IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2672

[2020] NZHC 2768

UNDER	Resource Management Act 1991.
IN THE MATTER	of an appeal under section 299 of the Resource Management Act 1991 against a decision of the Environment Court.
BETWEEN	NGĀTI MARU TRUST Appellant
AND	NGĀTI WHĀTUA ŌRĀKEI WHAIA MAIA LIMITED Respondent

(Continued next page)

Hearing:	18 June 2020 Auckland Council submissions received 26 June 2020 Respondent submissions received 1 July 2020 Appellants' submissions received 26 June and 6 July 2020
Counsel:	A Warren and K Ketu for Appellants L Fraser and N M de Wit for Respondent R S Abraham for Panuku Development Auckland S F Quinn for Auckland Council
Judgment:	21 October 2020

JUDGMENT OF WHATA J

This judgment was delivered by me on 21 October 2020 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors:	McCaw Lewis, Hamilton Simpson Grierson, Auckland DLA Piper, Auckland Chapman Tripp, Auckland

CIV-2019-404-2673

BETWEEN	TE ĀKITA O WAIOHUA WAKA TAUA INCORPORATED SOCIETY Appellant
AND	NGĀTI WHĀTUA NGĀTI WHĀTUA ŌRĀKEI WHAIA MAIA LIMITED Respondent

CIV-2019-404-2676

BETWEEN	TE PATUKIRIKIRI TRUST Appellant
AND	NGĀTI WHĀTUA NGĀTI WHĀTUA ŌRĀKEI WHAIA MAIA LIMITED Respondent

[1] The Environment Court was asked to answer the following question (the Agreed Question):

> Does the Environment Court have jurisdiction to determine whether any tribe holds primary mana whenua over an area the subject of a resource consent application:
>
> (a) generally; or
>
> (b) where relevant to claimed cultural effects of the application and the wording of resource consent conditions.

[2] The Court answered "no" to part (a) of the Agreed Question. The Court declined to answer part (b) of the Agreed Question, and instead "reframed" the question (the Reframed Question), namely:

> When addressing the s6(e) RMA [Resource Management Act 1991] requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, does a consent authority including the Environment Court have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions.

[3] The Court answered this Reframed Question in the affirmative.

[4] The appellants contend:

(a) the Environment Court reframed the question unlawfully and unfairly;

(b) the Environment Court should have answered both parts of the Agreed Question "no"; and

(c) the Environment Court was wrong, in any event, to find jurisdiction to assess relative strengths of relationship insofar as that involved identifying an iwi pecking order.

[5] Following argument, it was agreed I should resolve:

(a) whether the Environment Court erred in law and/or procedurally; and

(b) if so, address part (b) of the Agreed Question; and/or

(c) answer the Reframed Question.

Part 1 – Background

[6] The appellants represent tribes with customary interests across Tāmaki Makaurau.

[7] Panuku Development Auckland (Panuku) sought and obtained consent to:

(a) extend the north-western breakwater and causeway (via land reclamation) at Westhaven Marina (the Westhaven proposal); and

(b) construct two ship mooring dolphins and associated wharf access structures from the end of Queens Wharf in the coastal marine area and to undertake alterations to the existing Queens Wharf structure (the Queens Wharf proposal).

(Panuku Consents).

[8] Ngāti Whātua Ōrākei Waia Limited represents Ngāti Whātua Ōrākei, who claim to hold, what they call, "primary mana whenua" over the land which is subject to the Panuku consents. I describe what they mean by the phrase "primary mana whenua" below.

[9] Ngāti Whātua Ōrākei did not challenge the grants of the Panuku consents, but has filed appeals challenging the conditions dealing with mana whenua engagement, including the placement of 19 pou whenua as part of each proposal, as proposed by Panuku, to recognise the 19 iwi authorities in Tāmaki Makaurau (the Ngāti Whātua Ōrākei Appeal). The consent conditions require Panuku to invite all 19 iwi authorities to establish a Forum and prepare a Kaitiaki Engagement Plan with the assistance of the Forum to "assist Mana Whenua to express tikanga, fulfil their role as kaitiaki, and establish the engagement process before, during, and after the completion of construction activities".

