

There's obviously things that aren't going to be regional if it's – clearly, but as you say something like that will fit perhaps slightly more in the middle.

MS HILL:

That's right, because of the nature of coastal structures, those areas tend to be used by people much further than just the local industry, so I think the coast can be different in that sense to land-based activities, where it's a lot harder to get to and tends to be serviced by the local community. The other important point about that certainty, of course, is that where there's a dispute as to whether something is or is not an accommodate activity, the High Court has no jurisdiction over that, and that's a decision of the Minister. The Act says the Minister's decision is final, so no appeal, and therefore presumably it would be a judicial review, but that's not a merits-based enquiry, as the Court is aware, and so that in itself creates further uncertainty.

I've been informed I've got about five minutes to go, and I've got a fair bit to get through.

GLAZEBROOK J:

No, that's been very helpful though, because we were looking at that last week and I think we hadn't had full submissions on it, so thank you.

MS HILL:

I think I've really gone through the next point, which is the two different pathways. So the accommodated activity pathway, I think the key point there is that is the aspect of the political deal, if you like, whereby infrastructure is allowed to, or is accommodated within or allowed to co-exist with the customary marine title because Parliament has deemed those particular activities to be important to the public, and that's part of that balance, whereas for substantial interruption there is no public benefit test. It's really just about – so it's not recognising the particular activity, structure or type of activity. It is a factual enquiry as to whether there has been a substantial interruption of exclusive use and occupation as a matter of fact.

So it does provide significant certainty to my client, because it has had that area qualify a substantial interruption and therefore does not form part of the customary marine title.

So lead on very briefly to a second and related point which is, in my submission, the interruption is to the use and occupation, not to the relationship or the holding in accordance with tikanga. It's clear, in my submission, that that second limb, substantial interruption, only qualifies that, and I mean I submit the relationship with the area remains, although it might be on a modified basis, and there a number of examples there where that cultural relationship can exist even though the area itself, that you can't recognise the right of title over it, but it doesn't follow that the kaitiakitanga ceases, so there are other statutory avenues for that such as the RMA, which we know recognises those important relationships, so when you go through a resource consent proposal, the resource consent needs to make provision for that. PCRs, of course, can still be exercised over areas that there isn't customary marine title, and the harbour project is an example of that.

Some of the Te Kāhui parties, Ngāti Patumoana and Ngāti Ira for example, have sought PCRs which on their face the maps appear to co-exist with some of the area that would be carved out from the customary marine title and, in particular, within the river area if that is found to be in the CMCA

Ngāti Patumoana have been granted a PCR for whitebaiting in that area. So even if that's substantially interrupted and title isn't available, the PCRs and the recognition of the cultural rights and activities remain.

WILLIAMS J:

So that suggests a use remains?

MS HILL:

Substantial interruption doesn't require no use. It requires substantial interruption to use and occupation so I accept –

WILLIAMS J:

But there's an acceptance there for that there is continued use in the substantially interrupted area according to your submission?

MS HILL:

An order for the Court to have found that there's a PCR right available, the Court has found on the facts that there has been use of that area, continuous use remembering, Sir, that the PCR concept doesn't look at substantial interruption.

WILLIAMS J:

So what, for example, if on the groyne, the local people discover the fishery there is greatly enhanced because of the groyne and there are mussels all along the edge of it, it becomes an important set of mussel rocks just because they're rocks, what then?

MS HILL:

Yes, so the – in my submission the activities can still, the activity, so the use can still co-exist but there'll need to be a very careful analysis of how that occurs and perhaps the best example I can give is that that already occurs now. So in relation to the harbour resource consents, there are conditions that preclude dredging within the whitebaiting, spawning and fishing season and so dredging cannot occur in that area. So that's an acknowledgement of the use but saying there'll be particular times we won't be dredging and so there would need to be

quite careful consideration given in the terms of any PCR order to ensure that it didn't impact upon the existing lawful right –

WILLIAMS J:

My point is a different one. What if what changes is not the fact of use but the nature of the use because, even with a groyne and associated facilities, it's still a dynamic constantly changing ecosystem in which marine life lives and often you find in these situations gathering – marine life is gathered, can proliferate in these areas and be the subject of new gathering activities by tangata whenua, such that it might be said the use has changed but not substantially interrupted.

MS HILL:

So that may be so in terms of use when you're looking at the PCR when –

WILLIAMS J:

No, let's put the PCR to one side.

MS HILL:

So for CMT, the rights that attach, remembering that that's a form of title, the rights that attach to that, the main one is the permission right, so where I would submit that you need to look at the CMT test in that context so –

WILLIAMS J:

I don't want to reverse engineer this. Test is substantial interruption –

MS HILL:

Yes, of use and –

WILLIAMS J:

Let's not think of the consequences of CMT –

MS HILL:

– of use and occupation.

WILLIAMS J:

– let's just talk about whether there's substantial interruption which, as you say, is a question of fact.

MS HILL:

Yes.

WILLIAMS J:

What if, as a matter of fact, gathering activities continue but change in response to the changed environment, the changed marine environment?

MS HILL:

So there has – they may resurrect but there's been a substantial interruption of those, Sir, when the groyne was constructed.

WILLIAMS J:

Well, no, no, I'm talking about whether there has been one, you see my point? We're talking about a dynamic environment and ecology. The fact that some constructions are put there doesn't make it a now static environment and ecology. It remains dynamic.

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So if what happens is the local people do not gather the way they used to gather, do not relate to the place physically the way they used to relate, but continue to relate and gather in different ways reflecting the new dynamic environment and ecology, would you say that was substantial interruption?

MS HILL:

No.

WILLIAMS J:

So that's the factual question, you see.

MS HILL:

To, not to use, but in terms of the way the test puts it when it – to use –

WILLIAMS J:

Well, the test is substantial interruption.

MS HILL:

– to use and occupation.

WILLIAMS J:

Correct.

KÓS J:

Well, it's a bit more than that. It's to exclusive use and occupation for CMT and so the exclusivity seems to have gone slightly out the window when a port company has put a groyne in the middle of the mussel beds. They may create new mussel beds but they're going to be shared with a great variety of people.

MS HILL:

Well, Sir, I agree with that and that was the point that I was putting to his Honour, Justice Williams, before, that there has been a substantial interrupting event and at that point in time the test has been engaged. Now that use may subsequently change and cultural practices through the PCR may continue but once there's been a finding of substantial interruption to exclusive use, exclusive use and occupation, then at that point the particular RMA permission right doesn't attach, so that's the thing they haven't got.

WILLIAMS J:

Yes, but exclusion itself, it doesn't mean exclusive. We've established that. The Act is a little more subtle than that and in fact the use by others of a resource is not extinguishing, at least not by itself. The Act says so. So, the suggestion you make is that the creation of private rights in an area, even if they do not lodge use of the particular environment for customary purposes, will be substantially interrupting.

MS HILL:

So it's not private rights in this case, it's public, but the –

WILLIAMS J:

Because – well, no, they're private rights. Crown Regional Holdings Limited's right to the groyne.

MS HILL:

So his Honour, Justice Churchman, found on the facts that given that everybody was excluded from that area for a considerable period of two years during the construction of the groynes, that that was a substantially interrupting event, if you like, and then that was one factor. Married to that will be the ongoing exclusion for the maintenance dredging and then the third factor was the significant alteration to the landscape that these groynes cause. Now none of those things, in my submission, is inconsistent with an ongoing change, the use of the area by tangata whenua, but I say that's different –

WILLIAMS J:

So the first question is whether a two-year exclusion is enough for a community that's been there for 38 generations.

MS HILL:

Well, that's not a factual matter before you, Sir, but in terms –

WILLIAMS J:

No, but what amounts to substantial interruption is and you've given me a factual scenario, two years is enough. You've got to ask yourself whether that's –

GLAZEBROOK J:

I don't think that was the decision. It is a decision that that combined with the changes to the landscape have met that, wasn't it? That's…

MS HILL:

That's why I referred to the three factors, so –

WILLIAMS J:

Right, but I'm just going through them. That's the point because – so the first thing is two years. The second thing is intermittent exclusion for other purposes, and the third thing was?

MS HILL:

The significant change to, described to the landscape of the takutai moana as a result of the structures and the associated activities. So it's not just the structures themselves. As your Honour will be aware, dredging is a very interactive activity. Full exclusion is required. There's heavy machinery. It's dynamic. Geomorphology is changing. So those are some of the things your Honour will have observed in the photos.

WILLIAMS J:

In the end, though, isn't the question whether use and relationship, use and occupation and relationship has been interrupted, if it was, and whether the exclusive nature of it, if it was, has ended?

MS HILL:

It says "interruption", not "extinguish". So the Act doesn't use the word "ended".

WILLIAMS J:

No, but that's what you're talking about.

KÓS J:

But you lose the right to the title. You lose the right to the title so it has a fairly significant effect.

MS HILL:

Yes, the particular rights attached, or that the Act recognises you don't have, you don't lose them as such, but you don't gain them at the outset when these issues are determined.

KÓS J:

Well you had them, you had them and then a jolly great groyne gets popped on the landscape and you don't have them anymore.

MS HILL:

Well you never had them in the sense that the Act recognises them so that they – tangata whenua never had a RMA permission right associated with their cultural rights.

KÓS J:

What's that got to do with customary title which was restored by the Act in 2011?

MS HILL:

So this particular Act recognises certain incidents of that title, and the key one is that right. So that is a new right, a new statutory right associated with the title that the MACA recognises.

KÓS J:

No, I don't agree with that. I mean the Act in section 6 restores rights that previously existed, and as we've been debating for the last four days, what then happens is that some particular rights within that suite are given recognition, either as CMT or PCRs, and as I've kept banging on about it, it also seems to me there's a third category, potentially, of latent rights which don't fall within the two forms of recognised rights, but which are restored by section 6. So all of these are things that happened in, whenever it was, March 2011, that restoration occurred.

MS HILL:

So I don't disagree with you until we get to the point where – so rights were restored, and then in my submission the Act provides for a new right, which is the RMA permission right, because historically that right never existed in the statute.

KÓS J:

Right.

WILLIAMS J:

I don't think that's correct, as a matter of law, if you look at the Canadian cases. If, what's the phrase, aboriginal, the territorial, whatever their phrase is for the territorial right, vests, as you see in *Tsilhqot'in*, consent would be required before any activity by a third party is undertaken in the area. It's quite apart from the RMA. An RMA consent doesn't let you do anything on someone else's land. You need their consent. If a court finds its someone else's land, then you need their consent.

MS HILL:

Yes, I accept that.

GLAZEBROOK J:

I think the other side of your point, though, is that you see substantial interruption as not necessarily an extinguishment, but a different concept. Is that my understanding, because of course a substantial interruption can, both at tikanga and at law generally, be seen to have extinguished rights. It depends what – and we've been talking about this regeneration issue that is a rule of thumb, if you like, under tikanga.

MS HILL:

That is my submission and that's the final part of my oral outline.

GLAZEBROOK J:

So you say it's something different from that.

MS HILL:

That's right. I mean in my submission the Act deals with legal extinguishment as something different from substantial interruption, and it refers to legal extinguishment in a number of places, and substantial interruption, I say, is a separate concept to that, and there were just two places, and I'm conscious that I'm running over time, so I'll just pick up very briefly with the parts of the Act that addresses that. So I think this point is probably already made, but rather than extinguishing customary rights, and this is I think his Honour Justice Kós' point, it precludes recognition of some of those interests over a limited area. So arguably those rights remain inchoate and it's possible that we may have new legislation at some point in time which –

KÓS J:

Yes, or if you're groyne gets washed away in a gigantic flood, and it isn't there anymore, then if the rights were extinguished, they're gone, but if your groyne is gone instead, the rights are probably restored.

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MS HILL:

They, yes, the statutory permission right presumably would still remain in relation to the other activities, but it would allow someone in the future point, if the Act provided jurisdiction for doing so, or if some other Act did, for them to say, hey, they've been restored. So they're different concepts, I submit, and I did want to just briefly deal with a couple of the sections of the Act which I'm aware that there have been submissions made about.

So with section 106 which is the burden of proof provision, there's been a submission that – hang on, let me just turn to it – that subsection (3) of section 106 which talks about it being "presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished" is intended to refer to substantial interruption, and in my submission that's not the case. That subsection refers to a recognition order, so that would apply to both CMT and PCR orders, and so it's intended to refer to something different there than substantial interruption.

But just to qualify, I am not submitting that an applicant has a burden of proving substantial interruption. I'm aligned with my colleagues that that would be a matter for a party such as my clients wanting to establish substantial interruption to establish on the evidence that that's occurred, and that's the way that it played out in this case whereby my client called evidence of that, and so the Court was in a position to make that finding.

WILLIAMS J:

Can you just tell me the first point you made about subsection (3)? Can you just please repeat that?

MS HILL:

Yes. So in my submission where – that subsection does not just relate to customary marine title, it also relates to protected customary rights orders, and because if you look at subsections (1) and subsections (2) they deal with both of those alternatives, and therefore I submit subsection (3) cannot be referring to substantial interruption when it's referring to extinguishment, it must be referring to something –

GLAZEBROOK J:

Well except to the extent that substantial interruption does amount to legal extinguishment, I presume?

MS HILL:

I agree with that.

GLAZEBROOK J:

Yes.

MS HILL:

So that would be one example which might amount to substantial interruption.

GLAZEBROOK J:

So it's not practical, so you have a – substantial interruption can include both substantial interruption that causes legal extinguishment either at tikanga or otherwise, or alternatively just as a practical sense there's substantial interruption and despite section 106(3) in your submission not applying to that, you accept that the party that is asserting substantial interruption has to put evidence forward to show that?

MS HILL:

Exactly right, Ma'am. And the reason for that last point is that subsection (2) doesn't require proof of that, whereas it refers to the other elements of the test.

WILLIAMS J:

The thing is that PCRs also refer, also contain a continuity test.

MS HILL:

They do.

WILLIAMS J:

And substantial interruption is just one way of articulating the continuity test.

MS HILL:

It would be –

WILLIAMS J:

It is. That's the reason it's there.

MS HILL:

The – Parliament has chosen not to include that as a specific exemption, if you like, from that test.

WILLIAMS J:

No, but it's the same idea. With PCRs you have to show continuity to the point of application, of course, and if you can't show that then you don't get one and that's because it's been interrupted.

MS HILL:

I don't disagree with that, Sir. The point that I was making was I don't consider that the reference to extinguishment in here in subsection (3) is intended to refer to substantial interruption.

FRENCH J:

Have you had a look at the legislative materials?

MS HILL:

Not in any detail, Ma'am.

FRENCH J:

Because actually that's not – in terms of those, that's not correct. This section 106 was the result of a supplementary order paper and what appears to be the case is that it was intended, the presumption is intended to cover the negative aspects as it were, the exclusivity and absence of – the existence of a substantial interruption, and the burden of proof was to be on those contesting it and the applicant group was not required to prove the negative.

MS HILL:

That's my submission – sorry, the –

FRENCH J:

So –

MS HILL:

That's my submission, Ma'am, that my client would have to prove it rather than the applicant group disproving it.

GLAZEBROOK J:

But just not under subsection (3), but under subsection (2) I think is the –

MS HILL:

That's right.

GLAZEBROOK J:

Yes. That arises out of subsection (2), not subsection (3).

MS HILL:

Yes. I was –

GLAZEBROOK J:

Anyway, it's...

KÓS J:

Well, either you read –

GLAZEBROOK J:

We probably need to move on.

WILLIAMS J:

Yes, well, they say the same thing.

KÓS J:

Either you read subsection (3) very broadly or there's a gap between (2) and (3), but I don't think there's much disagreement as to how to operate it.

MS HILL:

No, and as I say that's how it's happened in practice. The parties with the particular knowledge of the project or the interrupting activity are best placed to establish it and that's what's occurred, and I suppose just to make the final point without opening up a can of worms but I think it's supportive of the fact that substantial interruption is to the exclusive use and occupation, not to the cultural relationship, and if a party such as my client had a burden of proving that a cultural relationship has been substantially interrupted that would be a difficult burden on that party because generally it's accepted that it needs to be the tangata whenua parties who bring evidence of their cultural connection.

So those were my submissions. I'm going to address you briefly later this afternoon on the rivers point, and I'll hand over now to my friends from the Whakatāne District Council.

GLAZEBROOK J:

On mine we have Whakatāne District Council by VMR. They're here? Not VMR at all.

MR GREEN:

I'm here with my junior, Mr Greensmith-West, your Honours, and he's going to present the brief oral argument on behalf of the District Council as an interested party.

GLAZEBROOK J:

Mr Greensmith-West.

MR GREENSMITH-WEST:

Tēnā koe, your Honour. Tēnā koutou e ngā Kaiwhakawā. Your Honours, I have a fairly brief amount of time with you this morning, 15 minutes if I understand, so I think it would be best, and as you can probably ascertain from our oral submission, our oral outline, it may be best that we perhaps dive into this question and discussion around substantial interruption because I think that's where I can potentially be the most assistance for you. I would make note in relation to the sort of overall aspects of our submissions. So I'm sure you are aware we presented or provided a list of council structures or council-owned structures that were considered in the High Court. The purpose for this, I would like to be clear, is not to seek any factual findings in relation to those.

WILLIAMS J:

From us?

MR GREENSMITH-WEST:

No. That's not what we're asking for. We're not relitigating that. I guess the purpose of presenting those to you is it might help you focus some of your

thinking in terms of when we think about third party structures, what this looks like on the ground, beyond something like what my friends presented earlier in relation to the harbour project. So we have a selection of structures such as stormwater assets and port assets, to name a few, and because of time I won't drill into those but you will have copies of that evidence that was presented in the High Court which might help you in terms of your thinking.

So if we sort of turn to the start of the oral outline. So in general across the board we would support the Attorney-General's submissions as well as the submissions from Crown Regional Holdings and Ōpōtiki District Council, and we submit that limb 2 of section 58 ought to be applied as a composite and dynamic test which incorporates both tikanga, the old law, and the English common law as the new law, and it's relatively evident from, we submit, limb 1 of section 58 it requires to applicants to hold an area in accordance with tikanga.

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We say that this is supported by the inherent nature of MACA which is to produce a compromise between the law of tikanga and the English common law, and we reference the preamble of the Act which touches on the idea of no ownership over the common marine coastal area and the protection of rights of access, navigation, and fishing. Those are under sections 26, 27 and 28.

In light of that we would say that adopting an artificially high exclusively tikanga-based test leaves substantial interruption with nothing to do, and we would also say that it would be ignoring what I describe as the practical reality of substantial interruption on the ground which relates to third party structures, and when we think about this, and I believe your Honour last week touched on post-colonisation, the many towns and communities that have been built around the foreshore since 1840, and that would include towns typical of, well, for example, Whakatāne where there are structures like wharves and jetties that have been built, but as well there are also pieces of crucial infrastructure such as stormwater outlets that protect the coastal communities from, particularly nowadays, the impacts of rising sea levels and climate change.

So if I take you down past where we address some of these particular assets, and take you to the part of the table that specifically goes into substantial interruption, and in relation to our written submissions from paragraph 3.1 onwards. So what we say is when the Court is considering whether use and occupation has been substantially interrupted, and I echo the submissions from my friends from the Ōpōtiki District Council that the substantial interruption goes to that question of use and occupation, we suggest some things that the Court could consider. So whilst limb 1 talks about holding in accordance with tikanga, there may be, use and occupation may be demonstrated through tikanga. I don't want to adopt a test where tikanga is not at all relevant in relation to the second limb, that's not the position of the Council, but there may be a question as to whether there has been a substantial interruption of that use and occupation expressed through tikanga.

Your Honour also discussed last week around the concept of asserting mana over an area, and I think that is also part of it. So you might think about the ability or the intent to engage with resource management matters, for example. More to the point, though, we touch on this question of what is the physicality of the structure, and your Honours discussed this briefly with my friends in relation to the harbour, to the harbour project, and there are questions here around whether access has been cut off in whole or in part temporarily or permanently. We submit that, you know, this concept may come down to an approach of, is there a physical barrier to access, and this also sort of relates, I think, to one of our points, which is where does power lie regarding use and occupation of a structure. So if it's owned privately by a third party, perhaps someone who is not council, do they have the ability to physically and legally restrict access, but in the case of territorial authorities there may be instances where access can also legally be restricted.

So in our supplementary bundle we've presented the Whakatāne District Council Ports and Wharves Bylaw. Within that bylaw there is the ability, and relatively typical I would say, or many territorial authorities who can obviously in a way that is legally sound, restrict access to ports and wharves, perhaps maybe for health and safety reasons, but also many councils will expect users

of wharves to pay for berthage and if that is not paid then access can also be restricted as well.

Your Honour also last week spoke about the relationship with the resource complex of the takutai moana, and I think that is also a relevant point. So if there are instances where a structure perhaps impacts or affects this relationship with a resource complex, perhaps not necessarily the case with a port structure, maybe perhaps with an example of reclaimed land or you may have the – a good example is the Pan Pac pipe in *Ngāti Pāhauwera* [2021] NZHC 3599.

WILLIAMS J:
Can you – sorry, I'm just interested in the facts there.

MR GREENSMITH-WEST:
Sure.

WILLIAMS J:
I don't know anything about the Pan Pac pipe in Pāhauwera territory. Is it huge or just your standard outfall kind of thing?

MR GREENSMITH-WEST:
Well I can do my best in terms of –

WILLIAMS J:
You can do better than me, anyway.

MR GREENSMITH-WEST:
Yes. So my understanding, your Honour, in relation to the Pan Pac pipe was that there was a – the substantial interruption there was in relation to the applicant's ability to be able to gather and access kaimoana and the, I guess the environmental damage that that pipe had caused, I believe it would be accurate to say such to the extent that kaimoana was no longer able to be gathered there, or if so –

WILLIAMS J:

So it had destroyed that aspect of the complex?

MR GREENSMITH-WEST:

Yes, your Honour, yes. And we would say that that example sort of talks to that question around the resource complex, but we would also say, and this echoes the submissions of the Attorney-General, that these considerations are part of a matrix of factors and while other examples from other parts of the country are potentially helpful, I don't believe that they should be used as a yardstick. We submit that the question of substantial interruption should really be based on the facts at place within the local context.

We also note specifically some passages from the High Court and then subsequently from the Court of Appeal at – or for the Court of Appeal it was at paragraph 433, and we also refer your Honours to – and within in our written submissions to comments from Justice Churchman in relation specifically stage 2, the paragraphs 34 to 36. So on one hand we submit that in stage 1 it appeared that Justice Churchman accepted that activities relating specifically to port infrastructure such as wharves and jetties may well amount to substantial interruption, but whether they do is to be determined by an examination of the facts in each case, and we would support that approach. However, in the next decision we submit that the comments by Justice Churchman appears to suggest that port infrastructure such as wharves and jetties can never amount to a substantial interruption by the simple fact that they would enhance access to the foreshore and seabed by their nature. We sort of –

WILLIAMS J:

Where is this? Is this in paragraphs 34 to 36?

MR GREENSMITH-WEST:

Yes, paragraphs 34, 35, and 36.

WILLIAMS J:

Of the – of?

ELLEN FRANCE J:

Of the stage 2.

FRENCH J:

Stage 2.

MR GREENSMITH-WEST:

Second stage.

WILLIAMS J:

Stage 2?

MR GREENSMITH-WEST:

Yes. So he says at 36: "If anything, the activities and structures associated with these consents can be seen to enhance the use of the relevant area by the applicants and others, rather than as substantially interrupting the exercise of customary rights." Again, I respectfully say that we're not looking for an overturning of fact in relation to whether these structures are considered substantial interruptions or not, but we refer to that comment and we just note that it stands somewhat in contradiction to paragraph 433 of the Court of Appeal where when they talk about the express act of Parliament and how that contributes to a substantial interruption.

They note at the end of the paragraph: "So for example the lawful construction and operation of port facilities pursuant to a resource consent or some other form of legislative authority, in a manner that excludes the applicant group from access to certain parts of the common marine and coastal area, would preclude the grant of CMT." We refer your Honours to those passages because it appears that there is some confusion as the matters have progressed their way through the Court and perhaps some clarity there maybe on this question of substantial interruption relating to port assets.

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WILLIAMS J:

I guess you could say they are reconcilable if the focus is on facts because if in fact in Justice Churchman's example it did enhance use, then that's important, and if, to use the Court of Appeal's example, it excluded use, that's important.

MR GREENSMITH-WEST:

Well speaking in the general I would say that if the facts made out that they did enhance access, then I think obviously that would be acceptable to my clients. I would say, however, I think that there was that assumption that port assets always enhance access.

WILLIAMS J:

Yes.

MR GREENSMITH-WEST:

I would say that that's not the case – or, well, and even if there wasn't an example of where there might be enhanced access, there may be other considerations which may point towards substantial interruption, which the Court could consider, and as we lay out in our oral submissions.

WILLIAMS J:

So you say basically black and white rules, one way or the other, aren't that helpful. Look at the facts. Which makes it hard to deal with the issues prospectively.

MR GREENSMITH-WEST:

Yes your Honour. I think – well it's difficult to be able to ascertain the mind of Parliament, but I think it was clear that Parliament intended for section 58 to be, as I was saying, dynamic, and I think facts-based, and I think taking a black and white approach would not produce good outcomes in relation to section 58, and I return again to my submission in relation to other examples from other parts of the country are helpful in making clear in the Court's mind when it comes to these individual scenarios, but I don't think that they should be used as a yardstick.

KÓS J:

At the blacker end of black and white, though, you have quite a lot of freehold title in common coastal, marine coastal area, don't you, so those titles presumably are sufficiently exclusive that you could say they would perhaps be a substantial interruption to a coastal marine title.

MR GREENSMITH-WEST:

Well under the Act freehold title that isn't owned by the Crown, or by local authorities, is not considered part of the CMCA. So my submission –

KÓS J:

Right, so it takes it out altogether. Yes you're right.

MR GREENSMITH-WEST:

Yes, so in that instance my submission would be that if a structure lay on freehold title that wasn't owned by the Crown or local authorities, that would exempt it from the CMT title by virtue of the fact that it doesn't form part of the CMCA.

WILLIAMS J:

But it also protects interests within the CMCA that are not freehold titles, and which are not excluded from the CMCA, doesn't it. This is section 21?

MR GREENSMITH-WEST:

I believe so. Sorry, would you be able to ask that question of me again, just so that I can be clear or refer myself to the section.

WILLIAMS J:

Section 21 does provide protection for private interests that are accepted to be in the CMCA.

MR GREENSMITH-WEST:

Yes, yes, that's correct.

WILLIAMS J:

Which aren't, presumably, freehold titles, or necessarily so.

MR GREENSMITH-WEST:

Yes, that is correct, with the exception of resource consenting. So section 21(1)(a) lists out those interests and resource consenting is not included in that.

WILLIAMS J:

That's in section 20.

MR GREENSMITH-WEST:

Yes, yes, that's right, but again as my friends from the Ōpōtiki District Council covered, the Act does not, takes an approach looking at resource consents which have already been granted, at least either exist at the time that the Act was passed, or there is the consideration of deemed accommodated infrastructure, but – and we also emphasise the importance in relation to resource consenting and the impact on renewals. So many structures such as wharves and jetties will sit within the coastal marine area and will be subject to a renewal consent from the regional council, which may potentially, well, be impacted by the RMA permission right under CMT.

WILLIAMS J:

Yes, but the vested interests, other than consents, are protected? If they vested prior to 2011?

MR GREENSMITH-WEST:

Yes, that's my understanding of the effect of section 28, easements for example may be one of them. I would like to carry on the thread of discussion in relation to accommodated infrastructure and my friends addressed that, and I don't think that I have anything more to add there. I would just refer your Honours to section 18 of the Act, and this relates to structures, or existing structures. So section 18(1) applies to any structure that is, on or after the commencement of the Act, fixed to, on, under over, any part of the CMCA.

So the way that this section works, in my submission, is that it protects the structure itself from the permission right under CMT, or at least it excludes it from the CMCA so CMT does not apply. However, there are questions in relation to, or unanswered questions in relation to, how broad this goes. So we would reasonably assume that this would not apply to or this would not impact the rights of a CMT group to exercise an RMA veto over a renewal because that is in relation to the use and occupation within the CMA which we would obtain consent from the Regional Council but there may also be questions in relation to. So if a structure was in a state of disrepair and that structure itself needed to be repaired, on one hand you may – these are the sort of practical considerations – let's say you have a wharf and it may require cosmetic changes to the structure itself in a way that doesn't impact the surrounding sort of beach or water perhaps, maybe that may be exempted under section 18, but if you've got a situation such as an underground pipe or a pipe that sets sort of half into the foreshore and seabed there may be a question of if that pipe needs to be dug out of the ground, extensive earthworks needs to be undertaken, section 18 may not protect that infrastructure and obviously there will be the opportunity to be able to utilise accommodated infrastructure provision in relation to that, but I guess I refer you to section 18 and it may be helpful for you in terms of your consideration overall about how the Act interacts with third party structures.

Your Honours, I am essentially at the end of our oral submissions because I don't want to re-tread any trodden ground. I would just briefly mention, in relation to the question of navigable rivers and other extinguishing events, we take the same position as the Attorney-General and our friends at the Ōpōtiki District Council, that the Act only revives extinguished rights in relation to the foreshore and seabed and not previously extinguished rights such as those over navigable rivers.

So if that's all your Honour, your Honours, may it please the Court those are the submissions for the Council.

GLAZEBROOK J:

Thank you very much. I think we'll probably take the adjournment and hear from you, Ms Arapere, after the adjournment, and with whatever adjustments of time are needed because you taking longer was our fault, not yours.

MS ARAPERE:

That's fine, Ma'am. We intended to be brief, not three minutes, brief, before the morning adjournment, but I think 20 minutes is all Ngāi Tai requires, thank you, Ma'am.

GLAZEBROOK J:

We'll take the adjournment.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.49 AM

GLAZEBROOK J:

Thank you.

MS ARAPERE:

Mātua ake, ki ngā mate huhua o te wā, Te Ika a Whiro, ā, te koroua mōrehu o te Rua Tekau Mā Waru, haere, okioki, whakaoti atu rā. Ka huri ki te hunga ora, e te pae o ngā Kaiwhakawā o Te Kōti Mana Nui, papaki kau ana ngā tai o mihi. E te pā whakawairua, e te pāpā nāu i whakatū te arawhata ki te rangi. Nā reira, ka mihi, ka mihi, ka mihi. Ki ngā uri o Manaaki Ao rāua ko Tōrerenui-ā-Rua, koutou e hono ā-ipurangi nei, ka nui te mihi ki a koutou, e aku rangatira. Ki a koutou katoa e karapinepine mai nei i tēnei nohoanga hirahira, tēnā koutou. Ka moe a Tūrongo i a Mahinarangi, ka puta mai ko Raukawa. Ko Raukawa tēnei e mihi atu nei.

Your Honours, as is tika, I've acknowledged those who have passed away in recent days and, in particular, I acknowledge Tā Bom Gillies, who is this morning having his final karakia before he goes on his final journey to Hawaiki.

I have acknowledged all your Honours and Ngāi Tai who are watching from Tōrere and Ōpōtiki on the livestream. This application has been pursued by Whaea Muriwai Jones and other kaumātua and due to illness they were unable to travel to court in person today but they watch the livestream. I also acknowledge Anaru Vercoe, the chair of the Ngaitai Iwi Authority. He is also watching online.

Ngāi Tai and Ririwhenua are respondents to the Attorney's appeal in relation to the interpretation of section 58. They say that the narrow interpretation of the second limb of section 58 sought by the Attorney is inconsistent with the purpose of the Act with te Tiriti and with tikanga Māori.

I will address your Honours on two matters. Firstly, I would like to provide some background on Ngāi Tai and Ririwhenua and their involvement in this proceeding. Then I will briefly address your Honours on why Ngāi Tai say the Attorney's interpretation of the second limb is incorrect. Your Honours have had full submissions on section 58 over the past week, particularly from my friends for Te Kāhui and those submissions are supported by Ngāi Tai. I will only address your Honours on matters not already submitted to your Honours in the hearing last week.

We have filed a short oral outline and that should be before you now, your Honours. Beginning first with some background on Ngā Tai and Ririwhenua, as I said in my mihi, they descend from Manaakiao who was of Te Tini o Toi. Your Honours will recall submissions from my tuākana Ms Feint last week referring to Te Tini o Toi and Toi-te-huatahi. They were an earlier people here before the Tainui waka arrived.

Tōrere Nui a Rua was the daughter of Hoturoa who was the master navigator of Tainui waka and their child was Tai who is the eponymous ancestor of Ngāi Tai. Ngāi Tai is made up of three hapū; Ririwhenua, Tainui and Ngā Pōtiki. They have been a seafaring people mai rā anō. The coastline has always and continues to have a significant role sustaining the people, their manuhiri and

their marae. Ngāi Tai share whakapapa and strong connections with their neighbouring iwi and hapū either side of them, so Te Whakatōhea to the west and Te Whānau-ā-Apanui to the east, and Ngāi Tai emphasise the shared whakapapa and mutual respect of these iwi and hapū for each other's mana and responsibilities to care for the takutai moana in accordance with tikanga. I have provided some examples in the submissions and in the outline but I won't take your Honours there.

The rohe of Ngāi Tai is from Tarakeha in the west to Te Waipuna Stream in the east. Their rohe was partially overlapped with the priority *Edwards* application and therefore they were brought into these proceedings by virtue of being neighbours with their whanaunga Te Whakatōhea.

The Ngāi Tai applications in this proceeding only include part of their rohe from Tarakeha to Te Rangi, and your Honours will recall the map in the back of the Court of Appeal judgment which shows the long thin strip to the east, which is CMT 3. I think Te Kāhui had a better version of that in their PowerPoint the other day. But two applications were brought by Whaea Muriwai Jones for Ngāi Tai and Ririwhenua and they were effectively run as one case in the High Court. The Ngāi Tai application between Tarakeha and Te Rangi was not contested by other applicants apart from their close whanaunga Ngāi Tamahaua and there, like elsewhere, their focus has been on whakapapa and whanaungatanga.

In terms of the application for Ngāi Tai/Ririwhenua, they've been on somewhat of their own track. The High Court granted CMT order 3. The Court of Appeal referred it back for a re-hearing. That re-hearing occurred in April this year and Justice Churchman again granted CMT order 3. The Attorney has now appealed that and that matter is adjourned pending the outcome of this appeal.

The main point there, your Honours, is that Justice Churchman heard all of the evidence and made orders for CMT in relation to area 3 twice.

Turning then to the interpretation of the second limb of section 58, in the Court of Appeal the majority found that the best available reading of section 58 is one that respects both its text and purpose.

On the outline, I'm probably going to go straight to the very bottom dash point. Your Honours have had, as I've said, extensive submissions on the role of tikanga in this proceeding, that MACA was intended to be a compromise and intended to reflect Te Tiriti, and this ground has been well tilled, so I'm going to turn then to ground perhaps that has not been so well covered so far in this appeal.

The Attorney urges a narrow interpretation of limb 2 on the basis of what she describes as the "clear and unambiguous requirement" to prove exclusive use and occupation. In response we note, as your Honour, Justice Kós, has done, that ambiguity has been baked into the statute and there is nothing clear and unambiguous about limb 2, in my submission, as shown by the range of interpretations advanced by the parties to this case.

In our submission the section requires consideration of the context of the Act, the nature of the physical environment over which rights in issue are exercised, and the nature of the tikanga under which the specified area is held. So in tikanga terms, exclusivity can be viewed with respect to the resource complex, as your Honour, Justice Williams, noted last week, and it's the relationship and control over the resources being maintained that is the important factor.

I'm now at the first major bullet point at the top of my second page of the outline. Turning next to the Attorney's assertion –

GLAZEBROOK J:

Can I just – I just want to make sure I've got your submission on the – so in terms of what you're saying in relation to tikanga and exclusivity, I think, and use and occupation, probably all three together, you're talking about it being relationship and control over the resources? Did I get that down right or was there something more than that?

MS ARAPERE:

So relationship with the resources and the exercise of an iwi or an applicant group's tikanga in relation to those resources.

GLAZEBROOK J:

All right.

MS ARAPERE:

Turning to the Attorney's assertion that the majority's interpretation of limb 2 does violence to the text, we say that the Attorney's reliance on the *Urlich* case is misplaced. The terminology in that judgment reflected the Court's conclusion that it was possible to interpret section 134 of Te Ture Whenua Māori and section 41 of the Public Works Act 1981 in a way that would do justice to tangata whenua, such that a plain reading of section 40(5) of the PWA would not offend the general purposes or the duty of active protection. So in that case a narrow approach could be taken because there was an alternative statutory pathway provided for in section 134 and section 41.

By contrast, in this Act, we say the Attorney's narrow interpretation cannot be justified on the basis that a separate Tiriti-consistent interpretation or pathway is available here.

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Just to round out the point on the narrow interpretation, we say that it's no answer for the Attorney to submit that this approach can be justified on the basis that underlying customary interests continue to exist even if a group is unsuccessful in obtaining recognition orders. Firstly, that submission is contrary to one of the purposes of the Act, which is to give legal expression to customary interests, and further, I support the submission of my learned tuākana Ms Feint that Parliament can't have been so cynical to have on the one hand recognised and restored rights and on the other intended to not give legal expression to those rights except in exceptional circumstances.

The Attorney urges upon this Court an interpretation of limb 2 which would require evidence of an intention and capacity to control an area as against third parties. We simply note in response, your Honours, that that requirement was in the Foreshore and Seabed Act at section 32(2)(a) but was removed from the MACA Act. The Attorney does not explain why these words should be read into the Act when Parliament decided itself not to include them.

The final matter I wish to address your Honours on is the Attorney's submission that the majority interpretation of the second limb gives the requirement of exclusive use and occupation from 1840 no work to do. We again tautoko the submissions of Te Kāhui that it is – that context as found to apply in the High Court in *Tipene* and in *Reeder* is what gives the qualitative dimension to the first limb of the test.

And the importance of context from the Ngāi Tai and Ririwhenua evidence in the High Court is that twice now they have established their own interrupted presence, the tikanga they follow on their seascape, and the teaching and obligations of kaitiakitanga and manaakitanga. So from their perspective, your Honours, the main point they wish to convey is that it's the continuity of the exercise of tikanga and the way they care for and look after their seascape.

To close, your Honours, we submit the Attorney's restrictive and narrow interpretation is incorrect. I seem to have made it to 15 minutes relatively unscathed, and unless your Honours have any questions –

WILLIAMS J:

But wait. I'm just – I haven't read *Urlich*. Can you give me a proceed of the facts so I can understand how the Public Works Act and section 134 of the Te Ture Whenua Māori Act interacted?

MS ARAPERE:

So the *Urlich* case, the judgment was written by his Honour Justice Kós for the Court of Appeal, is about –

WILLIAMS J:

Oh, should've asked him.

KÓS J:

I'll see how you go.

MS ARAPERE:

You can fill in the gaps, Sir, is about two descendants of two brothers and the land was left – oh, sorry, the land was given to the Crown for a school. When that school was no longer operating and there was an option to either offer it back under section 40 of the Public Works Act or to go down the alternative statutory pathway of section 134 of Te Ture Whenua Māori Act, the Crown –

WILLIAMS J:

Was that to apply to the Court to –

MS ARAPERE:

Yes, for a vesting order.

WILLIAMS J:

For a vesting order, I see.

MS ARAPERE:

That's right. Yes, so the Chief Executive of Land Information New Zealand has that option, and in that option there is a wider class of people who might be able to receive that land, and then on vesting it changes to Māori freehold land.

KÓS J:

It was about the meaning I think of "successor" in the Public Works Act.

MS ARAPERE:

Yes.

KÓS J:

And it was a full court in the Court of Appeal and we concluded that it was unnecessary to give that a wider contextual reading than the ordinary idea that a successor was within I think three lines of direct descent because you could go to a broader interpretation if you applied section 134, which the Crown simply hadn't thought of doing and was rather surprised when we suggested it.

MS ARAPERE:

Yes, when in fact actually the Minister for Land Information – sorry, the Chief Executive who has the power has done that in other school cases, has applied under section 134. The point for your Honours' purposes, in my submission, is that there was in that case an alternative statutory pathway. We don't have that here, and so I say that a narrow interpretation and reliance on *Urlich* should not be followed.

GLAZEBROOK J:

Can you explain why you say it's a narrow interpretation, because I mean it obviously accepts that tikanga is relevant to both limbs, so what do you say the test is under that second limb, in the sense to the extent that you say it differs from the Attorney-General's interpretation?

MS ARAPERE:

We say that that second part of the test is the – it adds that qualitative dimension to the first limb. So yes, clearly tikanga applies to both limbs, in our submission, but we say that the stricter interpretation that the Attorney-General is seeking from your Honours doesn't consider Te Tiriti and it doesn't consider tikanga in the sense of considering context and the spiritual and physical relationship of applicants with their takutai moana.

WILLIAMS J:

You agree, don't you, that tikanga also has a doctrine of substantial interruption?

MS ARAPERE:

Yes, and as discussed last week, your Honour, with my learned tuākana, Ms Sykes, the varying degrees of –

WILLIAMS J:

Of ahi.

MS ARAPERE:

– of your ahi, whether your ahi is mātaotao, ahi teretere, ahi kā roa. There has to be proven by applicants the intensity or how warm their ahi is, whether their ahi is still lit and how warm it is.

WILLIAMS J:

That's right, whether you can cook a feed on it.

MS ARAPERE:

Exactly, your Honour.

WILLIAMS J:

So, and one of the questions we're going to have to confront is what's the relationship between that tikanga view of substantial interruption and the limb 2 view of substantial interruption? Any views on that?

MS ARAPERE:

Not beyond what I've already said, your Honours. I'm very conscious of not wanting to undo my friends from Te Kāhui's excellent work laid down last week. I don't envy your Honours the task you have before you.

GLAZEBROOK J:

But you say that the interpretation that the Attorney-General puts on it is too narrow and one of them is this intention to control it against third parties?

MS ARAPERE:

Yes.

GLAZEBROOK J:

Although that would be part of the tikanga view in any event, wouldn't it?

MS ARAPERE:

Yes, I suppose my brief submission on that, Ma'am, was just that those words are not in the section.

GLAZEBROOK J:

No, I understand that, but the mana and the authority and the tikanga in relation to that area us say is vital to the test in any event?

MS ARAPERE:

Yes, I do, your Honour.

GLAZEBROOK J:

Which is what I had understood you to be saying, yes.

KÓS J:

So what's really wrong with paragraph 42 of the Crown's submissions which is the one you're taking issue with? That's the narrow interpretation.

MS ARAPERE:

Well, just to reiterate, Sir, in our submission it doesn't appropriately reflect tikanga and Te Tiriti and takes – it would effectively make the remedy, the restoration of this, a right nugatory because it would be so difficult to prove.

KÓS J:

Really?

MS ARAPERE:

Well, could be so difficult to prove. I'm wondering whether I should quit while I'm ahead.

KÓS J:

Nice try.

GLAZEBROOK J:

I must say the part that concerns me slightly in terms of the Crown's is not most of them but it's the third party recognition in the sense that one can understand why third parties wouldn't recognise it because the previously understood position was that there wasn't actually that authority and I'm hesitating to say "ownership" because, of course, that's not a concept, but let's "ownership" in in inverted commas, "ownership" by Māori in the foreshore and seabed, so it's difficult to see why – well, if you had that as an absolute requirement it becomes difficult, in any sense, for that to be proved.

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MS ARAPERE:

Yes, and again we submit that it can't have been the case that this legislation that was intended to repeal and replace the Foreshore and Seabed Act would, as I said, on the one hand restore those existing rights but on the other hand make it so impossible that people can't meet the test, your Honour.

KÓS J:

Well I think – I spent last night reading the Parliamentary Debates, all three readings, and there's no suggestion whatsoever of that from anyone. The spirit is one of reconciliation, of compromise, and of returning.

MS ARAPERE:

Yes.

KÓS J:

There were some proponents or some opponents who were arguing for a greater degree of return, but no one was suggesting that this was essentially going to be a mean-handed return.

MS ARAPERE:

Yes, your Honour.

FRENCH J:

Can I just ask, why would it be too difficult to prove when the applicant group doesn't bear the burden of proof on those critical section limb criteria?

MS ARAPERE:

Perhaps I misspoke. It could be difficult to prove, but yes, I mean those things, as it's said on that, that those things exist and it's about whether the – what an applicant puts before the Court is sufficient enough that a recognition order can be granted.

WILLIAMS J:

I wonder whether if you have a complaint it might be that if the list is treated as cumulative, because it's hard to argue against the suggestion that the rāhui is an indicator of the retention of the mana you're talking about.

MS ARAPERE:

Yes.

WILLIAMS J:

It's hard to argue against the idea that –

MS ARAPERE:

It's not.

WILLIAMS J:

– if you own the abutting land, as Justice Powell considered in the Ngā Pōtiki case, that's going to make a difference and so on and so forth. So it is hard to quibble with each of these individually, don't you think?

MS ARAPERE:

Yes, but the rubber hits the road when applicants are in the High Court with their evidence, and again it's that intensity of the relationship and what they can show in terms of imposing rāhui acknowledgement by their iwi neighbours of their existence.

WILLIAMS J:

Yes, it's the –

MS ARAPERE:

Mana.

WILLIAMS J:

The difficulty faced is where whatever rights and powers are exercised, they are necessarily impaired, at least in the 20th century. How impaired do they need to be before you lose them, that is where the rubber hits the road.

MS ARAPERE:

Yes.

WILLIAMS J:

But that's – the Crown's suggestion, suggested list here is a list of indicators of insufficient impairment, including simply making submissions to a local authority or being on the local authority's consultative committee or whatever, being the tangata whenua and the kaitiaki, which is a pretty soft way of exercising power but accepted by the Crown as sufficient, perhaps not in and of itself, but a good indicator.

MS ARAPERE:

Absolutely, your Honour, they are good indicators, but I think from a tikanga Māori perspective it would be more about your mana and ability to, for instance, lay a rāhui and for your neighbours to acknowledge your mana to do that.

WILLIAMS J:

To comply. Yes, but that's accepted as an indicator, I suspect for myself probably the strongest indicator.

MS ARAPERE:

Yes.

WILLIAMS J:

Because it's a pure exercise of power, but that's – no one's arguing against that.

MS ARAPERE:

No, yes.

WILLIAMS J:

So is the problem the vibe?

MS ARAPERE:

With the Crown's approach, your Honour?

WILLIAMS J:

Yes. I mean we do need to drill down into this because, as you say, this is where the rubber hits the road and there seems to be a great deal of contention about words and perspectives with violent agreement over factual consequence.

MS ARAPERE:

But no violent agreement on the interpretation, your Honour?

WILLIAMS J:

Well it does make me think the interpretation may not be as big a deal as you think it is or as the parties think it is, given that there doesn't – in the middle ground, including the middle ground occupied by the Attorney, the very indicators that one would expect would indicate continuation are accepted to indicate continuation, despite a century and more of impairment?

MS ARAPERE:

Yes, your Honour. I think bringing it back to Ngāi Tai and Ririwhenua there, their main point in that they wish to convey to this Court is the continuity of their exercise of tikanga in the way that they care for and hold mana over their

seascape and their little part of their rohe that is within this proceeding your Honours.

I don't think I can take you any further than that, your Honours. Unless there's anything further, those are my submissions. E ngā kaiwhakawā.

One final minute, sorry, your Honours. I don't intend any discourtesy at all but if I might be permitted to attend the rest of the hearing online I would be very grateful.

GLAZEBROOK J:
Absolutely.

MS ARAPERE:
Tēnā koutou.

GLAZEBROOK J:
Thank you very much. Ms Roff?

MS ROFF:
Tēnā koutou. Ms Roff for the Attorney. I'm going to be covering off what is issue 2, ground 2 of the Attorney's appeal, and that's in respect of extinguishment and what that means for navigable rivers.

I think in the hand up, or the hand up that we gave to your Honours last week, said that I would be addressing navigable rivers today and also issue 4 which covers off overlapping multiple CMT orders but I see that we have – there's a further slot for the Attorney on Friday to address interested party submissions in relation to specific appeal. So what I might do, so as not to put too much pressure on everyone today to get through what we need to do, I might just address your Honours on that Friday if I need to. There may be that there's not too much to add than what the written submissions provided.

So what I'll do today is just cover off issue 2. We've handed up a road map for today and it's hyperlinked. Your Honour should have that.

GLAZEBROOK J:
Yes.

MS ROFF:
That is how I intend working through the material. Some of the points have been covered off this morning.

KÓS J:
Just to be clear, we're in your submissions of the 20th of September and paragraph 47 just so I've –

MS ROFF:
That's right, your Honour, yes, Sir. They run from paragraph 47 through to 56 of those written submissions and then I've handed up this morning a two-page road map which I will – it's an outline of my oral submission this morning and I'll work through that.

I thought that it may be helpful before I get onto the main submissions just to cover off some just preliminary issues in terms of thinking about why rivers are included in the CMCA and what has happened as a result of the High Court's decisions in respect of the Waioweka River. So what I'm intending to do is following the road map, take your Honours through just some of the preliminary definition provisions in the Act which sets out why rivers do come within the CMCA and then I'll go and cover off, give an overview of the common law doctrine of extinguishment, and why the Attorney says that's a different concept from substantial interruption, and then I will address why the Attorney says the statutory vesting of navigable riverbeds by section 14 of the Coal-Mines Act Amendment Act 1903 is sufficiently plain and clear to extinguish customary title in those riverbeds, and lastly why the Attorney says that the Court of Appeal got it wrong to treat section 11(3), which is the divestment provision in the Act,

as reviving customary interests when divestment occurred on the commencement of the Act.

So, just by way of summary, you'll see there at point 1 of the road map what the Attorney says is that the error that the Court of Appeal has made here is to treat or approach extinguishing events that occurred prior to the commencement of the Act as being revived by section 11(3) of the Act and we say that's wrong. 1220

That the Act was never intended to revive other than those rights specifically provided for in section 6 so those rights that were extinguished by the foreshore and seabed, it wasn't intended to restore or revive historical extinguishments, and so the Act was intended only to recognise extent, customary interest only, and there's nothing clear or expressed in section 11(3) which reinstates customary interests that have been extinguished historically before the Act came into force.

But before I do that, just looking first at the area of the ground of appeal, I guess, that the Attorney's concerned with here. Riverbeds are clearly included as part of the marine and coastal area and then they can form part of the common marine and coastal areas, that's the CMCA, that's over which CMT can be recognised, and we'll just bring up on the Clickshare the Act itself and take you to definition 9 of the Act, and the reason why this is the case, if we start with the definition of the "marine and coastal area" you'll see there it says it "means the area that is bounded, on the landward side, by the line of mean high-water springs; and on the seaward side, by the outer limits of the territorial sea;" and then relevant for our purposes it includes "the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and includes the airspace above, and the water space (but not the water) above," and the areas described in paragraphs (a) and (b); and then includes the subsoil, bedrock, and other matters there. So that's the "marine and coastal area" definition.

If we go now to the definition of the "common marine and coastal area", that's in a key definition in the Act, that means "the marine and coastal area", which I've just taken you to, "other than", and there's specific carve-outs here. You'll see: "Specified freehold land located in that area;" and then: "Any area that is owned by the Crown and has the status of any of the following kinds," and there are specific then carve-outs in respect of conservation areas and reserves and national parks.

So that brings the rivers within the common marine and coastal area, but in order to – we still need to go to the Resource Management Act because that's what we referred to in the definition of the marine and coastal area. So if we, on the road map, can go to the Resource Management and the definition there of "coastal marine area" and that means "the foreshore, seabed, and coastal water, and the space above the water," so this is similar to the previous definition in the MACA Act, but you'll see there that, "of which the seaward boundary is the outer limits of the territorial sea;" and: "of which the landward boundary is the line of mean high water springs, except where that line crosses a river and the landward boundary at that point shall be whichever is the lesser of 1 kilometre upstream from the mouth of the river; or the point upstream which is calculated by multiplying the width of the river mouth by 5," and in order to calculate – what you need in order to calculate the extent of the CMA within the river is the definition of "mouth" within the RMA. So you'll see there the mouth, "for the purpose of defining the landward boundary of the coastal marine, means the mouth of the river," and then it's as agreed and set between the Minister of Conservation, or as declared by the Environment Court.

So what here, in respect of the river that we're dealing with, there is an agreement between the Minister of Conservation and so there is a calculation in terms of the extent of the CMA within the Waioweka River and if we have a look at that, I know that Ms Hill, my friend from the Regional Council, took you to the map of what the river looks like now but this is the map that we're dealing with here that you can see. This is document 345.20703 which is part of the Attorney's map book that was before Justice Churchman. So this is what Justice Churchman was looking at when he was hearing the case and you can

see this is what was the mouth of the Waioweka River – and I just wondered whether we could make that a bit smaller, Ms Moinfar-Yong, because just to put it in context, you'll see the box up on the left-hand side there which shows that the white boundary areas are the hearing area, and then you'll see the Waioweka River is the red box, so it's right in the middle of the hearing application area, and you'll see from the legend the boundary, the teal line, the coastal plan CMA boundary and you'll see that on the map. So that is the extent of the CMA boundary which has been calculated in accordance with the river mouth and according to the – within the – sorry, the definition of the CMA and the RMA but there are actually – you'll see there's two CMA boundaries here and that's because we're actually dealing with two rivers, the Waioweka River and the Otara River, and then they converge and flow out into the eastern bay there.

So this is the area where, this is, sorry the CMA, and so the area where CMT was possible but what Justice Churchman found that because of the extinguishing event of the vesting under the Coal-mines Act that actually it wasn't able to be recognised. So I think I've heard a couple of submissions that the effect of Justice Churchman's decision was to take this area out of the CMCA. It doesn't. It's still within the CMCA but it wasn't recognised and it's outside of the CMT area so outside of the area where the Court granted CMT. And that was because on the evidence, Justice Churchman said that the river was navigable and that as a result that he followed the *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277 and therefore section 14 of the Coal-Mines Act was applicable which meant that the historic vesting of the riverbed to the Crown extinguished all customary rights in the river.

If we go now to the, just bring up the map again that you've seen this morning, that's it, the CRHL submissions at paragraph 12, so that's the map you've seen already this morning and you can see there the effect of the order that the Judge has made, the CMA, sorry the CMT order, whereas instead of the customary marine title extending into the inner reaches of the river, the effect is that the line of the CMT order is just the mean high water springs mark which runs along the outside of the mouth of the river. I can see there at paragraph 13, obviously

the black line is the CMT boundary, not the CMCA boundary, based on the High Court's decision that was ultimately overturned by the Court of Appeal.

ELLEN FRANCE J:

So, sorry, the river in terms of being part of the CMCA would go all the way down to the bottom of the map then?

MS ROFF:

Yes, that's right, where the green area, I think it is, is marked on this, that's right but it still stays within the CMCA but it doesn't have CMT recognised in that area so it's not within the CMT area. So that obviously, that finding was appealed by Te Kāhui and that was overturned by the Court of Appeal and so now what the Court of Appeal says was actually CMT is available in that area that we can see as green now.

Addressing your Honours on, I'm moving now to paragraph 4 in the road map, so the effect of section 58(4) in the Act is that customary marine title cannot be recognised if the underlying rights have been extinguished as a matter of law, and I did want to address your Honours on just there is no guidance in the Act, if you like, of what will amount to those extinguishing events but – so it is necessary to go to the common law in order to understand what that means and I say there and that's the clear and plain extinguishment is well established. 1230

So the Attorney absolutely accepts that these customary rights cannot be taken away by a sidewind, extinguishment must be clear and plain, and the intention must be clear and plain. So it maybe that extinguishment may be expressed directly in the legislation itself, or it can be implied from the statutory scheme, but it's not necessary for the statute to refer expressly to customary property.

So there a number of examples in New Zealand context in particular where customary rights have been, title has been extinguished, and that's through sale to the Crown, investigation of title through the Native Land Court and

subsequent deemed Crown grant. So it can be by legislation or executive act, but whether or not those interests have been extinguished –

WILLIAMS J:

Well it can't be by executive act. There's clear law on that.

MS ROFF:

In my submission Sir it could in terms of if there was a particular interest or right that was granted, that in terms of the legal right that was granted, if it was so inconsistent with the legal rights of the customary interests that it couldn't co-exist then that would be sufficient.

WILLIAMS J:

Not by executive act. Unless there's some statutory power to extinguish, the executive can't extinguish by fiat. It's a case called *Nireaha Tāmaki v Baker*, a Privy Council decision.

MS ROFF:

I'm aware of that case sir. Here I would say we have obviously a piece of legislation.

WILLIAMS J:

Sure, but you're talking about that list of possibilities. Executive action is not one of those possibilities unless it's pursuant to an authority that allows extinguishment.

MS ROFF:

So if there was a, I'm thinking of say *Wik*, the Australian case where there were pastoral leases that were granted, and looking at particular leasehold interests. If those leasehold interests granted exclusive use and occupation, and the nature of that interest was, and this is taking the approach the Australian court is taking in terms of comparing the legal rights of each customary rights, and the right that is granted with it, that was so inconsistent then that would be enough to extinguish the customary rights.

WILLIAMS J:

Well *Wik* says those rights aren't extinguished, except in narrow circumstances, and in New Zealand the authority is if customary law is in contention, then a mere proclamation by the executive that a customary title I should say, a mere proclamation by the executive is not enough to extinguish it.

MS ROFF:

For our purposes you're right Sir. We do have a piece of legislation here and so that is what my focus is on.

WILLIAMS J:

Yes, that's the focus, yes.

MS ROFF:

Yes, absolutely, thank you.

ELLEN FRANCE J:

I'm just not quite sure then because pastoral leases, there's some power behind that, isn't there? So I'm not quite sure what you mean by, when you talk about executive fiat.

WILLIAMS J:

I think that was my phrase.

MS ROFF:

I didn't use that phrase. The focus – what I want to do is focus on the legislation that we have, and the nature of the rights that is created by that legislation. The wording of the legislation, and the nature of the title that is vested in the Crown, and I'm going – I will get onto that, I'm intending to get to that next.

ELLEN FRANCE J:

No, that's fine. So you're not really going beyond the effect of this Act?

MS ROFF:

No I'm not your Honour.

GLAZEBROOK J:

Well except that you did start with saying that it can't be recognised if it's been extinguished as a matter of law, then you went on to say what that meant. So in fact you are going outside of the Act to the extent that you're saying you have to look what extinguished as a matter of law means in the general law. That's what you just submitted.

MS ROFF:

Yes I am your Honour, I am, but when I say I'm not going outside the Act, I'm talking about not going outside the particular piece of legislation that the Attorney says extinguished the rights here. So the coalmining legislation your Honour.

GLAZEBROOK J:

Okay. That's fine.

MS ROFF:

Thank you. Sorry if that wasn't clear. So my – what I was trying to do, the point I was trying to make is that, and I think I refer to it in terms of here we have a piece of legislation, what is crucial in my submission is that extinguishment can also arise where a property interest is created, and here we have it by legislation, that is so inconsistent with the customary title that it cannot survive the creation of the inconsistent interest, and that was the point I just made to your Honour Justice Williams, and of course – and here I'm thinking about fee simple titles that are granted in legislation. It also –

GLAZEBROOK J:

They're excluded anyway under this Act so I don't think that helps you. I mean if you're going to stick to the Coalmining Act, perhaps just stick to it.

MS ROFF:

Okay, I probably should stick to the Coalmining Act.

GLAZEBROOK J:

I think you should.

MS ROFF:

I'm going to narrow that right down and stick to the Coal-Mines Act. I think that's hard enough actually sticking with that, so I will do that. I was going to make some more general submissions, but I won't, I will leave those and I will leave them as set out in my road map. They are in the written submissions as well.

I will move on to a slightly off-piste, probably no less difficult, but the difference between substantial interruption and the concept of extinguishment, and I set this out at paragraph 6, and there has been a number of submissions made last week, and this morning as well. I agree with my friend Ms Hill's submissions that the concept of substantial interruption and extinguishment are distinct, and that is because I say the extinguishment is the consequence of legal events, and that could be, as we have here, creation of an interest that is legally inconsistent with customary title such that customary title cannot survive, whereas substantial interruption is the consequence of factual circumstances that have led to the practical inability of a group to use/occupy the area or to exercise control of that area, and it was interesting listening to my learned friend Ms Feint talk about how she conceptualised these two concepts, and what I took her to mean is that there was a subset and a superset. So the superset was substantial interruption, and then extinguishment was part of that, and I think it's more helpful to look at it as, in terms of two separate concepts, but they may intersect, they intersect in the middle. So you may have circumstances where they overlap, but in some situations you may not, and it may be helpful to think about the circumstances when that would apply, and I think some of them have come up this morning already in terms of the conversations that have been had.

So a situation that I could think of where you have extinguishment but with no overlap of substantial interruption, could be the vesting of the foreshore lands to the harbour board under legislation. So that's the extinguishment as a matter of law, but then you could have continued exercise of authority by an applicant

group in that area. So the area still – sorry, the group still continued to use and occupy the area. So there's no substantial interruption as a matter of fact but those customary rights have been extinguished at law.

The next example where perhaps you've got that grey area in the middle, the extinguishment ends, substantial interruption overlap, so same situation, the vesting of the foreshore lands to the harbour board. They hold a – that's the extinguishing event, but the area has been used to establish or construct a port and subsequent heavy use of the area by vessels leased to the group no longer using and occupying the area, or perhaps not being able to point to any examples of how it controls the area.

Then the third example is substantial interruption with no overlap of extinguishment and that would be, could be the harbour project area, some of that area, but also heavy intensive use of area by boats, and these examples perhaps the *Ngāti Pahauwera* case where there is commercial shipping lanes, and the practical effect is that the group does not use and occupy the area. The group cannot point to any examples of how it controls a particular area but those rights have not been extinguished at law.

Another example of that perhaps, and we heard that this morning, and I was a bit nervous about saying it out loud actually because there's lots of "Ps" involved, in the Pan Pac pipe by Ngāti Pahauwera, but that was an example where the Court found it's actually obiter in the end because the Court didn't actually make a recognised CMT in the area.

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But the Judge did find that because of the pollution, it was a discharge pipe from out to sea from the Pan Pac organisation factory, and what it meant was that the – on the evidence as a matter of fact, the group in that area, their evidence was that they hadn't actually used the area or collected kai since around the 1970s because of the extent of the pollution in that area. So in my submission that would be another example of where you've got substantial interruption which is sitting with no overlap with the concept of extinguishment.

KÓS J:

So that if the pipe ceased to be used, or in the other example I gave, the groyne was washed away in a tsunami?

MS ROFF:

You did. Yes, and I was thinking about that, Sir, and I – what I thought may – this may be dangerous because I'm thinking out loud here – but in the Act there is some flexibility in the Act I think for circumstances such as those, and what I was thinking about is section – I wonder if we could bring that up please, Ms Moinfar-Yong, section 111 in the Act, and if you have a look at that you'll see there that it says: "Recognition orders may be varied or cancelled." So: "The Court may vary a recognition order, including" – and it says there: "Varying any of the matters referred to in section 109(2)."

And if we go to section 109(2), which is the form of recognition orders, it says there the matters the recognition order – at subsection (2), sorry, the order must specify the particular area of the marine and coastal area which the order applies, and I wondered whether that may be an opportunity perhaps for say for example in the situation that your Honour Justice Kós referred to, if there were some fundamental change in the landscape which meant that – environmentally which meant that that was no longer interrupting a group's use physically in terms of them being able to access that, whether the Court may be able to – a party may be able to make an application under there, and I see that it says –

KÓS J:

Or indeed just a new application in relation to that bit of land that had been excluded from the CMT anyway, because –

MS ROFF:

Yes, that's – yes.

WILLIAMS J:

You can't.

FRENCH J:

No.

ELLEN FRANCE J:

You're out of time.

KÓS J:

Out of time?

MS ROFF:

Oh, yes, you can't, you're out of time.

KÓS J:

Oh, you're right, okay.

MS ROFF:

Yes, sorry, because of the… but you could perhaps –

KÓS J:

Right, so section 111 becomes important.

MS ROFF:

But just to follow that thread through though, section (2) says the Court may vary it only if the requirements of section 58, section 51, as the case requires, are met by the variation, so you could still – I guess that's what you'd be coming under that to say there's no longer a substantial interruption, and I just note that subparagraph (6) of that Act – sorry, that provision says that sections 101 to 108 apply within necessary modifications, so that would mean, just in case my friends from the regional council were getting nervous, that section 104, 105 – 104, it does say the interested parties could appear and be heard on an application, so it still potentially could mean that third parties could make submissions.

GLAZEBROOK J:

What you're really saying is that power to vary or cancel isn't just vary to remove, it could be varied to recognise rights which haven't been extinguished but have come back into – been revived?

MS ROFF:

Yes, potentially, yes. And it's all premised on the basis of course that because the Attorney's position is substantial interruption doesn't amount to an extinguishment, but those rights are still there.

GLAZEBROOK J:

Yes.

MS ROFF:

And I note that – and there is practical examples of that looking also at paragraph – sorry, section 94 of the Act. It says there: "Recognition of protected customary rights and" – so PCRs and CMT, they can be recognised as we know through an agreement made with the Minister under section 95, or subparagraph (b), by an order of the Court made on application under section 100. And what often is the case is that applicants have done both, so they filed applications with the Court by the deadline but also they have Crown engagement applications in as well, so there's two pathways, and I know at least one example where a particular group entered into negotiations with the Minister. Was not satisfied with what the Minister decision, what was agreed by the Minister, and then went and pursued the same issue in the High Court. So I'm not sure there's anything – I'm not sure I want to be recommending this, but there doesn't seem to be anything in the Act that would stop that if those rights are not extinguished of course.

WILLIAMS J:

So substantial interruption can be temporary?

MS ROFF:

Substantial interruption is all about the facts and I guess if those facts – the factual circumstances changed, in my submission there could be an opportunity to – if those rights have not been extinguished, to see, to go back to the Court.

KÓS J:

Well that's part of your argument. I mean part of your argument is that there's a group which is asserting that it holds according to tikanga, but it fails because there's been a substantial interruption in the past. Now that substantial interruption may have come to an end, on your argument, but you still say there was a substantial interruption. So the fact they hold according to tikanga under the first limb may not get them home. I think that's your argument. Or maybe they don't hold onto tikanga either. You might have both limbs covered.

MS ROFF:

Yes. The limb 1 is still required to be met, and I know that there hasn't been submissions around this because no party is challenging the Court of Appeal, but that still is, you know, that is still something that needs to be proven, and in terms of showing control and authority in a contemporary sense, that was the, Justice Miller's test in respect of the first limb. So it's still necessary to bring evidence and show that.

KÓS J:

But the interruption can be both physical and temporal right?

MS ROFF:

Yes.

KÓS J:

And it may well be that for a period of 30 years or something, or much longer, perhaps four generations after 1840, the applicant group or its members can't show that they exercised tikanga, or that there was something that prevented them from doing so, and you would then say well substantial interruption kiboshes that.

MS ROFF:

Yes, if that's the evidence that's before the Court yes. Yes.

WILLIAMS J:

So Pan Pac closed?

MS ROFF:

Pan Pac was – well, that's still, that's Ngāti Pahauwera that is subject to appeal.

WILLIAMS J:

No, the pipe. Pan Pac closed?

MS ROFF:

Pan Pac has closed?

WILLIAMS J:

Yes, or is about to.

MS ROFF:

Oh, okay. I didn't know that.

WILLIAMS J:

I understand so. The Whirinaki Mill?

MS ROFF:

It is at Whirinaki, yes.

WILLIAMS J:

Is closing because of electricity prices, I am told in the press, and therefore the outfall may no longer be used.

MS ROFF:

I am quite surprised about that, sorry, just because I have a family member who works there.

WILLIAMS J:

Oh dear. Well I'm sorry to be the bearer of bad news.

MS ROFF:

I'll just text him and tell him. In that case, well it is, Justice Churchman's in that case are obiter because he didn't actually go on to make the CMT order in respect of the area where the Pan Pac pipe was because –

WILLIAMS J:

There were bigger things at stake, yes.

MS ROFF:

– for other reasons, there were other reasons about that. So in the end there wasn't a CMT order or, it is just, it is obiter comments in respect of that.

WILLIAMS J:

So you see if tikanga has a doctrine of substantial interruption called ahi kā, your suggestion is that the doctrine of substantial interruption referred to in limb 2 is different.

MS ROFF:

It may be different. As you're aware, your Honour, the Attorney's case is that tikanga is relevant to limb 1 and limb 2. Limb 2 involves –

WILLIAMS J:

I guess there are two ways of thinking about this. One is that say a non-user from the 1970s, which probably for Ngāti Kahungunu is yesterday, would not be sufficiently substantial interruption, but Justice Churchman said it was, I presume, I haven't read the judgment.

MS ROFF:

Yes, yes he said it was, yes.

WILLIAMS J:

Now the question is how do we derive those two measuring approaches, and on what basis.

MS ROFF:

This is difficult. I know it's no answer to say it depends on the facts because I, you know – but the way that the Attorney sees this is that you have, I guess, a spectrum and a scale, I guess, of use when you're looking at here – we are talking about, I think, coloured by physical use and occupation. I understand what your Honour's saying in terms of tikanga and that is different, or it may be different. No?

WILLIAMS J:

I don't think it is.

MS ROFF:

Okay. That makes it a lot easier to explain then.

WILLIAMS J:

I mean it's back up by spiritual relationship –

MS ROFF:

Yes, but in terms of ahi kā –

WILLIAMS J:

– and an entirely different way of thinking about rights and resources but it's expressed in use and occupation and the exercise of mana –

MS ROFF:

Okay.

WILLIAMS J:

– which is not unlike western law. It just comes from a completely different perspective. It's just not unlike any law, frankly.

MS ROFF:

Yes. So the Attorney's case is very much in terms of this second limb, that it does need to be sensitive to tikanga, but there is definitely as well some common law property concepts in there as well. When it comes though to substantial interruption, and I will find this and provide it to your Honours because I think it might be quite useful, we found a useful framework that's put together by Professor Richard Boast and it's his work entitled *Foreshore and Seabed*. It's a LexisNexis work that's dated 2005 and it actually concerns the foreshore and seabed but I think it's just as helpful when looking at this Act and looking at what "substantial interruption" means because his comments do actually focus on section 32(2) of the Foreshore and Seabed Act which concerned territorial customary rights but there was still in that, there was still a requirement for exclusive use and occupation without substantial interruption from 1840 to the present day. So I think it is still relevant.

WILLIAMS J:

Is this where he said it was impossible to work out what the revision meant?

MS ROFF:

No, it's not that bit.

WILLIAMS J:

Okay.

MS ROFF:

What he says, he says that exclusive use and occupation can be seen on a continuum or a spectrum of intensity of use with exclusive use and occupation of the area by the applicant group at one end and then you've got exclusive use and occupation by third parties at the other. So that the – what he looks at, he says the uses by others in the area, he says it's useful to look at them as whether or not they destroy the exclusive use and occupation by the group in fact, which is what the Attorney says is required under MACA. He comments, and I agree, that some uses are not inconsistent with the exclusivity. So, for example, casual swimming, surf casting, fishing, arguably not use and

occupation at low levels unless they reach a level of intensity that any possibility of real exclusivity has been obliterated, and so what he does he approaches the question in terms of intensity of adverse use and he works along a continuum where at one end of the extreme you have a construction of a port, he refers to the Mount Maunganui one, and at the other end you've got one lone surfcaster, an isolated beach at Cape Runaway, and so what though, what is the tipping point? When does exclusive use and occupation of a group as a matter of fact, when does that occur, and what he says it's when it's supplanted by exclusive use and occupation of others, and he very much said that that approach recognises the modern day realities of the use – or we say, sorry, that that does recognise the modern day realities of the use of the takutai moana.

KÓS J:

Supplanted by the exclusive use of others or just the use of others?

MS ROFF:

Exclusive use and occupation of others.

KÓS J:

By others?

MS ROFF:

Of others, yes.

KÓS J:

That seems to take you to the other end of the spectrum. It must be short of that, I would have thought.

MS ROFF:

Yes. That's the extreme, isn't it, when you're tipping –

KÓS J:

That's right, exactly.

MS ROFF:

Absolutely, and so what the difficulty of the Courts is where is that? Where do you – where is that tipping point?

WILLIAMS J:

But it does actually, I think that test does carry some weight, again going to the *Ngā Pōtiki* decision where there's extensive use by others, can't really say occupation, of the foreshore area because it's too hard to occupy the foreshore area in any intensive way, but it wasn't enough because of the strength of connection and activity by the local hapū.

MS ROFF:

Yes, and bringing it back to the Attorney's test as well, what does that mean in terms of exclusive? I think your Honour said "well what does that mean". Well we say of course exclusive means it requires a group to manifest both an intention and ability to control the area as against third parties.

FRENCH J:

So where does substantial interruption fit in? If that's a distinct element.

MS ROFF:

It seems to come from the Australian jurisprudence, the Australian Act, but that requires – I just had some notes on that, sorry your Honour, I'll quickly have a look. It is somewhat different because in the Australian case I think you have to show uninterrupted, a connection with the land that is substantially uninterrupted. I think that's, just off the top of my head, I think that's what's required under the Native Title Act.

WILLIAMS J:

Yes, not exclusive use and occupation, but connection.

MS ROFF:

It's the connection, that's what I was going to say your Honour. So even though the substantially uninterrupted is a phrase that we have adopted in limb 2, in

my submission those cases, those Australian cases are not relevant because they are purely focused on the spiritual connection, whereas we do have this test of use and occupation and in my submission that does bring in some physical element, a physical presence that is required in the area in order to meet the test, which is more in line with the Canadian jurisprudence.

FRENCH J:

Yes, but can there be substantial interruption and exclusivity at the same time. So in other words what does substantial interruption add given that the article you quoted from was talking in terms of exclusivity?

MS ROFF:

Well substantial interruption means that the group's exclusive use and occupation of the area has been interrupted.

WILLIAMS J:

They're heads and tails, aren't they?

MS ROFF:

Yes.

GLAZEBROOK J:

Just again, I still have some difficulty with this ability to exercise authority when in fact there was no lawful ability thought – there was thought to be no lawful ability to do so for a number of years.

MS ROFF:

Yes, and just a point as well, in terms of what the Attorney's case is, some comments around if it would be enough or sufficient just to assert an intention or protest, an unsuccessful protest, whether that would be enough. The Attorney's case is that it's necessary to show absolutely an intention to control an area, and that would meet that part of the test in terms of a particular group's activity in environmental matters, in terms of protest or making

submissions to local authorities, that would absolutely go to that part of the test, and then there does need to be, the Attorney says, an ability to control as well.

GLAZEBROOK J:

Well what does that mean. If you don't have the ability as a matter of law to do anything of the sort.

MS ROFF:

Well what the Attorney says is that when, when I'm referring to ability or capacity to control, we don't say that you require a legal ability to enforce those rights. It's not, it's basically, it does need to be a recognition by other groups, but it doesn't need to be backed by law, and those examples that we've been given –

GLAZEBROOK J:

Well I can understand a recognition by other iwi or hapū because that's part of the whole customary title, but somebody who says "by law you don't own anything at all and I can do what I like", and as the law was understood, could, why should you require somebody – I mean I do understand that in many instances there will be a real recognition of rāhui, and more generally people do tend to respect them to the extent that they know about them and understand them.

MS ROFF:

Yes, absolutely. That's been my experience of being involved in these cases, that they are generally respected and adhered to, and I do have a number of –

GLAZEBROOK J:

Well, is that enough, or if somebody said "no you can't fish here" and they say "yes I can" and they, and actually even under the current law they can, in terms of the compromise.

MS ROFF:

What I might do your Honour, because I do have, I think it is helpful if I go through some of these reasons, but I just notice that it's 12.59 right now.

WILLIAMS J:

Saved by the bell.

MS ROFF:

I'm quite happy to proceed if you would like.

GLAZEBROOK J:

No, no, maybe after the adjournment.

MS ROFF:

Thank you.

WILLIAMS J:

I wonder, just this is a parting comment for you to think about, I wonder if the test can be no more than you have to establish that you've done all you reasonably can and you haven't given up?

GLAZEBROOK J:

Coupled with use and occupation, I can understand the Attorney's submission that it's not enough to say we don't have anything to do with this area because we've been pushed out of it altogether, but we still assert that we –

MS ROFF:

Yes. That would be evidence – the Attorney's position is that it needs to be – that would be evidence that goes into the overall assessment of the that wouldn't be enough in and of itself.

GLAZEBROOK J:

No, no, I understand that submission.

MS ROFF:

Yes.

GLAZEBROOK J:

Because I know that you say it has to be use and occupation.

MS ROFF:

Yes, but absolutely it is sensitive to factually what's happening on the ground and the practical reality of what is happening and what is – what the groups are capable of, but perhaps I could address that after the lunch –

GLAZEBROOK J:

Yes, certainly. Thank you.

MS ROFF:

Thank you.

KÓS J:

Can I just say, it's also where section 106 seems to be quite important, section 106(2), because that's only about use and occupation, not about substantial interruption, and those obligations, the counter-obligations are thrust on you, not the iwi applicants.

MS ROFF:

On third parties, Sir, yes.

KÓS J:

That's right.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.17 PM

MS ROFF:

Thank you your Honour. I thought what I might do is just answer the questions that you put to me before the lunch break, and I have a hand up as well to give to your Honours, and then I'll get back on track with the map of navigable rivers. Your Honour asked whether, or the difficulty I think you said you were having with the Attorney's case perhaps was not necessarily the intention in terms of groups showing they have the intent to control, but the ability or capacity to control a particular area. So again just to be clear the, what the Attorney says

about that is that the demonstrating an ability or capacity does not require a group to be able to show it has the ability backed by State law to control the area, and accept the legislation does not and could not expect the groups to be able to show that. But the overall assessment, in my submission, can still be made that the ability of particular groups to control an area hasn't been lost, and I thought it may be helpful –

GLAZEBROOK J:

Has *not* been lost?

MS ROFF:

Not been lost your Honour, yes.

KÓS J:

The trouble is when you use the word "control" it doesn't really help. What on earth does it mean?

MS ROFF:

Well I – this is perhaps a hand up I'm going to give your Honour that may give some examples of what that looks like.

KÓS J:

Right.

MS ROFF:

And that's what the Attorney's case. We need to be focused on the factual practical reality of what's happening on the ground in particular areas for particular groups. So if I could just hand up a table, and we'll distribute these to the parties as well. At the same time I've just got these to hand up as well. This was the *Foreshore and Seabed* extract from Professor Boast's textbook that could be helpful to your Honours.

GLAZEBROOK J:

Is that the extract you were talking to us.

MS ROFF:

Yes.

GLAZEBROOK J:

Thank you.

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MS ROFF:

So you'll see the table that we've handed up, what we've done is gone through the cases that have been decided to date and extracted out the references and evidence of where the Courts have found an intention and capacity to control the particular area, and these are examples that the Attorney says show that the ability has not been lost in terms of not only showing an intention, but also the capacity to control, and you'll see that the –

KÓS J:

Meaning what?

MS ROFF:

What was that sorry, Sir?

KÓS J:

Meaning what? Back to the word "control"?

MS ROFF:

That is in terms of –

GLAZEBROOK J:

And capacity.

KÓS J:

Yes.

MS ROFF:

The capacity to be able to – in terms of what "control" means, you're saying, sorry?

KÓS J:

Mhm.

MS ROFF:

In terms of being able to show authority, have authority over the area, and this is what we say exclusive use and occupation means, in order to maintain exclusive use and occupation across the period from 1840 to the present day. And so perhaps it's more helpful for me to take you through the practical examples of what that means and how the groups have proven their case and the courts have accepted the evidence that's been provided to them.

You'll see the first one there is *Ngā Hapū o Tokomaru*. That's the Tokomaru Bay case that was determined earlier this year that was heard by Justice Cull. So in that case, these examples in this first one is these probably relate to the ownership of abutting land and how that was useful and helpful in order for particular groups to control areas in terms of access points to the takutai moana. Not only that, you'll see there's the bolded areas. That was – the Court relied on evidence from witnesses of the steps they took in their role as kaitiaki of the kaitiaki – in terms of exerting control, and that's in terms of protecting access to boat landings and also in terms of steps taken to protect fisheries, such as the return of kākāpō, which is a significant waka launching site in that case and the subsequent conditions of – sorry, imposition of conditions on access, so controlling access to those particular sites.

Over the page, another – an example, we've got headings of: "Exercise of non-commercial customary fishing rights." And the first one there, that's the Wairarapa case that Justice Gwyn delivered earlier this year, and that case was persuasive that two of the hapū in that particular case had gazetted rohe moana in respect of the application area under the Fisheries (Kaimoana Customary

Fishing) Regulations 1998, which enabled those hapū to manage and control customary fishing within the area.

ELLEN FRANCE J:

So if we take for example the one that refers to the hapū having the ability to recommend restrictions for the Minister to consider?

MS ROFF:

Yes.

ELLEN FRANCE J:

If the Minister rejects those recommended restrictions, does that matter on your analysis?

MS ROFF:

It would not – not in the overall round of the evidence. What the Attorney would be looking at, yes, that would be an example of meeting the intention to control, intention, it may not meet the requirement of the capacity, but it's a matter of looking at the evidence as a whole in the round, not just one particular strand. So if that was the only evidence that the party presented to support its case, then no, it wouldn't meet the test in terms of what the Attorney says the test is, but that would be just one strand of the overall evidence that the Court would consider when making a finding in terms of the exclusive use and occupation of the area.

WILLIAMS J:

In the first reference to *Re Ngāi Tūmapūhia-a-Rangi Hapū* [2024] NZHC 309 you refer to Te Ātiawa. Is that a typo, or? In the second paragraph. Second box, second paragraph on the first page.

MS ROFF:

What page is that, Sir?

WILLIAMS J:

"The Court held that Te Ātiawa had retained ownership." That doesn't seem right. It is right?

MS ROFF:

I'd have to check that, Sir. Sorry.

WILLIAMS J:

Which – is this a different Te Ātiawa to the Te Ātiawa in Wellington?

MS ROFF:

I'd have to check.

WILLIAMS J:

Okay, all right, someone's going to fix that, don't worry.

MS ROFF:

Okay.

WILLIAMS J:

Someone's got this.

MS ROFF:

The purpose of the table is to show that there are a number of ways or exercises of mana in an area by particular groups that go to particularly that group's ability, the Attorney says, to meet the test of exclusive use and occupation. So I was thinking, your Honour Justice Glazebrook, of your comment and thinking about, well these, a lot of these are contemporary examples, as are there examples that go back further when perhaps the law wasn't as clear about – and there are some examples pre Ngāti Apa, and the one I was looking at there was the *Re Reeder*, I'm sorry the pages are not numbered but this heading falls under the applicant group's involvement in resource management and other regulatory processes. So the point I'm making is that these are not just contemporary examples. These actually, there I go back historically, you'll see

there, in the 1970s the Council proposed to construct sewage treatment ponds at Mangatawa, which involved discharging waste from the oxidation ponds directly into –

GLAZEBROOK J:

My real concern was you seemed – the submission was that you have to show the ability to control, and the third parties respect it, and I just don't see how that can be shown.

