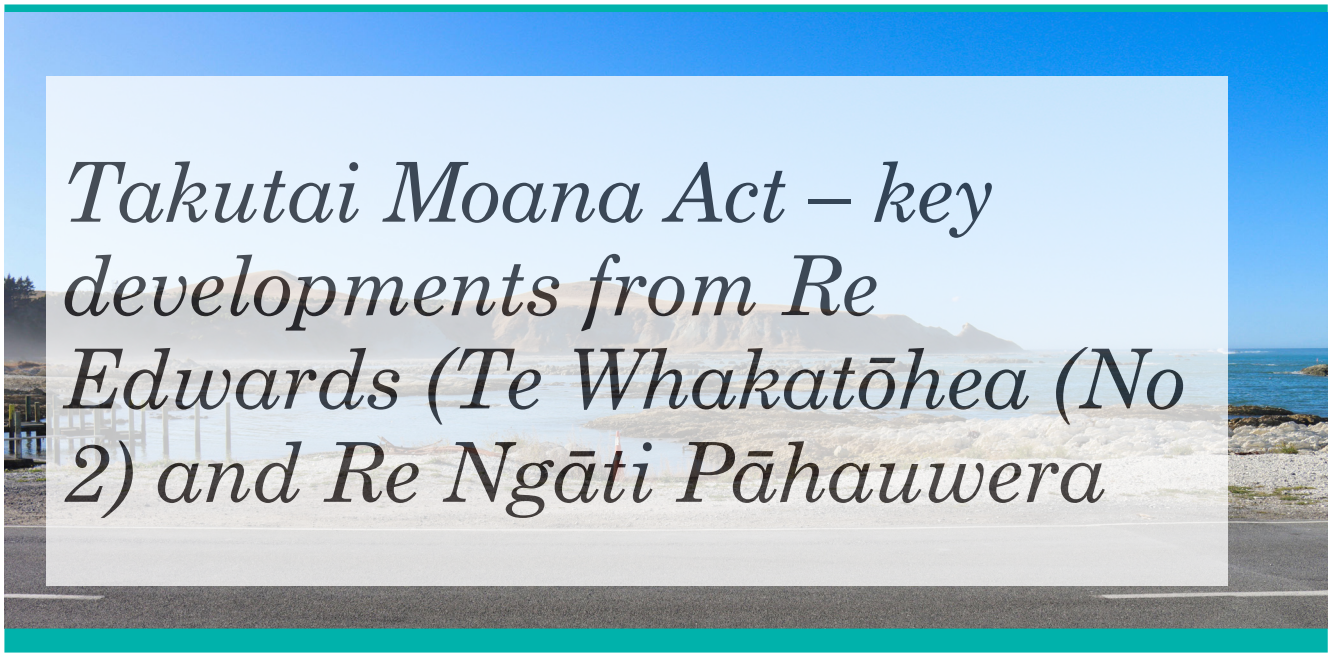
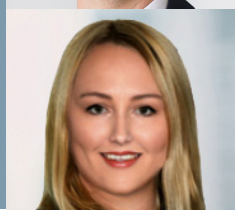


Takutai Moana Act – key developments from Re Edwards (Te Whakatōhea (No 2) and Re Ngāti Pāhauwera

Authors:
Hamish Harwood, Senior Associate and Lauren Phillips, Solicitor both at Simpson Grierson



Reform of the Resource Management Act 1991 (RMA) is, appropriately, the topic of the day. Nevertheless, a significant change to the management of resources in the common marine coastal area (CMA) took place in 2011 with the passage of the Marine and Coastal Area (Takutai Moana) Act 2011 (Act). The impact of that change is becoming more visible as applications for rights under the Act progress through the courts and essential questions about how the Act is to be applied are answered.

BRIEF BACKGROUND

Customary title in land and the marine and coastal area was denied to Māori for over a century. In 1877, *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 extinguished any potential for the recognition of customary title. 126 years later in 2003, the landmark decision in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) held that customary title was recognised at common law until lawfully extinguished. The Court of Appeal captured the position in the following way (at [13] per Elias CJ): "The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with the law".

The controversial Foreshore and Seabed Act 2004 was enacted the following year, vesting full legal ownership of the public foreshore and seabed in the Crown. With a change in government in 2008, the Foreshore and Seabed Act was repealed and replaced by the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).

The Act provides applicant groups with the ability to establish legal recognition and protection of customary interests in the CMA, through what the Act calls "customary marine title" and "protected customary rights". These rights can be obtained through the High Court or by direct negotiation with the Crown.

The Act imposed a six-year time limit for applications. At the deadline, there was an avalanche of applications. Just shy of 200 applications were made to the High Court and nearly twice as many applications were made to negotiate with the Crown. The entirety of the CMA was subject to at least one application. Many of the applications overlap.