Grounds of appeal

[10] The reasons for appeal specified by Ngāti Whātua Ōrākei set the frame for the Agreed Question. Ngāti Whātua Ōrākei contend the hearing panel erred in its findings at [166], [168] and [169] that:

- "[166]..the AUP-OP while recognising the Mana Whenua of these groups does not offer any guidance as to which group, if any, has primacy over any area within the Auckland Region."
- "[166]..there is nothing in the RMA, or in the AUP-OP, requiring that a particular group be afforded priority status...neither the RMA nor the AUP-OP requires a consent authority to determine whether a particular group has priority or primacy over another.. this determination is best made by iwi themselves.."
- "[168]..the two resource consent options offered by.. Ngāti Whātua Ōrākei..go too far given the neutral status adopted by the Council in the AUP-OP and its recognition of multiple, overlapping and interrelated Mana Whenua groups with regard establishing [sic] primary Mana Whenua status."
- "[169]..all iwi groups represented at the hearing have Mana Whenua status and their views are all valid and must be considered when considering cultural effects...any determination regarding whether any one Mana Whenua group has primacy to be best determined by the Mana Whenua groups themselves and as such we have amended the PMRKEP condition (Condition 12) to add this as a matter to be considered by that forum.."

[11] Ngāti Whātua Ōrākei also contends (among other things) that there is a duty to consider priority status when it is a material issue triggered by competing evidence of iwi and hapū authority submitters, under ss 6(e), 6(g) and 8 of the Resource Management Act 1991 (RMA) (or the related planning and policy framework). Alternatively, they contend, "assessment of the layers of interest asserted by each iwi submitter was a discretionary issue to be assessed by the decision-maker on its merits". Therefore, they say:

> It was error of law to say that the decision-maker has no jurisdiction to decide competing claims to recognition of relationships under s6(e) and s8 RMA. If all claims are equally valid, none are special. The decision claims not to "pick sides" but rejected the tikanga and evidence of Ngāti Whātua Ōrākei (primacy, based on its detailed

evidence), and gave preference and priority to the tikanga of opposing iwi (putative equality of treatment).

Process followed

[12] As there were no challenges to the grants of consent for the Westhaven proposal, the parties consented to an application to the Court on 19 March 2019 seeking a determination of early commencement, which was subsequently granted by the Court. Directions were also made consolidating the two appeals and inviting the parties to consider how to proceed, either by way of preliminary question of law or by declaratory proceedings. Ngāti Whātua Ōrākei then applied for declarations that the Environment Court has jurisdiction to determine which iwi holds primary mana whenua (customary authority) where relevant to the wording of the resource consent conditions and that "mana whenua" in the Auckland Unitary Plan (the AUP) is neutral and non-determinative as to the issues of primacy of customary authority.

[13] However, on 18 July 2019, the then-Principal Environment Court Judge: directed that the appeals be consolidated, adjourned the application for declarations made by the Ngāti Whātua Ōrākei and directed that a preliminary question proceed to hearing.

Agreed Question Factual Matrix

[14] The parties then tabled the Agreed Question for adjudication as well as an agreed factual matrix. That factual matrix records the following:

> **Contested mana whenua**
>
> 9. There is a dispute between the parties in relation to proposed consent conditions relating to mana whenua engagement, and the extent to which (if at all) these can accord primacy to Ngāti Whātua Ōrākei. The issue is not limited to the Westhaven and Queens Wharf proposals, and includes other public projects in the Auckland CBD and waterfront.
>
> 10. Ngāti Whātua Ōrākei says that it has primary mana whenua in relation to the rohe or area that includes the subject proposals. This assertion of primary mana whenua is contested and opposed by the iwi at [4] above (other than Ngāi Tai ki Tāmaki which has adopted a neutral position). All of the above Mana Whenua tribes claim customary interests in the Waitematā including the project areas.

11. If the Court accepts jurisdiction, then the relevant iwi authorities will file evidence supporting or opposing the issue of primacy.

Claimed cultural effects

12. Ngāti Whātua Ōrākei says that the disputed mana whenua engagement conditions, including provision for pou whenua, breach Ngāti Whātua Ōrākei tikanga, and cause significant adverse cultural effects. This assertion is contested and opposed by the iwi at [4] above (other than Ngāi Tai ki Tāmaki which has adopted a neutral position). Both positions will be the subject of evidence (if jurisdiction exists).

Other relevant matters

Location and Significance

13. The location of the projects subject of these appeals are:

    (a) Pile Mooring – 31 Westhaven Marina Drive, Auckland Central; and

    (b) Queens Wharf Dolphin Mooring – Queens Wharf and water space of the Waitematā Harbour north of Queens Wharf, Auckland Central.

14. Both projects are located within the Waitematā/coastal marine area.

15. All Mana Whenua tribes participating in these appeals:

    (a) Are parties to the Tāmaki Makaurau Collective Deed of Settlement between the Crown and Ngā Mana Whenua o Tāmaki Makaurau dated 5 December 2012 ("Deed"), that states at Part 10:

        10.1 Nga Mana Whenua o Tamaki Makaurau and the Crown acknowledge and agree that -

        10.1.1 the Waitemata and Manukau harbours are of extremely high spiritual, ancestral, cultural, customary and historical importance to Nga Mana Whenua o Tamaki Makaurau; and

        10.1.2 this deed does not -

            (a) provide for cultural redress in relation to those harbours, as that is to be developed in separate negotiations between the Crown and Nga Mana Whenua o Tāmaki Makaurau; nor

            (b) prevent the development of cultural redress in relation to these harbours in those negotiations.