MS ROFF:

It can be shown in my submission –

GLAZEBROOK J:

I mean it can certainly be shown with land, contiguous land, because of course you can say you can't go across it, and nobody could even say "yes I can, I'm allowed to go across your land". I mean they might, but they would be trespassing.

MS ROFF:

The thrust of the Attorney's submission though your Honour is that when looking at exclusive use and occupation, and looking at the group's ability, intention and ability to control the area, it must be looked at through a culturally sensitive lens. So we accept and rely on the Canadian jurisprudence, and in my submission these are examples of just that. Rāhui of course is the most, is probably, I agree, the strongest example of where that is the case, but these are, other examples are…

WILLIAMS J:

Such as?

MS ROFF:

In terms of kaitiakitanga, exercising rights in and on the land.

WILLIAMS J:

Such as, what are the examples of kaitiakitanga?

MS ROFF:

Well we have examples, and I think it's in here too, perhaps of individual groups stopping individual fishers and asking them what they're doing, why they're there. There's examples here of evidence where it is known that particular areas, groups are actually approached and asked whether or not other parties can come on and use resources in that area. So there are real life examples.

WILLIAMS J:

Isn't going to the local authority or the Minister and requesting a particular outcome an exercise of kaitiakitanga.

MS ROFF:

Yes it is Sir.

WILLIAMS J:

Where you don't have the statutory or other authority to bring about that result yourself?

MS ROFF:

Yes it is, and there are examples of historical situations where that's happened as well in terms of petitions and protests that have been presented to the Ministers over the years from particular groups and areas, yes.

WILLIAMS J:

So it does seem to me it comes down to have you done all you can, and I don't know whether that's culturally sensitive, it's just sensitive to the fact that whatever has happened has been severely impaired by the superimposition of the settler legal system, and so be sensitive about that when deciding whether the tangata whenua have been crowded out.

MS ROFF:

Yes, I agree. It's looking at it and being – the realities of modern life now. What is –

WILLIAMS J:

Well the realities of the last 150 years of life.

MS ROFF:

Yes.

WILLIAMS J:

So I don't know that that's cultural sensitivity. I think it's just sensitivity to the difficult problem of transitional justice, which is what this is writ large.

MS ROFF:

Yes, and acknowledging the history, not rewriting history, acknowledging that these – and ensuring that taking a practical approach to what is possible.

WILLIAMS J:

Yes, and being honest about what's going on.

MS ROFF:

Yes Sir. I'd agree with that.

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KÓS J:

I wonder if it's – whether it's really though having done all you could've done, or whether it's actually just having done enough to maintain continuity. It seems to me there's a trap in the, in that terminology. I'm really having a debate with Justice Williams here, Ms Roff. You can just watch.

MS ROFF:

I can go sit down, yes.

WILLIAMS J:

I'm not sure what he means, but whatever he does mean, I disagree.

GLAZEBROOK J:

Well there's obviously – I think the point you're making, isn't it, that there's obviously – you have to have enough use and occupation and enough assertion of authority and mana to have a CMT as against perhaps a PCR or…

KÓS J:

Yes, my – well my translators more or less got that right, but when you – if your test, you're going to apply a test of done all you could've done, then that invites an opponent to say: "Well there's this that you could've done, that that you could've done," because it seems to me the test may be a more objective one of simply having done enough to really keep the fire, that fire warm?

WILLIAMS J:

Yes, I should've said perhaps do all you reasonably could've done.

KÓS J:

Yes, I'm happy –

WILLIAMS J:

And there could be a debate about what's reasonable and what's not.

KÓS J:

Happy with that.

WILLIAMS J:

And we have to be sensitive to the fact that we're dealing with the superimposition of another order in deciding how much people kept fighting in the presence of that other order.

MS ROFF:

Yes. I mean there still does need, and I guess I do still put it back to the Canadian jurisprudence and their emphasis for a strong presence in the area,

and so what that means is going to be influenced by all of these things, tikanga, the area, the nature of the CMCA that we're talking about. There's a lot of other factual considerations to be taking into account.

FRENCH J:

Before you move on to navigable rivers, sorry to labour this, but I'm still a little bit confused as to the Attorney-General's position on the work done by the phrase "without substantial interruption". From what I understood, from this morning from what you were saying really that (b)(i) could end at present day, exclusively used and occupied it from 1840 to the present day, stop.

MS ROFF:

I'm not sure I meant to say that. Sorry, your Honour, could you just repeat that again so I can have a look at the test?

FRENCH J:

Well I'm just trying – is there – is without substantial interruption and exclusively used and occupied, are they two distinct requirements, are they overlapping, or are they – or is one just swallowed up in the other?

MS ROFF:

I think the use of the word – substantial interruption is being used there as a means of telling the Court the scale of the interruption that's going to be necessary to remove the exclusive use and occupation. So it's saying that it has to be more than a de minimis interpretation. So I'm not intending to separate those concepts out as part – as the second limb, and necessary to show exclusive use and occupation without substantial interruption…

WILLIAMS J:

Yes, the important word is "substantial", because "interruption" of itself isn't as strong as "substantial interruption" and indicates the importance of the rights that are being protected.

MS ROFF:

Yes, I agree, Sir.

FRENCH J:

At footnote 104 of the Attorney's submissions it's got: "Substantial interruption, by contrast, is a consequence of the de facto loss of exclusive use and occupation."

MS ROFF:

Yes.

FRENCH J:

So that's really suggesting that it's just a description of the outcome of the loss of exclusive use, it's not a separate distinct criteria in its own right?

MS ROFF:

I'm not sure it's been dealt with as a separate distinct concept in its own right.

FRENCH J:

Okay.

MS ROFF:

I'm not sure how much further I can take that point, your Honour.

WILLIAMS J:

Is it not the test is essentially "you have kept doing it and you haven't stopped"?

MS ROFF:

Yes, and minor –

WILLIAMS J:

And, of course, they are really co-extensive ideas.

MS ROFF:

I think so, that's right, and minor bumps along the way are not going to…

WILLIAMS J:

Cut it.

MS ROFF:

You're not going to lose your rights. It has to be something significant. It has to be, and just taking it to my first point, it has to be more than a de minimis interruption in order to lose those rights. That's what it means in order to tip the scales, if you like. We were talking about a spectrum or a continuum of third party use or other activities that may interrupt, or a break in the continuity perhaps. The break in the continuity has to be substantial.

Justice Kós, you mentioned before the break about section 106 and so, of course, the burden that hasn't been, that's not being appealed by any party, and the Attorney, of course, accepts that, the Court of Appeal's decision that it's not necessary for groups to show substantial interruption or extinguishment. It doesn't refer to exclusivity but, in my submission, there is still a practical burden, evidential burden, on the parties to establish their case and that is by virtue of section 98(2), and in this case, and I am sort of edging towards, closer towards, navigable rivers, just slightly, but in this case I guess it's an example of that because here in the High Court Justice Churchman made findings in respect of the Waioweka River and, of course, extinguishment.

It says, section 106(3) says, provides that in absence of the proof to the contrary, customary interests have not been extinguished, and so the burden is on the party raising the extinguishment, but in here in the High Court no party raised extinguishment, but nonetheless the Judge, when considering the evidence and when making a determination, he still had to satisfy himself under section 98(2) and what happened – I'm assuming the Court got to the point where that was, the burden, in terms of the amount of evidence, was sufficient to conclusively rebut the fact that there had been no extinguishment, so that, in my submission, is what the purpose of –

KÓS J:

Sorry, to rebut that there'd been no extinguishment?

MS ROFF:

The evidential burden, well, the evidence was so sufficient, the Judge says in his judgment, in terms of the river being navigable, then he had no choice but to carve out or not award CMT in respect of that area, and although the – the parties weren't asked to provide submissions in respect of that, so that was just something that was in the judgment when received by the parties but, of course, if there was any prejudice that's been cured by appeal process now because all parties have had an opportunity to present submissions on that. But that's an example, I would say, of how section 98(2) works.

The other point, perhaps a related point to that, Sir, is in respect of substantial interruption it may be that, as well it may be that although no party is – sorry, one of the groups are not required to meet that, but they could be, just from listening to the earlier exchange, it may be a substantial interruption that is internally related to the group, so there would be no other party who would be able to bring that evidence or raise the evidence, discharge that burden, so there would still potentially be the situation where if there was evidence of that in front of the Court it would still perhaps prevent the Court from making an award of CMT or make a finding of substantial interruption if that was the case.

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WILLIAMS J:

Does it come down practically to this, people demonstrate by reference to probably Native Land Court minutes and tribal stories, that they were occupying the area and using the seascape in 1840 or thereabouts, or right up until the 1860s, and then they show evidence that they've, were doing it in 1950, and then in 1980, and then in 2010, and it's not sufficient to say well you haven't provided anything between 1840 –

MS ROFF:

Of course.

WILLIAMS J:

– and 19 whatever it is, that's not going to be enough. Once you get to the point where you've got dots to join.

MS ROFF:

Yes, I agree.

WILLIAMS J:

Then the onus is reversed.

MS ROFF:

And the Court will, is available to the Court to draw inferences from that evidence, if there are – it wouldn't be necessary to bring day by day evidence of use and occupation.

WILLIAMS J:

That's right. Isn't that what this provision is trying to avoid?

MS ROFF:

Section 98(2) you mean sorry, or section 106?

WILLIAMS J:

Section 106.

MS ROFF:

Section 106 is a very difficult provision to make sense of in my submission.

WILLIAMS J:

It seems to me it's trying to prevent the burden of applicants having to prove week by week, or year by year, for the last 180 years, that they have maintained continuity. It's open for inferences to be drawn about that, and if those inferences are available, the other side must rebut them.

MS ROFF:

And then it would be, yes, section 98(2) would do, I guess, the work in terms of the Court sitting and seeing whether or not that was, whether the test had been met under either section 58 or 51.

WILLIAMS J:

Yes. Yes.

MS ROFF:

Based on the evidence that's been provided.

WILLIAMS J:

So a perfect picture is not required.

MS ROFF:

Mmm. I think I was up to, on the road map, paragraph 7, but I probably dealt with that and I'll move straight onto navigable riverbeds. So here there is no dispute between the parties that the Waioweka River is navigable. So by virtue of that there seems to be no dispute that the ownership title to the riverbed was vested in the Crown, in my submission, that was in 1903, and so we're really just looking at, the real issue whether or not by virtue of section 14 there's been clear and plain extinguishment of the customary interests in navigable riverbeds, and in the Waioweka River in particular.

There are a number of provisions, the first provision was section 14. That was enacted in 1903. Then it was rolled over, carried through into I think it was 1925, and then 1979, and then has been preserved by section 354 of the RMA, but if we, we might just bring up if we can please section 14. This is the original provision you'll see there. Section 14(1) is the key part of the provision for our purposes: "Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the

absolutely property of the Crown." Then it's got a definition of the "riverbed" and also "navigability".

Then if we could skip please through to –

WILLIAMS J:
Just tell me what the "thereto" is referring to there? Is it referring to the bed or the minerals?

MS ROFF:
I think probably that's referring to the minerals.

WILLIAMS J:
Okay. That makes a difference, doesn't it?

MS ROFF:
No, it doesn't make a difference. It is another – it's just one strand, the Crown doesn't rely solely on that part of the provision Sir.

WILLIAMS J:
Which bit do you rely on then?

MS ROFF:
What we say, and I will come to this –

ELLEN FRANCE J:
Why does it relate to minerals?

KÓS J:
Riverbeds, surely.

MS ROFF:
Sorry, it's the river, sorry, "the absolute property of the Crown", "all minerals, including coal, within such bed shall be the absolute property of the Crown." What I might do is just get, sorry, I was going to come to –

KÓS J:

Well, there's nothing limiting about their right to minerals. Everything –

MS ROFF:

No.

KÓS J:

Every mineral is theirs, so the "without limitation" must relate to the riverbed.

WILLIAMS J:

Well, no. There are only some Crown minerals. There are lots of minerals that don't belong to the Crown.

KÓS J:

No, no, I accept that, but…

FRENCH J:

But the "thereto" must be the bed.

WILLIAMS J:

Well, that's the question, you see, because if the "thereto" relates to the bed then what follows after it may well affect the nature of what's claimed in the bed, but if it relates to the minerals it probably doesn't and you've got a wording that is pretty close to the wording in *Ngāti Apa*, in fact identical to the wording in *Ngāti Apa* which wasn't enough.

MS ROFF:

But I will take your Honour to that because this was contrasted with that particular provision.

WILLIAMS J:

Yes, but that was perhaps mistakenly so. That's your problem.

MS ROFF:

I'm going to work through that, Sir, so I'll step through –

WILLIAMS J:

You're going to convince me that…

MS ROFF:

I'm going to do my absolute best, yes.

WILLIAMS J:

Good on you.

MS ROFF:

So if we look at, that's section 14(1), if we can move through – sorry, the more recent provision, which just probably got confused about, is section 261, and this is of the 1979 Act and this is what section 354 of the RMA preserves. So here, 261: "Right of the Crown to bed of navigable river. For the purpose of this section," it's got the definitions again at the front but the important point is subsection (2): "Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown." So this is the provision that is preserved and is in force by virtue of section 354 of the Resource Management Act, and then –

WILLIAMS J:

Interesting there they've inserted a semi-colon after "Crown" which separates that clause from the clause before it, suggesting the "thereto" relates to the minerals, because that semi-colon isn't in the 1903 –

MS ROFF:

No, it's slightly changed and there is the – subsection (3) has been added as well to clarify: "Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers."

KÓS J:

I must say I read "thereto" as relating to the riverbed in this as well because it was saying by making provision in relation to the minerals you are not prejudicing any other rights the Crown may have in relation to the bed that's vested in it.

WILLIAMS J:

Yes, well, I'm sure that's one way of reading it –

MS ROFF:

Yes.

WILLIAMS J:

– but the semi-colon separates the phrase in a way that at least subtly counts against that. Subtly, I agree, but the semi-colon means you have got to ask yourself what the "thereto" is attaching to now.

MS ROFF:

Well, in – yes, I'm going to work through, Sir, if I can in terms…

WILLIAMS J:

Yes.

MS ROFF:

Because it is important to go through the context around and the intention and purpose of this particular provision, and then if we can go now to, please, section 354, you'll see there: "Without limiting the Interpretation Act," subject to subsection (2), you'll see that section 261 is referred there at (c), so the repeal "shall not affect any right, interest, or title to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed." So the effect, the vesting effect, in my submission, of section 261 is preserved by 354.

So what we say at – and the reasons for why, from 9.2 down of the road map, but what the Attorney says that the clear and plain intention of Parliament in 1903, and that's been carried through into today, was to vest the full beneficial ownership which is akin to freehold title in navigable riverbeds, and that includes the substrata, the water column, but not the water, and the airspace above, and you see that there at 9.1 of the road map.

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So the nature of such ownership, in my submission, is inconsistent with the continuance of any prior rights and interests, and that includes customary interests surviving and existing post-1903 when the vesting occurred, and you'll see at paragraph 9.2 of the road map it explains – and this is actually set out in some detail in the *Paki* number 1 case as well, but the *Mueller v Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA) case is in the Attorney's supplementary bundle, and that section 14 was enacted to address the uncertainty caused by this *Mueller* case which was a 1900 case which concerned the application of the ad medium filum rule, and that was a conveyancing presumption that when a purchaser acquired land it also acquired title to the midpoint of the river.

So in my submission the section 14 and section 261 is not just simply to declare the Crown's ownership to the minerals located in the riverbed or declare a public right of navigability over navigable rivers, but also to put beyond doubt the Crown's title both in the beneficial and legal sense to navigable riverbeds to enable it to have actual physical control of the beds and the airspace above the riverbed, and to make improvements and to disturb the riverbed in order to extract gravel and minerals and improve the river, in navigable rivers, which is treated as a highway.

So in *Mueller* it concerned the authority of the Crown to make grants that would derive from the New Zealand Settlements Act 1863, and that was intended to enable land to be confiscated and military settlers to be placed on it to maintain law and order, and if we can just go to the *Mueller* case, please, you can see

some of the reasons why the Crown enacted these provisions in order to take away the uncertainty or – and explains the Crown's intent at that time.

So at page 109 of the *Mueller* case you'll see – it's actually quite hard to read I'm sorry, but half way down there was uncertainty caused by this case. In the case the Crown was actually successful in rebutting the presumption, but it was a split decision. The majority you will see here at page 109 says: "I think there is abundant evidence to rebut the presumption that the Crown intended to part with the…river. The authority of the Crown to make grants of this land was derived from the Act of 1863. At the time the Act…war existed. The Act was intended to enable land to be confiscated and military settlers to be placed on it to maintain law and order."

And then a question is posed: "Is it conceivable that the Legislature could have contemplated that, if in any such district there was a river which was the only practicable highway for military purposes and for every purpose, the Crown should by virtue of that Act grant away the bed, and so deprive itself of the right to interfere with the soil and improve the navigation?" And the Court found that no, that wasn't.

Then you'll see at the foot of the page, the last sentence there carrying on over to page 110: "The Crown, as trustee for the public, was interested not only in removing obstructions and keeping the highway open, but also in retaining the power to improve navigation by deepening or altering the channel. In such circumstances it could not be supposed that the Crown could intend to part with the bed of the river to private persons unless the bed were granted in express terms."

Then if we can scroll over please to page 121. Half way down you'll see there it starts: "Although navigable, it was evidently in such a condition as to make it a matter of importance that the Crown should maintain the actual physical control over the bed of the river, so that it might be deepened or otherwise improved. Even if a right of public navigation could be held to exist although the soil of the river was vested in the proprietors of the adjoining lands, such a

right could not give it the necessary power to control and improve the river for the purposes of navigation." So in my submission, and this is set out at paragraph 9.5 of the road map, the section 14 was enacted not just to allow or ensure public navigation, but to ensure the Crown had ownership of the riverbed in the fullest sense possible so it could enjoy physical control, and all the incidents of, for the beneficial ownership such as exclusive, the ability to exclude others and the ability to access and interfere with the soil and extract minerals, and also the wording of the – if we can go back please to the wording of section 261. The wording of section 261 is informative as well I would say. Section 261, subparagraph (2) where it says: "Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown."

In my submission that is persuasive in terms of the saving provision, because what Parliament is talking about there is the circumstances where the Crown has already made a Crown grant, in respect of the bed of the river, but also is likely to in the future. So in my submission it wouldn't be possible for the Crown, it wouldn't be likely for the Crown to give what it hasn't got. So it must be that the Crown has, and has always had, full beneficial ownership in order that it can actually provide a grant. The reference to Crown grants confirms that the Crown has and continues to be capable of granting fee simple estates in my submission, in respect of navigable riverbeds, and in my submission that couldn't be just merely to radical title, it must be to beneficial title because, of course, the radical title was already, the Crown already had radical title on sovereignty, and it wouldn't be necessary for the Crown to declare or revest that into itself. It must be something more, and in my submission it's beneficial ownership that it's referring to.

WILLIAMS J:

That was true with the foreshore and seabed as well, and that wasn't enough.

MS ROFF:

In my submission this is enough in terms of the wording on this, and if it's taking into account as well the context and the purpose, Parliament's purpose and intention of enacting it.

WILLIAMS J:

So can I get my head around *Mueller v Taupiri Coal Mines*. There the majority said that the ad medium filum rule didn't apply.

MS ROFF:

No, the Crown rebutted it in that situation, yes.

WILLIAMS J:

Yes, that's what I mean. And section 14 was enacted for what purpose?

MS ROFF:

It was in order to take away – it was in order that the Crown wouldn't have to turn up to court each time and the uncertainty that that created. It was depending on whether or not they could bring evidence to rebut the presumption. So this was to put beyond doubt that the Crown…

WILLIAMS J:

Well it was to avoid having to litigate it every time.

MS ROFF:

Yes, and the uncertainty.

WILLIAMS J:

There was an issue about the ability to travel through navigable rivers, right.

MS ROFF:

And to take control of those rivers in order to make improvements to the riverbed in terms of dredging or widening or deepening, and also in terms of minerals as well.

WILLIAMS J:

Yes, so the dredging, widening, and deepening is referred to in the judgment is it?

MS ROFF:

That is referred to – well I've taken you to those extracts Sir in terms of –

WILLIAMS J:

Yes, I was trying to keep up with you, that's all.

MS ROFF:

I can go back to those if you like.

WILLIAMS J:

No, no, they're in there?

MS ROFF:

They are Sir. But they also refer to – perhaps we can go to *Paki (No 1)*.

KÓS J:

All of this is dealt with at paragraphs 29 to 31 of that judgment.

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MS ROFF:

Of *Paki*, yes Sir. It is. It sets out the Court's view of the context and history and the intention of section 261(3) there.

So you'll see there, Sir, at the end of paragraph 29, it's talking about the particular provision in the Coal-Mines Act: "On this basis, statutory provision of rights of navigation alone would not have achieved the purpose, and continuing doubt about ownership of the river bed would have impeded the Crown's ability to undertake improvements of river highways (for example, by removing obstructions and excavating the channel) and extracting gravel and minerals," and so it goes on: "Some solution was clearly desirable."

WILLIAMS J:

Does the Court in *Paki (No 1)* say that the beneficial title vested in the Crown?

MS ROFF:

It wasn't in issue in that –

WILLIAMS J:

Well, the issue was navigability in that.

MS ROFF:

It was navigability, Sir, that's right and –

WILLIAMS J:

Correct. So there's no obiter in here saying the effects of section 261 was to vest beneficial title?

MS ROFF:

There is some obiter, Sir, which I can take you to which I'm sure my friends are going to take you to as well.

ELLEN FRANCE J:

It goes the other way, doesn't it?

MS ROFF:

It does, yes, and that is at – I can take you to that. I think it's at paragraph 43, if we could just have a look at that. So, of course, in this case it wasn't – there was no issue about whether – or the impact of section 14 and whether or not that would extinguish customary rights. That wasn't an issue in *Paki (No 1)*, but there is an obiter comment here made by the then Chief Justice Elias where she makes an observation of comments made by Justice Cooke in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 and she says that the President "expressed the view that the terms of section 14 of the Coal-mines Act Amendment Act were not sufficiently explicit to achieve an expropriation of Māori customary land (a view perhaps turning on

use of the word 'remain' and the reservation in relation to Crown grants, which could be taken to indicate that section 14 is effective only in respect of land obtained in ownership and subsequently granted by the Crown."

It may be helpful to look at what President Cooke actually said in *Te Ika Whenua*. That can be found in the Te Kāhui bundle of authorities at tab 28. Page 26, and it is around line 40.

WILLIAMS J:
What's the tab number again? Sorry, I'm really slow at this.

MS ROFF:
Tab 28. So this, of course, was an appeal in respect of some interim relief, in respect of the proposed transfer of dams to energy companies, but you'll see – so this wasn't actually an issue in this particular proceeding and the judgment doesn't expressly address or – the potential extinguishing effect of section 14 on Māori customary rights, but you'll see from around 42, I think it is, the Judge is talking about – it's actually quite difficult to understand what the Judge is referring to. I'm not sure whether he's saying that there is a potential claim that the applicants could make in respect of the river as a whole as opposed to – because he's talking about the concept of the divisibility of the river. He refers to the Mohaka River Report adopting a river as a taonga. So I'm not sure whether he's saying that is what the vesting of, the provision is not perhaps sufficiently explicit to override that concept, the concept of a whole indivisible river. But the Chief Justice in *Paki (No 1)* it seems his words there are intending to mean that the vesting under the Coal-Mines Act is insufficient to achieve an expropriation of Māori customary land.

But in my submission those comments are just obiter comments and obviously the Attorney's case is that there is clear intention here for all prior rights and interests in the riverbed to be extinguished on that vesting.

Perhaps I could take your Honours, when you're ready to, there are some other decisions where comments agree with the Attorney's position, and the first one

is *R v Morison* [1950] NZLR 247 (SC). You'll see that that's in the Attorney's bundle of authorities at tab 14. So this case the Crown applied, this is a 1950 I think case. In this case the Crown applied for writs preventing the Whanganui Māori from obtaining title in the riverbed following a Native Land Appellate Court, sorry, decision, on the ground that there was no jurisdiction for the Court to investigate the ownership of the riverbed, and that was because the adjoining land had already been investigated, and so that had already been the case, there was no jurisdiction, and on the alternative ground the Court said – sorry, the Crown said that the bed was owned by the Crown by virtue of the Coal-Mines Act, and you'll see there when looking at this the Court at page 267 what the – so what the Court does, it says it doesn't need to consider the first line of argument from the Crown because it's clear to the Court that the riverbed is owned by the Crown by virtue of 206, so this is the, I think the 1925 Coal-Mines Act, and it says: "The language of section 206 is, to my mind, plain and unambiguous as expressing an intention on the part of the legislature that the beds of all navigable rivers are to be deemed always to have been vested beneficially in the Crown, excepting in cases where such beds have been expressly granted by the Crown. Unless that interpretation is adopted, it is difficult to see what purpose was to be served by passing the legislation at all."

Then it refers to the *Mueller* case there. "So far as the concerns the effect of the section on Māori customary titles, there is internal evidence to show that the vesting referred to was something more than the vesting defined by…" they're referring to the Māori Land Act, "… for the section declares all minerals to be the absolutely property of the Crown. It is impossible to conceive that, in view of such a provision, the Māori Land Court could proceed to make a freehold order." So that's the position in *R v Morison*.

1510

WILLIAMS J:

The trouble with this is that, apart from the vesting of minerals which if the Crown was the beneficial owner it wouldn't need to do both because it owns the Crown minerals and the other minerals are owned by the landowner, is that this

reasoning, setting aside the minerals, is exactly the same reasoning that was rejected in *Ngāti Apa*.

MS ROFF:

Not in terms of this particular piece of legislation, Sir. In terms – I'm focussing on the interpretation –

WILLIAMS J:

No, but in terms of the language of vesting title in the Crown, it's almost identical wording to the legislation in –

MS ROFF:

I'm just going to take your Honour to that now, because that's the very same Act as looked at by – in *Ngāti Apa*.

WILLIAMS J:

Yes.

MS ROFF:

So perhaps we could go there now.

WILLIAMS J:

Good.

MS ROFF:

So *Ngāti Apa* is at tab 5 of the Attorney's bundle, thank you, and if we look at paragraph 161. So what the Court is doing here, this is Justice Keith and Justice Anderson, they're looking at the Territorial Sea and Fishing Zone Act 1965 and looking at whether the language in that Act is sufficient to dispose of customary rights and interests. And you'll see, if we just scroll it through, I think the– what had happened, I think the – here we go, around page – sorry, line 9: "The Solicitor-General contends that the wording of section 7 of the 1965 Act was substantially borrowed from section 206 of the Coal Mines Act 1925 (initially enacted in section 14 of the Coal Mines Act Amendment Act 1903

following *Mueller…*) which declared that the beds of navigable rivers, except where granted by the Crown, 'shall remain.'" So it refers to that.

So that was the submission of the Solicitor-General to rely on that, but what the Courts say there is that there's a critical difference between that Act, so the Territorial Sea Act, and section 14, a crucial difference: "The latter do not include the 'absolutely property' phrase. The phrase recognises the coexistence of the radical title of the Crown and other (beneficial) property; in the particular case of the 1903 Act the Crown" – has both the absolute, is both the absolute owner – "was the 'absolute' owner, to use the statutory language." And –

GLAZEBROOK J:
Wasn't that absolute owner of minerals, not of the land?

MS ROFF:
I think it – I think it does refer to the minerals, but the thrust of it, though, so my main submission is the difference the Court find in terms of the Territorial Sea Acts and this particular provision is that the Territorial Sea Acts were just merely declaring sovereignty, it wasn't about property. And in my submission it's clear that the judges are influenced by the fact that this provision is not just declaring sovereignty in terms of the radical title, it's more, it's about the property in the river. It's about the Crown having physical ownership of the riverbed and the water space and being able to do what it likes in terms of disturbing the riverbed, which it wouldn't be able to do if it didn't have ownership of it.

So one more reference in that, of *Ngāti Apa* – oh, no sorry, it's in *Paki*. Sorry, it's *Paki (No 1)*. Are we able to go to that, Yasmin? Sorry, at paragraph 111 I was just going to draw your Honours' attention to a comment made by Justice McGrath where he looks at section 14, and you'll see there: "Seen in this light, by legislating to acquire or affirm Crown ownership of riverbeds according to a concept of the navigability of the river, Parliament was assuming control of those rivers which were or might frequently be used for purposes of

travel and transport," and that: "The context and legislative history indicates that it was principally" – but not solely – "for this reason that all minerals within the bed were Crown owned under section 14."

WILLIAMS J:

What I must say I don't follow is that if a beneficial interest was being vested, there's no need for that?

MS ROFF:

Sorry, Sir, if you – if there –

WILLIAMS J:

There's no need to refer to the minerals at all. What's the point? Must –

MS ROFF:

No, because it would own them, that's right.

WILLIAMS J:

Yes, so…

MS ROFF:

But isn't that an indicator that it does own the beneficial title by referring to that?

WILLIAMS J:

It wouldn't need to say so.

MS ROFF:

But it couldn't access the – just by – in terms of being able to disturb the riverbed and access the minerals, in terms of the other reasons, it has to be more than just navigability.

WILLIAMS J:

Well, that's certainly an argument in your favour but what is the point in saying: "Oh, and by the way, the Crown owns the minerals," if it's actually the beneficial owner?

MS ROFF:

I understand your point, Sir.

WILLIAMS J:

So it's possible to read this as if it's not taking beneficial ownership.

MS ROFF:

What then would be – I just struggle to see what the reason for it would be.

WILLIAMS J:

Well, you need to control traffic and you need to have sufficient control to put jetties in perhaps in the context of an economy that was riverine, is that the word, in those days. But apart from that?

MS ROFF:

But it couldn't –

WILLIAMS J:

It didn't really need to be the beneficial owner to control rivers as highways because that's what it was for.

MS ROFF:

In my submission, it would need to do that if though – because otherwise the – if in order to rebut the ad medium filum rule because otherwise it would be owned by the adjoining riparian owners, so wouldn't be able to – I think I took you to the particular part in the – of the *Mueller* decision.

WILLIAMS J:

Yes, but *Mueller* says if it's navigable ad medium filum doesn't apply.

MS ROFF:

No, it depends.

WILLIAMS J:

On what?

MS ROFF:

On the facts of the case. It can be rebutted.

WILLIAMS J:

Yes. Navigability is a rebuttal point to –

MS ROFF:

Not as a matter of course, Sir. It depends on the intention of the party who sold the land. So in that case that was the cause of the uncertainty. It wasn't just a given if the river was navigable, Sir. It had to be that presumption was in place and it was only rebutted if there was evidence brought in terms of the…

WILLIAMS J:

It was about adjoining intention in the transactions?

MS ROFF:

Yes.

WILLIAMS J:

Not about navigability at all?

MS ROFF:

Well, they had to show navigability but otherwise – it was necessary, and in my submission it wouldn't have been possible for, in that case, without this particular provision, for the Crown to undertake those works in order to – if dredging, in order of, widening perhaps or deepening the bed of the river, they wouldn't have been able to do that without having full beneficial ownership which is what the intention and purpose of section 14 was.

WILLIAMS J:

If you removed the – this does seem to me rather similar to the foreshore and seabed which the Crown can build all the structures necessary, subject now to CMTs, on the basis of its radical title. It doesn't need beneficial title to do that.

MS ROFF:

In my submission it would have needed beneficial title. Radical title wouldn't have been enough.

WILLIAMS J:

But it was in the foreshore and seabed. Why not in a navigable river in which the ad medium filum rule doesn't apply?

MS ROFF:

This is not a tidal area, Sir. There may be differences between public rights of navigability in tidal areas and then fresh running water rivers where that's not – there isn't necessarily a public right of navigation –

WILLIAMS J:

So my question is not that. It's if the adjoining property owners don't own the bed because there is navigability and that goes towards indicating intention of the adjoining owners, that they had not acquired the bed of the river, then subject to the native rights the only player in the bed is the Crown. There's no other owner. So it doesn't need to be the beneficial owner any more than it needs to be the beneficial owner in the foreshore and seabed to do the public works things you're talking about, subject to the customary rights, which it does not at least expressly extinguish.

MS ROFF:

But in my submission, based on the context of the time and based on what was the situation in 1903 and as a result of this particular case, that was, for whatever purpose, whether the Parliament's intention was that it did require beneficial ownership to do these things, to do these works. I'm just conscious of the time your Honour. It's 20 past three.

1520

KÓS J:

You do get some support for your argument from that earlier passage of the Chief Justice in *Paki* 28 and 29.

MS ROFF:

Yes Sir.

KÓS J:

That's probably about all we need to note really.

MS ROFF:

Thank you. So I've made some further points, and I guess this comes to, at 9.6, I'll just deal with this quickly because I'm conscious of my friend and making sure there's enough time for them to start their submissions. That when it comes to interpreting section 14, and the approach I guess to section 14, and I'm talking specifically about section 14 and section 265 of the Coal-Mines Act, that it is – the Courts obviously have a number of tools in its toolkit when it comes to statutory interpretation and protecting fundamental rights, and of course this is a fundamental right customary title, customary interests, but that is what the – that is the point of the plain and clear requirement for extinguishes of native title rights. So that is just another way, I guess, of framing the principle of legality. This is the specific safety net, if you like, that the common law has established for the protection of customary interests.

So that is the relevant test, in my submission, when it comes to interpreting section 14, but also must, as well, look at and take on what Parliament, the plain and clear purpose of Parliament, and in my submission that is that all rights and interests were to be extinguished in the riverbed in order that the Crown could take on full beneficial ownership, and that included, on the vestment included the extinguishment of customary interests. So there are, reading down or ignoring the parliamentary, the clear and plain parliamentary purpose in my submission would run the risk of undermining the Treaty settlement process, which is the clear means for addressing any historical breaches of the Treaty, and I just note there at paragraph 9.6 –

GLAZEBROOK J:

It's a bit like saying you should actually make sure the Crown's breached it rather than…

MS ROFF:

No, that's not what I'm saying your Honour, but the –

GLAZEBROOK J:

Well I don't think it's a particularly useful argument. I think the argument might be well there is another…

MS ROFF:

There is.

GLAZEBROOK J:

Another remedy but to say, well you have to read it this way because – well.

MS ROFF:

That wasn't my submission your Honour. The submission is that there is redress available if there is a Treaty breach, of course.

WILLIAMS J:

Yes but that can't be reversed engineered so that…

GLAZEBROOK J:

Yes. It will have – it certainly looked like –

WILLIAMS J:

We're allowed – read this as a Treaty breach because we can fix that.

MS ROFF:

No. That's not what I'm saying.

GLAZEBROOK J:

Well 9.6 did look like that's the submission you were making.

MS ROFF:

The more the submission I'm making is that it's not possible for the Court to rewrite history, no matter how tempting that is.

WILLIAMS J:

No, but it does have to grapple with it. In fact, the Act says so.

MS ROFF:

Yes, and this is an old Act.

WILLIAMS J:

No, not that Act, MACA.

MS ROFF:

Oh, the other Act.

WILLIAMS J:

Yes.

MS ROFF:

The other Act that we're here to talk about, yes. I agree. So quickly, my last point, this is actually set out in the written submissions so I can work through this quite quickly because it is in the full submissions, written submissions, the 20th of September. So it's clear that customary property rights once extinguished cannot be revived, unless revival is achieved by a specific legislative provision. We have, of course, section 6 in the Act, so that's clearly an example of that, but in my submission that particular provision is directed at those rights that would extinguish by the Foreshore and Seabed Act only, and there's nothing that I can see from the legislative materials, and I won't take you there, but there's a reference there to the Departmental Report, there's nothing in that that I can see which suggests that Parliament was intending or officials were intending that it go broader than that.

To the contrary, I would say – and if we can just skip down to paragraph 12 of the road map. I was thinking about just in terms of what the Act was intended to recognise, and that's extant rights and interests only, we see there the Hansard reference at tab 34 of the Attorney's bundle of authorities and we'll just see the Honourable David Parker's comments. There we go. We can see him

saying there – referring to it: "National opposed that at the time, most vociferously. But everyone in this Parliament now agrees that there should be proper recognition of continuing customary interests in the foreshore and seabed that have not been extinguished through history." Then if we can please go to the Departmental Report at paragraph –

KÓS J:

I mean, you'll find that sort of expression in numerous places in the Parliamentary record.

MS ROFF:

In the Hansard.

KÓS J:

I'm not really sure what – how we're helped by even a distinguished opposition member speaking on the topic.

WILLIAMS J:

Who voted against it.

KÓS J:

Yes.

MS ROFF:

That still shows, Sir – in my submission it's still helpful for the Attorney's position that the – only extant rights were intended to be – it wasn't, the coming in of the Act wasn't intended to revive all customary interests that had been previously extinguished. The political compromise was, of course, as we've heard over the last few days, in respect of the Foreshore and Seabed Act, those rights, but there were other – it wasn't intended to go broader than that.

Then if we look at the Departmental Report at paragraph 1436, that's at the Attorney's bundle, tab 39, again confirmation there that: "The Government's intention is the rights being tested are extant rights in that they have existed

since before 1840 and continue to exist today," and that's "consistent with the common law doctrine of customary title which recognises rights which have not been extinguished or lapsed," and in my submission that's exactly what – the rights that we're talking about now, in terms of the customary rights and navigable riverbeds.

Then there's one last reference at – sorry, just further down, I think paragraph 1438, and that's just the confirmation that the – in terms of historical, any historical breaches, that there is of course the Treaty settlement process that will address that and that wasn't intended that the MACA would address those issues.

KÓS J:

I mean all of this is dealt with by section 6 of the Act, which is quite explicit, which is that all that is restored is what was extinguished by the Foreshore and Seabed Act.

MS ROFF:

Yes, Sir.

KÓS J:

And by nothing else.

MS ROFF:

Yes, it clearly says that, Sir.

WILLIAMS J:

It would be difficult to read it any other way, really, otherwise you're resurrecting a lot of consensually extinguished rights.

KÓS J:

That's right.

WILLIAMS J:

And that can't be correct.

MS ROFF:

Yes, that's right. Yes, I agree. Unless your Honours had any further questions, that is my submissions on navigable rivers. Thank you.

GLAZEBROOK J:

Thank you. Ms Hill, I think?

MS HILL:

Good afternoon. I've got 15 minutes on navigable rivers. I'm not going to take that long, in theory. I did want to just briefly address a point, a new point that my friend raised, and I'm sorry to take the Court back to substantial interruption but it is this idea of the tsunami and whether there's an ability to vary an order that's already been granted.

So I suppose the first point to make out of respect to my clients and engineers is that the groynes are designed to withstand a tsunami event, and indeed –

WILLIAMS J:

Have you not been watching *CNN*?

MS HILL:

Indeed one of the purposes of the harbour project is to better manage and be more resilient to those types of natural hazards, and that issue does actually tie in to the navigable river issue, which I'll deal with in a minute.

1530

But just briefly on the interpretation point, and I encourage or admire my friends' innovation in relation to section 111 of the Act which is the provision that says that a recognition order once granted can be varied and I acknowledge the point that it can be varied in relation to the area of the grant because it clearly refers back to section 109, but where we differ, I think, comes down to the requirement

in section 111(2) that says the Court can only vary the order if the requirements of section 58 are met, section 58 of course being the test to establish customary marine title, and the real reservation I have relates to the concept of exclusive use and occupation from 1840 to the present day without substantial interruption and so, in my submission, given there's a continuity element to that test, once it had been found that there had been a substantial interruption to that continuity, and in the case of the groynes there has been that finding, then the removal of the groynes as a matter of fact doesn't the prevent the fact that there has already been that substantial interruption to the continuity that's required by that provision and therefore the fact that the part of the physical structure that did the interrupting is no longer there doesn't allow – it wouldn't enable that test to be met because there's already been the interruption when the order was first considered. So it's a continuity test.

WILLIAMS J:

So it is extinguishing?

MS HILL:

It's interrupting, different to legally extinguishing. Her Honour, Justice Glazebrook, makes –

WILLIAMS J:

Same effect though?

MS HILL:

You may have. Well, it has the effect of precluding the recognition of certain rights over the area that's been interrupted.

KÓS J:

Well, raupatu was a tsunami of a kind, and despite the confiscation of lands, customary rights seem to have re-emerged. So that tsunami seems to have been washed away. Do you get my point?

MS HILL:

I missed your first point.

KÓS J:

Well, you're saying it's a question of continuity. Raupatu was long and grievously interrupting but it's now accepted that it's to be disregarded in relation to interruption. So I'm not sure your argument is right.

MS HILL:

My point was a slightly different one, Sir, which is that if there's already been a finding of substantial interruption such that whatever that event was or combination of circumstances has taken it out of the CMT area because it's been found to have met the test in section 58(1)(b) then the fact that later in time part of the physical structure is no longer there means you can't come back and re-establish that test because that interrupting event has already occurred, or the interrupting structure has already occurred, so that was the point that I was making.

I suppose the related point too, of course, is that there would still be resource consents extant enabling the occupation of space in that area and so the practical reality if the wall was washed away is that those consents would still allow that occupation of space and the structures would likely be repaired or resurrected.

So then turning to the navigable rivers point, I don't intend to address the legal argument. My friend has covered that thoroughly. I simply wanted to make a few practical points from a local authority perspective and I think the first point is that this is an evolving issue on the ground because the High Court upheld the decision in *Paki* and that area within the bed of the river was originally excluded by the High Court and therefore wasn't the subject of careful evidence or analysis and that is why my client has sought and obtained a decision of the High Court that the matter would need to be reheard on the evidence if this Court upholds the Court of Appeal's decision.

But one of the issues is that, to take the Ōpōtiki Wharf example, so that's different to the harbour project, the wharf is located well within the bed of a navigable river and in an interesting location because it's right next to Ōpōtiki township. It's reasonably unique circumstances in that it's both a coastal environment and a riverine environment and adjacent to an historic and now modern town. So the wharf originally was constructed in the 1920s. There's a further wharf constructed in the 1940s and the 2017 resource consents granted to the Council to construct the new – well, it's an extension of the existing wharf. So there's a little bit of a lacuna for this particular project and it's quite a good example to consider because I've already explained that it might not meet the accommodated activities test because it serves a local community, although that's arguable and that's a matter that, if this matter does go back for a hearing on the evidence, would need to be considered, but there's the potential that it doesn't and there's also the potential that it isn't as substantial as the harbour project, for example, and therefore may not meet the substantial interruption test, and so what that means then is if it were to be owned, to use that term, or to be covered by customary marine title, then any reconsenting in relation to that structure or new consenting or amendments would require the permission of the customary marine title owners, and there's another issue that the MACA doesn't really cover which is interesting in relation to structures which is permissions not in terms of a resource consent but, for example, if the Council wished to lease out the structure, which the Act makes clear that the Council owns, whether it requires the permission of the CMT holder as a matter of property law because generally when you own a structure you need to be able to provide access to, in the round, the land that the structure sits on. So at the moment the Council has been looking to lease the new wharf structure and has been dealing with the Crown on the basis that at the present time it's the Crown that owns the land underneath.

So that is obviously the historic position and that is one reason why local authorities have some reservations if the law is to change from the current situation which is that the Crown owns the beds of these rivers to a CMT situation and the Act doesn't necessarily deal with that second aspect of it. So I've raised that point in my written submissions.

WILLIAMS J:

Why does the Crown own that bed?

MS HILL:

Because it's within the bed of a navigable river and therefore –

WILLIAMS J:

But it's also in the CMCA.

MS HILL:

Being within this common marine and coastal area doesn't affect –

WILLIAMS J:

I thought the Crown lost all its rights in the CMCA.

MS HILL:

Yes, sorry, just for the traditional – are you talking about above the – apologies, I'm having an interaction with my friend here. The area above the black line and the area below the black line are different.

WILLIAMS J:

Well, whatever the CMCA is the Crown has given up its proprietary rights there.

KÓS J:

Section 11(2).

1540

MS HILL:

But as I understand that point, so when we're talking about whether the customary marine title is available within this area where the wharf is, the Crown, the argument is that the Crown has – that that title has been extinguished and is not available over that part of the CMCA.

WILLIAMS J:

What's extinguished? The ability to claim CMT, or?

MS HILL:

Yes. That's the argument –

WILLIAMS J:

Right, yes, but that's a different question to who owns the bed because the whole point of MACA is no one does. Even if a CMT is granted, no one does.

MS HILL:

Sorry, that's a slightly separate point. Yes, that's right. So there are still – within that area, so within the CMCA area where there's a question that the CMT has been extinguished –

WILLIAMS J:

CMT has been?

MS HILL:

The ability to have CMT recognised –

WILLIAMS J:

Yes, the customary rights have been extinguished is the argument.

MS HILL:

Yes.

WILLIAMS J:

CMT can't be extinguished because it hasn't been made yet.

MS HILL:

That – well they have been but they haven't been finalised, that's why we're here.

WILLIAMS J:

Oh, true, true.

MS HILL:

Yes, so that those orders, the Court of Appeal – so initially this area has been carved out of those orders. The orders have been granted, but not finalised.

WILLIAMS J:

Yes.

MS HILL:

So the effect of the High Court's decision is that this area has been excluded from those orders, the effect of the Court of –

WILLIAMS J:

Yes, yes, I understand that.

MS HILL:

Yes. The effect of the Court of Appeal's decision is that they may now be back in.

GLAZEBROOK J:

I think we were just having difficulty with the second point you made. We can understand the first point that you might have to get permission, but I don't think any of us understood the second point about leases and things, especially since no one owns it.

MS HILL:

Well that's exactly my point, that there is a real lack of clarity about what the situation is, because the Act doesn't deal with that. It only deals with existing proprietary interests and it doesn't deal with future ones.

WILLIAMS J:

Sorry, perhaps I'm missing something or maybe I'm just dim, but –

GLAZEBROOK J:

I think we're all missing it, sorry.

MS HILL:

Unlikely, yes.

WILLIAMS J:

Whatever rights the Crown has vested in it, in the CMCA, section 11, divests them.

MS HILL:

Correct.

WILLIAMS J:

So whatever happens, the Crown is not the lessor.

MS HILL:

That's correct. That's my point, Sir, so –

WILLIAMS J:

I thought you said it had to be – you needed the certainty of a Crown lessor? Someone to ask permission from?

MS HILL:

Well, it's a gap in the Act in that it doesn't appear to deal with that issue at all, so in divesting the Crown or anybody of that ownership and then –

GLAZEBROOK J:

But we can't fill that gap, it just is a gap.

MS HILL:

Fair enough.

WILLIAMS J:

And section 62 does not make Does not make the iwi the landlord.

MS HILL:

No, that wasn't my submission, Sir, that it was making the iwi the landlord, but my –

WILLIAMS J:

Oh, I thought you said you were having to get their permission in addition to –

MS HILL:

No, no, the opposite – no, my point was that it's clear that you need to get an RMA permission.

WILLIAMS J:

Yes.

MS HILL:

But the Act is silent on –

WILLIAMS J:

Who else you ask?

MS HILL:

Who else you ask, yes.

WILLIAMS J:

Isn't that good for you?

MS HILL:

Well, not really. It doesn't provide certainty. But I take your point that's still something you are going to be able to provide.

WILLIAMS J:

Well if you don't have to ask anyone's permission, then you don't have to ask anyone's permission, and you're protected as to the structures because MACA says so.

MS HILL:

That's helpful, Sir.

WILLIAMS J:

I'm not giving you an opinion, I'm just indicating that I'm missing something important.

MS HILL:

Thank you. So – yes, to sum up then, the position of the structure owners is that the rights in the riverbed – sorry, it's we support the position of the Crown on that issue and, yes, there is a concern if the Court of Appeal's decision is upheld on this issue because it does create uncertainty for structure owners. So those were my submissions on that issue.

GLAZEBROOK J:

Thank you very much. Ms Feint, I think.

MS FEINT KC:

Yes. I'm going to hand over to Mr Smith.

GLAZEBROOK J:

Mr Smith. Yes, you did actually say at the beginning. I've just lost it in the mist.

MR M SMITH:

Tēnā koutou. What I plan to speak to, probably realistically now for the last 15 minutes of the day and into tomorrow morning, is the issue of navigable rivers and extinguishment that has just been addressed and your Honours will hopefully have electronically and in hard copy a road map that we have filed earlier today.

GLAZEBROOK J:

We do.

MR M SMITH:

Which is titled "Te Kāhui Roadmap on Navigable Rivers" and this is really speaking to the written submissions and it's our written submissions of the 18th of October of this year and it's section 3, paragraphs 3.1 to 3.20, and in terms of the structure that I intend to follow it's just reflected in the major headings in the road map.

So, firstly, and I won't linger here at all, it's more by way of orientation, the factual context, and just orienting us in terms of the relevant decisions on this issue of the two Courts below.

Then looking at what I've called in the road map the "first issue", so what exactly is it that the 1903 Act has extinguished, and then that feeds naturally into the second issue of, based on the answer of what's been extinguished, is there an issue that needs to be grappled with in terms of revival and, if there is, what's the effect of section 11(3) in terms of revival of rights and, more particularly, whether or not the Court of Appeal is correct in holding that section 11(3) revived rights that were extinguished through the 1903 legislation.

So that's the direction of travel for the navigability submissions.

In terms of just picking it up at paragraph 1 of the road map, really the locational orienting there is that the navigability issue relates to the confluence of the Waioweka and Otara Rivers which form an estuary that's called Pakihikura which is named after an early waka that landed there, and just thought it was helpful to record that within the road map because if your Honours are looking through transcripts and some of the evidential materials in addition to the judgments of the Courts below it's helpful to bear in mind that you're not just searching for the names of the two rivers but the name of the estuary that's there. That's depicted at the two maps that I've provided the Case on Appeal references to in paragraph 1 and I won't take your Honours there. We've looked at maps that have helpfully provided an overview of the geography already.

Paragraph 2, the other contextualising point, as my learned friend, Ms Roff, said, it's accepted that this particular area of rivers, where the rivers merge, is navigable and the issue then is just what, if anything, did the Coal-mines Amendment Act of 1903 extinguish and, pivoting off of that, what, if anything, needed to be revived in terms of section 11(3) in order to uphold the outcome that was arrived at through the Court of Appeal which is to say that rights that, or the area in respect of which CMT as well as PCR rights can be recognised in respect of, extends around one kilometre upstream, or in terms of that, those two lines on the maps that you were looking at in the – those helpful maps from my learned friend's submissions for Crown Regional Holdings and the Ōpōtiki District Council.

1550

So that's the area that we're concerned with so far as this issue goes. That then really moves us into where I might get to possibly the end of, maybe not, today which is what I've referred to as the first issue in the road map, and we've made the point in paragraph 3 that the starting point we say is tikanga is law which requires critically the conceptualisation of the river as a whole rather than its component parts, and also as a taonga, and that's significant both because that is the tikanga position, but also because it ties into those observations that Ms Roff took you to in the *Ika Whenua* judgment of the then president Cooke in the Court of Appeal, and the relevance that his Honour saw of that conceptualisation of the river to the question of whether there has been a appropriate extinguishment of rights in terms of the extinguishment principles through the Coal-Mines legislation.

I just note there that if you compare and contrast that, this is kind of directed at some of the discussions that we had last week over how this, to what extent does MACA itself reflect a tikanga-consistent view of matters, and we just note in the bracketed text in paragraph 3 there that it goes some but not all of the way to a conceptualisation of rivers as they would be conceptualised in – as they conceptualised in Te Ao Māori terms, in terms of recognising rivers and seas as three-dimensional spaces. If your Honours look at the paragraphs (b) through (d) of the definition of "marine and coastal area" in section 9 of the Act,

the one point of difference is the exclusion of water, which is consistent, I assume, with the long-standing Crown view that there's no ability for ownership of the water generally, which is a view that is, in other proceedings, working its way towards this Court in the next year or two.

So that's the starting point we say to looking at what's been extinguished. The tikanga and Te Ao Māori conceptualisation of a river as a holistic entity, part of a landscape in terms of, perhaps your Honour Justice Williams' language in *Wairarapa Moana* referring to the wider context of a landscape, rather than just looking narrowly at the whenua itself for instance.

Then we take from that starting point we come to the text of section 14 of the 1903 Act, which you were focused on in some detail with Ms Roff in her submissions. Just before looking at – I've set that out and emphasised in bold font in the road map the words that we say it's important to unpack and consider the meaning and effect of. Before getting there I just, I envisage probably pushing an open door on this, but just wanted to make a couple of points on this in response to the suggestion that I don't apprehend when, or its likely to go anywhere, that there can be extinguishment through executive act.

The other case that in addition to *Tāmaki v Baker* that your Honour Justice Williams referred to in a rivers and lakes context, *Tamihana Korokai* is the example that comes to mind for me, and if your Honours were contemplating whether or not this proceeding which has got enough, in my submission, big issues in and of itself, there's also an opportunity to consider extinguishment conceptually.

I just, by way of context of what's happening in other proceedings, including a proceeding that Ms Sykes and I are in the Court of Appeal on next week, there is the issue there of the impact of Torrens titles and indefeasibility on customary rights and the extent to which, and this goes to Ms Roff's reference to *Wik Peoples* and the extent to which pastoral releases and other title-based rights might be inconsistent with the continued existence of customary title, or at least a subset of rights. So those issues are, his Honour Justice Cooke in

the judgment under appeal that we have next week for hearing in the Court of Appeal, concluded that the interface between the Māori Land Court, Te Ture Whenua Māori Act and the Land Transfer Act was such that indefeasibility wasn't a trump card, and I raise this not because I'm expecting your Honours to wade into this issue here at all, but just to indicate that –

WILLIAMS J:
If it is a river, we shouldn't wade into it.

MR M SMITH:
So that's really by way of endorsement of a minimalist approach to what needs to be and has to be addressed through the judgment that your Honours will right, considering the concepts of extinguishment more broadly in the law.

That gets me, moving on now, to paragraph 5 of the road map, and what we've sought to do is to break it down into two sections, and firstly to ask textually has there, if your Honours break it down and look at the key elements of section 14 of the 1903 Act, has there been, is there effective clear and plain extinguishment in terms of the accepted test for that, and that's the focus textually of the analysis in paras (a) to (d) in particular and paragraph (e) is a contrast with a clearly extinguishing provision in terms of the 1926 Act there, and then in paragraphs (f) through (h) we cross-check that in terms of section 10 of the Legislation Act, statutory interpretation principles, with a consideration of purpose in context and just asking, well, what is the purpose and the reason why this was enacted and is there a necessary incompatibility between any and all customary rights and what is provided for as vesting in the Crown through section 14?

I'll start with paragraph 5(a) and I could probably actually go through these reasonably quickly based on the discussion that there was with Ms Roff. We say, and this is paragraph 5(a), that the vesting that's referred to in the third line, as I've quoted under paragraph 4, is of the radical title only and we rely upon the reasoning in those paragraphs of *Ngāti Apa* that are referred to there,

and there's support for that in – and that was analysing the Territorial Seas legislation.

GLAZEBROOK J:

I think it would actually be useful to slow down a bit on this and actually take us to that rather than rushing through, for myself anyway.

KÓS J:

I agree. I mean no disrespect to the Court of Appeal but it didn't get a lot of airtime in that judgment.

MR M SMITH:

Not at all. They leap straight to really an assumption without any reasoning that it did effect an extinguishment and to that extent these are, this is not a straightforward issue, and it's really an issue that was left open by the first *Paki* decision because there was no dispute there that it had an extinguishing effect. The only issue that was accepted really the appeal was premised on whether there was, the river was navigable in the relevant parts because if it wasn't, which was ultimately the decision of this Court in the first *Paki* decision, then extinguishment didn't apply. So that was, it avoided this Court having to grapple with the very issue that's now before the Court in respect of the Attorney's appeal here, and you see that, and maybe this will, and if I can ask please to open up the, if we start with, before getting to *Ngāti Apa*, *Paki*, and just go to *Paki (No 1)* decision please, and paragraph 13.

That really is making the point that I've just made there that because the, really this Court in the first *Paki* decision didn't need to grapple with the prior question of whether or not it had section 14 of the 1903 Act had extinguished. Māori land as defined in Te Ture Whenua land as Māori customary land or Māori freehold land, and it's allied to that paragraph in paragraph 43 that Ms Roff took you to in her submissions where there's another reference to President Cooke's decision in the *Ika Whenua* case, but this is making that point that I made earlier, that the extinguishing effect of section 14 wasn't before the Court in *Paki*.

If we could go next please to *Ngāti Apa* and paragraph 62 first, please. Having asked to go there I see it's 3.59 and I could deal with paragraph (a) of the road map now, or paragraph 5(a), or this might be a matter to come back to tomorrow to look at the different paragraphs together in one go.

GLAZEBROOK J:

I think maybe – do the whole thing tomorrow, I think, is probably a better use of everybody's time, so…

MR M SMITH:

Yes.

GLAZEBROOK J:

So we will await with interest, to be continued. Thank you, we'll adjourn for the day.

COURT ADJOURNS: 4.00 PM

COURT RESUMES ON WEDNESDAY 13 NOVEMBER 2024 AT 10.03 AM

KARAKIA TĪMATANGA (MAC REWIRI)

GLAZEBROOK J:

Mr Smith.

MR M SMITH:

Thank you, and good morning, your Honours. We were up to, yesterday, paragraph 5(a) of my road map, and before picking it up there and really to lay the foundation, the building blocks for getting there, I thought it might help to begin by just going through an identifying the relevant aspect of the reasoning in *Ngāti Apa*, the building blocks that ultimately take us to the reasoning by analogy that we do with *Ngāti Apa's* analysis with the Territorial Sea Acts.
1005

So if we start there please, and if we could go first please to paragraph 21 of *Ngāti Apa*. So I just want to go through to short that, to explain the order in which I want to go through propositions in *Ngāti Apa* as a building block. I just want to start with firstly what *Ngāti Apa* says about how the Crown obtained "radical title" upon – with the sovereignty, with the acquisition of kāwanatanga through Article 1 of the Treaty. That's building block one.

Building block two is looking at what *Ngāti Apa* says on the test for extinguishment of the customary title that exists alongside and that the radical title was obtained subject to.

Building block three is then just looking up the extinguishing statutes that the Crown was relying upon in *Ngāti Apa* itself for reasons, or, the relevance of which I'll come to.

Four is looking at the Territorial Sea Acts and the analysis of those two interrelated statutes, and *Ngāti Apa* is having wording very similar to the

Coal Mines Act, Amendment Act, provision that is relied upon as extinguishing title and rights in respect of the navigable stretches of the rivers in issue.

So if we start with what I said, I will refer to is building block one, the Crown obtained radical title. I'll just take your Honours to some passages first in the judgment of the former Chief Justice and following that a statement to similar effect, and President Gault's judgment.

In the first of the former Chief Justice's judgments, recognising that is paragraph 21, which is up on the screen here, and your Honours will see there in the first sentence there's her Honour, the former Chief Justice, recognising that: "In New Zealand, the Crown's notional 'radical' title obtained with sovereignty, was held to be consistent with and burdened by native customary property", and that is in international law the distinction between imperium and dominium. It was imperium that was acquired on sovereignty and dominium the pre-existing property rights of first nations communities in New Zealand. Māori was the dominium that the radical title was held subject to. So, paragraph 21 is the first reference for that.

Her Honour, the former Chief Justice, just to give a couple of other references addresses the same point over a few pages at paragraph 29, if we can go there please. There's a helpful summary at paragraphs 29 through 31 of the effect of the radical title, I'm just picking it up in the first sentence of paragraph 29: "The effect of the radical title acquired by the Crown with sovereignty", and there's a reference there and a quote from President Cooke in the *Ika Whenua* decision on that.

Then down in paragraph 30 the point is made that: "The radical title of the Crown is a technical and notional concept. It is not inconsistent with common law recognition of native property." If we go over the page please there is, and to my knowledge this remains, the greatest elaboration on what the relationship at a conceptual level is between the notional radical title on the one hand and the pre-existing Māori title and rights on the others. I just emphasise there, the first full sentence where the former Chief Justice recognises the content of such

customary interests, so the dominium, the pre-existing customary title right, "is a question of fact discoverable, if necessary, by evidence". Then her Honour goes on to make the point that: "As a matter of custom, the burden on the Crown's radical title might be limited use or occupation rights held as a matter of custom." There's a reference to the Canadian *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 App Cas 46 decision amongst others there.

That's one, if your Honour's thought of it, is a spectrum that's perhaps near one end of the spectrum, and near the other end of the spectrum is the sentence beginning at line 8: "On the other hand, the customary rights might be 'so complete as to reduce and radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference'." So, you've got at the conceptual level there recognition that the radical title be burdened by pre-existing customary title and rights and the nature of those rights has the ability to vary.

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One way in which we might think of that in terms of where we've got to in some of the more recent decisions considering customary title and rights is that, as Ms Feint put it earlier on in the first hearing week last week, that we have the rich tapestry of rights. So for instance, with reference to Ōhiwa Harbour where you've got the rights of a more usufructuary nature that Tūhoe held in addition to those rights of the mana whakahaere groups that have possessed the mana at place, that's your rich tapestry. Recognising and reflecting what the Chief Justice is referring to there, there might be at place, at any particular place, a range of different rights that the Crown's radical title is burdened with and it's a nice, in my submission too conceptually, nice statement of what that relationship is and the potential variability of those. That tapestry of rights that that might exist at place to which the radical title on which the Crown acquired on sovereignty is burdened to.

KÓS J:

As of the 31st of January 1840?

MR M SMITH:

Yes.

KÓS J:

What system of law determined the nature of those customary rights?

MR M SMITH:

Well that date is pre Treaty, so the only system of –

KÓS J:

Exactly, that's why I chose it.

MR M SMITH:

So the only system of law is tikanga is law. Then you've got the exercise that was simpler the closer you are to 1840 of we only received English law to the extent that it was consistent with what was provided for in the Treaty compact and then we had that confirmed through, we don't have it in the materials, but there's a discussion of it for instance in this Court's decision in *Wakatū.* If you go through the early written constitutional documents. If you go through the early written constitutional documents such as the 1840 and 1846 charter we have a recognition consistent with the Treaty itself. The Land Claims Ordinance, the pre-emption rights in there that you have written, baked into, these really important early written constitutional documents. That position that your Honour Justice Kós is putting that it was initially purely tikanga as law that determined what the rights were and then as the endeavour that is Aotearoa took off and burgeoned –

WILLIAMS J:

Did you use "endeavour" on purpose?

MR M SMITH:

Yes and no. I hadn't thought as I uttered it in that direction, but I see where your Honour's mind has gone. I don't – of all counsel, I wouldn't want to be endorsing anything associated with the New Zealand Company's exploits.

But putting that to one side, and you also had, just running to an end that thread that your Honour, that (inaudible 10:13:02) there your Honour.

KÓS J:

I think you'll find that was the Royal Navy anyway.

MR M SMITH:

You have that –

GLAZEBROOK J:

Well the purchases that were accepted by the commissioners were purchases that were from the particular iwi or hapū that held in accordance with tikanga, and that was the whole of the commissioner process after 1840 in order to make sure that if they were recognising any sales that they were sales – not that, of course, there was a concept of sale.

MR M SMITH:

Yes.

GLAZEBROOK J:

But that they were at least from the people holding the customary title.

MR M SMITH:

Yes.

GLAZEBROOK J:

According to tikanga.

MR M SMITH:

Yes that's right, and to that extend if you look at it through early colonial law eyes that would be through those colonial eyes and acknowledging your Honour's important point of the disconnect of sale as a concept in tikanga that, through early colonial law eyes, that's your voluntary transaction. What UNDRIP would call transaction with free prior and informed consent that

was recognised in early colonial law as a basis for the relinquishment of first nations property rights, indigenous property rights.

The other – I won't go there, but the other paragraph that really makes, stands for these same propositions of the Crown radical title being burdened with pre-existing Māori title and rights is, it's addressed in the joint judgment of their Honours, Justices Keith and Anderson, generally through, not unsurprisingly given that his Honour Justice Keith wrote through an international law lens, but also by President Gault at paragraph 102 of his judgment. But I don't think for present purposes we need to go there.

So, that's my building block one from *Ngāti Apa*, that the – was radical title that the Crown acquired on sovereignty.

That then begs a question of, well, the radical title was burdened by pre-existing Māori title and rights. How are those rights lost? And your Honour Justice Glazebook has identified one circumstance, and the other was extinguishment.

My second building block that I just want to go to briefly is what *Ngāti Apa* confirms is the test for extinguishment of customary rights. I'll just take your Honours to a handful of paragraphs articulating that.

The first please is at paragraph 147. Your Honours will see there, so it's the first sentence, and this is the joint judgment of Justices Keith and Anderson, a recognition there that "native property or title or right can of course be extinguished", and there's reference there to a US Supreme Court decision illustrative of that. Their Honours move in paragraph 148 there, which is also on screen, to talk about the test for extinguishment, and they refer in that first line to a necessarily protective approach, the purpose of the high bar that's set for extinguishment. Then they articulate that with a reference to a number of comparative decisions overseas and the *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 decision of our Court of Appeal in line 36,

by making the point that the "onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain". So, clear and plain test.

Then the point is returned to at paragraph 154, and it is line 24 your Honours will see there. The proposition: "Native property rights are not to be extinguished by a side wind, in this case by general statute concerned with harbours." Then again, the reiteration of the clear and plain test.

Then finally on the test, if we go please to paragraph 185, and this is – if we go just over onto page 694, that's it, thank you, this is his Honour Justice Tipping's judgment, and at line 5 there his Honour writes: "Undoubtedly, Parliament is capable of effecting extinguishment but, again in view of the importance of the subject matter, Parliament would need to make its intention crystal clear."

So that's his Honour Justice Tipping's articulation of the clear and plain intent. Although, in a way, it's arguably watered down by what his Honour goes on to recognise, which is extinguishment can not only be "by express words" but "by necessary implication". To my mind at least, necessary implication sits slightly awkwardly with the crystal clear intent, but his Honour Justice Tipping didn't see that as an issue.

So, that's what *Ngāti Apa* says about the test for extinguishment. I don't apprehend there's any difference between ourselves and the Crown on us and indeed the Crown submissions cite to *Ngāti Apa* amongst other authorities for this test. So that's building block two, the test for extinguishment.

The third building block, although it's probably not, in fairness, is just to before looking at the Territorial Sea Acts and how *Ngāti Apa* analyses them, I just wanted to identify what the extinguishing statutes were relied on, were that were being relied upon by the Crown and *Ngāti Apa*, and we see that please at paragraph 4 the former Chief Justice's judgment. Your Honours will see there, and it's line 33, summarising the Attorney's argument. So, the reliance there on extinguishing legislation included "s 7 of the Territorial Sea,

Contiguous Zone and Exclusive Economic Zone Act 1977 and s 9A of the Foreshore and Seabed Endowment Revesting Act 1991".

1020

In addition, there were more local Acts, and if we go please over to paragraph 6, you have there the eight questions that were posed by the Māori Appellate Court I think it was to the High Court for answer, and your Honours will see in question 6 and then down in 7 and 8, there is a listing of the various statutes that were itemised as potentially extinguishing statutes. My point in going to this is that the statutes that were relied upon by the Crown as having an extinguishing role didn't include the 1903 Act or any of its reenactments. Subsequently, a point which is significant because it means that when we get to looking at the joint judgment of Justices Keith and Anderson, when they're talking about that statute, that's clearly obiter in terms of what they're saying. So, that's the point of identifying what statues were, in a ratio sense, relied upon by the Crown as extinguishing and by implication, what weren't.

So, that's the immediate context in terms of extinguishing statutes that gets us to the Court of Appeal's analysis in *Ngāti Apa* of the Territorial Sea Acts, and it's only these Acts that I want to take your Honours to because their language is very similar to the 1903 Act that's relied upon as extinguishing here and we, because of that similarity, rely upon the Court of Appeal's reasoning in *Ngāti Apa* in saying that it didn't effect an extinguishment of title or rights, or at least not an extinguishment of the bundle of title and rights that would justify CMTs, CMT as well as PCRs, which I'll come to.

WILLIAMS J:

Didn't it just say that it couldn't answer that question without facts? Those questions in respect of those local Acts.

MR M SMITH:

Her Honour Justice, the Chief Justice, did. She said they raised factual issues. One of the other – would it help to go there? Because there are – I can take

your Honour to two paragraphs dealing with that. One of them is certainly the Chief Justice. To that effect, if we –

WILLIAMS J:

Well there was no answer to any of the questions except question 1 by any of the judges.

MR M SMITH:

Yes, correct.

WILLIAMS J:

So they didn't answer that. The Chief Justice said it's because she needed facts.

MR M SMITH:

Yes.

WILLIAMS J:

I'm not sure what the others said, but.

GLAZEBROOK J:

Well just give us the paragraph numbers. So the Chief Justice said just factual?

MR M SMITH:

58, and then – maybe it might help if we go there. So paragraph 58, so here is where the Chief Justice is considering the area-specific legislation, vesting in the Marlborough Sounds and that's your Honour Justice Williams' point near line 45.

GLAZEBROOK J:

Right, so if they confer freehold interests then obviously they, she says, they extinguish.

MR M SMITH:

Yes, but there wasn't much argument on that.

GLAZEBROOK J:

But you didn't know if – yes.

MR M SMITH:

That partly was because they only related to relatively small territorial areas, relative to the territorial area which was potentially the subject of the claim in the Māori Land Court. The same point in terms of the vesting of fee simple estates that your Honour Justice Glazebrook has referred to, that's noted in paragraph 112 where these statues are briefly touched upon by President Gault, and it's line 28 there: "There was no serious argument that any Māori customary land status was not extinguished by this area-specific legislation", but it only affects small areas of the claim.

In terms of the theme that I was touching on yesterday, this is amongst the issues that your Honours don't need to grapple with in the appeal, it's already got enough big issues that you do need to grapple with, and that's if only because the Crown doesn't rely on anything other than the 1903 Act as extinguishing rights in respect of that stretch of the rivers that are navigable that are an issue.

KÓS J:

There's no suggestion I think, is there, that either the Foreshore and Seabed Act or the present Act any way attempt to alter the extinguishment test expressed in *Ngāti Apa*?

MR M SMITH:

No, and indeed, the Crown's submissions accept the *Ngāti Apa* test.

KÓS J:

Mmm.

MR M SMITH:

From our perspective we don't need to say that there is a higher test because that test is already so high in the circumstances for very sound constitutional

reasons that are anchored to the important values that are part of the fabric of our unwritten constitution, and also anchored to the Treaty compact and the rights that were affirmed through Article 2 of the Treaty itself.

GLAZEBROOK J:

In terms of our own constitutional position you're referring, I presume, to the protection of property under our constitutional arrangements, speaking broadly, in terms of not taking property except lawfully and with compensation.

MR M SMITH:

Yes, so there's two dimensions to it. There's if your Honours look at it through the lens of the Treaty compact, there are the Article 3 rights that Māori have alongside everyone so.

GLAZEBROOK J:

Yes I know, I was asking about the –

MR M SMITH:

So those ones.

GLAZEBROOK J:

Yes, and so the other one is the common law protection of property.

MR M SMITH:

Yes. Now that moves us to looking at the analysis in *Ngāti Apa* of the Territorial Sea Acts, and if we can start please with the former Chief Justice's judgment at paragraph 62, and her Honour the former Chief Justice just helpfully paraphrases the critical statutory language. So they were the 1977 Act was a re-enactment of the 1965 Act, but extended the territorial sea limits, as her Honour notes there, from three to five miles. But the critical language of these Acts was deeming the seabed and its subsoil from the low watermark to the limits of the territorial sea "to be and to always have been vested in the Crown". So the same language as the 1903 Act as we'll come to, and like with

the 1903 Act: "… existing grants made before and after the Act are specifically preserved."

So that's the statutory text context that her Honour goes on to consider in paragraph 63, and her analysis of the text and purpose of that legislation is that it didn't effect an extinguishment in terms of the legal principles relevant to that, and the principle points to that end that – and the reasoning to that end of the former Chief Justice are firstly it's concerned with matters of sovereignty, not property, so it relates to the radical title of the Crown in other words, and then after cross-referencing to the joint judgment of Justices Keith and Anderson, the former Chief Justice makes the points that, the inter-related points, that the language of the statutory, the deeming language, "…the preservation of existing property interests, the compatibility of radical title in the Crown and Māori customary property, and the absence of any direct indication of intention to expropriate make it impossible to construe the legislation as extinguishing such property."

WILLIAMS J:

So against you is the argument that rivers are different because of the particular needs of the situation arising from *Mueller*. You're probably going to address that at some other point, which is fine.

MR M SMITH:

Yes. So the best argument for the Crown is what your Honour Justice Williams has articulated, that we need to view the analysis of the territorial seas legislation in its context. We're talking about a matter in part addressing matters of international law in the territorial boundaries of New Zealand for the purposes that are ultimately facilitated by the, where the boundaries are drawn for territorial sea purposes, and that's a different purpose in context to the Coal-Mines Amendment Act, and it doesn't have the whakapapa to the *Mueller* decision ultimately that explains and points in a different direction so far as the interpretation and understanding of extinguishment principles on that Act is concerned, and I will come to that.

1030

So that's her Honour the former Chief Justice's reasoning. The next relevant reasoning is at paragraph 113 please, and this is the judgment of President Gault reaching the same conclusion, and the key reasoning starts at line 35. "Those provisions deem the seabed 'to be and always to have been vested in the Crown' but subject to…" pre-existing interests of the kind specified, and critically his Honour President Gault reasoned: "Land held by the Crown but subject to grant is not inconsistent with so called radical title." So relying upon the radical but not the beneficial title being vested in the Crown and therefore justifying a retention unaffected of the pre-existing customary rights, and his Honour reasons, just picking it up at line 41: "To accept that line of argument…" that this legislation was sufficient to extinguish the pre-existing customary title rights, "… would be to recognise extinguishment of customary rights by a most indirect route when express legislative enactment would have been expected."

And that is, in my submission, it's honestly recognising the nature of the exercise, which is, in part, a value judgement as to whether or not, and this is the "would have been expected", the language is sufficiently clear and plain, crystal clear in terms of that aspect of his Honour Justice Tipping's reasoning that we went to earlier, as to lead justifiably to the conclusion that an expropriation of pre-existing Māori rights has been affected.

KÓS J:

I mean the trouble is that the word "vesting" is inherently ambiguous. It's vesting in a state of some sort.

MR M SMITH:

Yes.

KÓS J:

It could be a legal estate, it could be a beneficial estate. Could possibly be something else. But it might just be the former legal.

MR M SMITH:

Yes, and that's obviously why it's a pivot point, and it's been used in that – if we stand back it's, this is just – and approach it through the lens of the very helpful summary of principles in the *Fitzgerald* decision on this Court of how we interpret legislation consistent with, and against the backdrop of important values of our legal system, including human rights, where we need that statutory hook to read up, read down, read in, read out, as the case may be consistent with the various tools in the toolbox that we have for statutory interpretation, but I certainly take your Honour Justice Kós' point that that was an obvious hook. It was a materially ambiguous, or very least sufficiently open-textured enough word that that was available, that interpretation, and as we'll come to when we look at the 1903 Act, we say the same position applies there.

FRENCH J:

Did these other statutes contain the phrase "absolute property"?

MR M SMITH:

No, and that is we'll get to when we look at the joint judgment of Justices Keith and Anderson. That was a, if I can kind of call it a compare and contrast exercise, that was an aspect of their reasoning, that one of the three reasons they identified for why the territorial seas here didn't extinguish customary title was in contrast to the section 14 of the 1903 Act. There wasn't a reference to absolute property, and they saw and drew the inference of significance from that, and I'll come to that, but I need to acknowledge that that is a point of, a second point of distinction, in addition to the one that his Honour Justice Williams identified earlier.

KÓS J:

Trouble is that points breaks both ways because it's absolute property in the minerals.

MR M SMITH:

Yes.

KÓS J:

So as Justice Williams suggested yesterday, if you're vesting, and vesting extends to beneficial title, it extends then to the minerals.

MR M SMITH:

Yes.

KÓS J:

Indeed it does probably through legal title, but you simply don't necessarily have the beneficial interest in them, so you say absolute property to convey both estates in the minerals.

MR M SMITH:

Yes.

KÓS J:

So the surplusage suggests that the vesting in the first part is something less than full title.

MR M SMITH:

Yes, and we agree with and endorse that analysis. There would be no point for the vesting of that absolute property if that had been achieved by the first part, and the vesting there.

GLAZEBROOK J:

What about the other part of the territorial sea which keeps existing property rights, or it's subject to existing property rights, but taking again the Crown's

point that otherwise there could be existing property rights, not just customary rights but other rights in the riverbed.

MR M SMITH:

So in that respect section 14 of the 1903 Act is the same, the saving provision at the very outset of that language saves both current and future grants, and as we'll come to slightly later this morning, that –

GLAZEBROOK J:

Grants are slightly different from owning it in the first place, isn't it?

MR M SMITH:

Yes, I accept that, but one of the –

GLAZEBROOK J:

I suppose the Treaty would say everything from there on is a grant.

MR M SMITH:

Provided that native title has been validly extinguished, yes.

GLAZEBROOK J:

Yes. So if you own contiguous land, that's through a grant, so I suppose it does include that language.

MR M SMITH:

Yes, I hesitate –

GLAZEBROOK J:

I mean I know it may not be because it might be serial purchases.

MR M SMITH:

Yes.

GLAZEBROOK J:

But the whole, the radical title was transferred to the Crown, and everything from there on was effectively through grant. From 1840.

MR M SMITH:

Yes, but it was only the domain lands, wastelands that the Crown was able to grant, which was –

GLAZEBROOK J:

No, no, no, I'm not suggesting anything else, it's just, I was just…

WILLIAMS J:

The Crown had no power to grant rights it didn't own.

MR M SMITH:

Yes, the nemo dat principle.

WILLIAMS J:

Yes, well, that and several cases in aboriginal title law that say so.

MR M SMITH:

Yes.

GLAZEBROOK J:

I was just checking whether the language was sufficient, but I think it is, yes.

MR M SMITH:

Yes, and that, we rely, and getting ahead to our analysis of the section 14 of the 1903 Act, but we say the significance of the recognition that private rights can sit alongside navigability rights, and the absolute property in minerals that is conferred upon the Crown is a recognition that there was an intention to protect pre-existing property interests, which include, and must include constitutionally Māori property rights and interests amongst them, and that was the –

WILLIAMS J:
Sorry, give me that sentence again?

MR M SMITH:
So we say in terms of that savings provision, this is –

WILLIAMS J:
This is the prior and prospective grants?

MR M SMITH:
Yes, so we say as her Honour the former Chief Justice reason that one of the limbs, or arguments, in support of not finding extinguishment, is that there was an intention to protect –

WILLIAMS J:
So other forms –

MR M SMITH:
– pre-existing property rights.

WILLIAMS J:
Well, you can say, if other forms of private rights are being protected, it would be discriminatory to refuse to protect pre-existing forms of private right that are not expressly referred to in that provision, as they clearly aren't. They don't require a Crown grant. The Crown got them. Got whatever it's got subject to them.

MR M SMITH:
Yes.

WILLIAMS J:
I see.

MR M SMITH:

And that was her Honour the former Chief Justice's, one of her interpretative arguments for reading the Territorial Seas legislation against having an extinguishing effect.

The next relevant paragraph please is 159, and we're getting close now to your Honour Justice French's point. So this is the joint judgment of their Honours Keith and Anderson, and their consideration of the Territorial Sea Act, and they've, having summarised the provision in paragraph – the provisions in those Acts, and paragraph 159 they pose the question in paragraph 160 of whether those provisions "deny the existence of Māori customary land… or extinguish that land if it did exist?" They then go on to say for three reasons we think not, and the first of those reasons, and this is line 42, is the hook to the vesting point, your Honour Justice Kós' point that we were exploring a moment ago. So the vesting was only the radical title.

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Over the page at paragraph 161 is your Honour Justice French's point. So the second reason they give, and this is line 7, is based on effectively a compare and contrast exercise with section 14 of the Coal-Mines Act (inaudible 10:40:18) the 1903 Act, based on the Solicitor-General's submission that "… the wording of s 7 of the 1965 Act was substantially borrowed from…" ultimately the statutory language in section 14, and the relevant reasoning is at line 17 of paragraph 161, where they reason: "There is a critical difference between that provision," so section 14 of the 1903 Act, and the Territorial Sea Act, and that is that the Territorial Sea Act "do not include the 'absolute property' phrase."

The significance of that in the context of this analysis was that it was seen as recognising the co-existence of the radical title and other beneficial property in the 1903 Act, so that the Crown was the absolute owner, and the absence of any reference to absolute owner in contrast in the Territorial Sea Act was a pointer against in terms of statutory interpretation analysis reading the statute book as a whole. Extinguishment there.

KÓS J:

It doesn't quite grapple with the complexity of the drafting of section 14 though, does it?

MR M SMITH:

No, and that's the point that I was just about to make. There is the way in which that final sentence of paragraph 161 is expressed is a bit ambiguous. You could read it, as the Crown does, as saying well the absolute, they were reading absolute property as extending to the bed as a whole, or you could read it as saying, well, they were only, and they must have only meant it as extending to the minerals, and if the second reading, which is the reading that we adopt of it, is the correct one, then the foundation for the Crown's reliance upon this paragraph as supporting their argument falls away and with it the argument itself. So far as it's relying on paragraph 161.

WILLIAMS J:

What was the point in the addition of non-Crown owned minerals? Let's assume it was just non-Crown owned minerals. Why were they –

MR M SMITH:

Is your Honour talking about the Territorial Sea Act?

WILLIAMS J:

No, no, the Coal-Mines Act. Why were minerals even in play in section 14?

GLAZEBROOK J:

It was a Coal Act, I suppose.

WILLIAMS J:

Yes, but *Mueller* wasn't about ownership of minerals, it was about navigation on rivers.

MR M SMITH:

Yes, and it was also in part, and I'll come to the relevant passages in the *Paki (No 1)* decision on this, it was also in part a statute that grabbed for the Crown a mineral rights, when those were also in issue in the Waikato River at the time, and that was part of the context too and reason for the enactment of section 14.

WILLIAMS J:

Is that referred to in *Mueller* is it?

MR M SMITH:

It's referred to in *Paki*.

WILLIAMS J:

In *Paki*, right.

MR M SMITH:

And the analysis of the context and legislative history.

WILLIAMS J:

I see. So this was a useful opportunity to get that issue clarified as well?

MR M SMITH:

Yes, and do it in a way which didn't raise with the same either, property rights, the 1903 equivalent of Mr Hodder's clients, and Landowners rights associated with what might have otherwise been a much broader grab outside of a navigable rivers context of mineral rights there. But I'll take your Honours, because I need to, and this was the point that your Honour Justice Williams made earlier, I need to go to what the purpose of section 14 was, and I'll take your Honours to some paragraphs in the *Paki (No 1)* decision in the not too distant future on that.

FRENCH J:

If the word "thereto" relates to minerals, why do you need the phrase "without limiting in any way the rights of the Crown thereto"? It would just say, and all minerals.

WILLIAMS J:

Because the Crown has other rights in respect of minerals.

FRENCH J:

But they become the absolute property, all minerals become the absolute property.