CUSTOMARY MARINE TITLE

Customary marine title (customary title) is, like many legal concepts, a bundle of rights prescribed by statute. That bundle of rights is tightly confined and has little resemblance to common law property rights. For example, customary title creates an interest in land, but does not include a right to alienate or otherwise dispose of any part of the customary title. To that end, free public access has been retained in customary title areas. The Waitangi

Tribunal is currently considering whether the limited nature of the customary title breaches the Treaty of Waitangi.

Holders of customary title obtain an "RMA permission right", which is significant and is likely to be of most interest to resource management practitioners. In areas that are subject to customary title, activities that require resource consent (including controlled activities) cannot commence until the permission of the customary title holder has been obtained. Holders of customary title may give or decline permission on any grounds. There are no rights of appeal. (Some limited activities, called "accommodated activities", can be carried out without the permission of a customary title holder.)

In practice, the RMA permission right will give holders of customary title significantly more control over the areas subject to that customary title. In all cases (other than those covered by the limited exceptions in the Act), obtaining the customary title holders' permission to proceed will be an essential component of project planning.

To establish customary title, an applicant group must prove that it has had "exclusive use and occupation" of an area from 1840 to the present day without "substantial interruption" and holds the area "in accordance with tikanga".

INTERPRETATION

Prior to the commencement of hearings under the Act, critical questions existed about how "exclusive occupation" and "substantial interruption" would be interpreted, given neither term was legislatively defined. These terms appeared problematic, considering there are a large number of overlapping applications. Would two overlapping applications mean that neither group had exclusive possession without substantial interruption?

Similarly, it remained to be seen how compatible te ao Māori concepts of land ownership would be with the legislation and how land could be held in accordance with tikanga under the Act.

Two recent decisions by the High Court have gone a considerable distance to answering these questions.

The High Court in *Re Edwards (Te Whakatōhea (No 2))* [2021] NZHC 1025 adopted the concept of "shared exclusivity" from the Canadian jurisprudence (at [168]). Under this approach, a single customary title can be shared between applicant groups. Overlapping customary titles were not anticipated by the structure of the Act and the Court identified a number of practical problems that would arise from that approach. Provided the applicant groups can agree to such a shared exclusivity arrangement, the concept of "shared exclusivity" appears to be a pragmatic way forward for applicants with overlapping applications.

Additionally, the words "substantial interruption" were interpreted purposively. The Court found that certain physical activities could amount to a substantial interruption, but the mere granting of resource consent itself could not. Whether a substantial interruption has occurred is a question of fact in each case – there is no presumption (at [230]). The Court observed that some structures (such as navigational markers) may well enhance the use of parts of the takutai moana instead of interrupting that use (at [252]).

The Court concluded that the phrase "holds the specified area in accordance with tikanga" must be interpreted against concepts of tikanga only. The Attorney-General and the Landowners Coalition Incorporated argued that "holds" should be interpreted as a proprietary or proprietary like holding of the specified area. The Court disagreed and found that any attempt to measure a factual situation against western property rights or even the common law tests for customary land rights were unhelpful (at [144]).

The Court observed that holding an area in accordance with tikanga is something different to being the proprietor of that area (at [130]). That proposition reflects the significant differences between tikanga Māori and European law at 1840, such as the emphasis on the use and relationship with resources of the land and sea in tikanga Māori, compared to exclusive individual (or collective) title to an area of land in European law.

An assessment of "holds in accordance with tikanga" is to be determined by focusing on evidence of tikanga "and the lived experience of the group". As the Court eloquently put it (at [130]): "*The exercise involves looking outward from the applicant's perspective rather than inward from the European perspective and trying to fit the applicant's entitlements around European legal concepts.*"

An example of "substantial interruption" by established infrastructure was considered in the more recent decision

Continued

of *Re Ngāti Pāhauwera* [2021] NZHC 3599. The Court was required to determine whether the presence of the Pan Pac Forest Products Ltd outfall at Whirinaki amounted to a "substantial interruption". An outfall had been in place since 1973 and had recently been extended to a total distance of 2.4km.

The Court applied the factual analysis described in *re Edwards*. Ultimately, the evidence indicated that hapū members reduced or ceased using the outfall area as a result of the pollution from the Pan Pac mill and outfall. The evidence drove the Court to a finding that there had been a substantial interruption of use and so customary title was declined for this particular area. The Court held, however, that the first element of the customary title test had been met, namely that the area was held in accordance with tikanga (at [230]-[232]).

The Court went on to consider a range of other structures. It found that two buoys located on Pania Reef, near Napier did not amount to a substantial interruption. Neither did the bridges and walkways in the Ahuriri Estuary, nor another stormwater outlet close to Ngāti Pārau's boundary. For all of these assets, there was no evidence before the Court that their presence substantially interrupted the applicants' exclusive use and possession of the CMA (at [493]-[514]).