16. Section 3 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 states the purpose of the Act:

The purpose of this Act is to give effect to certain provisions of the collective deed, which provides shared redress to the iwi and hapū constituting Ngā Mana Whenua o Tamaki Makaurau, including by –

(a) restoring ownership of certain maunga and motu of Tāmaki Makaurau to the iwi and hapū, the maunga and motu being treasured sources of mana to the iwi and hapū; and

(b) providing mechanisms by which the iwi and hapū may exercise mana whenua and kaitiakitanga over the maunga and motu; and

(c) providing a right of first refusal regime in respect of certain land of Tāmaki Makaurau to enable those iwi and hapū to build an economic base for their members.

17. There are a number of outstanding Marine and Coastal Area (Takutai Moana) Act 2011 applications for that part of the Waitematā, subject to these appeals.

18. All Mana Whenua parties are members of and have the ability to participate in, the Panuku Mana Whenua Governance Forum; equally, all Mana Whenua parties have the option of engagement with Panuku direct, and not through the Forum. The two proposals subject to appeal include consent-specific mana whenua engagement forums imposed by consent conditions.

Ngāti Whātua Ōrākei view explained

[15] In light of the agreed factual matrix, the parties did not consider it was necessary to provide evidence about other things, such as the tikanga-based meaning of mana whenua. But affidavits (included in the common bundle) were filed in respect of the application for declaration by Professor Emeritus David Vernon Williams and Deputy Chair of the Ngāti Whātua Ōrākei Trust, Ngarimu Alan Huiroa Blair. Professor Williams provides evidence of principles of tikanga Māori relied upon by Ngāti Whātua Ōrākei. The meanings of "mana whenua," "ahi kā" and "ahi kā roa," as described by Professor Williams, are applied where relevant by Mr Blair in his affidavit. While I make no findings about the claims made in this evidence, it helpfully provides context and definition to the assertion by Ngāti Whātua Ōrākei of "primary mana whenua".

[16] Professor Williams describes the concepts of "ahi kā or ahi kā roa," "mana whenua" and "take tuku, tuku whenua" as follows:

Ahi kā or ahi kā roa

> Ahi kā or ahi kā roa means the long burning fires of occupation. This concept relates to the notion of title to land through occupation over a significant period of time and, importantly, through whakapapa. Ahi kā presupposes continuous occupation and use of the land by those groups who could whakapapa to it.
>
> ....
>
> **Mana whenua**
>
> Mana whenua is the notion of territorial rights or authority over land. The concept can loosely be equated with the Pākehā idea of jurisdiction.
>
> Mana whenua and ahi kā are closely related. A group cannot have mana whenua without ahi kā, and losing ahi kā (through raupatu, for example) or failure to maintain it would erode a group's mana whenua.
>
> Mana whenua through ahi kā gives "better" or "stronger" rights to land than, for example, rights acquired through raupatu.
>
> ....
>
> **Take tuku, tuku whenua**
>
> Take tuku is a root of title to land akin to a gift. Unlike the Pākehā concept of a gift, for Māori the rights of the party transferring the land do not extinguish or cede to the other party receiving the land. On the contrary, there is a continuing relationship between the donor and donee. ....
>
> For Ngāti Whātua Ōrākei, the Crown acquired take tuku rights in the 1840 Transfer Land. This is reflected in the Agreed Historical Account in the 2011 Deed of Settlement at clause 2.23, which says of the transfer:
>
> > This transaction enabled the establishment of the town of Auckland, which soon became the main European settlement, the leading commercial port and the seat of government in the colony. **Ngāti Whātua and the Crown entered the transaction with a view to a mutually beneficial and enduring relationship**. [emphasis added]
>
> Tuku whenua is the act of transferring land, in accordance with the principles of take tuku. A mutual and ongoing relationship between the donor and donee of land is central to tuku whenua as it is to take·tuku.

[17] Professor Williams also addresses the concepts of "primacy" and "primary' in his evidence:

> When the Ngāti Whātua Ōrākei chiefs Apihai Te Kawau, Te Reweti and Te Tinana marked the Treaty of Waitangi on 20 March 1840,

> Ngāti Whātua Ōrākei had mana whenua through ahi kā in Tāmaki Makarau. In my view, it is important to note that while there may be overlapping claims from other iwi to mana whenua in some parts of Tāmaki Makaurau, there is also a core area of Tāmaki Makaurau over which Ngāti Whātua Ōrākei have, since the Treaty of Waitangi was signed, consistently had their mana, their customary rights gained through ahi kā in Tāmaki, and their role as mana whenua in Tāmaki, afforded. This core area is, to adopt Pākehā terminology, an area of primacy for Ngāti Whātua Ōrākei.