WILLIAMS J:

Yes but the Crown has additional rights as the owner of gold et cetera, which absolute owners don't have, they're excluded. That's my understanding of it, gold and petroleum later, but probably not at this time.

MR M SMITH:

I think that's right in terms of our history of minerals exploitation.

WILLIAMS J:

Gold was the big deal back then and the Crown had certain prerogative rights that became statutory rights, didn't they?

MR M SMITH:

Yes, but the –

WILLIAMS J:

Which were excluded from absolute owners of the soil.

MR M SMITH:

Yes, with a complicated exercise of working out to what extent those prerogative rights came as applicable to the circumstances, and that was one of the reasons for statutory codification if you look across into those historic statutes on minerals.

KÓS J:
But not I think coal.

WILLIAMS J:
Not coal, no.

ELLEN FRANCE J:
In the discussion of the history in relation to *Mueller* et cetera, does it cover that point we've just been discussing about additional rights in relation to some minerals?

MR M SMITH:
Its focus, there's coal and one other, lignite.

WILLIAMS J:
That's coal.

MR M SMITH:
It is coal. It shows my geology expertise. I'm happy to go there now if your Honours want to explore that issue, or we could just finish off because we've almost finished off *Ngāti Apa*. I'm very happy to do either. If your Honours would be assisted by going to…

KÓS J:
I think you should finish –

GLAZEBROOK J:
No, finish *Ngāti Apa* I think is…

MR M SMITH:
Before returning to – there is one, and this is perhaps behind your Honour Justice French's question, that the answer to that also perhaps there too depends on whether or not you see that the debate that their Honours Justices Kós and Williams were having yesterday as to whether or not, I think

amongst other of your Honours, whether or not the focus was on the bed of all the minerals.

FRENCH J:

Yes, whether the thereto relates to the bed of the minerals.

MR M SMITH:

As if the thereto relates to the bed, it's more understandable why the minerals are different and are separately referred to after the thereto because they're then one part of the subset of the bed and the only part that the Crown obtains absolute property in respect of and everything else is just the – and in terms of your Honour Justice Williams' point, the other rights and responsibilities that the Crown legitimately has in terms of the radical title, but they're not inconsistent with the continued maintenance of customary title property rights.

FRENCH J:

That's the line of reasoning?

MR M SMITH:

Yes. So we are about to get to the third reason, we're still in, just going back to *Ngāti Apa* and paragraph 162, so the third of three reasons that Justices Keith and Anderson gave for the Territorial Seas Act not extinguishing Māori customary title is just the strength of or the height of the barrier for that and it's the point in line 25: "… legislative measures claimed to extinguish indigenous property and rights must be clear and plain. That clarity of purpose does not appear in legislation which, as the Solicitor-General acknowledges, was primarily directed…to extending New Zealand fishing waters to 12 miles and in 1977," that is the final two lines, "that is with international or, to return to earlier terminology, with matters of sovereignty."

So if one stands back, the three reasons that were identified by the joint judgment there; (1) the vesting was only if the radical title, (2) the compare and contrast exercise with that absolute property that was conferred in the 1903 Act

and (3) just in terms of the very high bar for extinguishments set through the clear and plain effect test, that bar wasn't met.

Then finally in *Ngāti Apa* there is analysis of the Territorial Sea Act, at paragraph 203 please, and this is his Honour Justice Tipping and for him the issue was so straightforward that there was no need to discuss it. "It cannot possibly be regarded as having extinguished the status of any Māori customary land…"

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GLAZEBROOK J:

And that's presumably going back to his test?

MR M SMITH:

That's how I read it. Reading the judgment as a whole, that's because it just failed on the test. Now that takes us through *Ngāti Apa* and brings us now back to paragraph 5 of my road map, and I propose to go through the points really in two steps, firstly just to do the textual analysis, and this is paragraphs (a) through (e) under paragraph 5, or subparagraphs (a) through (e), and then to look at the purposive contextual analysis.

And the first point there is we say, as *Ngāti Apa* reasoned in respect of the Territorial Seas Act, that the "vested" is only vesting the radical title, and the significance of the point for taking your Honours to what I refer to as building block 1 in *Ngāti Apa* where the Court of Appeal recognised that through the acquisition of kāwanatanga the Crown obtained only the radical title in and through the Treaty compact. That's the answer that your Honour Justice Williams gave to Ms Roff yesterday, that the fact that the Crown had obtained radical title upon the acquisition of sovereignty didn't mean that there was – you couldn't reason, as the Court of Appeal in fact did reason, that when you're looking at a provision vested you can read it appropriately down as referring to only the radical tile, and in that sense is confirming the common law constitutional position. So that's our first point.

And we've had a look at *Ngāti Apa*, the only other authority that I want to have a look at there is the first *Paki* decision, please, which is in our authorities, and paragraph 43, and this is the former Chief Justice's discussion of his Honour President Cooke's decision in the *Ika Whenua* case of the mid-90s where – and I won't take your Honours there but I will note in terms of my road map I've referred to the relevant *Ika Whenua* extract, and this is paragraph 5(a) of the road map, as being – at page 24 that's a typo, it should be page 26 as correctly recorded in footnote 59 of the judgment here, but the point in taking your Honours to this paragraph of the former Chief Justice's judgment is how she understands President Cooke's decision in *Ika Whenua* where he expressed the view that the terms of section 14 of the 1903 Act "were not sufficiently explicit to achieve an expropriation of Māori customary land".

And her Honour the former Chief Justice expressed the view, and this is in the brackets that start on line 38, that view perhaps turned on the use of the word "remain" at section 14(1) of the 1903 Act, "and the reservation in relation to Crown grants, which could be taken to indicate that section 14 is effective only in respect of land obtained in ownership and subsequently granted by the Crown", which is your Honour Justice Williams' point in relation to we wouldn't read in or easily infer a discriminatory intent to one type of property owners to the benefit of grantees of the Crown, but not to another pre-existing property owner in terms of Māori property rights. So that's how her Honour the former Chief Justice saw his Honour President Cooke's views expressed in *Ika Whenua* as being anchored to the statutory text and consistent with a view that section 14 of the 1903 Act and the vesting it achieved didn't extinguish pre-existing, or it didn't expropriate Māori customary land.

At paragraph 5(b) of my road map we say that the "deemed", and this is the "deemed" in if your Honours are looking at section 14(1) of the 1903 Act, the "deemed" doesn't take matters any further because it relates to what was vested in the Crown. And if you look at – I'm just looking at the statutory language there – the beds "shall remain and shall be deemed to have always been vested in the Crown", that is consistent with really a confirmation affirmation of the radical title of the Crown.

FRENCH J:

Do you know historically what sort of grants had been made by the Crown of the bed –

MR M SMITH:

Yes.

FRENCH J:

– because presumably there had been grants so what were they purporting to be grants of?

MR M SMITH:

The best help I can give your Honour on that is, so there's reference to this in *Ngāti Apa* and there's reference to it in *Paki (No 1)* and there is an older English case that's referred to in *Ngāti Apa* that's in our authorities that illustrates it as well.

FRENCH J:

Thank you.

MR M SMITH:

And maybe I'll segway to that now. So if we go back please to *Ngāti Apa* and at paragraph 133 please. So your Honours will see there, there's a subheading "Private property and marine areas under the common law in British and colonial territories" and there's a reference in the first sentence there: "It was also early established, but again without prejudice to public (or common) rights especially of navigation (including anchoring), that the Crown could grant, and did grant, to subjects the soil below low water mark including areas outside ports and harbours." So there's a legal reference to that historical practice having occurred in British and colonial territories and your Honours will see there a reference to the *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192 decision, which I'll come to, as illustrating that shortly because that's in our case book, and down at the first sentence of paragraph 100 and –

KÓS J:

And there's *Wemyss* which appears to involve mining, *The Lord Advocate v Wemyss* [1900] AC 48?

MR M SMITH:

Yes, assuming the reference to submarine mining accurately captures the subject matter. And then you've got the point made in the first sentence at paragraph 134 that the English law that we received through the Treaty compact so far as applicable at least would have enabled "private individuals in New Zealand to have property in sea areas including the seabed." So there's – that's your legal principle framework for, in answer to Your Honour Justice French's question, and the same theme is picked up in the *Paki (No 1)* decisions and if we go there please to paragraph 16 –

KÓS J:

But we're presumably talking primarily about things like mining and jetties, those sorts of – I mean a jetty will be more likely to be a leasehold interest but…

WILLIAMS J:

Probably more likely canals although they were often private Acts. I think they were private local Acts but it would be in an economy where rivers are your motorways, there'd be quite a bit of modification that would require authority by someone who had authority.

MR M SMITH:

Yes. I don't know enough to say anything sensible on what the practice was historically so I won't venture into that. The canal situation certainly was the subject of private statutes, and I just think of some of the ones associated with the, ultimately the redirection of the Ruamāhanga River over the Remutaka Hills that led to ultimately all of the problems with Lake Ferry. Those were through – some of the history to that was the redirection of the natural flow of the river through the crashing of canals to open up the land ultimately for farming and –

WILLIAMS J:

Right, I was thinking more of England but you're right, that legal culture that comes from an economy for which rivers are central to the working of the economy gets brought here in the middle of the 19th century and to the extent that it is useful is applied but mostly gets overtaken by a very busy settler Parliament I would have thought and dealt with that way?

MR M SMITH:

Yes, I have – I'm sure the Tribunal dealt with this in its Whanganui River inquiry looking at the early history of the river as the – it was the – and the same with the Waikato River, they were the means of transportation inland at a time when we didn't have the roading infrastructure or the writ of the constabulary that ultimately came to get access to the interior for settlement and exploitation and other purposes.

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It was really only with Ford and the mechanisation of the motor car brought about for things when they arrived here. Rivers as a mode of transport became, relatively speaking, less significant leading inexorably to the highways position that we see today around us.

So that's the English position referred to in *Paki*. So there's paragraph 16, and if we go also to paragraph 58 of *Paki* please. This point is also made in the, picked up in the judgment, in the 1903 Act, contacts more directly the judgment of the former Chief Justice, and I just pick it up at line 8. "The exemption of Crown grants," that's the savings at the start of section 14(1), "indicates that such mixed ownership was indeed envisaged, since it cannot be the case that grants for the bed of an entire river were in contemplation."

Then addressing your Honour Justice Kós' point: "No doubt grants of river bed may have been unusual, but the legislation contemplated they could have been made and it preserved any such existing ownership through Crown grant before 1903." It doesn't give us the practical examples but kind of makes otherwise a

commonsensical point, there wouldn't have needed to be a savings provision for such grants if they didn't exist.

Then rounding out these authorities your Honours will recall that I flagged the *Gann* decision when we looked at the *Ngāti Apa* extracts on this, and that's in our casebook at tab 36, and the passage that I'd highlight is at page 1314 in terms of the paginations in the bottom centre, and it's the paragraph almost half way down beginning: "But the principle difficulty" and it's referring to there grants of soil and fisheries, some dating as far as before Magna Carta, and it makes the point that any of those grants are rights, grants to the riverbed, are, and I'm just quoting from about half way in that paragraph: "… subject to the rights of all subjects to pass in their vessels in the ordinary and usual course of navigation, and to take the ground there, or to anchor there at their pleasure, free from toll, unless the toll is imposed in respect of some other advantage conferred upon them, or at least on the public."

I highlight that for two reasons. It's recognising that there were private grants of riverbed land in England, but those grants were subject to public rights including rights of navigability, and the way that I read this passage is the bundle of rights or interests associated with navigability includes the right to anchor at pleasure, and other rights associated, just inherently with navigation as an activity, and interestingly the reference there to you're free from toll from the private owner of the riverbed land, but you're potentially able to be told by, in respect of advantages conferred in the public interest, and I took that as take that as potentially some authority supporting the proposition that your Honour Justice Williams I think put yesterday, that well, there would be, the radical title of the Crown included the ability to do public works type things. We're not inconsistent with customary property and that might include to toll for public uses of, as part of the right of navigation, if there were proper public purposes associated with that.

This is all, as we'll come to, relevant to the area of – or the issue of compatibility, to what extent is there total incompatibility, as the Crown said or not between rights of navigation and the minerals rights that are reserved to the Crown on

the one hand, and the retained customary title, customary property rights on the other hand. But that, does that answer, well that's the best that I can answer, the most helpful I can answer your Honour Justice French's question around private grants.

FRENCH J:
Thank you.

MR M SMITH:
Now we're back I think at paragraph 5(c) of the road map. So I've dealt with the "deemed" point. We say there is an intention to preserve existing property rights as with the Territorial Seas Act, and I think I've said everything that I can about that. Paragraph 5(d) comes to a point that we have already discussed, which is the "absolute property" language is the only indication of an expropriatory intention, but we say it's restricted – when you read that section as a whole and in terms of its plain meaning it's just restricted to the minerals, and that's – there's a reference there to paragraph 161 of the judgment and that was where I was putting I think in response to a question by your Honour Justice Kós the two ways to read whether there was an ambiguity in there. So I won't go back to that.

What I will go to though, please, is just page 21 of Professor Boast's *Foreshore and Seabed* text in our authorities, so you can see Professor Boast's view. That's tab 48. It's page 21 of the text, which is page 10 of the PDF, if that's helpful. And so if you scroll down a little bit, please. That's it. And your Honours will see there, so it's the page on the right-hand side, there is a quotation of that joint judgment of Justices Keith and Anderson, it says it's paragraph 61, I think it's missing a "1" in front of the "61", and then Professor Boast addresses that in the paragraph that follows and we endorse his reasoning that the view of President Cooke in *Ika Whenua* is to be preferred: "Section 14 does not actually state that the Crown has 'absolute property' of river beds. Rather the provision states that the beds of navigable rivers are 'vested' in the Crown and that *minerals* 'within' the bed are the *absolute property* of the Crown. The legislation vests a beneficial title to minerals, not riverbeds,

as is clear from its context. The legislation arose out of issues relating to title to coal beneath the bed of the Waikato River." We'll come to that with *Paki (No 1)* as well, but that's consistent with the purpose as we understand it.

So – and then critically Professor Boast concludes: "It is submitted that while the statute does extinguish customary title, if any, to minerals in the subsoil of riverbeds," it is "insufficiently 'clear and plain' to extinguish a customary title to the beds as such and that the Crown's title remains burdened by Māori title."

KÓS J:

So what page number is that, please?

MR M SMITH:

Page 21.

KÓS J:

Thank you.

MR M SMITH:

So we – as is reflected in that, as much as I would like to argue that the "thereto" relates just to minerals, it seems to me that the better reading of subsection (1) is the "thereto" relates to the bed and the minerals as separate to it. And as your Honour Justice Kós has pointed out more than once, there would – and your Honour Justice Williams yesterday, there would've been no need to vest the beneficial title in the minerals if that had been achieved by the first part of the provision dealing with the bed.

And paragraph – just going back to my road map, paragraph (e), this is our compare and contrast exercise. You'll remember I took your Honours to the compare and contrast exercise with the 1903 Act that their Honours Justices Keith and Anderson did in *Ngāti Apa*. We do the compare and contrast with reference to section 14(1) of the Māori Land Amendment and Māori Land Claims Adjustment Act 1926, the Act that extinguished customary title in respect of Lake Taupō and parts of the Waikato River.

And that is relevantly quoted and discussed in the *Paki (No 1)* decision at paragraph 43, if we go there, please. And your Honours will see quoted near the top the relevant provision, and you'll see there very clearly, and it's the third line on, hereby declares the earlier mentioned property "to be the property of the Crown, freed and discharged from the Māori customary title (if any)".

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And as the former Chief Justice goes on to say in paragraph 43: "The section accomplished [much] more than vesting the bed of the portion of the river referred to in the Crown. It dealt with use of the waters of the river and cleared the land of any Māori customary title or Māori freehold title." And we say by way of compare and contrast that if section 14(1) of the 1903 Act was intended to effectively clear pre-existing customary title as the Crown argues, one would expect to see much clearer and plainer language of the kind that one can see in this provision, and that is a factor that tells against the extinguishment conclusion that the Crown is asking this Court to draw.

KÓS J:

I suppose one question is whether Parliament in 1903 ever had in mind Māori customary title at all in relation to coalmining and riverbeds. I mean it may not have been in practice at all, and so what was done here was probably more focused on Pākehā exploitation than troubling themselves, or thinking about the customary title implications for Māori. As opposed, for instance, to the 1926 Act where they clearly were thinking about it.

MR M SMITH:

Yes, I accept that point.

WILLIAMS J:

So the 1926 Act was in response to *Tamihana Korokai* I presume?

MR M SMITH:

Yes.

WILLIAMS J:

In which the Court found that the Native Land Court had the power to grant titles because private titles in lakebeds were fine in English law as well, everybody relaxed.

MR M SMITH:

Yes.

WILLIAMS J:

So the middle ground between this and at least your interpretation, well the middle ground between this and Territorial Sea legislation is the concept of necessary implication, Justice Tipping's necessary implication, and that's where we really need help because is there necessary implication here that even though the Māori interest was not the focus, that seems to be very clear, the provision wouldn't make any sense unless those interests were extinguished.

MR M SMITH:

Yes.

WILLIAMS J:

What do you say to that?

MR M SMITH:

That there is still work for the provision to do if they're not extinguished so that makes sense, and this is, I need to take your Honours to the relevant legislative history discussion.

GLAZEBROOK J:

At the very least it takes away minerals.

MR M SMITH:

Yes, and we accept that it takes away minerals.

GLAZEBROOK J:

No but there's work to do because it takes away minerals.

KÓS J:

Yes, that's right.

MR M SMITH:

And it takes away rights that will be inconsistent with public rights of navigation.

GLAZEBROOK J:

Which is possibly the case anyway.

MR M SMITH:

Yes.

GLAZEBROOK J:

Because it would have been the case under tikanga really.

MR M SMITH:

Yes.

GLAZEBROOK J:

Because I don't think – well I think it would have been the case under tikanga, and maybe in a slightly different context, and probably not including fishing rights, but that was, from what we saw earlier, not entirely clear under English law either, for obvious reasons.

MR M SMITH:

Yes, yes, that's right.

WILLIAMS J:

The law in tikanga was reasonably clear if you rely on the evidence in the Wainui River case, in which they say there was a right of navigation up and down the river, but it was always subject to fishing rights, including these massive eel weirs that sometimes blocked the river and that was, they were

entitled to block it only intermittently I think was the evidence, it's a long time since I looked at it, but very clear rules anyway.

MR M SMITH:

Yes, and that –

GLAZEBROOK J:

Maybe not entirely consistent with the common law rules, but certainly enough, consistent enough, in terms of the public right of navigation.

MR M SMITH:

Yes, so in that sense your Honour's right, there's at least two big things it's still doing. It's recognising that in circumstances where there isn't a material inconsistency, if it's framed in that way, but also where there is an absolute vesting, the radical and the full title and the Crown in respect of the minerals in the subsoils of the bed.

WILLIAMS J:

So the Crown's argument is that there had to be enough of a right for the Crown to be able to control the placing of structures in the beds of navigable rivers, and changing the course of rivers where required et cetera et cetera, and without the beneficial title they could not have done that.

MR M SMITH:

Yes.

WILLIAMS J:

You were going to take us to the statutory history that says that's not the case, or are you going to just disagree with that on other grounds?

MR M SMITH:

Disagree with that as a matter of principle. The statutory history doesn't – because it wasn't –

GLAZEBROOK J:

Can I point out, if it's subject to other grants then they couldn't do it anyway.

MR M SMITH:

Yes.

GLAZEBROOK J:

Which is why I think the point I was making earlier is actually related to Justice Williams' point, because unless you get rid of all of those as well, then you can't do that.

MR M SMITH:

Yes.

GLAZEBROOK J:

And the same argument must apply to the foreshore and seabed as well, in terms of putting structures.

MR M SMITH:

Yes, yes. So – and in that sense that's a very compromised Crown set of rights that comes, because of also the preservation of the existing granted rights.

GLAZEBROOK J:

Well I think – are you going to take us to the *Mueller* case, and – well I think you were going to take us to the – or have you already taken us to the mineral, the issue about minerals in terms of being one of the aims of the legislation, or are you going to do that now?

MR M SMITH:

I'm just – that's my now.

GLAZEBROOK J:

Oh, and you're going to take us to *Mueller* as well? That's fine, great.

MR M SMITH:

Not to *Mueller*. I wasn't intending going back there because there is a discussion of the – the 1903, it was a response to *Mueller*, and the history of it in light of that is discussed in the *Paki (No 1)* decision.

GLAZEBROOK J:

Oh, that's all right. It's just – well the Crown relied on particular passages in *Mueller*. Well anyway, let's do that and let's see whether we need actually…

MR M SMITH:

Yes. So if – helpfully within *Paki*, and if we go just back a few paragraphs please to paragraphs 28 through 30. So we – I'll say what we say the context and purpose of the 1903 Act is and then I'll take your Honours to the paragraphs that we rely upon for this, and we say that the 1903 Act had three purposes. The first of those was to address uncertainty after or as a result of *Mueller* about whether navigability always ousted ad medium filum presumptions in respect of Crown-granted land, being the immediate contest and subject matter of the *Mueller* proceeding.

Secondly, we say the 1903 Act had the purpose of enabling through the certainty of navigability the use of rivers as highways for the reasons of transport and economic development that we were discussing not too long ago. And the third purpose was to establish Crown ownership of minerals in riverbeds that had not been the subject of Crown grants, but protecting all the while existing property rights, and that's the savings clause in section – the start of section 14(1), and we rely upon in particular just the summary of the legislative history in paragraphs 28 through 30 and 54 of the judgment, and I'll just go through those in turn.

So we're at paragraph 28 now of the former Chief Justice's judgment and she's expressing agreement with the common ground that section 14 of the 1903 Act was enacted in response to the litigation in *Mueller*, and the immediate context, the next sentence: "Although the Crown was successful in result in that case, the Court's failure to rule that the presumption of ownership to the middle of the

river bed" – that ad medium filum presumption – "was always ousted if the river was navigable." And that failure to rule on that meant that, over the page: "In all existing Crown-granted land bounded by rivers, ascertainment of ownership depended on an assessment of the grantor's intentions from all the circumstances." Then final sentence there: "Leaving matters on that basis was likely to cause uncertainty into the future which might require litigation to resolve." So that was –

GLAZEBROOK J:

How is that sorted by just radical title?

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MR M SMITH:

Well we say it's – the immediate context to *Mueller* was private grants of land and the dispute as to what the impact of the private grants were and really the extent of them through to the centreline of river through ad medium filum, and that aspect of it doesn't address Māori rights at all, and then that gets to our necessary implication point.

GLAZEBROOK J:

Well no it doesn't. Well, it actually doesn't make much sense, because if it does include that then you've had a grant that includes that anyway, but you say it was looking at this private intention that's post-Crown grant.

MR M SMITH:

Yes, so that was the immediate context.

GLAZEBROOK J:

Yes, all right.

MR M SMITH:

And you didn't have, Māori rights –

GLAZEBROOK J:

Which has – because if it says, well the Crown, if the Crown grant did include that in the first place, then it's saved by section 14, so this doesn't, it doesn't help the uncertainty at all.

MR M SMITH:

No that's right, and the way that this Court in *Paki (No 1)* interpreted the savings is it was only when Crown grants expressly extended to the bed of the river, not –

GLAZEBROOK J:

Of course understandably yes.

MR M SMITH:

And it had too, yes.

FRENCH J:

Is that in all the judgments or just this one, just the Chief Justice's?

MR M SMITH:

At that point, in terms of the express Crown grant point, that, from memory, is in all of the judgments because it doesn't make sense, it wouldn't achieve any purpose if, resolving the uncertainty if it was not limited to, the savings was not limited to grants that expressly extended to the bed of the river adjoining the riparian land.

GLAZEBROOK J:

But then if it – if it is just radical title that doesn't help with uncertainty, does it?

MR M SMITH:

No, I'd accept that, that it –

GLAZEBROOK J:

So that could be a contextual point saying it was meant to, contrary to, in a different way from the foreshore, from the Territorial Sea Act?

MR M SMITH:

Yes –

KÓS J:

Is that assumption right? Radical title at least give you some form of legal control over the waterway, and would to some extent would diminish the ad medium filum rule I think.

GLAZEBROOK J:

Well that was my question. Not that was my question, but I think there are some questions involved in that.

FRENCH J:

Have you looked to see what, if anything, is in the 1903 buildup to the enactment?

MR M SMITH:

I haven't gone beyond the *Paki (No 1)* decision because it sets out, and had to analyse the legislative history in quite a lot of detail, although in fairness the issue there was because it wasn't, there was no argument at that point that the land remained in Māori customary title, so that point didn't arise starkly, or didn't arise at all in the *Paki (No 1)* facts. But the – and this is why – so there are a couple of points in addressing this and confronting this head-on. One is that the, and it's your Honour Justice Kós' point, that radical title would have, and this is why I also took your Honours to that old English *Gann* decision, the radical title coupled with recognition of navigability rights, and coupled with the vesting of absolute ownership of the minerals, it must necessarily and inherently confer some rights associated with that on the Crown, and the ability to undertake activities that are ancillary to and give effect to that, and that the issue, if you look at it through that lens, is whether or not, to adopt a metaphor from earlier in the week, there has been a crowding out of any residual customary title rights in light of the rights that through radical title in this provision the Crown acquired and –

GLAZEBROOK J:

I suppose the other argument is even if they intended to do that, they failed because they didn't do it in an explicit fashion.

MR M SMITH:

Yes.

GLAZEBROOK J:

And that might have been because they didn't have Māori customary rights in mind, whereas they did have the other sort of riparian rights in mind but that was all dealt with in any event by the…

MR M SMITH:

Yes, and that was going to be my second point.

GLAZEBROOK J:

Yes.

MR M SMITH:

And in terms of where the first point gets you to is, it's a very interesting recent British Columbia Court of Appeal decision at paragraph 5(h) that I've referred to there where you, to give an entrée into that after the break, there the issue was First Nations rights in respect of a fishery on a river was recognised by the Courts and the issue was well in light of the recognition of that right how is a hydro dam to be operated by Rio Tinto and, more particularly, by the Crown where the Crown had –

WILLIAMS J:

This is an existing dam?

MR M SMITH:

Yes. Where the Crown had rights in relation to water allocation and flow regimes to manage that on the rivers and there the British Columbia Court of Appeal, and I've given the pinpoint paragraph references, they concluded that

having recognised the First Nations customary rights in respect of the fisheries on the, I'll get the name of the river right, the Nechako River, the Crown, both at a federal and provincial British Columbia level, had a fiduciary duty with two dimensions to it, a procedural and a substantive. The procedural dimension to the fiduciary duty was to consult with the First Nations, whose fishery right would be affected by water flow associated with operation of the dam, to consult with them in a way to ultimately exercise the discretion to change water allocation flows in a way which might avoid, I don't use it deliberately in these terms, but that are in my language, avoid remedy, mitigate – avoid any or at least to minimally impair the incursion on the customary fishing right.

So that was the procedural dimension to the fiduciary obligations that was found in those circumstances, but there was also critically a more substantive dimension which is to exercise, fiduciary duty to exercise the discretion in relation to water allocation and flow, to manage it in a manner consistent with the Crown's obligations under section 35 of the constitution in Canada, Constitution Act, which is the affirmation of Aboriginal and Treaty rights.

So you have to exercise a discretion in a way to, in terms of your Honour Justice William's language of last week, to minimally impair, where that is at all possible, the incursion, infringement, curtailment of the pre-existing customary right and that would be – I raise that here because it will be a similar situation where you've got Crown powers and rights ancillary to the mineral rights to the navigability, and just ancillary tour as a part and parcel of the package that as radical title, that will – inevitably there will be room within some rivers for the exercise of discretion; where do you build a structure, at what times of the year relative to customary access to use of occupation of riverbed and adjoining lands, how do you do it. That discretion, if we think in just orthodox, constitutional and administrative law terms, you exercise the discretion in a manner which has regard to and is consistent with minimally impairs your really important constitutionally protected rights, pre-existing customary rights and it's through that mechanism of reconciliation inherent in the exercise of discretion that you can have both that package or bundle, parcel of Crown rights, sitting

alongside the pre-existing customary rights and operating compatibly. It is not a crowding out binary either/or situation.

So that's the, in terms of that first point, that's the point of principal decision that we make in it. It ties in with, and these are the points in paragraphs (f) and (g) of the road map, that the – if you think about navigability, as your Honour Justice Glazebrook pointed out, there isn't any inherent inconsistency between rights of navigation and pre-existing property rights either at tikanga as law or private property rights, and I've taken your Honour to most of those cases that are referred to there.

The only other one we don't need to go to is the *Chippewas of Nawash v Canada* 2023 ONCA 565 decision, which is in the Crown authorities, which stands already for the same proposition and, interestingly, at paragraph 80 to summarise this evidence from an expert in American law, we're talking about the American position being similar, there's navigable servitudes that expert witness referred to as being recognised in the United States, that the reserved Indian banned rights associated with water are subject to, and that's the reconciliation over there in the US as a matter of US federal law that recognises and gives meaningful effect to both.

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Similarly, we say there is just no incompatibility in principle between Crown ownership of minerals on the one hand and a bundle of rights in respect to the riverbed on the other, and just make the point that for a long time the legal policy in New Zealand understandably has been the fact that there's a reservation of minerals in favour of the Crown doesn't mean that you don't otherwise own even terra firma land, they just sit alongside each other, and that if one conceptualises it in bundle of rights terms, it's you've lost a little wedge out of the bundle of rights associated the ownership of land but you still have all of the other wedges that comprise a very large otherwise bundle.

Now, it's 11.30. Might now be a time to break?

GLAZEBROOK J:

Thank you. We'll take the adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.51 AM

MR M SMITH:

We were just before the break finishing off the material that we were taking your Honours to as setting out the purpose of the provision in section 14 of the 1903 Act, and we had been looking at paragraph 28 of the former Chief Justice judgment in *Paki (No 1),* and if we could go please to paragraph 29, so certainty and resolving certainty is where we ended at paragraph 28, although that certainty wasn't perfect certainty that was being looked to be achieved because of the pre-existing rights that were preserved through the savings clause, and we say also through the preservation of extinguished customary rights, and adding a further complication through the lens of that certainty is it was by that point possible, there's no suggestion of it on the facts here, but it was possible that in respect of some navigable rivers the pre-existing property rights of Māori might have been validly lost in accordance with a sale, transaction, free prior and informed consent, or through other extinguishing legislation prior to 1903.

So inevitably that means that the certainty that was sought would have to take into account logically that exercise too, of working out what, whether or not there were – the starting point would not be necessary – wouldn't be logically that unless and except to the extent there was a Crown grant, express Crown grant, in respect of riverbed land, Māori property rights related because of those possibilities of valid transactions of alienation through State law extinguishment lenses, or extinguishment through other statutes prior to the point, which is a long-winded way of saying the certainty that was sought, when you actually stand back and look at things in context, is not totally but a little bit of a will-o'-the-wisp.

The second and third purposes of the legislation, which are alluded to in paragraph 29, is it's first sentence, line 7, end of line 7: "… Parliament was concerned with both the use of rivers as highways and the ownership of minerals." And the former Chief Justice explains in the next sentence: "On that basis, statutory provision of rights of navigation along would not have achieved the purpose, and continuing doubt about ownership of the river bed would have impeded the Crown's ability to undertake improvements of river highways… and to extract gravel and minerals."

So that goes to the point that we were discussing before the break, which occurred to me over the break, one way of framing the issue when one stands back from it is in order to have the powers necessary to ultimately give effect to the public rights of navigation that are recognised and provided for through this Act, and the absolute right in minerals in the Crown, does the Crown need full title to do that, and we would answer that question no, and if that's right, if there is room for the Crown to do the things that it needed in order to secure across time navigability and to have access to and relevantly exploit as appropriate Crown minerals, then we're in a world where there is the potential for co-existence that just needs to be worked through on a case by case basis, and that brings in my emphasis before the breaks on this is just the situation that we're well familiar with, and constitutional administrative law where there is a discretion, and as we all know there's no such thing as an unfettered discretion, and the fetters that guide its exercise are the need to avoid or where it can't be avoided to only minimally impair Māori property rights that remain in the navigable water space.

So that's paragraph 29. Paragraph 30 is, just makes the point that clear from the debates, this is the second sentence, "… that there was anxiety about expropriation of existing rights of property." And as a result of that you have the preservation of existing property interests, that's the savings clause in section 14(1), and that point is rounded out in the final two sentences of paragraph 30. "For present purposes, what is of significance is that a balance was struck in the legislation between private property and public property which protected both." It wasn't a binary and/or and to that extent there is room for

the analysis that we say this Court should follow in terms of recognising the space for co-existence and reconciliation, which doesn't involve the crowding out of customary title or property rights in a context where when we stand back and look at it through the lens of MACA today, that there means that for those customary rights that weren't crowded out, do they, can they support the grant of CMT and/or PCRs in respect of the navigable parts of the river, and that ties into, just picking back up the road map, we've set out at paragraph 6 of the road map relevant PCR rights that have been recognised with, there's two decisions that are not in the, either the authorities in the case on appeal in this proceeding there as well as a reference in that red font case on appeal reference to the High Court judgment, those are the citations to the PCR rights that have been recognised on the assumption that the 1903 Act was not extinguishing, and I thought it was helpful to identify, to itemise those because it shows with a lot – they're just not inconsistent with public rights of navigation co-existing, nor Crown mineral rights co-existing. It might impact on the, differently put, say with whitebaiting there is obviously a time of the year that whitebaiting is done and any dredging, for instance, to open up or widen channels for the purpose of maintaining rights of navigability can be done at a time which doesn't impact that customary fishing practice, and I thought that was helpful because it illustrates through a very practical lens that the more principled point that we make that there is no inevitable conflict between a crowding out of customary rights, recognising the limited inroads into those rights that section 14 of the 1903 Act provides for.

WILLIAMS J:

CMT brings a whole different frame to the discussion of reconciliation though, doesn't it?

MR M SMITH:

I accept for CMT it does.

WILLIAMS J:

But this is a fight about CMT. Not PCRs.

MR M SMITH:

Well it's a fight about both because if it extinguishes, then the extinguishing effect means that, if you think back to the presentation yesterday by Crown Regional Holdings and Ōpōtiki District Council, Justice Churchman had set that black line.

WILLIAMS J:

Yes, I understand. I was thinking PCR had been accepted according to the unanimous Court of Appeal on that point, in the contested area.

MR M SMITH:

Yes.

WILLIAMS J:

And no one seems to be disagreeing with that.

MR M SMITH:

No. My point, which isn't different, I don't think, to your Honour's, is that if the Crown's appeal succeeds, the PCR rights up the navigable stretch of the river go, because that can't be. They've been extinguished.

WILLIAMS J:

Does that follow?

MR M SMITH:

On the Crown's case it does.

WILLIAMS J:

Yes, but does that follow?

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MR M SMITH:

We say it doesn't because – and this is the – so as I understand the Crown's case, they say that the effect of section 14(1) is to confer full title on the Crown, totally crowd out and exclude the ability for there to be any customary property

or rights retained in respect of the navigable stretches of these rivers, and if that's the case there is no – and if the Crown's argument is accepted, there is no room for PCRs or CMT in respect of this –

WILLIAMS J:

Except that they could be thought of as, I think Paul McHugh called them unregistered easements.

MR M SMITH:

Yes, so that –

WILLIAMS J:

And so not subject to, if you took a Torrens title approach to this, which is probably unnecessary with the Crown title, not inconsistent with a Torrens system.

MR M SMITH:

Yes, I –

WILLIAMS J:

These are very limited user rights.

MR M SMITH:

Yes and – I don't think I'm disagreeing with your Honour, but is your Honour having in mind that this is the latent right situation of his Honour Justice Kós that these are rights that sit totally outside of the MACA framework, or through that conceptualist –

GLAZEBROOK J:

Well they can't really, can they, because they're in the MACA framework.

MR M SMITH:

Well that's our concern, yes.

GLAZEBROOK J:

I mean there will be rights that sit, I think Justice Kós' point, and I think it was also a point made by one of the parties, and I can't remember which, that even if you don't get a CMT it doesn't mean at tikanga you don't have mana over that particular area, it just means that that isn't recognised for whatever reason under MACA.

MR M SMITH:

Yes. There is, and I don't –

GLAZEBROOK J:

Because all of those rights have been restored.

MR M SMITH:

Yes.

GLAZEBROOK J:

And there might be a disconnect between what's restored and what's recognised.

MR M SMITH:

Yes.

FRENCH J:

But your argument is that logically if it was extinguished at law by the statute, 1903 statute, then that must be true for the purposes of PCR as well.

WILLIAMS J:

That's my question, because PCRs are different to CMTs, the requirements of extinguishment may be different. Just because absolute title may give you an answer in something as extensive as CMT, but would it give you an answer in something much more limited like a PCR.

MR M SMITH:

Yes, I was channelling my understanding of the Crown Act, if your Honours, at that structural level, if we were to look at the statute, as your Honour Justice Williams is suggesting, that the test for extinguishment can be contextually variable depending on what the rights that you're looking to.

WILLIAMS J:

What it's extinguishing.

MR M SMITH:

Yes. Yes, and the modern form of recognition associated with that statutory pathway then that would be open to adopt and that would just be a nuanced contextual understanding of extinguishment in light of the, really the nature and the bundle associated with PCR rights in contrast to CMT.

WILLIAMS J:

But PCR rights don't generate the permission requirement, and so could give rise, for example, to an obligation on another marine space user to limit the extent of use so as to preserve as much as possible, thinking of the *Rio Tinto* case. The PCR.

MR M SMITH:

Yes, I accept that. Now I think, subject to any further questions, that those were the only points that I wanted and needed to make on the first issue of the effect of section 14 of the 1903 Act. Just to put in context, moving then to the second issue, this only arises as an issue if you found contrary to our argument that there has been an extinguishment of everything in respect of the navigable (a) parts of these two rivers as a result of the 1903 Act. If you don't find that it materially extinguished anything then this issue doesn't require determination, although you can see in circumstances where there'll be an obvious precedent effect of this decision, that will be nonetheless helpful for guidance on the revival issue.

We, just picking up my road map again, we start at paragraph 7 of it by saying what – setting out what we say is the context in which this issue arises, which is the interface between tikanga as law and State law, and picking up on a theme of last week in particular, if you look at issues of revival through the lens of – or issues of rights through the lens of tikanga as law, it is a situation where customary title and rights are not lost, but rather if you're looking at it through the lens of state law it's a situation of invisibilisation or unrecognised rights over a period of time. And we make the point, and this is focussed on foreshore and seabed related cases, that the invisibilising agent in terms of state law or vehicle has sometimes been the legislature, and the Lake Taupō expropriating statute is perhaps the strongest example of that, but it also has been explored in earlier exchanges, it's also been the judiciary.

And as was explored earlier I think last week, you had the invisibilisation of tikanga rights and title in the period between the *Ninety-Mile Beach* decision in 1963, corrected in *Ngāti Apa* in 2003, and it seemed to us you could also say the same in respect of the period really starting with *Wi Parata* and the associated, in terms of philosophy, Protest of Bench and Bar in 1903 that wasn't really corrected until his Honour Justice Chilwell's decision in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC), and recognising in-state law as status for the Treaty that had been under the cloud of *Wi Parata* prior to that.

And then Professor Boast, and I won't take your Honours back to page 21, but he also refers to an invisibilisation period in respect of fishing rights that was corrected through the *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 decision in 1986, but had its genesis back in the *Weepu* decision of 1956 in respect of customary sea fishing rights that – as I'm sure the Court well knows, the *Te Weehi* decision was in respect of the customary gathering from a kaumātua, from memory of Ngāti Porou, in Motunau in North Canterbury in Kāi Tahu's takiwā, and whether or not that was a protected customary activity so as to ultimately avoid prosecution under then fisheries legislation, and that, as Professor Boast accurately identifies, was really a quite important

stepping-stone that – on the way to and explaining the correction of the law through *Ngāti Apa*.

And that's a long-winded way of saying that sometimes it's the decisions of the Courts that have invisibilised tikanga, which hasn't in terms of tikanga as law as a system led to the loss of those rights, just the invisibilisation on recognition of them in terms of state law. And we say that is the bigger picture context in which we come to the issue of revival and what the effect of section 11(3) is, and –

KÓS J:

But I'm not sure what you're trying to do here, because is this some – is paragraph 7 some sort of qualification of your first argument about extinguishment, because I would've thought if it's extinguished, it's extinguished, and the only question then is whether section – well we know section 6 doesn't have the effect of restoring it because that's limited to the Foreshore and Seabed Act extinguishment, so what – if it's extinguished I'm not sure what paragraph 7 does. The question then is what actually section 11(3) does.

MR M SMITH:

Yes, so we – paragraph 7 is not related to the first issue at all, and we say that if it's extinguished it's not extinguished for all time, it's only extinguished so far as the statute that extinguishes has that force and effect, and that's the revival theory which we say is – has a common law backdrop, and this is the – I'm just looking now down at paragraph 9(a) of the road map, and we referred to, it's not referred to there, but the judgment in *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 of his Honour President Richardson as he then was conceptualising the relationship between at a high level statutes in the common law as – or constitutional law, common law, as the common law bedrock is the floor and the statutes are the rugs that are placed on them from time to time with the – if you follow the metaphor through, if the rug is removed or is replaced, take the removal example, if the rug is removed the common law

springs back, and we say that conceptually that that is right generally with the law, and that is equally applicable to considering the effect of extinguishment. 1210

There's an example, before I get into an immediate context, we've got the *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) decision that we've referred to and it's referred to there, and it's in our written submissions, is a nice illustration in a different context of that, because there you have the Court of Appeal recognising that where the ACC scheme contracts, the ACC scheme will expand and contract in terms of coverage across time, where it contracts there is a role for tort law to flow back up in terms of the flaw of tort law when you remove that part of the statutory rug of the ACC scheme –

KÓS J:

Sure, I mean that's law. What we're dealing here with is titular status though. Entitle has a, tends to have a slightly more, slightly greater mortality.

FRENCH J:

Can I just be clear. Is your submission that section 11 revives every customary interest in addition to those that were, has been extinguished by other statutes, other than the 2004.

MR M SMITH:

We don't need to go that far. So we say, yes in part is the short answer. So we say that the effect of section 11(3) is that where the Crown is relying on title obtained by, under any enactment, and by operation of section 11(3), there is a divestment of that title. The rights that were suppressed by that enactment spring back up. So we say here the title of the Crown that it's relying upon is a title based on section 14 of the 1903 Act, and we say, and this is what the Court of Appeal held, the effect of section 11(3) is to extinguish that title and revive the customary rights that had been held down by the statute creating that Crown title.

FRENCH J:

Right. Is there any mention of that in the legislative history?

MR M SMITH:

Not to my knowledge, but we say that's the meaning and effect of –

FRENCH J:

It would be pretty far-reaching, wouldn't it?

MR M SMITH:

But it's in – yes and no. It's only a revival only for the purposes of this Act.

WILLIAMS J:

You're saying it's a revival of statutory confiscation.

MR M SMITH:

The rights that were statutorily confiscated.

WILLIAMS J:

Yes, only by statutory, by general provisions of statutory taking? Well that – section 14 effectively, section 179 whatever it is.

MR M SMITH:

We're only looking at it through the lens of the effect of – if we're wrong, and section 14 created the title that the Crown relies upon, then we say that title went, and with it the customary rights that were suppressed for the – not for all purposes, just for the purposes of this Act – and you've got to ask well what's the critical feature of recognising them for the purposes of this Act, it's to determine whether or not they support either CMTs or PCRs. So it's not – it is…

GLAZEBROOK J:

Which had limited rights, I think you'd say, and certainly don't include minerals, so there's no issue in respect of that.

MR M SMITH:

Yes.

GLAZEBROOK J:

Is that the…

MR M SMITH:

Precisely.

ELLEN FRANCE J:

But although our focus is on section 14, your argument would apply across the board to all sorts of statutes that…

MR M SMITH:

Yes, I'd accept that. Where they had vested title in either the Crown or a local authority as owner, in terms of just the plain meaning of the language of section 11(3). But I accept that is the logical consequence of it, yes.

GLAZEBROOK J:

Including whatever that other section that specifically said we get rid of customary title.

ELLEN FRANCE J:

Yes.

MR M SMITH:

Yes, but that would never fall within the common marine and coastal area, but if there was –

GLAZEBROOK J:

Well true but I'm just –

WILLIAMS J:

Well, not yet.

MR M SMITH:

I was just going to do the climate change qualification.

GLAZEBROOK J:

Quite, no but I was really just saying it, we don't know what other statutes there were, I guess is the…

MR M SMITH:

No, and this is, and not wanting to retread ground over the practical implications of section 106, but it would only be a rise and fall consideration, fall for consideration on a case by case basis where the Crown had, or some other party had raised an extinguishing statute.

GLAZEBROOK J:

All right.

WILLIAMS J:

Well the Taupō case is a little different anyway because in fact that was a negotiated settlement that led to the creation of the Tūwharetoa Māori Trust Board, with an annuity to make up for the taking, which of course was renegotiated in the modern Treaty settlement phase, so that's not a sweeping no discussion or compensation taking.

MR M SMITH:

Yes, in contrast to section 14 here, which if it did expropriate, it was without free prior and informed consent or compensation.

KÓS J:

Well, that's the point. I mean, coming back to my question before, which you haven't answered yet, you are now replacing the concept of extinguishment with two other softer expressions, one is suppression and the other one is expropriation, but this is a theory of extinguishment I'm not familiar with because I have taken the view that if title is extinguished, the title is lost, and your

argument is no title was taken by statute, it's only a suppression if that statute is repealed, and just repealed would be enough presumably.

MR M SMITH:

Yes.

KÓS J:

You don't actually need a restoration, just a repeal of the expropriating statute on your theory?

MR M SMITH:

Yes, I accept that's the logic of my theory and that's the – this is the interface of the State law understanding of property rights and tikanga is law understanding because at tikanga is law then whakapapa is not broken unless we're in situations where the ahi kā principles lead to the conclusion that it is but – and that is your explanation and justification for a different position in respect of Māori property rights relative to non-Māori property rights.

KÓS J:

Well I know what your argument is.

WILLIAMS J:

So, there's a flavour of that in the idea that rights can be impaired without being extinguished, even impaired to a significant degree?

MR M SMITH:

Yes.

WILLIAMS J:

There doesn't seem to be any argument about that, that control doesn't really mean control and exclusive doesn't really mean exclusive. You have to take into account what's happened in between. Your argument is really the logical extension of that to suppression simpliciter?

MR M SMITH:

Yes.

GLAZEBROOK J:

Well aren't you just saying, if they'd have left it as owner, it must go back to the previous owners which arguably could apply to not just customary title but other title but, of course, it's only in the context of this Act?

WILLIAMS J:

Well you've got the Public Works Act that does that generally speaking.

GLAZEBROOK J:

Well no that's right except that you're there looking at payment and compensation et cetera so that's a statutory regime.

WILLIAMS J:

No, I mean the hand back, section 42 hand back provisions.

GLAZEBROOK J:

No, no, I understand that but it might be if you didn't have that, that would be the logic for everybody but if you know, if you took it you no longer own it, that you would actually have to hand it back possibly with some, possibly with money if money had passed before but…

MR M SMITH:

Yes, but I accept that as –

GLAZEBROOK J:

But it's a very odd, it's an odd situation to have something that says we did own it and now we don't.

MR M SMITH:

Yes, and we are trying to make sense of –

GLAZEBROOK J:

It's very bespoke.

MR M SMITH:

Yes, and it's not only very bespoke in this drafting of the legislature but it's very bespoke in the regime in which it is located and the purposes including the restorative and, if one looks at it through a Treaty principles lens, a redress for past wrongs lens and restoring Crown honour lens and it, to that extent, we're not asking – the Court doesn't need to go as far as, we're not asking your Honours to go as far as endorsing a general revival theory of Māori customary rights for any or all purposes. We are much less ambitiously and much closer, much more closely anchored to the statute saying the effect of this provision in this statute for the purposes and to the ends that this statute exists to achieve is to do that.

GLAZEBROOK J:

I think we've understood the argument. We could keep debating it but I don't think, I don't think to much effect. We either accept the argument or we don't. We've understood it now.

MR M SMITH:

Yes, I suspect that's right. So, and we've set out the – really paragraph 9 is, is setting out some of the justifications that are elaborated in the submissions, the written submissions. The only point that I would make there, just because it's a reference to a decision that I didn't think about until preparing the road map, is just coming at it through the lens of the structure of the Treaty and then faced between the text of Articles 1 and 2

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I thought a helpful way into that is his Honour Justice Cooke's decision in the High Court in *Hart v Director-General of Conservation* [2023] 3 NZLR 42 (HC) which the issue there was the limits of the kāwanatanga role of the Crown under Article 1 in mediating a dispute between iwi as to rights at tikanga to jaw bones, whale jaw bones, and his Honour reasoned that the proper way to understand

the Treaty compact and the interface between Articles 1 and 2 is that it wasn't a legitimate role within the Treaty for the Crown as kāwanatanga to ultimately determine a matter of pure tikanga and to that extent the Article 1 kāwanatanga rights and powers with the Crown were qualified by and had to be exercised consistently with the recognition and protection of Article 2 rights, and we're not on all fours, obviously, with that situation here but it's helpful as a framework in my submission because it points to the fact that where you have an interface between the kāwanatanga powers and the recognition of protection of Article 2 rights, the Crown's scope of action, its ability to act must be determined in light of and its positions must be informed by the need to recognise and protect the Article 2 rights and if that's the case we say that that – it tells in favour of adopting a position in respect of the kāwanatanga powers of the Crown that involve giving better force and effect to the Article 2 rights that Māori have in terms of the text of the Treaty itself.

WILLIAMS J:

Was that resolved in the decision?

MR M SMITH:

The practical outcome was that – so in a practical sense the Director-General of Conservation had, my language not his Honour Justice Cooke's, picked a winner which was Ko Tahu, in respect of having the jaw bones returned to it, when I think it was Rangitāne who had competing tikanga-based rights, and his Honour Justice Cooke determined that the outcome that set aside the decision of the Director-General of Conservation made a declaration that it was unlawful and indicated that there needed to be a tikanga-based process followed to determine it in accordance with tikanga as law as the only relevant body of law.

WILLIAMS J:

I see. There hadn't been one up until that point, is that…

MR M SMITH:

There hadn't been a full one, no.

WILLIAMS J:

Okay.

MR M SMITH:

Now, unless your Honours have any further questions, those are probably the only points.

GLAZEBROOK J:

Thank you very much.

MR M SMITH:

Thank you.

GLAZEBROOK J:

I understand are we having a karakia at the end of these submissions or is it at the end of the day or?

MR M SMITH:

At the end of the day, your Honour.

GLAZEBROOK J:

End of the day, thank you. And are we on track, even though we are a bit behind?

MR FOWLER KC:

We're a little behind, your Honour, but I'll be as efficient as I can.

GLAZEBROOK J:

Thank you.

MR FOWLER KC:

Now, what I would like to do first, your Honours, is just a short piece in terms of orientating where the WKW case fits because, of course, this is a hearing full of cross-currents as well as the Herculean struggle against the Crown so – and I'm not going to spend a lot of time on it, just mark out where we sit.

In terms of the interface with parties such as Upokorehe or Ngāti Awa and so on, I will leave those issues completely to one side to be addressed, possibly by Mr Sinclair, if we need to, in reply time on Friday to the extent that there's any concerns or gaps or issues that the Court might want to raise.

In terms of the contest with Te Kāhui, that is of course essentially internal and largely, but not entirely, and I'll come back to that in a moment, not addressing section 58 issues but insofar as the WKW waka includes parties who did not obtain CMT, in other words, in inverted commas “were the losers”, then their position is picked up by my learned friend Mr Sharp, who is present now and not looking over us as he was last week, and he will take carriage of that aspect, and that insofar as it goes into section 58 issues, our position is that insofar as that is slightly different or a bit different from the Te Kāhui provision, we prefer his, but obviously in terms of an eventual outcome as long as it lands in favour of awards of CMT coming in direction of the iwi then that would not be a matter in which we would be overly concerned, but I just want to make it clear, we support his approach.

Now there is one other aspect though that sits outside of that, just to make this more complicated, and that’s this issue of the seaward boundary which my learned friend Mr Cunningham will address, and we’ll address that separately and that of course is a broader issue and isn’t so much a – well is not a Te Kāhui issue.

I wanted to – just before moving into the first part of the – no, in fact what I’ll do next is go directly to the outline of our oral submissions to set out the framework of where – the main planks of the submissions today. The first one is you’ll see it there emboldened, why the mandate issue remains live and a red herring – and not a red herring, because that is the position that Te Kāhui take, and we say that’s not the case at all, and we will address why.

GLAZEBROOK J:

Sorry, I’m just going to have to – I need to find what you’re referring to, sorry.

MR FOWLER KC:

There's an outline of oral submissions that's been sent both in hard copy and also should be in soft copy as well.

GLAZEBROOK J:

Yes.

KÓS J:

Well we now have more road maps than an AA shop, Mr Fowler.

GLAZEBROOK J:

Yes, I'm sort of –

MR FOWLER KC:

Well I'm sorry about that, that's the –

WILLIAMS J:

We've got more road maps than road.

MR FOWLER KC:

Yes, yes, the expressway. I've got more copies here, if that's needed.

GLAZEBROOK J:

It's all right. I've dug it out, thank you very much.

MR FOWLER KC:

Right. So if you look at the bold, the emboldened pieces, you'll see that there are five broad planks, and they're the planks of the argument that I will take you through. The first one is why we say the mandate issue remains very much live and not a red herring. Then secondly, we say the iwi/tīpuna mandate should have been recognised and the CMT awarded to the iwi. Then thirdly, and I'll explain in a moment why, we say, well, if we end up in a situation where section 58 tests are met by both iwi and hapū, then we say that by virtue of section 125 of the Act priority goes to iwi, that's the priority argument. And then the fourth plank is that, well, regardless of where you land in terms of

section 125, an iwi/tīpuna award of CMT is more apt. Finally the fifth and final plank is what I've just called the landing ground. So that's where I'm going to be travelling.

So lastly, on terms of preliminary observations, the appellation "iwi/tīpuna". The appellation "iwi/tīpuna" is absolutely deliberate. The emphasis in terms of the word "tīpuna" is to recognise the forebears of Whakatōhea, the whakapapa dimension to this, the issues of descent, descent to groups that still exist even though they might've metamorphosed or attenuated or amalgamated, that doesn't matter. If the line of whakapapa is intact and direct, then they are still part of this. But most importantly, the reason that we insist on including the word "tīpuna" is that it acknowledges the role of deceased kaumātua and rangatira in terms of what is before the Court in terms – regarding this application.

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Now, in that regard, I do refer to the He Poutama Law Commission paper and at paragraph 245, it's a solitary sentence in the middle of that paragraph, and that paragraph addresses the wharenui which is obviously a metaphorical journey into the constituents, if that's the probably incorrect expression of Māori society, but you'll see in the middle, dead in the middle of that paragraph, it says: "This further illustrates the close connection between the living and the dead in a Māori world view." And for WKW, who presented some 60 or 70 briefs, including from a lot of these people that are no longer with us, that's very significant and makes the mandate significant and it's important to also emphasise that in terms of the applicant that would be the bearer of the CMT, there was never any suggestion that that was going to be the late Mr Claude Edwards and it's not the suggestion that it's going to be Ms Adriana Edwards or any other unelected individual. What is suggested and has been suggested from the beginning by the late Claude Edwards and continues now is that there should be some trust, iwi-wide trust, that takes carriage of any CMT granted.

That disposes of the preliminary points and where I wish to go next is, first is to this question of the mandate issue remaining live. Now, as I mentioned, there's been a suggestion by Te Kāhui that the focus on mandate is a red herring and is conceptually wrong. Well, WKW would say the word “mandate” is an unsatisfactory term and we acknowledge that and we said so in the Court of Appeal and also in the Supreme Court submissions, and we would agree that there is no special authority to agree to something on behalf of an affected group that’s washing round in the mix here, rather we’re talking about someone applying for CMT. So, the analysis would seem to land here, it comes down to this. Who applies, for what and on behalf of whom and that’s why we say at the end of this point that there would be the obvious, and I'll come back to this later on, the obvious entity to take carriage of this would be Te Tāwharau plus perhaps some directions but that’s why the mandate issue is so important and it is also important when you stand back and try and analyse what are the avenues here, what's going to happen in terms of a section 58 analysis with regard to the evidence and what the holding in terms of section 58 is and, in my submission, when you do that you’ve got a couple of categories, certainly two and maybe three.

The first category, and it's my expression, if it's inept that’s my fault, but the first capture of that I suggest is to call it iwi direct and the fact that you can have a particular resource that is recognised as having iwi-wide use is recognised even by Te Kāhui. You'll find that in footnote 18 of their submissions in response to ours and I'll spend a little bit more time later on, on that issue of the iwi-wide relationship with a particular resource. In other words, it's going from the entire iwi, it’s a resource where the relationship is with the entire iwi, it's not particularly focused or framed or linked to a particular hapū.

The second category is where you have both iwi and hapū meeting the section 58 test for the same resources. Now, here there was considerable evidence filed in support of the iwi/tīpuna application, which was actually adopted by the hapū, the hapū applications in the course of the hearings and where that takes you, in my submission, is that if you’ve got evidence relied on by hapū in respect of a particular resource that can or, in fact, was also to be relied on by the iwi

as meeting the section 58 test, then a finding would be that a section 58 test is met by the hapū which would also be met by the iwi, or as Te Kāhui itself put it in its submissions at the end of paragraph 2.23, the hapū are the iwi. So just pausing there, it's not a sense in which overlapping claims as such are actually in competition, one is standing in the shoes of the other. It's not a matter of one hapū seeking to edge out another. The overlap is entire in that sense.

WILLIAMS J:

The problem with this is you're really asking the Court to do what the constituents themselves have been unable to do. This battle has gone on for 20 years.

MR FOWLER KC:

Yes.

WILLIAMS J:

That's part of the problem.

MR FOWLER KC:

Yes, and that's part of what your Honour raised, that somebody's got to take the – somebody who should have the mana should be picking this up and driving it.

WILLIAMS J:

Well, yes. Well, one of the problems with this is that it's gone on for so long. I mean that's legislative reworks, as you've said, since this man's application was in 1999, only two years after the original Ngāti Apa application and under the Te Ture Whenua Māori Act –

MR FOWLER KC:

Yes.

WILLIAMS J:

– not under any new legislation.

MR FOWLER KC:

No.

WILLIAMS J:

But the effect of those 20-odd years has been the melting away of kotahitanga. That seems just unavoidable. It's a fact and Whakatōhea has and the only iwi that's had this problem.

MR FOWLER KC:

Well, no, your Honour, we certainly contest that and we say that the original mandate has never been denied or at least it's not, it's never been reversed would be a better way to put it and it continues –

WILLIAMS J:

But mandate is a question of fact not technical process –

MR FOWLER KC:

Yes, your Honour, and it's a fact –

WILLIAMS J:

– and the number of people in this courtroom indicates that mandate is the subject of deep dispute.

MR FOWLER KC:

Yes, indeed, and it's a dispute that still needs to be resolved.

WILLIAMS J:

I agree, but is it something in which a court miles away from the protagonists, both structurally and geographically, is in any way the best institution to resolve what the people themselves refuse to?

MR FOWLER KC:

Possibly not, but at the end of the day it might have to, which is partly why in our submission what might need to happen here is this goes back to the High Court with directions attached and those directions might need to

encompass further steps to endeavour to resolve the issue of mandate, but at the end of the day I don't think it can be avoided that, if the parties themselves can't resolve it, someone else will have to and who else could that be other than the Court as a matter of determination of fact.

WILLIAMS J:

Well, another way of thinking about that is if the parties can't resolve it then that's the resolution or –

MR FOWLER KC:

Well, yes, the directions could – I listened with interest to that exchange, your Honour, yes the directions could be crafted in such a way that it brought in the need to impel the parties to resolve it, or to carry the difference somehow in how the CMT is shaped.

KÓS J:

I didn't think that was quite what Justice Williams was saying the resolution was. I understood the suggestion to be that if the mandate is so deeply contested the mandate is eroded. Perhaps that's not what he was suggesting.

MR FOWLER KC:

Well, I don't want to put words into Mr Justice – into his Honour's mouth but, your Honour, I understood that you were putting forward a proposition that the fact of the dispute and the need to resolve it might need to be part of the outcome.

WILLIAMS J:

These are difficult balances because Courts like ours can be accused of paternalism and sometimes history judges that paternalism even if well-meant and has done in the past in many situations that are not too dissimilar with this. The fact, the political fact appears to be that Te Whakatōhea is not kotahi right now and has struggled with that, not just in respect of its MACA claims, but in respect of its raupatu claims which I understand have now been settled.

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MR FOWLER KC:

Yes, the inquiry is before the Waitangi Tribunal.

WILLIAMS J:

By agreement of all, is that how it's played out?

MR FOWLER KC:

Yes.

WILLIAMS J:

Which I know nothing about any of this, but would suggest perhaps there's a pathway through, but in all of these cases it's an organic pathway that has to come up from the ground. It can't be imposed from the top because they never work. Even with good intentions.

MR FOWLER KC:

Certainly, but coming back to this issue of mandate and carriage by the iwi, I certainly resist the suggestion that there's clear evidence that that mandate has ended. There are an awful lot of groups and people who still assert that the iwi application, the iwi tīpuna application is the one that should prevail, and is the one that should be, at the end of the day, awarded, and in fact there's a good deal of confusion, as was set out in our submissions, around the question of when individual hapū were, to put it one way, dropping off. There was a good deal of confusion as to whether they were actually somehow hedging bets to somehow take a belt and braces approach to applications, and it's only been relatively late in the piece that it's clear certain hapū are rowing their own boat, so to speak. So it's a very messy, murky issue in terms of who actually – whether the mandate has been, in fact, ended by some of those hapū.

WILLIAMS J:

Yes, well, mandate is a question of political fact in accordance with tikanga.

MR FOWLER KC:

Indeed, and I was going to make that point too, we've got actually two dimensions to the tikanga issue here. We have the mandate to actually bring and take carriage of the application through to conclusion, and we have the section 58 question of tikanga. So tikanga is relevant in both of those dimensions.

Perhaps if I continue to say, in terms of this first area of possible categories or avenues, there's arguably a third, which is what you could call the tukutuku or interwoven entitlements. What I'm getting at here is where you have other hapū, other than what you might call the one that is most closely associated with the resource, that has some entitlements or rights as well, which was also an issue that was raised by your Honour last week, and you've got an interesting issue in terms of those as well. Who takes carriage of those, and that might also be an iwi issue rather than for any particular individual hapū other than what I could, for want of a better expression, call the one that's most closely associated with the particular resource. So for all of those reasons we say the mandate issue is very much alive and important, and the question comes back to who is taking carriage of it, for what, and for whom.

So I'm going to move now to the second broad plank, which is that we say that the iwi tīpuna applicants should have been recognised, that's their mandate should have been recognised, and should have been awarded the CMT, and I'll start with the point that there is no legislative presumption favouring hapū regarding customary interests. I don't know that I need to take the Court to the particular sections, you're probably well familiar with them, but I'm looking particularly at section 9. A section 3 guide, there's a guide of course at the beginning of the Act. If you look at those there is absolutely no distinction. It refers always to iwi, hapū or whānau, and you can't say one takes any precedence over the other.

The Te Kāhui submissions referred to the significance of the Treaty in this context. Well we say if you have a look at section 3(2)(c) or 7(a), which are the two provisions that refer to the Treaty, once again there is no reference there

to any of those groupings, of those three three types of groupings having preference or priority, one over the other.

The next point I want to raise under this plank is this question of what the Whakatōhea tikanga evidence is of mandate, because that's being challenged, and our answer to that is, well, the Te Ara Tono document or exercise to establish Whakatōhea tikanga answers that. Yes, it was commissioned for Treaty settlement purposes, but what it was engaged, engaging to do was to in the first instance try to distil or ascertain what Whakatōhea tikanga was, and it sets out steps, the various steps for that tikanga generally where there are decisions affecting the whole tribe, and this here, this was plainly considered to be an iwi-wide issue and hence the number of iwi hui-ā-iwi references in terms of steps and the hui-ā-iwi meetings that actually did take place. But we'd go further and say, well, even if it was in the first instance to address a Treaty settlement, why would that matter if it was intended to capture and distil Whakatōhea tikanga? The document is directed to Whakatōhea tikanga.

It's been noted by Te Kāhui that there are references in the Te Ara document that all Whakatōhea decisions are to be recorded and decided on a hapū basis and that supports the hapū approach. We say that in fact the document makes plain the importance of iwi consultation, support, and mandate, and on the actual subject of identifying a process, if we could bring up part of that document, that's at page 313.05126. On the screen, yes.

GLAZEBROOK J:

Can you give that number again, please?

WILLIAMS J:

It's 05126. 313.05 –

MR FOWLER KC:

3.01526 [*sic*], on the screen.

WILLIAMS J:
05126, yes?

MR FOWLER KC:
Yes, 126.

GLAZEBROOK J:
Thank you.

MR FOWLER KC:
And if you scroll down there, you'll see that there were hui-ā-iwi meetings on the 27th of June of 2004, 19th of December 2004, 23rd of January 2005, and the 1st of May 2005. Now certainly, yes, they were for purposes of the settlement, but that's – nonetheless you've got four hui-ā-iwi meetings inside 12 months. And what's interesting is that the one hui-ā-iwi that was for this particular purpose, that is the purpose of discussing this application in terms of MACA, well in that stage in terms of the Foreshore and Seabed Act, was held on the 30th of October 2005, some – not that far away from the period of those four meetings.

And further, if you go over to 313.05135, 135 down to the bottom of the page, last paragraph there, you will see – in fact at the top of the page you will see that that's a – the topic of tikanga is what's being explored there, and if you drop down to the bottom of the page you'll see that hui-ā-iwi is said to be "… the normal mechanism used by Whakatōhea iwi when ratifying strategic decisions and encompassed in this decision-making process is the dimensions of Whakatōhea…".

So you actually have there a particular report that identifies and evidentially substantiates the fact that hui-ā-iwi are considered to be the normal ratifying step to be used when you've got iwi-wide concerns or issues or considerations and, in my submission, what could be more obviously iwi-wide in terms of the sorts of issues that we've got here in these applications than exactly that.
1250

Now, I want to shift the lens on the camera now to He Poutama because this now is casting the examination more broadly in terms of being motu-wide and if we could look quickly please at the He Poutama document again, and this is at page 102, and what I want to draw to the attention of the Court there is that here we've got a guard for engaging with tikanga and there are a series of steps that are recommended in terms of how that exercise is tackled. If you go down to step 3 and look at (a), go to the bottom of that page, that's step 1 we can see on the screen at the moment, down to step 3(a): "Where tikanga is being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred within the iwi, hapū and whānau."

And what we say about that is well here we have one, if you look at the history, we have the 30 October 2005 hui-a-iwi which seems to be unequivocally clear in terms of authorising the forward carriage of this application. It's never been countermanded. That's what you would look at in terms of looking for what the tikanga around the mandate would be and where it would land. That's what you'd go to. There's never been any subsequent hui-a-iwi to consider the position and there's no tikanga-based evidence to change the iwi/tīpuna approach to a hapū one and it's not, we say, appropriate for the Court of Appeal to have disposed of that matter as a simple issue of etiquette.

KÓS J:

Well I think they saw it in slightly broader terms than a simple matter of etiquette. I mean it was the absence, it was the development of the separate hapū applications that –

MR FOWLER KC:

Well, even leaving aside the murkiness of how those emerged because clearly some were chugging alongside the iwi one, it still would have required something to have brought about a change or reverse, or it's not just a matter of we say there's no tikanga basis for it just simply to regard it as having somehow lapsed because there happened to have been other applications that after a while had hit the front of the queue. It's not as if the issue was unknown

even to Ngāti Rua because Ms Hata, who was very much the proponent in 2019 of the resolution that we'll come to, which we say is highly equivocal, she was actually the minute taker at the 30 October 2005 hui-a-iwi and that's referred to, you will see that in our submissions, it's the evidence of that. So –

WILLIAMS J:

The problem you have is that mandate is a fiendishly dynamic thing in any political community and particularly one that doesn't, hasn't, isn't constrained by legislative, you know, structures and so on, and is itself an oppressed community. These things are fiendishly difficult and the fact that no one's turned the light off, doesn't mean that what you've got is set in concrete because this thing is a political thing in accordance with the tikanga of a community.

MR FOWLER KC:

Maybe your Honour, but it's not a light being turned off to an empty room.

WILLIAMS J:

I'm not sure I understand that metaphor.

MR FOWLER KC:

Pardon?

WILLIAMS J:

Oh, well, there are still some people in the room obviously.

MR FOWLER KC:

Yes, yes, a lot of them.

WILLIAMS J:

But – yes, and a whole bunch have left. That's just undeniable. So that presents the hapū and the iwi with great difficulties in due course but they're not difficulties that the Court has either the ability or the mandate to control.

MR FOWLER KC:

Well ultimately, your Honour, certainly the Court, if satisfied that the section 58 test is met by iwi, it's open to the Court to make the award an iwi/tīpuna one.

WILLIAMS J:

Absolutely, and if the mandate in that regard were clear as a bell, and the requirements were made out, that's what would follow. Your problem is a factual one, not a potential one. There's the potential, of course, for a Whakatōhea-wide award of whatever has been established, but the 20 years have seen the coalitions within the tribe shift relatively constantly. I'm not suggesting that WKW doesn't have some form of support within the iwi. It does seem pretty clear that it no longer controls the entire support of the iwi, as it did in the early years when Claude Edwards was advancing the application.

MR FOWLER KC:

Well there was at least one group that claimed that he didn't, even then.

WILLIAMS J:

Well you can't win them all.

MR FOWLER KC:

No, but your Honour at what point do you say that the iwi/tīpuna application is impugned to the point that it's no longer viable for the purposes of mandate. Because one group leaves, because two groups do, because one hapū, someone will need to, insofar as those that have left, if the room is still full of people, at some point won't there have to be a determination by someone, if that room full of people still wishes to take the application forward, and still consider that the right answer here is for there to be an iwi-wide inclusive outcome for all. Not just the select six, but for anybody who can whakapapa to the relevant ancestors.

WILLIAMS J:

Frankly it sounds like a brilliant idea.

MR FOWLER KC:

Well let's do it.

WILLIAMS J:

But unless everyone's in the paddock.

MR FOWLER KC:

Yes.

WILLIAMS J:

It's wishful thinking. That's the fact of the matter. Whether the title belongs at iwi or hapū level is not a matter of preference in the legislation, it's a matter of tikanga.

MR FOWLER KC:

Yes.

WILLIAMS J:

Right, and if the tikanga is such that hapū are advancing their own claims with genuine mandates to do so, then you're stuck with that. I mean it's tragic, in my view, because this application would have been much better advanced as an iwi-wide application, but that can't be wished from the Bench.

MR FOWLER KC:

It could be directed from the Bench in the sense of being – if this is going to have to be sent back to the High Court, which would appear to be a strong possibility, it's open to this Court to indicate very clear, in very clear directions how that task should be approached, or the principles that should be applied to that, and indeed there are places where, and I'll be coming to that, perhaps after lunch, where in fact the Te Kāhui position looks like it drifts not that far away from the iwi/tīpuna one at its closest point. But we can get to that. But it is certainly still our position that you've got a room full of people who consider that the mandate has never been properly changed in terms – or never been changed in terms of the carriage of the iwi application, and that it should

continue, and that's the right answer. Now how does the Court approach a situation where it's 14 people, say, cutting loose, and the iwi-wide application is still otherwise broadly supported. I mean at the end of the day the mandate might come down to some numbers considerations.

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WILLIAMS J:

It certainly would but are you suggesting that the hapū claims by other people are in fact not properly hapū claims at all?

MR FOWLER KC:

Yes, I am. There are – they've been –

WILLIAMS J:

They have no mandate to advance them?

MR FOWLER KC:

There are question marks over the mandate for those other groups. The evidence for it has been set out in the written submissions. The Te Kāhui written submissions refer to the mandates that they have and the WKW submissions refer to the pushback position, if you like, or the position that underlines that.

WILLIAMS J:

I took you not to be saying you challenged the other mandates. I took you to be sort of walking very carefully through that very difficult area so as to avoid calling the other, your co-applicants at hapū level, false applicants.

MR FOWLER KC:

I'm being very careful about not saying that anyone's in a position of falsity as such but what I am firm about and clear about is that there are question marks over the mandate for those groups.

WILLIAMS J:

At hapū level?

KÓS J:

And clearly over yours, Mr Fowler?

MR FOWLER KC:

Yes.

KÓS J:

Question marks everywhere?

MR FOWLER KC:

Yes, there are question marks everywhere, yes, indeed.

WILLIAMS J:

Right, so you say the Ngāti Rua claim, the Ngāti Patu claim and so forth are not properly carried by those claimants?

MR FOWLER KC:

Well, what I say is that in – well if I take the Ngāti Rua one, it is here as an interested party. It is, its application is off the back of the WMTB and the Māori Trust Board application. It is –

WILLIAMS J:

Well I'm talking about mandate, not procedural niceties.

MR FOWLER KC:

No, no, sure, but well –

WILLIAMS J:

Does the Ngāti Rua applicant/interested party have the mandate to speak from Ngāti Rua, or do you say they do not, you do?

MR FOWLER KC:

We say we do and if you look at the – if you look at the resolution that is relied on, it does not –

WILLIAMS J:

Yes, I understand.

MR FOWLER KC:

It does not shut off the iwi application. It's a –

WILLIAMS J:

You see it's a matter of good behaviour in these contexts in my experience for people simply to proceed on their own without disparaging others who they would in private circles say they do not believe they speak for them but they would not do so publicly, they would simply let the thing proceed?

MR FOWLER KC:

Yes.

WILLIAMS J:

That's a very Māori way of addressing, of keeping these disputes out of the public eye and avoiding conflict if you can avoid it.

MR FOWLER KC:

Yes. Well, obviously I would defer to your Honour on all of those sorts of observations and what I would say is that indeed this is a situation, all the more reason, this is what I would call messiness, is all the more reason why effort should be made to clean it up and it comes back to the solution, the best solution being an iwi-wide one, but if it's not that, then in terms of it going back to the High Court for issues of mandate to be resolved because it's not appropriate and it's certainly not on the evidence at this point open to the Courts to say well clearly the iwi/tīpuna application is dead in the water, it's lost, the light's been turned out and there's no one in the room any more than the counter-side can be embraced in terms of saying well we've now taken this over, that's clear.

So, in my submission, where all this is pointing is the good sense of either looking at an iwi-wide outcome that accommodates exploration of these issues, or if not an iwi-wide outcome at this point, then a return to the High Court for these things to be determined, hopefully first internally, if they can't by some other process, because otherwise you just end up with a situation where a small sector of the centres, or whatever, can say well the mandate's ended, that's it. It's sufficiently messy that if you look, for example, at the exhibits annexed to the – I'm conscious I've gone past 1 o'clock – if you look at the exhibits annexed to the affidavit of Ms Edwards, there are kaumātua who are saying they don't have the mandate, the people that are running this don't have the mandate and we don't consider we, that the hapū that I am kaumātua of, consider that this should be run by iwi. Anything outside of the iwi is unacceptable in terms of carriage.

GLAZEBROOK J:

Can we perhaps take this up after lunch. I'm just checking how you're going you think and whether it might help to come back at 2 o'clock if people – no you can't. No, we can't come back at 2 o'clock so it has to be 2.15.

MR FOWLER KC:

I will move forward as briskly as I can, your Honour. Obviously there's some meaty issues.

GLAZEBROOK J:

All right, 2.15.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.24 PM

GLAZEBROOK J:

We're a bit late because there'd been this horrible smell. I'm not sure that counsel had noticed it but it does seem to have dissipated now, so if counsel

are happy I think we'll just carry on. If it comes back again we might have to reconsider that, so perhaps counsel can just – it does seem to have gone.

MR FOWLER KC:

Not noticeable here, your Honour, yes.

KÓS J:

Right. Well that's good.

GLAZEBROOK J:

Thank you, Mr Fowler.

MR FOWLER KC:

If the Court pleases I would like to seek some clarification and if you would accommodate me for a few moments to go back over this question about mandate. I have, in fact, what might be an attractive offer to make to the Court. Certainly it could help in terms of saving some time, but let's see where we get to. The submissions from Te Kāhui in respect of mandate you will find, and I'll give you the reference at paragraph 2.34 in their submissions in response to WKW, and the WKW submissions on mandate you'll find at paragraphs 27 to 34, and I'm not going to wade through all of those, but I will refer you to the first parge of paragraph 27, which mentions the reaffirmation attributable to the collection of evidence from 60 further witnesses through to 2020 including various rangatira who have since passed, experts in tikanga and so on. So what I would say to that is certainly there's a point that's relevant to the staleness issue, and also indicates that there were, and still are, a lot of people in the room. I'd also refer the Court to the fact that the WKW Edwards iwi/tīpuna application was the only one for the whole rohe. That's significant because it ended up, as you will recall from the judgments, where there was a tangle over amendments to enable what the Court wanted to do in terms of a CMT outcome to effectively use the breadth of the Edwards application, the WKW application, as the lorry to be able to allow that to proceed, and also, of course, as I mentioned earlier, there's a good deal of iwi evidence that was adopted by Te Kāhui.

So where does that get to? There is a fierce credible contest over this issue of mandate. It's not a situation where you could say one side or the other is plainly taking a position that's trivial, or the degree of dissent is minor, or something like that. The learned High Court Judge never addressed this issue of mandate. It was raised a number of times that he never actually grappled with it, and it's obvious that this Court certainly wouldn't wish to, not at least until the matter has been properly explored at first instance. The only addressing of mandate was the Court of Appeal position which one would say was, with great respect, fleeting at best, certainly very dismissive. So we've got a live context on mandate.

In terms of the Court of Appeal's position on that, it's 203(b) of the judgment, the majority said, the majority judgment, that's the judgment of his Honour Justice Miller: "The applicant group may confer on a natural person or legal entity a mandate to seek an order on their behalf. Should there be any controversy, the court will need to be satisfied that they do represent the applicant group."

Now I don't want to be giving evidence from the Bar, but I understand that in subsequent applications issues of mandate are always raised and assurances sought. The short point is, it's not going to be dealt with here.

It seems that we're on a course to a re-hearing anyway, and if the position will be if it goes back to a High Court re-hearing, that it will include the issue of mandate, and that's the position that the Court is willing to take, I will sit down. I won't need to and do not have instructions to need to address any further submissions to the Court, and the only remaining residual piece would be Mr Cunningham's one in respect of the seaward boundary. That's the issue of marine space.

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So I don't know whether that is something that the Court is willing to countenance at this stage. Whether it would need a brief adjournment what,

but if it isn't something that the Court can accede to, then I will simply continue with my submissions. If the Court needs references to where the issue of re-hearing was referred to by the Court of Appeal, it's in a number of places, paragraphs 270, 287, 295, 296, 439, and 447. There's also another reference at 268.

KÓS J:

What do you say about the fact that Justice Miller said at paragraph 274 the Judge had dismissed your application?

MR FOWLER KC:

Well that was the –

KÓS J:

Which seems to be based on at least in part on a mandate conclusion?

MR FOWLER KC:

Well that's something of a mystery to us, your Honour, because it wasn't apparent that the learned Judge ever actually grappled with any evidential issues at all in respect of mandate, and the observation by the Court of Appeal as I say was certainly relatively brief and terse, and as I say, is, with great respect, difficult to follow or to tether to any assessment of the mandate evidence.

KÓS J:

On what –

FRENCH J:

What about the final phrase in paragraph 273, that the Judge stated in a later judgment that he had done, he had dismissed –

MR FOWLER KC:

Oh, that's a different issue, your Honour. What that was about was that we had taken the position that not only had the issue of mandate not been addressed,

but it didn't seem that the WKW Edwards application had been dismissed at all, and indeed if you trawl through the Court of Appeal – sorry, the High Court judgment, you won't actually find where it is dismissed. However, my learned friend Ms Feint pointed out to the Court of Appeal that subsequently, after the High Court judgment that was the subject of appeal in a subsequent judgment, the learned Judge said then that he had in fact dismissed the WKW application, but that was the application in toto. A different issue falls out of that in terms of the degree to which a judgment stands on its own feet and is subject to or capable of being subsequently adjusted, but that's by the by and it's not being pursued, not – is not being pursued here. But that, my point is that that was in relation to the entire application.

ELLEN FRANCE J:

And what do you say in relation to the Judge's findings at paragraphs 331 and 465 regarding who holds the area in accordance with tikanga?

MR FOWLER KC:

Oh, well that of course is a separate step. That's beyond the issue of mandate. The question of who holds in accordance with tikanga under section 58, that's the issue that I have been –

ELLEN FRANCE J:

Well I suppose what I'm asking you is why does that not take us past the issue of mandate?

MR FOWLER KC:

Well the issue of mandate is purely about who can bring the application for what and how and so on. You could have a situation where you've got contested mandate because you've got two parties who actually could satisfy the section 58 tests, and indeed that was something that I was starting to raise. It's actually not the – we take the view that that is not the situation here, but there is I suppose an alternative possibility that it might be, that you could say that in respect of certain resources that hapū meets the section 58 test and the

iwi meets the section 58 test, but who actually has the mandate to bring the application and seek the CMT is a different point.

KÓS J:

Why does it matter in terms of the Act? I mean, what the Act requires is the assembly of an applicant group. That doesn't –

MR FOWLER KC:

Yes, and you've got two applicant groups assembled.

KÓS J:

Correct, that's right.

MR FOWLER KC:

And someone is going to have to sort out which one gets it, if they both meet –

KÓS J:

It's not really – not really a question of mandate though, it's a question of whether your group exercises – holds according to tikanga and the limb 2 tests, and likewise, Ms Feint's group.

MR FOWLER KC:

Well we say that we do. We say that the iwi does, in fact, hold in accordance with tikanga and called a great deal of evidence to that effect, some of which evidence was used also by the hapū to say, well, on the same evidence we say that we hold in accordance with tikanga. So what I'm saying, your Honour, is that indeed you can have this overlapping situation doesn't answer the mandate issue. We're stuck with the mandate issue. One way or the other somewhere, somehow we've got to get back and deal with it. I accept that it would be inappropriate for this Court to try and do it on a first instance basis.

WILLIAMS J:

So the awards were in favour of hapū?

MR FOWLER KC:

Yes.

WILLIAMS J:

Which suggests –

MR FOWLER KC:

But they excluded – but by the way they're framed they exclude a number of members of the iwi, other groups in the iwi.

WILLIAMS J:

What do you mean?

MR FOWLER KC:

Well Ngāti Muriwai and Kutarere for a start.

WILLIAMS J:

I see, yes, well there was a judgment about that part that's subject to appeal.

MR FOWLER KC:

Yes.

WILLIAMS J:

But –

MR FOWLER KC:

What we say is that this should be an iwi CMT, iwi-wide and inclusive.

WILLIAMS J:

And you lost on that point, the Judge saying –

MR FOWLER KC:

Well we say that –

WILLIAMS J:

– the correct customary rights holder are hapū. The question of who represents those hapū is another question.