PROTECTED CUSTOMARY RIGHTS

An applicant group can also seek recognition of certain customary activities such as waka launching and gathering natural materials through "protected customary rights". Fishing, gathering seabirds and feathers (ie tītī and tōroa feathers), and activities relating to marine mammals cannot be subject to a protected customary rights order, despite those activities being important uses of the takutai moana. The activities must have existed at 1840 and have been continually undertaken since then.

Where protected customary rights are obtained, the activities they protect are exempt from resource consent requirements and coastal occupation charges.

Protected customary rights are also protected from other activities. Resource consents cannot be granted for activities if they are likely to have adverse effects that are more than minor on the exercise of a protected customary right, unless the holder of the protected customary right gives its written consent. Similarly, plans and proposed plans are prohibited from including rules that permit activities which will, or are likely to, have an adverse effect that is more than minor on a protected customary right.

The Court in *Re Edwards* found that an applicant need not show that it had exclusive use of an area or resource in order to obtain a protected customary right. Exclusivity is not an element of the test for a protected customary right. Instead it is entirely possible for an applicant to obtain a protected customary right for an area subject to customary title by another iwi/hapū/whānau. The Court observed that the principle of whanaungatanga emphasises an inclusiveness and collectiveness, and found that a requirement for exclusivity would be unreasonable for rights grounded in tikanga (at [395] – [398]).

EXTINGUISHMENT OF TITLE IN RIVER MOUTHS UNDER THE COAL MINES ACT 1979

The issue of the availability of river mouths to be recognised in a customary title or protected customary rights order arose in *Re Edwards*. The rights conferred to the Crown to minerals by s 262 of the Coal Mines Act 1979 were preserved by s 354 of the RMA.

In summary, if a river can be defined as "navigable", then the bed of it has vested in the Crown; if it is vested in the Crown, then customary title could be said to have already been extinguished, precluding the applicants from having the mouth of the river included in a customary title or protected customary rights order (at [346]).

The starting point in considering whether a river mouth is "navigable" was the Supreme Court decision in *Paki v Attorney-General* [2012] NZSC 50; [2012] 3 NZLR 277 which held that navigability was to be assessed at 1903, the date at which an amendment was made to the Coal Mines Act that had the effect of vesting the beds of navigable rivers in the Crown. The Court found that the Waiōweka River mouth had vested in the crown due to its navigability at 1903. There were established wharves at the river mouth at 1903, which appeared to put the matter beyond doubt (at [347] – [361].

The issue arose again in *Re Ngāti Pāhauwera* where the Court found that preservation of the Crown's rights to minerals had extinguished Ngāti Pāhauwera's interests in the bed of the Mōhaka River mouth. It determined that on the balance of probabilities the mouth of the Mōhaka River

was navigable at 1903 and consequently, customary title and protected customary rights could not be granted for that area (at [211] – [216]).

The Court went on to observe that position effectively amounted to extinguishment via a sidewind and resulted in an injustice to the people of Ngāti Pāhauwera (at [217]).

The matter is now before the Court of Appeal.

STAGE TWO HEARINGS

The applicants in *Re Edwards* had a large degree of success, with customary title being awarded over three areas, including the western part of Ōhiwa Harbour and the coastal marine area between Maraetōtara in the west to Tarakeha in the east. The exact boundaries of the order were left to be determined as part of the Stage Two hearings. That hearing took place during February, but final orders have not been issued at the time of writing.

The applicants in *Re Ngāti Pāhauwera* also had a large degree of success obtaining customary title over the application areas, which extend from a point approximately 11km south of the entrance to Napier Harbour, northwards to the northern bank of Poututu Stream just south of Wairoa. The High Court decision is now subject to appeals. However, the Stage Two hearing to finalise the orders will commence on 23 May 2022.

FINAL COMMENT

The hearings and negotiations under the Act are the latest in a long line of legal challenges by both the Crown and mana whenua to determine the status of customary title in New Zealand. The large number of applications will mean that it will take years, if not decades, to achieve finality for all of the applicants.

The Court's decisions in *re Edwards* and *re Ngāti Pāhauwera* have set a clear pathway for applicants to follow in pursuing their applications (subject to the resolution of the *re Ngāti Pāhauwera* appeals). The large success by the applicants in these early cases suggests that obtaining customary title and protected customary rights orders may be achievable for many applicants around the country.

The legal and consenting landscape will continue to evolve with the resolution of each application, which will be of acute interest to existing and prospective users of the CMA and regional councils.

Disclosure – the authors represent Hawke's Bay Regional Council in Re Ngāti Pāhauwera *and as well as other regional and district councils in relation to customary title and protected customary rights applications around New Zealand.*