[18] Mr Blair refers to "primary mana whenua" in this way:

> The meanings of mana whenua, ahi kā and ahi kā roa, as described by Professor Williams, apply where relevant in my affidavit. I note that the RMA definition of "mana whenua" includes "customary authority": my references to primacy of "mana whenua" should therefore be read as including the primacy of our "customary authority" and rangatiratanga.

[19] He also says:

> Ngāti Whātua Ōrākei have maintained ahi kā, their 'fires of occupation', over the CBD waterfront from 1740 to this day. The CBD waterfront is bookended by two headland Pa sites being Te To (Beaumont Street in the west) and Taurarua (Judges Bay in the east). Ngāti Whātua Ōrākei continues to own approximately 20 hectares of CBD land, being the former Railways site at what is traditionally known as Te Toangaroa (the long dragging of waka) between Quay St East and Beach Road. This site was 're-acquired' from the Crown in 1996 through a commercial purchase following Ngāti Whātua Ōrākei's assertion of customary ownership to the reclaimed sea-bed.

[20] And further:

> Ngāti Whātua Ōrākei, as the iwi holding primary mana whenua interests in central Tāmaki Makaurau, agreed to join and participate in the Collective Arrangements as an exercise of its mana, but only to the extent of the express terms of the Collective Arrangements (and the other lawful rights of Ngāti Whātua Ōrākei).
>
> It was a pragmatic compromise made by Ngāti Whātua Ōrākei in the context of a halt in Treaty settlement negotiations in Tāmaki Makaurau that had been in place since around 2007.
>
> There was no suggestion or intention that, by joining the Tāmaki Collective, Ngāti Whātua Ōrākei or any other iwi, would abandon its mana whenua that it had established and maintained over the course of at least 250 years.

[21] Mr Blair also provides evidence about the concerns of Ngāti Whātua Ōrākei in relation to the consent conditions:

> Pou Whenua, or carved posts in their purist form, are statements of mana and authority akin to flag posts being stood and being flown in colonial history to claim rights to land. Pou Whenua can also be used to define tribal boundaries and to mark places of cultural significance. Placing Pou Whenua in this context would in cultural terms assign tribal mana and authority and be a signal of legitimate rights of an iwi to that particular place.
>
> Given the proposal was for 19 Pou Whenua, which reflects the Wider Iwi, Ngāti Whātua Ōrākei took this as another example of the erosion of our customary rights and the elevation of status of many other iwi who cannot claim any customary rights to the land in the Auckland CBD to the same extent as Ngāti Whātua Ōrākei. We had no choice but to object to the proposals in the strongest possible terms.
>
> In Māori terms a turangawaewae or 'place to stand', is a place that is indisputably your land and water and a place where your tikanga or world view prevailing is fundamental. If Ngāti Whātua Ōrākei has no turangawaewae or any place where its views matter the most (and more than any others at all), then it essentially is no longer Māori and it certainly is no longer Ngāti Whātua Ōrākei. If even in our very heartland, the central Auckland Isthmus and the CBD, we are simply accorded the same status as the Wider Iwi, then our very being as Māori and as Ngāti Whātua Ōrākei is undermined.
>
> If the Auckland Council as our Treaty Partner, whose Town Hall and head office sits on the very land we gave to the Crown in 1840, simply enables 18 iwi the opportunity to erect a 'Pou Whenua' and a statement of their mana then we had no option but to object. Further, given the continual treatment of Ngāti Whātua Ōrākei on our traditional lands as simply being one of many, we have determined to seek a declaration from this Court so that claimed interests can be weighed and so the Court can provide clarity and direction to those operating at local government level as to who they should be engaging with.

[22] According to Mr Blair, the claim by Ngāti Whātua Ōrākei to primacy is not be equated with claim of exclusivity. He says:

> The rights that go with being the ahi kā iwi also comes with obligations to manaaki our visitors and to also recognise those with legitimate customary interests.
>
> .....
>
> Ngāti Whātua Ōrākei also recognises a number of the Wider Iwi have legitimate customary relationships with the Westhaven area. These include Ngāti Paoa and Te Waiohua (Akitai, Ngai Tai ki Tāmaki, Ngāti Te Ata and Kawerau a Maki). We have previously proposed that Ngāti Whātua Ōrākei would lead an arts project at the proposed marina and invite all iwi who claim a customary relationship into the korero to firstly demonstrate and have tested their claims to the area in accordance with our tikanga. To then collaborate and agree an

> appropriate artistic representation of the various iwi that reflects the varying levels of relationships to the site. That Ngāti Whātua Ōrākei would lead the project was a sufficient recognition of the customary, treaty and legal rights we firmly believe we have.