MR FOWLER KC:

Yes.

WILLIAMS J:

But the finding is the rights holder are hapū, holders are hapū?

MR FOWLER KC:

Certainly that's the finding but that doesn't – it overlaps because it's based on the same evidential platform with the iwi claim. So you come back inevitably –

WILLIAMS J:

Yes, but you're speaking as if the iwi is different to the hapū and, of course, it's not.

MR FOWLER KC:

Well, yes, the only difference – no, that's right and I accept your Honour's point but the point of difference is that it includes other people. The iwi includes other groups other than just the select six.

WILLIAMS J:

Yes. So are you purporting to appeal it on behalf of them?

MR FOWLER KC:

As iwi, yes, and you've got Ngāti Muriwai and Kutarere here as well.

WILLIAMS J:

Okay.

FRENCH J:

I thought Ngāti Muriwai was allowed to take part in the re-hearing, Ms Davis?

MR FOWLER KC:

All the hapū are involved in the re-hearing.

GLAZEBROOK J:

I must say I'm having a slight bit of difficulty in having these as separate questions because if there's already been a finding that they hold at hapū level, then presumably that's an acceptance that whoever's arguing for those hapū is speaking to the hapū as well?

MR FOWLER KC:

Well an acceptance by whom though, your Honour? As I say, we have a –

GLAZEBROOK J:

Well by the High Court.

MR FOWLER KC:

That just brings us back to the live issue of mandate.

GLAZEBROOK J:

Well you say it's live?

MR FOWLER KC:

Yes.

GLAZEBROOK J:

But is it actually live after the High Court finding?

MR FOWLER KC:

Well the High Court never addressed it, never actually said that the –

GLAZEBROOK J:

Well does it need to, if it says it's hapū level and accepting that whoever was arguing for those hapū has the mandate to argue for it, doesn't it by implication make that finding?

MR FOWLER KC:

Well it didn't make that finding, that's the point first, your Honour, and insofar as there's any inference that by virtue of the fact –

GLAZEBROOK J:

Well it has to be an inference that the iwi doesn't speak for the hapū because it's an acceptance that the hapū hold the rights.

MR FOWLER KC:

By virtue, yes.

GLAZEBROOK J:

I understand there's another part of your argument that says that if both meet it, then the iwi should be given it, not the hapū?

MR FOWLER KC:

Yes, that's right.

GLAZEBROOK J:

So that would still be live but I don't quite see the other.

MR FOWLER KC:

With respect, your Honour, it's very difficult to see how this matter can be resolved without someone at some point grappling with the issue of mandate here.

GLAZEBROOK J:

All right, well is that – do you need to say anything more on that?

MR FOWLER KC:

I don't think I need to say anything further. The offer's there if the Court were inclined to take the view that the re-hearing ought to include the issue of mandate but, if that's not the Court's view, then I should proceed as I planned.

GLAZEBROOK J:

Well we'd have to hear from the other parties on that.

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MR FOWLER KC:

Of course, yes.

GLAZEBROOK J:

But I'm assuming they'd say no, they don't agree with it.

WILLIAMS J:

So, two separate questions. The first one is, the Judge finds that the appropriate rights-holders are hapū. Not all of those who purport to be hapū, or other forms of kin group, but it identifies the ones that it finds. The second point is, who speaks for those hapū.

MR FOWLER KC:

Yes.

WILLIAMS J:

Now they are different questions.

MR FOWLER KC:

In my respectful submission both get back to the same point, the same issue of mandate, because the answer to the first still involves an overlap with iwi.

WILLIAMS J:

Well that's to suggest that somehow the iwi has a right that isn't obtained via the hapū, and that doesn't really make any logical sense.

MR FOWLER KC:

Well there's a good deal of evidence that there was what I call iwi-direct evidence that demonstrably shows that –

WILLIAMS J:

That the hapū never had any rights?

MR FOWLER KC:

Well, insofar as they had rights, they were only through the iwi, because the rights were iwi-wide.

WILLIAMS J:

So there were – so the argument was these were iwi rights, not hapū rights?

MR FOWLER KC:

They were rights that hapū could utilise but they were through iwi. They were iwi-wide. I'm about to take you to some of the evidence.

WILLIAMS J:

You realise how novel that is as an argument in tikanga?

MR FOWLER KC:

No I don't realise how novel that is your Honour in terms of tikanga, but in terms of the evidence –

WILLIAMS J:

It's a very novel argument.

MR FOWLER KC:

Well in terms of the evidence, and I understand it to be, if you look at footnote 18 of the Te Kāhui submissions, they accept that it's perfectly appropriate for there to be certain awards in favour of iwi.

WILLIAMS J:

That's a different point. That's a different point.

MR FOWLER KC:

I'm not sure that it is your Honour.

WILLIAMS J:

Well because you see if all the hapū are holding hands, they can agree that the award can be at iwi level. If they're not, it's extraordinarily difficult to do that because in tikanga terms rights of resource user are almost invariably hapū and whānau-based.

MR FOWLER KC:

Not always.

WILLIAMS J:

But it's an exceptional circumstance that would say there was an iwi-wide right, unless all of the constituent hapū within the iwi agree that the right is an iwi-wide right.

MR FOWLER KC:

Well two points to that your Honour. First of all, are all of the hapū in agreement, in accord on that, and we say the answer to that is clearly no, and secondly the particular history –

WILLIAMS J:

Well that counts against you.

MR FOWLER KC:

No, if the point being made is that the select six by combination –

WILLIAMS J:

No, no, I'm not talking about the select six. You're saying there is an iwi right here.

MR FOWLER KC:

Yes.

WILLIAMS J:

My suggestion to you is that is a novel argument in tikanga terms since I think almost all cases those rights vest at hapū level or lower. There will be

circumstances where iwi take, but I know of no example where that has occurred without the unanimity of the constituent hapū.

MR FOWLER KC:

Right. Well I'm not certainly going to raise any sort of contest with your Honour on matters of tikanga. What I will say is that there is evidence here, in terms of the particular Whakatōhea history and background, that there were iwi-wide use of resources that were, appeared to have the acceptance of all hapū.

GLAZEBROOK J:

But with respect now you seem to be mixing up a mandate issue and (inaudible) iwi rights issue, which you've said it's just a mandate issue, and you definitely do have a finding against you on who held the rights.

MR FOWLER KC:

It was definitely a finding – I wouldn't be here if there weren't an adverse finding on the right.

GLAZEBROOK J:

Well a finding against, because it has been –

MR FOWLER KC:

But we say the root there is flawed because the learned judge never actually addressed the critical issue of who had the mandate to bring this application.

GLAZEBROOK J:

But you're saying they're two different questions.

MR FOWLER KC:

Yes.

GLAZEBROOK J:

But then you're saying they were iwi rights, but there is a finding, a definite finding against you on that because the rights have been given at hapū level.

MR FOWLER KC:

Yes, I follow that.

GLAZEBROOK J:

I mean you say without looking at the mandate, but I would have thought by implication looking at the mandate because they're given at hapū level and presumably on the basis that the people arguing for those hapū had the right to do so ie the mandate to do so.

MR FOWLER KC:

Perhaps the easiest way I can form the bridge, your Honour, is to say it's that expression "by implication" that's troublesome here, the implication that the issue of mandate had been determined in the way that your Honour is postulating. Anyway, I have said my piece on that so I'll carry on, on the basis that the Court's not minded to explore that any further.

GLAZEBROOK J:

Well do you want to…

WILLIAMS J:

Let's just carry on.

GLAZEBROOK J:

No. I think you –

WILLIAMS J:

It's not necessarily that we're not minded, it's just that we're not going to make –

GLAZEBROOK J:

Not at the moment.

WILLIAMS J:

We're not going to shoot that decision from the hip.

MR FOWLER KC:

No, no, no. Right, well the way I'm going to go next is this issue of iwi direct evidence and what we're referring to here is where there's an iwi-wide relationship with resources, and what we say is that there are a number of aspects that was very evident from the evidence, namely that pre-raupatu Whakatōhea are fished as an iwi, there were Whakatōhea tribal fishing boundaries that were shared and exclusive, there was identification of information about multiple fishing grounds and use and just pausing on that, Mr Warren, who was the author of the map that covers a number of grounds across several, covering several hapū in the area that the Court was interested in in week 1, he's actually present in court. There was access to resources for all of Whakatōhea in the moana all along the coast. You have the rāhui following the Whakaari tragedy. There is evidence that because of forced relocation of Ngāti Patumoana to Waiaua and forced relocation of other hapū, the mana moana interests of Ngāti Patumoana are now aligned with wider Whakatōhea and that includes all its hapū.

In each instance what I've done is if you look at the outline, the right-hand column, I've given the evidential reference. I'm not proposing, with one exception, to take the Court to each of those references and labour through them. The last one though I will. That's the evidence of Mr Gage regarding a five-mile net cast and shared with every hapū at Tirohanga. If that could be brought up. It's at 201.00518.

What's interesting about that is that it goes beyond just the thesis that the further out to sea you go the more likely it is an iwi ought to be treated as an iwi resource rather than a hapū one but this clearly involved some inshore activity. "Our tīpuna would cast a 5-mile net and do one catch to be shared with every hapū. They would use a couple of boats to take the net out and groups would wait on the shore to pull the net in. My koroua would do his karakia and our tohunga would karakia a week before. Our tohunga would put his hands in the water and the fish would swim around in circles. Based on the behaviour of the fish, he knew the best time to fish, whether it was the next day or in a few days' time. When the time was right, the people would go out in the water and lay

the net. Tarakihi and tāmure were the main fish species back then." Then it goes on in paragraph 60 to the use of the landmarks and those landmarks emanating from Tirohanga and Tirohanga being the central point, the gathering point for the various hapū.

So in terms of where that gets to, in my submission, if you've got evidence that's effectively iwi-wide without distinction in terms of hapū, in my submission, the question of mandate to pursue that becomes problematic.

WILLIAMS J:

What was the paragraph there please?

MR FOWLER KC:

The paragraphs were 59 and 60.

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WILLIAMS J:

Yes. You know there's a great deal of history of this kind of iwi-wide fishing really from the top of the island all the way down. You can't get a five mile net without the iwi doing it together, there aren't enough people in the hapū, and almost all the iwi have examples of the coming together to gather in this way, some of them spectacular, and recorded it in Cook's voyages and so forth, but that doesn't mean the rights are iwi rights, it just means the iwi are co-operating, which frankly is a very good idea.

MR FOWLER KC:

Yes.

WILLIAMS J:

But it doesn't mean the rights are iwi-based.

MR FOWLER KC:

Certainly, your Honour, but it all adds up. When you've got, particularly in the case of Whakatōhea, quite a long list of items like that. Aspects, resources,

used in that way. What we say it points, it points in the direction of an iwi-wide understanding of the rights and the entitlements.

GLAZEBROOK J:

Or else titles that are shared between all of the hapū, which is what actually happened. I know there are hapū supposedly left out, but that's not the…

MR FOWLER KC:

The critical part of that observation from your Honour, with respect, was all of the hapū. It's that inclusivity issue that's the reason we're here.

GLAZEBROOK J:

I understand that. But if, in fact, as the finding seems to be at the moment, subject to appeal, that only a certain number of hapū had rights, why would you then say, well they're iwi-based rights, therefore giving rights to hapū that otherwise wouldn't have them.

MR FOWLER KC:

Well that's the other part of the case, your Honour, where we say that they weren't all rights of the select six. That there were, there is a basis for it to be iwi-wide, and the poutarāwhare that the pūkenga suggested plainly contemplated that. I will come to that in a moment.

The next point that I wanted to cover that there is a table filed with the Te Kāhui submissions which you will see assembles a lot of evidence in terms of Whakatōhea's position.

WILLIAMS J:

Is that in the submissions is it?

MR FOWLER KC:

It is in the Te Kāhui submissions. it's headed "Table of indicia showing customary relationship between Whakatōhea and the takutai moana". I'm not going to take you right through that but in my submission you can't help but, on

reviewing that, see very clearly all the – well as the heading says “indicia” of a customary relationship between the tribe and the takutai moana.

There was discussion in the first week, I think it was his Honour Justice Williams, a query regarding the roster, the Whakaari roster. Again you could say, all right, this was good, this was some sort of iwi-based co-operation, but again all of these things add up. That’s very much part of our case. The evidence of Mr Warren covers that roster, and I've given you a reference there at 201.00246.

I'll turn next to the pūkenga. We dealt with that in our written submissions at paragraphs 60 to 61, and I'm not going to read out large sections of that, of the Pūkenga Report, but what we say is that in terms of that examination of the tikanga position, it clearly left open the iwi/tīpuna solution and, if anything, gave a nod in that direction. They even went to the trouble of capitalising the word “iwi”. You may see if you have a look at that extract at 101.00534G. They didn’t answer question 3, we all know that, and what the Court of Appeal said about that at 267 was this: “Instead they look forward to a structure in which CMT could be held and governed to include all members of Whakatōhea.”

Now the Te Kāhui decision is in disagreement from with the Court of Appeal over the pūkenga conclusions and makes the point that metaphorical speech in that poutarāwhare was not intended to be existing tikanga and therefore it was – the correct position is that the poutarāwhare consisted of just the six hapū, or five hapū plus the Board, and customary title lies with them. Well what we say is that’s not what the report says, and it doesn’t explain the various statements of the pūkenga, which were calling for more hui, that the poutarāwhare would address all other applicant groups, that no one from the whole rohe should be excluded. That there should be a full (inaudible 14:56:51) bit of kaimoana gathering across all rohe for the takutai moana under discussion, and also that there would be an issue of how the poutarāwhare addresses the position of particular groups whose interests can be accommodated going forward. So we say that construct that Te Kāhui place on the Pūkenga Report isn't tenable.

You'd ask well how were the select six selected. The first point there, the pūkenga said well it's not for the poutarāwhare to determine who are whānau, hapū or iwi. If you look at the cross-examination of the pūkenga, there were two witnesses and I think it was hot-tubbed. I wasn't involved in the High Court but I understand it was hot-tubbed. Those hapū that were selected by the Trust Board were simply those that were in the original and of the six hapū. That was the only explanation. I've given you the evidential reference there at 108.04572, the point being there was no great analysis, there was no analysis at all. It just seems that the pūkenga simply cut and pasted, so to speak, the existing hapū members of the Trust Board.

Now I'm moving next to my third broad plank and this is premised on the overlapping result in terms of meeting section 58 tests that I was referring to before, in other words, two parties that are capable of coming through the gate with the section 58 box ticked, and our submission in respect of that is, if that's where the analysis gets to, whilst it's not what we say is the best position, but if that's where the analysis gets to, then section 125(1) clicks in which is this priority provision one. So we would say that while we accept that section 125 is not setting a different test for assessing entitlement, the use of the expression priority means something that is more than just temporal. It's not just timing. Te Kāhui say that wasn't raised. I beg to differ. It was very much the point of what we were trying to urge upon the Court.

1500

We would say that the suggestion that the mere fact of filing hapū applications, dislodging the iwi/tīpuna one, that is the iwi across the whole rohe does not align with statutory priority status. In other words, that sort of dislodgment wouldn't fit with the priority mechanism in section 125.

In support of the suggestion that it is purely temporal, Te Kāhui refer to two High Court Rules, 25.52, that's relating to the proceeds of sale of a ship under arrest, and 27.57 which is priority of intestacy administrators. If you actually look at those rules, they both give substantive priority. They're not temporal,

not purely temporal in nature. But we would say even if they are temporal, then if both meet section 58, the priority one prevails and the others must yield.

Finally on that, Te Kāhui say well given that's right, then the – by reason of the fold-over provisions in respect of section 125 in the Foreshore and Seabed Act 2004, the WKW position slips between the stools. What we say is well section 125(1) applies to all applications under the Foreshore and Seabed Act 2004 for customary rights orders not finally determined to be transferred to the High Court. Subsection (2) refers to all applications under subsection (1) must be treated and so for applications under subpart (2) for protected customary rights and it's that simple. Once you work through that position, there's no distinction of CMT versus PCR and there's no reference in the Foreshore and Seabed Act 2004 carried over in terms of section 125 to sections 48 or 33 of the 2004 legislation.

Now if you wanted the reference for where that's argued by Te Kāhui, it's paragraph 2.36(d) of their submissions but even then if what applied for did matter, which is what – the distinction they're trying to make, if it did matter in not being for territorial customary rights, then if you actually look at the application of what was applied for, originally applied for, both originally and then when amended, it's very clear in terms, and I've given you the references there and the outline, that there are particular areas specified, particular customary rights specified and in a particularised application on 30 May 2005 following the first one, which then repeats the provisions of the first and also refers incidentally at paragraphs 2 and 3 to the mandate and there's a schedule of customary rights and activities.

That takes me to plank number 4 where our submission is that ,even regardless of section 125, an iwi/tīpuna award is more apt and we say that because, first of all, the raupatu, the hapū entities were displaced, there were new villages, most importantly, a loss of agricultural land leading to iwi-wide use of the takutai moana. That evidence is all undisputed and I would refer you there to sections 8 and 9 of the Settlement Act and I would like to refer to some provisions there.

Does the Court have access to sections 8 and 9 of the Whakatōhea Claims Settlement Act 2024 or do we need to bring that up on the bundle?

KÓS J:
Bring it up I think.

MR FOWLER KC:
You've got that?

KÓS J:
No, can you bring it up?

MR FOWLER KC:
Yes.

KÓS J:
Right, I've opened it up myself anyway

GLAZEBROOK J:
Where is it?

KÓS J:
It's in the legislation, sorry. Also it's tab 9 of the Whakatōhea bundle.

MR FOWLER KC:
What I was wanting to draw the Court's attention to there is that in section 8(7), I'm looking at the English version, the point is made about the loss of traditional knowledge. So this is statutory recognition of these things in terms of the iwi and obviously that has an alignment with what we say about the significance of this being an iwi/tīpuna application.

Then over at 12, this is still in section 8: "With insufficient arable land and limited work opportunities, Whakatōhea struggled to survive economically. They endured the impacts of poverty, including substandard housing and poor health. Whakatōhea suffered disease outbreaks, while having little access to

adequate healthcare" and then in subsection 14 there's the reference to: "The lack of employment…" and the migration with: "Ninety per cent of Whakatōhea lived outside their traditional rohe by 2020, with many disconnected from their whanaunga, reo, tikanga, and whenua." So, again, the point being that this is statutory enforcement of what is an iwi-wide issue, an iwi-wide problem and an iwi-wide resolution.

The same thing in section 9, and I'd draw your attention to the acknowledgements at subsection (24) under "Environmental Issues", there's a reference there to "over-exploitation of fish and kaimoana…" and "…severely damaged traditional food resources and mahinga kai" and at (25) again the reference to leaving Whakatōhea virtually landless and the loss of traditional knowledge.

So those are points that obviously can't be emphasised to the level of suggestion that they are determinative but I say in terms of our position that they point very firmly in the direction of alignment within iwi-wide resolution and an iwi-wide solution.

The next topic to be addressed is inclusivity and we say this points firmly in favour of an iwi-wide solution. There's obviously what's already been covered with regards to the pūkenga. Nowhere, with one possible exception that I'll come to, do the selected six indicate a willingness to share the CMT. The other point there, of course, to remember is that there's a dynamic quality to these hapū and Whakatōhea has been particularly subject to this with regard to originally 22 hapū eventually attenuating to six and then perhaps in more recent years the addition of further hapū, the important point being that if the common descent and the common – the ability to whakapapa to the same ancestor is clearly there, then there's every reason to treat the evolution of these groups as something to be catered for and to be accommodated. So you do have new groups such as Pakowhai, Hiwarau, and Kutarere emerging, and we say that they clearly need to be involved in this and included.

1510

The next point is there's a degree of messiness, and this was referred to indeed once or twice in week one, in that there is confusion over exactly what the metes and bounds of these applications were or are. You've got the point that in respect of the resolution itself for Ngāti Rua, which is at 316.06942, I think. Can that be brought up, please? And if we go to the next page you'll see the motion there: "Ngāti Rua" – oh, no, that's for the settlement claim. Further on down please, next one, yes: "Ngāti Rua move a motion to support the MACA application by Mereaira Hata to go forward for the benefit of Ngāti Rua. Ema will be a support person for her."

In our submission, there is nothing about that that indicates an end to the iwi mandate or a suggestion that, certainly in respect of that resolution, that Ngāti Rua were terminating that particular mandate. It simply says that they would support an existing application and that, that was in 2019. The gate had already shut in terms of new applications so you're really talking about the question of utilising the position of being an interested party and coming on board with the trust board application. If you'd look to the bottom of that page, it would appear that the number of voters there were 14, if you look at the bottom of the page.

So what we're saying here is that it's far from clear that you've got a clean run in terms of mandate for what was being brought and what has eventuated, and you can repeat that across other, the other applications. Ngāti Ngahere, there's a High Court Stage 2 judgment. I've given you the reference there. It's evident that the appointed person has not – or at least Ngāti Ngahere has not taken any part in proceedings. The Ngāti Ngahere and Ngāti Rua claims are only through the trust board, so there are some interesting issues with regard to all of that and the best word to – or the best label to put on that is messy, particularly when you – the fantastic irony to all of this is that it's actually the rohe-wide iwi/tīpuna application that has ended up being used a the vehicle here along with its evidence.

A further point in respect of *He Poutama*, the Law Commission paper, I've given you a reference there to paragraphs 128 to 132, and if that could be brought up

please? I don't think I've put the reference for this in the outline, so it's the bundle of authorities item 3, pages 17 to 19, and we're looking at paragraphs 1.28 to 1.32. This is this question of tukutuku or interwoven relationships and I particularly draw the attention of the Court to paragraph 1.32. It starts at 1.28 and if you go across to 1.32 you'll see there that this is identified as actually a gap between tikanga and State law. So what we say is this whole inclusivity issue or interwoven latticework, however you want to describe it, is another very good reason why an iwi-wide outcome would be far more apt than the current situation.

Now Te Kāhui itself, not in the submissions in respect of responding to the WKW appeal, but in their submissions, it is the submissions for Ngāti Ruatākenga in response to the Ngāti Muriwai appeal at paragraph 5.3, their submission says this: "… *all* of Whakatōhea are included if the constituent hapū hold CMT, as the pūkenga correctly recognised." Now it depends how you read that but this is why I made the point earlier that there are one or two places in the Te Kāhui position that do drift towards a position of being very close to what the iwi/tīpuna application has sought all along.

Just on the matter of the position regarding the pūkenga findings, it's also relevant to bear in mind that the findings for hapū have been set aside because of the pūkenga findings. That's an outcome that has some bearing on this.

The next point under this issue of aptness is more of a legal one, just in terms of the framework of the legislation and the deeds, the deeds of settlement, which we all know, the settlement assets include valuable commercial rights to marine space and that includes an extra 5,000 hectares more marine space in this rohe. Expansion would require a permission right from a CMT holder and your reference for that is section 64(2)(e)(ii). Then from that, if you track it through, under sections 62 through 66 and to 68, you will see that in terms of the provision of a permission right that's obviously a valuable and important right but the point is that there is no appeal, no appeal right, if you look at section 66, 68 and section 85 gives a right to prepare a planning document. So that's

really just a very quick plotted summary of what those rights in statutory terms amount to.

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I'm going to switch the focus now to Te Tāwharau. Te Tāwharau provisions enable inclusivity, and you can see that at section 13(2) of the Settlement Act, and you'll see from the way that it is framed that there is, whilst the six that are identified for CMT are certainly listed there, you'll see that the way the possible members of Whakatōhea are framed that that can include people outside or groups outside of those named hapū. In the settlement deed, and I'll give you the references, they're in the bundle, the deed of settlement clause 6.15 and the deed of trust clause 8. The deed of trust is at 10(a) of the bundle. You'll see there's a mechanism there for new groups to join, new hapū to join Te Tāwharau.

WILLIAMS J:

What clause, sorry?

MR FOWLER KC:

You'll have clause for the trust deed, it's clause 8 and, as I say, enabled by section 13(2) of the legislation. So drawing those threads together, what we say is that there's potential there for tension. There's potential there for difficulty and conflict which is why we say, yet again, a sensible answer is for Te Tāwharau as an iwi entity to be the recipient of CMT and one is reminded of his Honour Justice Williams' observation on day 4 that there's a problem with subdividing the whakapapa matrix to avoid the discussion those with the mana need to face and that, in my submission, is what this is all about in terms of this inclusivity issue. From the beginning, as I've said, there's an iwi trust is what we sought. That was long before Te Tāwharau existed. Certainly what we have via Te Tāwharau is an ideal placement with some direction regarding the desirability of inclusion of further groups. You've got the expected provision for elections. It's not a case of locking this into individuals, unelected individuals to take carriage of the CMT.

My learned friend on day 3 on this question of possible inclusivity, my learned friend, Ms Feint, did make an observation, and I hope I've recorded it correctly, that it could be left to hapū to accommodate others. That is I assume the hapū that are the – the selected ones. Again, in my submission, we've got a point where the Te Kāhui position is actually drifting towards the direction of what the iwi/tīpuna application is all about and has always wanted.

Now in the fifth plank, which is this question of landing ground, I've already covered that to some extent so I think I can be relatively brief, but it's a matter of working through the Court of Appeal judgment on a couple of things and they're largely the paragraphs that I referred to earlier immediately after the lunch adjournment.

Starting at paragraph 270 the Court concluded: "It is fair to say, as Ms Roff submitted, that the Judge relied heavily on the Pūkenga Report. I do not accept the submissions of other counsel that his findings rested entirely on it. Nor do we accept that it is necessary to order a re-hearing simply because he attributed to the pūkenga certain conclusions that they did not reach. We might be satisfied, on reviewing the evidence ourselves, that his factual findings were correct. But no counsel invited us to do so; rather, they accepted that a re-hearing would be necessary were we to disagree with the Judge's approach. For reasons to which I next turn, a re-hearing is unavoidable with respect to CMT Orders 1 and 3."

If I take you next to 287 which comes at the conclusion of the discussion of the Te Upokorehe appeal: "It follows that Te Upokorehe's appeal must be allowed and their application remitted for re-hearing in the High Court along with those of Te Kāhui and the Board." That is along with the Te Kāhui ones and the Board. "CMT Order 1 must be set aside."

And then to 295: "I have explained that Order 1 must be set aside on the appeals of Te Upokorehe and Ngāti Awa and the applications of the six hapū must be reheard. Because the High Court did not squarely address the section

58 test, this order must extend to that part of Te Whakatōhea rohe moana that is not the subject of Te Upokorehe's appeal."

So at that point what we've got are conclusions that a re-hearing is unavoidable for CMT 1, CMT 1 order to be set aside, what is to go back for hearing. Well the issue of section 58 holding in accordance with tikanga for CMT 1 and apparently all of it and then when it does go back, that's where paragraph 296 is relevant because there the Court says: "I add that it was necessary to amend the individual hapū and Board applications to reflect the fact that they now sought a single CMT on a shared exclusivity basis. I appreciate that this change of stance came very late in the process. Had the need for amendment been recognised, the Judge might not have overlooked the difficulty that Te Upokorehe were not party to the amendment. Amendment would have addressed the difficulty that strictly only the Edwards application covered the entire rohe moana ultimately claimed by Te Kāhui and the Board. Subject to the extension of hapū claims to Whakaari, which I discuss below, it would have been appropriate to amend the hapū and Board applications in this way, for the reasons given by the Judge; there were applications before the Court which proceeded on a shared exclusivity basis. It follows that, subject to those amendments being made, the re-hearing will proceed on the basis that the Whakatōhea parties between them" that's interesting, the Whakatōhea parties between them "have made a timely application for CMT over the area encompassed by Order 1."

Then you go to 439 and this is the separate judgment. The previous parts I've been reading to you were all parts of the judgment where it was the Court's outcome that was adopted by all three Judges but was the judgment of His Honour Justice Miller. The other two Judges say this at 439: "We agree with Miller J that the Judge was right to conclude that it would be inconsistent with the scheme of MACA to have two or more overlapping CMTs in respect of the same area. That would be unworkable. But we see 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. 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."

1530

Then finally at 447 right at the end: "The applications for CMT recognition orders over the area covered by Orders 1 and 3 in the High Court should be reheard in the High Court in light of the approach set out above." So where we end up is that you're looking at a single CMT that can be ordered for two or more groups. In our submission that looks very much like an iwi outcome, and only the issue of mandate needs to be added to that as I was indicating before. It already involves Te Upokorehe, the five Te Kāhui iwi, and the Trust Board for which now read Te Tāwharau, who is the iwi entity trustee that we are urging on the Court is the appropriate recipient.

So in our submission that's why the advantage should be taken of the return to the High Court and re-hearing, notwithstanding the exchanges that I have before where the Court resisted doing anything about that now, an elegant result would be to wrap this issue of inclusivity in an iwi-wide involvement into a return to the High Court, particularly in the light of the sorts of observation that his Honour Justice Williams made before the lunch adjournment.

Finally, just a couple of tidy up matters, housekeeping. In respect of costs, we would coat-tail on Te Kāhui in terms of their position. So we'd want to be involved or informed of any steps that are taken in that regard.

There was an earlier request, last week I think, for the information in respect of the resource consent, more than just the bare decision. I'm grateful to my learned friend Ms Roff that apparently it is in the bundle at 347.21673, all 400 pages of it.

WILLIAMS J:

It's a 400 page decision?

MR FOWLER KC:

So I understand. Well the papers.

WILLIAMS J:

Well we've got a target to work to then, haven't we.

MR FOWLER KC:

Now unless there are any other matters that I can assist with.

WILLIAMS J:

Sorry, can you give me that reference again please?

MR FOWLER KC:

Certainly. 347.21673.

WILLIAMS J:

Thank you.

MR FOWLER KC:

And I think Mr Cunningham will address you on the seaward boundary, unless there's anything else that I can assist with.

GLAZEBROOK J:

No thank you. Thank you very much.

MR CUNNINGHAM:

May it please the Court. I propose to address the Court only on the single issue of the seaward boundary of CMT 1. The Court of Appeal appears to have adopted a consensus plan put forward by some of the applicants which, in my submission, falls well short of how his Honour Justice Churchman defined the boundary. It might be said that the WKW CMT ship has sailed, but in view of the prospect of a remittance back to the High Court, WKW seeks to preserve its position and challenge the finding of the Court of Appeal as to the seaward boundary of CMT 1.

Now do your Honours have a copy of my written outline of submissions?

WILLIAMS J:

Yes, the road map.

MR CUNNINGHAM:

Now the CMT 1 is defined in a New Zealand law report, reported judgment, which my friend Mr Sinclair might bring up, which is there, referring to the "lower map" which is labelled CMT 1, it's actually not very clear. But the seaward boundary is labelled "12 nautical miles from" can't even read it myself "from mainland coast". So in my view that falls well short of the potential area for CMT 1, and if I could refer your Honours to the appendix A, which is the third page of the written submissions, and I'm at paragraph 6 of the outline talking about the *No 7* judgment and the *No 7* judgment can be found at 05.00660 of the bundle and in my written submissions I refer to paragraph 102 of Justice Churchman's statement where his Honour says: "I have concluded that the appropriate approach is to: (a) survey the western boundary of CMT 1 as beginning at the midpoint of the Maraetōtara Stream," which does coincide with the Court of Appeal's reference point "angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit."

Now the Court of Appeal consensus plan falls well short of the 12 nautical mile limit and if you look at the third page, appendix A, there is only one place where the western boundary reaches the 12 nautical mile limit and that's at the extremity at the top of the page and the eastern boundary, which is similarly defined starting at Tarakeha, is said to cease at the 12 nautical mile limit. But, however, in the *No 7* judgment his Honour Justice Churchman modifies his position to exclude the CMT, or CMT 1, covering the area in or around Whakaari. So that if we look at the diagram that leaves a triangular shape with the same landward boundaries at Tarakeha and Maraetōtara but terminating not at the midpoint of Whakaari but at mean highwater springs just short. That map actually coincides with the same map put forward by the Whakatōhea Māori Trust Board so they're identical in all respects. So, in effect, it's a triangle with a tongue cut out with the intrusion of the high seas. The Court of

Appeal – so that in my submission the consensus plans brought forward by the Court of Appeal do not adequately reflect the judgment of his Honour Justice Churchman as far as defining the boundaries of CMT 1.

I've added in paragraph 18 to the submissions, which are not on the written one, but counsel submits that WKW ought to have been granted a CMT over the whole of the area claimed including Whakaari and its surrounds and out to the 12 nautical mile limit on a shared exclusivity basis with Te Whānau-ā-Apanui and Ngāti Awa. So the map that has been put in front of you is the map of the original WKW Edwards claim which has the same shoreline points at Tarakeha and Maraetōtara but the boundary heads due north out to beyond Whakaari and to the 12 nautical mile limit. So that was the claim that, in my submission, a CMT ought to have been awarded but in the event it was not.

ELLEN FRANCE J:

Sorry, so is the only difference at that seaward boundary?

MR CUNNINGHAM:

Is that the – at that current map that's showing at the moment, the eastern and western boundaries run due north but his Honour Justice Churchman, his definition of CMT 1 said that they should be angled towards the midpoint of Whakaari and the diagram on page 3, labelled appendix A, shows the effect of that and that the apex of the triangle falls just short of Whakaari at mean highwater springs. So that WKW is anxious to preserve its position in cases of remission back to the High Court and not leave unchallenged the Court of Appeal's interpretation of his Honour Justice Churchman's definition of CMT 1.

GLAZEBROOK J:

So what are you asking us to do?

MR CUNNINGHAM:

Record that the Court of Appeal got it wrong in saying that the WKW reading of his Honour Justice Churchman's definition of CMT 1, they're saying that was

not an available reading but in my submission it was the only available logical reason, reading of his Honour Justice Churchman's judgment as to the shape of CMT 1.

1540

So I'm seeking a finding that the consensus plan was wrong, and it didn't accord with his Honour Justice Churchman's definition of "CMT 1".

GLAZEBROOK J:

Thank you. No, carry on, I just wanted to know what you wanted us to do.

MR CUNNINGHAM:

Oh that's exactly what I'm asking for. Those are my submissions your Honour, seeking a finding that the consensus plan did not accord with the definition put forward by his Honour Justice Churchman as to the area of CMT 1.

FRENCH J:

The two plans were agreed by everyone else, though, weren't they? Or were they?

MR CUNNINGHAM:

I'm not sure they were agreed to. They were thrust upon them.

FRENCH J:

Well footnote 31 says they were agreed – they were supplied by counsel at our request. They were agreed by all parties except WKW.

MR CUNNINGHAM:

Yes, there was a memorandum filed that was not accepted. It's my paragraph 5 it says the parties who filed a memorandum saying they dissented from the consensus opinion. There's nothing, no questions your Honour, those are my submissions.

GLAZEBROOK J:

No, thank you very much.

MR CUNNINGHAM:

Thank you your Honour.

GLAZEBROOK J:

Now as I understand it tomorrow the Attorney-General doesn't need that slot, is that right still? So that will be, we'll start with Te Kāhui tomorrow.

MS FEINT KC:

Yes, we're not going to start now.

GLAZEBROOK J:

Sorry?

MS FEINT KC:

Are we still hearing from Mr Sinclair

?

MR SINCLAIR:

No.

MS FEINT KC:

Yes, indeed, so we have response submissions to WKW, and also to Te Upokorehe.

GLAZEBROOK J:

Yes, there's no point starting now is there.

WILLIAMS J:

Maybe, are we on time again.

GLAZEBROOK J:

We're well on times, yes, so far.

WILLIAMS J:

Well done.

GLAZEBROOK J:

And seeing we don't have the Crown tomorrow I think we might as well adjust, start with you, and we look as though we're doing reasonably well for time. But it's probably better to – well I don't know, it's up to you if you want to take the 15 minutes now.

MS FEINT KC:

Yes, I would have thought we might have some time pressure tomorrow, because we've got to respond to Te Upokorehe as well.

GLAZEBROOK J:

Sorry, I can't hear. It doesn't seem to be coming through on the…

MS FEINT KC:

Sorry, I was saying we might have some time pressure. We also have to respond to the Te Upokorehe appeal, so we've got two sets of submissions to do in the morning.

GLAZEBROOK J:

Do you want to start now?

KÓS J:

Shall we see what the timing of the other two parties tomorrow is. Ngāti Muriwai, Ngāti Ruatākenga. Just a suggestion.

GLAZEBROOK J:

I thought, are they going to answer?

KÓS J:

Well hopefully they will.

MR SHARP:

So I think we've been allocated some time until just after lunch, is that correct.

KÓS J:

That's right.

ELLEN FRANCE J:

I suppose the question is how much, do you need all of that time?

MR SHARP:

It's hard to say but it's probably an accurate estimate of time.

KÓS J:

Let's start. Let's carry on with Ms Feint.

GLAZEBROOK J:

Just have her start.

MS FEINT KC:

We prefer to start now. So in accordance with the team approach that Te Kāhui is taking, and the principles of whanaungatanga and manaakitanga, we have my friend Mr Bennion to present the submissions in response to WKW, and then we'll have Mr Fletcher in relation to Te Upokorehe.

GLAZEBROOK J:

Thank you.

MR BENNION:

E ngā Kaiwhakawā, tēnā koutou.

WILLIAMS J:

Tēnā koe.

MR BENNION:

Tēnā koutou ngā kanohi o te rā, Whakatōhea. I think – I suppose I apologise for giving you a road map.

WILLIAMS J:

I suppose we accept it.

MR BENNION:

Can I call it the Aratika?

WILLIAMS J:

That's not the one that grounded, was it?

MR BENNION:

Well that's an unfortunate reference, isn't it. So I've been sitting back there and wondering, your Honours, if I, whether just respond quickly and I'm always advised to, you know, stick with what you've prepared so I'm going to do that, but obviously respond to the issues that have been raised. So the road map is just three pages and I'll just work my way through it but obviously jump to responses as we go, and I'm assuming that I think we'll take probably the rest of today and a short piece of tomorrow, not very long I'm assuming, given the indications you've already given to my friend about where your thinking is going.

I guess in summary there, at the first part of the test, of the road map we've got, so we're suggesting that the mandate's not a separate test. The key thing is section 58, who holds it. In fact, you can say in one way that mandate is the wrong question. It's a gloss on, you know, it's a word we use now but it actually is a little Eurocentric and very much Crown, large natural group-focussed and Treaty settlement-focussed, so tikanga Whakatōhea is the place to go, and very much the evidence is that tikanga Whakatōhea is for foreshore seabed, in the foreshore seabed is hapū rangatira. We'd say more broadly than that, but that's your focus today, and very strongly and clearly hapū-focussed. I mean – anyway, and then the hapū choose to come together as iwi and we use that word "choose" in a fairly, you know, that's an English word but the

relationships are between them and they organise between each other, and then they can also insist on their let's say distinct status. Again focussing on the fact that we're using English words here which are a little inadequate, but insisting on their distinct standing, distinct status, and we say that is what has occurred here.

Now just while we're there, I will just jump out to one issue, which is my friend has raised this idea that in the takutai moana there might be sort of iwi interests that somehow float separate from the hapū and we strongly resist that conclusion, and we just want to take you to one piece of evidence, Mr Gage, Carlo Gage's evidence for Ngāti Ira, and that's at 201.00518. There's just something that came up from my friend Mr Fowler, and Mr Gage at paragraph 59 of this evidence, so he's a key witness for Ngāti Ira in the proceedings, and he talks about that large fishing effort at sea which your Honour Justice Williams referred to.

So: "Our tīpuna would cast a five-mile net and do one catch to be shared with every hapū," and they'd take a couple of boats. Interesting detail for me is the: "My koroua would do the karakia and our tohunga would karakia a week before," and put their hands in the water, the fish would swim around in circles. Based on the behaviour, he knew when to fish, the next day or in a few days' time. So it's a, you know, sort of a weather forecast and a seacast there, and when the time was right, people would go and lay the net.

1550

And there's an awful lot going on there, but if we come to I think paragraph 102 of the same brief and so: "Ngāti Ira has always had an undeniable relationship with the moana. I have always been of the belief that the primary relationship to and with the moana sits with the hapū. Ngāti Ira is no different. The legacy left by our rangatira, Hira Te Popo…" and at 102: "Individual tohunga and rangatira from each hapū are the knowledge keepers maintaining customary practices for the benefit of all hapū members" and we would say obviously between the hapū.

So I think this makes the point both ways that very much in the takutai moana, even these very large efforts, you might have a single hapū that seems to be suggested going out and doing a five-mile net fish, or it might be a combination, but always thinking about each hapū, thinking about its contribution and thinking about how the catch will be shared among the hapū. So we say that that's the sort of evidence that tells you that even in these large efforts at sea hapū are foremost.

So back to the road map –

KÓS J:
Could I just ask a really boring pleading sort of question and it's simply this. The legislation talks about applicant groups and applications being made and I'm just a little unclear what happened there. Mr Edwards made his application under the 2004 Act, the other groups that you represent, did they make separate applications within the six-year period?

MR BENNION:
Yes.

KÓS J:
They did, right.

MR BENNION:
Yes, and that was my next point in the road map if you like. So I think we say MACA is indifferent in the abstract to who might bring applications. It could be iwi or hapū or even whānau and we've had that happen too and that might be appropriate in the right places.

So the Act itself is quite – and I'm sure this was very carefully thought about, it's quite careful about not – it could have placed a gateway there. You know, that's obviously something you always ask if you're in front of the Waitangi Tribunal or anywhere else designing legislation, should there have been a gateway and they've obviously said no that's not appropriate here, let's just

open it back out. We know there are subsisting applications. They could also have a draft of the legislation to say those existing applications coming through under section 125, you know, they have some, you know, clear precedence over any hapū or iwi that's not there either. We say the priority is just a temporal priority, you know, procedural.

So both at the technical level of section 125 there's no particular priority there and the Act itself just says bring the applications, let's see them, and I guess the approach is, the general approach we would take is that, if there are issues about who holds where there are these many applications in the one area, the idea was bring it all to the Court, define a hearing area, hear them all and let people in their evidence address and remedy or set to address any issues about where rights are appropriately held.

Just while I'm there, I do note in our main submissions at paragraph 2.31 we explain that the question of representation and how applications sat with each other was clearly alive coming into the hearing because actually there's two occasions on which my friends went to Justice Churchman and said: "Listen Te Upokorehe should they be in front of you with their own separate application and Ngāti Rua is it appropriate for them to appear before you" and at 2.31 we note those two moments in the preliminary memos and decisions where the Court says, if you look at our footnote 60, the Court noted that "where an issue of authority to represent a particular applicant arises, this Court clearly has jurisdiction to determine that." That was a minute in July 2020 for example. So there's no – my friends were raising this issue early and the Court was well aware of it.

And I think while – yes okay we'll go back to the road map. So I'm down at sort of the lower part of the page: "Whakatōhea tikanga for foreshore seabed is hapū-centric" it's a clumsy term but we know what we mean there, "emphasises hapū rangatiratanga" but also that means that there's nothing, at the outset there's nothing for hapū to have to prove against anybody else, they've just go to say, well, we're the hapū, no one's questioning there are these hapū, that

they exercise this independent mana whakahaere mana i te whenua and that's what we've done.

So we've got some references there, but I do, I think if we go to the judgment itself, and I did have a couple of points to make in response to my friends there. I did want to go to the report of the pūkenga, and take you through a few references here. So if I go to the Pūkenga Report, at the back of the Court of Appeal decision, and just to also note that the pūkenga here were Dr Hape and Doug Hauraki. Dr Hiria Hape and Doug Hauraki. These are not your Native Land Court assessors, if I can put it that way. These are highly experienced individuals, and Dr Hape is, for example, a translator in a lot of the other MACA proceedings that are occurring, so that, you know, not unused to court process. They're pretty clear about, you know, the traps and what they're doing here, and also they sat right through all of the evidence. So they're the ones, you know, filtering and assessing every person in front of them, and I just wanted to go to a couple of references.

If we go to the – it's page noted oddly isn't it. The third page of the report, of their report, under "He Whakamārama", the page, the next page there, just under "He Whakamārama". There, (g). No, I want to go right to the beginning of the report. The third page. This final, they set out a whakatauāki and they say: "Finally the whakatauāki espouses the principles of **I** as meaning **WE / US** and that the focus should be on the WE as in whānau, hapū and when required, iwi." Now for pūkenga to make comments like this, and I'll go through a couple more, they are acutely aware of what that means. These are not made casually, and they're important.

So if I then come down to 1.d – sorry 2.d sorry, the tikanga-based solution, 2.b first, let's go to 2.b. Apologies. "Our simple solution is to go to a tikanga based poutarāwhare… in choosing that poutarāwhare, we do not designate or deem it appropriate for us to determine who is an iwi. Our poutarāwhare already in our opinion, already exists and is supported by whakapapa…" et cetera.

So they're not saying it's a new concept, they're saying that it already exists, and just to – my friends have taken you to the Poutama report, and this picture of a whare, there's some irony here, that's exactly what's being described by the pūkenga here. Then at 2.d. the poutarāwhare we suggests comprises, and again they simply name the six hapū. Again these are pūkenga who will be acutely aware of what is in and out in that discussion, so it's not a decision made lightly.

If I go through to 2.e – sorry, 2.e, can you just come up to v just above it. Our recommendations, just the second sentence there: " Our recommendations for a single title with governance at the poutarāwhare level while acknowledging their rangatiratanga, may not solve all issues. It does however mandate their mana whenua and mana moana and allows [for]… meaningful decisions in respect their interactions with regard the previously mentioned iwi or hapū."

If we come to, so they're talking there: "Our recommendations for a single title with governance at the poutarāwhare level." So it's very specific about where governance will be. They've named the hapū. Then e, just below: "Our poutarāwhare can then decide how it addresses the interests of [each] applicant group as well as each hapū's affairs going forward."

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And at g below, referencing back to where "iwi" is the follow-up, they go: "We witnessed…a strong focus on **I**wi **and not** i**WI**. This observation motivated our use of the lead whakatauākī used to open this report." So there's clear indications there about the hapū governance leading and that named set of groups is important. Again, we shouldn't underestimate the fact that the poutarāwhare are very – are making a very nuanced but very important distinction there, and just to –

KÓS J:

What's the significance of the capitalisation selection?

MR BENNION:

Oh, I just noticed that it's – it refers back to that – the capitalisation at the – you mean the g, the "Iwi" – and the "Iwi" and "not iWI"?

KÓS J:

Yes.

MR BENNION:

I'm noticing that the other place that it's used is right at the beginning under that whakatauākī where they say the "I" as meaning "we and us", that's the other time they capitalise: "The focus should be on the WE as in whānau, hapū, and when required, iwi." So I'm – you know, that's the – when they're using capitalisation in that way, that's where they also use it to make it clear that the iwi are "when required", but they're looking at the whānau, hapū as key units.

GLAZEBROOK J:

What do you say 2.g means?

MR BENNION:

Sorry?

GLAZEBROOK J:

What does 2.g mean?

WILLIAMS J:

It's a criticism.

MR BENNION:

Yes, it's a criticism of people for not pulling together, I agree. I was just noticing –

WILLIAMS J:

There's too much "I" in "Iwi" and not enough "we" in "iWI".

GLAZEBROOK J:

Oh, okay.

MR BENNION:

And I was just noting that that use of capitalisation in the "I", the "iWI", was also referenced back just under that whakatauākī, and when they do that, they actually talk about "whānau, hapū, and when required, iwi". So –

WILLIAMS J:

What's the paragraph where that is? The "when required, iwi"?

MR BENNION:

Oh, so it's just under the –

GLAZEBROOK J:

So the one right at the top, it was.

MR BENNION:

Our paging is a bit weird, but…

KÓS J:

Oh, I see. Yes.

MR BENNION:

Yes. It's just under the "He Whakamārama", the second page of that. Again, I guess I just want to stress that the decision to say six hapū is a calculated one, it's not a – you shouldn't assume it's some sort of gloss or mistake.

And just to finish that point because I know we're at 4 o'clock, just to say at paragraphs 314 and through 318 of the decision, the main decision, that his Honour Justice Churchman picks that up and he understands what it means and talks about – he says: "Six entities"– at paragraph 314: "Six entities constituting the poutarāwhare were identified by the pūkenga as being" those entities. So I notice it's just after four, and my apologies.

GLAZEBROOK J:

Well we'll adjourn for the day.

WILLIAMS J:

Someone's doing a karakia.

FRENCH J:

The karakia.

WILLIAMS J:

The kaikarakia.

GLAZEBROOK J:

Sorry, I was going to say we'll have the karakia, but thank you, Mr Rewiri.

KARAKIA WHAKAKAPI (MAC REWIRI)

COURT ADJOURNS: 4.04 PM

COURT RESUMES ON THURSDAY 14 NOVEMBER 2024 AT 10.02 AM

KARAKIA TĪMATANGA (DR TE RIAKI AMOAMO)

GLAZEBROOK J:

Mr Bennion?

MR BENNION:

Mōrena. Just picking up where we left off yesterday and I hope to take no more than perhaps 10 minutes but I just wanted to go back into the Court of Appeal judgment because we were there at the Pūkenga Report but I wanted to go to the place where his Honour Justice Churchman picks up the Pūkenga Report and applies it and makes some important observations at 313, paragraph 313.

KÓS J:

This is the High Court or Court of Appeal?

MR BENNION:

This is the High Court. So this is the 7 May 2021 decision and this is the moment where his Honour picks up the report and says, you know, the conclusion is about the six hapū and he applies that. A couple of points there. One is that at 314 you'll see the six entities referred to and their names, the hapū there, a single CMT for those six named entities. An important point at 315 is that: "In respect of the other applicants, specifically Whakatōhea Rangatira Mokomoko, Hiwarau C Block, Kutarere Marae, and Pākōwhai, the pūkenga concluded that their interests can be accommodated..."

Also that I think the Muriwai interest is, of course, very close with the Ngāti Rua interests so that's also accommodated. So they were clear that those six through whakapapa et cetera and long history can take in all those other groups. And just the other point there is at 318: "The pūkenga acknowledged the benefit they received from the wisdom of tohunga and kaumātua such as –

GLAZEBROOK J:

When it says they can be accommodated, what do you take that as meaning in the sense that is that an order that they be accommodated, is it a recognition that they should be accommodated, is it – well…

MR BENNION:

Well it's first of all recognition that those groups are in any event part and parcel of the hapū that are recognised and I mean from the subsequent hearings and discussions, the suggestion is that those groups specifically are inside of the final orders. Now how it's then for the hapū to say well obviously there's a lot of sensitivity around the Mokomoko whānau, for example, but it's – I think the key point is that the hapū are the drivers of the conversation because they are the six pou of this decision. Perhaps that's the key point that I'm making is that the clear conclusion is that the hapū are the pou, they drive further discussion because that's where the mana of this lies, the mana whakahaere of the takutai moana and it's not – it doesn't lie with a tīpuna approach, that's clearly rejected here. And could I just add one more point while I'm here too about the –

WILLIAMS J:

Well I don't think they reject it. I mean there's a constant call throughout this for Te Whakatōhea to act as one with one voice. It's troubling and distressing that that's not happening frankly.

MR BENNION:

Yes, and I wanted to return to that because that was the point that we discussed yesterday about the telling off, as your Honour put it –

GLAZEBROOK J:

Just so I can be clear, we're now on the Pūkenga Report rather than what the High Court made of it, is that – because they're –

MR BENNION:

Yes.

GLAZEBROOK J:

There is a – one of the issues that parties are raising is whether what the High Court made of the report was actually the conclusion of the report and then my question was really well what was the Judge actually expecting to happen but you've answered that. So we're on the Pūkenga Report now?

MR BENNION:

Yes, so just going back –

GLAZEBROOK J:

Okay, no, it's fine, it's fine.

MR BENNION:

That's okay. So again, yes, the conclusion of the Judge is it must be the hapū that drive the conclusion –

GLAZEBROOK J:

Yes.

1010

MR BENNION:

The ultimate form of things. On the report, I just wanted to return briefly to that point about people being told off, and there's people watching, and I'm aware of, there's reaction to that. But the point I would make is when we look at that telling off, if you like, that urging people to co-operate.

GLAZEBROOK J:

Perhaps an exhortation to, yes.

MR BENNION:

Yes, the exhortation to co-operate. It should be clear the context of that, which is that the hapū co-operated in front of the Court. Upokorehe stands out, and you see the pūkenga particularly concerned, if you read that report, you'll see particular concern about Upokorehe standing out, and that's a real focus for the

pūkenga, and I would say that's a much bigger focus than the question of, what do we do about all these other, you know, the Kutarere Marae, the Muriwais and et cetera. So who are they exhorting there, and who are they saying needs to co-operate, I would suggest that if you read the report it's about the six hapū they're particularly concerned about Upokorehe and how they stand in relation to the rest, and then for the issue – and then the tīpuna application, I don't know that it actually, I don't know where they sit with that, but it doesn't seem to me to be a central focus of their discussion, and again, just to make the point, if you read the decision and the evidence the hapū are co-operative about their inter-relationships with each other, and Upokorehe issue, as you've found and discussed already, is about degrees of mana or control. Even Upokorehe is accepting a shared, shared interests across the area.

GLAZEBROOK J:

Do you want to take us to particular parts of the Pūkenga Report to back up – I haven't totally understood that to be the focus yesterday. You can give it to us later.

MR BENNION:

Yes, I mean I can just provide you with references later, but that's my, I didn't have particular sections in mind, except that if you look through and read about the reference to Upokorehe and how they stand out, that seemed to me to be a particular concern. I'll give you a couple of references to that later.

GLAZEBROOK J:

Yes, if you can just drop a note to the registrar it would be helpful for us I think.

MR BENNION:

So I just want to come back to the road map, and I think we've moved a reasonable way through it. I'm at, on the second page of the road map, at paragraph 3 you'll see this moment where we say the hapū maintain distinct identities and mana even in response to the substantial trauma of raupatu. Just the point we're making there is that in as far as the suggestion from my friends is that the raupatu changed the nature of the relationship to the takutai

moana of each hapū, we reject that conclusion, the Court seemed to make nothing of it, and the reference there in *Edwards* is just to those concluding paragraphs about raupatu not having much effect, and there's no, I say – I think the issue was very briefly touched on, but there's no deep relevant cross-examination of any sort of level or depth, or any evidence on that issue in front of the Court. So something you'd have to explore in some depth if you wanted to explain it, and it's just not there in front of the Court. All we have is this conclusion that raupatu has little effect, and of course the applicant's view is of course their mana in their particular areas continues to run unaffected by raupatu.

WILLIAMS J:
You do get this strange phenomenon that you're forced into arguing the raupatu didn't hurt and of course it did. The question is, did it hurt enough, and that's your answer, isn't it?

MR BENNION:
Yes.

WILLIAMS J:
However badly it hurt it didn't hurt that bad.

MR BENNION:
Yes, that's our answer, and there's the information, there's the evidence about quickly getting back to sea and actually selling fish back to the soldiers who'd arrived. So a thriving market with the large population that's just arrived has now become a, you know, valuable commercial fishery. So paragraph 4 there, if hapū have rangatiratanga they choose to come together, that's their – the iwi, and I think we have to put this carefully, but it takes form when hapū come together. Paragraph 5, hapū applications that clearly had the support of the hapū. Each one was supported by what we call a pou tikanga. You know, key figures, key tohunga, rangatira.

We say – and then in the next paragraph that the – my friend's argument's the wrong way around, is the iwi needs to show that there's that hapū support to come together and if hapū are going, seeking some independence, that has to be – nothing in tikanga prevents them doing that.

The next paragraph, the pou tikanga gave evidence in support – no, sorry. No pou tikanga gave evidence in support of WKW's tīpuna approach. Paragraph number 2 there, no basis in tikanga to suggest whanaungatanga and kotahitanga justify removing the hapū applications, and it would be a breach of tikanga we say to do that.

Paragraph number 3 down there, the Te Ara Tono document, and this gets into the Treaty settlement documentation, and the Ara Tono book actually is at great pains to spell out that it's a hapū – the first agreement that everybody comes to as they try to reconstruct their claims settlement approach is to come to a painstaking agreement that it will be hapū, will be the groups that have to be satisfied as they go forward to a settlement, and that's quite a big decision because there are lots of, you know, rangatira voices, there are marae voices, there are whānau voices, et cetera. So that's a core – Te Ara Tono actually we say supports our position.

And then over the page, just finishing off there, the – even in the 1989 Tribunal claim there were representatives from each hapū. That was – early on of course that was the whole Whakatōhea approach, because that is who Whakatōhea is. And then the last couple of points are about cross-examination, but I – and points not put to our witnesses, if these were the issues that were being raised.

I just wanted to lastly point to something that's in our submissions at paragraph 2.28 and just make a final comment about your Honour Justice Williams' comment about "melting away". There is actually an important moment in that melting away situation for –

WILLIAMS J:

What "melting away" are we talking about?

MR BENNION:

The melting away of the mandate for the tīpuna application.

WILLIAMS J:

Oh.

MR BENNION:

There's actually a legal moment where that's fully explored and there's a conclusion about it. We mention it at paragraph 2.28 and it's a decision of the Māori Land Court in 2018, and I thought we'd just very quickly put that on the screen, and you'll see this is the Whakatōhea group that was progressing the Treaty claims settlement, and out of which the takutai moana applications grew, actually had a section 30 order under the Ture Whenua Māori Act in 1994, and in 2018 just as the Crown was settling, the question was what happened to that order, and we set out the key provisions from – the key sections from this judgment in our submissions, but just to note that that gets fully explored in front of the Māori Land Court and the Court simply says the circumstances have changed, it's not appropriate for – the order is effectively over just as a matter of circumstance and it's not appropriate for us to change and rename further people to the order, we're just going to put a finalisation date on it.

WILLIAMS J:

What does a "finalisation date" mean?

MR BENNION:

Well, just a date that says: "On this date, the order ceases." And they say that's –

WILLIAMS J:

Oh, so an expiry date. Yes.

MR BENNION:

And they say that's actually matter of let's say etiquette or tikanga, if you like, that they just simply say: "Let's just give this the appropriate moment it requires and" – but effectively that the iwi has moved on.

1020

So if I look at paragraph 92, just the very last decision there, they go right through the history of people having moved away from the settlement body and there would have been, as we've noted, due to change in circumstances there is no longer effective – does not reflect the Whakatōhea reality. The order is legally made and then (b) over the page 93(b) there's been significant changes in circumstances in regard to Whakatōhea a section 30 order is no longer effective. That's just factual. It's necessary to reflect the change, bring it to an end, it ceases on 12 March 2018.

WILLIAMS J:

This related to the land claims did it?

MR BENNION:

Yes, and of course the WKW submissions before you are that the land claims give rise to the takutai moana applications and that they're founded out of those applications. So we're saying this is where the land claim part of the whole, the genesis of the takutai moana claims, if you like, in the land claims, the land claims aspect is adjudged to have changed fundamentally, the Whakatōhea situation has changed dramatically.

KÓS J:

You say that WKW says that, do you say it also?

MR BENNION:

Says, sorry, Sir?

KÓS J:

The derivation of the current claims, current applications from the land claims?

MR BENNION:

That is definitely true on the evidence that that's how their current applications came into being.

KÓS J:

So that's common ground?

MR BENNION:

It's common ground, yes. Actually if I – yes, there's lots we can explore there but even if I go to paragraph 74, for example, here's a couple of names to know, that we know. We further note the number of those named in the order have at various times, either orally or in writing, indicated they have resigned from the negotiating groups. He said Rangi Walker, John Hata, Biddle, Vercoe, Mr Claude Edwards, Mr Amoamo and others. So it's quite significant change occurred and the judgment discusses that.

So I think it's particularly in reaction to my friend's submissions where they go, it is unclear to us quite what happened and why these fresh applications came and we submit that it's not unclear at all. It's actually very clear that circumstances have moved on significantly in relation to the Treaty claims and that has an impact obviously on the takutai moana applications.

Unless the Court had further questions that was all I intend to present.

GLAZEBROOK J:

Thank you very much.

MS FEINT KC:

Ata mārie, e ngā Kaiwhakawā. I just want to take five minutes before Mr Fletcher gets up to very quickly address a discrete issue that was raised by my learned friend Mr Fowler yesterday concerning the mandate of Ngāti Rua

because he singled out Ngāti Rua as one “mandate” that they challenge, and I just want to take the Court to the evidence on that to show that in fact that is a basis for the mana that Ms Hata and Dr Amoamo say that they hold.

So, in our submissions in response to WKW, paragraph 2.34, we have set out there for each of the hapū, the basis upon which they say they have the mana. So we say mana or authority is the appropriate term rather than mandate. And then if we go to Mereaira Hata’s affidavit, you'll recall that yesterday Mr Fowler took you to the resolution that was passed at a hui-a-hapū and I just wanted to set out the context for that.

If we go down to paragraph 4 please. So Ms Hata in paragraph 4 sets out the key steps that they took to secure the right to represent Ngāti Rua and so she says in 4.1 that: “On 19 February 2017, Ngāti Rua decided at a hapū hui at Ōmarumutu Marae,” that’s the Ngāti Rua Marae, “to file an application under the MACA Act.” As she was the marae secretary, that task fell to her and she lodged the application. And, secondly: “On 23 June 2019 at a hapū hui at Ōmarumutu Marae, Ngāti Rua passed a unanimous resolution to support the MACA application going forward for the benefit of Ngāti Rui. Uncle Te Riaki Amoamo and myself were selected…” and the minutes are what Mr Fowler took you to yesterday.

Then she notes that in June 2020 Te Whakatōhea Māori Trust Board passed a resolution agreeing to support the Ngāti Rua request to represent themselves in accordance with the tikanga of mana ā hapū and the reason they needed to rely on the Trust Board application was because when Ms Hata filed an application by the deadline, she didn’t realise there were two separate applications. One for the Court pathway and one for the negotiations pathway, and she’d only filed a negotiations pathway application. But the Trust Board had filed a protective application on behalf of all the hapū and the Trust Board agreed to support the proposal for Ngāti Rua to join the Trust Board application, but for Ngāti Rua to speak for itself.

Then in paragraph 5 she says she's updated Ngāti Rua on progress with the High Court application at their latest hapū hui and she notes that although the hapū's appointed Uncle Te Riaki and I to act on their behalf it's expected we maintain that support by regular updated to the hapū. Since we're acting on behalf of the hapū we're accountable to the hapū and are expected to act according to the collective decisions of the hapū. So they have a monthly hui and they report on progress of the application every month. So if someone has an issue, then that's where it should be raised. She goes on to note that it's the ahi-kā-roa who keep the home fires burning who are responsible for protecting and preserving the hapū rights.

If we then go back to the submissions at paragraph 2.33, so Robert Edwards, who at that time was the chair of the Trust Board, and he's of Ngāti Rua, and he was appointed by WKW back in 2005 to represent Ngāti Rua on the Edwards application and when I cross-examined him he conceded that the Ngāti Rua application was now represented by Ms Hata, and that had been authorised by the ahi kā. So if you look down at footnote 66, rather than go straight to the transcript. To save time I'll just read this out. Mr Edwards was very frank and conceded in cross-examination "… that he had not kept Ngāti Rua updated about progress of the Edwards' application, but should have." He said he'd been busy because he was chair of the Trust Board. He said: "… that since 2017 Ngāti Rua had been represented by Ms Hata;" and he accepted "… that the Ngāti Rua application had been mandated by the ahi kā that attend the [regular monthly] hui ā hapū at Ōmarumutu Marae."

So in face of the concessions of Mr Edwards that he no longer represented Ngāti Rua in relation to MACA matters, it's not clear to me on what basis WKW can assert that the mandate endures, and it seems to me the only evidence they put before the Court was that there is a single hui ā iwi in 2005, and they seem to regard that as having been set in stone, and that that should endure irrespective of the fact that they haven't been back to the iwi since to ensure that they maintain that support.

So it's quite clear on the evidence from each of the hapū, if you look through the references we've included in the submissions, that the hapū preferred to represent themselves in accordance with their mana, and because they hold the customary title rights as a matter of tikanga.

So that's all I wanted to say in relation to that, and now I'll pass over to Mr Fletcher, unless the Court has any questions.

GLAZEBROOK J:

No, thank you. Mr Fletcher?

1030

MR FLETCHER:

E ngā Kaiwhakawā tēnā koutou. I can see you're getting handed up the hard copy of my road map. I had hoped to try and combine it with Mr Bennion's to try and reduce the amount of paper for you, but we couldn't quite get that done sorry. So apologies there's an additional road map there, and I'm hoping you also have an electronic copy if you were after that, which we filed earlier this morning.

So as my learned senior Ms Feint says, I'm addressing the Upokorehe appeal, and just to begin by signposting, I'm largely following the structure of the written submissions and this road map. You'll see if you turn over the page that I've just inverted what I call the procedural arguments or overlapping CMTs discussion, which is earlier on the submissions and later to the back end I'm going to focus on the evidence of tikanga at place from one through paragraph 7.

There's two things that I want to do very importantly as I begin these submissions, and it's something that you've already picked up from listening to my friend Ms Cooper last week. Te Kāhui doesn't take a position about whether Upokorehe are a hapū or an iwi, that's something that's been left for another day. It's the approach that the pūkenga took, it's the approach that

Justice Churchman took, and we take the same approach. It's a matter for Upokorehe to speak for themselves as a matter of tikanga.

Where we join issue with them is the idea that in essence they say they are the only ahi kā at Ōhiwa, and elsewhere within the rohe, and we respectfully say firmly by fairly that no, the mana at place is very much shared, and that's a position that's been very much a matter of Ōhiwa, particularly mai rā anō as we'll see.

So beginning at paragraph 1 of the road map, which is also following my written submissions at 3.7, I think it's helpful as we're talking about Ōhiwa just to briefly conceptualise the place that we're at, because then the subject of extended discussions, particularly in the Tribunal's Te Urewera report, in relation to the relationships between Tūhoe and Upokorehe, and it's also been discussed in the Ngāti Awa Tribunal and of course your Honour Justice Williams mentions it in the Wairarapa Moana report. As I say in the road map, Ōhiwa is one of the most significant pātaka kai in the area, and it is kind of inevitable as a reaction to that across a large number of different ways of conceptualising relationships in that space, that there are a lot of iwi and hapū from different descent lines.

In the written submissions at 3.7 we mention one of the different ways of conceptualising this mai rā anō, which is the idea that te umu taoroa a Tairongo, that there's so much kaimoana here that Tairongo could keep his umu burning constantly, because there was always more kai for him to cook, and for Whakatōhea this is explained in a slightly different way as well. The idea of Ngā Tamahine o Whakatōhea that we think about place as being where there are so many daughters of Whakatōhea, the pipi particularly, and the kaimoana in that space.

In light of that we say it's perhaps unsurprising that there isn't really evidence of tikanga. That there's one group that can claim sole exclusive mana, and another way to think about this in terms of the historical position is you have a large variety of different battles and conflicts between Tūhoe, Ngāti Awa, Whakatōhea, Upokorehe at place, several of which are mentioned in my written

submissions, and also situations where those shared whakapapa links avoid battles. My friend Ms Irwin-Easthope took you last week to the example of Mereaira, who shared whakapapa between Whakatōhea and Te Upokorehe – sorry, and Ngāti Awa and Whakatōhea, and she held up her son to avoid a battle there, and I've mentioned the same example in my written case, and we conceptualise the space in that way. We say it's not particularly surprising that the interests are layered and interwoven and there's mana whakahaere across a variety of hapū and iwi in this location.

I want to then move to my paragraph 2, and I won't discuss the arguments around whakapapa in detail, your Honour Justice Williams explored those with my friend last week, but we did want to take you back to the Whakatōhea whakapapa chart just briefly for a slightly different point. Sorry Nerys, those aren't hyperlinked. To make a slightly different point to the ones that were made last week by my friends and my learned seniors. So if we can bring that up.

Now I'm hoping if you can zoom in on the bottom left, that would be particularly helpful. It's quite small typeface. There we go, that's fine. So if you see down the bottom left of the whakapapa chart, there's some names there. You'll be familiar with several of them by now, and of course you know Dr Amoamo, Matenga Biddle from Ngāi Tama, those are minute books, the first three references, and the name I'm particularly interested in there is Te Huinga and his whakapapa book.

And Te Huinga, as I say in paragraph 2 of the road map, is an Upokorehe tohunga who assisted along with Dr Amoamo and Matenga Biddle as authors of this whakapapa chart in constructing it, and it was accepted at trial by Mr Aramoana who you also met last week that Te Huinga was a knowledgeable man on matters of Upokorehe whakapapa, and I wanted to take you to this because I understood my friend Ms Cooper to be suggesting that this whakapapa chart doesn't quite show the Upokorehe perspective, it doesn't reflect that Upokorehe knowledge in mātauranga Māori, and we respectfully say that's not quite right, that it is constructed with knowledge from both

Whakatōhea and Upokorehe, and that it's not quite as simple as treating this as only being a Whakatōhea perspective.

I'm not sure if I need to say it expressly, but to the extent that there was an argument last week before I move on from whakapapa that Upokorehe's suggestion of earlier waka gives some kind of priority of rights in time, I think your Honour Justice Williams was clear that you weren't sure that would quite work, and we tend to agree. So other than that, what we say is simply that the whakapapa, as you've been taken to several times now, shows very clearly the ties that bind, particularly the closeness between Ngāti Rua and Te Upokorehe, which you can see very clearly down the bottom left, and that's something that particularly Dr Amoamo discusses in his evidence several times.

Moving to paragraph 3 of the road map, I've set out here in very brief summary a number of rangatira from Whakatōhea across several of the examples that we've summarised in the written submissions, and I've really done that just to remind yourselves of some of these names when we go to some of the evidence that I'd like to talk about orally and on the screen.

Because the key submission at paragraph 4, as I say in the second sentence, is that it's not the case as my friend Ms Cooper seemed to suggest last week that the record before you fails to distinguish clearly between Whakatōhea and Upokorehe. I understand the concern at an abstract level. Absolutely, if we were talking about historical Pākehā sources it might be a concern that those sources might not understand the position, but there are many examples in the record, some of which I have taken you to, which show that clear distinct exercise of mana whakahaere at place through particular rangatira, and I find it helpful to identify the rangatira through these examples because it helps to I think put my friend's concern to rest that there are only Upokorehe rangatira, because we say that's not really the position in the record.

So my paragraph 4 is mostly focussed on the example in the written submissions about the disinterring of Te Arawa dead after the raupatu, and as I say, that's at paragraph 3.18, and there are quite a few things we can say

about this example, because what it shows very clearly I say is both (a) Upokorehe and Whakatōhea rangatira exercising ahi kā at place, there being sought rangatira ki rangatira by Te Arawa to ensure that there's not going to be conflict after the raupatu when Te Arawa are, of course, kūpapa who have been fighting Whakatōhea, and particularly what's helpful about the evidence is that it names specific rangatira for each of Ngāti Ira, Hira Te Popo, that's a very important rangatira for Ngāti Ira who Te Rua Rakuraku whakapapas back to. Te Teira, Te Upokorehe, Tiwai Piahana, Ngāti Patu, and Ngāti Rua rangatira Te Awanui.

I'm not going to go through what you discussed last week about examples of how you might show CMT, but in the idea of another iwi coming to place, finding the rangatira who are there, and asking for permission to come and disinter dead, and then recognising their ahi kā at place is, I say, a very clear example of this shared exclusivity working in the historical record, and I don't really understand there to be a dispute that any of the other rangatira who are listed here are rangatira of Whakatōhea as opposed to Upokorehe, but my friends may have something to say about that in reply.

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Similarly, I've said at the end of paragraph 4 there that this is a mahi tahi idea of working together that goes through the record through time. The most modern example I thought was helpful to explain is that you can see there I've talked about Ngāi Tama and Upokorehe here, both opposing subdivisions in the modern area in Waiotahe because of concerns of the Wāhi Tapu site Te Arakotipu being something that was going to be just damaged or destroyed by that development. That's something the High Court Judge picked up at and I've given you the reference there to Ms Hillier's evidence from Ngāi Tama.

So just pausing there, what we say so far then is it is quite clearly the case that you have not only examples of Whakatōhea clearly exercising ahi kā place, both in the written submissions and here, but there's often examples of that being done collectively and together on the basis of those shared relationships in mana whakahaere.

What I want to focus on then, given the exchanges between Bench and Bar last week, is my paragraph 5 because my friend Ms Cooper took you last week in her road map to what is called in her document "Acceptance by other groups of Te Upokorehe as holder of ahi kā and kaitiakitanga" and your Honour Justice Williams asked Ms Cooper whether those were examples of concessions about exclusive mana, and to be fair to my friend, my recollection is that she said she wasn't sure but she thought some of them were, and I have checked them all, and I have to say on my reading of the transcript none of those are concessions. They are all either recognising that there is kaitiakitanga exercised by Upokorehe but that's not disputed. Kaitiakitanga is exercised by Whakatōhea and Ngāti Awa and Upokorehe at place, or in fact some of them are quite the contrary, they are emphatic that the rights are shared as to mana whakahaere and ahi kā.

So in my paragraph 5 I've just chosen to focus on three witnesses there. These are the three witnesses who were chosen by my friends who gave evidence for Te Kāhui. In going through them one-by-one, we have Ms Karen Mokomoko from Te Whānau a Mokomoko. She was simply not asked whether Upokorehe were the only people to exercise kaitiakitanga at place. She accepted they do exercise kaitiakitanga but the framing of the question there matters, as does the answer that follows, and we say that if the correct question had been put the answer might well have been quite different.

The second example there is one of Ms Sykes and I as Ngāti Ira clients, Ms Rakuraku. I was a bit surprised to find that she was listed as an example of someone who at least obliquely was said to concede exclusive mana for Upokorehe and Ōhiwa because, as I say there, she filed a full reply affidavit on this topic and very much disputing that. So, I'm not quite sure that was the first example my friends might have wanted to go to.

More critically, in terms of the affidavit in their list, I've got there 202.00652 and it's the same reference, 657 sorry, is the same reference for their affidavit. Ms Rakuraku is explicit about this. The way she says it is we have mutually

respectful relationships with Upokorehe at place. The place is shared, it's not just Upokorehe's, and she says the same thing in the transcript reference that my friends have also put in in their road map.

I did want to take you briefly to the transcript cross-examination in 5.3 of pou tikanga Hetaraka Biddle because I think 22 pages and it really helps to conceptualise clearly how this argument played out at trial. So this is my friend Mr Lyall at trial cross-examining Mr Biddle. You can see there that he introduces himself and starts with his questions and the first answer is: "I think we had discussions with Upokorehe and it's part of our history and our whakapapa to that area through quite a few tīpuna known to Whakatōhea and Te Upokorehe... We can go back to Te Rupe…" that's one of the people I mentioned as rangatira in my paragraph 2 and "…we can go to Titoko," that's Te Whānau a Titoko, who my friend Ms Panoho-Navaja represents and we can also, going further down there's a reference to Tūtakahiao,who is Mokomoko's father. Mokomoko is another one of the rangatira in my paragraph. This is where I'm getting into the nuance around different questions and the way they're put.

So why I think my friend's gave you this example is the next question. "Today would you accept that Te Upokorehe are the hapu or the group that primarily exercises kaitiakitanga…". There's a lot of nuance in tikanga as to what that question could mean, but to be fair the witness says: "Yes."

I think if we go down to the next question at the bottom of the page: "I did not see in your evidence an explanation of the relationship that your hapū has with the highlighted pā here. So, are we able to discuss a couple of those or is there someone better to describe those?"

Hetaraka says: "Yes, it was quite simple. When Muriwai and her tamariki moved this way to this area or to that are they stayed at those pās." "Āe." "And also some of my uri of Ngāi Tamahaua were born at those pās… Onekawa, [that's where] Mokomoko was born." And Ihukatea there, you might recall is the dispute between Ngāti Awa and Whakatōhea about where the

boundary on the west is. "… are you able to give me more information on the relationship with that pā site?" "Yes. But that is where one tīpuna stayed… and [then] they followed the rest. They did not stay there long… when they come in and there is other pā sites in there as well like Huritawa, Hokianga."

There is more of a discussion of orientation, and if we scan down further, just noting that reference to Tūrangapikitoi at the bottom of the page. I'll come back to that a little later, and onto the next page we have the key question as asked. "And then obviously to the east we have the larger cluster of sites but I'm not going to take you through those as they're outside of my clients' core area of interest." That's a reference from my friend to the Upokorehe rohe. "But what I would say is, would you agree that the ties that bind Te Upokorehe to those sites in the west would be stronger than the ties that bind your hapū to those sites." It's still not a question about exclusivity, just to be clear, but it is starting to put the question more directly.

Then the answer, very clear. "… we're of the same tupuna. How can you judge that when we've all got the same tupuna. We have bloodlines and we have the same tupuna? We have bloodlines and we have the same tupuna from Tamaikoha where he was never challenged. I am a direct descendant of [him] and he was of Ngāi Tama, yes. So when you say how strong can you get, so are those spokepersons they are my cousins speaking for Upokorehe too…".

I emphasise the word "too" here. He's clearly saying, speaking for both Upokorehe and Ngāi Tama. They also come of the same whakapapa line, and that's where the cross-examination ends.

So there's three submissions to say about this. The first point simply is obviously it's not a concession at exclusivity like I said. The second point, as I've been highlighting in this passages and the transcript is, how you put the question to the witness matters, and what you ask them, giving the layers and nuance of rights, and the more directly the question is put, the more direct the rejection as an answer.

But the third reason I wanted to highlight this example is, at least in my reading of the transcripts, these kinds of questions are not put to Dr Amoamo, and they're not put to Te Rua Rakuraku, who are the living pou tikanga from Ngāti Rua and Ngāti Ira by the time of trial, and we say that's a problem because you would expect that these kinds of questions would be put to the knowledge-keepers at place if there was going to be an argument around exclusivity in the way that my friends are now putting in this Court.

Moving to paragraph 6 in the road map, I've given you a comparison point there from the late Charlie Aramoana, who's a well-known pou tikanga of Upokorehe whose evidence he prepared for an earlier proceeding under the Water and Seabed Act, he was talking about Ōhiwa and he says: "I still focus on guardianship because we can't really say it's really ours. When you look at Mataatua, you got three iwis here that come and go, but we leave the mantle of guardianship, as long as other iwis recognise the guardianship of Upokorehe." And he's not entirely clear which iwi he means, but the way I read that is he's treating Upokorehe as an iwi, reflecting my friend's case, and he's also clearly referencing Ngāti Awa and Whakatōhea. He could also be referencing Tūhoe, but the way I read it is he's treating Upokorehe as an iwi themselves.

My paragraph 7 takes me to the memorandum my friends filed on Tuesday after there were some questions from the Bench around the different marae that were referred to in their road map. Rather than filing a memorandum in response I thought it was just helpful to add to the submissions briefly and respond. I'm not going to go through all the examples because there are other lawyers here, for example my friend Mr Sharp for Kutarere who can respond if they like.

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But I do want to speak about two. The first is Tūrangapikitoi, which I referenced, noted in the transcript before, that Hetaraka Biddle was speaking about, and you'll see here and if we can go to the – oh, actually no, don't worry about going to their memorandum. In their memorandum they describe Tūrangapikitoi as being based on an agreement between Te Upokorehe and Waimana Kaaku

following the battle in 1823 at Maraetōtara. Well that's the battle involving Te Rupe that we discuss in our written submissions with the haka that's used to defeat Tūhoe, and though we accept that Te Rupe has multiple whakapapa lines that includes Ngāi Tama as well, and we don't accept that that Ngāi Tama link can be severed in terms of the way we identify the locations and relationships at place.

The second there is Roimata, and my friends in their memorandum say: "There can be no debate about Roimata," and unfortunately I have to say I do debate that. As you can see, Te Rua Rakuraku, the Ngāti Ira pou tikanga, said in his evidence that he believes and he recalls that Roimata was given to Rakuraku and was occupied by him from the 1820s to the 1870s. That's roughly equivalent to the same time period that's discussed at paragraph 5(a) of my friend's memorandum. He explicitly says in his evidence-in-chief that Rakuraku was exercising mana whenua and mana moana there, but that evidence isn't challenged and we say that's an issue because of course we're not disputing that Upokorehe also exercised mana whakahaere at that place, but Ngāti Ira's distinct whakapapa line to Rakuraku doesn't disappear simply because Upokorehe have suggested that marae is only an Upokorehe marae.

WILLIAMS J:

Well it depends, doesn't it? It's way more complex than that, because your – the passport you're using changes depending on where you are. Just because you're Ngāti Ira somewhere doesn't mean you're not Upokorehe somewhere else and that's what gives you the right to be there, so to say that multiple affiliations means you can ignore particular affiliations is – doesn't, isn't necessarily a lot of help, because you have to know what the affiliation is that gives you the right to be there.

MR FLETCHER:

I'm not quite sure that's my submission though, is it? So the first prior point before I engage with the question directly is I do understand my friend's case to be that you do ignore other whakapapa lines when you're looking at Ōhiwa,

that if you're at Ōhiwa they say you have to be Upokorehe to exercise mana whakahaere there.

WILLIAMS J:

Yes.

MR FLETCHER:

So I think if that's the criticism of my submission, respectfully I think that cuts both ways. But in terms of the Rakuraku example, to extend it if that's the concern from the Bench, that – the evidence is not just we have a rangatira there in the past, I accept that wouldn't be enough. The point is rather, just like Hetaraka Biddle was talking about Te Rupe, that line continues all the way through as a basis for exercising mana whakahaere at place, and Te Rua is very clear about this in his evidence. For him, that is still the basis on which Ngāti Ira can exercise mana moana and mana whenua at place.

WILLIAMS J:

So you say Te Rua – and I'm not familiar with enough of the evidence – but you say Te Rua says: "When I am there, I am there not as Upokorehe, which I can claim descent from, but as Ngāti Ira"?

MR FLETCHER:

Āe, and I don't know off the top of my head whether Te Rua would talk about Upokorehe whakapapa in that way, but he definitely would say and he says in his evidence, and I can find those references for you in the break if you'd like, that he exercises mana moana and mana whenua there through that Rakuraku line, and if it helps, I go back to the written submissions –

WILLIAMS J:

Well the question really is then is that Rakuraku line a Ngāti Ira line in this respect, or an Upokorehe line?

MR FLETCHER:

So I'll come back again to the direct question, but can I take you to the written submissions briefly because it might help identify the answer quickly. If we go back to my introduction, the specific role of Rakuraku apart from in our evidence is discussed at length in the Te Urewera Report, and the conclusion there is that for that Tribunal Rakuraku is a distinct whakapapa line for Tūhoe as well through which rights –

WILLIAMS J:

Yes, it certainly does.

MR FLETCHER:

Yes. So if the concern is he solely an Upokorehe rangatira for present purposes in mana whakahaere or quite apart from Ngāti Ira, no, that's not the conclusion the Tribunal reached, and I'm trying to find the footnote as I talk to you, but that's specifically an argument that was put –

WILLIAMS J:

Maybe we can foreshorten this by you helping me with this thing.

KÓS J:

It's footnote 117, I think.

MR FLETCHER:

I meant 85. I just found it as you told me that but I will see what I said at 117 as well. Thank you, your Honour.

WILLIAMS J:

The lands around the harbour were subject of raupatu entirely?

MR FLETCHER:

I'd have to check the record about that. There you go.