[23] Mr Blair concludes:

> In my opinion, Ngāti Whātua Ōrākei is the iwi with primary mana whenua status for the Auckland CBD Waterfront area and has long-standing ancestral and contemporary relationships with the CBD, Viaduct Harbour, and Waitematā. We recognise the legitimate relationships to our primary mana whenua interest area of other iwi particularly those of Te Waiohua and Ngāti Paoa. We reject however that all Tāmaki Collective and Wider Iwi have the same level of interest as Ngāti Whātua Ōrākei and that they be accorded the same status as ourselves for resource consent conditions relating to mana whenua engagement and related matters (such as pou whenua).

The Environment Court decision

[24] The Environment Court found that the RMA does not invite decision-makers to identify "primacy" of mana whenua.[1] The Court also found the Agreed Question was misdirected, and that the Court's inquiry should not be into primacy of mana whenua because it does not reflect the potential for there to be many layers of differing interests among many parties (as is the case here). The Court thus resolved that part (a) of the Agreed Question was too broad and was not strongly argued for Ngāti Whātua Ōrākei. Jurisdiction was therefore declined concerning part (a).

[25] As noted in the introduction,[2] the Court considered that part (b) of the Agreed Question needed to be reframed. The Environment Court then answered the Reframed Question in the affirmative. It said:

> [82] Our finding in this instance is that the AUP is relatively silent on the mana whenua and related cultural matters referred by the appellant, in the sense as just held that they are non-determinative about overlapping or competing interests. We hold therefore that it is appropriate, indeed necessary, to resort to the provisions of Part 2 that we have listed in this decision. That said, we reiterate that while it is possible to conclude that a decision-maker might be required to consider evidence about multiple interests of multiple parties in any given place, we do not see any clear directive or encouragement in the Act to identify "primacy" in the sense of a general pre-eminence or dominance as argued on behalf of Ngāti Whātua. The conclusion we draw is

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1 *Ngāti Whātua Ōrākei Whai Maia Ltd v Auckland Council* [2019] NZEnvC 184, (2019) 21 ELRNZ 447 at [82].

2 *Ngāti Whātua Ōrākei Whai Maia Ltd v Auckland Council*, above n 1, at [84]-[89].

> that there is clearly jurisdiction to hear and determine competing claims as to relative status between Māori groups. We do not accept however that it would necessarily be correct to describe that jurisdiction as a power to determine that a particular tribe holds primary mana whenua over an area. These concerns highlight the problems arising in an attempt to answer such a broad question in the abstract.

[26] The Court also responded to the Council's submission that councils or their hearing commissioners were not equipped to make such inquiries. In doing so, the Court observed that consent authorities must face up to the complexity of issues in all facets of resource consenting, whether of a Māori cultural-nature or otherwise. The Court further observed that it was likely there would be few situations faced by consent authorities as complex as the present, in terms of the numbers of parties claiming to be affected, or the ways in which effects might be manifested. However, these complexities afforded no reason for not facing up to the task.[3]

[27] The Council, Te Ākitai o Waiohua, Te Patukirikiri, and Ngāti Maru all presently appeal the findings of the Environment Court on that preliminary question of law.

Part 2 - Legislative and Planning Scheme

[28] The present appeal requires the interpretation of provisions of the RMA as they relate to the power to grant resource consents and to impose conditions of consent and as they relate to Māori, iwi and hapū. As with all interpretation, those provisions must be interpreted having regard to the text in light of purpose and context.[4]

[29] In this regard, there is comprehensive provision within the RMA for Māori and iwi interests, both procedurally and substantively. It is not possible to address all of those provisions in any depth. I have focused only on those provisions I consider are most relevant to resolving the central issues on appeal. I provide an overview of their significance below.

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3 At [90].

4 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [24]; *McQuire v Hastings District Council* [2002] 2 NZLR 577 (PC); and Interpretation Act 1999, s 5.

Power to grant resource consents and impose conditions

[30] The power to grant resource consents is conferred by s 104 of the RMA. The power to grant consent is expressly subject to Part 2. Section 104 also outlines numerous mandatory considerations concerning a wide range of matters, including adverse and positive effects of the proposed activities, environmental standards, the provisions of relevant policy or planning documents including those produced under the Marine and Coastal Area (Takutai Moana) Act 2011 and wāhi tapu conditions included in a customary marine title order. Part 2 and each mandatory consideration under s 104 provide scope for consideration of mana whenua.

[31] The power to impose conditions can be found at ss 108 and 108AA of the RMA. Section 108 provides:

> **108 Conditions of resource consents**
>
> (1) Except as expressly provided in this section and subject to section 108AA and any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

[32] Subsection (2) identifies a range of matters for which conditions may be imposed, including financial contributions, bonds, requiring specific works and best practicable options in respect of discharges, provision for esplanade reserves and for monitoring or to meet the requirements of planning instruments.

[33] Section 108AA also states:

> **108AA Requirements for conditions of resource consents**
>
> (1) A consent authority must not include a condition in a resource consent for an activity unless—
>
> (a) the applicant for the resource consent agrees to the condition; or
>
> (b) the condition is directly connected to 1 or both of the following:
>
> (i) an adverse effect of the activity on the environment:
>
> (ii) an applicable district or regional rule, or a national environmental standard; or

(c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

...

(4) For the purpose of this section, a district or regional rule or a national environmental standard is **applicable** if the application of that rule or standard to the activity is the reason, or one of the reasons, that a resource consent is required for the activity.

...

[34] The power to impose conditions is thus also widely framed. As with the power to grant consent, the power to impose conditions has broad scope for consideration of mana whenua where consented to by the applicant or where relevant to the management of adverse effects and/or the implementation of applicable planning rules and/or administrative matters.

Part 2

[35] The reference to Part 2 at s 104 brings ss 5, 6, 7 and 8 of the RMA into the resource consenting process.[5] Section 5 states the sustainable management purpose of the RMA, namely:

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

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5 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [52].

[36] "Environment" is defined as:

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

[37] Section 6 specifies "matters of national importance." It includes express reference to matters of national importance to Māori:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
>
> …
>
> (g) the protection of protected customary rights:

[38] I return to the significance of s 6(e) below. A "protected customary right" means an activity, use or practice established by an applicant group in accordance with subpart 2 Part 3 of the Marine and Coastal Area (Takutai Moana Act 2011) and recognised by a customary marine title order of the High Court or an agreement.

[39] Section 7 of the RMA then deals with matters to which "particular regard" must be had. Most relevantly, it states:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) kaitiakitanga:

....

[40] "Kaitiakitanga" is defined to mean "the exercise of guardianship by tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources, and includes the ethic of stewardship". "Tangata whenua" means "the hapū or iwi that holds mana whenua over a particular area". "Mana whenua" means "customary authority exercised by an iwi or hapū in an identified area". "Tikanga Māori" means "Māori customary values and practices".

[41] Section 8 of the RMA states:

> **8 Treaty of Waitangi**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[42] Sections 6(e), 7 and 8 of the RMA are focal points for the present appeal. Their special significance was affirmed by the Privy Council in *McQuire v Hastings District Council.* As Lord Cooke said:[6]

> [21] Section 5(1) of the RMA declares that the purpose of the Act is to promote the sustainable management of natural and physical resources. But this does not mean that the Act is concerned only with economic considerations. Far from that, it contains many provisions about the protection of the environment, social and cultural wellbeing, heritage sites, and similar matters. The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By s 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of natural importance, including "(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By s 7 particular regard is to be had to a list of environmental factors, beginning with "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by Mari people of the area]". By s 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process.

[43] And further:

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6 *McGuire v Hastings District Council*, above n 4, at [21].

> [22] … Hastings has in effect the dual role of requiring authority and territorial authority, so in a sense it could be in the position of adjudicating on its own proposal; but, by s 6(e), which Their Lordships have mentioned earlier, it is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (s 7) and it must take into account the principles of the Treaty (s 8). Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

[44] The majority in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* also described the interlocking nature of these directions in this way:[7]

> [26] Section 5 sets out the core purpose of the RMA — the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. As between ss 6 and 7, the stronger direction is given by s 6 — decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).
>
> [27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among the matters of national importance identified in s 6 are "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga

(footnotes omitted)

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7 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [26] and [27].

Standards, Policy statements and plans

[45] Part 5 of the RMA deals with statutory planning instruments, including national standards, national policy statements, regional policy statements and regional and district plans. As stated by the Supreme Court in *The New Zealand King Salmon Co Ltd*, planning instruments may set the frame for resource management decision-makers without further need to refer to Part 2.[8]

[46] Except for national standards, involvement of "iwi authorities" in the promulgation of these instruments is expressly envisaged by the RMA.[9] There is also express provision for dealing with regulations relating to taiapure, mahinga mataitai, non-commercial fishing rights, as well as customary marine title.[10]

[47] Subpart 2 of Part 5 of the RMA contains detailed provision for initiation of Mana Whakahono a Rohe or iwi participation agreements. The purpose of a Mana Whakahono a Rohe is:

> **58M Purpose of Mana Whakahono a Rohe**
>
> The purpose of a Mana Whakahono a Rohe is—
>
> (a) to provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act; and
>
> (b) to assist local authorities to comply with their statutory duties under this Act, including through the implementation of sections 6(e), 7(a), and 8.