WILLIAMS J:

And then reserves were returned via the Compensation Court?

MR FLETCHER:

Mmm.

WILLIAMS J:

Do we know whether the reserves that were returned were returned on the basis of take tupuna, or was that set to one side and they were just done to make the reserves available do you know?

MR FLETCHER:

So I can answer that but it's going to require, I think realistically I'm going to give you some references in the memorandum so you can –

WILLIAMS J:

That would be great.

MR FLETCHER:

But the short answer is Hiwarau C, which my friends talk about, is complex because I think it's David Armstrong, who gave evidence as a historian for Te Whānau a Mokomoko who explains it most nicely, but there are references in the Te Whānau a Mokomoko evidence too that because Mokomoko, obviously well known, killed for the murder of Völkner, his whanaunga and their relationships with Ngāti Patu and Ngāi Tama were essentially downplayed because if you were going to get lands at Hiwarau C –

WILLIAMS J:

You weren't going to be emphasising that?

MR FLETCHER:

But that’s the problem, is that you could say that that raupatu just eliminates those lines but that’s not what we say and not what the evidence established.

WILLIAMS J:

I'm really thinking about to the extent that there are reserves around the Ōhiwa Harbour, and I'm sure Hiwarau C isn't the only one, were they allocated

by take tūpuna, or were they allocated by just kind of a pragmatic political arrangement in which the Court didn't really care too much about take tūpuna. The reason I ask that question is if the Court allocated by take tūpuna that gives you your answer. If it's more than one hapū in the reserves in that area then that solves that probably unless there's some dispute about whether the Court was right about that. If the Court didn't allocate in that way but allocated by some sort of rough and ready carve up because the land had been confiscated, then that's no help, but the problem with relying on whakapapa lines is that they are so complex and whakapapa lines never divide, they always join, so you have to know what uniform you're wearing when you're in one particular place as opposed to another particular place.

MR FLETCHER:

I think there's – I will check the record. I hear my friends making some mutterings positively but I will want to check the record before I give you an answer directly. I think this just underscores the point I was making previously about how important it is to test these matters in cross-examination. If you don't leave the point asserted by a rangatira that's how they understand their own relationships at place and we're in this Court now and it's making things rather complicated for you to unpack these questions but I take the point about the land block and I will go and check it. That's my recollection in terms of Hiwarau C but I need to go back and look at – I think you're right, I think there are other land blocks at least outside of Ōhiwa. I don't know specifically post-raupatu whether there are other reservations in Ōhiwa. For example, Dr Amoamo will speak about Ōpape, you might have seen references to that, but that's all the way east to be fair.

WILLIAMS J:

Right, okay, thank you.

MR FLETCHER:

If I go now to paragraph 8, that's me leaving the discussions round tikanga at place, towards the discussion of overlapping CMTs, and before I do I just

wanted to check if there are any more questions around that tikanga apart from my homework for Justice Williams?

GLAZEBROOK J:

No, thank you.

MR FLETCHER:

I think this point has been well discussed between Bench and Bar with my friend Mr Lyall last week and it's really at heart quite a simple proposition. If you have a claim for multiple overlapping CMTs in the same space, and putting aside the section 58 debate for the moment, each of which require exclusivity, and they're all overlapping within the Upokorehe here because it's Upokorehe here who are asking for these, then you clearly have a problem about what it means to say you're claiming sole exclusive mana. I think the Bench has explored that already. I don't propose to go through that point in more detail.

1100

What I did want to briefly explore with you, and just recall from last week, I won't take you to the references, is my friend Ms Irwin-Easthope I think filed with you my friend's Court of Appeal submissions where they specifically conceded this point around Ngāti Awa's inclusion, and my point for Te Kāhui is that it's much stronger, even for us, because that point was never appealed in the first place. My friends were quite explicit about this, and they noticed, they challenged the inclusion of Ngāti Ngāhere, a point they lost on in front of Justice Miller in the Court of Appeal. They abandoned the inclusion of Ngāti Awa, and they never challenged the inclusion of Te Kāhui in a shared CMT.

I struggled, frankly, a little to follow my friend Ms Cooper's reasoning around these propositions of we always intended to appeal because I just don't respectfully think that's what the appeal notice says, or what the written submissions cover, and your Honour Justice Kós when Ms Cooper was speaking asked her to go down to the relief sought, which I think is of itself quite a telling indication of where the argument was. But the reason I brought this back up again is because if we think about the argument that's being advanced

below in the Court of Appeal, it is just this argument of overlapping CMTs relevant to Ōhiwa and elsewhere within the Te Upokorehe rohe. For me it's to use the phrase from this Court's decision in the *Parker* case, it's an apparently deliberate strategy that, look, at the end of the day we might not manage to establish exclusive mana at Ōhiwa and elsewhere, so what we can do as a compromise is try and get our own separate overlapping CMT, rather than being bolted into a shared CMT.

I can understand, for my friends, the logic of that strategy, but it's very difficult to reconcile with the approach that's taken now, which is more of a direct challenge to the tikanga at place.

I think if we get to that point, I certainly accept you can, of course, allow my friends to depart from that strategy, but it is an indulgence, and with respect to my friend Ms Cooper, I'm not quite sure it's as simple as just saying well there's no prejudice so we can do that, apart from the obvious point that you don't have reasoning in the Court below about this. We say there clearly is prejudice, my paragraph 9. We weren't expecting a re-hearing on this type of point because it simply wasn't argued in the Court of Appeal, and a re-hearing is, for me, a classic example of prejudice that's more time, and I don't want to labour the Court in the context of this Court's previous decision, but it's obviously more (unfunded) cost.

So to say there's no prejudice to Te Kāhui from being asked to do a re-hearing on these matters is, in my submission, a little ambitious and not something that we think is particularly compelling.

Finally, my footnote – sorry, my paragraph 10. The formal position is we don't take a position on the availability of overlapping CMTs. We acknowledge that there may be some workability issues which the Bench has explored with my friends, and I suspect my friends for the Crown will have something to say about that too. The point that we really want to emphasise is that either way, regardless of how you conceptualise the CMTs, the tikanga still has to apply. People still have to mahi tahi and work together and respect those shared

relationships at place, and it shouldn't be the case that an overlapping CMT changes that tikanga. It's not, I don't think, what my friends are arguing, but it is necessarily an important point to understand in how we contextualise this.

Necessarily, given that what we're recognising are tikanga rights, that last sentence after the colon, tikanga must be the applicable law once the appropriate groups have been determined, and we've set that out in some detail in the written submissions.

That's where I was planning to end, but I wanted to offer to go through the High Court judgment about Upokorehe, just because my friend Mr Bennion brought it up, and I could see there were some questions from the Bench about how the High Court Judge reasoned through on this point, and I'm happy to take you through that if that's helpful.

GLAZEBROOK J:
Well it's probably up to you whether you think you need to in light of the discussion.

KÓS J:
We can presumably read the relevant section if you identify it.

MR FLETCHER:
What I'll do then is I'll just give you some paragraph references. A helpful compromise so we can try and stay ahead of the timetable/vaguely timely.

GLAZEBROOK J:
And if there's something in particular you want to take us to then feel free to. I think we're still doing reasonably okay on time.

MR FLETCHER:
Let's do that then. If I can go to 157 of the *Stage Two* judgment, which I'm hoping you have copies of to hand, it's not in my road map, sorry, your Honours.

ELLEN FRANCE J:

Could that be brought up on the screen?

MR FLETCHER:

I think – I think that's *Stage Two*. You want stage 1. Scroll up a little, so –

WILLIAMS J:

Not the *Stage Two* judgment?

MR FLETCHER:

Yes.

FRENCH J:

You did say *Stage Two* before, yes.

MR FLETCHER:

Oh, did I?

ELLEN FRANCE J:

You said stage –

MR FLETCHER:

Oh, I meant to say number 2. That's not helpful of me, apologies. Getting confused with my numbers.

KÓS J:

What's the date of the judgment?

GLAZEBROOK J:

I did wonder why we were going to *Stage Two*, I must –

MR FLETCHER:

No, no, it's perfectly reasonable confusion.

WILLIAMS J:

21 May isn't it, something like that?

MR FLETCHER:

Paragraph 157. So one of the issues that's no longer before you, it wasn't really live in the Court of –

KÓS J:

Sorry, which date? I'm now confused as to which judgment we're dealing with. Which date is the judgment? That'll do.

WILLIAMS J:

Oh, sorry, 18 October.

MR FLETCHER:

[2021] NZHC 1025, or 7 May 2021.

KÓS J:

Thank you. 7th of May, thank you.

MR FLETCHER:

Apologies for confusing you, that's on me.

KÓS J:

Thank you.

MR FLETCHER:

So one of the issues that helps to contextualise the way Justice Churchman is thinking about the issue with Upokorehe is a pure legal issue, which wasn't before you before, but my friend Ms Roff at the time arguing for the Crown in that indented quote there, that: "The inability of one iwi, hapū or whānau to recognise the rights and interests of another to the same shared specific area will" – necessarily, I'm adding that word – "frustrate a shared exclusivity claim." And you see at paragraph 158, and this is why I'm bringing it to you: "Counsel relied on the evidence given by Felicity Kahukore Baker on behalf of

Te Upokorehe Treaty Claims Trust which asserted that Te Upokorehe held mana over Ōhiwa Harbour, and that any rights other groups claim to exercise in the area are done so under" Te Upokorehe's mana. And then a similar point at paragraph 159 about areas of concession.

And if I can jump you forward a little while in the judgment, because this is all discussions about whether shared exclusivity is appropriate as a matter of tikanga, I'm now at paragraph 183, and this is what Justice Churchman is referencing: "As discussed above, Ms Baker…has a different view to the other five Whakatōhea hapū" – and to be fair to Justice Churchman, he said earlier in the judgment he's not intending to say "hapū" or "iwi" there, it's just a turn of phrase – "as to the basis upon which certain areas were held in accordance with tikanga." And he says: "It is open to both the pūkenga and the Court to come to a different view from Ms Baker as to what the facts established."

So he's clearly indicating here that he's respectfully not trying to outright deny the Upokorehe mana, but he's trying to politely say: "Look, I'm not agreeing with you," foreshadowing where he gets to in the judgments about what the position is with Upokorehe re: Ōhiwa.

So we can jump forward a little while in the judgment now to some of the more tikanga and fact-based analysis, in paragraph 313, and this is where we introduce the pūkenga's poutarāwhare. It comprises, relevantly for present purposes, Te Whakatōhea and Upokorehe. One of the issues in conflict was about whether Upokorehe was an iwi or a hapū of Whakatōhea: "The pūkenga did not purport to determine that question," and in my judgment "I see no need to make a ruling" on the same question.

If we turn down now to paragraph 323, and his Honour's discussing the Pūkenga Report. You can see there the pūkenga – you can find this in the Pūkenga Report too, but for my purposes I think it's important to see what Justice Churchman is saying about it – the pūkenga have set out the areas of customary interests they consider Upokorehe have and all of these areas are within the Upokorehe rohe, and importantly for present purposes they're

recognising that rohe. And then there's the statement at paragraph 324: "The pūkenga did not accept the claim that Upokorehe's interests were exclusive to them but considered that they were interests shared with the other" – again "other" is a bit awkward, but – "five Whakatōhea hapū."

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Now pausing, you've had some discussion with my friend Mr Bennion about the poutarāwhare and the idea that you have the six pou each individually representing mana whakahaere at place, but together mahi tahi and through shared whakapapa supporting the overarching grant of CMT and that's why Justice Churchman is saying the pūkenga is not accepting exclusivity. There's no one pou standing alone. Aside from the other five, the whare wouldn't stand if that were true to, sorry to use the metaphor. Rather they're doing it in a particularly sensitive way through metaphor, a polite way of saying we understand that that's your kaupapa Upokorehe, we understand that you don't think anybody else is there, but we've listened to the tikanga, we've listened to the evidence at place and we don't think that's a fair statement about what actually the nature of the interests are. I mean Justice Churchman goes on at 325: "Of course I'm not bound by the findings of the pūkenga but where the recommendations of the pūkenga directly relate to questions of tikanga they're likely to be highly influential."

And just for completeness, it's helpful I think to note that quite apart from the Pūkenga Report, and it's easy to lose sight of it and I think perhaps the Court of Appeal did, Justice Churchman is very clear that he understands the argument that my friend Ms Cooper put to you last week about the idea that Upokorehe had very distinct whakapapa. So, I'm hoping the rest of you go to paragraph 63, you'll jump right down to the bottom of the judgment in his appendix B, if Adobe is going to be helpful.

So this is the part of the whakapapa appendix which is a significant, not really a judgment, at least recitation in its own right, where he sets out his understanding of Upokorehe, his whakapapa, and you'll see there in paragraph 63 referencing Mr Wallace Aramoana emphasised in closing

submissions for Te Upokorehe, same as in this Court, focused on Te Upokorehe's connection to waka other than Mataatua, and then Mr Aramoana goes on to set out the different relationships that my friend Ms Cooper took you to, and Justice Churchman is well aware of this and he's not outright trying to say, I don't want to disrespect your mana by outright saying your claims are wrong, but he's clearly saying, I don't agree and neither does the pūkenga, and that's the metaphor and the way the poutarāwhare is being used to essentially say, we're not going to rule or determine the question of hapū or iwi, we're not going to rule or determine on the question of disrespecting your kaupapa directly, but we are going to say that's not right, it's not what we consider to be correct on the state of the evidence.

And I think there's some analogies with what your Honour Justice Williams was putting to my friend Mr Fowler yesterday around the idea of in Te Ao Māori you might part company without directly wanting to say we're leaving and having a more direct confrontational attack on someone else's mana in that way and that's what the Judge and the pūkenga are trying to do, and I'm not sure for myself if it's a particularly valid criticism to criticise them for approaching this question in that way. They've clearly made findings about it. They're clearly alive to the issues and arguments. They just respectfully and carefully don't agree with them.

That was all I wanted to cover plus a little bit extra from the road map. Unless there's anything further, that's where I'll rest.

GLAZEBROOK J:

Thank you very much. Mr Sharp, we may as well get started.

MR SHARP:

I'll just get set up. Tēnā koutou, e ngā Kaiwhakawā. Tēnā koutou Ngāti Muriwai, hoki anō Kutarere Marae, hoki anō ngā hapū me ngā whānau kua hui nei katoa. Tēnā koutou Whakatōhea iwi me ngā iwi kua hui nei katoa.

Your Honours, I'm presenting the appeal for Ngāti Muriwai and Kutarere Marae. I've filed an oral outline this morning. Unfortunately I don't do paper. I don't print things so I've just sent it electronically.

GLAZEBROOK J:

No, we have a copy.

WILLIAMS J:

Unfortunately I don't do electrics.

MR SHARP:

It's that middle ground of technology you get caught out in.

WILLIAMS J:

I was born at the wrong time, Mr Sharp.

GLAZEBROOK J:

We've got it in both but it's good luck finding it either in paper or in electronic though in the piles that we now have but yes we do have it.

MR SHARP:

Yes. I don't know how you keep track of what's coming to you. Just to, just for an introduction, so I've filed some submissions on appeal for Ngāti Muriwai and Kutarere Marae, one set of submissions because they deal with very similar issues, and I've filed a Ngāti Muriwai reply to a Ngāti Rua response on appeal and then I've also filed Ngāti Muriwai and Kutarere replies to the Attorney-General. So I hope I'll just summarise these in the outline I've got here.

Now one other matter is that this morning I filed, an affidavit had been filed in the Waitangi Tribunal by an expert on Canadian law, Roger Townsend. I was a bit reticent to file that. Originally I distributed it to the parties because it's a matter for legal opinion that's not a matter directly admissible to this Court but I've simply filed it because Mr Townsend points out some quite useful

differences between Canadian law and the common law and the approach particularly in MACA, particularly around concepts that, you know, under Canadian law once pre-sovereignty title is established and it's not common law, customary title so pre-sovereignty is established, then what happens after that is not really relevant until it's constitutionally extinguished, so all these other matters that we deal with, such as continuing use of exclusive occupation and substantial interruption are not really relevant to them. So just really to make that point when going on to discuss the relevant approach that's been taken with this legislation.

GLAZEBROOK J:

And I think you said you had distributed to your friends?

MR SHARP:

Yes, yes, before the hearing, yes. It's a matter of public record. It was on the – during the –

GLAZEBROOK J:

No, no, I understand and so thank you for the explanation.

MR SHARP:

Now just dealing with the first ground of appeal and that is that the CMT test that was applied to both Ngāti Muriwai and Kutarere Marae by his Honour Justice Miller was hold in accordance with tikanga since 1840 is in substance an incorrect test especially in the first limb of the test. So just on my broad approach to this, my submissions do seem to be a bit of an outlier in that in our view the Court of Appeal got the first limb wrong and the second limb right and everyone else is the other way round but we'll see how we go.

So with the – just at paragraph 3, the Court has received various parliamentary material about trying to ascertain this very difficult question of what parliamentary intent was, or what's the intent of the legislation, and so without wanting to confuse things more, I just want to put in a couple more documents and the first is – so if I can get this to work properly, is that up on the screen?

GLAZEBROOK J:

Yes, we have it now. You might need to –

WILLIAMS J:

You might need a bigger screen.

MR SHARP:

Yes, quite. So look this is on the regulatory impact statement post consultation for the Marine and Coastal Area Act and I just thought it was a good sort of outline of what the Government was thinking going into the legislation being introduced.

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So you can – in the previous page at paragraph 71 they look at options. They've got the Māori Land Court approach, they've got the Canadian approach, and they say on balance it's best to have the Māori Land Court than the Canadian approach. So what's interesting is when they go to discuss what the approaches are, say option 1 Canadian jurisprudence, test for CMT land occupied according to sovereignty and further that had an intention to capacity control, maintenance of connection and further down they talk about fishing and navigation not necessarily preclude exclusivity. So, as I discussed, that's not really, those further parts post sovereignty aren't really Canadian tests, they're common law tests, so they just seem to have them mixed up, sort of a combination of a Canadian common law approach that they're looking at, and you can also see that what they say is with the Māori Land Court approach they're not quite sure what it is so they'll add that for us at the beginning and then add some substance at the end with what they say the Canadian approach is.

KÓS J:

I mean the key point of difference in that table is in the pink section under the test for customary title, the last bullet point shows substantial maintenance or connection between the people on the land.

MR SHARP:

Yes.

KÓS J:

That's the core distinction between the pink and the blue I think looking at it.

MR SHARP:

Yes, the blue they repeat it but they – the Canadian test, but in different terms –

KÓS J:

They do.

MR SHARP:

– and, of course, a substantial maintenance connection is an Australian approach so, yes. Then if I can just move next on to parliamentary debates and this is one thing that, I've seen lots of parliamentary debates, but I'm not sure if we've referred to this one. This is in a question to the House to the Minister and in the first paragraph there, they discuss the approach and under that it starts with there being points of difference. It talks about the customary title being restored and how we propose that and he says: "The Bill provided guidance for the Courts based on the remarks of the Court of Appeal in the *Ngāti Apa* case, the experience of Commonwealth jurisdictions such as Canada and a shared understanding." So when it gets to Parliament, it seems to have moved on from just a Canadian approach to a mixed approach is what seems to be in the Minister's mind at that stage.

The next thing I do is just the –

KÓS J:

There's not that much reference in the parliamentary debates to the Australian approach I think. I mean it's a mixture of common law Canadian.

MR SHARP:

Yes, they just say general common law Canadian, yes, and as I said, that's an important distinction to make, because Canadian is not common law, yes. It's original –

WILLIAMS J:

Canadian is not common law, why do you say that?

MR SHARP:

Well it's not, it's not common law of customary title because it starts with pre sovereignty rights, whereas the common law approach would be like in *Yarmirr* where you look at what the rights are upon receiving the common law so at the stage where common law is imposed what are their rights. So that's a –

GLAZEBROOK J:

But that will still be based on pre-sovereignty, won't it?

MR SHARP:

Well –

GLAZEBROOK J:

Based on the – whatever is received into the common law is based on the custom of the peoples who are going to be subject to the common law.

MR SHARP:

Absolutely, but with the Canadian process that's not an issue at all what the common law is because it's pre-sovereignty but with *Yarmirr* the Court had to grapple with well the common law has public rights of navigation and fishing, how does that recognise with receiving the customary rights and things. So that's the customary, common law customary law approach as opposed to a pre-sovereignty approach.

WILLIAMS J:

I don't really understand that distinction I'm afraid. You'll have to help me out.

GLAZEBROOK J:

Well you're saying, aren't you, that – perhaps if I can rephrase. Is the submission therefore that under the common law when you bring in whatever the previous customary law is, it has to be accommodated within the common law system and the common law system may have some rights that, in fact probably in terms of navigation, as we discussed yesterday are relatively co existent with the rights that would have been under customary law anyway but there will nevertheless have to be an accommodation with other parts of the law once you bring it into the common law. Is that the –

MR SHARP:

That's right so in *Yarmirr* that's the whole discussion and the majority said that the rights are so impaired by these common law navigation rights and things that you don't get title.

ELLEN FRANCE J:

Well you don't get an exclusive right. I mean there that's title.

MR SHARP:

Yes, because *Yarmirr* is a bit different in the Australian legislation where you have different sorts of title.

ELLEN FRANCE J:

Yes, yes but they were seeking –

MR SHARP:

You have exclusive title and non-exclusive title –

ELLEN FRANCE J:

They were seeking exclusive rights.

MR SHARP:

So it's a bit different, yes. But you see with the Canadian approach they look at what's a customary control pre-sovereignty. It's not – common law is not an issue because it's before the common law so – and that's what Mr Townshend makes that point here.

WILLIAMS J:

But I'm not sure I understand what the substantive difference is because in Canada you still have to meet the common law test for common recognition. Whatever you had pre-sovereignty does not mean you get common law aboriginal title in Canada. It depends on meeting the tests in *Delgamuukw* and *Tsilhqot'in*.

MR SHARP:

That's right and Mr Townshend makes that point too. That is not a common law test, it's an aboriginal – it's a test of aboriginal title formulated in Canada based on common law property concepts.

WILLIAMS J:

It sounds to me like the same thing.

MR SHARP:

Well except it has no issue – it doesn't deal with the common law receiving those rights at all.

WILLIAMS J:

Well the common law still has to accept that they exist because there's no statute that says they do.

MR SHARP:

Well I think in Canada it's a constitutional right for –

WILLIAMS J:

But only existing rights.

MR SHARP:

Yes.

WILLIAMS J:

It doesn't revive rights if they didn't exist –

MR SHARP:

No.

WILLIAMS J:

– in 1982.

MR SHARP:

Mmm.

WILLIAMS J:

So I don't understand what the substantive – you're coming to the same result either way.

MR SHARP:

Yes. Well may – I don't think it really impacts much on this hearing.

WILLIAMS J:

Yes, okay, good.

MR SHARP:

But you know the view that I've taken, and I think Mr Townshend explains it as it is different so it's a particularly Canadian test, but anyway –

WILLIAMS J:

Right, I better read Mr Townshend.

MR SHARP:

It's not going to, it's not going to help, it's not going to impact us a lot.

WILLIAMS J:

Yes, okay.

MR SHARP:

What I've got on here is just the foreshore and seabed at 632 so I'm not sure how this happens but then we have this discussion in Parliament about Canadian common law tests –

GLAZEBROOK J:

Perhaps just get it up a bit bigger.

MR SHARP:

A bit bigger.

WILLIAMS J:

Push magnify.

MR SHARP:

Is that better?

GLAZEBROOK J:

It's a strain otherwise for everybody.

MR SHARP:

So simply the point is, in this is that somehow then we get wording in the Act which is like very similar to the FASA, Foreshore and Seabed Act, with exclusive occupation continuing, substantial interruption. Now this is despite the fact that we're supposed to be starting from a clean slate and looking at all these other tests and the wording is very similar and Justice Miller, his Honour Justice Miller in the Court of Appeal makes that point I guess. So I'm not saying that – it probably just adds to the confusion but I'm just saying that it adds to the confusion.

FRENCH J:

So what did the Court of Appeal get wrong on the first limb?

MR SHARP:

I'll come to that now. So with the first limb the – I think everyone's agreed that you apply the Māori Land Court approach to the status of Māori customary land and prior to the Court of Appeal the best authority to that was the decision in *Re Reeder* where they made the point that in applying that holding Court of tikanga test the Court looks at is there a connection to the – a cultural connection by Māori to the land without applying any ownership test that comes later on.

So if I could bring *Re Reeder* up and that's in paragraph 27 –
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GLAZEBROOK J:

And is – sorry, just so we know where we're going, you say the Court of Appeal didn't apply that?

MR SHARP:

Yes, so what the Court of Appeal did, they discussed that yes you apply the – you apply the Māori Land Court test of status of Māori land but we need to add a proprietary test to it and I think that –

KÓS J:

I don't think that's what they do at paragraphs 400 to 401 which are the ones you footnoted. They emphasised the word "holds" and that must be right surely because the statutory wording is holds in accordance with tikanga.

MR SHARP:

Yes, they do, they do.

KÓS J:

So they say it has to be elevated from a mere use right to something that gives you a holding. If it's a mere use right, we get into the PCR and if it's a holding in accordance with tikanga, we're dealing with a CMT, a title.

MR SHARP:

Yes, that's right and so that – and that's, they took that approach but in my submission it wasn't the approach because what was intended, and if we just look back at the parliamentary materials, it was the Māori Land Court test and the way that the Māori Land Court interprets that test is not to have a proprietary part of it. It's just to see whether there's a customary relationship with the land and which – well he's –

WILLIAMS J:

Where's the reference to proprietary?

MR SHARP:

In which, in the Court of Appeal or Justice –

WILLIAMS J:

Yes, in the Court of Appeal.

GLAZEBROOK J:

Do you want to bring that up? Perhaps we can continue this after the adjournment.

MR SHARP:

Yes.

GLAZEBROOK J:

And you could bring up 400 so we can look and see what the issue is.

MR SHARP:

Yes, I will.

GLAZEBROOK J:

So we'll take the adjournment.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.52 AM

GLAZEBROOK J:

Thank you.

MR SHARP:

Thank you. When we left we were just looking at the Court of Appeal judgment, the majority relating to the section 58(1)(a) test and I've just put that up on the ClickShare. So the first relevant paragraph 397 they say they apply, he applies the definition of customary land in the Te Ture Whenua Māori Act and then it just observes that important word is "held". There's no connotation of ownership, rather retained or kept in accordance with tikanga Māori. So that's the decision of John da Silva which his Honour Justice Powell referred to in *Reeder*.

And then if we go on following that, it just refers to the Judge's below approach is supported by the respondents but then it says the Attorney-General Landowners Coalition broadly supported it but submitted that the Judge gave insufficient weight to the term "held". The focus should be on tikanga but also holds that the relationship of the land must be territorial and territorial end of customary rights shows some form of sort of control or authority of the applicant group over the area. It elevates the group's connection with the area from the use and/or holding and they say adopted, adopt that approach. So they basically expand upon the Māori Land Court approach.

GLAZEBROOK J:

Of what approach sorry? When you say they adopt that approach, do you mean the approach of the Attorney-General and landowners?

MR SHARP:

Yes, by adding that to the Māori Land Court approach. They were adding a proprietorial holding to distinguish it from a use right.

ELLEN FRANCE J:

Could we just go back to that 397.

MR SHARP:

Do you want me to go back to…

GLAZEBROOK J:

The Court of Appeal judgment, yes.

MR SHARP:

Yes, sorry, I took it off too quickly. So you can see it's different from –

ELLEN FRANCE J:

Isn't what the Court finds in – set out in paragraphs 401 and 402?

KÓS J:

Yes.

MR SHARP:

Yes, that's the continuation of the discussion to – to use proprietary control –

WILLIAMS J:

Where's "proprietary"?

GLAZEBROOK J:

Well aren't they really just saying are they use rights – are they only use rights, or are they mana, authority over the area?

KÓS J:

That's right.

GLAZEBROOK J:

Which would be the test in tikanga anyway, wouldn't it, and the Māori Land Court test?

MR SHARP:

Well no, it's not in the Māori Land Courts. The Māori Land Court is under that section 129 test for Māori customary land. It's just customary relationship, and then the Court will move on to I think section 132 to discuss whether a title should be awarded in accordance – well, in accordance with tikanga. So –

WILLIAMS J:

Well whether a –

MR SHARP:

A freehold title. A freehold title.

WILLIAMS J:

Whether a freehold title should be ordered.

MR SHARP:

Yes, that's exactly right. Yes.

WILLIAMS J:

So they apply the connection measure and if it's high enough on the yardstick, it may justify a freehold title.

MR SHARP:

Yes, if you go on to that next stage. So –

WILLIAMS J:

Why is that problematic in this context?

MR SHARP:

Well it's not problematic, it's just a practical matter. So if you – can I just go to his Honour Justice Powell's decision?

GLAZEBROOK J:

Can we have a look at paragraph 402? Is that what you're concerned about?

MR SHARP:

No, it's – the concern is really just adding to the Māori Land Court test, this control test.

GLAZEBROOK J:

So you say it's adding to the Māori Land Court test because all you need to do under (a) is just show a connection, whatever that might be?

MR SHARP:

Yes, yes. And then you go on. If –

GLAZEBROOK J:

And the second limb is to say how high, is that –

MR SHARP:

Yes, is it enough for title or is it –

GLAZEBROOK J:

But that should be under the second limb, is that what the submission is?

MR SHARP:

That's right.

GLAZEBROOK J:

Okay.

MR SHARP:

Same as in the Māori Land Court. So –

WILLIAMS J:

What second limb?

MR SHARP:

(1)(b).

GLAZEBROOK J:

(1)(b).

MR SHARP:

Section 58(1)(b).

WILLIAMS J:

The Māori Land Court doesn't have that in its test.

MR SHARP:

No, no, sorry. Same in the Māori Land Court where they would go on from – if it's Māori customary land they'll go on to section 132 to look whether there's enough for title.

WILLIAMS J:

Doesn't that just tell you that Ture Whenua Māori doesn't distinguish between PCRs and CMTs, to use the phrase inaccurately, phrases inaccurately, and so there's no need to distinguish? That's done if you want to do it at the transformation stage, but in this, in MACA, the whole thing is structured on the distinction between PCRs and CMTs, so you've got to read "held" more powerfully than you would read it in the Ture Whenua Māori Act or it won't make sense?

MR SHARP:

Well with – in the Te Ture Whenua Māori Act, for example the *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board (*1998) 25 Tai Tokerau MB 212 (25 TTK 212) case, where having decided that it's Māori customary land then went on to assess the rights, and one group had title and the other group had use rights.

WILLIAMS J:

Yes.

MR SHARP:

So they do distinguish when they go to that next step in the Māori Land Court.

WILLIAMS J:

I know, so one group gets a PCR and the other group gets a CMT?

MR SHARP:

Yes.

GLAZEBROOK J:

No, but I think your point is, yes, that's right?

MR SHARP:

Yes.

GLAZEBROOK J:

But it's – (a) just looks at whether there's a connection, whatever sort of connection, and then the second limb, (b), says is this strong enough to get a CMT? If not, it's a PCR or maybe nothing?

MR SHARP:

That's right, that's right. And that –

GLAZEBROOK J:

Well it won't be nothing probably, because you've already had –

WILLIAMS J:

But the "held in accordance with tikanga" is not a requirement of a PCR?

MR SHARP:

Well it's not a requirement of a PCR, but "held in accordance with tikanga" in the Māori Land Court is – they adopt the test of customary relationship rather than any proprietary holding. So when you go beyond that, then section 132, there might be a use right.

And see, if you look at – I wonder if I could just go on to his Honour Justice Powell's decision quickly. See, he refers to *John da Silva* at paragraph 27 and in the end "held" reflects the "continuity of the customary relationship with the land rather than…ownership", and that's what the Court of Appeal referred to. And then he just goes on to paragraph 28, the test for CMT is different, it cannot be right to imply "proprietary-like" concepts to the holding – to the tikanga in the first part of the test. That's in the second part of the test, so that –

WILLIAMS J:

Well that's probably right, but that's a completely different point.

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MR SHARP:

Well the point is how you interpret under section 58(1)(a), the "holding in accordance with tikanga" test, how you apply it. Do you just apply it like in the Māori Land Court with a customary relationship and then move on to (1)(b) to discuss whether there's any – what is the nature of the interest, or they can set aside title.

WILLIAMS J:

Yes, except that you've slipped in the word "proprietary" there. It's not in any of the discussion and (a) doesn't require that.

MR SHARP:

It doesn't, but they do – but the concepts, and the Court of Appeal discussed that the Landowners and the Crown, I think the other – said there should be some sort of control test to distinguish it between a title –

WILLIAMS J:

But that's not proprietary, necessarily. Proprietary is an English law term. Property is an English law idea, a deeply English cultural idea.

MR SHARP:

Yes, yes.

WILLIAMS J:

It has nothing to do with tikanga.

MR SHARP:

Exactly, that's my point. So when you move on to the next test, then –

WILLIAMS J:

But control does.

MR SHARP:

Yes.

WILLIAMS J:

Control is very important in tikanga, as we've heard time and time again over the last week and a half.

MR SHARP:

Yes, yes.

WILLIAMS J:

And that is in there.

WILLIAMS J:

Yes. But that's – the point is that the Māori Land Court doesn't apply that approach in defining what is Māori customary land. And so it's just – I don't think – in the end it may not make that much difference to the outcome, but it seems to be the mechanics that Parliament is looking at, because the test as it is now, and if you can see in – I think there's one decision, the *Tūmapūhia-a-Rangi Hapū* trust decision and in other cases since you have this situation where to satisfy the test you have this list of tikanga which relates to control and so you're ticking that off at paragraph – at section 58(1)(a) back from present down, and then you go to the next section 58(1)(b) test, the control

test, and you just turn that around and do the same thing again. So it just doesn't – just from a, in my view, you should hesitate before giving interpretation which just, as Justice Miller says, collapses the two tests.

GLAZEBROOK J:

Well your submission is that they are separate tests and the first one doesn't look at control, it's only once you get to – first one looks at connection, it's only when you get to the second one that you look at control and authority?

MR SHARP:

That's right.

GLAZEBROOK J:

So I think we've understood that.

MR SHARP:

That's right, that's right. Yes, and –

GLAZEBROOK J:

And I presume you also – well no, I presume, do you – what do you say about that second part of the test, is it in accordance with tikanga when you're looking at control or is it – are there notions of common law in that second part as – well of course the Landowners would say it's only English concepts in the second part, nobody else does?

MR SHARP:

Well as I'll come to in a minute, I don't think there's much distinction between what they're saying and what it actually is, and the –

FRENCH J:

Who is "they"?

MR SHARP:

The Landowners' counsel and whatever else they're saying. I think everyone in the end, everyone is playing property law-like concepts for rights that are in tikanga.

So if I just go to the – paragraph 5, the first leg of section 58(1)(b), exclusive use and occupation at 1840, then agree that the Canadian test was – customary control in essence was used, and one point just to make, in the Canadian courts, the use of, use and occupation term was explained as sui generis in that they were property law concepts but meant to translate tikanga, to distinguish between what is title and what is not. So – and so the one thing that comes from that, and Justice Miller I think discusses it at 183, is that they're not meant, those terms, they're a translation device but you're not meant to apply them strictly or literally and call them the property law concepts. They're just a way of – a translation device. So you can give them different meanings and they are in general property law which we'd say deaden in the Canadian way of looking at control and title.

With the post test in occupation without substantial interruption, so the thing that the Court of Appeal had to grapple with is it's not really a concept on its own known in common law or Canadian law. It's a new thing which they seem to have just grabbed from the Foreshore and Seabed Act, but…

GLAZEBROOK J:

So you're saying that under – which I think is right – under common law third party use rights don't extinguish title?

MR SHARP:

Well, it can impair title.

GLAZEBROOK J:

It can impair title?

MR SHARP:

Yes, of course, yes, but this concept of – and this was what people, everyone has difficulty with this, exclusive use and occupation and control up to the present, so that's not so much a test in common law although it's implicit in it, but in the end – so the Court of Appeal got this, both the majority and Justice Miller got this perfectly right, and they applied it, the approach that third party use rights that don't especially extinguish do not in themselves prevent title. It's just a simple concept, and to come back to the property law concept that's a concept in common law – or anyway, right. So if I had a house and there's a public access through my property, doesn't extinguish my title, I've still got a title.

WILLIAMS J:

Unless it's a motorway.

MR SHARP:

Unless it's a motorway, yes. Then we get to the issue of impairment which your Honour, Justice Williams, has been talking about. So, firstly, were they right that – section 51(1)(b) – I know his Honour, Justice Miller, said no party suggested that approach. Well, our clients, they put forward basically that approach, common law with qualified exclusivity in the Court of Appeal, so it wasn't without support, but I think –

WILLIAMS J:

Which…

FRENCH J:

Where does he say that?

WILLIAMS J:

Where does he say that? I'm just trying to follow where you're taking us.

MR SHARP:

So I think he criticised the majority approach. He says no party suggested this approach.

FRENCH J:

Yes, I remember reading that. Can you give us a specific paragraph?

MR SHARP:

What if I come back to you on that? Or if I can find it quickly. I should have it here. So that's at paragraph 188. Move on from that?

GLAZEBROOK J:

Yes, please.

MR SHARP:

When we discussed it and the Court of Appeal have adopted it, it's – I think the discussions here in this Court have made it more nuanced because in looking at the concepts of impairment and extinguishment we can arrive at a threshold for when third party use does extinguish it because there's just too much. Like, if I had my house and there's a motorway through it, you know, there's too much, I can't exercise control of my property right now so.

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WILLIAMS J:

Exactly.

MR SHARP:

You know, so –

WILLIAMS J:

And I think if those scenarios had been put to the Court of Appeal they, both sides would have agreed on the appropriate response to that fact situation, which makes me think that the difference between the majority and the minority is more imagined than real.

MR SHARP:

Exactly, I agree. They arise at different ways. Like Justice Miller arrived at it through the Foreshore and Seabed Act and how they were trying to deal with the *Yarmirr* approach, by getting around it, whereas the majority just referred to Ngāti Apa and matters of the extinguishment expressly or by necessary implication, where they both carry concepts of impairment because with *Yarmirr* they referred to *Wik* for example. If you have lease on your land but you still, you're still using it, right, so you're still able to exercise control over use because even though it's an underlying title, and for example in (inaudible 12:11:15) the sea in *Yarmirr*, they said, well, there's public rights of navigation through common law fishing, but they can still fish, control their fish and navigate. Doesn't –

WILLIAMS J:

They do still.

MR SHARP:

Yes, do still, so it doesn't fatally impair their rights to the point of extinguishment. So that's, I think that's a useful ending, I think, of rounding off the test so I can rationalise it, and it's also quite a very useful way of looking at substantial interruption to which is actual impairment. So even if we, you know, the customary rights of Māori aren't legally by law extinguished or impaired, if they just can't move people off, you know, and despite their protest, despite their customary rights for fishing, and so this is the point where they can't control the aera for their own customary purposes at all and probably just walk away, I think as Justice Williams was saying, then that's a good way of looking at what substantial interruption is.

GLAZEBROOK J:

So impairment to the extent that there cannot be control.

MR SHARP:

Yes and –

WILLIAMS J:

Well isn't it rather just, this is a cruel judgment really, but giving up on the attempts to control. That's where the reconciliation line is.

MR SHARP:

It is.

WILLIAMS J:

It's actually a tough test on the applicants because even when they have no legal levers, they have to keep trying.

MR SHARP:

That's right, yes, and perhaps there's a different approach to legal extinguishment and substantial interruption. Like if people aren't, no legal right, they just crowd on it, they just ignore their customary rights and things, but they keep trying, then they keep – they're still trying to assert their mana over the area where there's no legal – legally they should be able to, right. So that should be seen, considered as continuing control, but if it's extinguished, like for example with Rangataua and the sewage ponds, they put a title there and it's gone anyway so it's, they could, you know, they – there they protested there before it had gone, you know, and that's part of their mana, but after it's gone, it's gone.

But one point I do make on substantial interruption is that there seems to be too much emphasis in the past decisions on, well, can they use the land because of the impairment rather than control, and so the, a good example is the Pan Pac decision that we've talked all about. In that decision, despite the fact there was no fish in the pipeline there, the local hapū were still trying to restore that area, they were trying to actively exercise kaitiakitanga and what Justice Churchman, his Honour Justice Churchman said, well, okay, they're still trying to exercise kaitiakitanga, that set aside section 58(1)(a), but not (1)(b) because they can't use it. So in my, in my – that mixes, confuses "use" with "control for use", which may mean you can't use it at the moment but you're trying to, you're still trying to use it so you can use it in the future.

WILLIAMS J:

Does that not just suggest you be very careful about leaping to that conclusion, even in a compromised environment?

MR SHARP:

That has been abandoned, or?

WILLIAMS J:

Yes.

MR SHARP:

Yes.

WILLIAMS J:

That there's been interruption, just be careful about that. At some point the tsunami of contrary activity will become too much.

MR SHARP:

Yes.

WILLIAMS J:

It has to, but if there's a question of fact, but don't leap to that conclusion in light of, in that case, 38 generations of ongoing connection and commitment?

MR SHARP:

Yes, yes.

WILLIAMS J:

That seems in a sense, common sense.

MR SHARP:

It does. And say for example with *Pāhauwera*, where – this is the shipping lanes were interrupted because there's ships going down it, you know, that surely can't be much of a tsunami that people can't use the area or exercise some control because there's some ships going down it sometimes, and in that

respect I might support my friend Ms Roff is saying that there is, there's a capacity with practical impairment, substantial interruption if it's revived, for example the fish come back later on to Pan Pac, that you can apply to amend the order, and we've made that argument in the Whangārei hearings at the moment, because there's a lot of impairments in those like jetties which were there which are going and, you know, transitional sort of impairments.

Shall I move on to the next subject? Thank you. So the – so overall, as I said at the start, it's – in the round of it, the practical impact of the holding in accordance with tikanga since 1840 by Justice Miller, really the only difference is that the control test we say is necessarily applied in (1)(a) but it's repeated in (1)(b), so maybe there's no difference, but…

So the second ground of appeal relates to Kutarere Marae. So if I can just turn to the Court of Appeal for that one. Sorry, I've got mark-ups on my Court of Appeal decision. I just have to find the right – I'll find it in a bit, but the – in simple terms, the ruling of Kutarere Marae was not eligible for CMT because on its own evidence it was not a whānau group. That's all the decision says.

KÓS J:
Paragraph 280.

FRENCH J:
Yes.

MR SHARP:
Paragraph 280?

KÓS J:
Paragraph 280.

MR SHARP:

Oh, thank you, your Honour. I thought I'd have it in my notes but I don't, because they deal with Ngāti Muriwai as well. Yes, and that's at paragraph 279(a): "On its own evidence Kutarere Marae came into existence in the 1930s and is not a whānau, hapū, or iwi." And so the simple point, it's quite a simple point on appeal that they didn't say that, and this is in the context Kutarere Marae is only an interested party. It's in a negotiation pathway. So although there's this ruling here, they say that prejudice is in further negotiations with their pathway, and –

WILLIAMS J:

In the MACA-negotiated pathway, or?

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MR SHARP:

Yes, MACA, yes. Yes, and there's – and just on that, there's sort of ongoing consultations of how the negotiation pathway coincides with the court system and then trying to make allowance saying you can still come in even after title is issued. If I can, the submission is that the evidence is, was a group of whānau, is a group of whānau who involved the marae. So if I can go to – I should have Mr Kiwara's evidence up on the screen. So just to place this, so Kutarere Marae is on the Ōhiwa Harbour. I think it's the largest marae in the Whakatōhea area. It's a modern marae which was founded in the 1940s, and this is paragraph 8, 9, 10, Mr Kiwara is just telling the story of his father, Hura Ihaia, how he founded the marae. He was of Turanga Tūhoe descent who traditionally came down to Ōhiwa in the summers. Ended up settling there at some stage and at Roimata Marae, and he says after an argument he bought a bit of land where the marae is and built a marae. Then if we go to 27, 42, talking about whānau. So he says there's 18 whānau, so the founding whānau of the marae, they each appoint a trustee. So that's the continuing community at Kutarere. So that's a simple answer. That's, they are a whānau group who are associated with that marae, and if I go down to –

FRENCH J:

What was the High Court Judge's reason for saying they weren't?

MR SHARP:

He just said on their own evidence they said they weren't.

FRENCH J:

Right.

MR SHARP:

And then Justice Miller, his Honour Justice Miller just said the same thing.

FRENCH J:

He said the finding was open to him.

MR SHARP:

Yes. I thought I did make submissions in the Court of Appeal that, giving this evidence, but this is the evidence.

FRENCH J:

And it wasn't disputed by anybody?

MR SHARP:

No.

FRENCH J:

Okay.

MR SHARP:

The only issue with Kutarere Marae is, you've heard this with Upokorehe Marae, and it's a, I think Ranginui Walker in his book says it's an evolving situation with Kutarere Marae in that Upokorehe considers Kutarere to be a hapū of Upokorehe. People at Kutarere actually, I think Mr Kiwara says they aspire to be a hapū of Whakatōhea, and so it's a, yes, it's still, I guess the

question is still out as to how it's a status, but it's definitely a whānau group. Whether it's a hapū or not is another matter which we don't need to deal with.

KÓS J:

That at least qualifies it as an applicant group.

MR SHARP:

Yes, that's the point, yes.

KÓS J:

I mean it may, the question then becomes whether it exercises authority in terms of section 58, but that's a different question.

MR SHARP:

Different question, yes, and they're not in these proceedings, they're only interested parties so, yes. So – just lastly the 24, 26, yes, 24, 26 they've got photos of the marae, you can see it's a substantial marae, and the new marae it's got pous, different ancestors around the area including Muriwai on the wharenui. So, yes, and discuss where their whānau live et cetera. So that's all I've got to say of that.

FRENCH J:

So what are you actually seeking from this Court in relation to say that the appeal should have been allowed?

MR SHARP:

Yes. To reverse the finding from the Court of Appeal and the High Court that they're not eligible for a CMT because they're not a whānau group. So eligible and whether they qualify for CMT are different matters, as his Honour Justice Kós just said, but that – with that they can go ahead and continue to negotiate. They never asked for any rulings to be made in the High Court, but it was just made.

FRENCH J:

So, sorry, what impact would that have on any of these titles that have been recognised by the High Court and the Court of Appeal?

MR SHARP:

If they manage to negotiate with the –

FRENCH J:

If they came within – if they satisfied the limbs for a CMT, where would they be – what would be their specified area?

MR SHARP:

Well they say that this is – and Ōhiwa is a shared area of Whakatōhea.

FRENCH J:

Right.

MR SHARP:

So they're just a group within Whakatōhea. So basically just an iwi, iwi title. So let's just move on to the next point –

GLAZEBROOK J:

Can you just hold on a moment? Yes, is this an appropriate time to ask about the maps? Did you want to see if Mr Sharp can assist us?

WILLIAMS J:

Oh, sure. You've got a third ground anyway. I'll ask him at the end.

GLAZEBROOK J:

No, I realise that. Whether it's better for him to do it – just ask if he can assist us now.

WILLIAMS J:

I had a question of detail. It may or may not be for you but it will be for someone in the room, and that is the CMT 2 area. The description of that area is the

western side of Ōhiwa. The maps, all of them that I have looked at, seem to depict the entire extent of Ōhiwa and I'm trying to figure out why that is. Can anyone help me out?

MR SHARP:

Yes, I don't know. I don't know, Sir.

WILLIAMS J:

No, okay.

MR SHARP:

So the – definitely Upokorehe and Te Kāhui would – they would be all over that.

GLAZEBROOK J:

Well perhaps whoever can help us with it, if they can dig out some maps, discuss it among yourselves, dig out some maps, and after lunch at a suitable point when we have a suitable break somebody can come and deal with that question, which is why I thought it was useful to ask people now so that – so you have your third ground, then.

MR SHARP:

Yes.

GLAZEBROOK J:

We actually thought you might be able to help. We thought you might've –

MR SHARP:

Well yes, we didn't – awarded a title.

GLAZEBROOK J:

We thought you might be good on maps, Mr Sharp, that was the –

MR SHARP:

Thank you.

GLAZEBROOK J:

That was the comment. Which you probably are, but not on this particular situation.

MR SHARP:

No. I'm not –

GLAZEBROOK J:

So the third ground.

MR SHARP:

I'm not the greatest with maps. Third ground is Ngāti Muriwai. So it just seems a little bit complex because – well unless I have some interpretation difficulties with the ruling, but the ruling in the end is Ngāti Muriwai, the appeal was dismissed but they can participate in the re-hearing, but we're just not – there is some different views on the basis they can participate, do they participate as a party, or in a recent High Court direction it just said well no, you're just an interested party, you're not a direct party to it. So I'll come to that, but that's really the controversy that I'm trying to sort out. So –

GLAZEBROOK J:

Yes, we were slightly puzzled about that.

ELLEN FRANCE J:

So, sorry, I was going to say is that something we can deal with if it's already before the – if it's being dealt with by the Court in the other hearing?

MR SHARP:

Well they've only made preliminary directions. And yes, I did grapple with this a bit because there are some clarification issues with the judgment on this that would be, would've been handy, but as I understand it, you can't re-call a judgment for clarification unless it's an obvious error, so it seemed to me appropriate to bring it to this Court to decide whether that what –

WILLIAMS J:

Well if they don't know, we won't.

MR SHARP:

Well someone's got to give an answer.

FRENCH J:

What are the relevant –

WILLIAMS J:

Yes.

FRENCH J:

What are the relevant paragraphs? So that's starting at paragraph 277, the Court of Appeal.

MR SHARP:

Well if we go to – that's a good place to start. So if we go…

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GLAZEBROOK J:

Well, I suppose one view is if you send it back for re-hearing you send it back for re-hearing on the whole of the issue rather than on a part of it, is that the submission, and therefore it should just be a re-hearing with all of the parties able to participate?

MR SHARP:

Yes, and it just seems to me that's obvious because the Court of Appeal set aside the findings which go to the "held in accordance with tikanga", the pūkenga didn't say that, so how else can you decide that matter unless all the applicants are there, so that's really the point. I think Mr Fowler discussed that yesterday.

FRENCH J:

Is your challenge to paragraph 282 that the Judge was right to find that they were not applicants who met the statutory criteria in their own right?

MR SHARP:

Yes, yes. Well, he does go on and say that they are a whānau with an iwi so they can participate in the re-hearing. But –

FRENCH J:

Because they form part of the successful applicant group?

MR SHARP:

Yes, so what he's discussing there is the submission I made – because there is the submissions we can come to in a moment that certainly from the interests of the party of Ngāti Rua they're just a whānau group – and so the submissions I made in the Court of Appeal or the High Court were that, well, they're a hapū, but even if they are they're still a group within the iwi, and so…

WILLIAMS J:

The Judge doesn't disagree with that.

MR SHARP:

No. He says they're a substantial group, they're at least a whānau group within the iwi and they can participate in the re-hearing.

WILLIAMS J:

Isn't that all you need?

MR SHARP:

Well…

WILLIAMS J:

It just seems to me that getting a judge to declare that someone's a hapū in accordance with the tikanga of that iwi is, one, very strange and, two, inconsistent with *Ellis*.

MR SHARP:

He's not declaring it. He says they're at least a whānau group and it's really a matter for the re-hearing.

WILLIAMS J:

Yes.

MR SHARP:

Yes.

WILLIAMS J:

If there's opposition within the iwi as to status then it's rather hard for a court to say: "Despite opposition within the iwi we declare in the face of that opposition, apparently in accordance with tikanga, that you are in fact a hapū."

MR SHARP:

Of course.

WILLIAMS J:

And *Ellis* is very careful to say don't do that. So how can we help?

GLAZEBROOK J:

Is that your point, is the – or just that you want to participate in the re-hearing as a party?

WILLIAMS J:

Well, he is. You have a right to do that.

MR SHARP:

The difficulty came – well, addressing his Honour, Justice Williams', point, our view is that there's been no findings, no evidence of any proper findings, whether a whānau or hapū, because in the High Court the High Court assumed that the pūkenga would do all that but they didn't, so there's been no findings that they were or what sort of group they are. We say they're a hapū. It's mainly the interested party from Ngāti Rua which says they're not. But that's a matter –

WILLIAMS J:

Do the other hapū say: "Yeah, you're in"?

MR SHARP:

Well, they're not opposing this appeal. There's only one opposition and that's the interested party, Ngāti Rua. So when we come to re-hearing no doubt they might say: "You're not hapū," or whatever, but all we're saying that that should be made, a determination should be made by that, looking at the evidence a proper determination made. Given that just didn't happen in the High Court because, as I say, he thought he could rely on the pūkenga.

WILLIAMS J:

Okay.

MR SHARP:

And –

FRENCH J:

So they don't want to be part of a group? They want to have CMT in their own right?

MR SHARP:

No, not at all. So the approach to Ngāti Muriwai is always that they should, that they want to be in a CMT with all the other Whakatōhea groups as an iwi CMT. They've never sort of said, you know –

GLAZEBROOK J:

But as a separate – "entity" isn't the right word but as a separate either whānau group or hapū, is that…

MR SHARP:

Yes well but you can, I guess the complication in that is that with CMTs there's two options. You could just say, this is an iwi CMT, and then, you're not naming groups, you're just saying iwi CMT. Sort of like Ngāti Awa, Ngāti Awa has got

a CMT but it's got 18 hapū or whatever, they're not named. Or you can go and try to name everyone in the hapū on the title, which we argue that's not necessary, it won't – but if you wanted to do that, if you wanted to go and name everyone, they would say they're a group within the iwi, the Whakatōhea hapū. But the, really the, you know, did struggle with this, because when, I think it's at 287, his Honour Justice Miller talked about the re-hearing for Upokorehe, and this is going to be a re-hearing involved just with Te Kāhui, the Trust Board, Upokorehe, and so then in the High Court, in the directions conference that's what the Judge looked at and said, well, you're not included, but in our submission it's, that was just the direction for that, and quite clearly the Judge ordered a re-hearing, a whole hearing, so at the end he just says re-hearing for CMT 1, and in – it's paragraph 282 it says: "It does not follow that Ngāti Muriwai's appeal should be allowed. They sought a CMT… on the ground that they were applicants who met the statutory criteria in their own right. I have upheld the Judge's conclusions about that. The manner in which title is to be held has not been settled in the High Court and will need to be revisited in any event."

So it seems clear the Judge is saying, you know, they can participate in the re-hearing and that that can be thwarted, and to add to the complexity of the scenario, when he says they, not entitled, the appeal was dismissed they say – 280, it says: "I am not persuaded that the Judge was wrong to find that neither group was entitled to CMT in its own right." For Ngāti Muriwai that refers to paragraph 465, and all that paragraphs says is that, oh, the pūkenga says that these group, including Ngāti Muriwai, don't hold that area in their own rights, and the other six do. So it's not really a proper finding because Justice Miller is always, Justice Miller has already decided that the pūkenga didn't decide those issues. So it's very difficult to –

KÓS J:

He's really decided you don't qualify because of 279(b) absence of presence between 1840 and 1870. That's why you don't get the CMT. As I read the judgment.

MR SHARP:

Yes, and that's another issue. I can go through a part, with the history of Ngāti Muriwai and how it's disputed, but there was evidence led pre-40, 1840 history, where they were, and there's just a gap in the history between 1840 and 1870, and so I'm not sure what, if that's the reason for, for refusing CMT but then in 1875 they're in the Whakatōhea registry as a hapū, and then they get land blocks in 1880s and things, so it doesn't seem to be a reason for refusing CMT.

KÓS J:

Well that's the Courts reasoning, I think, as I understand it.

MR SHARP:

Yes, yes, I just say that's another difficult part to understand about the Court's reasoning. So I can go through it, I've got some documents relating to the history, just a few documents, to illustrate the history. It won't take too long. Should I go through and quickly look at those?

GLAZEBROOK J:

Sure.

1240

MR SHARP:

Yes, okay. This is useful, so it's sideways.

GLAZEBROOK J:

You should be able to flip it, but I can't remember how.

KÓS J:

I think it's on the right-hand side under the numeral. Go down the right-hand side. The toolbar, that one there.

MR SHARP:

Oh, thank you your Honour. So this is from Ranginui Walker's book on Whakatōhea, *Ōpōtiki-Mai-Tawhiti*, and you can see this is produced in the court at paragraph 137 – page 137. He's talking about the reserves that were allocated in – Ōpape reserves in the 1870s and 80s which we've heard about, and he's referring to Eru Pōnaho, Paku Eruera's grandfather, "was included in this block with Ngāti Rua". So this is talking about that number 3. But then he applied for and obtained a subdivision for his hapū of Ngāti Muriwai. He was awarded a partition, that was 3A, 660 acres. It then says Ngāti Muriwai originally lived at Te Kaha, had been driven out by Toihau of Te Whānau-ā-Apanui, and they found refuse with Ngāti Rua through their genealogical connections with that hapū.

So in the High Court the historian for Ngāti Muriwai, Tony Walzl, looked at those references to the Native Land Court and found record of Ngāti Muriwai going during the early 18th century during the – there was a lot of disruption during the early Musket Wars and things to Te Kaha, fighting there and then being brought back by their whanaunga to Waiō, which supports his version of events.

Then the next exhibit is a Native Land Court record from 1975. That's when Ōmarumutu Marae, which was shared by Ngāti Muriwai and Ngāti Rua, we say at that stage was being put under a reservation. And the history of that, as it says, at the start was that we weren't sure whose land it was, Ngāti Muriwai's, Ngāti Rua's, it turned out to be Ngāti Rua, so then they held a hearing and Ngāti Rua decide what's going to happen with it.

And at the bottom, discussion about wanting to add Paku Edwards, that's the Edwards whānau. And then Tiwai Amoamo from – a rangatira from Ngāti Rua, speaks to the original name of Ngāti Muriwai-a-Rua and asks that the marae be set aside for the common use of Ngāti Rua only, they're talking about the house being called Ruatake and the name Ngāti Rua, the original name for the hapū is Ngāti Muriwai-a-Rua. So that's – that aligns with the evidence of the Ngāti Muriwai people that when they went back from Te Kaha, this is Ngāti Rua

at Ōmarumutu, that's – they lived under this combined name, Ngāti Muriwai-a-Rua.

Then if we go to page 4, it's got a better underline there. This is the Judge giving his decision. They talk about Ngāti Muriwai-a-Rua splitting when the reserves were allocated in Ōpape and then became separate Ngāti Rua, Ngāti Muriwai, and then he talks about they've healed their issues and they've got back together. So that once again – well what's referring to there and there's a lot of evidence about this, about the dispute that arose between Ngāti Muriwai and Ngāti Rua, one of it – the – is because Ngāti Muriwai were farming sheep on the reserve, it was an unsubdivided reserve, and also because the Ngāti Muriwai people, although they whakapapa to Ngāti Rua, also whakapapa through – have Ngāi Tai connections, so they claim then to the adjoining inland blocks against Ngāti Rua. So there's a rāhui about that anyway, so…

Then if we turn to the next one. That is once again from Ranginui Walker. He's got the tribal register, at page 0143, in 1874. So this is in the middle when Ngāti Muriwai-a-Rua are living together in the reserve, but in that register you'll see Ngāti Muriwai is still recorded as a separate hapū, and just a brief background, I suggest the whole of this case is that there were I think more than 22 hapū at 1840 but then so decimated by the raupatu, the musket wars, that they ended up having to coalesce on a small area of land in Ōpape, and so a lot of the smaller hapū coalesced with a larger hapū under their allocations, so they were all sort of collapsed into six, six allocations with sub-hapū or smaller hapū, and then before, when they had the subdivision, ended up seven Ngāti Rua.

Of relevance also is the evidence of Ngāti Muriwai people that when they did live on the marae Ōmarumutu had a very unusual situation of having two wharekai, one for Ngāti Rua, one for Ngāti Muriwai, which is very unusual, and that existed up until the 1960s when they built a new marae.

Then the next document is once again Ranginui Walker and this is a document that the interested party of Ngāti “Rua relies on particularly to support their narrative and this talks about in the 1990s during the iwi working party for Treaty negotiations that led to the failed Whakatōhea settlement in the 1990s, and he talks about Claude Edwards who was no longer part of, representative of Ngāti Patu, he said revived the moribund hapū of Ngāti Muriwai as the turangawaewae for himself.

So we don’t accept that it was clearly moribund. At that stage certainly the hapū was struggling because after that order by the Native Land Court for Ōmarumutu they left there because they weren’t recognised but they were still a hapū group, we say.

Then if you read further down, when the working party was trying to work out how to negotiate the settlement Ngāti Muriwai said, well, we should be represented as well, and so they decided to recognise the seventh hapū of Whakatōhea, and since then that sort of waxed and waned where it was very political in Whakatōhea because the Trust Board which is set up for the iwi just had representatives from six hapū, as we’ve heard. They had the ability to find who was an iwi and they never have, so there’s always been pushback on recognising new hapū and so on because then they would dilute the – they would have political power on the Trust Board.

But anyway, so that’s just a narrative that really goes to the present. You know, they voted in some Treaty votes and then the others sort of kicked them off and they came back again and there’s a mandate report from the Waitangi Tribunal. 1250

But anyway, so what we’re saying is all round that just has a narrative, right, of Ngāti Muriwai, just, you know, outside of the six hapū, but still as a historic hapū, and, and, more point, exercising their own mana, you know, doing things like politically claiming other blocks, you know, claiming, and other matters, you know, such as making their own political decision et cetera. So where that, where that takes us is that where the, I should say the interested party Ngāti

Rua, that this took up a big chunk of time at the High Court hearing, and just departing from Ngāti Rua, was adopting a position you're not a hapū you're a whānau of Ngāti Rua and there was lots of evidence, a big chunk of the hearing, which was unfortunate for our clients. Hard enough dealing with the MACA Act rather than someone trying to undermine their whakapapa and relationships, but just as a general point, I just sort of raise that, no decision has been made on Ngāti Rua at the moment, but there's an issue of the standard of proof that groups have to prove under MACA proceedings. There's the concept that using Canada, that if there's gaps in your evidence, that pre-sovereignty can rely on continuing connection. So just raises those issues as to how groups can establish themselves. But in the end this lands us with, his Honour Justice Miller said well, okay, he's not going to resolve the matter, you're at least a whānau group within the iwi so you're entitled to take part.

KÓS J:

So if we look at your paragraph 128, which is the directions you seek, which is really the very small amount of rubber that hits the road with this submission.

MR SHARP:

Are you talking about the substantive submissions?

KÓS J:

Yes.

MR SHARP:

Yes.

KÓS J:

That's simply what you're seeking from this Court, isn't it?

MR SHARP:

Yes.

KÓS J:

There are two directions, which are as to potential eligibility ie that you are a whānau group, therefore an applicant group for the purposes of the re-hearings. That's it, I think, isn't it?

MR SHARP:

Yes, we're not seeking findings that we are – satisfied a test or anything, you know, and –

WILLIAMS J:

But that's not, the High Court Judge accepted you're a whānau group.

MR SHARP:

The Court of Appeal Judge?

WILLIAMS J:

Sorry, the Court of Appeal Judge accepted you're a whānau group.

MR SHARP:

Yes. I know –

WILLIAMS J:

Don't you really want to be a hapū? That's what you wanted to argue, wasn't it, you don't want to argue that anymore? I mean I'm not encouraging you but…

MR SHARP:

We are, the whole way, but the practical difficulty is when we went to the High Court to get to a hearing, the High Court Judge said, well look at this thing, it says only the six participate in the re-hearing, you can't, which logically seems a nonsense, like if you're saying there's no finding as to holding accordance with tikanga, why would you just include the six who had the ruling. So that's why really we're just in a very unusual way seeking, you know, the assistance of this Court as far as rulings go.

If I can just move on to – just one other point in our submissions I did have is, just out of an abundance of caution, just looked at the issue of whether a, I guess a whānau group of an iwi can participate in a CMT, and there are, there is a lot of discussion in the Court of Appeal, especially Justice Miller, about new groups emerging, and how they, you know, how they can be accommodated.

Now the – and in the Whakatōhea context the (inaudible 12:55:00) went from 22 hapū down to six, and then you've got all these other communities, how do you accommodate those into a CMT. What they're saying is perfectly proper, and when you talk – when his Honour Justice Miller is talking about a whānau group or hapū, that's really a difficult question as whether you apply modern-day standards or traditional standards when they're saying they're a hapū. For example, Ngāti Awa, I think you've got a couple of urban hapū that they've recognised.

So it's – what I've referred to, we have some correlation is the interlocutory decision in *Tsilhqot'in*. We've dealt with a very similar issue where that nation was decimated, they were all put on reserves, dispersed, and then there was I think a suggestion by the Crown that they – only the traditional bands should be on a title, but then the Court says, well, no, it's, you know, historically it's been so developed that the only appropriate way of including everyone is a tribe title. So that's – I guess that's really the centre of the argument irrespective of whether, you know, the question of whether a whānau group can be included within that or not. That's the appropriate – that's why we say the appropriate title here is just the iwi title because you're going to continually get the debate about, you know, what your status is, who you are, for people who are groups, like whānau groups, at least who are definitely part of Whakatōhea.

Just moving on to paragraph 16 in reply to the Te Kāhui appeal. I'm not – yes, I'm not entirely sure where Te Kāhui is with their appeal that the Court of Appeal were wrong to find the pūkenga didn't answer the question and order a re-hearing because they don't seem to be directly confronting that rather than like my friend Mr Bennion today, like talking as if the hearing – that determination hadn't been made and the Pūkenga Report did mean what they

say it meant, but I just fully support what his Honour Justice Miller said, and my friend Ms Cooper was saying about Upokorehe about he very clearly made a determination and it's very sound when you look at it, because you look at the Pūkenga Report, the first part they talk about poutarāwhare, which they – in our view at least it is quite – definitely identify the Trust Board hapū because they're saying they're already there, and I think Mr Fowler referred to some cross-examination with him and they said they identified the Trust Board, but in any case they say they're a structure to help bring everyone together, where there was 20 – once was 22 hapū then down to 10 or six and whatever, and so everyone's included, and they say specifically that that poutarāwhare, they're not to determine who the iwi or hapū or whānau is, that that's a matter for hui.

So it's definitely not saying that's just the, it's a, it's a title just for that six, so they're the facilitators, which hasn't happened, but then quite specifically with the questions 3 and 4 about whether they are – who holds according to tikanga, very deliberately just put everyone in, who are the hapū or iwi, just deliberately just put everyone in, and so they were quite clear that they weren't asking the question, they were putting it within a structure, and the Court was wrong in just saying that the pūkenga said it's only the six hold the CMT, and in just a very simple part of the judgment where he just says that the pūkenga says these people out, six are in.

And that's the context, in the High Court there was very complex evidence from, especially from the six hapū, about they saying they had particular areas which they held for themselves and there was all these cross-relationships and Upokorehe say they hold their own area, they hold control.
1300

We were saying the evidence is that everyone just fishes and use that area as an iwi, as long as they're Whakatōhea, it doesn't matter what hapū they are. So it's a very complex question and the High Court Judge never grappled with that at all. So it's only appropriate that the orders that the Court of Appeal did to send it back. So either it is sorted, or those issues will have to be dealt with.

GLAZEBROOK J:

How much longer do you think you have?

MR SHARP:

Not very long.

GLAZEBROOK J:

Do you, five minutes?

MR SHARP:

Yes, probably only five minutes, 10 minutes.

GLAZEBROOK J:

Shall we carry on.

WILLIAMS J:

You said five minutes, 10 minutes. You mumbled 10 minutes after the five.

MR SHARP:

Do you want to have a break just in case. I don't intend to say much more, just so I can check. I'm in your hands.

GLAZEBROOK J:

Carry on and finish and then we'll start at 2.15 with whoever is next.

MR SHARP:

Just on the pūkenga decision, there were suggestions in the Court decisions that the pūkenga said that Ngāti Muriwai were not a hapū. That's just simply not the case and they were very careful in not making decisions on anyone as –

GLAZEBROOK J:

I think we've already been taken to these points in that report.

MR SHARP:

Yes, yes, and just so that I – just bring up the part where they are referring to at 108.04582, and this is just, I'm asking some questions of pūkenga about the evidence of Te Riaki Amoamo about you can tell a hapū because, in the Ōpape Reserve they've got a coastal block as well as a hill block, and Ngāti Muriwai didn't. Well the evidence was that they got a larger coastal reserve so they didn't get a hill block, so I just discuss that with him, that they knew that, they said no they didn't. I said it's a matter of tikanga, just on the other side, and they said we didn't see the tikanga where you just get a coastal block, and they said they married in, yes, their origins from two other places as I remember, but that is a conversation, like a "lot of other conversations had to be had with the iwi." "Yes."

So they're just saying with everyone, you know, whatever their status are it's just a matter for the iwi, and they're definitely saying in line with the Ngāti Muriwai evidence that they came here from somewhere else, Te Kaha married into Ngāti Rua, you know, as opposed to the other narrative that they're part of Ngāti Rua as whānau.

KÓS J:

Where are we in your outline Mr Sharp? We need to get back to that.

MR SHARP:

Yes. So if you go to our outline it's the very last part, iwi title.

KÓS J:

Thank you.

MR SHARP:

I just, this is the last point, and it's a general point. It's just there's some nuance and perhaps confusion about what's being sought by her. Certainly Justice Miller thought that the successful hapū agreed to an iwi-level CMT. I'd always thought the, at least Te Kāhui just saw the CMT just for their hapū, and – but they seem to be saying now in the Ngāti Rua reply submissions they'll

get a title to look after everyone else including Ngāti Muriwai, and just a general note in that. They've adopted this interesting interpretation of mana whakahaere, which is hapū authority, to say it's who makes the political decisions against title. Well the reality is that in tikanga it's who makes, the rangatira makes the decisions as a group, right, who hold the mana, or who have the control. So that's sort of going the other way round, and it does really gel into the, the issue I said before about the province of Whakatōhea with political decision-making being the Trust Board, and Ranginui Walker talks about this, he says since the 50s rangatira haven't been leading. There doesn't seem to be many hui iwi, so it's all concentrated on the Trust Board to ensure they had the political authority, but that doesn't get them overall mana on the iwi over things like CMTs. That's why (inaudible 13:05:43).

GLAZEBROOK J:

So those are the submissions?

MR SHARP:

Those are my submissions your Honour.

GLAZEBROOK J:

Thank you very much. We'll come back at 2.15.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.18 PM

GLAZEBROOK J:

Now I'm not sure who is going to be presenting the next submissions. I didn't think it was you actually but…

MS FEINT KC:

I was jumping up to address your Honours on the map issue.

KÓS J:

You're a subset also.

MS FEINT KC:

Yes, a poor substitute.

1420

So we've just been discussing amongst the parties, so in the High Court judgment at paragraph 660 Justice Churchman refers to the three orders, the first being between Maraetōtara in the west and Tarakeha in the east and then out to the 12 nautical mile limit, and then he says: "(b) in relation to the western part of Ōhiwa Harbour, a jointly held CMT between the six Whakatōhea hapū and Ngāti Awa;" and then he's got the third one for Ngāi Tai, and you could interpret that second order as either being for the western part of the harbour or for being the whole part of the harbour with Ngāti Awa in the western part, and when the parties discussed this in making the maps for the Court of Appeal hearing my understanding is that everyone's preference is to just have one order for Ōhiwa Harbour and there are a number of reasons for that: one, because it's administratively simpler but, two, because we didn't want to have an argument with Ngāti Awa about where you draw the dividing line in terms of them being in the western half, and so the thinking was you'd just have order 2 being for Ōhiwa Harbour, and then if you go to – and it may be that that's what Justice Churchman meant but he's not entirely clear.

WILLIAMS J:

What did you mean, you lot?

MS FEINT KC:

Us lot talked about – so the maps that are attached to the Court of Appeal judgment were made with the consent of everyone except WKW and so we just treated CMT 2 as Ōhiwa Harbour, and the Court of Appeal in its judgment at paragraph 25(b) says Ōhiwa Harbour is the subject of order 2, recognising the shared CMT between the Ngāti Awa hapū and the other hapū.

KÓS J:

Ngāti Awa was happy with that?

MS FEINT KC:

Yes. Yes, so Ms Irwin-Easthope is travelling to a tangi today as I understand it but she sent me a note which I can read to you. So she says regarding the Court's questions her understanding is we're all on the same page. There should be one CMT for Ōhiwa Harbour acknowledging my client's interests are primarily on the western side in accordance with the application.

KÓS J:

Right.

MS FEINT KC:

It wouldn't be tika to carve up Ōhiwa into separate titles but there may need to be some reflection in narrative or through other means in the CMT itself.

KÓS J:

So how would you see that working if, for instance, there was a resource management permission sought in relation to some works on the eastern side of the harbour? Say if there was a single CMT, presumably you would talk to Ngāti Awa but you wouldn't expect them to take a particularly vigorous view. Is that how you'd see tikanga working, if it was on the opposite side of the harbour?

MS FEINT KC:

Pretty much, Sir. So those are the submissions we made in response to the Upokorehe appeal that Mr Fletcher referred to this morning. So what we're saying is that you don't delineate the interests within the CMT order; you just leave tikanga to work it out according to whatever the issue is, the location, the context, and then whoever has interests in relation to whatever issue arises is the hapū that would be, you know, making the decision in accordance with their mana.

WILLIAMS J:

Or they can be on opposite sides, as happened with the marine farm.

MS FEINT KC:

Yes, indeed. But…

GLAZEBROOK J:

And how does a third party actually navigate all this?

MS FEINT KC:

Well, there would only be one – so as matters stand there's only one order, so whoever, whichever third party deals with the CMT order holders. It would depend whether it's a trust, I suppose, where you have one point of contact or whether it's separate representatives for each of the hapū. But what our clients were envisaging is that it would just be dealt with on a case-by-case basis.

GLAZEBROOK J:

Not overly helpful if somebody says: "Well, what do I do with this? Who do I ask for permission?" and if someone gives permission how do I know it's the permission of all of them and someone's not going to come and say something else?

MS FEINT KC:

Well…

GLAZEBROOK J:

I mean I can understand from an internal perspective but I'm asking from an external perspective.

MS FEINT KC:

So if it was an RMA permission right, unless everyone agreed then it would have to be a veto surely.

WILLIAMS J:

Well, that depends on the structure, doesn't it?

MS FEINT KC:

Yes, it does. It depends whether you've got one trust representing the hapū or six separate representatives.

WILLIAMS J:

How do you resolve that?

MS FEINT KC:

Well according to tikanga, and that's the way it's operated throughout the hearings, and it seems to work pretty well most of the time.

KÓS J:

I mean I don't see anything particularly wrong with that, because at the end of the day if the title is held by a number of parties, well a number of parties hold the title.

MS FEINT KC:

Indeed, and what underpinned our submissions on the point was that if – it's very hard to anticipate in the terms of the order itself what contingencies are going to arise in the future. So for instance, if there was an RMA permission right issue in relation to the western side of Ōhiwa Harbour, then the Ngāti Awa hapū might be the ones who have the say. If there's an issue relating to a pā of a particular hapū, then it would be the hapū who is affiliated to that pā. You know, like you might have different groups interested in the outcome at the same location, depending on what the context is.

WILLIAMS J:

It won't be a pā. It won't be a pā, unless the pā is under water now.

MS FEINT KC:

Yes.

WILLIAMS J:

It'll be a use of the marine space for some purpose, in which the impression one gets now on the evidence the rights which might once have been very closely-held are now much more, as they say, whakamoana, much more consolidated. It does make it difficult for the outside world to deal with the customary owners. That may or may not be your problem, but it will be a problem with the law somewhere. Perhaps not with you, but at some point in the future it will be an issue.

MS FEINT KC:

Well Te Kāhui say that the tikanga of Whakatōhea is very much mana-a-hapū and that it's up to each hapū to decide for themselves their position in relation to any particular issue. So I acknowledge that that may mean that there may be multiple hapū interested in say an RMA permission right, though you're right, it wouldn't be in relation to a pā, but it could be in relation to a wāhi tapu, say, or a development that one of the hapū is undertaking.

WILLIAMS J:

Yes.

MS FEINT KC:

Or a third party. The other point that Ms Irwin-Easthope asked me to raise is to correct the submission that Mr Sharp made that Ngāti Awa's CMT is an iwi CMT. In fact, Ngāti Awa has elected that its hapū Ngāti Hokopū and Te Wharepaia are the hapū who will be on the Ōhiwa CMT, not Ngāti Awa, because those are the two hapū who have interests in Ōhiwa. So the Rūnanga –

WILLIAMS J:

What's the second hapū name? Ngāti Hokopū and Rangi-i-pāia?

MS FEINT KC:

Te Wharepaia.

WILLIAMS J:

Te Wharepaia.

MS FEINT KC:

So the Rūnanga application was used as a vehicle for the hapū. I understand my friends from Upokorehe have raised the issue of whether the eastern part of Ōhiwa Harbour is within CMT 1 or 2, which may make it interesting in terms of the remittal of CMT order 1.

GLAZEBROOK J:

Yes, well I think that's one of the issues we wondered, but…

MS FEINT KC:

It seems to me, having looked at the judgments, that it's not entirely clear and the better interpretation is that Ōhiwa Harbour in its entirety is CMT order 2.

WILLIAMS J:

That's probably the best outcome whatever was intended, isn't it?

1430

MS FEINT KC:

It is, and that's the consensus of the parties who are in the order as I understand it.

GLAZEBROOK J:

I think it would be useful if we can have this put down as a joint memorandum from everybody with this explanation.

MS FEINT KC:

Certainly. We can organise that.

GLAZEBROOK J:

And when I say "everyone" I'm not entirely sure what I mean by "everyone" but certainly everybody who is on the title and is possibly also saying they want to be on the title.

MS FEINT KC:

All right, we'll –

WILLIAMS J:

It would certainly be useful if everyone said whatever the result is it's better if there is a single Ōhiwa CMT and then an offshore CMT.

MS FEINT KC:

Agreed, and I understand that is the consensus. We can follow up on that.

GLAZEBROOK J:

Yes, so if that can be filed as soon as possible. I realise it might take a bit of time to put that together but how long do you think? But it may not take much time though.

MS FEINT KC:

Maybe a week.

GLAZEBROOK J:

Let's say a week and obviously if there's a difficulty with that then you'll come back.

KÓS J:

Is anyone reserving their position on that point?

MS COOPER KC:

Well, yes, your Honour. So I don't want to take up too much time now.

KÓS J:

No, I just wanted to know if you are or you aren't.

MS COOPER KC:

Yes, and the short point is yes.

MS FEINT KC:

So that brings us to the submissions for Ngāti Rua.

GLAZEBROOK J:

Yes, and who is presenting those?

MS FEINT KC:

Ms Udy is going to present the submissions for Ngāti Rua. This is both the Ngāti Rua appeal against the Ngāti Muriwai PCR and the response to the Ngāti Muriwai appeal against the CMT order. I just wanted to say before I sit down, so in relation to the other hapū of Te Kāhui, so my friend, Mr Sharp, made a submission that the other hapū aren't opposing the Ngāti Muriwai appeal, which might be so, but neither are they supporting it. We've said in our submissions that the other hapū within Te Kāhui take the position that this is an internal Ngāti Rua dispute and so they're not going to get involved. They're going to abide the outcome.

GLAZEBROOK J:

Thank you.

MS FEINT KC:

With that, I'll pass over to Ms Udy.

MS UDY:

Ka mihi ki a koutou e kā Kaiwhakawā. Ka tū ahau hei mākai rōia mō Ngāti Ruatākenga, ara ko Ngāti Rua tērā i te ahiahi nei. I te tuatahi, me mihi kia tika ki Ngāti Rua rātou kua atae ā-tinana mai ki te Kōti, ko Pou Tikanga, Dr Te Riaki Amoamo, ētahi o ērā tāngata kua tae mai me ētahi atu, nō reira, e mihi ana ki a rātou.

So, your Honours, it falls to me this afternoon to address this Court on Ngāti Rua's position in response to the claims for Ngāti Muriwai as to rights and authority under the MACA legislation, and perhaps the best way that I can open submissions for Ngāti Rua is to refer to a statement that was made by

Dr Amoamo in oral evidence. Dr Amoamo rejected that Ngāti Muriwai are a legitimate hapū of Te Whakatōhea and in referencing the relatively recent emergence of Ngāti Muriwai's claims to that status he said: "I would say it had only come in yesterday. We have been here since the canoe," and this statement from Dr Amoamo refers to the origins of Ngāti Rua hapū tracing to the arrival of the Nukutere Waka at Te Rangi near Ōpape close to a millennium ago, and Ngāti Muriwai trace their identity and their mana whakahaere today through the whakapapa to their ancestor Tauturangi who arrived on the Nukutere waka and established a community at Ōpape, who lived there for some generations before intermarrying with arrivals from the Mataatua waka and becoming known as Ngāti Rua, and it is Ngāti Rua that continues to reside there today in exercise of their mana whakahaere at place. And it is this long-established mana whakahaere, underpinned by ahi-kā-roa, whakapapa, and kaitiakitanga obligations that sits at the heart of the issues in both of these appeals, and it is why these issues are so sensitive for Ngāti Rua.

And I refer to the long-standing nature of that mana whakahaere not to suggest that authority and identity are immutable and can never change and evolve, but rather to emphasise the deep-rooted nature of that mana whakahaere at place and to highlight that it would indeed take a dynamic rangatira to unseat that authority or to challenge it, and we say that is indeed not what has happened here. Ngāti Rua's authority remains clear and that is why the claims by Ngāti Muriwai are opposed so strongly by Ngāti Rua, because it is a challenge to their mana and it is a challenge that is not based in tikanga, and it is particularly offensive because Ngāti Muriwai have advanced factually inaccurate claims, historical claims, which undermine the kōrero tuku iho that has been passed down through those generations and held by knowledge holders like Dr Amoamo today.

So that is the broad context that these appeals sit in, and you should have a copy of my road map in front of your Honours, and you'll see there at paragraph 1 I've set out a brief overview of the key points that we intend to take you through this afternoon. So the overarching point is that Ngāti Rua support the factual findings made in the High Court and in the Court of Appeal that the

Ngāti Muriwai party are not a hapū, and we say that therefore it is not possible for Ngāti Muriwai to meet the test for CMT because they cannot show that they hold rights in accordance with tikanga. The evidence was clear that mana whakahaere and customary title sits at the hapū level.

But we also say that those findings were in fact findings that Ngāti Muriwai have no identity as a matter of tikanga at all, and that was the explicit language used by Justice Miller in the Court of Appeal, but where both the High Court and the Court of Appeal subsequently misdirected themselves was to assume that this might mean that they are at least – that Ngāti Muriwai are at least a whānau despite no evidence on that point being addressed in the evidence, and without understanding the implications of the Ngāti Muriwai claim to hapū identity through the use of the prefix "Ngāti", which refers to tribal identity. And so we say this Court should take Ngāti Muriwai's position at face value that their claim is to be a hapū, and so we say for that reason this Court should be weary of new groups attempting to use MACA proceedings for the purposes of legitimising an identity and status that they do not have as a matter of tikanga, and underlying that –

KÓS J:

Why do we have to take it in those terms? I mean if there's self-misidentification but they are nonetheless a whānau group and that's what's required to be an applicant group for the purposes of the Act, why is that not sufficient? In terms of the statutory language, at least.