[48] The guiding principles in developing a Mana Whakahono a Rohe are:

> **58N Guiding principles**
>
> In initiating, developing, and implementing a Mana Whakahono a Rohe, the participating authorities must use their best endeavours—
>
> (a) to achieve the purpose of the Mana Whakahono a Rohe in an enduring manner:

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8 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 7, at [85]. See also *R J Davidson Family Trust v Marlborough District Council*, above n 5.

9 Sections 58D, 58H, 61(2), (2A)(a) and (b), 62(1)(b); Schedule 1, 1A, 1B and 3B.

10 Section 61(2)(iii) and 61(2A).

(b) to enhance the opportunities for collaboration amongst the participating authorities, including by promoting—

(i) the use of integrated processes:

(ii) co-ordination of the resources required to undertake the obligations and responsibilities of the parties to the Mana Whakahono a Rohe:

(c) in determining whether to proceed to negotiate a joint or multi-party Mana Whakahono a Rohe, to achieve the most effective and efficient means of meeting the statutory obligations of the participating authorities:

(d) to work together in good faith and in a spirit of co-operation:

(e) to communicate with each other in an open, transparent, and honest manner:

(f) to recognise and acknowledge the benefit of working together by sharing their respective vision and expertise:

(g) to commit to meeting statutory time frames and minimise delays and costs associated with the statutory processes:

(h) to recognise that a Mana Whakahono a Rohe under this subpart does not limit the requirements of any relevant iwi participation legislation or the agreements associated with that legislation.

[49] This subpart then provides a detailed framework for reaching agreement between one or more iwi authorities and one or more local authorities in respect of a wide range of resource management matters, including (in summary):[11]

(a) how an iwi authority may participate in plan promulgation processes;

(b) how participating authorities will undertake consultation – participating authorities are iwi authorities and local authorities that are able to agree at a hui of those authorities how they will develop a Mana Whakahono a Rohe;

(c) how participating authorities will work together to agree methods for monitoring;

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[11] Section 58R.

(d) how participating authorities will give effect to requirements of any relevant iwi participation legislation;

(e) a process for identifying and managing conflicts of interest; and

(f) a process for resolving disputes about the implementation of the Mana Whakahono a Rohe.

[50] A Mana Whakahono a Rohe may also specify, among other things, how two or more iwi authorities will work collectively together to participate with local authorities. It also provides a definition of "area of interest", namely, the area that the iwi and hapū represented by an iwi authority identify as their traditional hapū.

[51] The statutory process involves an invitation by one or more iwi authorities (initiating iwi) to relevant local authorities to enter into a Mana Whakahono a Rohe with one or more iwi authorities. After receiving the invitation, the local authorities may advise relevant iwi authorities and relevant local authorities that an invitation has been received and must convene a hui of the initiating iwi and any other relevant iwi authorities and relevant local authorities. "Relevant iwi authority" means "an iwi authority whose area of interest overlaps with, or is adjacent to, the area of interest of an initiating iwi authority."[12]

Resource management decision-making

[52] The RMA also contains numerous provisions that seek to provide for Māori, iwi and hapū input into resource management decision-making, including:

(a) Express provision for engagement with "iwi authorities" in the plan promulgation process (s32(4A), Schedule 1). "Iwi authority" means "the authority which represents an iwi and which is recognised by that iwi as having authority to do so".[13]

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12 Resource Management Act 1991, s 58L.
13 Resource Management Act 1991, s 2(1).

(b) Transfer of functions, powers or duties of local authorities to an "iwi authority" (section 33).

(c) A duty to keep records about iwi and hapū, including about "iwi authorities" and the areas over which one or more iwi or hapū exercise kaitiakitanga within a region or district (section 35A).

(d) The power to make a joint management agreement and for that purpose, satisfying itself that each iwi authority and group that represents hapū, represents the relevant community of interest (section 36B).

(e) Recognition of tikanga Māori where appropriate in hearing procedures (section 39).

(f) Provision for iwi authorities to submit on draft national policy standards (section 58D).

(g) The appointment of Environment Court Commissioners with knowledge and expertise in matters relating to the Treaty of Waitangi and kaupapa Māori as well as the appointment of alternate Environment Court judges in consultation with the Chief Māori Land Court Judge (ss 251-255).

(h) An express direction that the Environment Court shall recognise tikanga where appropriate in terms of its powers.

The AUP

[53] The AUP contains express references to "Mana Whenua". It defines "Mana Whenua" as follows:

> Māori with ancestral rights to resources in Auckland and responsibilities as kaitiaki over their tribal lands, waterways and other tāonga. Mana whenua are represented by iwi authorities.