MS UDY:

So we say that where the Court of Appeal and the High Court have misdirected themselves is in effect making factual findings that Ngāti Muriwai are a group of related individuals and they've therefore conflated the requirement that an applicant group could be an iwi, hapū, or whānau with actually undertaking a tikanga enquiry as to what that relationship that exists between this group means in terms of the rights and authority that are being claimed, and I'm intending to address that point in a little bit more detail at point 3 of my road map.

KÓS J:
Right.

MS UDY:
But I'm quite happy to go directly there?

KÓS J:
No, no. Take it in your time.

MS UDY:
Thank you, your Honour. So before I come to that, what is quite a fundamental point in these appeals, I would just like to address some of the factual issues.
1440

My friend for Ngāti Muriwai this afternoon, well earlier this afternoon, took you through various pieces of the evidence that were presented in the High Court and Ngāti Rua say that actually we don't need to go into the evidence because Justice Churchman made factual findings and he rejected the evidence that was presented for Ngāti Muriwai, including the points that were raised by my friend this morning.

But to ensure that we're all situated in the same factual context, I would just like to step through some of those factual findings, and so starting with the critical question, who are this group that is before the Court, and Ngāti Muriwai – Ngāti Rua say that what was shown on the evidence is that the name "Ngāti Muriwai", the origins of that name, are effectively historical block appellation and then that name was picked up in the 1990s as a name for a new group attempting to establish hapū identity.

So in the 19th century the lands of Te Whakatōhea were confiscated by the Crown during the raupatu and they were moved onto the Ōpape native reservation, and that reservation was carved into 12 titles among the six hapū. Ngāti Rua was at Ōpape 3, that was the name of one of their blocks, and sometime between the 1870s and 1880s there was a dispute within Ngāti Rua

between the rest of the hapū and a Ngāti Rua man named Paku Eruera, or Edwards, who was the grandfather of Claude Edwards. And this dispute was in relation to Paku Eruera and his whānau running sheep on Ōpape 3 without sharing the benefit of that sheep enterprise with the wider hapū, and in effect the way that dispute was resolved was through Paku Eruera petitioning to have his interests partitioned off, and that's exactly what happened. The – his interests were partitioned off on an individual basis for each member of his relatives into another new block which was known as Ōpape 3A, and which Mr Eruera named Ngāti Muriwai, and in Māori Land Court proceedings a decade or so later, Paku Eruera explained that he reason he used that name "Ngāti Muriwai" was to identify the block with his Whakatōhea whakapapa because he also had whakapapa to Ngāi Tai, and indeed Paku Eruera continued to identify as Ngāti Rua throughout the rest of his life, and he lived at least into the 1920s, is my understanding.

And so that was the crux of the factual findings in the High Court and those were adopted by the Court of Appeal, and perhaps if we could just go to the Court of Appeal decision at paragraph 279 just to see where Miller J accepted those, or Justice Miller, accepted those factual findings. So if we could just scroll down to (b), and he's there in short setting out that issue – if we could scroll down a little bit further, thank you Mr Fletcher – in terms of that dispute over the grazing, and the reason Justice Miller adopted these findings is because Justice Churchman was very clear in rejecting the evidence to the contrary that was presented for Ngāti Muriwai.

He found in particular that there was no evidence of a presence of a Ngāti Muriwai in the Whakatōhea region before the 1870s when this dispute arose, and he also rejected Ngāti Muriwai's four separate factual narratives presented as mutually inconsistent, and that was because Ngāti Muriwai did indeed advance several historical narratives which my friend Mr Sharp spoke to you about this morning. And so in short, those four narratives were that there had been a singular hapū named Ngāti Muriwai-a-Rua that split into two some time in the 1970s. There was also a mutually inconsistent –

WILLIAMS J:

1870s or 19?

MS UDY:

Oh, sorry. 1870s, yes. Thank you, your Honour. There was also the narrative that Ngāti Muriwai were living in Te Kaha and returned to the Whakatōhea area in the 1820s. They further advanced the suggestion that there had been a tuku of rights by Ngāti Rua post-1870 to Ngāti Muriwai, and that was advanced in closings in hearing on the basis of no evidence put before the Court, and Justice Churchman for that reason rejected that claim, and if we could – I'd like to just address some of the points that were made this morning, in particular the Māori Land Court minutes that you were taken to by my friend, Mr Sharp, in support of the suggestion that Ngāti Muriwai had at one time been part of a singular hapū, and if we could go to those minutes at 501.00078.

So the starting point is that there is a singular reference in these minutes to the name "Ngāti Muriwai-a-Rua" which my friends from Ngāti Muriwai have pinned that narrative on and the first point is that this is effectively hearsay evidence. These are minutes not of a hearing of the Māori Land Court but of a hui that was held at Ōmarumutu Marae and these are notes taken by the registrar. It's not clear even if the hui was conducted in English or what the context of these notes were, but regardless, what the issue in this hearing was essentially about the fact that the descendants of Paku Eruera and those who had been granted the Ōpape 3A block had mistakenly been left out of the reservation that Ōmarumutu Marae sits on because that marae sits on the Ōpape 3 land and because their individual interests had been partitioned out they weren't included in the list of owners that were part of that reservation and these proceedings were to bring them back into the reservation to be recognised as Ngāti Rua, and that's clear from about half way down the page there and it says: "Going back to Paku's people," who were the whānau of Paku Eruera, "it is apparent that any old differences have long been buried and they have been very much involved in running and maintaining this Marae. One of the persons regarded as an elder of the Marae, is in fact Paku Edwards. Those here today are unanimously of the view that Paku's people should be brought into the Marae,

so that all Ngāti Rua [can be as one again]," and so that was the context of these minutes and what was being discussed. I return to the point that Justice Churchman rejected the suggestion that this was sufficient evidence to found the claim that there had been a singular hapū in existence known as Ngāti Muriwai-a-Rua.

So that's really as far as I wanted to take your Honours in terms of the factual findings other than to simply endorse the fact that Justice Churchman had the benefit of hearing the live evidence and assessing the credibility of the witnesses and was clear in the factual findings he made.

But perhaps more to the point what was also established at trial is that today Ngāti Muriwai are not recognised as a legitimate hapū, as having hapū status, and that was advanced by pou tikanga, Dr Amoamo, who was adamant that the individuals who make up the Ngāti Muriwai group are in fact recognised as part of Ngāti Rua hapū. That was also supported by the pūkenga who found that the extant hapū of Te Whakatōhea do not recognise Ngāti Muriwai as a hapū, and then on the basis of that evidence Justice Churchman accepted that they are not recognised as a legitimate hapū of Ngāti Muriwai.

But I would pause here to note that, as the pūkenga said, the door remains open to Ngāti Muriwai one day achieving that status, and that goes to the point I raised at the start of my submissions that this is not a claim that identity is immovable and cannot change over time. But the point is that would need to happen consistently with tikanga processes which would require discussion within the community on marae to achieve the recognition of those hapū that Ngāti Muriwai have authority of that nature.

That brings me to point 3 on my road map which really addresses the question that you raised earlier, Justice Kós, in terms of what is the relevance of identity as a matter of tikanga and particularly the claims that have been made to the labels of identity, hapū, whānau, et cetera, and so we say that group identity matters because it indicates the nature of authority and rights at tikanga, and

what we mean by that is that tikanga constitutes Māori communities and Māori communities constitute tikanga.

1450

That is, Māori communities are the constitutional site of authority from which tikanga flows. And that point was captured well in our view by this Court recently in a slightly different context in the *Nikora v Kruger* decision, where it was said: "Like any exercise of authority, tino rangatiratanga cannot be its own judge. Its parameters must be defined and maintained by reference to principles of equity, legality and tikanga."

To put that same point in a slightly different way, I would also refer to the comments of Dr Moana Jackson in his affidavit, which I haven't got on my road map there but at tab – it's in tab 51 of our authorities, and I'm not intending for us to go there, I would commend to your Honours his discussion of Māori constitutionalisms in that affidavit, but particularly at paragraph 83 he says: "Iwi and hapū also developed what may properly be called a Māori constitutionalism. Within this constitutionalism tikanga as law and the ideas of political and constitutional authority have always existed in symbiosis."

And the reason that we refer to this concept is because we say the real problem here is that Ngāti Muriwai are claiming tikanga-based rights, but they have not located themselves within the constitutional framework and legal system that those rights exist in. So as I've just discussed, they have not located themselves within that matrix by establishing that they have a hapū identity, and they have now picked up the assumptions of the High Court and Court of Appeal that they may be a whānau and they're relying on that superficial label of "whānau" without actually showing where they fit within the constitutional framework under that label.

To illustrate the point, I refer to a comment made by the Chief Justice in the *Ellis* decision at paragraph 170. Her Honour the Chief Justice said that: "Tikanga flows out of the matrix of iwi, hapū and whānau relationships that fundamentally frame the Māori world." And I emphasise that word

"relationships" there, because to be clear, we're not saying when we say that Ngāti Muriwai are not a hapū or a whānau is that there's some rigid definition of what those things are, we very much say they are dynamic, permeable concepts which are mediated and operate through the active relationships at play in the communities, but the problem for Ngāti Muriwai is that in claiming now that they could be a whānau, they are actually separating themselves out of that relational matrix.

So just to step through that, that's because they are claiming to be a whānau that affiliates to the iwi and they're very clear in their submissions that they do not affiliate to Ngāti Rua or indeed to any other hapū, but the fact of the matter is the evidence before the Court was that the iwi identity is constructed through the hapū, and your Honour Justice Williams made the point yesterday that indeed any position otherwise would be novel within Te Ao Māori, and I might just refer to –

WILLIAMS J:
But why does that mean that a whānau can't be an applicant?

MS UDY:
We're not saying that a whānau can't be an applicant. What –

WILLIAMS J:
Well they are a whānau, aren't they? They're the descendants of Paku Eruera?

MS UDY:
So we say that the Edwards whānau is a whānau, but the point is they are adopting a new identity as a hapū in the sense that they are claiming to have a particular authority of the nature of the kind of mana whakahaere that sits at hapū level. So – and my point is –

WILLIAMS J:
Right, but that's a different point. The first question is can a whānau make an application, the answer to that question is yes, the statute says so.

MS UDY:

Yes, absolutely, your Honour.

WILLIAMS J:

Should this whānau receive rights, that's a whole other question, but it's not the same question.

MS UDY:

Yes, and so what we say is that the error that the High Court and the Court of Appeal fell into was conflating those two points. So in effect they said: "Well, we assume that they're a whānau and therefore they can have protected customary rights" –

WILLIAMS J:

Well they – oh, I see.

MS UDY:

Without engaging with what does "in accordance with tikanga" mean in that statutory test. And so in essence what we say is that the claim for Ngāti Muriwai is that: "Well, we're related so we get rights." We're saying: "You're related so you might come in through" –

GLAZEBROOK J:

But didn't they fail in both courts?

MS UDY:

So they were successful in their application for protected customary rights, your Honour.

WILLIAMS J:

Which ones?

GLAZEBROOK J:

Oh, okay.

MS UDY:

Could you repeat that, your Honour?

WILLIAMS J:

Which PCRs?

MS UDY:

So I understand that they were PCRs covering the entirety of the rohe from Maraetōtara to Tarakeha to gather and collect firewood and possibly shells. They were in the nature of gathering rights. There was possibly some whitebaiting PCRs granted as well.

WILLIAMS J:

So the whitebaiting PCR was granted to Ngāti Muriwai?

MS UDY:

Yes, not to Ngāti Rua, and we say that's the problem because the rights flow from Ngāti Rua whakapapa, but Ngāti Muriwai are very explicitly locating themselves outside of Ngāti Rua's whakapapa or authority rather or the relationship that exists between a whānau such as the Edwards whānau, who we absolutely accept have an identity as a whānau and exist as a whānau of Ngāti Rua.

WILLIAMS J:

And this happened because Ngāti Muriwai claimed the lesser right and your client claimed the greater right?

MS UDY:

So Ngāti Rua also was granted PCRs in the High Court.

WILLIAMS J:

Oh, I see.

MS UDY:

So it's not necessarily in our conception a matter of greater and lesser rights, and that flows from the fact that there are certain resource management permission rights that attach to those PCRs as well, only in the context of if there's I believe adverse, likely to be adverse effects, so it's not as strong as the right –

WILLIAMS J:
Is it a permission right or a consultation right?

MS UDY:
I believe it is a permission right with some exceptions.

WILLIAMS J:
Really?

MS UDY:
Akin to the sort of Resource Management Act –

WILLIAMS J:
Well those are definitely not permission rights.

MS UDY:
Well no, in the sense of if there's likely to be adverse effects then you have to assess that.

WILLIAMS J:
But they're still not permission rights, they're just rights to be consulted as a highly-affected party.

MS UDY:
Well perhaps we could go to section 55 of the MACA Act just so that we can look at what those rights are. And so you can see there at subsection (2) that a consent authority must not grant a resource consent within a protected customary rights area if the activity will, or is likely to, have adverse effects that

are more than minor on the exercise of that PCR without the PCR rights holder giving its written permission, so.

WILLIAMS J:

Oh, right. Right, yes.

MS UDY:

But there's – at (b) there, there's an exception there, but I'm –

WILLIAMS J:

So the permission right is you can agree to the activity being impaired significantly?

MS UDY:

Yes, yes, and that's what we say is the problem here, because these rights are existing within a matrix, they're tikanga rights that flow out of in this context the whakapapa of Ngāti Rua that is established at place and was enlivening those rights in 1840 and continues to do so, and so in terms of PCRs we accept that, yes, there may be contexts in which it is appropriate for whānau to be rights holders in terms of a PCR, but this is not one of those contexts, particularly because they're rejecting the relationship with the hapū.

WILLIAMS J:

Yes.

MS UDY:

And that's the problem here, and that's why we say they're isolating themselves out of the matrix that these tikanga rights exist in. It is –

WILLIAMS J:

That is how hapū construct themselves.

MS UDY:

Is through whānau.

WILLIAMS J:

It's a pretty standard historical process that a whānau walks away and over time, you know, hapū is what hapū does, and if hapū does it enough then –

MS UDY:

Yes, and that's –

WILLIAMS J:

Then eventually it gets accepted.

MS UDY:

And that's our fundamental point, your Honour, is that we shouldn't be overly focussed on these labels of who is an iwi, who is a hapū, who is a whānau. What we should be looking at is the actual authority that is displayed in action in the relationships in the community on the ground. Ngāti Muriwai have made an attempt to say: "We are a hapū and that we have that authority, that's the nature of who we are."

WILLIAMS J:

Yes.

MS UDY:

But they've failed. They haven't been recognised as a hapū and so they're – it's a bare assertion of authority, and as a matter of political reality, authority doesn't mean much if nobody recognises it.

KÓS J:

If they did achieve it, what would be the position in terms of meeting the 1840 requirement? When would this hapū exist from?

MS UDY:

So Justice Williams had an exchange with my friend I think Ms Roff last week about what I perceive to be that continuity requirement in section 51, and I think the term that was used was you would need to identify who the true successor

to the rights were and that that would be very much connected to the fact that the whakapapa was always there and those tīpuna had been walking the land, so to speak, or the takutai moana perhaps –

KÓS J:

But doing so wearing Ngāti Rua gumboots?

1500

MS UDY:

Yes and so we say that it's not necessarily useful to get caught up in terminology of true successes or relevant connection because again tikanga does the work. So if the whakapapa has reorganised itself, it's still the same people, it's the same whakapapa exercising the rights, but just in a different form, and we say that's not what's happening here. Not least –

WILLIAMS J:

Not yet.

MS UDY:

Not yet, and –

WILLIAMS J:

You see what's happening here is we are witnessing, as we often do, we saw this in the Native Land Court over two or three generations, is that this becomes the site of the contestation leading to the separation.

MS UDY:

Yes.

WILLIAMS J:

Which is unfortunate but, you know, I guess it beats engaging in hostilities.

MS UDY:

Well we don't say that there are…

WILLIAMS J:

In the old day, if there wasn't agreement, and some uppity whānau was not accepted as a hapū, someone might pay for it, at least with injury. Those days are gone and now these official channels are being used to play out the ancient disputes and the question is whether, what the effect of a PCR in favour of this group, whether it's a whānau or a hapū doesn't really matter, is in this case. Is it just another straw on the camel's back? Whether it's the breaker of it is another question.

MS UDY:

In answer to that your Honour I would first refer to the cautions in the *Ellis* decision that the Courts should respect the integrity of tikanga, and it's not for the common law to engage in that arena, not least because of the raru that have arisen over the centuries from the Native Land Court and others doing exactly that, and we also say that it's not the case that tikanga has no ways other than physical hostilities to address and resolve issues, the fact of the matter is, as Matua Te Riaki likes to say, the western civilisation, the march of western civilisation arrived to change that kind of interaction in terms of physical blows, but the fact remains that –

WILLIAMS J:

They use drones now.

MS UDY:

Well, yes, and I don't think we want to suggest that we should get the drones out either.

WILLIAMS J:

No.

MS UDY:

But what we simply say is tikanga has processes, peace-making processes, agreement-making processes. The point here is that this is not a situation where the Court, for example, might say, well people need to go away and

undertake a tikanga process to resolve this particular hostility. The point is tikanga has already resolved it. The hapū and the legal institutions within tikanga that operate and reside in these relationships, and pou tikanga and knowledge-holders like Dr Amoamo, have been very clear that Ngāti Muriwai had not achieved that recognition, and what the group identifying themselves –

GLAZEBROOK J:

One of the difficulties, though, is what do you do about the fact that whānau applications are allowed? Because what you're really saying is whānau applications are allowed but actually they can never be granted, even if for a PCR, because it all has to be a hapū area, level.

MS UDY:

That's not our submission your Honour.

GLAZEBROOK J:

Well what is the submission?

MS UDY:

Certainly, so our submission again is that tikanga does the work, and the fact is that in this particular context the evidence was one that in terms of the customary authority that would found a CMT, that that is held at a hapū level. We absolutely –

GLAZEBROOK J:

Well that's what I understand, and they did fail on that is the point I was making.

MS UDY:

Yes, other than the sort of confused position that Justice Miller left us in on that.

GLAZEBROOK J:

Well exactly, and we don't know quite what that means.

MS UDY:

Yes, and I plan to address that particular issue. But I think it's important to make a distinction between the fact that a whānau can be an applicant, but whether or not tikanga says that they hold those rights in this place, and so we should be careful to avoid homogenising tikanga across the motu. We're saying that in this context, and indeed not just in the Whakatōhea context, but in the particular context of Ngāti Rua, that the rights that are being claimed by Ngāti Muriwai are held by the hapū and that actually links into Justice Kós' question about the continuity requirement because the factual findings of evidence was clear that they didn't exist in 1840, so there was no Ngāti Muriwai in 1840. So for the purposes of the PCR test –

KÓS J:

Not as a whānau – not as a hapū, but their tūpuna existed and when in 2096 Ngāti Muriwai achieves its fully fledged hapū status it'll be able to trace right back into the 17th century and before, surely.

MS UDY:

Yes, but the distinction there is that Ngāti Rua's authority may have changed in some way in order for that evolution to occur and that's what we say is the difficulty in using these words of iwi/hapū/whānau as proxies for the substance of the rights. Just because somebody is recognised as a hapū or achieved that recognition doesn't mean that those rights spring out of nowhere. There aren't new areas of land –

GLAZEBROOK J:

Can you take us to the factual findings you rely on in respect of the – I understand the CMT based on hapū. Do you say there are factual findings that make it clear that that's the case for PCRs as well and those lesser use rights?

MS UDY:

So not in –

GLAZEBROOK J:

Because what you're saying is it was absolutely clear from the evidence that the PCRs shouldn't have been granted, and for myself you're going to have to point to the actual evidence about that.

MS UDY:

So our point is that there was no evidence as in, that whānau, that they were a whānau in the sense that they have a distinct identity from Ngāti Rua, and that's because Justice Churchman and then Justice Miller leapt entirely over the issue of what "in accordance with tikanga" means. He accepted that Ngāti Rua have PCRs because they were granted to Ngāti Rua but what he did in terms of that limb of the section 51 test, that you have to be exercising these rights in accordance with tikanga, was to say that that has been met because when Ngāti Muriwai carry out these practices they say karakia and they exercise manaaki by sharing what the catch or the collection might be and our submission is that is – I come back to the point that this is a constitutional legal system, that Justice Churchman's approach was to break the meaning of "in accordance with tikanga" down into constituent practices rather than grappling with the fact that tikanga grounds these rights in that matrix of relationships, and the point we're making is that when I say there was no evidence to the fact that Ngāti Muriwai are a hapū, I beg your pardon, are a whānau, is that there's no evidence that they can exist in isolation from anyone else but that is their claim. They say they are a hapū that, a whānau that affiliate to the iwi and are entirely separate from Ngāti Rua, but in order to make that claim they would need to confront the fact that Ngāti Rua, the whakapapa that was in operation in 1840 for the purposes of that continuity test, is still in operation and has still asserted its authority there and nobody else has recognised Ngāti Muriwai, and so the point that we're making is not simply that they're not a whānau but rather that they have no recognised identity as a matter of tikanga and so they can't hold tikanga rights when they have no identity as a matter of tikanga.

Perhaps we could go to paragraph 341 of the Court of Appeal judgment just to make that point. So at 340 there Justice Miller refers to the fact that: "Mr Amoamo's opinion that Ngāti Muriwai have no separate identity as a matter

of tikanga must be respected." So that is the factual finding, but he goes on to say: "In my view that concern must yield to the scheme of section 51."
1510

And the fundamental problem there is we say you can't have rights in accordance with tikanga if you have no identity as a matter of tikanga, and so that's the problem in terms of the conflation that's been put on the section 9 definition of who can be an applicant group, and assuming that simply because the group before the Court was related, that they could receive these protected customary rights. We say what would have needed to happen was to identify, yes, this is a group that is related, so they sit within, they pass that gateway in section 9, but there needs to be an enquiry as to what that means as a matter of tikanga, and the factual findings were that it means nothing at tikanga, and we simply say that it's very clear from the entire scheme of the MACA legislation that it's interested in recognising rights at tikanga.

FRENCH J:
How do you achieve recognised identity as a matter of tikanga?

MS UDY:
So this was addressed by the pūkenga who said that it would require essentially recognition by the other hapū that they had that claimed status, and in particular Dr Hiria Hape, who was one of the pūkenga in cross-examination referred to the fact that, yes, the door is open for Ngāti Muriwai to become a hapū, but they would need to run the gauntlet with all those other hapū, and we say that is – and the Pūkenga Report doesn't set out exactly what that tikanga consistent process for achieving recognition would be.

GLAZEBROOK J:
You keep coming back to "hapū" rather than "whānau".

MS UDY:
So what I might refer to, your Honour, is the fact that the evidence before the Court was that iwi identity is constructed through hapū. So there is no iwi

without the hapū, that's the starting point. But Ngāti Muriwai say they are a whānau that do not affiliate to a hapū. They affiliate to the iwi. In other words they affiliate to an identity that doesn't exist independently of any connection in relationship to a hapū. So they are putting themselves in a vacuum and saying, making a bare assertion of rights without grappling with the fact that those rights are framed within, those tikanga rights come within this constitutional framework of iwi/hapū/whānau in relationship together, and the life of a community together. It's a bare assertion that's not based in the law of the rights that they're claiming exist.

KÓS J:

Presumably iwi embrace whānau, even if they're disconnected to hapū. They must still embrace them. They're still part of the people of the area. Part of Whakatōhea.

MS UDY:

So as a matter of whakapapa yes. So the whakapapa is recognised.

KÓS J:

Yes so going back to Justice Glazebrook's question, it may be a different matter when it comes to customary marine title, but what about PCRs? Do they depend on a hapū association or are PCRs something which may, within Whakatōhea's tikanga, derive from whānau status as part of the iwi?

MS UDY:

So we say that those PCRs cannot derive from hapū status as part of the iwi.

KÓS J:

From whānau status?

MS UDY:

Sorry, from whānau –

GLAZEBROOK J:

Well what about whānau status as part of a hapū?

MS UDY:

Yes.

GLAZEBROOK J:

So you have six whānau, and one has got a particular relationship to a particular area, do you say somehow they have to be recognised or see themselves as part of a hapū in order to get that PCR, or could they say, we don't care, which is what I think Ngāti Muriwai are saying. We don't care, we have rights here, and we want a PCR.

MS UDY:

Yes, so absolutely your Honour. We say that whānau could hold PCRs, and that would be a matter of the particular shape of their relationship with the hapū, and we don't say that whānau only relate to one hapū. There are numerous examples of whānau who have relationships with multiple hapū, but the hapū are the site of the – the core site of political authority, and those rights for whānau, for example, if a whānau has a particular relationship to seafood gathering rock, for example, the nature of the recognition between both the whānau and the hapū may be such that it can't necessarily be said that the rights flow directly from the hapū in the sense of the hapū granting the permission, but neither can the whānau exercise those rights without engaging with the other relationships in the community that are at play there.

So to illustrate the point, my learned tuākana Ms Sykes last week referred to the fact that various whānau hold fishing mātauranga or they might be the eeling whānau, and the evidence that was given as to those whānau carrying out those fishing practices, putting aside the fact that PCRs can't be granted for that type of activity, was that those whānau then come back and tohatoha to the wider hapū community in which they exist, or the community of multiple hapū within which they exist, and so what we really say here is not that it's a problem for

whānau to be able to ground PCR rights, but that Ngāti Muriwai are not claiming to be a whānau, they're claiming to be a hapū.

Perhaps the most practical way that I can illustrate that point is to go briefly to the *Stage Two* judgment at paragraph 205. And so Justice Churchman granted PCRs to Ngāti Muriwai on his assumption that they may be a whānau, and then we come to the *Stage Two* judgment which required working out the particular form of the PCR orders, and by the time of the *Stage Two* judgment Ngāti Muriwai are back to asserting their identity as a hapū.

So if we could just scroll down, Justice Churchman here is recounting the submissions for Ngāti Muriwai on what the PCR should look like and it's saying – he's saying there that their submission is that the Ngāti Muriwai Trust is proposed as the holder of the PCR on the basis that the hapū of Ngāti Muriwai have provided a mandate to that trust through hui-a-hapū, and so the point we're really making there is that Ngāti Muriwai are picking up the convenient label of whānau to get through the gate in terms of the grant of these rights, and in doing so are in effect saying: "We have independent identity and authority that should be recognised by the legislation," without acknowledging the fact that they exist in relationship with the rest of the community and don't have independent mana whakahaere of the kind that hapū exercise, and so that's why we say we must take their claim at face value when they say: "We are a hapū." That claim has been rejected as a matter of fact, but that doesn't mean that by a consolation prize they can be assumed to be a whānau for the purposes of grounding rights as a matter of tikanga.

FRENCH J:

Because even for that purpose, to be a whānau that is eligible they would need the – well the consent or agreement of all the hapū, other – the hapū of the, that make up the iwi.

MS UDY:

To be recognised as having an independent, entirely independent, separate kind of mana whakahaere of the kind that hapū exercise.

FRENCH J:

Okay.

MS UDY:

And so we're not saying that they would need the consent that a whānau such as the Edwards whānau would need the consent of all the hapū to grant – to exercise customary rights, to exercise practices that are protected as of right as a matter within the legal system of tikanga, but that would be a matter for the particular tikanga within the community of the hapū that are made up of whānau and relationship as to who exercises or who is the correct group or person, individual to carry out those practices.

And if I could perhaps give a practical example of why this matters, in the *Stage Two* judgment or hearing it became apparent that the Ngāti Muriwai group were claiming PCRs for whitebaiting at a wāhi tapu. That was at the Waiwhero Beach, which is the site of a very important battle within the history of Ngāti Rua and Te Whakatōhea, and Waiwhero refers to the waters running red with blood at that location.

WILLIAMS J:

Is that in the harbour or out on the coast?

1520

MS UDY:

It's along the beachfront is my understanding.

WILLIAMS J:

The spit or in the harbour?

MS UDY:

No, so this is more to the eastern side of the rohe near Ōpape, or Ōmarumutu, is my understanding. So Ngāti Rua had to intervene as the kaitiaki and the knowledge holders to say: "You can't go whitebaiting there and you can't have protected customary rights to whitebait at a wāhi tapu, and we say that is a

double whammy, if you like, because, one, it simply indicates that Ngāti Muriwai do not hold the kōrero tuku iho that attaches to the whakapapa that is expressed in the authority of Ngāti Rua but we say it also shows why it's important to be connected into the community because Ngāti Rua were not simply focused in on a particular small slither of the rohe where rights might be exercised. They are taking that wider view as the hapū exercising kaitiakitanga in that place, whereas if that hadn't been recognised that would have been the practical effect is that the Ngāti Muriwai group would have been in effect granted a PCR that was very much inconsistent with tikanga because it would be tapu to whitebait in that area.

WILLIAMS J:

What I don't quite understand is this. The statute says whānau can make applications. Whether those applications can be properly made out is a next-stage question. It's important not to put that cart before the horse because at some point during the re-hearing these issue will come out and be played out and a judge will be convinced one way or the other. Isn't that how this is supposed to work?

MS UDY:

What we say is that Ngāti Muriwai made an application as a hapū for these rights and the factual findings, and perhaps this answers your question earlier, Justice Glazebrook, were that they are not a hapū and that they are not recognised as having any identity at tikanga. So their claim –

WILLIAMS J:

Well, that's a bit hard to swallow really. They're clearly the Eruera whānau.

MS UDY:

Yes, we accept that, that there are whānau within this group that are coming together as Ngāti Muriwai and they are related. But perhaps to illustrate the point, in their submissions, for example, the Ngāti Muriwai submissions, I'll just find that reference…

FRENCH J:

So you're not saying that legally they're precluded from sort of going to a fall-back position of whānau when they filed in the name of a purported hapū, are you, or are you?

MS UDY:

Well, that might be the practical effect of the statutory bar but what we're saying is if the Edwards whānau had come to the Court and said: "We wish to receive a PCR as a whānau in accordance with tikanga," they would have needed to advance evidence to show that as a whānau the tikanga at play on the ground was that they were the people entitled as a matter of tikanga to carry out these practices, whether or not that was in a very reciprocal relationship –

KÓS J:

But is that the first stage or the second stage in Justice Williams' approach? It seems to me what you're doing is slamming the door in their face whereas another approach might be to let them in through the door and then evaluate their standing then in the second stage.

MS UDY:

We say the standing has been evaluated by the High Court.

WILLIAMS J:

Well, that's as to whether they're hapū. But what doesn't seem to have been resolved is whether any of the rights claimed are rights properly attributed to the descendants of Paku Eruera, whatever those rights may be, and that may be the end of the game if all they're doing is running a generic customary rights case under the heading of Ngāti Muriwai rather than saying: "These are the particular rights of the descendants of Paku Eruera." But that's what tikanga would require.

MS UDY:

Yes, and I think we do need to be careful about referring to Ngāti Muriwai as only being the descendants of Paku Eruera, and if I could return to the partition

of the Ōpape 3A block. So Paku Eruera was the one that was leading that partition but the grant was to 22 people, I believe, so I think 11 adults and 11 children, and they also included his Uncle Purekapa, so it was all his relatives.

WILLIAMS J:
What year is this?

MS UDY:
This is – the titles were officially issued in 1881, but it's not clear at exactly what time this solution of partitioning them off into their own area was decided upon. So we say that you'd have to be able to look at the people making a claim, looking at the particular relationships between them, and it maybe since the 1880s a very strong whānau identity has remained, or it might be that these are just relations, but at that point the applicant group definition of "iwi, hapū and whānau" starts to fracture down into essentially allowing individuals through the door.

WILLIAMS J:
Why?

MS UDY:
Because the claim is that they are a group of related individuals, and you need to be able to say, well, we're a whānau or we're a hapū, and they've said we're a hapū.

WILLIAMS J:
Why, are they saying we're the descendants of those 22?

MS UDY:
That is my understanding, but the point is not –

WILLIAMS J:
It's a bit like the Ngāi Tahu list.

MS UDY:

Well I won't go there your Honour. Perhaps I'll refer to the evidence of Mereaira Hata who pointed out that not all members of the Edwards whānau support Ngāti Awa an Dr Amoamo made a similar point in the evidence, and I can give you the reference to, I won't take you there, but I can give you the reference to Ms Hata's evidence if you would like.

WILLIAMS J:

It's kind of a different point, isn't it, these things can get messy but if we just accept that there is a subgrouping here, at the least there is a subgrouping here of Ngāti Rua, who are the descendants of those probably 11, because the 11 children will be children of the 11 adults. Then they're just going to have to prove they've got rights, and that's quite a steep, that'll be quite a steep path I would have thought.

GLAZEBROOK J:

Well is your point that they didn't do that and that therefore the, I think probably the hapū thing is irrelevant apart from in relation to CMTs, but is your point really that they didn't prove that they had those rights at tikanga, that would then give them a PCR, and that therefore it was wrong for those to be issued?

MS UDY:

Yes.

GLAZEBROOK J:

I think we're getting tied up with hapū and relationships and it's not overly helpful in this context.

MS UDY:

Yes your Honour, and that's the point we make in our written submissions, that the focus needs ultimately to be on the substance of the rights that are being claimed, and not the labels precisely because, the point that Justice Williams made, that these things are permeable in terms of who attracts those labels. I think our fundamental point here is that the case for Ngāti Muriwai in the

High Court was advanced on the basis that they have a particular kind of authority, that is mana whakahaere. That is the concomitant fact of their claim to be a hapū. They didn't make any claim to any other kind of rights, and so they were found to not be a hapū and not have that kind of authority. But where Justice Churchman went wrong was, and then this was picked up by Justice Miller, was simply assuming that because they hadn't proven that status, that type of authority in rights, that they must have some lesser form of rights or authority that would ground a PCR. Whereas we say the evidence from Dr Amoamo in particular, as was endorsed by the pūkenga, was very clear. That they do not have that status, and it is a bare assertion of authority that has not been recognised within the broader community, and that's why I referred to that passage of the *Stage Two* judgment just to make that point, that if this Court –

GLAZEBROOK J:

Are you saying they didn't say anything about the particular PCR rights that they were granted?

MS UDY:

So there was evidence from Ngāti Muriwai witnesses that they were carrying out certain practices, that is certain activities, so it was evidence, affidavits talking about going to the beach as children and collecting the firewood, and the like, and that's the type of PCRs that were granted. But we say the point is that section 51 does not just refer to activities. It refers to rights.

1530

If we could perhaps bring up section 51. So it says here that a protected customary right is a right that has been exercised since 1840; and continues to be done so in accordance with tikanga. Our point is that Ngāti Muriwai have shown that they are a group of related people and that's where the assumption that they are a whānau comes from, and I don't intend to quibble with that necessarily but rather the more fundamental point is that tikanga rights exist in a constitutional framework. If they don't then tikanga doesn't mean anything. It exists in that world, and Justice Churchman and Miller J in the Court of Appeal

leapt over that “in accordance with tikanga” requirement and went straight to looking at as a matter of fact was there evidence that these people were carrying out the activities but didn’t engage with whether or not they’re being carried out as a matter of right at tikanga.

GLAZEBROOK J:

And why weren’t they being carried out as a matter of right?

MS UDY:

Because we say that the rights belong to Ngāti Rua because they are based on Ngāti Rua whakapapa and that was what was made clear in evidence that the whakapapa claimed by Ngāti Muriwai was Ngāti Rua whakapapa, and so Ngāti Rua – and we’ve heard a lot of discussion throughout the hearing of the fact that rights –

GLAZEBROOK J:

So what you’re saying as a matter of fact the rights were Ngāti Rua rights and not – and if the whānau, for a better word, or the group of descendants of those 11 were carrying them out they were carrying them out through the authority of Ngāti Rua, is that the submission, as a matter of fact?

MS UDY:

Yes, your Honour, I think that’s the crux of the submission and that’s why we say that that continuity point becomes important here because factually there is no Ngāti Muriwai in 1840 and so in order for them to have evolved as a group such that they could now be the true successors, if you like, of those who were exercising the authority under that whakapapa in 1840, they would need to show that there was recognition by that antecedent group which remains, Ngāti Rua, that Ngāti Muriwai were exercising those rights in accordance with their authority and our –

GLAZEBROOK J:

Their authority being Ngāti Muriwai?

MS UDY:

Ngāti Rua's authority.

GLAZEBROOK J:

Well, what you're – if you accept that you could have rights at whānau level then if they're exercising them under the authority but they have become their rights then presumably they could get a PCR.

MS UDY:

I would draw a distinction there, your Honour, between the exercise of rights and the source of rights.

GLAZEBROOK J:

No, I understand the distinction.

MS UDY:

Yes. So we say the source of the rights is Ngāti Rua and they have not allowed as –

GLAZEBROOK J:

So they'd have to be shown that it's an independent right?

MS UDY:

Yes, so I wouldn't even go as far as referring to it as "an independent right". It would be a right that would exist in the relational space between the hapū and the whānau and I use that language deliberately because I don't intend to say that hapū as a matter of fact have to grant consent. In terms of the complex matrix of tikanga rights at place it's often the fact that it's so well established that a certain whānau might have certain rights in a place that it would be difficult to say where the source of the right is but it exists in the relationship.

GLAZEBROOK J:

Could they get a PCR?

MS UDY:

Your Honour, who do you mean by "they"?

GLAZEBROOK J:

Well, you said it may be totally established as a matter of fact that certain whānau have those particular rights that they have exercised. Could they get a PCR? I'm trying to work out where the boundary is because whānau must be able to get PCR –

MS UDY:

Yes, we don't dispute that.

GLAZEBROOK J:

– because if they can apply they must be able to get them.

MS UDY:

Well, I'm not sure that I would actually put it that far in terms of that logic, your Honour, but in theory yes, they can come through the door, but it's a matter of reality. It's conceivable that wouldn't be the case but I don't put it that far because I do in fact accept that it is the fact that whānau can get PCRs. I just wouldn't base it on that logic necessarily.

If I could perhaps give an example, so Te Whānau-a-Mokomoko were granted PCRs by the High Court and the difference – and they are a whānau that associate with all the different hapū of Te Whakatōhea, and we say that the difference between Te Whānau-a-Mokomoko and Ngāti Muriwai is that Te Whānau-a-Mokomoko recognises their relationships with the hapū, they recognise that the hapū exercise mana whakahaere at place, and so the PCR rights that they were granted were granted in accordance with tikanga because they were acknowledging that authority and acknowledging that their – their right to carry out these practices existed in relationship to that broader community, and Ngāti Muriwai don't accept that. They say: "We're not a whānau of Ngāti Rua, we are a whānau that affiliates separately somehow to the iwi." And so I return to the point that the iwi identity doesn't exist without

the hapu, and so Ngāti Muriwai have taken themselves outside of the framework of the legal system, of that constitutional system, and made their assertion as to rights without locating themselves within the parameters of legality, to refer back to the *Nikora v Kruger* quotation.

WILLIAMS J:

Can I ask, the evidence in support of the Ngāti Muriwai application in respect of PCRs and CMT, was it primarily identity-based or was it user-based, i.e. activity-based?

MS UDY:

Do you mean – do you mean in the sense that were they claiming – was each individual witness claiming to be of Ngāti Muriwai, or?

WILLIAMS J:

No. So the two kinds of evidence that one would get is evidence that "this is our identity", and then evidence of "this is what are our distinctive rights".

FRENCH J:

"What we do".

WILLIAMS J:

Yes.

MS UDY:

Sure.

WILLIAMS J:

So what was the evidence of distinctive rights of that group as opposed to the others?

MS UDY:

"The others" being the hapū?

WILLIAMS J:

The other groups, yes.

MS UDY:

So in one sense there was evidence of both in that much of the affidavit evidence for Ngāti Muriwai was related to the practices, so carrying out the collection of the firewood, carrying out the whitebaiting, but all of those witnesses were very clearly identifying themselves as Ngāti Muriwai, and that's about as far as the evidence goes. It's not very sophisticated on that point.

WILLIAMS J:

On the distinctiveness?

MS UDY:

Not –

WILLIAMS J:

No suggestion that they were doing it to the exclusion of others?

MS UDY:

No, but there is a suggestion that they were doing it as Ngāti Muriwai, so all those witnesses –

WILLIAMS J:

Yes, I understand that. That's identity.

MS UDY:

Yes, and so that's what I mean, there's both –

WILLIAMS J:

I'm talking about the actual activity.

MS UDY:

Yes.

WILLIAMS J:

So the Mokomokos, how did that evidence go?

MS UDY:

So that evidence was very clear that they recognised the –

WILLIAMS J:

I'm not talking about identity. I'm talking about the activities.

MS UDY:

I'm not as familiar with the evidence for Mokomoko to be able to address your Honour on that particular point in terms of their PCRs.

WILLIAMS J:

See, if it's accepted that the Mokomokos can undertake collecting activities in concert or sharing those or however that's articulated with other hapū without that causing ructions, they can have distinctive rights, it kind of suggests it's harder to argue that a group that you might see as rebellious can't claim distinctive rights also if they're doing it in concert in the same way as the Mokomokos are. It then becomes actually just an identity punch-up with not much at all to do with the PCRs and the CMTs.

MS UDY:

Well I –

WILLIAMS J:

Because you're not actually fighting over those things, you're only fighting over whether they can leave the paddock or not.

MS UDY:

Well –

WILLIAMS J:

This is a political fight, not a rights fight.

MS UDY:

Yes, your Honour. So we would accept that this is an identity punch-up, to use your phrase, but we say –

WILLIAMS J:

But it's got not much to do with the kaimoana or the inanga.

MS UDY:

So that's where I refer back, though, to that wāhi tapu example in that if you have a group that is –

GLAZEBROOK J:

Well you'd never get one there, would you, even if you're claiming it.
1540

MS UDY:

And that's the point your Honour, is that the grant of these rights actually has practical impacts on the community on the ground.

GLAZEBROOK J:

Well it doesn't have much of a practical impact because I can't think of any world where you'd be given a PCR over a wāhi tapu area.

WILLIAMS J:

The point in that case was that that group didn't know it was a wāhi tapu perhaps.

GLAZEBROOK J:

Which showed itself that it didn't actually have the right in the first place, I would have thought.

MS UDY:

But that was only because Ngāti Rua intervened as the knowledge holders and the kaitiaki in that space to identify that that was a wāhi tapu and was inappropriate for a PCR to occur there, and the point being that it might be wāhi

tapu in that context, but in another context it might simply be that in the area could be where a PCR had been granted, might be being over-fished, well again it's not fishing rights, but the gathering activities there, say it was seagrasses or the like, for rongoā purposes was being over-utilised, and if you have broader authority within that community saying, we also have, we exercise kaitiaki over that, we protect that, and whānau who make up our community are the ones actually going out and doing the activities, if you have a whānau that says, we don't recognise our relationship with the community, then there's, those tikanga controls the reciprocal relational balance is lost, and so they're not actually exercising the right in accordance with tikanga, so it's the fact that they, the identity punch-up therefore is important in terms of how the rights, however minor these PCRs might be characterised as, do affect the community, and that's –

WILLIAMS J:

So your point is that the other separate PCRs have accepted the overall mana whakahaere of the hapū and it's dangerous to allow one to proceed within this rohe that does not.

MS UDY:

Yes and perhaps to zoom out from just the PCRs discussion in terms of the, and I would refer to the poutarāwhare that the pūkenga adopted to describe how these tikanga relationships are playing out at place. The point there was that every individual is included in the community, and my friends talked you through that poutarāwhare construct, but just so that we're all on the same page, what that construct is envisaging is a whare that is being held up by six pou who are the hapū who exercise the mana whakahaere at place and all the individual members of the community and the whānau who sit in that relationship come into the whare. So nobody is left out. No one is being said you can't go and do these things. It's simply saying you have to do them in accordance with law, in accordance with the authority at place, and that's really the crux of the issue for Ngāti Rua here.

KÓS J:

We've probably tested that as far as we can. Oh, perhaps not quite.

ELLEN FRANCE J:

Sorry, I just have one question. Did you have any submission you wanted to make in relation to Professor Walker's text, which does refer to Ngāti Muriwai being counted in the register of Whakatōhea in 1874 I think.

MS UDY:

Yes, I can address that your Honour. So we say that on the factual record it's not exactly clear when this dispute between Paku Eruera and Ngāti Rua occurred. We know that it 's sometime between the 1870s and 1881, and we say that because 1870 was when Commissioner Wilson first allocated the blocks on the Ōpape Reserve between the six hapū, and then in 1881 was when those legal titles were – or the legal title of Ōpape 3A, or the Ngāti Muriwai block was finalised, but there's no clear evidence of exactly when the sheep dispute occurred, and the nature of these types of title allocations were very much that they weren't necessarily finalised within the Court system, often for years after they had been split off as a sort of matter of practical fact, and perhaps to round out the kōrero on the historical discussion, I'm conscious I actually didn't spend much time on the point that it was in the 1990s that the name "Ngāti Muriwai" was picked up, or to use the words of Ranginui Walker in that book, in his text, was revived by Claude Edwards, that name, after he lost his position on the Whakatōhea Māori Trust Board as the representative for Ngāti Patu, I believe, and so –

WILLIAMS J:

Not Ngāti Rua?

MS UDY:

No. So my understanding is that there's also Ngāti Patu whakapapa there but as Dr Walker notes in his book he also wasn't welcome at Ngāti Rua, and those are Dr Walker's words, not mine. We just underscore the point here that while this factual history is interesting in context, it is ultimately irrelevant because the

point is we say Ngāti Muriwai do not hold or do not have hapū status now, and so just to refer to the section 58 point, we haven't touched on that much, I would just make or illustrate the point that Justice Miller seemed to get caught up in the second limb of the section 58 test in suggesting that Ngāti Muriwai as a whānau should perhaps be included in some form on the title with reference to the fact that they, although they didn't exist in 1840, to return to Justice Kós' point from this morning –

GLAZEBROOK J:
I actually thought the finding was the opposite on that.

KÓS J:
Yes, I…

GLAZEBROOK J:
I actually thought it was found they weren't a hapū and shouldn't be included.

MS UDY:
Yes, that was the factual finding, your Honour.

GLAZEBROOK J:
But I thought it was the legal finding as well in terms of CMT.

MS UDY:
Yes, yes, absolutely.

GLAZEBROOK J:
So I'm not sure what the point is.

MS UDY:
Well, perhaps if we go to paragraph 280, the point is that despite that legal finding, which Justice Miller –

GLAZEBROOK J:

Well, yes, because you said you were going to come back to that. Is that what you're coming back to, what that means in terms of them taking part in the re-hearing?

MS UDY:

Yes, well, we say that there's no need to have a re-hearing on this point because not just a purely factual issue. The legal finding that we ask this Court to uphold is that customary title sits at the hapū level and so because of the factual findings that Ngāti Muriwai are not a hapū they cannot meet the section 58 test, and that is what Justice Miller recognised at paragraph 280 here in –

KÓS J:

But, Ms Udy, he's simply saying they can participate in the re-hearing and be heard on it. That's how I read it. I don't…

GLAZEBROOK J:

That's how I read it as well. I don't read it as anything other than that.

MS UDY:

Well, at 281 there, your Honour, it says they may participate –

GLAZEBROOK J:

We're being asked to say that they should be reheard on the hapū issue, there's no doubt about that, and you're saying they shouldn't be.

MS UDY:

Well, I don't read paragraph 281 as referring to a re-hearing. It's referring to them being able to participate in a recognition order granted to an applicant group of which they form part and Justice Miller went as far as to record that in the actual orders at the front of the judgment. So this is why we say there's some ambiguity in what Justice Miller –

WILLIAMS J:

What did he mean?

MS UDY:

In what did he mean, yes, because he's saying there that" "Their participation in CMT," and again I point out that that's just referring to holding CMT, it's not referring to a re-hearing specifically, "ought to be resolved among a successful applicant group of which they form part and in accordance with tikanga," and that's where the rubber hits the road because the tikanga has already decided that they don't have any formal part to play as Ngāti Muriwai. They are recognised as part of the poutarāwhare as members of Ngāti Rua.

GLAZEBROOK J:

But they would certainly have a right to participate as part of Ngāti Rua, wouldn't they?

MS UDY:

Yes, the individual people would but the point we're making here is that –

WILLIAMS J:

If that's what Justice Miller meant, that's okay.

MS UDY:

Yes, absolutely, we accept that, but –

GLAZEBROOK J:

But I would have thought that's what he did mean, that – myself.

MS UDY:

And Justice Churchman in effect adopted that interpretation in a minute in regards to the re-hearing on the 8th of March where he said no, Ngāti Muriwai can't participate in the re-hearing because the findings have been made and all that Justice Miller meant was, in relation to Ngāti Muriwai's status as a matter of fact in law, and all that –

WILLIAMS J:

They can't participate at all?

MS UDY:

Not as Ngāti Muriwai.

1550

WILLIAMS J:

What, they have to sort of put Sellotape over their t-shirts, or?

MS UDY:

Well I suppose in effect that means that the people who have had carriage of the Ngāti Muriwai claim cannot participate, if I'm understanding that correctly, because the mana sits with Ngāti Rua. And so my learned tuākana Ms Feint earlier referred to the fact that the authority of Ms Hata to lead the Ngāti Muriwai claim arises out of hui-a-hapū at Ōmarumutu Marae, and so we say that's how these individuals can participate, they can be a part of the community life at Ōmarumutu Marae.

WILLIAMS J:

Oh, so you're saying Ngāti Muriwai, ka… kua – Ngāti Muriwai aren't allowed in the door?

MS UDY:

Yes, that is the point, because – and I return to the fact that they are asserting a kind of authority that is akin to hapū status, mana whakahaere, but are trying to hide that under the label of "whānau".

WILLIAMS J:

Well that – yes, absolutely. That may be very annoying, but that doesn't mean you can keep them out of court.

MS UDY:

Well we do say it means – well yes, as a matter of practical reality you can't keep them out of court in the sense that they have come before the Court, but we say you can keep them out of the orders that the Court makes.

FRENCH J:

So they can't – I understand paragraph 281 to be saying that if the applicant group – which is the people you represent – are successful, that these people can participate in that order, if your clients are successful.

KÓS J:

Exactly.

FRENCH J:

So are you saying they don't get the benefit of it at all?

MS UDY:

Not at all. We say they get the benefit as part of the poutarāwhare as hapū members of Ngāti Rua, but why this is ambiguous and it's not necessarily clear on the face of paragraph 281 itself, is Justice Miller refers there to his discussion at paragraph 204, and if we perhaps go to paragraph 204, this is a generalised discussion of Justice Miller looking at the meaning of the test, and he's – it's under the heading, perhaps if we scroll up to about paragraph – oh, 197. So he's talking about what does the "applicant group" mean in terms of shared exclusivity. And so we need to be careful in paragraph 281. When he's talking about "applicant group" he's not meaning a hapū, he's talking about the fact that an applicant group can be made up of multiple groups, and that's what the section 9 definition says, it can be "one or more iwi, hapū, or whānau".

And he goes on in this section, if we then turn back to paragraph 204, to accept that you can have multiple groups within an applicant group because, one, that allows for the recognition of shared exclusivity, and at paragraph 205 allows groups to avoid the "fragmentation of title" which has been the vexed issue in these kind of customary title issues for so long, but he also says at the end of

paragraph 204 – if we could just scroll back up slightly Mr Fletcher, thank you – that you can also have multiple constituent groups in an applicant group as long as one of them "has exclusively used and occupied each part of the area since 1840". And in my friend's submissions for Ngāti Muriwai, what they say this means is that they can join an applicant group regardless of whether or not Ngāti Muriwai can satisfy the section 58 test and therefore be granted CMT in that way.

And we say, to return to what I understood Justice Kós' characterisation of this to be earlier, is that Justice Miller is referring to the fact that MACA can accommodate changes in iwi, hapū, or whānau groups who weren't there in 1840, but the whakapapa has reorganised itself consistently with tikanga processes, but the problem is that Ngāti Muriwai are saying this means they can hold a CMT even though they don't satisfy the first limb of section 58, being that they don't hold an area in accordance with tikanga currently because of the factual findings that they aren't a hapū.

KÓS J:

Well that's certainly not what paragraph 281 is holding open to them.

FRENCH J:

No, nor paragraph 282. Because they don't –

MS UDY:

Yes, we agree with that.

FRENCH J:

They don't meet the statutory criteria "in their own right" but they are members of a bigger group, and how to the – their participation has to be resolved among the successful applicant group "of which they form part and in accordance with tikanga".

MS UDY:

Yes, and it's the "accordance with tikanga" part that does the work there. What tikanga has resolved is that they can participate as the individuals and the whānau can participate as members of the Ngāti Rua community because Ngāti Rua is the successful applicant in that context, but they can't get some sort of formal recognition as Ngāti Muriwai because that amounts to the Court bestowing identities –

WILLIAMS J:

What kind of formal recognition are you talking about?

MS UDY:

Well it is unclear to us –

GLAZEBROOK J:

It could just be conditions, couldn't it? Because you've got to fight with these people, you can't exclude them from the CMT. You can't say at the same time they're part of Ngāti Rua and then say, but nyah nyah, you are saying that you're separate so you don't get a look in.

MS UDY:

The problem with that, your Honour, is that is sort of putting the cart before the horse, because what those particular members of the hapū community might do will be dependent on what the community decides. So…

WILLIAMS J:

But they're a section of the community –

MS UDY:

Yes and so they participate in community decision-making, but that doesn't mean – and we say that would be the problem if there were conditions on a CMT that said you can't exclude them from the CMT. I'm not sure what that would mean.

WILLIAMS J:

From what, what do you mean can't exclude them?

MS UDY:

The customary marine area, and I mean I'm not sure what that would mean because it would depend on how the successful applicant group chooses to utilise the grant of CMT to them, but if we turn to the example of the resource consent rights under CMT, those are effectively veto rights, if you had conditions on a CMT that was saying, oh but you can't exclude this section of the community, does that mean that they have a particular influence and mana in the community decisions to say yes or not to a resource consent.

WILLIAMS J:

Except the fact is as a matter of tikanga you can't exclude them. That's the –

MS UDY:

No, and we're not saying they're excluded, they're part of that decision-making.

WILLIAMS J:

There you go. Well as long as you don't exclude them then the decision is the decision. We all know, let me speak about my own experience, there are some whānau that are just, you know, drive you nuts.

MS UDY:

Yes. Well perhaps your Honour –

WILLIAMS J:

I'm not suggesting this is one, I'm just saying you still include them in all the huis, and all the decision-making, and they either agree or disagree, but ultimately there's a decision made.

MS UDY:

Well perhaps, your Honour, I could refer to a well-known example of community decision-making in the decision that was being led by Sir Hepi Te Heuheu to

amalgamate the lands of Tūwharetoa, and all the whānau gathered together to make a decision on this, and the resolution came back that it was 80% of people in support, 20% not in support, and as rangatira do in terms of the consensus decision-making, the motion failed, which in a western conception of community decision-making seems bizarre because you would say 80% in support is a clear win. But the point was one whānau, that 20% being one whānau, was sitting outside of the group and so as a rangatira Sir Hepi Te Heuheu knew that if he couldn't get that consensus, then this decision would never stick, and as a result what happened is that the other tikanga principles operation in the system, the whole system come into play, so that whānau goes out and the force of whakamā whanaungatanga come into play so that they come back in and say, okay –

WILLIAMS J:

Just the refreshing effect of a nice cup of tea.

MS UDY:

Well I don't know if there was tea involved in that.

KÓS J:

I suspect it's the refreshing existence of a lack of conditions. I mean the title – the simpler the title the better so that tikanga can determine what on earth happens when these internecine battles erupt.

MS UDY:

Yes, and we say tikanga has, is at work here, and that the Court would be artificially interfering to recognise this Ngāti Muriwai authority that actually doesn't exist at that level, they exist in the life of the community and in accordance with the cautions, the strenuous cautions in the *Ellis* judgment, we simply ask this Court to let tikanga do its work.

WILLIAMS J:

I read Justice Miller's paragraphs to say exactly that.

KÓS J:

Yes, I think that's right.

MS UDY:

In which case we're perfectly happy with that, if this Court would clarify perhaps that this doesn't mean that the Ngāti Muriwai identity is uplifted –

WILLIAMS J:

It's a CMT.

MS UDY:

Or that the Ngāti Muriwai identity is recognised. The people within that identity –

WILLIAMS J:

The Ngāti Muriwai identity is the Ngāti Muriwai identity. They don't seem to be going away. Whether they're hapū or whānau doesn't really matter. They, you know, they're pushing the identity, and no one is going to stop them, least of all us.

1600

MS UDY:

Well we say it's not a matter of you stopping them, it's a matter of the Court emboldening and opening the gateway, and I return – in our written submissions we refer to that quote from *Nikora v Kruger* to make the point that yes, as in reality, the way somebody chooses to self-identify internally means very little. It's a label. But when that identity is given the imprimatur of a court order, when those court orders are being made in the context of an Act that's seeking to recognise a tikanga legal system and that identity hasn't been able to establish itself within the four corners of legality in that system, that is doing something different than simply saying your identity is your identity.

WILLIAMS J:

Did you appeal their PCR?

MS UDY:

Yes, that's what this appeal is.

WILLIAMS J:

I see. I thought you were talking about the CMT.

MS UDY:

So we have appealed the PCRs. Ngāti Muriwai have appealed the CMT.

WILLIAMS J:

I thought you were just responding to the CMT.

MS UDY:

No, we're approaching both issues, your Honour.

WILLIAMS J:

Okay, right.

MS UDY:

So I think that's – yes, it's 4 o'clock so unless your Honours have any other questions on those points perhaps we leave it there for this afternoon. I am conscious that my friend, Mr Mahuika –

GLAZEBROOK J:

When you say leave it there for this afternoon, have you got more that you want to say?

MS UDY:

Perhaps I will defer to my learned tuākana, Ms Feint, on that point, your Honours.

WILLIAMS J:

I think if you've got more that you need to say.

GLAZEBROOK J:

Yes, sorry.

MS FEINT KC:

As someone who had the benefit of acting throughout the trial, I would like to address the Court on some of those factual issues, but I wouldn't be more than 10 minutes, I don't think.

WILLIAMS J:

Which factual issues?

MS FEINT KC:

Well, for instance, Justice Kós asked a question about the Te Kaha reference in Ranginui Walker's book.

GLAZEBROOK J:

I'm not sure you're actually –

MS FEINT KC:

Does this microphone not work?

GLAZEBROOK THE:

We can hear you but I'm not entirely sure you're coming through for the transcript.

MS FEINT KC:

Yes. I would like to address the Court but probably for not more than 10 minutes just on some of the factual issues so that –

GLAZEBROOK J:

And then that's the end of those submissions, so 10 minutes and – well, you are –

WILLIAMS J:

Still ahead then, aren't we?

GLAZEBROOK J:

You are down, I think…

WILLIAMS J:

For tomorrow morning, yes.

KÓS J:

Well, part of tomorrow morning.

MS FEINT KC:

Also I had agreed with my friend, Mr Sharp, that because we're both appellants and respondents we thought if we both did our appellant and respondent submissions –

WILLIAMS J:

Do a joint reply?

MS FEINT KC:

Joint – I'm sure we could agree on that. No. I've agreed to Mr Sharp having a right of reply to us, so we…

GLAZEBROOK J:

So how is that going to work in terms of our timetable?

MS FEINT KC:

Well, I think we're still within time because we –

GLAZEBROOK J:

No, I think we are. It's just I'm not quite sure who's talking when and why. Maybe, why don't you overnight redo this and tell us who's got what time tomorrow morning?

WILLIAMS J:

We also need to know how much time the replies in the afternoon are going to need. Do they remain accurate, those estimates of time?

MS FEINT KC:

I think so.

WILLIAMS J:

That's comforting.

MS FEINT KC:

So I'm imagining –

GLAZEBROOK J:

Well, I was meaning the whole day, if you can just do a revised timetable for the whole day with actual times, not, you know, "we're sharing this", just sort of "I'm 10 minutes".

KÓS J:

And perhaps a recognition that replies are brief and focused.

GLAZEBROOK J:

Yes, replies are replies. They're not a chance to re-put the case.

MS FEINT KC:

Understood. Ma'am, well, we'll revise this timetable overnight.

GLAZEBROOK J:

It would be just helpful because what we don't want to do is to get to the end of the day and find that we've got a number of replies that we haven't managed to allow proper time for.

MS FEINT KC:

I think we've knocked out Landowners Coalition and Seafood Industry Representatives, haven't we, so it's really only the appellant.

KÓS J:

And we're hearing Mr Mahuika? We're hearing Ngāti Porou. Are we hearing Mr –

WILLIAMS J:
Ngāti Porou, yes.

MR MAHUIKA:
I was actually going to ask about that after my friend had finished but I –

WILLIAMS J:
You'll need a microphone.

MR MAHUIKA:
I was simply going to ask whether or not we have been given leave to make submissions, and actually in the light of everything that's been dealt with over the last few days, if we do have leave, if there are any particular matters that you would want me to focus the oral presentation on.

The reason I ask that question is that, I mean apart from the bespoke set of Ngāti Porou agreements, which potentially cast some light on how the test might be applied, there's also the fact that I think there are 19 customary marine title areas that have been recognised and confirmed, and 18 of them are in Ngāti Porou. So there are some, there are potentially, although we don't focus on things like substantial interruption, there are some matters relating to those areas which perhaps, if your Honours are interested, I could talk to in terms of how the test has been practically applied in respect of those different areas.

WILLIAMS J:
That might help.

MR MAHUIKA:
So I could make that more the focus than talking about test, which you've heard about for seven days, and I imagine you don't want to hear a lot more about it.

KÓS J:
I don't imagine you're going to say the opposite of what you said three days ago?

MR MAHUIKA:

No, no, I'd probably just say the same thing and reinforce it.

KÓS J:

Yes.

MR MAHUIKA:

But I take it from that, so you don't want me to do that, so…

GLAZEBROOK J:

I think that would be – I think everybody thinks that would be helpful, but what we need is to just make sure we've got the timetable, and that everybody is fitting into tomorrow.

MR MAHUIKA:

I think I share that middle session, in terms of the timetable, under the subject of leave with Mr Pou, so perhaps I could have a discussion with Mr Pou overnight and then communicate where we get to, to Ms Feint, for the purposes of providing the update to the Court.

GLAZEBROOK J:

Yes, so if we just have a Friday timetable, that would be useful, and if we finish early on Friday, all to the better, for everybody I suspect.

MR MAHUIKA:

Yes.

WILLIAMS J:

Can I just say, from my point of view, it would be helpful if I heard from Ngāti Porou what are the things that present difficulties in terms of the practical issues that have to be worked through with CMTs and how they are worked through, I don't mean in the negotiations, but what mechanisms or wordings or whatever are used to resolve them?

MR MAHUIKA:

Well I can perhaps use as an example, I do have some maps which are not the record, which perhaps could be produced on the record, because it would be, perhaps if you were wanting to go through that process, easier to talk to the maps rather than to use the references that are in the recognition order.

WILLIAMS J:

Mmm.

MR MAHUIKA:

And there is a, the reason there are 18 areas, because there's in fact a contiguous area that runs from the Awatere Stream, which is by the Te Araroa township, east to East Cape, and then down that coast as far as, I think Waipiro Bay, largely broken out to three nautical miles as a consequence of the ongoing process of negotiation.

WILLIAMS J:

And they're contiguous.

MR MAHUIKA:

They are…

WILLIAMS J:

Hapū by hapū are they?

MR MAHUIKA:

I think they are but you can see from the order, first of all how the different trusts are organised, and then secondly, how the position of the individual hapū is recognised in terms of the order and you can see, because there are a couple of areas where there were, there were areas immediately adjacent to the coast where there wasn't initially agreement around the existence of CMT. So there are a couple where there was part 1, and then part 2, when there was agreement to those closer areas later on, and that has to do with the road. It's also an area where there were historical townships at the coast before

State Highway 35 was built so there's, of course, a substantial interruption discussion that occurred in the context of what do those townships mean and…

WILLIAMS J:

I presume those were Māori townships?

MR MAHUIKA:

No they weren't Māori townships but, for example, there's the Tūpāroa township, which was the, where the township in the vicinity of Ruatōria was located. State Highway 35 is an inland road at that part of the East Coast, so the township relocated from Tūpāroa to Ruatōria in about 1920.

WILLIAMS J:

Right.

MR MAHUIKA:

But there was a township that existed there for a period of time, a period of decades, and so the issue of substantial interruption arose in the context of that discussion.

WILLIAMS J:

I'd also be interested to hear about whether there are any PCRs dotted amongst it. Don't give me the answer now.

MR MAHUIKA:

The answer is no.

WILLIAMS J:

Oh okay. Give me the answer now then.

GLAZEBROOK J:

Thank you we'll adjourn until tomorrow at 10 am.

COURT ADJOURNS: 4.10 PM

COURT RESUMES ON FRIDAY 15 NOVEMBER 2024 AT 10.04 AM

KARAKIA TIMATANGA (DR TE RIAKI AMOAMO)

GLAZEBROOK J:

All right, I think we've got the timetable.

MS FEINT KC:

Mōrena e ngā Kaiwhakawā o te Kōti. Tēnā koe e te kaikarakia Matua Te Riaki, otirā, tēnei te mihi atu ki a koutou kua huihui mai nei i te rā mutunga.

The last day. So yes, sorry, we haven't got a written timetable. It takes longer to negotiate than you would expect, but the morning session will be me for 15 minutes and then Mr Sharp and then the remaining hour, or just over an hour, Ms Cooper for Te Upokorehe and then Mr Pou and Mr Mahuika have agreed that they will share that middle session equally between them and then that leaves the afternoon session for replies. So the Attorney-General has indicated they only need five minutes to respond to specific appeals and that leaves an hour and 40 minutes for the replies of the appellants, so that gives everyone approximately 20 minutes each.

GLAZEBROOK J:

Can you just let us know what order that is going to be in?

MS FEINT KC:

We're proposing the reverse batting order of the order that we appeared in. So we've got WKW, Te Upokorehe, Te Kāhui and then the Attorney-General.

GLAZEBROOK J:

All right, that's the order. Yes, thank you. The Attorney-General again? Yes, at the end.

MS FEINT KC:

The Attorney-General to reply.

GLAZEBROOK J:
Yes, all right.

MS FEINT KC:
So to cut straight to the chase then, so in relation to Ngāti Muriwai, I don't want to cut across the good work that Ms Udy did yesterday but I did want to underscore some of the factual issues because they're quite complicated and I didn't want the Court to go away without being clear as to the facts.
1010

And I wanted to mention, I meant to mention this last week and I forgot, that we call Te Riaki Amoamo "Dr Amoamo" and he doesn't call himself that because he's a very humble man, but he was awarded an honorary doctorate last year or the year before by Te Wānanga o Awanuiārangi in recognition of his expertise in both the whakapapa and history of Te Whakatōhea. And in a nice twist Dame Tariana Turia, who was of course one of the architects of the MACA Act, was awarded an honorary doctorate at the same session.

So I wanted to begin by explaining that we really need to underscore that this is not a case where there are simply different historical traditions based on different oral histories with hapū contesting those oral histories between them. This is a case where there's virtually no historical records concerning Ngāti Muriwai, and Ngāti Muriwai don't have historical traditions of their own. So you'll see in the evidence that they've constructed narratives which are based on snippets of information that they've gleaned from various sources, and those narratives are not only mutually inconsistent, but they're also demonstrably false. Some were found to be clearly incorrect by the High Court and other facts were not proven.

And that distortion of the whakapapa and the history of Ngāti Rua has resulted in a visceral reaction from the keepers of knowledge within Ngāti Rua, and that's why there's been such a strong response to the Ngāti Rua claims to customary rights, because by distorting the whakapapa and history of Ngāti Rua they are undermining the mana of Ngāti Rua, and that's why this is really a

hotly-contested claim, and as Mr Sharp said yesterday, consumed a significant amount of the evidence in the High Court.

I wanted to underscore this claim, this MACA claim, is the first time Ngāti Muriwai have ever claimed customary rights at any time in the Ngāti Rua rohe. So although Paku Eruera made various claims in the Native Land Court in the 19th century, he never did that as Ngāti Muriwai. He always claimed either through Ngāti Rua or through Ngāi Tai or through Pananehu, is the other name you see, and Pananehu was the hapū that preceded Ngāti Rua, and that's set out in Dr Amoamo's evidence.

Further, there are no factual findings made in favour of Ngāti Muriwai apart from the fact that Ōpape 3A was carved out of the Ngāti Rua Ōpape 3 block after the dispute over Paku Eruera running his sheep, and that appears to be the – there are only two records in the historical documents that refer to Ngāti Muriwai. One are the records about Ōpape 3A being created and the other is the 1874 census that Mr Sharp took you to yesterday.

GLAZEBROOK J:
That's the land block being created, is it?

MS FEINT KC:
Yes.

GLAZEBROOK J:
Yes.

MS FEINT KC:
So the land block 3A was created after the blocks had been allocated to the six hapū of Whakatōhea, and it was created by the Commissioner in response to the dispute over the sheep, so it's not clear whether it was done with the agreement of Ngāti Rua. So there's only those two historical records that refer to Ngāti Muriwai, otherwise the narrative is consistent with the understanding that Ngāti Muriwai was the name given to that block, and Paku Eruera when he

was cross-examined by Ngāti Rua claimants in the Native Land Court said the reason he gave that appellation to the block was simply to distinguish that land from the other land that he was claiming through his Ngāi Tai whakapapa. So in other words, he was claiming – he used that name because Muriwai is in Whakatōhea.

In terms of the historical traditions I've set those out in our submissions in response to the Ngāti Muriwai appeal from paragraph 3.10 onwards, and I want to start by taking you to Nepia Tipene's evidence. So he was the main claimant who gave evidence of what he knew of the Ngāti Muriwai historical traditions. If we can go to those please, it's at 201.00295, and you see in his evidence he starts at paragraph 19 saying: "What is the history of Ngāti Muriwai? Where were they from in Whakatōhea? Who removed them from existence and why."

Then he makes a series of claims from paragraphs 22 to 26, all of which are wrong, so he first of all says that Ngāti Muriwai was the rangatira hapū of Penenehu. That's not correct.

He then goes on to say that: "Ngāti Muriwai were located on what is known as Ōmarumutu Pā site, and then he says in paragraph 25 that: "In the mid-1800s Ngāti Rua… lost its marae at Whitikau, through fire… Ngāti Muriwai offered Ngāti Rua joint us of Ōmarumutu Pā where each hapu lived in harmony side by side…".

And you can see why that is strongly opposed by Ngāti Rua, because Dr Amoamo had given whakapapa evidence over 30 generations showing who the tīpuna were who lived at Ōmarumutu and said that Tauturangi who disembarked from the Nukutere waka had established his home there and that his descendants have lived there ever since, and there's no whakapapa or historical narratives that match the depth and richness of the history that Dr Amoamo gave in the traditions that Ngāti Muriwai offered up. So this evidence between paragraph 22 and 25 was found to be clearly incorrect by the High Court at paragraph 462 of his judgment.

They then go on to claim in paragraph 26 and onwards, and we don't need to go through it, but they claim the reason they were so small, only 22 people, was because they'd been decimated at the battle of Te Tarata, which was in the Ngāti Ira rohe, and Ngāti Ira gave evidence in response saying that's simply not true. They're not aware of a single person of Ngāti Muriwai descent who was at that battle.

GLAZEBROOK J:
Were there findings on that if it's, I mean it may not be particularly relevant.

MS FEINT KC:
No, there weren't findings on that, but I can dig up the references to the Ngāti Ira evidence if that's helpful.

GLAZEBROOK J:
I think that probably is helpful.

MS FEINT KC:
So at paragraph, if we go back to my submissions again, Justice Churchman at 3.11 found that that evidence that we've just looked at was clearly incorrect and he instead endorsed Dr Amoamo's evidence and he'd explained that the facts had been twisted because the marae – the whare that they'd talked about being burned down was somewhere else and Ōmarumutu had always been a Ngāti Rua marae, and the whare tīpuna that had stood prior to 1901 was named Ruatākenga after the eponymous ancestor Ngāti Rua, and when I cross-examined Mr Tipene he said he had not known that.

So that narrative that they set out in their evidence was found to be wrong by the High Court, and then if we go down to paragraph 3.12 they then advanced a second narrative which was based on the idea that there'd previously been a hapū known as Ngāti Muriwai a Rua, and that that hapū had split into two groups, and the sole reference they had for this contention was those Māori Land Court minutes which were effectively it's hearsay evidence, as Ms Udy

said yesterday, because it's based on handwritten notes that the registrar took of what was said in court that day, so it's very, very thin evidence upon which to base a historical claim that they were, in fact, a hapū known as Ngāti Muriwai a Rua.

1020

Then thirdly, during the High Court hearing the historian for Ngāti Muriwai, Tony Walzl, undertook research into that reference in Dr Ranginui Walker's book to there being a Ngāti Muriwai having been located at Te Kaha between 1800 and 1830, and on the basis of that evidence it was postulated that that was where Ngāti Muriwai have come from and that's why there was no evidence of them being in the Whakatōhea rohe before 1870. In fact, there was no proof that the group called Ngāti Muriwai at Te Kaha was the same group and the problem that they had was that the whakapapa – so Mr Walzl went and researched the Native Land Court minutes which were referenced in the footnotes in Dr Walker's book and when he did that he found that there was evidence given of the whakapapa of that Te Kaha Ngāti Muriwai group and it was on a different line of descent from Muriwai, from the whakapapa that Mr Sharp's clients have given.

So Mr Sharp's clients have given their Ngāti Rua whakapapa based on the descent from Rēpanga who's the son of Muriwai but the Ngāti Muriwai group at Te Kaha was through the youngest child of Muriwai and Mr Walzl conceded in cross-examination that he had no evidence to support the contention that they were related to Mr Sharp's group in any way, and likewise Dr Amoamo gave evidence that he didn't know of any whakapapa connecting to Paku Eruera through Te Kaha, and it's significant that Dr Amoamo is Te Whānau-ā-Apanui through his mother's side, so he is Taharua. But Dr Amoamo also pointedly observed that even if they had come from Te Kaha that wouldn't mean that they had customary rights living on the customary land of Ngāti Rua and that's why it's significant that they don't have, that they've never made any customary rights claims in that regard until now.

Then at 3.14 we note that finally in closing submissions that advanced a new argument which was that they had been the beneficiaries of a tuku from Ngāti Rua to them and, as Justice Churchman pointed out, they'd advanced no evidence in support of that contention and Ngāti Rua hotly disputed that.

So in summary, the only finding that was made by the High Court in relation to Ngāti Muriwai was that their name came from the Ōpape 3A block. At paragraph 330 of the judgment it's noted that – so at paragraph 330 the High Court notes that the pūkenga concluded that Ngāti Muriwai had not established they held a specified area in accordance with tikanga, and then Justice Churchman made that same finding at 465 of his evidence, and there's also references in the Pūkenga Report where it's implicit that they don't accept the claims of Ngāti Muriwai. So I'll give you the references: paragraph 2(d)(ii) and paragraph 5(xviii), so 18.

WILLIAMS J:

D2?

MS FEINT KC:

2(d)(ii) and 5(xviii). Then finally, at paragraph 500 of the High Court judgment, Justice Churchman says: "It is possible that Ngāti Muriwai are a whānau group even though that is not how they identify themselves." Then he notes: "A whānau group can be an applicant group for an order of PCR." So he's not actually reaching a finding that they're a whānau. He's just assuming that it's possible that that's how they could be identified even though, as we said, and the reference is in our submissions at footnote 28, Mereaira Hata had given evidence that not all of the descendants of Te Paku Eruera affiliate to Ngāti Muriwai, only some of them.

Then finally I just wanted to mention as well that Ngāti Muriwai haven't been successful in their quest to establish hapū status within Te Whakatōhea because notably although Te Tāwharau, the PSGE for Whakatōhea has hapū representation for each of the six hapū. That does not include Ngāti Muriwai.

So although they were mentioned in the Te Ara Tono document, and made a bid for status as a hapū through that process, they weren't successful.

Then finally I just note there would be absurdities if multiple PCRs are permitted by the Courts on the basis that whānau seek them, even though they don't have a distinctive claim for making one. We say that's because those whose rights are the same as every other whānau in the hapū, don't have a basis in tikanga for holding rights that are distinct to everyone else's.

WILLIAMS J:

Why then the Mokomoko whānau?

MS FEINT KC:

Because they do have a distinctive claim based on their role as, as I understand it, the patrollers of the boundary, and also the history based on the injustices that Mokomoko suffered, and all the hapū agreed that Mokomoko had basis for a distinct claim, and so that's the difference, essentially. That they're recognised by the other – by all the hapū, but Ngāti Muriwai are not.

WILLIAMS J:

So the patrollers of the boundary, what does that mean?

MS FEINT KC:

Ms Sykes knows this evidence better than I.

WILLIAMS J:

Okay.

MS FEINT KC:

Might have to come back to you on that.

GLAZEBROOK J:

Maybe you could just give us the references in the evidence, when you give us the references. I think you had some other evidence references you were going to give us as well.

MS FEINT KC:

Indeed, I don't want to take up more time because I'm conscious that we're short of time today. That's all I have to say, thank you.

GLAZEBROOK J:

Thank you. Now Mr Sharp I think.

MR SHARP:

Thank you your Honour. So you can see why this took so many weeks in the High Court. I've filed a road map which I'll just read through. But just firstly on my friend's just gone through the historical debate. I, in my appeal submissions, because I anticipated this happened, I've put the whole historical date from paragraph 111 onwards, with the different perspectives of it, so we don't have to just go through it all from here.

WILLIAMS J:

Paragraph 111 of?

MR SHARP:

The Ngāti Muriwai Kutarere appeal submissions.

WILLIAMS J:

Right, your substantive?

MR SHARP:

Substantives yes. Yes I've put the whole debate in there. There's different perspectives of everything, you know, including Ōmarumutu, you know, the evidence of – that I've referred to Ōmarumutu, it was a Pananehu Marae historically was taken by Ngāti Rua from Ngāi Tai in the 1840s, and so the

Ngāti Muriwai perspective that they were there, given Ngāi Tai connections, I have some credence. But all I'm saying is there's historical context on all the facts, but what there is in true sort of context is, is the evidence of Ngāti Rua themselves, their ongoing, that through, from colonial times Ngāti Muriwai although lived with them, lived within the separate people, and in my road map at paragraph 1 I've taken a point that the view given is just one part of Ngāti Rua. For example, Robert Edwards, chair of Ngāti Rua, gave evidence that they had a separate identity to Ngāti Rua, which then Ranginui Walker in his book Ngāti Rua writes of their history as separate people.

1030

So we have a historical context which is not resolved in the court, and in my submission is not a matter for – to be resolved by the Court. The matter before the Court was a matter of identity and tikanga and mana, and that's – unfortunately that's a matter which the pūkenga didn't answer, so the Court wasn't in a position to make any findings.

Now just traversing through, I'm at paragraph 2, just some specific things. My friend yesterday said in the *Stage Two* judgment that Ngāti Muriwai didn't know that there were wāhi tapu in part of the PCR area. If you look at the record of the Court, they say they knew it was there and that's why they didn't whitebait there, but it was just a procedural thing of where the PCR covered.

Paragraph 3, I've just discussed that ongoing debate of their narrative. Paragraph 4, just clarifying that Ngāti Rua have always claimed as a hapū here. There seemed to be a suggestion yesterday they switched to claim as a whānau. That's not correct. Paragraph 5 is just – his Honour Justice Williams made just a query about the people in 3A block were –

KÓS J:

So to understand that last point, number 4?

MR SHARP:

Yes?

KÓS J:

Do you therefore not rely at all on the whānau ground that was postulated by Justice Churchman and by Justice Miller?

MR SHARP:

Do, in the alternative that as a legal submission, that even if that finding, and if such findings are correct, which we don't agree with, that doesn't prevent them from holding rights in the CMT or PCRs. So it was an alternative –

KÓS J:

They're something they're not claiming to be?

MR SHARP:

Well for example, with – well they're claiming to be a hapū. If a factual finding is they're a whānau, then the legal submission is that wouldn't make any difference.

KÓS J:

Okay.

MR SHARP:

Just with regards to who were the Ngāti Muriwai in the 3A block, just the record, so there were broadly the whānau of Eru Pōnaho, who is, son Porikapa and Paku Eruera. That should read "grandson Paku Eruera" instead of "Eru Pōnaho", and there were also some others in that group.

Just at paragraph 6, and this is probably an important point from our point of view, although it's not correct to say the High Court have found they're not a hapū, the problem, an issue that we have –

WILLIAMS J:

Just before you go on to that, you were going to talk about the take tūpuna rights in Ōpape, were you not? Is that what you were going to raise?

MR SHARP:

No.

WILLIAMS J:

Oh, okay, then I misunderstood.

MR SHARP:

You just raised the question of who was in the 3A block.

WILLIAMS J:

Oh, I see. Right, thank you.

MR SHARP:

Yes. So the – an issue we have is a comment by – well we say there's no findings by the High Court there's not a hapū, they've just made an observation on the evidence. Miller at – Justice – his Honour Justice Miller at paragraph 341 with regards to PCRs made a comment they're a "new and apparently substantial" whānau group. You notice in our appeal we specifically appeal that comment, we don't think it's a finding without basis and that's why I've provided the historical finding, and it's – and it sort of runs contrary to the earlier finding throughout the CMTs, that they're at least a whānau group after listening to the relevant evidence, and we really make the point that –

GLAZEBROOK J:

Sorry, you've lost me.

FRENCH J:

They seem to be consistent on the face of them.

MR SHARP:

Yes, so there's two – so when his Honour Justice Miller, when discussing CMTs, say they're at least a whānau group and then when he discusses them at PCRs at paragraph 341, makes a comment they're a "new and apparently substantial" whānau group. So in our view that's the only possible sort of finding

that they're not a hapū, that comment at paragraph 341, and that's what we've raised in our appeal, that that's just without basis when you look at the contested evidence, and the important point is that none of the courts were in a position to make any finding who was a hapū or whānau because there was no expert evidence on that. The pūkenga did not make the findings anticipated. So any comment or evidence by the Court as to who's hapū or whānau are not proper informed findings, in my submission.

ELLEN FRANCE J:

Sorry, Mr Sharp, just going back to Justice Williams' question, the memorandum we have from Ngāti Rua in relation to the awards in the two relevant areas are that they weren't awarded on a take tūpuna basis?

MR SHARP:

Sorry, you'd have to clarify, your Honour. Which were they?

ELLEN FRANCE J:

So if you look at the memorandum just filed on the – what day is it?

MR SHARP:

The memorandum filed with the road map?

ELLEN FRANCE J:

Yes, from – no, no, Ngāti Rua, in relation to Justice Williams' questions.

MR SHARP:

I haven't seen that. Just filed this morning?

ELLEN FRANCE J:

Yes, I think so.

WILLIAMS J:

I haven't seen it either, so…

MR SHARP:

I don't seem to have received an email.

WILLIAMS J:

Might have been yesterday.

GLAZEBROOK J:

Has someone got a copy for Mr Sharp?

ELLEN FRANCE J:

It was emailed to us this morning.

MS FEINT KC:

The memorandum was filed on behalf of Te Kāhui rather than Ngāti Rua.

ELLEN FRANCE J:

Yes, sorry. Yes, it's just you – I was just reading the first part of your signature line, not the next.

MR SHARP:

Sorry, I haven't seen it so I can't comment, but…

GLAZEBROOK J:

Well, we'd…

ELLEN FRANCE J:

Has that been filed with counsel, with the parties?

MS FEINT KC:

Yes, it has.

ELLEN FRANCE J:

Have you got a copy there?

MS FEINT KC:

I don't think we've got a hard copy. It was filed at 10 past five last night.

KÓS J:

So it would have come in this morning?

ELLEN FRANCE J:

Yes, yes. I'll send it to you but we have had it.

MR SHARP:

Yes, I still for whatever reason haven't received. So maybe the best way to deal with that, if you have any questions on that then I could have a look at it and maybe just a quick answer when WKW gives their submissions if there's anything I have to answer on. Should I proceed with…

GLAZEBROOK J:

Sure.

MR SHARP:

Now just with paragraph 7, regards my friend's view yesterday, what is the tikanga that determines whether Ngāti Muriwai or anyone in Whakatōhea holds mana in regards to the takutai moana, they're just submissions of counsel. You know, my client's taken a very different view of tikanga in Whakatōhea or with the takutai moana, but in the end it is a matter which needs the benefit of expert evidence such as the pūkenga didn't give before anyone can make any findings or determined who holds what rights.

I note this at paragraph 8, however, that in the Court of Appeal his Honour, Justice Miller, did refer to tikanga evidence, the Muriwhenua Report of foreshore and seabed rights, including whānau having rights to fishing and seabed grounds subject to over-rights of hapū and whānau. In the context of that evidence, Ngāti Muriwai, as they gave their evidence in the High Court, was the practices that they practised with the PCRs, whitebaiting, collecting shells, firewood, rocks, et cetera, have always been their historical practices as

themselves and it's never been indicated that they're not carried out with tikanga and it's always their belief that it was appropriately carried out, so a PCR on that basis is appropriate.

1040

Paragraph 10, I've already made that point that we need expert evidence on tikanga and mana and control rights before we make any findings, and just lastly, your Honour, the suggestion that Ngāti Muriwai can join with Ngāti Rua, that's been made clear on a number of occasions that they have a separate identity and wish to remain so, and I've just made in the footnotes there that it is a significant group in Whakatōhea, the evidence was one of the larger groups. They've done significant things of late, for example getting CFRT funding for Whakatōhea claims, et cetera, so they are a significant and continuing group within Whakatōhea.

That's all the submissions I have, your Honours. Is there any questions? Thank you.

GLAZEBROOK J:

Thank you very much. And now – sorry, it's very inconvenient not having it as a printed out – Ngāti –

KÓS J:

Ms Cooper.

WILLIAMS J:

Upokorehe.

GLAZEBROOK J:

Oh, yes, Ms Cooper.

MS COOPER KC:

I believe it's me, your Honour. I'll just get set up, your Honours. So I'm going to be presenting at this stage Te Upokorehe's submissions as respondent to

the other appeals, and I'm just going to cover very briefly some points in response to the Attorney-General on substantial interruption. Then I'm going to deal with – address Ngāti Ruatākenga and Ngāti Muriwai's appeals very briefly just to explain Te Upokorehe's position in relation to those, and then I'm going to address the Whakatōhea Kotahitanga Waka appeal in relation to the 12 nautical mile limit, and Mr Lyall will address the other part of that appeal in relation to the mandate. And I'm just going to stick to the points in reply to the other parties' appeals at this point on the basis that our reply to the other parties' submissions in response to Te Upokorehe's appeal will be addressed this afternoon in replies.

So starting then with the substantial interruption point. I don't want to say too much about this but other than just to – I suppose the starting point is that Te Upokorehe do say substantial interruption must be carefully assessed on the facts, and we agree with other submissions that rather than necessarily interrupting use and possession of an area it may be that the potential interruption simply shifts the way in which the area is held or used, for example, from use of resources to kaitiakitanga. And there's an excellent example of that which is dealt with in the number 7 decision of Justice Churchman, and I've just brought up the relevant paragraphs now on the screen. So this is dealing with the –

KÓS J:

Just to be clear, are you saying – when it shifts the potential interruption, are you saying that it shifts the use or manner of occupation without creating a substantial interruption?

MS COOPER KC:

That's right, your Honour.

KÓS J:

Yes, thank you, just to be clear.

MS COOPER KC:

So the nature of the use and possession may change due to a structure or an external use, but it doesn't necessarily end the holding in accordance with tikanga or the exclusive use and occupation because that can continue to be manifested in perhaps slightly different ways. And so the example of that, as I say, is the sewerage outfall pipe off Ōhope Beach. Now that was addressed as I say in Justice Churchman's number 7 decision at paragraphs 42 to 43, and you'll see there in that passage that Te Upokorehe submitted before his Honour that the outfall merely changed the nature of the use, so whereas before the use for food gathering might have been affected to some extent, that had been replaced with kaitiaki responsibilities of monitoring the environmental impact, which they continue to exercise, and as they say there, tikanga continues to evolve to adapt to changing circumstances. And that is very different to the Pan Pac outfall pipe referred to in the *Ngāti Pāhauwera* decision where it was found that effectively the area had ceased to be used.

Then just while we're on substantial interruption and that topic, your Honour, I did also just want to go briefly – the other point that opposition, if a substantial interruption has occurred over opposition, then that needs to be taken into account as well, and I just wanted to take, give your Honour the references, and we might just go to it briefly, to the Te Upokorehe's opposition to the eastern sea farm mussel farm, that being the mussel farm that some of the Te Whakatōhea hapū have an interest in. So that was opposed by Te Upokorehe, and their opposition is recorded in the Regional Council consent officer's report on the application, and the bundle reference for that report is 347.21673, but I can provide a note of that to the Court later. But what we've brought up on the screen is the record in that report of the objection from Upokorehe Resource Management, and you may recall from our submissions, Upokorehe Resource Management is a standing group that has been set up and been working on behalf of Upokorehe since the 1980s, and they objected to in on a number of grounds. You'll see there, inadequate consultation, inadequate evidence to prove liability, concern over the structures ability to withstand events, ownership of the proposed site, impact on the mauri of the site, responsibility for repair of damage.

Finally, I should also note, just for completeness, there was also an objection made by Claude Edwards, which Upokorehe was effectively in his individual capacity because they regard the Upokorehe Resource Management group as being the hapū, the iwi's objection.

Then just to finally, there's no, nothing in the record about this, but I understand that my learned friend counsel for Crown Regional Holdings and the Ōpōtiki District Council, talked about their realignment of the harbour mouth at Waioweka River mouth and that was also opposed by Upokorehe.

So that was all I wanted to say about substantial interruptions your Honour. I did just then want to very briefly make sure that my clients' position in relation to the Ngāti Ruatākenga and Ngāti Muriwai appeals was clear. So in our written submissions as respondent at paragraph 2, which we've brought up there, we summarised our position in relation to the various appeals, and as we say there, broadly support the Te Kāhui appeal other than in respect of their opposition to CMT being sent back for re-hearing. Oppose the appeal brought by the Attorney-General. Do not take a position on the appeals by Ngāti Ruatākenga or Ngāti Muriwai, and I just wanted to make clear that by not taking a position, that it should not be understood as a concession by Te Upokorehe that either of those parties are entitled to CMT or PCRs within Te Upokorehe's rohe. It's simply that Te Upokorehe sees those appeals as raising issues internal to Te Whakatōhea hapū and whānau. So it doesn't see that as an issue that it needs to be involved in or comment on. So we see that as separate to the overriding issues raised by Te Upokorehe about whether any hapū is entitled to recognition within Te Upokorehe's rohe.

That brings me then to the Kutarere Marae appeal, and that is dealt with at Te Upokorehe's respondent's submissions at paragraphs 59 to 60. In essence Te Upokorehe's position is that Mr Kiwara participated, admittedly as an interested party, but he played an active part in the hearing. In trial there was – he gave evidence and made submissions, and we say that the Court was entitled to find that Kutarere Marae had not established that it held an area in

accordance with tikanga, and indeed it was effectively obliged to do so in order to make orders for CMT in favour of the successful applicants.
1050

So I don't think – well perhaps it might be worth just going briefly your Honours to the High Court's judgment at paragraphs 421 to 424. Yes, we've got that up already. So as said there, Mr Kiwara gave evidence explaining the marae was founded by his grandfather, Hurae Ihaia, and his grandmother, Mere Rakai, both of whom were of Ngāi Tūhoe descent.

So as I think we referred to earlier when I gave my submissions in support of our appeal, Kutarere Marae is a fairly recent establishment. It's been founded in the 1930s originally. Well, the first kāinga was in the 1930s and the first wharenui in 1943, as the Judge finds there, and then the Judge finds at 424: "On its own evidence, Kutarere Marae is not a whānau, hapū or iwi," and then importantly: "It was not in existence until the 1930s." I don't think I need to go to the Court of Appeal's judgments, but it was these findings that the Court of Appeal then referred to and importantly the Court of Appeal was not only relying on the finding that Kutarere was not a whānau, hapū or iwi but also the finding that it was not in existence until the 1930s.

So Te Upokorehe says that both the High Court and the Court of Appeal findings are correct, and if we go back to our submissions what we essentially say, the key points we rely on at paragraphs 59 and 60 is that it is Te Upokorehe tikanga that marae are not entitled to make decisions about the area outside the marae gates. The mana of the rohe outside the marae resides with Te Upokorehe, not the members of the marae. Secondly, there was no evidence given by Mr Kiwara about what support he has for his application, so there is also a question there as to who he is actually entitled to represent. Thirdly, as a matter of tikanga, we say Kutarere Marae is not the appropriate group to hold an order for CMT. The mana sits with Te Upokorehe.

And that is consistent, entirely consistent actually, with the evidence of Mr Kiwara. So if we go to his cross-examination by Mr Lyall, if we start at 406,

so there is quite a long section essentially who has the mana and in the highlighted passage there Mr Kiwara says: "We don't have the tangata whenua status of a lot of people because that wasn't – we are tangata whenua in our marae. We don't say to people we are tangata whenua outside our marae. So, there's that difference," and then he repeats the same point again later on in his cross-examination at 04414. So Mr Lyall says to Mr Kiwara: "Now, we have discussed that Kutarere Marae is in the rohe of Upokorehe, but it follows that decisions made on the marae should be for the marae and not for the surrounding area, doesn't it?" and Mr Kiwara replies: "Yes. That's quite clear. Which means that we have tangata whenua in the Marae, so we have got our chiefly authority. Anything outside has to be agreed by the Marae Trustees so, but we do as I mentioned before, represent our interest when it is available to the wider fabric…" Sorry, and I think it's probably a bit lower down. I can't quite see the passage I wanted to take your Honours to. Let me see if I can find it on my… Well, perhaps that is it, your Honour.

I think, and then if we go to Mr Kiwara's affidavit, I think the point is that it does appear that Mr Kiwara is acknowledging the wider – they sit within the wider rohe, and then this is in Mr Kiwara's affidavit where he says at paragraph 3: "This notice made by me on behalf of Kutarere Marae which was also known as Kutarere ki Ngāi Turanga demonstrating whakapapa connections… The marae reservation land is within the traditional rohe of Upokorehe," and then he goes on to say that the whānau involved have wider whakapapa amongst the Whakatōhea hapū. But nevertheless the recognition that it is in the rohe of Upokorehe and you'll recall the evidence was that Mr Kiwara's grandfather was originally living with Te Upokorehe at Roimata Marae. There was an argument. He went and established his own whare, and over time that was given the blessing of Upokorehe essentially by giving the name to the wharekai.

Then at paragraph 26 as well, again an acknowledgment that: "Although Kutarere Marae is situated within the area or rohe of Upokorehe it does not refer to itself as an Upokorehe marae. That distinction is afforded to Roimata Marae." So of course there is contention between my clients and Mr Kiwara about whether Kutarere is an Upokorehe marae. My clients certainly

say that it is, but in any event there is no dispute that it is within the rohe of Upokorehe and we say it follows that the mana whenua and mana moana of that rohe remains with Te Upokorehe.

So your Honour, for those reasons we say that Kutarere Marae cannot meet the test for CMT and therefore the decisions made by the High Court and the Court of Appeal must stand, and that is a combination of Te Upokorehe's tikanga, the non-existence of the marae as an entity in 1840, and finally, although I don't say it's the strongest point, but Mr Kiwara, it's not clear that he was purporting to represent a particular whānau, hapū, or iwi.

That brings me on to the Whakatōhea Kotahitanga Waka issue in relation to the 12 nautical mile area of CMT 2. I don't need to say too much about that, but Te Upokorehe certainly agrees with the Court of Appeal's finding that it is not an available reading of Justice Churchman's decision that CMT 2 extends out to the 12 nautical mile limit based off Whakaari. There was no CMT awarded in respect of Whakaari, so we say there is no logical basis to use Whakaari to extend the 12 nautical mile area beyond the 12 nautical mile area off the mainland coast.

So that's really all we need to say, but I did also just want to make a note about the maps. So other counsel have already noted that the submission made disagrees with the position of the parties as shown in the map appended to the Court of Appeal's judgment. Now that map was prepared by Te Arawhiti and provided to the Court of Appeal by the Crown with the consensus, informal consensus, of all parties except Whakatōhea Kotahitanga Waka. So Te Upokorehe did agree to that map being provided to the Court of Appeal, and as has already been noted, the Court asked a question about the fact that the map shows the entire Ōhiwa Harbour within the CMT 2 – I beg your pardon, in the CMT – yes, I beg your pardon.

WILLIAMS J:

2.

MS COOPER KC:

CMT 2 area.

WILLIAMS J:

When you say “the Court”, do you mean us or the Court of Appeal did?

MS COOPER KC:

Well you raised the question.

WILLIAMS J:

Yes, yes.

MS COOPER KC:

The Court of Appeal didn’t raise the question, no.

WILLIAMS J:

Right. Good, I thought you were suggesting they had.

MS COOPER KC:

Yes. No, your Honour. So no, I meant your Honours raised the question, quite an excellent question.

WILLIAMS J:

Yes.

MS COOPER KC:

Well it was – I think it was somewhat –

WILLIAMS J:

Well I happen to agree with that, but.

MS COOPER KC:

Yes. I was hoping to get some acceptance for at least part of my submissions, your Honour. It is a very good point to raise because I think it was something that was perhaps not given the scrutiny it deserved at the time. Indeed you

are – your Honours, it has been acknowledged the order that was made by his Honour Justice Churchman was in fact for the western part of the Ōhiwa Harbour with the eastern part by necessary implication being within CMT 1, and actually if we look at – that aligns with the Ngāti Awa application area.

So if we can bring up Ngati Awa's application, this is the map that was appended to Ngāti Awa's application for CMT, and it's not terribly clear, but right down at the bottom you can see the application area.

1100

The green line extends out to sort of the midpoint at the entrance to Ōhiwa Harbour and then there is a green line that runs down and then there's also a black line that runs diagonally, and I'm not entirely sure which line is the correct one, but in either event the western part of Ōhiwa Harbour was not within Ngāti Awa's application area, hence why the CMT division makes reference to eastern part only whereas the CMT that was for the Te Whakatōhea and Upokorehe applicants was for the, the out, the remaining part of the harbour and the seaward area.

Now I acknowledge that Te Upokorehe did join in the consensus when that map was provided to the Court of Appeal but that was before the Court of Appeal had issued its decision and, of course, there is now a very practical and important implication for my clients as to whether which CMT order that part of Ōhiwa Harbour falls in because as matters currently stand only CMT 1 is going to be reheard although we do say it should be both. So we do say that actually, notwithstanding the map that was attached to the Court of Appeal's decision, the true position is as according to the orders that were made by his Honour, Justice Churchman.

WILLIAMS J:

Was that because that gets you a chance at re-arguing Ōhiwa?

MS COOPER KC:

Well, yes, your Honour. So –

WILLIAMS J:

Can you put the map, the Ngāti Awa map, back up?

MS COOPER KC:

Certainly. And in fact we say it's an additional reason why it makes more sense for both orders to go back.

WILLIAMS J:

Can you just tell me what you say that is intending to do with respect of Ōhiwa?

MS COOPER KC:

Well, my understanding, your Honour, is that Ngāti Awa was not claiming, did not claim any interest in the eastern side of Ōhiwa Harbour. So I think they claim their rohe extends up to the end of the Maraetōtara Spit and does not include the western side.

WILLIAMS J:

Yes. Is there a –

MS COOPER KC:

Sorry, the eastern side.

WILLIAMS J:

Is there a claim – is that in relation to the CMT 1 only? Is that why there's no green line around the harbour itself? Someone else can probably tell me the answer to that but it doesn't –

MS COOPER KC:

Yes. Look, I can't speak to that, your Honour.

KÓS J:

I think we'd better see the words as opposed just to the map.

MS COOPER KC:

Yes. Are we able to bring that up?

WILLIAMS J:

And the Ngāti Awa words?

MS COOPER KC:

Yes, well…

WILLIAMS J:

Perhaps we can ask Ngāti Awa.

MS COOPER KC:

Yes, perhaps Ngāti Awa could – yes, I don't want to speak for Ngāti Awa, your Honour. That is my understanding of the rationale for why that distinction is made between the two CMT orders.

KÓS J:

Is anyone here to speak for Ngāti Awa? I'm not sure they are. Ms Douglas, is it? Good luck, Ms Douglas.

WILLIAMS J:

You don't need to answer it now but…

MS DOUGLAS:

Ka pai. I will look into it and provide something by email if that works for the Court.

MR POU:

The boundary that they use is the Nukuhou Stream. The Nukuhou Stream comes out from where that green lines comes into the inner part of the harbour and then it wends its way out, and those are the agreements that Ms Irwin-Easthope discussed with you around there's an agreement that was made between Whakatōhea and Ngāti Awa for the purposes of the fish allocation in the harbour and that's that line. So where that green line comes in, in terms of their application they're following the Nukuhou River up that side of the harbour and they claim –

WILLIAMS J:

So everything west of that is shared and the –

MR POU:

Is outside of the – yes, west is shared. Well, that's –

WILLIAMS J:

– and that small part in –

MR POU:

To be fair to their application, they were saying that western part was Ngāti Awa noa iho, but they didn't claim past the Nukuhou River into the eastern part.

WILLIAMS J:

So that means that if Ōhiwa Harbour is back in play with respect to CMT 1 it's only that small part to the east anyway, is that correct?

MR POU:

Well, I'm not aware. I understood, just listening to the discussions from the VMR, that there had been some agreements around having a shared CMT for the whole of Ōhiwa. I'm not up to date on that. All I can speak to is that was their application, their application that was put in, and that's definitely the boundary that they've asserted throughout this process and others.

WILLIAMS J:

All right. That's helpful, thank you.

MS COOPER KC:

So, your Honours, I was going to hand over now to Mr Lyall to deal with the mandate. I do also want to talk about the reserve, so I can either do that if there's time after Mr Lyall, or in reply this afternoon. So perhaps if I hand over to Mr Lyall and we see how we go.

GLAZEBROOK J:

Thank you.

MR LYALL:

E ngā Kaiwhakawā, tēnā koutou. My brief today is to speak to the issue raised by the Whakatōhea Kotahitanga Waka, which I'll call WKW for short here, appeal concerning the mandate that they claim to hold to bring the applications on behalf of Whakatōhea. In their submissions they stated that there was no evidence any particular step had been taken by anyone over the two or more decades to end the mandate that they claim was achieved in the late 1990s, and my learned friend Mr Fowler in oral submissions said: "We say the original mandate has never been denied or reversed," and your Honours, Te Upokorehe say that's simply incorrect on the facts before you.

While my learned friend Mr Fowler responded to Te Kāhui submissions at length, he was silent on Te Upokorehe's respondent submissions, and Te Upokorehe say that there are issues raised there for the purported mandate that must be addressed by the appellants and they have failed to do so. So briefly I plan to take you to some of the evidence that shows Te Upokorehe challenging and removing that mandate, if it was achieved at all, and then to take you to what his Honour Justice Churchman ultimately determined concerning the mandate.

Your Honours, Te Upokorehe has progressed their application individually throughout these proceedings through the High Court, Court of Appeal, and before you during the last two weeks. They haven't participated in the various clusterings of applicants that's taken place, and Te Upokorehe say there's no reliable evidence to show that they support an iwi-wide application today or have done so in the first place.

If I could ask that the document 401.00013 be brought up. Your Honours, this is a page from the application to the Māori Land Court brought by Claude Edwards in 1999, and this it seems is the foundation for the purported mandate that WKW say they held and continue to hold today. And you'll see

there that there is a signature and address from a Charlie Aramoana, who was the kaumātua for Te Upokorehe of the day, and the date there being the 23rd of February 1999. And if we scroll down to the bottom of the page please, we see there: "NB Mr Charles Aramoana asked the Māori Land Court 7th of the 9th 1999 his support be withdrawn." Your Honours, that was also reflected in the judgment of his Honour Justice Churchman, the number 2 judgment, I think at footnote 4 where he noted that while there was evidence to suggest that Upokorehe initially supported that application, that support was promptly withdrawn.

This document was put to WKW witnesses during the hearing, and that it has gone unaddressed in submissions from counsel for WKW we say is deeply problematic to their case that the mandate was achieved and has been maintained.

WILLIAMS J:
Can you just give me that minute book reference again, please? Does it not give a minute book reference? No, at the bottom.

MR LYALL:
Can you just go to the bottom of the page, please.

WILLIAMS J:
Oh, it just says: "Minute book," does it?

MR LYALL:
Mmm.

WILLIAMS J:
Okay, thank you.

GLAZEBROOK J:
Also, did you give us the reference in the High Court judgment to a paragraph number? If you did, I missed it.

MR LYALL:

I haven't written it down. I think it's footnote 4.

GLAZEBROOK J:

Thank you.

1110

WILLIAMS J:

That's Judge Hingston's signature, is it? Looks like it. Thank you. Perhaps I should file some evidence.

MR LYALL:

Your Honours, a more recent example – well, first I'll say that there isn't a great deal of back and forths following this between Te Upokorehe and the Edwards applicants and given that they'd withdrawn from the proceedings it should come as no surprise, but the next piece of evidence I did want to take your Honours to is at 316.06614. Here, your Honours, is a letter from Te Upokorehe iwi addressed to Ms Edwards who has taken carriage of the WKW application dated the 6th of January 2016, and in that letter, which again was raised during the hearing in the High Court, Te Upokorehe make it clear that they do not recognise the Edwards application because it's in direct conflict with the mana whenua and mana moana of Te Upokorehe within their rohe, that Te Upokorehe has the right to progress our takutai moana claim through either Crown engagement or through the High Court, and they've instructed their then legal counsel, Kathy Ertel, who I'll acknowledge here, to prepare a legal challenge to Adriana Edwards' Seabed and Foreshore High Court application.

Now on top of these clear indications that Te Upokorehe simply do not support the Edwards application, there is also evidence on the record that Te Upokorehe were careful to ensure that they were the only group to progress an application on behalf of Te Upokorehe, and I won't bring it up but to flag in the transcript of the hearing and in Ms Baker's reply evidence. The reference to the transcript is 107.03635. The evidence is that at a 2017 hui in May, hui-ā-iwi held by Te Upokorehe, the group was advised that there was a second

Te Upokorehe application under the Marine and Coastal Area Act which had been filed, so this is separate from the Edwards and the application that you have before you today, and the hui then resolved that the application should be – apologies – the hui decided to communicate that the application should be withdrawn and passed a resolution that the Te Upokorehe Treaty Claims Trust application is the only application mandated by Te Upokorehe. Now that second application was not progressed by the applicants in deference to the position taken by Te Upokorehe at that hui-ā-iwi.

Your Honours, you heard from my learned friend, Mr Fowler, that the Court simply hadn't addressed the issue of mandate and so there was still some work to do, and in response to that we, one, wouldn't agree that it went unaddressed in the number 2 judgment but if there was any doubt whatsoever we say, Te Upokorehe say that the number 7 judgment, so the *Stage Two* judgment of his Honour, Justice Churchman, makes it crystal clear as to mandate were it not already so. If we can turn to paragraph 177 of that judgment, your Honours will see the heading there: "Who represents Te Upokorehe?"

Paragraph 177 records: "Surprisingly, given that during the Stage One hearing none of the other applicants challenged the mandate of Te Upokorehe Treaty Claims Trust to represent Te Upokorehe, during the Stage Two hearing Mr Cunningham," for WKW, sought to cross-examine Te Upokorehe witnesses in an apparent attempt to challenge their mandate.

At 178: "These submission fly in the face of the Court's findings."

At 179, and this reflects the first page that I took you to, your Honours: "There is no doubt that, in 1999, a representative of Te Upokorehe supported the original application… However, it is equally as clear that any authorisation … was promptly withdrawn."

Paragraph 180: "The entity that advanced the claim at the Stage One proceedings on behalf of Te Upokorehe was Te Upokorehe Treaty Claims Trust. It was that entity whose evidence was accepted by the pūkenga and by

the Court as establishing that Te Upokorehe, jointly with the others named, qualified for orders of customary marine title."

At 181 there's an acknowledgement from the Court that some people who identified as Te Upokorehe and held the view that Te Upokorehe was a hapū of Whakatōhea iwi gave evidence, but that paragraph concludes that: "No entity, other than Te Upokorehe Treaty Claims Trust, advanced an application at Stage One purporting to represent Te Upokorehe." And finally, and I would respectfully emphasise paragraph 182: "Where, at the Stage One hearing, no challenge has been made to the authority of the applicant group to be represented by the particular entity conducting the litigation, then it is not appropriate for the other applicants (or any other party) to attempt to raise such a challenge at the Stage Two hearing." And your Honours, we would simply say that it's equally inappropriate to attempt to do so in this court before your Honours this week. This issue is crystal clear and ought not to have been raised at all through these appeals.

Your Honours, the final matter that I need to address very briefly is the issue of costs that has been raised. Our instructions are that we're to ask that the issue of costs be reserved until after the decision is received, but we do support the approach of the Kāhui group in principle.

GLAZEBROOK J:
In terms of indemnity costs, I presume?

MR LYALL:
Correct, your Honour. Unless your Honours have any questions, we do have a few minutes left before the break, so with your leave I'll pass back to my learned senior Ms Cooper.

GLAZEBROOK J:
Thank you.

MS COOPER KC:

Thank you, your Honours. I thought we may as well use the time, because I do want to comment on the issue about the reserves and the memorandum of counsel that was filed by Te Kāhui last night responding to the Court's questions about that. Te Upokorehe do not agree with the characterisation in the Te Kāhui memorandum. Specifically at paragraph 1.3(c) of the memorandum it said: "The awards in Hiwarau and Hokianga were awarded not on a take tūpuna basis but to 'surrendered rebels and loyal natives of Upokorehe hapū.'" So what we say is while that is true – so there were three reserves, as the memorandum notes, there was the Ōpape, Hiwarau, and Hokianga. Hiwarau and Hokianga are the two within the Ōhiwa Harbour. Well Hokianga is literally within the Ōhiwa Harbour being an island and Hiwarau is adjacent to the harbour on the coastline. My understanding is that Te Upokorehe were – those two reserves were certainly nominally given to Te Upokorehe and we say are both within what was always the Te Upokorehe rohe. So we say that Te Upokorehe did in fact have pre-existing occupation rights and mana in those areas, it was not simply an arbitrary allocation to them, although admittedly it was done in a very imperfect fashion which led to ongoing disputes.

And there is absolutely masses of evidence about this and I do not have the scholarship to be able to do justice to it, but it is summarised very helpfully in the *Te Upokorehe Takutai Moana Overview Report*, which was part of the evidence or attached to the evidence of Ms Kahukore Baker at the trial, and we've just brought up there the relevant part of that report which you'll see is at 315.06348.

1120

And from paragraph 6 the report talks about the reserves and it says the awarding of the reserves can be seen from the perspectives of three different people: first of all, J.A. Wilson who was the Crown agent who made the initial award of the reserves; Warena Mokomoko who in 1898 sought definition of relative interests in Hiwarau following Wilson's arrangement; and Mihirangi Kotu, in the 1939 Native Land Court Hearing. So there was a Native

Land Court application in 1898 by Warena Mokomoko and then the subsequent one in 1939.

So if we start with Wilson, the land agent, as is said there, and this is taken from the report of Ewan Johnson for the Waitangi Tribunal, there's this quote that is used in the Te Kāhui report about "surrendered rebels and loyal natives", but, as I say, that doesn't undermine the fact that it was originally Upokorehe land. So he settled the so-called rebellious Upokorehe hapū on a reserve known as the Hiwarau block and the small island of Hokianga.

WILLIAMS J:
So Wilson was the Compensation Court Commissioner, was he?

MS COOPER KC:
Well, he's referred to here as the "Crown Agent", your Honour, but I believe that to be correct.

WILLIAMS J:
He was the Judge?

MS COOPER KC:
I don't know if he was the Judge. He was the certainly the person doling out the land at that point.

WILLIAMS J:
Well, then he was the Judge, and is there a record as to what he said when doling it out, as you say?

MS COOPER KC:
Well, I don't have references. As I say, your Honour, there is a lot of material and I haven't attempted to go back to records more than what is referred to here other than if we can go to the David Armstrong report – perhaps if I can just finish with this report, your Honour, and then we'll go to the David Armstrong report because that does also go into further detail.

So this really just gives the overview. So we have the Wilson allocation and then the Warena Mokomoko – well, in fact, let's just go – perhaps if just go to the David Armstrong report.

WILLIAMS J:
What's the number for that?

MS COOPER KC:
It's 311.04391 is the document.

WILLIAMS J:
04391?

MS COOPER KC:
Yes, 311.04391. So this is also footnoted in the Te Kāhui memorandum and it was a report prepared for another applicant, not Te Upokorehe. So this deals with Mokomoko's application to the Native Land Court and as we see in the third paragraph, it's the third sentence of paragraph 113, records: "Warana opened his case by stating that the land had been given to the Upokorehe hapū – 'they have the mana nui over it, it was given by the Government out of the confiscated lands, it was a toenga [remnant or balance] of their land returned to them by the Government'. He then handed in a list of 30 names of 'the true Upokorehe' … who should be named as owners, and another list of 26 people he claimed were not Upokorehe, and who would have to rely on the aroha (affection) of the 'true' owners; 'It will be for the true Upokorehe to set apart a part of the block for them'."

Then he goes on and paragraph 115 explains his connection: "At one point Warana was asked about his interests in Ōpape, gained through his Ngāti Patu whakapapa connections. This appears to have been an effort on the part of those who opposed him to cast doubt on his own claimed identity as a 'true' Upokorehe. Warana told the Court that he and his brothers 'were orphans, their father having died in Auckland, they were therefore included in Ōpape on their

Whakatōhea side'. As discussed, Mokomoko whānau members were able to claim land interests through more than one hapū, and doing so did not make them any 'less' Upokorehe, or for that matter Ngāti Pau."

Then the outcome was, as is reported there, the Court noted that customary title had been extinguished by the raupatu, and it refused to go behind the award of the Compensation Court and make a fresh order. The Court did there say that "Upokorehe" was a general term applied by Wilson to all Māori at Ōhiwa, but that is not accepted by my clients.

WILLIAMS J:

So it would be useful just to find the award because that will clarify it or not.

MS COOPER KC:

Well we can certainly try to find that. I'm sorry, your Honour, in the time available I just haven't been able to track that down, but we can find that reference and provide it to your Honours.

WILLIAMS J:

I accept that the problem is that raupatu messes everything up.

MS COOPER KC:

Yes.

WILLIAMS J:

Both politically and socially, as well as legally. But if the Judge does make a comment about who is allowed in Hiwarau, you do get at least some sense of what officialdom thought was the tikanga position at the time.

MS COOPER KC:

Yes, yes. Your Honour, and my understanding certainly from the quotes that are attributed to Wilson in these reports, it does appear very clear that he was referring to the recipients as being Upokorehe, and whether there's more detail that can be shed on that, I don't know, and certainly Te Upokorehe's position is

that that did reflect that they were the previous occupants and that was – the area was always part of their rohe. And as I say, Te Upokorehe were also included in the award at Ōpape but they did not – they regarded that as being outside their rohe, and they maintain, continue to maintain that is outside their rohe.

It's also worth, while we're in the David Armstrong report, also perhaps just worth seeing the comments on the Hokianga reserve, which are at 04435. So here there's just a little bit of background about Upokorehe and Hokianga Island being a long-standing place of occupation, Warana Mokomoko having himself lived at Hokianga at various times, and then an explanation that there was a period of escalating rates bills, an application made to set aside the land as a Māori reservation, and then we see half way through paragraph 132, if we just stop there: "The island was declared to be a Māori reservation 'for the purposes of a burial ground and as a place of historic and scenic interest for the common use of Upokorehe and other Māori of the district generally', and outstanding rates were written off."

If we just go down to the next page: "The island currently retains this reserve status, and although it is administered by the Whakatōhea Trust Board, Upokorehe remain the acknowledged kaitiaki." And I'm not sure what the footnote reference there is at 251, perhaps if we just scroll down. So that's reference to Tony Walzl's report.

So I think the short point, your Honour, and we will come back to you with the reference to the original decisions by Wilson, but the point is these are extremely fact – complex factual historical issues where both the facts themselves and their interpretation are contested. So the short point is we don't agree with the Te Kāhui memorandum. We do say that those reserves do reflect Te Upokorehe's underlying and continuing mana over those areas, but really it just underscores the need for this to be properly addressed in the High Court where there is time to do justice to the voluminous evidence.

So, your Honour, I think that brings us to the morning adjournment and the end of our submissions as respondent.

GLAZEBROOK J:

Thank you very much. We'll take the adjournment.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.50 AM

GLAZEBROOK J:

Mr Pou?

MR POU:

Oh, Ngāti Awa is going to correct the submission.

GLAZEBROOK J:

Oh, right.

MS DOUGLAS:

Tēnā koutou, e ngā Kaiwhakawā –

GLAZEBROOK J:

I suspect we might need you up here.

WILLIAMS J:

Pull the mic up .

GLAZEBROOK J:

Just for the transcript.

MS DOUGLAS:

Tēnā koutou, e ngā Kaiwhakawā. Can you hear me better now?

GLAZEBROOK J:

Just make sure you're speaking into the microphone, because otherwise it doesn't…

MS DOUGLAS:

As a small point of clarification on Justice Williams' earlier question, if it would be helpful to the Court we can file a copy of Ngāti Awa's originating application, which describes the area it claims, including that part of the Ōhiwa Harbour which wasn't reflected in the map shown before the break. That would suit?

WILLIAMS J:

Yes, please.

GLAZEBROOK J:

That would be useful, I think.

MS DOUGLAS:

Ka pai. All right, thank you.

GLAZEBROOK J:

Thank you very much.

MR POU:

It now falls to me –

GLAZEBROOK J:

If I can just check how long you're likely to be?

MR POU:

As signalled in the message by Mr Mahuika this morning, we're just going to endeavour to share. I'm going to try and get through –

WILLIAMS J:

"Endeavour to share"?

MR POU:

"Endeavour", there's that word coming up again. I want to give Mr Mahuika significant time, enough time. His issues are a little bit different and I thank him for the accommodation given that this is a Whakatōhea hearing, but as we know, there is no show without Ngāti Porou, so we need to give them enough time to get through their matters.

And I just probably have to comment on the interruption when my friend was up before. After I was discussing the Ngāti Awa issue my friend Ms Feint sent me a little note that let me know my fly was undone, so that's –

WILLIAMS J:

Thanks for sharing that.

MR POU:

That's what was – well it shows you that the imposition of a groyne might not necessarily be the substantial interruption that comes through.

WILLIAMS J:

Oh, please.

MR POU:

Look, what I wanted to do, and I'm going to try and get through in about 45 minutes, I want to answer any questions that your Honours might have. There have been a number of questions around the marine reservations, the consents. I can answer any questions that you might have and I'll probably make some comments about them and talk about the context of the participation of Te Tāwharau, Te Tāwharau o Te Whakatōhea now, within these proceedings.

I should also note that, and Mr Lyall referred to and was using that judgment number 7 to support some of the assertions that were being made, that was the decision that did make decisions around mandate. That decision is being appealed by the Whakatōhea Māori Trust Board and now Te Tāwharau on the

basis of the termination of Ngāti Patumoana representation and that it was given to an individual and not the hapū committee itself, so I would just urge some caution in relying on that at the moment, that that is under question, and it's just the way that these appeals have been staged it's been held up until this one is going to be heard.

Now the Whakatōhea Māori Trust Board participation in this was – as Ms Feint said, they filed a protective application and then it was refined when it saw that different hapū were being, were progressing their own claims, and the Whakatōhea Kotahitanga Waka. So there was no opposition to either of those two hapū in particular, asked the Māori Trust Board to represent them, that was Ngāti Patumoana and Ngāti Ngāhere. So the application was refined to them. The application area was maintained as it was, going out and including Whakaari, and I think that's an important point to make, and I don't need to talk about Ngāti Rua because Ms Feint has discussed the relationship between the Ngāti Rua claim and the Trust Board, and at the time it should be noted that Mereaira Hata was on the Trust Board that was there.

The context of participation also sits within the fact that this has all occurred within the seven years while Whakatōhea are endeavouring to negotiate and achieve and ratify a settlement, so their participation within this process was necessarily guarded and it was in a way where the focus was really on that settlement, achieving that settlement and achieving some of the goals that sit within that deed of settlement. That being said, the settlement is still quite informative if we are going to discuss some of the mechanisms or resource consents that have come up and have been discussed in particular by my friend, Ms Hill.

So if I touch on those marine farms, so the marine farms are the biggest in the world, the current one at 3,800 hectares. I think the next biggest is a 400-acre fish farm in Egypt. But they are significant, the largest in the world, and when they're combined they will comprise 8,000 hectares of consented space for Whakatōhea. The way in which the current one operates, so when the application was made Whakatōhea, they hadn't gotten the settlement, they

lacked the resources to fully implement and achieve the consent, so they went and they got a consent and that consent is held, they hold that, 54% of the consent is held. They then lease the space that is the subject to that consent to the mussel farm and they hold, I can't remember the percentage, but it's between 5 and 8% of the overall shareholding of the farm. But the iwi is the major shareholder in this space and they lease it as if they would a forest for the utilisation.

Your Honour, Justice Williams, you asked if there were signals in the applications for resource consent about whether or not that was a re-assertion of mana. No, they were just applications for consent. The efforts were about the assertion of mana moana within the area. Whakatōhea did seek to get investors from other iwi to assist them in the endeavours because they lacked the resources. They didn't get them. It was the mum and dad investors of the Ōpōtiki community that came in and invested and bought shares and supported those endeavours moving forward.

WILLIAMS J:

When I read the planner's report there was relatively extensive, well, no, not extensive, but there was clear discussion of the application being vindicated, a vindication of tikanga connections and so forth.

MR POU:

So that's the report but you won't see that in the resource consent, the resource consent which just sets out the –

WILLIAMS J:

The consent document itself?

MR POU:

Yes.

WILLIAMS J:

Well, of course not, but I couldn't find a set of reasons. All there is the planner's report and then the consent itself which generally doesn't include reasons but just the consent. The report does deal with cultural connection with place.

MR POU:

Yes, and that's the – I think it was Ray Thompson's report that he did.

WILLIAMS J:

That's right.

MR POU:

And he set out the people who had appealed, who opposed it in various ways, and I think – I mean again that mandate issue comes up. Whether or not consents are granted are, you know, subject to the process moving forward, but like the Waitangi Tribunal anybody can make an opposition, anybody can make a claim. That's not to go back and say, well, Te Upokorehe didn't have the right to lodge that claim and those sorts of things. But I think we also need to treat those processes as – it might be an indication of factor to take into account in determining whether or not there was authority there, but from the other perspective you've got two representatives, two Upokorehe representatives on the Whakatōhea Māori Trust Board, and I think it was Josephine Mortenson at that time and somebody else.

So there are different ways that that representation is manifesting in different ways, and I think Upokorehe participation has since the Tūhoe settlements, you see that and it's reflected in the documents that Mr Lyall was putting to you where Ms Ertel was representing them. They were trying to extricate themselves from the Tūhoe identity and align with Whakatōhea, then when Whakatōhea was settled, and then there's this establishment of an iwi presence.

1200

That's not necessarily accepted holus-bolus and you see in the evidence of Keita Hudson, I think it is, she says: "Well, we're here for Te Upokorehe but

they consider themselves a hapū of Whakatōhea." My submission today is on the basis that Te Upokorehe are a hapū of Whakatōhea. They are contained in the Tāwharau trust deed. There was a process that they embarked upon to try and remove themselves, that didn't go – that didn't result in them being removed, and they are represented by the Te Tāwharau o Te Whakatōhea. They have received as Upokorehe as a hapū of Whakatōhea benefits from the Whakatōhea Māori Trust Board. I've got the Gazette notice for Roimata Marae if we need to look at it, but it lists for the benefit of Upokorehe hapū of Whakatōhea. And I've got the minutes if this Court needs where Patrick Aramoana, who was the father of Wallace Aramoana who was in court earlier last week, accepted a position as an advisory trustee on the Roimata Marae when it was finally gazetted where they agreed for the Whakatōhea Māori Trust Board to be the ongoing administrative trustee of the land that the reservation was being made out of.

So I guess I just wanted to do it in kind of a shorthand way to say those connections are there. A lot of the discussion that I've heard over the past eight days has been a whole lot of gymnastics and abstractification to try and extricate people and separate whakapapa, which does not seem to be – to line up with some of the context of the way in which whakapapa should be used.

That being said, Ōhiwa Harbour is a complex area. The history of Ōhiwa is complex, where you see a layered presence of many polities, which are reflected in the naming of their whare. The name of the whare at Maromahue is Te Poho o Kahungunu, which speaks of their presence there and the relocation of Te Waru Tamatea. There's a Ngāi Tamatea claim that comes out of there from Keita Hudson. But it just shows you how they were – you know, as Justice Williams was saying, the raupatu did some really bad things, did some reorganisation, and I don't say this lightly, when it happened and Whakatōhea were shepherded out of their pā within the Ōpōtiki region, they were subjected to an ethnic cleansing where they were placed onto the reservations on the fringes of their rohe, and with great respect to Ngāti Rua, many of them were placed on that Ōpape reserve, which – where Ngāti Rua, where their mana emanates from.

When we move over to Ōhiwa, it does get a little bit more complex. Your Honour Justice Williams, you noted that Rongopopoia was the son of Rongowhakaata. That's right, his – when his pregnant wife left him with Rongopopoia she went up and Rongopopoia was born in Ōhiwa Harbour. He was killed there and there started some – a little bit of – well quite a lot of internecine conflict, I shouldn't marginalise it, around those areas. And then you see – and in particular he was – and this is in the evidence, if – and I mean it's context more than anything else, I don't think we need to take you there, but it's in the evidence of Desmond Kahotea where he talks about the Te Whakatāne relationship in there which actually highlights the Upokorehe overlap with the Tūhoe polity that comes down into that area as well, which you would have noticed, your Honour, when you were doing the *Takamore* case and doing those things around Kutarere Marae, there are strong connections with Tamakaimoana, with Ngāi Tūranga, and those groups down in the area. All that being said, their whakapapa still connects them to Whakatōhea. They are looked after by Whakatōhea. Whakatōhea provides them benefits and they are represented on the Post-Settlement Governance Entity.

One of the other themes that has emerged through this hearing is how is a connection maintained? How do you maintain those fires, and is it through protest and how long does that have to happen? It's really important to understand the context. "Whakatōhea" means stubborn, protesting, audacious. They get their name from their tupuna Muriwai who had the audacity to put a rāhui over the whole of the Bay of Islands – Bay of Islands, sorry, I'm in the wrong rohe completely. Bay of –

WILLIAMS J:

Might have done that too.

KÓS J:

This is the 400-year…

MR POU:

Mmm. So to have the audacity to do such a thing, to have such mana that the tapu of Muriwai could be – just shows that tohetohea. But I think we need to actually put in the context what happened to Whakatōhea when they did protest. So the first protestor when the invasion came in was a man called Tio Kahika and he came out waving his arms unarmed. He was shot in the Huntress Creek. He was used for target practice. His body was desecrated and they never returned his body back to his whānau. So there are good reasons not to protest when those sorts of things happen to you. My submission is the absence of protest or where you protest internally doesn't mean that your fires have gone out. It cannot mean that.

I want to refer to an Environment Court decision not in this region but it relates to the Pākiri sand mining. So just north of Auckland there were applications for resource consent to mine sand. The sand mining has been going on for a hundred years and the iwi at times have opposed – and this is where they start to use contemporary mechanisms to try and assert their presence in particular areas. Every time the iwi Ngāti Manuhiri have attempted to stop the sand mining they have been told no, the sand mining has to go ahead. Because the sand mining has occurred for a hundred years a lot of the kaimoana that they would have once used to connect themselves or provided evidence to a hearing like this has been sucked up through dredges, disturbed, and so basically the bed of the sea off the coast of Omaha Marae has been subject to substantial and extensive mining. I think the last mining permit was for 2 million cubic metres of sand. I just want to put up – so Ngāti Manuhiri have finally managed to stop the sand mining and there was a costs award that went against the sand miner in that case. I just want to read paragraph 68. I'll read this out and then I'll take you to the headnote.

"We suggest that a close," and this is the costs award against the miner, "We suggest that a close reading of the substantive decision of the Court demonstrates the ways in which these various burdens fell upon the parties to argue various aspects of the matter. In that regard, it is very clear to us that the

Manuhiri Kaitiaki Charitable Trust as the mana whenua and kaitiaki had the responsibility to carry this matter on a cultural basis before this Court."

Now that suggests that it would be easy to come in here and say, well, a hundred years of sand mining, 2 million cubes being taken out, is a substantial interruption. What that shows is that even though they've been unsuccessful that can't be now seen to be a substantial interruption, but why do we have to rely on a positive Environment Court after a sequence of negative ones to show that those fires have gone out, and what you get from this decision here at paragraph 68, so this is two Judges sitting on this one, Judge Smith and Judge Warren, who's got an alternative Environment Court warrant, basically saying that notwithstanding a hundred years of marginalisation you still maintain the responsibility to exercise kaitiakitanga and do these sorts of things. So when we're looking at this issue about substantial interruption, we need to be very, very careful. Now I can provide –

WILLIAMS J:

I think the Crown agrees with you on that. You're probably pushing on an open door there.

1210

MR POU:

Well, that's good, because I want to get into the – because it doesn't seem to match up the submission that I heard being made by Crown Regional Holdings around the groynes which they say is a substantial interruption, and I want to take you through a series of maps around those groynes. Ms Hill made the submission that without Whakatōhea's support they could have still got the consent, and I am going to make the submission categorically that that would not have been the case, and I'll show you some maps that come out of the attachments of the deed of settlement that show why not.

GLAZEBROOK J:

Can I just check, your submission is it's not a substantial interruption if the cultural connection to the land hasn't been broken, is that the –

MR POU:

Mmm, and if mana whenua continues to be exercised. Mana whenua, mana moana in some way. And that's – after I finish this I want to have a little bit of a discussion around rāhui as well around those things, but if you have a look at this you can see where, that's the outlet for before the groynes got put in. Next to that outlet is – are two blocks of land. That's the Huntress Creek Conservation Area which is now called Tawhitinui. You will see in the map in – there's a little carve-out that sits there, a little square carve-out, that's the Akeake urupā.

And just for point of reference, that's what the groynes are going to look like. You can see the Tawhitinui reservation area there in the background. You can see all the land that's going to be reclaimed that's there, that the Crown and the council have agreed will revert back to Whakatōhea. If the Crown – if Crown Regional Holdings consider that to be a substantial interruption, they are landlocked by Whakatōhea and Whakatōhea can substantially interrupt their access to those groynes in the absence of their agreement. And I guess the other issue with this, and I confirmed this with Dr Amoamo this morning, is Whakatōhea opened these groynes. Te Riaki and Te Kahatu Maxwell went there and Te Riaki agreed that Te Kahatu Maxwell should open these groynes. They are there to service Whakatōhea enterprise, which is the biggest enterprise in the region, and to help maintain their connection with their mana moana.

But when we go back to that little square, so if I go down further it shows the – it shows that this is an urupā, that square is an urupā that is coming back to Te Whakatōhea. In the evidence of Raiha Ruwhiu she confirms that the last Ngāi Tamahaua person was buried there in 1874, so it's a Ngāi Tama urupā and again this is the area that Te Upokorehe Claims Trust are saying is exclusively theirs. How could it be if somebody else's urupā is in there?

It also should be said that there was a discussion about Onekawa Te Mawhai and I think the discussion was, are all the marae in Ōhiwa Upokorehe? The majority of them are and the functioning ones today are, but Onekawa and

Te Mawhai weren't, and in fact Te Ringahuia Hata gave evidence that there's a Ngāti Patu urupā on that side of the – on the eastern side of the spit, so it's just wrong to come here and just say no, all of the cultural markers and identity are solely Upokorehe. They are there and the mana is there, and they are recognised as having significant mana unto themselves as a hapū through the Ōhiwa Harbour Implementation Forum. They are there with Te Waimana Kaaku who are the Tūhoe part, but they are also there with Whakatōhea and Ngāti Awa. So it's –

WILLIAMS J:

Can you help me with the, see the park Crown land with the urupā carved out?

MR POU:

Yes.

WILLIAMS J:

Is the urupā called Tawhitirahi [*sic*], did you say?

MR POU:

So the – no, no, the reservation, that's the Huntress Creek reservation. It's now called Tawhitinui.

WILLIAMS J:

Tawhitinui.

MR POU:

The urupā which I'll go down to, I think it's 41, there's the urupā there, and it's listed as the "Urupā Tawhito" but evidence before this Court labels it as "Akeake Urupā".

WILLIAMS J:

Akeake. Okay, so what I can't work out in my head is how this maps onto the realignment. Is there something that can help me with that?

MR POU:

Yes. So if we go back up to that one up the top, so this one here. So that's the Tawhiti one, Tawhitinui one. This is the western groyne here. Now if you can see where it's –

WILLIAMS J:

Where's – yes. What are you…

MR POU:

But if you have a look, see there's a bit that says: "11 to 15 metres"?

WILLIAMS J:

Yes.

MR POU:

That's where the harbour currently comes out.

WILLIAMS J:

That's the old?

MR POU:

That's the old –

WILLIAMS J:

The old mouth?

MR POU:

No, that's before the groynes, yes. So all of this has been backfilled. That's –

WILLIAMS J:

Yes, so where is the urupā in this map, if it is?

MR POU:

The urupā on this map is – see where the carpark is?

WILLIAMS J:

Yes.

MR POU:

So if I go – this one here. So you see it there.

WILLIAMS J:

Where…

MR POU:

So the western groyne is there, and then – so if you see where the old harbour mouth is and you've just got to –

WILLIAMS J:

Can you put your cursor on where it is?

MR POU:

So the old harbour mouth is there.

WILLIAMS J:

No, put your cursor on where the urupā is.

MR POU:

Urupā is – the urupā would be around here.

WILLIAMS J:

It's gone.

MR POU:

Sorry. Probably half way along from the carpark. So underneath where it says "natural wavy", straight back from there.

WILLIAMS J:

That's the bit on the green or the grey?

MR POU:

On the green bit. So the grey bit –

WILLIAMS J:

So it's on the dry post realignment? Is that grey area reclamation, is it?

MR POU:

The grey area is going to be reclaimed, yes.

WILLIAMS J:

Right. So it's on the former dry, of course.

MR POU:

Yes.

WILLIAMS J:

And then there's a reclamation in front of it?

MR POU:

There's a reclamation going out in front of it. If you have a look at the boundary, it was just touching onto the edge of the harbour mouth as it went out, and the issues around the access and stuff in the reclaimed land are to ensure minimum disturbance of that urupā, of that Urupā Tawhito. On the other –

WILLIAMS J:

So you said the last burial there was 1870. Was it Māori land? Is it Māori land?

MR POU:

It wasn't. It was part of the Huntress Creek reservation. So this is all subject –

WILLIAMS J:

I'm not sure what that is. Is –

MR POU:

So the raupatu happened and then there were a number of reserves that were made. One of them was the Huntress Creek Conservation Area. That's what this piece of land was. It was –

WILLIAMS J:

So this is an urupā that was taken in the raupatu?

MR POU:

Yes.

WILLIAMS J:

Never given back.

MR POU:

Never given back.

WILLIAMS J:

And then a local body reserve was created or something like that?

MR POU:

Yes.

WILLIAMS J:

I see, and now it is being given back?

MR POU:

It is given back in fee simple.

WILLIAMS J:

Part of the settlement, is it, part of the land claim settlement?

MR POU:

Yes, your Honour, and again that's again rekindling the – you know, they haven't had it for 160 years. You can't say that the fires didn't go out just

because somebody else was owning it. On the other side of the harbour, on the other side of the groynes, is the Te Roto Urupā for Ngāti Ngāhere, and again that's another urupā that has been held by the Council and has been given back by way of settlement.

Now the fact that these urupās were in the Council's hands would not discount against them being a justifiable reason. Should Whakatōhea have decided to, with venom, oppose these consents they would have been significant reasons to justify a non-grant and it is probably not wishful but wistful thinking to assert before this Court that the consent would not have been granted or that, you know, it would have been easily enough granted absent the assistance of Te Whakatōhea.

GLAZEBROOK J:

Just keeping an eye on the time?

1220

MR POU:

Yes, and I just thought – I think I've hit the main things, so essentially Te Tāwharau's position for Ngāti Ngāhere and Ngāti Patumoana is that Ngāti Patumoana are in Ōhiwa.

GLAZEBROOK J:

Sorry?

MR POU:

Ngāti Patumoana are in Ōhiwa. So to the extent that Te Upokorehe claims an exclusive interest there, that's not accepted. It's opposed exactly as Justice Williams was putting when those submissions were being made, the only way to reconcile those issues, and given, I mean, the re-organisation of them when they were pushed onto the fringes of their land, it is really hard to allocate these things. So I think the shared title is the only way that it can happen.

I've had some thought about the proposition from Upokorehe that you have these overlapping. My submission is that it would – you'd have to spatially define the overlapping titles so that what would be blunt in your exclusive mana whenua if you had any would necessarily, the rules wouldn't necessarily apply the same way if they were overlapped, so it creates a layer of complexity without needing it to be reconciled, and I guess in terms of that the last issue that I would raise is Mr Bennion took you to Te Ara Tono and he suggested that that's the document that was the basis for the template for settlement. He suggested that it was a basis for separate hapū holding titles. That's not what that document is about. That document is about prioritising the voices of the hapū within an iwi dynamic, and if need be I can supply the reference, but it's also about ensuring that the minority, that the tail doesn't wag the dog, that decisions, key settlement decisions can be made and can't be vetoed by any particular hapū. I don't want to go too much into that because that is the subject of a High Court determination that we're waiting for the decision on, but this Court should take Te Ara Tono as being something that reflects a whole lot of separate things. It's a model for a single settlement for Whakatōhea iwi but to ensure that hapū have the prominence of voice and in decision-making through various mechanisms.

Those are probably the only things that in the short time I think I really needed to address you on other than to say if you have any questions I'm here to answer.

Actually, there is one issue. So this issue of rāhui. Your Honour, you've suggested on a number of occasions that rāhui are generally observed. While that might be the case when somebody dies, it's not generally the case for when they are being tried to be applied for conservation purposes. So when the *Motiti Rohe Moana* case came to the Court of Appeal, that followed in the wake of the Rena when there had been an exclusion zone and all the fish came back and then when they dropped the exclusion zone all the fish went. They all got fished out. So the Rohe Moana Trust at the time tried to impose a rāhui which none of the local fishers wanted to observe, so they went and they sought – and this is using contemporary mechanisms to assert a cultural presence.

The application that they made was to seek the enforcement of a rāhui through the Regional Plan on the basis of the maintenance of biodiversity. So they were being quite innovative in trying to seek a mechanism to effect a rāhui that nobody would listen to when they tried to place one, and that's why we have taiāpure and mātaitai and those Fisheries Regulations to give legal force to rāhui that might be for reasons for conservation as opposed to anything else.

So I think those, however – I don't know, I find it difficult to reconcile those with what then gets spat out of this Act where people are seeking protected customary rights for instance to collect firewood or driftwood when you don't need a resource consent from that in the first place, so you get a protected customary right to do something that anybody who turns up on the beach can do anyway, and the – so why would you need it, and –

WILLIAMS J:

It's an assertion of mana. That's the point.

MR POU:

And I think that's what it comes down to. It's about – it's become less about what you achieve out of it and more about colouring in your boundary, as anything else, and I think when it's looked at in that way – because I guess you can analyse the Hansards as much as you want and you can say well did they mean 10%, did they mean this, you know, I mean the 10% were those comments of assessments, but what they meant, what they obviously meant is that tikanga would be important in the determination of how we spatially map these areas of mana whenua, how do we do it hopefully in a way that doesn't reflect the individualisation that happened in the Native Land Courts, hopefully it happens in a way that doesn't result in exclusions like happened in the Compensation Courts and those sorts of things, but when it's looked at – when you look at what you actually achieve out of it, because I guess the Landowners Coalition, it's about – there's a fear out of what if these Māoris get all this control, those fears are unjustified and they don't seem to match up or cut across the intention that's being portrayed in Parliament when this Act is being passed. It seems the arguments that they make are based on a

hyperbolic exaggeration of what is being achieved as opposed to what is actually being delivered, so.

That's all. Again, there is the Ngāti Porou show to come on, and so unless you have any questions that's my context in a nutshell.

GLAZEBROOK J:
Thank you very much.

WILLIAMS J:
Nice warm-up act.

MR POU:
Oh, if I'm the warm-up, you better be good. Thank you, your Honours.

GLAZEBROOK J:
Thank you.

MR MAHUIKA:
Heoi anō rā, tēnā anō hoki ngā Kaiwhakawā, tēnā tātou e te Kōti. Kia tangihia o tātou mate me kī, huri ngā whakaaro ki tērā o ngā pāpā, ki a Tā Bom, kātahi anō ka tukuna atu ki te kōpū o te whenua o āna mātua tīpuna. Otirā, ki a rātou katoa, kua whakangaro atu i te tirohanga kanohi, ana, ka hoki mai ki a tatou te hunga ora. E whai tonu nei i ngā kaupapa e whai ngakautia nei e rātou, i a rātou oranga. Me ngā mihi anō hoki ki te pāpā ki a Te Riaki, nāna i tau mai te mauri ki runga ki tēnei huihuinga o tātou i te tīmatatanga o tēnei huihuinga, i te whakatūwheratanga o tēnei rangi anō hoki. Nā reira, tēnā tātou.

I've just welcomed you all here – oh, acknowledged the Court again, acknowledged those who have passed, and also acknowledged our kaikarakia, who opened this hearing and also opened the day. And I should also acknowledge given that I'm here on behalf of Ngāti Porou our relatives from the waka of Mataatua, who have brought this take before the Court and who, amongst other things, Ngāti Porou is here to support. So thank you very much

for making this time available. I'm not sure if I can emulate the show that you've just had, I feel like rather a poor supporting act, but I do have a few things that hopefully will be helpful to your Honours' determination of this matter.

We did hand up a road map. I'm conscious that actually the question that was asked of me yesterday was to talk more about the application of the test in the Ngāti Porou situation. There were a few points in the road map that I will move through very very quickly to get to that point.

1230

The thing about an intervention is that you're not quite sure exactly how the hearing will play out when you make the decision to intervene. The principal concern of Ngāti Porou and the reason that we wish to be involved was not just to be part of the show, but there are some very bespoke agreements that Ngāti Porou has. Until this stage the Crown had taken a neutral position on the application of the test, but of course in this court is now taking a firm position, and our concern was that that position potentially flows through to the negotiations that we're having for the recognition of CMT within the rohe of Ngāti Porou, and in particular the notion that the Court should read into section 58(1)(b)(i) what we've described as this gloss, that there needs to be an ability, an intention to exclude.

As we say in paragraph 2, our view is that this does not flow as a matter of course from the wording of that paragraph. It is inconsistent we say with the scheme of the MACA Act which significantly qualifies what amounts to "exclusive use and occupation" for the purposes of that section, and most importantly from our point of view, potentially imposes a constraint on the future, on a future court when considering the bespoke situation of Ngāti Porou and the agreements that we've entered into. The other thing that we would add is that we don't consider that that gloss is consistent with the agreements that we've entered into with the Crown, which amongst other things includes an agreement not to make amendments to those arrangements without the consent of Ngāti Porou.

Moving on then to paragraphs 3 and 4, and this is really talking to the point I think that Justice Kós raised initially, and that is as to the nature of the Marine and Coastal Area Act. So is it something which is recognising and replacing customary rights, or is it something which is providing a mechanism through which those rights, although they exist and may be broader, are able to be legally recognised and enforced. So in other words, these are some legal mechanisms to support the existence of those rights as opposed to being a replacement and reflection of those rights, and there are two particular matters that – well there are three actually that I'll refer to in that list of paragraphs.

So first of all, there is an acknowledgement in the Ngāti Porou deeds which is that the mana of the hapū of Ngāti Porou throughout their rohe moana, so that's the whole area of the different hapū that have agreed to that deed out to 12 nautical miles, so this is – it's acknowledged by the Crown that this is unbroken, inalienable, and enduring. So in other words, there is an acknowledgement that those rights don't exist as a historical matter, but they exist, and they exist throughout that 12 nautical mile area.

Secondly, at paragraph 5, the purpose of the agreements is to better secure the legal expression, protection, and recognition of that mana in relation to ngā rohe moana o ngā hapū o Ngāti Porou. And the words there are important, it is to better secure the legal expression, protection, and recognition. So it is about providing legal mechanisms through which those rights are recognised, and in order to protect those rights as opposed to it being for the purposes of replacing those rights.

And lastly, and this is specifically relevant to the Ngāti Porou situation, we note at paragraph 7 that section 8 of the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 explicitly provides that the provisions of the Act "are to be interpreted in a manner that best furthers the agreements expressed in the deed of agreement", and this is relevant to the application of the test because if you look at paragraph 6 the test is brought through into the Ngāti Porou Act in section 111(3), although then cross-referenced to sections 58 and 59 of the MACA Act. But the point about that is that at least in this situation the way that

the test needs to be approached has to be in a manner which is consistent with the agreements that have been entered into between the Crown and Ngāti Porou. So that necessarily, at least in the Ngāti Porou situation, qualifies the way in which that ought to apply.

GLAZEBROOK J:

And it would be odd, in fact, if it was just Ngāti Porou and not a generic…

MR MAHUIKA:

Absolutely, yes, and that's why –

GLAZEBROOK J:

Well, actually, probably more than odd.

MR MAHUIKA:

Yes, and that's why I make the comment because actually if you look at the sequencing of the various steps that have occurred, you have the *Ngāti Apa* decision in 2003. You then have the Foreshore and Seabed Act which was passed in November of 2004. The Ngāti Porou agreement is then entered into in 2008 just before the general election and before the 2011 review, but if you look at the content of the deed quite a number of the mechanisms, although they are in a different form, then flow into the Marine and Coastal Area Act, so, for example, the environmental covenant, the idea of a permission right, and then you have the Act itself passed in 2011. So there is a sequencing there where you have mechanisms that were agreed between Ngāti Porou and the Crown then picked up, used slightly differently or in a slightly different form, but nevertheless they carried through into the 2011 Act which is why – and I don't know how far I can take that – but which is why the notion in the Ngāti Porou agreement around it being to recognise and to protect those rights and to provide the legal mechanisms for their expression is perhaps pertinent because that's the context within which those discussions at least occurred between Ngāti Porou and the Crown.

KÓS J:

Could I ask you about something else? We touched yesterday on section 122, sorry, 129 of the Te Ture Whenua Act and that provision, which in 1993 I think talked about "holds", it's Māori customary land, holds according to tikanga seems to have informed the first limb in the 2011 Act, but in turn goes back at least to section 2 of the Māori Affairs Act of 1953. So there's a long sequence of the first limb being a familiar concept.

MR MAHUIKA:

Yes. I'm not sure to what extent you can transplant it into the Marine and Coastal Area Act for a start but the notion of holding in accordance with tikanga is certainly true. When you're talking about it in the Māori land context you are, at least in terms of the thinking at the time which was that there was no title below mean high water springs, you're thinking about it in dry land and you perhaps are applying it in much more of a proprietary sense, and it's been talked about already, once you get below mean high water springs you don't occupy it in the sense that you don't have, well, maybe apart from wharves and ports and those sorts of things and other types of structures like marine farms, your occupation of that area is more reflected by a consistent pattern of use over time in respect of that. That's how you evidence that this is part of your tribal territory, if you like, and that you hold that area.

So I think that the notion of having that tikanga connection is well established. The challenge here is working out what it means in the context of the takutai moana which is especially different from dry land in terms of the way you possess and you exhibit use and occupation of that area.

I'm not sure if that was a helpful answer but that's…

GLAZEBROOK J:

And also probably more than inland contrary use by other people and how that's accommodated, contrary lawful use by other people and how that's accommodated and worked through and the compromise that is the MACA Act itself.

MR MAHUIKA:

Yes, and of course that's where custom becomes important as well because an area of water space might well be within a tribal territory but it is also used as a, if you like, as a roadway or as a point of navigation without necessarily there being any intervention. So the question becomes, well, if that's a practice, the types of vessel that you use to navigate might change and the intensity of that might change but if it historically hasn't been an interruption should it be an interruption now, which goes some way, I think, to explaining perhaps why section 59(3), I think it is, has that exclusion of navigation as being in and of itself an interruption to customary marine title.

1240

What I was then going to do was skip over the first part of the test, "held in accordance with tikanga", the main –

WILLIAMS J:

Can you just help me with this technical question? In the Ngāti Porou rohe moana legislation, does it contain tests?

MR MAHUIKA:

Yes, yes. It incorporates in section 111 –

WILLIAMS J:

Oh, that's – oh, sorry, I thought you were talking about the MACA Act.

MR MAHUIKA:

Yes. Well what it does is it – now I don't have it in front of me, so…

WILLIAMS J:

I do, yes.

MR MAHUIKA:

Yes, but it does in section 111 pick up section 58(1) I think and transplants that into the Act, and then makes –

WILLIAMS J:

Sections 58 and 59, yes.

MR MAHUIKA:

And then – but then makes reference to the test being interpreted in accordance with sections 58 and 59. So it's partly by including the – sort of the broader test and also references the MACA Act.

WILLIAMS J:

Yes. So this –

MR MAHUIKA:

But as I've noted, Sir, you also have that additional qualification that, at least insofar as the Ngāti Porou legislation is concerned, it needs to be interpreted in a manner which is consistent with the matters, well the agreements that are set out in the, now the 2017 deed of agreement.

WILLIAMS J:

Do you know how section 111 maps onto either section 106 or – what's the requirement provision…

MR MAHUIKA:

Look, I am not sure off the top of my head, Sir.

ELLEN FRANCE J:

Section 98, or –

WILLIAMS J:

Section 98?

MR MAHUIKA:

Yes.

WILLIAMS J:

It does seem to reflect to some extent section 106, but it's not really about burdens of proof, it's about what you – what must be in an application, and I know there's a provision in the MACA Act about what has to be in an application.

MR MAHUIKA:
Yes.

WILLIAMS J:
I just can't remember what the provision is.

MR MAHUIKA:
And in practice, in terms of approach, and we can get to that when we talk around the maps and I endeavour to answer the question you asked yesterday, your Honour –

WILLIAMS J:
Right.

MR MAHUIKA:
In practice, in terms of approach, there's been no actual difference, and you can understand the reason for that, why you would go through quite a detailed and robust process to get to an agreement around customary marine title because of course it needs to be first of all acceptable as an outcome from a political point of view, but also needs to be robust in the sense that it complies with the requirements of the law.

KÓS J:
Section 111(6) certainly picks up section 106.

MR MAHUIKA:
Yes, I'm sorry, Sir, I don't – well actually I do now have the legislation –

WILLIAMS J:
Section 111 –

FRENCH J:

Sorry, section 111 –

ELLEN FRANCE J:

Section 111 what?

KÓS J:

Subsection (6).

WILLIAMS J:

Of?

KÓS J:

Of the – of MACA.

WILLIAMS J:

Oh, is that what it is? Oh, that's why I got confused, yes.

ELLEN FRANCE J:

No – in the Ngāti Porou Act?

KÓS J:

No, no, no. Not the Ngāti Porou Act.

WILLIAMS J:

That's for variations though, isn't it?

KÓS J:

Yes. I'm looking at MACA as well. Okay.

MR MAHUIKA:

So – well what I was going to do next was simply skip over the section "held in accordance with tikanga". I think that's been discussed at quite some length. I – so unless you had any further follow-ups on that brief exchange we had?

The next question around "exclusive use and occupation", and there are two aspects to this, so there is – and I think this debate has been well thrashed out over the course of the last eight days or so, that's whether tikanga is a part of that test and how it might apply, and then at our submissions we simply note that there is a level of circularity in the argument that the first limb of the test, "held in accordance with tikanga", explicitly refers to "tikanga". So tikanga applies there but it doesn't apply to part 2 because there's no explicit reference to "tikanga", and part 2 is the common law test, and the circularity is that the common law test necessarily applies tikanga because the common law test is talking about customary title, and we refer in a couple of instances there to – the Canadian jurisprudence on this is reasonably clear, as is the Australian jurisprudence where the notion of "substantial interruption" comes from.

In the Ngāti Porou context what we also say is that actually it is made even clearer by the nature of the agreements that Ngāti Porou and the Crown entered into which are not focusing on the common law but they are focusing entirely on the recognition and protection of the mana of Ngā Hapū o Ngāti Porou which the Crown acknowledges is unbroken, enduring and inalienable. So if it's not clear from the wording of the test itself at least in the Ngāti Porou situation it becomes abundantly clear when you consider how that test would apply in that context, given the nature of the agreements that were entered into.

We do elaborate on that slightly in the submissions because there are a series of principles that are intended to apply to the interpretation and implementation of the deed and therefore the legislation, and those are toitū te mana whenua, toitū te mana moana, toitū te mana tangata, toitū te Tiriti o Waitangi. So that's talking about mana whenua, about mana moana, about mana tangata which is the ability of the Hapū of Ngāti Porou to influence the actions and activities of people within their rohe moana, and then, of course, also references the Treaty of Waitangi. So if you consider those principles and they have to be applied in the interpretation of the test, it would be very odd indeed if you could apply the second limb of the CMT test without having regard to the matters that those principles say are important in the interpretation of the agreements between the Crown and the Hapū of Ngāti Porou.

So moving on to the topic of "substantial interruption", we didn't deal with this in a lot of detail in our submissions, partly because of time and it's also because it has assumed a greater prominence than we had perhaps anticipated when we were writing our submissions, but we would agree that as we say in paragraph 16 of the road map that based on the scheme of the Marine and Coastal Area Act "substantial interruption" must refer to an event or activities that preclude the continued existence of customary marine title, which doesn't actually advance us very far, but we also agree that it could have a temporal or an intensity element. So it means in theory you could have an activity like a wharf which exists for a brief period of time is quite intense but it doesn't displace the customary rights holder which we think is one of the most important things to consider when looking at third party impacts on the continued existence of customary marine title, and that's where the examples that we refer to in paragraph 17 potentially become important.

So these are to your question, Sir, Justice Williams, around what are the sorts of issues and challenges that need to be worked through. So there are the normal things. This is a very evidence-intense process and we've seen that through this hearing, just the amount of evidence that needs to be gathered. First of all you need to cover a period from 1840 to now, and, of course, in any region you will have had changes in the demography and the activities that are occurring in that area and, in the Ngāti Porou example, settlements at the coast which have subsequently moved inland.

So the four examples that we refer to in paragraph 17, and I've been thinking a lot about how to talk to these. I don't wish to disadvantage the Crown because we've put the maps in evidence. There is a report that talks around why this comes about. I will try and talk to it in a way which reflects what's in that report. I would, of course, consent to my friend replying or putting in any information that she thinks is necessary, but I do need to talk to some of that context in order for you to understand how this has worked in practice and in order to respond to his Honour, Justice Williams', question of me yesterday.

1250

So I So I wonder if we could start off by bringing up the first of the maps. Now this is the map from the Waipapa Stream, Te Wharenaonao, and this an area which runs along the East Cape. So this is an area where the East Cape Road abuts the coastline.

GLAZEBROOK J:
Can we locate it in the book?

FRENCH J:
Page 23.

MR MAHUIKA:
It is located at 23 and 24, thank you, and you'll see that this has been dealt with in two stages. So there's a second map I think at page 24, which was a subsequent decision. So in terms of timing, and you'll see that from the orders, the area out at sea was agreed initially, and then the inland area was agreed subsequently, and the reason that the inland area wasn't initially agreed is that work needed to be done to determine what was the impact of the road abutting the coast in terms of the extent of third party use that allowed of that piece of foreshore and seabed. So this is very much around did that third party use, was it of sufficient intensity that it would displace customary marine title in that area, and without getting into the detail the fact of the second area being agreed means that after some discussion after gathering further evidence on this, after further investigation, it was agreed that it didn't.

WILLIAMS J:
What sort of information?

MR MAHUIKA:
There was a combination of some historical reports. I don't think he'll mind me dropping his name into this, but Dr Ashley Gould, in fact he probably would quite like me to drop his name into this, did quite a lot of the historical work, and then of course there was evidence of the people from this area. So there was,

I think, evidence of the late Koro Dewes. Subsequent to that is Campbell, his son, from Rei Kohere, whose family in and around East Cape and –

WILLIAMS J:

When you say "evidence", how did that…

MR MAHUIKA:

Affidavit evidence that we provided to the Crown.

WILLIAMS J:

Formal evidence is filed in affidavit form.

MR MAHUIKA:

Yes, we provide the evidence in affidavit form, yes.

WILLIAMS J:

How is it processed? There's no hearing obviously.

MR MAHUIKA:

No but it's, we just think it's better that it's sworn testimony.

WILLIAMS J:

Okay.

MR MAHUIKA:

And it's useful in the sense that you consider that this process started in 2003, 2004 actually. The majority of those people who were the leaders of the hapū during that time have passed away in the intervening 20-year period. So having sworn statements from them is actually quite a useful thing to have in the event that we need to rely on it in some future moment in time. So the practice is to try and obtain sworn statements. Some of the older ones may not be, actually, you know, we may not have had those sworn, but certainly that's what we endeavour to do. Then of course you have the historical report, and it wouldn't surprise me that there's a certain amount of discussion and negotiation around each of those but –

WILLIAMS J:

About how many Ngāti Porou members built the road?

MR MAHUIKA:

Well, in that area, yes, yes.

WILLIAMS J:

Couldn't be anybody else.

MR MAHUIKA:

Yes, who gave the land for the road, who goes there, and of course it wouldn't surprise that with the road itself, while it abuts the foreshore and seabed, there is debate there as to whether that's evidence of anything, other than a road running along by the sea. So does that actually amount to evidence that there's use by third parties of that bit of coastline.

KÓS J:

So is the landward side of the green area in that page 24. Is that not mean high water springs? Can it retreat out to the seaward side of it because of usage?

MR MAHUIKA:

No, it's quite a rugged piece of coast. The road there is raised up from the level of the sea.

KÓS J:

Yes, I mean the road obviously wouldn't be part of the, unless it's a road that goes underwater occasionally.

MR MAHUIKA:

No, so it does run very close to the beach at that particular point.

KÓS J:

Right, but it wouldn't be part of the marine coastal area in terms of the Act?

MR MAHUIKA:

No, no it's not no. But the question there Sir is more about, does that road, does the fact of that road facilitate third party access to the extent that it would displace the existence of customary marine title in that area.

KÓS J:

Oh I see. Right.

WILLIAMS J:

How do you balance that about it against it facilitating locals' access?

MR MAHUIKA:

Well I mean that's the nature of the debate, and it was really coming back to, I suppose, the overriding reason that we sought to intervene is that the idea of applying a gloss about being able to have an ability and intention to exclude. Not only does that not follow as a matter of course in our view, but actually what these examples show is that there has to be quite a careful analysis of the factual circumstances in order to determine whether, in fact, there has been an interruption, and it's why we say while the interruption needs to be sufficient either in terms of duration or intensity that it displaces the continued exercise of that customary right or that customary association, and of course in the context of that Sir, yes the extent to which it's local access and local use as opposed to third party use is a matter that you would need to interrogate.

ELLEN FRANCE J:

And just in terms of that ability and intention to exclude, if that's ability to exclude as the law permits, does that meet your… so you can't stop people crossing a road, for example.

MR MAHUIKA:

Yes.

ELLEN FRANCE J:

Lawfully but…

MR MAHUIKA:

There are a couple of aspects to that question, I think, and one of the challenges that you have when you're looking at the existence of customary marine title is that while those rights or that authority may have continued to be asserted, it's never been supported by necessary legal powers to undertake that enforcement. So it's thinking about the ability to exclude from a legal point of view ultimately will disadvantage the rights holder because it's comparatively recent that you have the ability to legally enforce. I'm aware of situations in that area where it probably has been illegally enforced because people are left to use other means in which to try and protect these areas, or enforce their interests, otherwise they're not supported by a particular set of legal rules. So this area is an area where historically there would be a rāhui at this time of year over the taking of kaimoana. It's not, you don't have a particular ability to enforce it but…

ELLEN FRANCE J:

No, but I think that's the – while I take your point about introducing different concepts, the as the law permits idea would be to encompass that idea. So you can put the rāhui on, but if it's not complied with that's not necessarily the end of the road.

MR MAHUIKA:

I understand your point. I think I was talking at cross-purposes with you. Yes, I suppose that's right, and the other aspect of it, and it was the discussion on the first two days of the hearing, is that if you also take the view that there is an extent, at least, to which tikanga informs the application of that second limb of the test, then you can take into account practices such as manaakitanga to visitors and those sorts of things, which will allow activities and access to a point as long as it's respectful and it doesn't infringe on areas that the holder of the right thinks are important, and – actually it's not quite an analogy, but if you think of the situation, and it's in the evidence of Mr Gage where he talks about the area at Cape Runaway, which is, you're essentially going over the entire territory of Te Whānau-ā-Apanui from Te Whakatōhea. In fact going over Ngāi Tai to catch moki at Cape Runaway. But it's his evidence that as a matter

of practice, and because of the whanaungatanga relationships that Ngāti Porou and Te Whakatōhea at certain times of year would come to Cape Runaway to the territory of Te Whānau-ā-Kauaetangohia and would gather moki. So that's the, the practice is to share resources when the resources are sufficiently plentiful.

1300

So the analogy there is that this is a different time but, you know, the Māori communities don't exist in a vacuum from the rest of the community. So if you extend then principle then that principle would also apply to other people who wished to visit, who wished to use beaches for recreational purposes. It's why the idea of allowing recreational activities within customary marine title areas in my view is inoffensive because that would be what happened as a matter of course. What you're really looking to regulate in the context of that is much more significant types of interventions, and interventions which cross that line and infringe upon those principles.

Ma'am, I'm very conscious of the time.

GLAZEBROOK J:

With your other examples that you've given here, are they examples where there's been some substantial interruption compared to the road, or examples of…

MR HAGUE:

The other two examples, Ma'am, is the map which is in (c) in that paragraph 17, which is at page 28. So this is Awanui and you'll see at the top of that CMT area the reference Port Awanui. So this was a place of significance. There wasn't really a port in the way that we think about it, but it was used for bringing goods in and out of the area. So there was significant use both by locals and by the people of that area, and then in the second, or the last of the examples at pages 30 and 31, this is the Tūpāroa township I think it is. So this was also dealt with in two places, and so you'll see the Tūpāroa in the middle of the page there, that was actually quite a significant township. So I think – it

had existed, I think, from the 1870s to about 1920, so a period of some 40 or 50 years.

KÓS J:

This is the place that was effectively replaced by Ruatōria?

MR MAHUIKA:

Yes, that's correct yes. In fact when Ruatōria was established they took a number of buildings from Tūpāroa and relocated them to Ruatōria. The even had a billiards saloon and other places such as that.

WILLIAMS J:

Cultural necessity. I just wonder what would be extinguishing about it, or interrupting about a township made up of tangata whenua.

MR MAHUIKA:

It wasn't just local people.

WILLIAMS J:

Ah.

MR MAHUIKA:

But there is – that speaks to the comment I made earlier around these things being dependent on the particular circumstances, and of course there is an argument that some of these places had always been a place of occupation. Just because you establish a port and you establish some other infrastructure so that you can trade and you can communicate with the outside world that, in and of itself, shouldn't be treated as an interruption unless or until you're able to interrogate more closely to your point Sir. The facts that relate to that area. Who established the township, who were benefitting from it. Of course in this case there was a township there for a long time and then there isn't, so who are the people that are still there, and that's where that temporal dimension also becomes relevant to considering whether or not the underlying title is affected.

KÓS J:

Might I ask a spatial question?

MR MAHUIKA:

Yes.

KÓS J:

I'm just intrigued in the way that the lines project from the coastline in a lot of these examples, and they seem simply to follow the gridlines on the map, as opposed to, for instance, projecting at 90 degrees out from the coast, or possibly reflecting an area of actual use and – not of occupation, but at least use. How are those horizontal lines defined?

MR MAHUIKA:

They're – because if you put the maps together you'll find that there is a continuous area –

KÓS J:

Oh, they're joined.

MR MAHUIKA:

– from the Awatere River, which goes all the way to Koutunui Point at Tokomaru Bay, so quite a big area of coastline out to three nautical miles, and these areas are agreed between the hapū as to how they're going to divide up the different spaces, and if you do look at the – actually if we go to the one of the orders in the Order of Council, just to schedule 1. You can see how the orders are dealt with. So you can see there is the area that we've got onscreen there Sir, so the name of the hapū of customary title is Te Whānau a Tapaeururangi. It then defines the area over which the coastal, the customary marine title exists. That area goes out to only half a nautical mile. If we could scroll –

GLAZEBROOK J:

Do these overlap at all?

MR MAHUIKA:

No, it's dealt with as between the different hapū.

WILLIAMS J:

They're contiguous.

GLAZEBROOK J:

So the agreement of no overlap.

MR MAHUIKA:

Perhaps if we go to the end of that schedule please, I'll give you an example. So I think the last of these is the CMT area that runs to – that wasn't the one I was thinking about, but this is an example. So here you have the three hapū of Waipiro Bay. Ngāi Taharora, Te Whānau a Iritekura, and Te Whānau Rakairoa. They haven't defined individual areas within that CMT area, they've agreed on sharing that particular CMT area, and then will flow through into I think the adjacent areas Te Aitanga-a-Materoa. If you go further towards Tūpāroa township, there will be a shared CMT between Ngāi Tangihaere, Te Whānau Moeraki and Te Whānau Ruataupare ki Tuparoa. So you'll see it as it moves along the coast, different hapū, and the really interesting example is if you look at the ones on either side of the Waiapu River. So the Waiapu River is referred to in Mr Moana's affidavit filed in support of the intervention. He refers to the tradition of the Waiapu, which using the same tēnei pāpāringa, ki tērā pāpāringa he whānau kotahi. So, you know, this cheek, that cheek, but one family, and –

WILLIAMS J:

Cheek, from one cheek to the other check.

MR MAHUIKA:

Yes, he whānau kotahi, because of the close whakapapa relationships between the 17 or so hapū that exist within Te Riu o Waiapu and if you look at either side of it, there is a single trust that represents all of the hapū, but in the – if you look at the orders on the northern Waiapu there is a subset of the list of hapū that

have the CMT, on the southern side of the Waiapu there's a different subset of hapū that are recognised as being the hapū that have the CMT, although there is a single trust that represents all of the hapū, through which those rights are expressed and recognised, and the hapū within that trust work out how they manage things between themselves given those whakapapa connections.

WILLIAMS J:

So they just wanted to make sure it was understood that there's a different tikanga complex on one side than on the other even if they're all working together.

MR MAHUIKA:

Yes.

WILLIAMS J:

So that wouldn't be forgotten.

MR MAHUIKA:

No. But the idea of having one trust reflects that even the inland hapū it's reflecting that all of these hapū are related and working together, but the holders of the title, the ones in whose territory those coastal areas, are the ones that are noted at the commencement of the orders.

FRENCH J:

I was just going to ask if a third party was wanting permission for a consent, would they go to the Trust Board?

MR MAHUIKA:

They would go to the trust.

FRENCH J:

Right.

MR MAHUIKA:

And the trust fulfils that administrative purpose. There will be ways within the trust where those decisions need to be made, and I might need to swear myself in to do this next bit, but those hapū are all related, I belong to those hapū, and there is, there are ways that you interact, that you manage that decision-making, and you ensure that you respect the position of those coastal hapū who have for however many generations have been the guardians of that particular part of the tribal territory. But those are internalised.

Unless there is anything further I don't propose to say anymore. I'm aware that I've gone over time.

GLAZEBROOK J:

Thank you, that's been very helpful.

MR MAHUIKA:

And as I said earlier because I have talked a little bit around, I've tried to stay away from the reports of it, but there is a report about this. I'm very happy for my friend to respond or file anything. It's only appropriate that she has that opportunity with your Honours leave.

WILLIAMS J:

Are you talking about the Gould report or another?

MR MAHUIKA:

No but there is a, there are papers that contain the recommendations around how these work. I wasn't suggesting that we would file it, or that it should be filed, but if my friend wished to have an opportunity to file something I think I should consent to her having that opportunity.

GLAZEBROOK J:

Thank you. We'll adjourn for lunch and come back at 2.15 pm.

COURT ADJOURNS: 1.10 PM

COURT RESUMES: 2.17 PM

MS ROFF:

I see that the Attorney has just got a five minute slot before we start with the replies, I'm sorry Mr Fowler, but what I was going to say your Honour is that I had a look again at the submissions that we prepared for, this is issue 4, which is the overlapping CMT orders, and it relates to the appeal brought by Te Upokorehe and the Attorney filed written submissions on this. They're dated 18 October 2024 and I've looked at those written submissions, your Honour, and there's nothing really I think I can usefully add, and so unless your Honours had any questions I'm quite happy for those to just let the written submissions speak and not take up precious time that we have this afternoon for reply.

GLAZEBROOK J:

Thank you.

MS ROFF:

Thank you.

GLAZEBROOK J:

Mr Fowler?

MR FOWLER KC:

Yes, thank you, your Honour. Your Honours, I feel slightly bereft, no road map.

KÓS J:

We're lost.

MR FOWLER KC:

And I realise that we're going to have to keep the pace cracking so in terms of our slot I will lead off with some reply matters directed to mandate. I'll be followed by Mr Sinclair, who will deal in particular with the Te Upokorehe interface with the iwi/tīpuna position and that has a direct relationship to matters covered by Mr Lyall, and I need to indicate now that, notwithstanding what he

covered and took you to, the iwi/tīpuna application and its case does not resile from its position of saying that there is no clear resolution or proper resolution of any hapū that reverses the mandate that they say, that we say has always been there and it's never changed. Then thirdly, we'll hear from Mr Sharp, the Court will hear from Mr Sharp, but that will be very brief, that will be about two minutes.

1420

So in terms of the question of mandate and the aspects that I wish to cover, first of all I'll cover one precise point of reply in respect of a matter raised by Mr Bennion, and then I'll move to the more general position in terms of responding to in particular the suggestion that somehow the mandate has withered on the vine or some proposition like that we've heard a good deal about.

Now in respect of the submission of Mr Bennion yesterday, he advanced the proposition that the raupatu application was a twin application in respect of both land and moana, land and foreshore and that, as I understood his submission, a high point of the attack by Te Kāhui on the expiry of any sort of a mandate in respect of that application.

WILLIAMS J:

That's the section 30 application?

MR FOWLER KC:

Yes, was the 2018 Māori Land Court direction and there was a question from His Honour Justice Kós as to whether that was common ground and Mr Bennion responded, my learned friend Mr Bennion responded "yes." Now I'm not entirely sure what the "yes" necessarily meant in terms of what was being responded to but the point I wish to make and make absolutely clear is that, yes although we said in our written submission that you can see a genesis for all this way back when the raupatu applications were originally made, by the time you move forward through to 2005 there was clearly on the face of the evidence a separate discrete application made under the Foreshore and Seabed Act

2004. It is for – it is only for foreshore and seabed rights, nothing to do with land. It has all the long list of signatures on it of various rangatira. It is the application that became the priority application under section 125 and then was followed, the filing of that application was followed by the hui-a-iwi that I took you to when I made my substantive submissions and that is absolutely clearly specific and separate and quite distinct from the raupatu genesis, if you want to put it that way, and I'm not going to take you to the document now but I'll give you the reference.

It's the hui-a-iwi document that we looked at when I was making my submissions. The starting page is 303.01200 and at page 303.01202 there is a passage where I think it is a Mr Castle, a barrister from Wellington, who actually articulates it as separate and quite distinct from the raupatu issues. So there's no reference at all to land claims in respect of that hui-a-iwi, so in my submission that particular point that my learned friend was advancing simply can't stand. So that's the particular point.

Now moving more broadly, I want to respond to the suggestion of, to use his Honour Justice Williams' analogy, the lights going out in the room, the room emptying, whatever you want to call it, a withering on the vine, however that be described. Now the significance, as I apprehend it, of that position is for those making that point to say oh well the room emptied or the withering on the vine was occurring so therefore you can understand why these hapū applications can be treated as filling the void or displacing – and thereby displacing the iwi/tīpuna application. Now we say that's completely wrong and that, in fact, there wasn't a withering on the vine or an emptying of the room, in fact what was happening is more and more people were coming into the room and turning the lights up because what the point completely ignores is that right through to 2020 there were evidence briefs from, particularly from kaumātua and rangatira, being gathered right up to 2020 where you'd get to your shut-off point before you're set down for hearing, and in my submission what better evidence could you have, short of some sort of collection of signatures on a further endorsement or formal piece of paper, but you've got actual evidence being tendered by these very important witnesses who know that they are tendering

and offering that evidence for the purposes of the WKW iwi/tīpuna application. In other words you're getting more and more paddlers being added to the waka, the kotahitanga and so on, and that rolls down to the question of whether there's been any termination as a result of the hapū applications which of course is the point that Te Kāhui pursue vigorously and what we say to that is well where is the evidence of displacement because in fact if you look at those applications what they – certainly when they kick off they look more like a belt and braces job rather than any question of displacement and the best example I can give you for that is this document that should come up, Mr Sinclair. You have somebody who's completely incompetent when it comes to IT matters.

This is the application made back in 2017 by Ngāti Ira who are one of the Te Kāhui group. Just to give you the actual reference in terms of the bundle, the document starts at 101.00274. This page that's been brought up is towards the end of the application at 101.00279 and if you look at what it says in (b) what's being sought: "…setting out Ngāti Ira hapū, is named as the holder of the protected customary rights and customary marine title orders under the auspices of Te Whakatōhea iwi; and…" so on.

Then finally in terms of just rounding out on this question of termination, whether there's been any termination simply by virtue of the filing of the hapū applications, I finish this point off by referring again to the resolution, the Ngāti Hauā resolution, different hapū I know, but when you look at the resolution you've got to ask yourself how on earth would anyone pick from that, that necessarily the iwi/tīpuna application is being displaced and more than that what were the 14 voters actually thinking in terms of what they were voting on vis-ā-vis any issue of displacement.

Next in terms of this more general issue of the ending of the mandate, I turn to the tikanga of its ending, now the Te Kāhui position on that, which they have emphasised again but originally you see in their submissions at 2.26 to 2.28 was that really there isn't – a tikanga ending as such isn't necessary. It didn't require that. Yet at the same time ironically when it suits you get these things being pressed very firmly. Tikanga does the work, tikanga will determine.

These are things said, for example, in response to the question of inclusion of Ngāti Muriwai. I don't think I need to emphasise further the deep irony in respect of that position, but in terms of the iwi/tīpuna WKW position, it did provide evidence and it pointed to, we pointed to Te Ara Tono and we pointed to He Poutama and the powerful, we say, suggestions there that's what required, particularly if you've got more and more people coming into the room or more or more paddlers being added right up to 2020, you need a iwi hui. 1420

By contrast, we say, well, there's really been no evidence produced by Te Kāhui that that is not required as a matter of tikanga or any clear hapū resolution ending the mandate, and we say that notwithstanding the points that Mr Lyall was making, and you'll hear from Mr Sinclair about that.

Then the other matter I want to cover off in terms of this particular issue is whether there has been – or the point that there's been possibly some sort of inferred or implied ending of the mandate simply by reason of the – well at least a finding that there's no mandate, would be the better way to put it, as a result of the CMT actual outcome. The order, in fact, and you'll remember I'm sure that exchange that we had. Well, two points about that. First of all, that order actually has been set aside by the Court of Appeal, but perhaps more importantly, we need to remind ourselves that this is an appeal by WKW Edwards iwi/tīpuna appellants against the apparent relatively, we say, skinny finding on mandate in the Court of Appeal. So there's absolutely no reason, and in fact we would implore the Court to turn its mind to this issue. How it disposes of it is another matter, but that it does need to be faced.

That brings me finally to the position that my clients, the iwi/tīpuna appellants, find themselves in. And I'm conscious here and I must acknowledge that there are a number of people in respect of the tribe who are very interested in this application and what happens here, who are following these proceedings closely and who are watching remotely. For them, in terms of their perspective, what we've got here in terms of the question of mandate is no apparent consideration or examination or wrestling with the evidence at the High Court

level, a relatively fleeting, almost throwaway line in the Court of Appeal judgment, and suggested implication that because of the order that was made in the High Court, the matter is somehow closed evidentially.

And for my clients, they are looking or facing a rather galling prospect that this matter may well head off to a re-hearing without them, bearing in mind what's going to be considered there was their application, and it would seem that their application, their waka, has actually been commandeered, the paddlers removed or left on the shore or something, and it's been chosen because it was the only one, and in my respectful submission it's much more than just a matter of process or procedure, they were the only application to seek iwi-wide – the rohe-wide CMT. And because it now suits, that's – as I say, that's been commandeered and the waka is leaving without them.

So if you pose the question, well, could these appellants consider that they have been short-changed if that mandate issue is not addressed somehow in some way, even if it's a direction for it to be considered back at a re-hearing, have they been somehow short-changed? And in my respectful submission, without something of that nature, without some sort of consideration of the mandate issue, the answer respectfully would be yes.

Now that's all I wish to cover. Unless there are any points that the Court wishes to raise with me, I would hand over to Mr Sinclair.

GLAZEBROOK J:

Thank you.

MR SINCLAIR:

Tēnā koutou ngā Kaiwhakawā, Whakatōhea tēnā koutou. He mihi tēnei, kia tātou katoa. To your Honours, as Mr Fowler has pointed out, I'm going to deal with the Upokorehe matter and I'm going to address a couple of other issues that have been raised by your Honours. One of the issues was the te taunga map that was asked by Justice Williams who was the author of that. I'll deal with that. I'll also deal with a matter that was asked regarding the situation with

the Waitangi Tribunal at present and the settlement issues and what with the current status at –

WILLIAMS J:
Is this the raupatu settlement issues or?

MR SINCLAIR:
The raupatu settlement, Sir, and it is inextricably linked in with the present Waitangi Tribunal inquiry for Whakatōhea and, Sir, there was a great deal of nodding of heads on both sides of the counsel's bars, some were agreeing and some weren't, so I'd like to clarify that matter as well and the other matter, Sir, I'd like to address is also the Whakatōhea Māori Trust Board applications.

So if we can, first of all, just turn to the question that was raised by your Honour to counsel for Upokorehe Trust and the question was that counsel provide the following day evidence of those iwi or those groups or any entities that had recognised Upokorehe TUT, that's Treaty claims – Te Upokorehe Treaty Claims Trust as an iwi. Now it's easy to get confused by reading the multiple layers of evidence that's before you as to which Upokorehe either applicant is directing their evidence to because there is no distinction in the evidence that Upokorehe to Treaty Claims Trust is distinct from Upokorehe, the Whakatōhea hapū.

Now I represent Upokorehe of Whakatōhea hapū and the evidence filed by the great historian Tony Walzl and Dr Desmond Kahotea was filed for the Upokorehe hapū of Whakatōhea iwi. That evidence has been used widely by Te Upokorehe Treaty Claims Trust. Now there's a distinction there that needs to be made and the distinction is that the Upokorehe hapū of Whakatōhea is inextricably linking their evidence to Whakatōhea iwi. The Upokorehe Treaty Claims Trust and Ms Cooper has been at pains to convey this to the Court of Appeal and now to this Court that her clients are not of Whakatōhea and they are a separate iwi and that should be respected. The Upokorehe Treaty Claims Trust wish the Court to see them as a separate entity and they've made that very clear.

Now when the question was asked or the – I think the request that Ms Cooper provide evidence, the following day the evidence provided was of a local body, a subcommittee of the council (inaudible 14:39:31) that had recognised Te Upokorehe Treaty Claims Trust. I'm suggesting that his Honour wasn't really looking for that. I'm suggesting his Honour was looking for something more substantial on the same level iwi-to-iwi. And, Sir, this is where I have a suggestion that my clients have made very clear, Mr Pou previous to me has made very clear for the Whakatōhea Māori Trust Board, my clients for Upokorehe hapū made very clear that they do not recognise Upokorehe Treaty Claims Trust as an iwi and there's never been any evidence provided of that, and hence it's why there's never any response or acknowledgment of them from my clients.

1440

The parties to these proceedings right now, Sir, they've never had the question put to them, and the parties I'm talking about are the Kāhui group, the Kāhui group of hapū representatives, well individual applicants in the name of hapū, they've never had it put to them, Sir, whether there is another iwi in the Ōhiwa Harbour under the Te Upokorehe Treaty Claims Trust. Ngāti Awa have never had it put to them, the same question, and Tūhoe, respectively.

Now the only iwi that my clients have ever dealt with is Tūhoe, Ngāti Awa, and Whakatōhea, and the last – and it's in the evidence, Sir, but the last major decision that was made was Karauria Edwards between Tūhoe, and that's Tāmati Kruger, was on a matter to do with Tūrangapikitoi and access to the Ōhiwa Harbour, and access to the Ōhiwa Harbour in which Tūhoe were able to access a fisheries allocation. Now that agreement was between Tūhoe, Whakatōhea, and Ngāti Awa. I'm just going to bring up a couple of –

KÓS J:

Well you've got very limited time, Mr Sinclair.

MR SINCLAIR:

Pardon? Oh.

KÓS J:

You've got three minutes left, by my timing. So –

MR SINCLAIR:

All right, okay.

KÓS J:

I'll leave it to Justice Glazebrook, who is presiding, but I'm just keeping an eye on the time here.

MR SINCLAIR:

All right.

GLAZEBROOK J:

Yes, I think you're probably already over time because the Attorney-General didn't take that time.

MR SINCLAIR:

Well that…

MS COOPER KC:

Your Honours, I'm reluctant to interrupt Mr Sinclair, but I do also question whether this is actually in reply. So I just make that note.

MR SINCLAIR:

Okay. Well, yes, my time has been used up by backwards and forwards. So look, Sir, the position regarding the Treaty settlements settlement was that at the end of that, Sir, and it's been mentioned previously that in the deed of settlement there is an inclusion clause there for other hapū, and this is in relation to the hapū that were once 22, they are now represented by Hiwarau C, Tūrangapikitoi, who I represent before the Waitangi Tribunal, and many other groups, Maromahue, Kutarere Marae. All of those groupings that have been

identified previously under the application are all Maromahue, Upokorehe, Tūrangapikitoi, Whakatōhea aligned, and there's a historical account of that relationship right through to the Whakatōhea Māori Trust Board's application.

I've got a final point here, Sir. The Te Ara Tono document was put together as a means of directing Whakatōhea to make decisions on an iwi-wide basis, and this came about by the fact that in 1996 Whakatōhea lost their Treaty settlement. They lost a $40 million Treaty settlement through the indecision and through the opposition by various factions in the tribe. So there was a document put together, Te Ara Tono, and in that document that was chaired by one of the representatives that we represent now, Barry Kiwara –

KÓS J:

What's the point you're replying to, Mr Sinclair?

MR SINCLAIR:

I just want to point in the hapū list you've got there, you see under the hapū Ngāti Muriwai we've got Julie Lux and Kahukore Baker. Kahukore Baker is the applicant for the Treaty Claims Trust, the iwi, and what I'm saying, Sir, is that this is the type of conundrum that you meet when you meet Whakatōhea involved under Treaty settlement and conflicting issues, MACA applications. The point is, Sir, is when did this Upokorehe iwi come about, who was it recognised, by who, and when? Because in 2005 the applicant is sitting there as a representative of Ngāti Muriwai, of all hapū.

So that ends my submissions, Sir. Thank you.

GLAZEBROOK J:

Thank you. So this group is already well over time. Mr Sharp, did you have, I understood, one thing to say?

MR SHARP:

Yes, just one thing with the indulgence of the Court, your Honour, and it's just a quick matter of clarification on the response by Upokorehe to the

Kutarere Marae submission, and I've spoken about it with my friend, but – my friend Ms Cooper. I just raise the issue that the appeal was on the basis that – the finding that Kutarere weren't a whānau. She also pointed out the High Court also dismissed her appeal because they weren't in existence in 1840, but just to clarify, that issue wasn't raised on appeal because the Court of Appeal have already found that post-1840 groups –

ELLEN FRANCE J:

Sorry, the Court of Appeal have already found what?

MR SHARP:

That post-1840 groups can participate in a CMT, so that's why that issue wasn't raised. So it's just really a point of clarification. Thank you, your Honour.

GLAZEBROOK J:

Thank you. Ms Cooper?

MS COOPER KC:

Thank you, your Honours. I think I'll perhaps just start by briefly responding to Mr Sinclair's submission, then. I think – I certainly had not understood the questions from the Court to be a request for evidence that other groups had recognised Te Upokorehe as an iwi or indeed Te Upokorehe Treaty Claims Trust as an iwi. I had understood the questions went to recognition by other groups of Upokorehe as having exclusive rights over its rohe, which I see as a different issue. So I don't intend to engage with that further. I don't think it's particularly relevant or useful.

But I do want to say emphatically that Te Upokorehe does not accept that Mr Sinclair is representing Upokorehe hapū or iwi or Te Upokorehe in any capacity. My understanding was that his client's application was for Tūrangapikitoi and Hiwarau C, not Te Upokorehe. So I just want to make that point clear, and other than that, I don't think it's necessary to repeat the submissions that Mr Lyall has already made regarding the mandate. Obviously my client's position remains as set out in our –

GLAZEBROOK J:

I think you can take it that we understand that.

MS COOPER KC:

Yes. Right, thank you, your Honour. So now I want to reply to the submissions of Te Kāhui in opposition to Te Upokorehe's appeal, and overall I would characterise the Te Kāhui position and their submissions as containing a lot of assertions but very little actual evidence or reference to actual evidence of the exercise of ahi kā or kaitiakitanga by any of the Te Kāhui hapū at Ōhiwa.

So they relied in their submissions on the fact that Ōhiwa is one of the most significant pātaka kai in the area, and I don't take issue with that, and certainly Te Upokorehe's position has always been that it acknowledges the use of the Ōhiwa by other hapū. That is not at all an area of contention.

1450

The issue is whether that use displaces Te Upokorehe as the holders of ahi-kā-roa and kaitiakitanga and Te Upokorehe say it does not. They say that their rights and occupation there are longstanding and have never been disrupted or substantially interrupted I should say. There certainly has been some disruption through raupatu and other things. There certainly have been other groups who have spent time in the area and we talked in our submissions about Waimana Kaaku, who had a reciprocal arrangement with Te Upokorehe to regularly access the area and indeed built a marae with the blessing of Te Upokorehe, but that does not make them the holders of ahi-kā-roa or kaitiakitanga over that area and does not displace the rights of Te Upokorehe and it's notable, your Honours, that Waimana Kaaku has not challenged Te Upokorehe. It is not here. It has not made an application for CMT.

So the most extreme example, we say, so when you look to the evidence, and obviously it has not been possible in this hearing to deal with all of the evidence comprehensively, but when you look through the evidence provided by witnesses on behalf of Te Kāhui hapū there is really very little to support claims. There is certainly access. There is certainly use. There is certainly whakapapa

connections. None of that is denied but there is very little to support the indicia of exclusive use and occupation, whereas we say there is a wealth of evidence from Te Upokorehe of that and that involves things like the rahuis, the resource management involvement, the conservation work carried out within the rohe, the whales, the historical sites, et cetera.

Now the extreme example of the lack of evidence we say is Ngāti Ngāhere and we appended a table to our written submissions that was also provided to the Court of Appeal which was a table trying to capture all mentions of Ngāti Ngāhere in the evidence and why we say they really didn't provide any basis for Ngāti Ngāhere to be included on the CMT and I won't take your Honours to that. As I say, it's appended to our submissions and what it shows is that most of the mentioned references are extremely general and they really don't provide the type of evidence that would be necessary to support Ngāti Ngāhere being found to meet the section 58 test and we say, while that's the most extreme example, it's also true for the other hapū.

Now Te Kāhui gave examples in support of their argument that CMT should be shared. They gave examples of whakapapa links of key figures to other groups as well as Te Upokorehe. Well that's absolutely right of course. Many members of Te Upokorehe do have whakapapa links to other groups. Mr Sinclair just showed you that Ms Baker was listed as a representative for, I forget which hapū, I'm sorry, but she certainly does have other hapū links and those are explained in fact in her evidence.

So, yes, here we go, that's very helpful. So this is Ms Baker's evidence. She talks about that the whakapapa links to Tūhoe and Te Whakatōhea: "As Māori, whakapapa enables us to move with ease between different tribal and/or hapū identities. For example, when I am driving to Ōpōtiki from Whakatāne, the minute I cross the Maraetōtara Stream I know I am in the Upokorehe rohe. As I drive up Hiwarau Road, my Upokorehe whakapapa connects me to time, places, histories and I have a sense of belonging. As I continue on and cross the Waioweka River, I enter the Whakatōhea rohe. My Upokorehe 'hat' comes

off and heading east to Tirohanga and Ōmarumutu, my Whakatōhea whakapapa connects me to those places, and so on and so forth…".

So this is the point, a lot of the witnesses in this case do have these multiple connections and that's why I said in my previous submissions it is important to read their evidence with a great deal of care, to know what hat they're wearing and I think that was a point that Justice Williams made as well. It depends what passport you're carrying at a particular place. We have to be very careful about what, when we talk about, for example, Rakuraku being in the rohe of Te Upokorehe which is one of the points, one of the identities relied on in the Te Kāhui submissions, well you do need to be careful about what capacity he was there in.

Was he there with the permission and under the manaakitanga of Upokorehe, or was he there asserting his own mana, and in my submission, that – there's a great deal of evidence that – about that which it's probably not possible to go into now, but simply to note I think there was a reference to, in my learned friend's submissions for Te Kāhui, to Rakuraku being at Roimata and indeed exercising mana there from the 1820s to the 1870s. That is certainly not accepted by my client. It is true that Te Upokorehe lived with Rakuraku at one stage, but not at Roimata, and then there is, as I – oh, it's up on the screen now, the overview report provided for by Ms Baker for Te Upokorehe addresses the position of Rakuraku, and we see there at paragraph 7.1 a discussion about the opportunity to settle chiefs from other iwi viewed as helpful to the Crown after – sorry, I'm just trying to read this. But in any event, this notes Warena Mokomoko, whose evidence we looked at previously in relation to the Hiwarau and Hokianga blocks objecting to the grant to Rakuraku, saying that he was not – had no right to be there.

Actually, if we go back up to paragraph 6.6, I think there's also a useful point there. So this is from the evidence of Mihirangi Koutu to the Māori Land Court in 1939, and as it says there, she was the granddaughter of Wī Akeake, the Upokorehe rangatira who signed the Treaty. And she's talking about who gave the list of names for the Hiwarau reserve and she notes that following the

raupatu Upokorehe went to live at Waimana. Rakuraku was a Tūhoe chief at Waimana with whom they were living. So that was the point I wanted to make. And then it goes on to talk about when Wilson, that being the Crown agent, was at Waimana he discussed Upokorehe with Rakuraku, who asked that Wilson give Upokorehe back some of their lands at Ōhiwa, and then the quote set out there, if we just scroll down a little bit so we can see that, that is from the minute book of the hearing, which I'm not sure if it's on the record, but we can certainly put that on the record. And I think it's useful because the description from someone who was there about the conversation where: "Wilson told Rakuraku that he could stay at Hiwarau and be the leader of Upokorehe… Then Rakuraku informed Wilson that he could not stay as he was not of Upokorehe, but he pointed round and said to Wilson: 'These are the Upokorehe people.'" So the presence of Rakuraku I say is not the evidence of Whakatōhea presence or mana or control at Ōhiwa that my learned friends were suggesting, and we totally agree with the point made by his Honour Justice Williams that the situation is very much more nuanced, and so each of these examples does need to be treated with a great deal of care.

I'm not sure how I'm going for time, your Honours.

KÓS J:

Twelve minutes.

MS COOPER KC:

Right, thank you. Well I better move on.

KÓS J:

I'm just keeping an eye on it, Ms Cooper. It's in all our interests.

WILLIAMS J:

Should never have bought him that stopwatch for Christmas.

MS COOPER KC:

So I think that brings me back to the point – so I think, as I said, there's a need to be careful with the evidence. The other point I wanted to reply to in respect of the Te Kāhui submissions was, and actually this was also raised by Ngāti Awa, they both took evidence – took issue, sorry, with the evidence references that were in Te Upokorehe's road map, which we say were examples of acceptance by other groups of Te Upokorehe as the holder of ahi kā and kaitiakitanga, and unfortunately I didn't have time to go to those examples in my oral submissions, but I do want to make clear again, and I hope it was clear.

1500

But just in case it wasn't, what we are saying about that evidence, and that is that multiple witnesses for other applicants acknowledged Te Upokorehe as the holder of ahi kā and kaitiakitanga in its rohe, and we can't expect to see witnesses for what are effectively cross-claimants agreeing that Te Upokorehe are the sole holders of ahi kā because that would be directly against their own applications but what I do say – also actually another point is it's not realistic to expect, as my learned friends appeared to, aggressive cross-examination on that kind of point in this type of case.

My learned friend Mr Lyall did cross-examine on this issue and in my submission he took those questions as far as was reasonably possible or appropriate and we say the concessions that were made, while they don't go as far as completely conceding exclusive rights to Te Upokorehe, are nevertheless very meaningful and significant and when they are appreciated in the context in which they're given, we say they're entitled to a significant amount of weight, and so I don't have time to go back to them again but I do urge your Honours to look at those examples in their context.

WILLIAMS J:

You don't say, certainly will be, you don't say that any of those witnesses said that Upokorehe was the exclusive holder of ahi kā and kaitiakitanga?

MS COOPER KC:

They don't say, they certainly don't say that explicitly, your Honour, and a number of them expressly disavow that so but –

WILLIAMS J:

Yes, but no one's arguing that Upokorehe doesn't belong in Ōhiwa are they –

MS COOPER KC:

No, but it –

WILLIAMS J:

– so you wouldn't expect them to be saying I deny Upokorehe there. What you need them to say is Upokorehe is the boss there. Did anyone say that?

MS COOPER KC:

Well there were – to a certain extent. So there were acknowledgements of they would respect Te Upokorehe's rights as kaitiakitanga and respect rāhui placed by Te Upokorehe, for example, and what I do say as well –

WILLIAMS J:

But were they were saying that Te Upokorehe was the only hapū that could impose a rāhui –

GLAZEBROOK J:

I think she's accepted that isn't necessarily the case.

MS COOPER KC:

Yes, no the –

WILLIAMS J:

Well that doesn't really help you then, does it?

MS COOPER KC:

Well, what I'm also saying your Honour is that there is very little positive evidence from any of the other hapū that they would place a rāhui at Ōhiwa Harbour. I haven't seen that evidence.

WILLIAMS J:

So that's your point?

MS COOPER KC:

That's the point.

WILLIAMS J:

Contrast that evidence and those acceptances with the lack of anything else?

MS COOPER KC:

Exactly right, your Honour, yes.

WILLIAMS J:

Right, thank you.

MS COOPER KC:

And I think there certainly is that evidence from Ngāti Awa. There is not that evidence from the Te Kāhui hapū and if there was that evidence I would have expected my learned friends to have put it before your Honours and in my submission they have not done that.

So another way to put it is to be – I think I've already made the point well enough, your Honour, but the point is Te Upokorehe are not denying the access rights or the use rights of the other hapū. They're simply saying in a sense that Te Upokorehe are the gate holders. They have a tikanga gate that they say other hapū come through in order to access those resources within their rohe.

So the next point raised by Te Kāhui was the procedural issue and also Ngāti Awa so they both argue that Te Upokorehe should not be permitted to

seek a re-hearing of CMT 2 because its appeal to the Court of Appeal was on a different basis. We acknowledged in our submissions that the notice of appeal filed in the Court of Appeal did not challenge the rights of Whakatōhea hapū other than Ngāti Ngāhere but we say that in oral submissions in the Court of Appeal this was made clear and indeed that was the basis on which the Court of Appeal ordered the re-hearing of CMT 1.

So over the course of the hearing the position moved on past the wording of the notice of appeal and the Court of Appeal clearly allowed that because that is – their judgment indicated the basis for allowing the re-hearing or ordering the re-hearing of CMT 1 and I say that that approach by the Court of Appeal was appropriate in a case of this nature. As you've heard it's highly factually complex, there are novel issues, there's a high degree of uncertainty about the test and exactly how CMT will work. So the parties are sort of really having to do a lot of work to understand this and shape their case and their evidence as required. So the real issue here is now that we have the Court of Appeal's judgment, there is an inconsistency in the Court of Appeal's findings between CMT 1 and CMT 2 and therefore I do say it's in the interests of justice for Te Upokorehe to be able to argue this point, that this is an analogical inconsistency and the same approach should be taken to both orders and they both should be reheard so that the interests of all parties can be adequately heard, they can be given a reasoned, a properly reasoned decision, where they are not left to guess the reasons or to wonder if the Judge or the pūkenga were being polite. You know that's not good enough. They need to have their application squarely addressed and dealt with.

And I do say as well, I maintain the submission that a re-hearing, or there is no prejudice in allowing Te Upokorehe to make this appeal because my learned friends raised the cost of re-hearing. I acknowledge the costs of re-hearing are a burden but those costs would be incurred whether or not there was a change in position by Te Upokorehe. So had this issue been raised differently in the Court of Appeal, it would have made no difference to the costs of a re-hearing so that may be prejudice but it's not one arising from the procedural issue.

Then finally, your Honours, I've just been asked to note Mr Pou referred to the Akeake urupā on the western side of the river mouth. That location I believe is at Te Arakotipu where Wī Akeake lived and the Akeake urupā I'm instructed was actually named for Wī Akeake who of course was the Te Upokorehe rangatira and kaumātua.

Unless your Honours have any further questions?

GLAZEBROOK J:
Thank you.

MS FEINT KC:
Your Honours will be pleased to know I'm running out of novel and interesting things to say quite rapidly. I have prepared a further road map which I know is a bit unusual in reply but I thought it would save me having to repeat all the references. Does the Court have copies?

GLAZEBROOK J:
Yes, thank you.

MS FEINT KC:
Thank you. So the first issue I wanted to cover is the question of mana-ā-hapū and I thought it was important to raise this while we can, to strongly resist any suggestion that having a sole iwi title would somehow be preferable to having title held in the names of the six hapū, and I wanted to really emphasise that the reason Te Kāhui oppose an iwi title is not because agreement can't be reached between the hapū, in fact we say there's a great deal of consensus, but rather it's about their mana and their customary rights, and we say that the evidence shows very clearly that customary title resides with hapū and that the tikanga of Whakatōhea is very hapū centric and I know that that can differ from iwi to iwi. So I just wanted to dwell on that point because some iwi I've acted for are quite centralised in the way that they operate and other iwi are very much driven more strongly by the hapū and Whakatōhea is certainly an example of the latter.

In our submissions in response to WKW, we set out some of the academic research which talks about the consensus really amongst the academics that, as Justice Williams said the other day, hapū were the political and resource rights and landholding polities of traditional Māori society and we've also included a reference to Dr Angela Bellara's seminal work iwi where she postulates that the iwi phenomena came about and really rose to prominence as a result of colonisation and the desire of the Crown to deal with larger groupings, and more recently in fact, as a result of the Treaty settlements process where iwi have been forced into large natural groupings.

1510

So Ms Sykes made a very interesting observation to me yesterday about the reason why Whakatōhea are hapū centric and I hadn't really twigged to this but I think she's actually right. She pointed out that there's a distinct history and tradition for each of the hapū of Whakatōhea, because although Muriwai is the tīpuna from whom all the hapū descend, each of the hapū trace back beyond Muriwai to pre – to other waka and other tīpuna who arrived much earlier, and I've – in paragraph 1.1.1 I've attempted to encapsulate some of the evidence about that, which I can't possibly do justice to, and I'm conscious with Dr Amoamo sitting behind me that I don't want to mess this up.

But for instance, I know the Ngāti Rua traditions the best, and although on the whakapapa chart of Te Whakatōhea that has been presented to you a number of times, you'll notice on that whakapapa chart they are listed in terms of their links descending – their common descent from tīpuna who Upokorehe also descend from, but their descent from Tutamure, who is the ancestor that they emphasise most prominently in their traditions, is not listed on that whakapapa chart. So that whakapapa chart was designed to show the common descent from Muriwai, but if you go back to Dr Amoamo's evidence, he talks about their descent from the Nukutere waka and that Tauturangi was eight generations before Muriwai. And similarly, Ngāti Ira, if – I couldn't find in a short amount of time a better reference than Lyall's book on the *Whakatōhea of Ōpōtiki*, which is this old book that's out of print, but they talk about – they emphasise their

descent from Tamatea Matangi, who was of course Muriwai's husband, and he came from a much earlier waka to whenua, and then Ngāti Patu, Ngāi Tama, and Ngāti Ngāhere all talk about their tīpuna Tārawa, and there are different traditions about how he arrived. The evidence of Hetaraka Biddle which is cited there, he talks about Tārawa surfing to Aotearoa on his chest, but there's also an acknowledgement of the Arautauta waka as well.

And each of these hapū have multiple affiliations and connect to a number of those waka, but the point really is that – not to explain in the space of two minutes very complex whakapapa and traditions, but just to point out that this is one reason that explains why the hapū of Whakatōhea jealously guard their mana and their distinct whakapapa and traditions, and all emphasise the right to speak for themselves and to represent themselves.

And that's something that all hapū emphasise. In the briefs of evidence for each of them, they all say something like "it's for Ngāti Ira to speak for Ngāti Ira". Similarly, Upokorehe has emphasised that very strongly. And I wanted to note that Te Kāhui respect the right of Upokorehe to represent themselves and to bring their own claim and to speak for themselves. Also wanted to emphasise that the hapū have worked together closely and that they've worked together co-operatively, and that that's largely worked very well, and that's not only the hapū within Te Kāhui, but also Te Kāhui respect the application of Upokorehe, and the only real disagreement is over whether there's shared exclusivity at Ōhiwa Harbour, which is an issue about evidence, but we're not challenging their mana to represent themselves in any way. In relation – and Ngāti Ngāhere have taken a lessor role in the proceedings. They've been represented by the Trust Board, but the other hapū have made sure to manaaki them and put forward evidence to cover their interests because it's recognised that they also share this rohe on a shared exclusivity basis.

WILLIAMS J:

Do you know why are they called Ngāti Ngāhere? It's not a name that evokes coastal rights.

MS FEINT KC:

No, I think it might refer to their interests in the bush in fact.

WILLIAMS J:

There you go.

MS FEINT KC:

But they are, if I'm right in this, they descend from Ngāi Tu.

WILLIAMS J:

So the story behind the name is a forest story?

MS FEINT KC:

Yes, so I think it's Ngāti Patu, Ngāi Tama and Ngāti Ngāhere who all descend from a prior hapū called Ngāi Tu who I recollect is around the Paerata Ridge area, Ms Sykes is nodding at me, and so Paerata Ridge overlooks the sea.

So in relation to what Upokorehe have emphasised about their exclusive rights, I just want to simply say no one's denying that Upokorehe are at Ōhiwa, that's very clear and everyone respects and accepts that. The only dispute is over whether they're there exclusively and it would be very, very unusual in terms of traditional customary land tenure for there to be exclusive interest particularly in a harbour that is such a significant pātaka kai and which is used by multiple hapū and one reason for that is because they can't defend Ōhiwa alone. And if we look at things like the battle of Maraetotara, that's where hapū came in to defend the boundaries in that battle with Tūhoe. So –

WILLIAMS J:

What do you say to Ms Cooper's point about the dearth of practical kaitiakitanga from the other hapū and the wealth of it from Upokorehe, do you say that's incorrect?

MS FEINT KC:

Yes, we do say that's incorrect and, well, we say – I mean I don't know for sure but like the Ōpape reserve is at the other end of the rohe, Upokorehe was on the reserves around Ōhiwa, so although it seems from the evidence some Upokorehe went over to Ōpape, most of them – because they were intermarried with Ngāti Rua, for instance, others stayed at Ōhiwa. So I don't know whether the raupatu may have had some impact on that but it's – I suppose the short submission is it's very difficult in a Supreme Court hearing to uncover the depth of the evidence that you need to in order to understand very complex customary interests, and we say that the whāriki is very tightly interwoven over the entire Whakatōhea rohe from Maraetotara to Tarakeha and you really can't disentangle the whakapapa threads anywhere. There's no discrete territories within those boundaries. All of the hapū, if you look at their respective application maps, are overlaid and interwoven with each other.

WILLIAMS J:

You did start by saying they were distinct, that Whakatōhea was heterogeneous and heterodox because of its multiple canoe-based descent lines that suggested the intertwining wasn't as complete as one would see from iwi and hapū that came down from a single tīpuna as their primary and dominant descent line.

MS FEINT KC:

So their mana and identity is distinct so they're not like an iwi who descend from an eponymous ancestor like, for instance, Tūwharetoa, who are descendants of Tūwharetoa, or if I'm right is Ngāti Porou a descendant of Porourangi, I think so, and if you have an iwi who will descend from a common ancestor then there's a more coherent narrative.

1520

Whereas I was making the point that there are distinct narratives for each of the hapū but because they've all lived together in such a small area, and is it from the western to the eastern boundary, it's actually less than 30 kilometres, from memory, and over that small territory they're very closely intermarried, which

means that the rohe are all interwoven as well. So that's a feature of that – of the Bay of Plenty, actually, that you have very densely-occupied territories because it's such a bountiful area to live in, hence the name.

So at 1.1.2 I wanted to emphasise that the six hapū are inclusive. They're not the select six, as WKW kept saying. They are the hapū of Whakatōhea, and by definition if you take all the hapū together, then everyone whakapapas to them. So they include everyone and the Pūkenga Report acknowledged that by saying they haven't overlooked the applicants of groups that weren't hapū, like Hiwarau C, Kutarere Marae, Ngāti Muriwai and so on, at paragraph 2.d.iv. It said they all are included within the pou of that existing whare.

And hapū organisation has always been the tradition within Whakatōhea as well, and that dates well back before the establishment of the Trust Board. If you look at for instance the raupatu petitions of the early 20th century, they're quite interesting because they were organised on a hapū basis. They had lists of hapū and they were levying everyone a sort of tax, a voluntary contribution, in order to fund the trips to Wellington to present those petitions to Parliament. And when the Trust Board was set up in response to the initial raupatu settlement for I think it was £20,000 in 1946, the Trust Board unusually was set up on the basis of representation of those six hapū, so they each voted seats onto that board. And that's quite unusual for trust boards around the country, there's only one or two that do that. The rest just had iwi-wide votes, and the structure of Te Tāwharau has replicated that same organisation with two representatives for each hapū, plus this time they've added four votes for the iwi, which I think is meant to include maybe some of the urban voters.

And we've set out all the references in our submissions, but I note in particular the Waitangi Tribunal has found that Whakatōhea as a matter of tikanga is traditionally hapū-driven in its decision-making. So all of that underscores why we say it's important that the hapū is held by the customary rights holders who are the hapū.

GLAZEBROOK J:

Just a reminder about time.

MS FEINT KC:

Yes, sorry. Let's proceed. So paragraph 1.2, Ngāti Patu, Justice Churchman has found they're represented by Te Ringahuia Hata in his *Stage Two* judgment.

Moving on to Whakaari and Te Paepae o Aotea. These are submissions in response to Te Whānau-ā-Apanui. It occurred to me that something that hasn't really been dealt with by anyone, including the Court of Appeal, is that Te Paepae o Aotea is held as a wāhi tapu in the title of the tīpuna Toroa, the captain of the Mataatua waka, on behalf of the iwi of the Mataatua confederation, and Ngāti Awa's evidence was that Ngāti Awa applied for that and they did so on the basis that the tikanga was shared interests amongst the iwi of Mataatua, and we say that the lower courts are wrong not to recognise the significance of this tikanga for the takutai moana in this area.

So the Court of Appeal recognised at paragraph 301 of its judgment that Te Paepae o Aotea had spiritual significance as a wāhi tapu because it's the place from whence the wairua of the dead commences their journey back to Hawaiki, but then at paragraph 314 when they dismiss the appeal they do so on the basis of their findings on Whakaari without indicating that they've taken into account the evidence on Te Paepae o Aotea and we say that that's significant because Ngāti Awa also support Whakatōhea's contention that it's not only Te Paepae o Aotea where there are those shared interests for the iwi of Mataatua but also Whakaari as well.

2.2, the nature of Whakaari as a volcano 40 kilometres out to sea is directly relevant to the nature of the customary rights held there and Boast notes this, that they're not permanently habitable those islands, which is significant in tikanga terms. Rikirangi Gage agreed in cross-examination that they didn't occupy Whakaari permanently and accepted that Whakatōhea had fishing grounds there. The Waitangi Tribunal in its Ngāti Awa report considered it was

doubtful that anyone had sole title given the number of hapū of different descent groups that use the island.

Te Whānau-ā-Apanui in their roadmap go to some lengths to criticise Whakatōhea's evidence in relation to Whakaari as piecemeal but without providing any evidence of their own in terms of their interests apart from the tuku. Whakatōhea say that the claim based on a tuku is weak when even the purported donor disputes that had occurred and Ngāti Awa agree with Whakatōhea, as I have said, that there are shared interests of Mātaatua out there which they set out in their submissions as an interested party. So we say on that basis it's not enough for Ngāti Awa and Te Whānau-ā-Apanui to say they will resolve the dispute between themselves as a matter of tikanga if that leaves Whakatōhea out in the cold. That's not just.

At their road map at paragraph 4 Te Whānau-ā-Apanui also set out a whole lot of research reports which they say provide the evidence. They don't provide any pinpoint references but if you go to the reports they've cited, in fact those references support the proposition that there is shared exclusivity.

So the main report is Professor Boast's. He says his reports were studying quite closely because he has quite an extended discussion of the various transactions. He says it's unlikely that those transactions in relation to the tuku and the later sale extinguished the other interests, the interests of other iwi, because they continued to use the island on a traditional basis as they always had. He says that the Native Land Court inquiry that took place in 1867 is not good evidence of the interests in Whakaari because 1867, of course, was only a few years following the raupatu and at that time both Ngāti Awa and Whakatōhea had been labelled rebels by the Crown and they would not have shown face at a Te Arawa hearing which is what Professor Boast labels the inquiry given that Retireti Tapsell was applying for title. He said those who had been labelled as rebels wouldn't have shown up at the inquiry and, in fact, he says probably didn't even know about it and then he goes on to say it would be very rash to conclude that Whakatōhea and Ngāti Awa have no claim to Whakaari. He says that if there was modern studies done taking into account

the customary evidence that it would probably be found that there were varying and overlapping interests of a number of iwi including Whakatōhea.

WILLIAMS J:
Where was it held?

MS FEINT KC:
Sorry?

WILLIAMS J:
Where was the inquiry held?

MS FEINT KC:
The Native Land Court one? It was at Maketu I think.

WILLIAMS J:
Oh.

MS FEINT KC:
Which is another reason why it was labelled a Te Arawa inquiry.

WILLIAMS J:
If that's not the case it's worth knowing that's not the case, can you just file something or email something to let us know.

MS FEINT KC:
It's in Professor Boast's report. I won't take time up by going to it now but those page references should confirm that. I don't need to go through the other reports.
1530

So the other reports Apanui have cited, Bruce Stirling says that Polack in the 1830s wrote accounts of Whakaari based on his relationship with Whakatōhea and Derby and Jennings mainly rely on Boast so they don't take matters any further. I think it's been accepted by all parties that the rāhui is strong evidence

of the kaitiakitanga exercised over taonga tuku iho of spiritual significance and that they can only be given in relation to areas over which the iwi exercise kaitiakitanga.

My learned friend, Mr Mahuika, said in his submissions that Te Whānau-ā-Apanui didn't object to Whakatōhea laying the rāhui in 2019 out of respect for the dead but there was no evidence given to that effect by Te Whānau-ā-Apanui even though Rikirangi Gage agreed that rāhui require mana whenua. We would also note that it's not necessarily the case that you can't raise a challenge as a matter of tikanga in situations where there's tapu from death and we give the example of wero that are raised at tangihanga when tūpāpaku wanting to be taken by hapū who want to take them back to their marae.

And then in relation to the concessions that Te Whānau-ā-Apanui keep saying that our witnesses have made, we say that not all evidence is equal and that it really depends who is giving the evidence as to the weight that's going to be placed on it. But significantly the pou tikanga that we rely on and, in particular, Te Riaki Amoamo and Te Rua Rakuraku haven't made concessions that Whakatōhea do not have interests there and I just wanted to emphasise that we think that there's a *Browne v Dunn* (1893) 6 R 67 HL problem with the way that Te Whānau-ā-Apanui cross-examined on these issues because they did not put to key witnesses the propositions that they're now advancing in submissions that Whakatōhea did not have customary rights at Whakaari and that Te Whānau-ā-Apanui had primary mana whenua. And I've set out in particular the main evidence that we rely on was Te Riaki Amoamo and he said in his evidence that the rohe moana was sea territory, he was talking about Ngāti Rua, extends out to Whakaari and beyond.

When he was being cross-examined by Mr Pou, he laid down a bit of a wero to Te Whānau-ā-Apanui by not only saying there were shared interests in Whakaari but he said, we say, sarcastically that he refuted Apanui's claims by saying that when he drives around the road to Te Kaha you pass the sign on the road that says "you're now entering Te Whānau-ā-Apanui territory" and he

said in relation to Whakaari he never saw any signs saying “you're entering Te Whānau-ā-Apanui territory” when you go out to Whakaari and he said similarly he'd never been asked for his passport and that cross-examination happened before Mr Mahuika then stood up to cross-examine Dr Amoamo and, although he followed up that cross-examination, his question, and I think in the interests of time I was going to take you to the transcript but I won’t, I'll just summarise it, he asked Dr Amoamo whether Whakaari is within the customary seascape of Te Whānau-ā-Apanui and Matua Te Riaki replied: “Te Whānau-ā-Apanui and other iwi also” and he then followed up with a question, “do you accept that Te Whānau-ā-Apanui have mana there” and he confirmed “yes” and that was the extent of the cross-examination. There were no direct propositions put about Te Whānau-ā-Apanui’s case that they say Whakatōhea does not have interests.

So we say also that the Court of Appeal wrongly concluded in the – in its judgment that there had been concessions made. If you look at the evidence in the footnotes there were no such concessions made, we say.

GLAZEBROOK J:

You’re virtually out of time.

MS FEINT KC:

And that’s good, because I’m virtually at the end.

KÓS J:

Is that different from being at the end?

MS FEINT KC:

It is. It’s not quite, but the finishing line is in sight. I’m stumbling towards it. So Ngāti Awa, this is just a quick point –

GLAZEBROOK J:

Well maybe we could rely on what’s there.

KÓS J:

I think so.

MS FEINT KC:

Yes.

GLAZEBROOK J:

Unless you've got something else you're adding?

MS FEINT KC:

I was just simply going to say everyone's agreed that the disputed area of CMT 1 needs to be remitted for re-hearing in the High Court. We were a little bit perturbed to see Ngāti Awa made an ambitious invitation to this Court to award it exclusive interests in the disputed area. We say that can't be done because Te Kāhui hasn't had a chance to respond to that invitation, given that it was made as a respondent. Te Whānau-a-Mokomoko, I just – for the sake of providing a reference for the discussion this morning, they conceded that they weren't on par with hapū for CMT. So in their closing submissions, and that's cited in the High Court judgment, so they said they acknowledge that they would support the hapū, but they got PCRs with hapū support and Justice Churchman acknowledged that as well. They were the – "sentinel" was the word I was looking for this morning, Mokomoko, monitoring the sea traffic in Ōhiwa from his pā on the ridge, and they were known, his descendants were known as the seafarers out on Ōhiwa.

Paragraph number 5, I just – this is just for the assistance of the Court, really. There's quite a good narrative in the historical account in the deed of settlement about the reserves granted at Ōhiwa and that's just a good summary, and Ms Cooper is partially right, so Ōpape was different because there were six hapū blocks allocated there and some of the hapū relocated, so it was acknowledged that that wasn't allocated on the basis of ancestral interests, everyone – that was just an expedient solution for the Crown, not for Whakatōhea. But in relation to Ōhiwa, the Commissioner went through a process, but the historical account says he took account of ancestral interests

but the process was rushed and flawed, and I don't think it's right to say he was acting as a judge because he didn't have formal hearings.

WILLIAMS J:

Yes, he was a Native Land Court judge sitting as the Compensation Court, presumably?

MS FEINT KC:

No, he was – it says he was acting as a special commissioner. So he was effectively there just doling out land blocks and he wasn't following a proper process in terms of court hearings, as I read it.

WILLIAMS J:

Yes, I think the commissioners were Compensation Court commissioners, but they were Native Land Court judges, as Judge Wilson was.

MS FEINT KC:

Yes, well your Honour might be right. But have a read of the historical account, it sets it out in more detail. I mean it does say that it was a very rushed process and it seems like there were all sorts of people put in the lists.

WILLIAMS J:

Yes, I'm not suggesting that meant it was good. I'm just –

MS FEINT KC:

No. It was expedient, I imagine. So finally, costs. Te Kāhui do seek indemnity costs on the basis of the original funding regime essentially, and –

KÓS J:

Well we've got your application.

MS FEINT KC:

Yes, absolutely. And I don't think I can do better than repeat the points made in your judgment, Justice Kós.

MS WILLIAMS:

Have you finished that point? Thank you. Then I won't raise the point I was going to about leaving costs at this stage.

MS FEINT KC:

Sorry? I didn't hear you.

MS WILLIAMS:

I was going to say if you were going to address costs now then perhaps that could wait until after the Attorney had given its address in reply, but if you've paused, we're fine.

MS FEINT KC:

I'm happy to wait until after you've given your address in reply. I was simply going to add that we were seeking a costs award now rather than waiting for the reserve judgment.

GLAZEBROOK J:

Yes, we understood that.

1540

MS FEINT KC:

Which again might be ambitious, but that is our submission. Tēnā ra tatou. Tēnā koutou e ngā Kaiwhakawā.

GLAZEBROOK J:

Thank you. Ms Williams?

MS WILLIAMS:

Tēnā e te Kōti. I want to again mihi to our kaikarakia for the week. They have settled the mauri in the room every day and taken the trip here and we very much appreciate it. Tēnā koutou.

If your Honours please, in respect of issue 1, I have three short points to give in reply and then Ms Roff will respond to a point on issue 3 which was about extinguishing events. Again the Attorney has only appealed on points of law and is abiding the Court's decision on factual matters.

Now last week on Wednesday just before lunch, Ms Feint for Te Kāhui submitted that the Canadian jurisprudence is a lot more nuanced and sensitive to context than what the Attorney-General has submitted to be the test for section 58. I want to restate that the Canadian approach, as it is in *Tsilhqot'in* and applied in submerged lands in *Chippewas*, is the approach that the Attorney is advancing. That's in our written submissions of 20 September at paragraph 40 and our reply submissions of 18 October at paragraph 20.

Tsilhqot'in is an attempt we would say to reconcile the dual perspectives within the common law framework for recognising aboriginal title and we submit that that's what Parliament is attempting to do in its drafting of section 58 bringing together and attempting to reconcile two legal traditions. Now this approach requires sensitivity to the methods that were available to assert mana across time from 1840 to the present day. That's what Miller J said in paragraph 162 and the Attorney has said that following the Canadian jurisprudence, it's that ability and intent to control the area against third parties, Māori and non-Māori, as a matter of fact and that the Court should be looking to see evidence of control of people, of place and of resources.

Now we say that these are akin to the acts of occupation in the takutai moana space that is talked about in Canadian case law. It's not taking a literal approach as has been said by some counsel. What the Attorney is saying is that the components that have to be met in section 58 are clear and the metaphor that was used last week is the binoculars that we are bringing to that assessment.

GLAZEBROOK J:

You say control, ability and intent to control is a matter of fact, people, resources and there was a third one that I missed.

MS WILLIAMS:

Place your Honour.

GLAZEBROOK J:

Thank you.

MS WILLIAMS:

People, place and resources. I think that's a good way of contextualising and understanding what control might be in that place, in that rohe and –

KÓS J:

But you accept shared control so it's very much qualified control?

MS WILLIAMS:

In terms of you're talking about in terms of shared exclusivity for a CMT?

KÓS J:

Yes.

MS WILLIAMS:

Yes, in terms of how that – but it's still exercised by –

KÓS J:

Collectively?

MS WILLIAMS:

Collectively, yes, your Honour.

WILLIAMS J:

So what do you – we've probably traversed this but what do you mean by ability? You have accepted, haven't you, that to the extent that the law permits?

MS WILLIAMS:

Yes, it's not the legal ability to enforce that right as a private landowner might in a trespass application but it is that intention to, showing an intention to control

and that – because it's a question of fact my friend put to you the table last week that showed how – what various cases had found about that intention and ability to control. It's a layering of events. So the fact that the party may have protested and it was partially successful might be a factor. A rāhui generally recognised might be a factor but they need to be layered up in order to get that factual assessment. A number of parties before you have talked about how it comes down to a factual assessment in the context of the place being sensitive to the methods that are available and to the contextual environment that's taking place which includes the nature of the rohe.

WILLIAMS J:

So the way you articulate it does seem nuanced and, with respect, sensible but it does suggest that "ability" is a hopeful word and that this is being finessed on purpose.

MS WILLIAMS:

Well my friend Ms Roff talked about the – Dr Boast's continuum. We have two continuums, one where you've got exclusive use and occupation, and the other where third parties do, and we get into that grey space and it becomes a very nuanced, sensitive consideration.

WILLIAMS J:

Okay, and how do we – is there any more guidance that can be given than that? Because that creates quite a large grey margin and battlefield in litigation terms that, if it could be avoided, might be usefully avoided.

MS WILLIAMS:

Mr Hodder used the example of – I think his words were "you know it when you see it". When you have that array of factual information –

WILLIAMS J:

That's really helpful.

MS WILLIAMS:

Well the parties in front of you are very much of the majority saying it is factually, very factually-dependent, and there is a number of things a judge will want to consider.

GLAZEBROOK J:

The real issue is ability, because in terms of the law as it was understood, for many, many years there was not only no legal ability, there was no factual ability either.

MS WILLIAMS:

In many areas the Crown's submission, as shown in that table, was that there was a recognised ability to exercise control in some ways.

WILLIAMS J:

Give me an example?

MS WILLIAMS:

Well we talked about the Tauranga Harbour recognised in *Reeder* and –

WILLIAMS J:

Oh, the sewerage thing?

MS WILLIAMS:

No, I'm talking about the Pōtiki case. Yes.

WILLIAMS J:

Yes, yes, the sewerage you're talking – I thought you were going to be talking about the sewerage treatment area that –

MS WILLIAMS:

No, I was going to talk about the fact that the continuous area – the hapū largely had control of the land around the harbour, sorry, the estuary, that there were a number of other facts on the ground that meant that they were able to continue to show their control over that area, which included the fact that the bridge

became a natural barrier, that there was mangrove swamps around that stopped where people may have naturally had more public access than in other takutai moana spaces.

WILLIAMS J:

It's still a very public place. I mean it's surrounded by a city.

MS WILLIAMS:

It is very close to a city, but the Judge was able to find in that case that they, the groups showed sufficient ability to control the space such that they could get CMT under section 58.

WILLIAMS J:

Yes, he did. And my searches for those indicators in a very shall we say ambiguous space like the upper reaches of Tauranga Harbour, so is it – you say this is a cumulative test?

MS WILLIAMS:

Yes.

WILLIAMS J:

And that seems wise, though it's – not every item on that list needs to be established, there's an acceptance that the world in which these rights were maintained was highly compromised.

MS WILLIAMS:

Yes.

WILLIAMS J:

But can we come down to you haven't stopped and you haven't forgotten?

MS WILLIAMS:

No, because the Attorney's position is that it's not simply a spiritual control –

WILLIAMS J:

No, no, I don't mean – no, I don't mean just you haven't – that's the you haven't forgotten, but you haven't stopped trying?

MS WILLIAMS:

The position based on the Canadian case law is that we are still looking for forms of – akin to ownership. So yes, tikanga is relevant, but so are signs of something similar to property rights of ownership.

WILLIAMS J:

I don't know, it's just – much of what's been put forward is indicators of that just don't make that grade, not even close.

GLAZEBROOK J:

And also, it's a – the nature of the –

WILLIAMS J:

It's not the nature of the conflict that's going on. It seems a little –

GLAZEBROOK J:

It's not land.

WILLIAMS J:

Yes, just a little bit too finessy.

MS WILLIAMS:

Perhaps we could pull up the reference to *Tsilhqot'in*?

1550

GLAZEBROOK J:

Because the Canadian cases are not looking specifically at an area where you don't expect occupation, for obvious reasons.

MS WILLIAMS:

That is the case but in *Chippewas* they've said that the same test applies to submerged lands and in the paragraph that's come up at 58 half way down –

FRENCH J:

Paragraph 48 or 58?

MS WILLIAMS:

Sorry, paragraph 48, thank you. "Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group" and to the very end: "Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control." Again this is – the case law is very clear that this is considered with reference, sensitive reference to the local conditions and the methods available to that group to show its mana over that space through time.

WILLIAMS J:

Yes, it does. Those propositions are lovely and thoughtful and sensitive but they do verge on the contradictory and I mean Central British Columbia circa 2011, what is it, something like that, was not a place that excluded others, that the *Tsilhqot'in* people excluded others in, couldn't possibly be. There were highways running through it, hydroelectric stations and so on and so forth.

MS WILLIAMS:

The test in Canada isn't assessed as at 2011.

FRENCH J:

That's sovereignty.

WILLIAMS J:

Yes, but the continuity requirement is.

MS WILLIAMS:

The test that there is – sorry, the test that they're assessing there is at the time of sovereignty and then they have a continuity requirement that I would suggest is different.

WILLIAMS J:

Right, so but in New Zealand there's no question, this sort of nuance is completely unnecessary. In New Zealand the coastline was clearly owned in 1840.

MS WILLIAMS:

Yes, but the test that we're assessing in New Zealand is from 1840 to the present.

WILLIAMS J:

Yes, that's the problem, isn't it?

MS WILLIAMS:

So we've taken the concepts from Canadian case law but we are modifying them for a New Zealand context.

WILLIAMS J:

That's what I'm wanting to get as clear as that can possibly be got and I realise how difficult that is because we know how the Courts dealt with the at sovereignty position in New Zealand because they did in a number of cases. What's required now can't be that because that would be to ignore the very reconciliation the Act is designed to achieve. How do we take proper account in the test of the impairment of these rights because of the elephant in the room colonisation and the Canadian Courts have addressed that? They do talk about that with some sensitivity.

MS WILLIAMS:

And this is where I would come back to what's in our written submissions that the Takutai Moana Act is restoring the rights that were extinguished as at 2004

with the Foreshore and Seabed Act. It's a balancing of the rights that were extant as at that time with the realities of the day which include a number of statutory frameworks that now carpet takutai moana including the RMA and fishing legislation and public access rights of navigation access and fishing.

WILLIAMS J:
Exactly.

MS WILLIAMS:
And that it's not an act that endeavours to restore or make balance for actions by the Crown and third parties in the past. There is a – there's a Treaty settlement process for that and that is separate to what occurs with the MACA.

WILLIAMS J:
Yes, although in most cases MACA wasn't, MACA rights weren't even negotiated and they're fully and finally settled now, it's game over, too late, even if that were true. So if that test is a sovereignty test, was it 1867 I guess in Canada, and the situation you are making that measurement on is 1867 not 2011. You really have constructed a test that's impossible to meet by saying that that same test applies in New Zealand in 2024.

MS WILLIAMS:
The legislative history was covered a lot last week and what was repeatedly drawn out there was a recognition that it was a balancing as at – a balancing of legal traditions and that it was recognised that the test would be stringent was one word but not impossible.

WILLIAMS J:
Yes, well I'm trying to work out what is possible and you're giving me a test that ignores colonisation and I'm having to apply it after colonisation, how do I do that?

MS WILLIAMS:

Sir, I wouldn't say that the test ignores colonisation. What I'm saying is that it's not aiming to restore rights that were effective through colonisation and if I can I'm going to go to my second point now which is about raupatu because it gets into the same space.

It was suggested by Mr Salmon for Ngāti Awa last week that it must be implicit in the act that a severe action like raupatu can't be regarded as collapsing the customary interest. It couldn't possibly amount to substantial interruption and there was a comment from your Honour Justice Kós to a similar effect. I want to be very clear that the Attorney's submission is that the test for substantial interruption is a factual test and that Parliament has left the question of whether raupatu of abutting land has amounted to substantial interruption to be determined as part of that question of fact.

If I could take us to the Departmental Report. This is in the Attorney's bundle of authorities at tab 39.

KÓS J:

Just before you do that, can I just go back to a point that Justice Williams has raised, something else that's worrying me and that is if you look at section 26 of the Act, which is the one that deals with the rights of public access in the common coastal marine area, you're not suggesting that this Act created those rights of public access are you?

MS WILLIAMS:

No.

KÓS J:

No. So they have existed since people have walked on beaches in this country?

MS WILLIAMS:

I think that gets – well it gets more nuanced in regard to say fishing but I would say that that is – well it's part of the balancing of what was seen as rights of New Zealanders including Māori and non-Māori.

KÓS J:

So your argument that what is required to amount to exclusive use and occupation being akin to ownership, which I'm having a lot of trouble with, doesn't mean however that in order to exclude or to show the necessary degree of exclusion, iwi, hapū, whānau have had to go and say to people "get off my beach."

MS WILLIAMS:

No, I'm not saying that and just to clarify, your Honour –

KÓS J:

I mean if someone wanted to cross my back garden and they do, I tell them to go and they do. Now – because actually it's on the way to a beach.

MS WILLIAMS:

To be clear when I referenced ownership before, what I was intending to say is that the test in section 58, second limb, draws from common law concepts of ownership together with the tikanga lens rather than the required ownership.

KÓS J:

Right, because the tikanga version of ownership – well I mean I don't think tikanga has – I'll defer to my colleague – but I don't think tikanga has that kind of, it certainly doesn't have an English property law perspective of ownership.

MS WILLIAMS:

And this is covered in our written submissions.

KÓS J:

It has mana, it has mana whenua.

MS WILLIAMS:

Yes.

KÓS J:

Yes.

MS WILLIAMS:

And our written submissions are very clear on how it is a balancing of tikanga and common law and that notions of exclusivity aren't antithetical to tikanga.

WILLIAMS J:

No, not at all. In fact the Native Land Court decisions on foreshore and seabed say so.

MS WILLIAMS:

Yes, your Honour.

WILLIAMS J:

So that's not a problem but how in the reconciliation process do we take account of what's happened since? What lens of interruption or extinguishment do we apply in order to be just when deciding what exclusive use and possession is today?

1600

MS WILLIAMS:

Your Honour, I'm going to finish my point on raupatu because I think it's going to be relevant to that and then I'll come back and address that.

In the Departmental Report, which we've now got on screen, you'll see the three paragraphs from 1436 to 1438: “The Government's intention is the rights being tested are extant rights in that they have existed since before 1840 and continue to exist today. This is consistent with the common law doctrine of customary title which recognises rights which have not been extinguished or lapsed.” The next paragraph: “The existence of raupatu does not necessarily prevent a

finding of customary marine title…" references the amendment to the test in the Foreshore and Seabed Act which required "…continuous title to contiguous land and that this allows groups who have suffered raupatu contiguous to the common marine and coastal area to potentially meet the test" and then at 1438 an explicit statement that: "For those property rights that were extinguished by a breach of the Treaty of Waitangi New Zealand has an established historical Treaty settlement process which provides tailored redress and compensation for such extinguishment and grievances. It is the Government's intention that the historical Treaty settlement process remains the process for the Crown and Māori to discuss and resolve extinguished customary interests."

GLAZEBROOK J:

The trouble is if you look at Ngāti Apa the only extinguishment is by clear statutory fear if you like. Yes, there would likely be not extinguishment but passing on by a proper sale that's been undertaken by the proper customary owners but as nobody thought they owned this that it's unlikely to be part of this apart from if we're looking at navigable rivers and possibly some contiguous land issues. So I'm not sure that really says what you say it does say because extinguishment means get rid of and we're talking here about whether as a factual matter there's been occupation and that factual doesn't or has not so far amounted to extinguishment especially from third parties because…

MS WILLIAMS:

I don't think that we're apart on that point, your Honour. I'm talking about the raupatu of contiguous land rather than any submission about how raupatu may apply to the foreshore and seabed and I'll show that further by pointing out how Justice Churchman dealt with raupatu in his decision in this case.

GLAZEBROOK J:

Okay, I understand it's a different point.

MS WILLIAMS:

So he discussed the effect of raupatu in the area in question at paragraphs 193 to 207 of his judgment. I'm not going to take you there but he considered

whether the raupatu had amounted to a substantial interruption and found on the facts that he hasn't. He's noted that: "Although many of the hapū of Whakatōhea were displaced from their traditional coastal settlements… the raupatu increased their dependence on the takutai moana particularly as a source of food given the confiscation of all of their cultivated lands and the destruction of other assets such as the flour mill and farm machinery…". That's at paragraph 202. So actually the indicators of the control over the takutai moana space was still there post-raupatu.

GLAZEBROOK J:

Although whether they were – I'm still coming back to the ability to control because whether actually they were recognised by anybody else especially given confiscation is an open question I would have thought.

MS WILLIAMS:

Yes, and one that again I would come back to, that goes into the factual matrix, it will be before the Judge considering the application.

WILLIAMS J:

So we know that interruption isn't interference?

MS WILLIAMS:

Yes.

WILLIAMS J:

And that the interruption which must be more than interference must also be substantial?

MS WILLIAMS:

Yes.

WILLIAMS J:

That is language, it seems to me of reconciliation, is it not?

MS WILLIAMS:

Or it's language that indicates an awareness of difficulties that may have been faced in that space.

WILLIAMS J:

Correct, yes.

MS WILLIAMS:

And it's also a recognition, I would suggest, of the length of time that the test is applying for from 1840 to the present. So we had earlier talked about claimants not needing to show that they're there every day.

WILLIAMS J:

Yes. You'd have to paint the perfect picture.

MS WILLIAMS:

Exactly.

WILLIAMS J:

But my question is really how generous are these binoculars, what attitude of mind do you bring to the analysis, do you start from the proposition that you will not likely find disqualifying events or abandonments or whatever because these are Treaty rights. You bring that kind of quasi BORA lens to this process in order for it to be the reconciling statute that it needs to be, or do you do it some other way? What are the techniques we use so that these, the way we discuss this doesn't start to sound just a little too glib? I'm not accusing you of that. This is a genuine search on my part.

MS WILLIAMS:

In line with the case law that has come out of this Court previously about Treaty principles and BORA, yes we are saying that those things should be applied with a bit of generous and broad approach reading to those provisions should occur. That would certainly be in line with the purpose provision in the preamble which make clear the conversation and debate that has gone on and that

Parliament considered that the 2004 Act had not struck the right balance between the various interests at plan with takutai moana. But the provisions of the section 58 and, in particular, the elements of the second limb are still there and that's where in our written submissions we have pointed to the importance of the *Urlich* case in the Court of Appeal and how that showed that regardless of taking a broad and – a broad approach and being cognisant of Treaty principles and interpretation, the elements of the test must still be met.

WILLIAMS J:

Yes, of course. Are you going to talk to us about section 106?

MS WILLIAMS:

Only to say, your Honour, that our position is still that the claimants must meet the requirements for CMT and PCR at sections 58 and 51. That's a clear reading of section 98 and that again that provision at subsection (3), section 106(3), is making it clear the applicants don't have the burden of proving everyday ongoing continuity. Your phrase about they don't have to paint a perfect picture.

GLAZEBROOK J:

That probably goes against the legislative history in fact.

WILLIAMS J:

So, yes, well certainly legal extinguishment is by Ngāti Apa a matter of counterproof. So it seems on these provisions is proof of substantial interruption.

MS WILLIAMS:

Yes and my friend has addressed that on her submissions on Tuesday. We don't accept that substantial interruption and extinguishment are the same concept. We used the –

WILLIAMS J:

No, no, I agree.

GLAZEBROOK J:

No, they're different concepts but both were supposedly, according to the departmental report I think, encompassed within subsection (3).

KÓS J:

Yes, it was quite simple, everyone was clear, every parliamentarian spoke about this, or each party did, and it was that the applicants had to prove the positives and the Crown, assuming it's the Crown opposing, had to prove the negatives. Simple as that, everyone understood that. That must be the case surely.

MS WILLIAMS:

Yes.

KÓS J:

Yes.

WILLIAMS J:

But that means that includes legal extinguishment and factual extinguishment, to use that term as broadly as possible?

MS WILLIAMS:

Yes.

WILLIAMS J:

Including interruption?

MS WILLIAMS:

If the plaintiff, the applicant has put its case to meet the tests of section 58. 1610

WILLIAMS J:

If it's got it's imperfect picture there.

MS WILLIAMS:

It's got it's imperfect picture, there's sufficient for the Judge to draw inferences from it, yes. It's requiring another –

WILLIAMS J:

Yes, it's got an evidential burden you might say.

MS WILLIAMS:

Yes.

WILLIAMS J:

But the Crown has to or the detractors –

MS WILLIAMS:

Another party, yes.

WILLIAMS J:

– have to – parliamentary materials say the Crown actually, but you're right it may not be the Crown, have to do the work after that. That itself, that distribution there, is itself a reconciliation technique.

MS WILLIAMS:

If the Judge is convinced in the first instance the plaintiffs have done enough to get that – to get them there in terms of the case, yes.

WILLIAMS J:

Yes, yes.

FRENCH J:

Well –

WILLIAMS J:

It does tend to suggest – sorry.

FRENCH J:

No, no.

WILLIAMS J:

It does tend to suggest that the lens, the starting lens at least, is a generous one?

MS WILLIAMS:

Yes.

WILLIAMS J:

Right, thank you. Sorry, Justice French.

FRENCH J:

No, it's I just wanted to be clear. So in section 106(2) that doesn't make any reference to substantial interruption, so in terms of the presumption in section 106(3) that would appear then to put the onus on the other party.

MS WILLIAMS:

A party that's alleging a substantial interruption, yes.

FRENCH J:

Yes. You accept that?

MS WILLIAMS:

Yes. But again I do point to the importance of section 50, sorry section 98, yes.

FRENCH J:

Yes, I'm not ignoring that.

WILLIAMS J:

Is that the same with exclusivity which isn't referred to in subsection (2)?

MS WILLIAMS:

No, we –

GLAZEBROOK J:

Well that was probably covered by you don't have to show it every day so you probably do accept that, you just have to put enough up to show exclusivity and then probably the burden would shift at that stage.

MS WILLIAMS:

If you've met the initial requirements, yes. I'm conscious of time. Those were two of the three points and I do want to address the third one quickly before my friend addresses you.

The third is about the value of rights achieved with a CMT. Ms Feint for Te Kāhui said on Wednesday last week that to the extent that Māori have CMT rights they're much lesser than what you'd get under customary title and there was also a suggestion from the Bench in that first week that the rights that attach to a CMT are not very different to what a group would get under the RMA anyway. The Attorney doesn't consider either statement to be correct.

In relation to the suggestion that the rights under the Act are inferior to what one would get under customary title at common law in the takutai moana, as set out in our written submissions of 20 September, paragraph 27, there is real difficulty in predicting however the High Court or the Māori Land Court would have approached the question of what legal incidents of title the takutai moana would be, particularly given the need for the title to interact with our existing common law rights of fishing and navigation and those existing statutory regimes such as the RMA and the Crown Minerals Act. And so any comparison between what is obtained under the statute for a CMT and the rights that would have been obtained immediately following Ngāti Apa can only at its highest be a best guess or approximation. And, secondly, the rights that attach to a CMT are different to what a group would obtain under the RMA and they're also different in a number of respects to the rights that private landowners in fee simple estates have either in dry land or takutai moana. I'm going to bullet point this here. I'm very conscious of time.

WILLIAMS J:

For myself I think this is helpful so we'll put in a bit of overtime and get TOIL.

KÓS J:

You don't know what that means but our clerks do.

MS WILLIAMS:

Revenge billing, Sir. Ownership of non-nationalised minerals, so customary marine title holders unlike private land owners have ownership of non-nationalised minerals within the customary marine title area. That's section 62(1)(f) and they're also entitled to receive loyalties due to the Crown for minerals subject to certain privileges and royalties for sand and shingle taken from their area, their CMT area, that's section 84(2), and by contrast, generally all non-nationalised minerals in privately owned land are owned by the Crown and not the private land title holder. As a result –

WILLIAMS J:

Shingle?

MS WILLIAMS:

For grants that are given in – under, sorry, that's section11(1) of the Crown Minerals Act 1991.

WILLIAMS J:

What does that say? That shingle on your land belongs to the Crown?

MS WILLIAMS:

Let me get it up, your Honour.

WILLIAMS J:

I guess Winstone's selling shares quickly. That's a bit of a worry.

GLAZEBROOK J:

A lot of quarries, I think, will be very upset about that.

MS WILLIAMS:

That's for grants made post the Act.

WILLIAMS J:

Oh, post.

MS WILLIAMS:

Post the 2011 Act, sorry, I'll get that up.

WILLIAMS J:

Grants of?

MS WILLIAMS:

Of non-nationalised minerals.

WILLIAMS J:

Let me just understand what you're saying there. Are you talking – who's granting what in that context? Who's the grantor?

MS WILLIAMS:

Sir, I'm just going to get the sections up on my computer, Sir.

WILLIAMS J:

What's the section, 11 of the CMA?

ELLEN FRANCE J:

Section 11(1).

MS WILLIAMS:

Section 11 is of nationalisation of certain minerals.

GLAZEBROOK J:

This seems to be going quite a long way past what I would see as reply. It might be that it's nevertheless still something that's of interest, but it might be

something that's best dealt with by memoranda and then the other parties can also have a chance to discuss it as well, because –

WILLIAMS J:

So this is a Crown grant of land, this is a grant from the Crown of land after 1991?

MS WILLIAMS:

Yes.

WILLIAMS J:

So almost nothing applies, because you're talking about land that the Crown couldn't grant?

MS WILLIAMS:

But it's still a right that that person receiving the grant gets – doesn't get, whereas a person receiving a CMT grant does. I'm happy to skip this, your Honour. My point is simply to say if you –

GLAZEBROOK J:

Well, but the – well.

WILLIAMS J:

But, look, I'm sorry, that doesn't make sense because the CMT is not a Crown grant. The Crown is not giving them anything.

MS WILLIAMS:

But my, sorry, my submission is that the rights that attach to a CMT are different to what a, in a number of respects, to rights the private land owners of fee simple estates have.

WILLIAMS J:

Yes, when they get their first Crown grant. But private owners of – owners of private estates for whom this Crown grant is almost always prior to 1991 did not have these reservations.

MS WILLIAMS:

Yes.

WILLIAMS J:

So I don't think it helps you very much, not in fact. In theory you're right, but in fact it makes no difference.

MS WILLIAMS:

Well, my – I think it's still significant that the theoretical approach is different even if I have no evidence on the number of grants that are given post that time, but the theoretical approach that has been different – taken, the legal approach is different.

WILLIAMS J:

Okay. Sorry.

GLAZEBROOK J:

Well...

ELLEN FRANCE J:

Well, I mean, it is a response in part to questions –

GLAZEBROOK J:

Well, it's a response in part to questions, but not any points that's been made by, as far as I'm aware, that anyone but Landowners who is actually supporting your appeal.

WILLIAMS J:

No, there was, there were arguments.

FRENCH J:

It was about the value, there were arguments about the value of CMT rights.

WILLIAMS J:

Yes, the value of CMT.

GLAZEBROOK J:

Yes.

MS WILLIAMS:

These rights can be traced through in statute, they don't need to be taken through by me orally, we can put that in a memorandum, but my point is that the rights that attach to a CMT are valuable and they are different in several respects that one would receive under a fee simple estate.

But I do want to pick up the second part of this point which is a suggestion that, by your Honour Justice Williams, that the planning rights set out in MACA do not add much to existing rights. Again, we can do that in memorandum, but I want to make the point that the wording that is different in MACA –

WILLIAMS J:

Is that the plan trigger?

MS WILLIAMS:

The plan trigger.

WILLIAMS J:

Yes, no, I understand that's different.

MS WILLIAMS:

Thank you.

GLAZEBROOK J:

I think the point was really more that, yes, you had similar rights under the RMA but, in fact, if you did own land normally you would have to have permission from the owner before you went on and put structures up.

MS WILLIAMS:

The point that I was responding to was different, which was about the rights that came to a rōpū that received a CMT versus the rights that went to an iwi with an iwi planning document under the RMA.

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WILLIAMS J:

Yes, I agree with you on that. I meant to mention it, I thought I had at the time, but –

MS WILLIAMS:

Thank you.

WILLIAMS J:

– apart from that, an iwi planning document would have exactly the same effect, apart from the trigger.

MS WILLIAMS:

No, that might be where we have difference then, because we say that the wording of recognising and providing for in a CMT for a plan under a CMT is quite different to the rights that go to an iwi planning document under the RMA, and that actually those words recognise and provide for have quite a case law in the RMA because they're used in that hierarchy of rights between sections 6, 7 and 8 of the RMA, section 6 being, account…

WILLIAMS J:

Yes, yes, we…

MS WILLIAMS:

Yes, national independency so.

WILLIAMS J:

But, of course, the recognise and provide for includes recognising and providing for the relationship between Māori and their ancestral lands and waters and the

plan would just be taken as the best evidence of what must be recognised and provided for anyway logically.

MS WILLIAMS:

There's quite a scheme in the RMA and the MACA Act about what must occur in those sections. Section 6, which your Honour is referring to, is about matters are identified as being of national importance, section 7 is the elements to have particular regard to, as you mentioned, and in section 8 is the principles of the Treaty to be taken into account. So there is – my point is there is a hierarchy and the section – the rights that come to a coastal and marine title owner are at that very highest level as opposed to other elements of the Act for iwi planning documents. I'm happy to leave it there and then hand to my friend Ms Roff.

MS ROFF:

Your Honours, I do have some submissions in reply to my learned friend Mr Smith but I am very conscious of the time and I'm trying to think of a perhaps a more efficient, practical way of approaching that because it was going to be about 10 or 15 minutes and I could, if it would be helpful, hand up or perhaps provide –

GLAZEBROOK J:

Well there was only 25 minutes for a whole reply from the Crown that you agreed to.

MS ROFF:

That’s true, your Honour.

WILLIAMS J:

Not entirely their fault.

FRENCH J:

No, there was a bit of injury time from us.

WILLIAMS J:

There were a few mauls that needed to be blown up.

MS ROFF:

But what I was, sorry, 10 minutes, your Honour, we did between myself and Ms Williams, there was supposed to be 25 minutes, but what I was proposing, if it would be helpful, is that I could turn my notes into a road map, which I hadn't prepared, and I could just provide that to your Honours after, when I get –

KÓS J:

What's the subject matter of your reply?

MS ROFF:

So it was the navigable rivers, your Honour.

KÓS J:

Right, yes.

MS ROFF:

And the topics I was going to cover, and I'm happy to put this into writing and provide it to the Court, the response that I wanted to make to my learned friend Mr Smith was in respect of his submission that there was room for the Crown to do the things they needed to do without vesting amounting to a full beneficial ownership in the riverbeds. His submission around the potential for PCRs perhaps and the impact of the extinguishing event on the vesting, whether there would be any room for those and then the suspension of rights, whether or not that was possible that they could be sprung back by virtue of section 11(3). So I can put these notes, because they are purely in reply, I can put them in writing and provide them, your Honour.

GLAZEBROOK J:

Is that okay?

KÓS J:

I agree.

GLAZEBROOK J:

Yes, thank you, Ms Roff, much appreciated.

MS ROFF:

You're welcome.

GLAZEBROOK J:

And I'm not sure where we got to in relation to the memorandum but I think if that can also be included if you have extra things to say Ms Williams in that memorandum. Thank you.

WILLIAMS J:

What memorandum, 72? What memorandum is that?

GLAZEBROOK J:

On the Crown Minerals Act.

WILLIAMS J:

Right, yes, yes.

GLAZEBROOK J:

Thank you very much counsel and I note that Dr Amoamo is here still, thank you very much, and I'm assuming that we have a karakia to finish the proceedings.

KARAKIA WHAKAMUTUNGA (DR TE RIAKI AMOAMO)

WILLIAMS J:

Tēnā koe e Koro me ōu karakia me ōu manaakitia mai ki a mātou i roto i ngā wiki kua taha ake nei. Hoki pai atu ki te kāinga me ngā whakaaro aroha me ngā whakaaro pai o te tokorima nei. Haere i runga i te rangimārie i a tātou katoa.

DR AMOAMO:

Ngā mihi, hei konā koutou, hei kōnei mātou. Ngā mihi aroha ki a tātou.

GLAZEBROOK J:

Thank you very much Dr Amoamo again and also counsel. So we'll now retire and obviously we'll be giving judgment in due course.

COURT ADJOURNS: 4.28 PM