[54] Part B6 of the AUP addresses Mana Whenua. It commences with the following whakatauki:

Ngā take matua a ngā ahikā-roa mai i tawhiti

The original inhabitants from afar

[55] B6.1 states:

> Mana Whenua participation in resource management decision making and integration of mātauranga Māori and tikanga into resource management are of paramount importance to ensure a sustainable future for Mana Whenua and for Auckland as a whole.

[56] It also identifies the issues of significance to Māori and to iwi authorities in the region include:

> …
>
> (4) recognising the interests, values and customary rights of Mana Whenua in the sustainable management of natural and physical resources, including integration of mātauranga and tikanga in resource management processes;

[57] B6.2.1 specifies objectives relating to recognition of Treaty of Waitangi/Te Tiriti o Waitangi partnerships and participation. Objectives in B6.2.1 include:

> (1) The principles of the Treaty of Waitangi/Te Tiriti o Waitangi are recognised and provided for in the sustainable management of natural and physical resources including ancestral lands, water, air, coastal sites, wāhi tapu and other taonga.
>
> (2) The principles of the Treaty of Waitangi/Te Tiriti o Waitangi are recognised through Mana Whenua participation in resource management processes.
>
> …

[58] B6.2.2 specifies related polices, including:

> (1) Provide opportunities for Mana Whenua to actively participate in the sustainable management of natural and physical resources including ancestral lands, water, sites, wāhi tapu and other taonga in a way that does all of the following:
>
> (a) recognises the role of Mana Whenua as kaitiaki and provides for the practical expression of kaitiakitanga;
>
> (b) builds and maintains partnerships and relationships with iwi authorities;

(c) provides for timely, effective and meaningful engagement with Mana Whenua at appropriate stages in the resource management process, including development of resource management policies and plans;

(d) recognises the role of kaumātua and pūkenga;

(e) recognises Mana Whenua as specialists in the tikanga of their hapū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, wāhi tapu and other taonga;

(f) acknowledges historical circumstances and impacts on resource needs;

(g) recognises and provides for mātauranga and tikanga; and

(h) recognises the role and rights of whānau and hapū to speak and act on matters that affect them.

[59] B6.3.1 states objectives relating to recognising Mana Whenua values, including:

B6.3.1. Objectives

(1) Mana Whenua values, mātauranga and tikanga are properly reflected and accorded sufficient weight in resource management decision-making.

[60] Corresponding policies include:

B6.3.2. Policies

(1) Enable Mana Whenua to identify their values associated with all of the following:

(a) ancestral lands, water, air, sites, wāhi tapu, and other taonga;

....

(2) Integrate Mana Whenua values, mātauranga and tikanga:

(a) in the management of natural and physical resources within the ancestral rohe of Mana Whenua, including:

(i) ancestral lands, water, sites, wāhi tapu and other taonga;

....

(4) Provide opportunities for Mana Whenua to be involved in the integrated management of natural and physical resources in ways that do all of the following:

(a) recognise the holistic nature of the Mana Whenua world view;

(b) recognise any protected customary right in accordance with the Marine and Coastal Area (Takutai Moana) Act 2011; and

...

(6) Require resource management decisions to have particular regard to potential impacts on all of the following:

(a) the holistic nature of the Mana Whenua world view;

(b) the exercise of kaitiakitanga;

...

[61] The AUP also includes objectives and policies relating to Mana Whenua cultural heritage at B6.5.1 and 6.5.2. This includes an objective that the association of Mana Whenua values with local history and whakapapa is recognised, protected and enhanced. It also includes a policy requiring decision-makers to identify and evaluate mana whenua cultural and historic heritage sites, places and areas considering Mauri, Wāhi tapu, Kōrero Tūturu, Rawa Tūturu, Hiahiatanga Tūturu and Whakaaronui o te Wā.

[62] The AUP outlines, in detail, the reasons for the adoption of the abovementioned objectives and policies, including the Council's ss 6(e), 7(a) and 8 obligations and the objective to recognise the relationship of Mana Whenua with the Hauraki Gulf. This part of the AUP also notes:

> In policies relating to Mana Whenua values, the Unitary Plan seeks to ensure that resource management processes in Auckland are informed by Mana Whenua perspective, including their values, mātauranga and tikanga.

[63] The AUP also identifies that a number of iwi and hapū in Auckland have developed iwi planning documents which articulate their specific resource management issues, noting also that they are a valuable source of information for integrating mātauranga and tikanga into resource management in Auckland. The AUP also states that the policies seek to give certainty to, and enhance, the involvement of Mana Whenua in resource management processes.

Overview of legislative and planning context

[64] The RMA is replete with references to kupu Māori, including Māori, iwi, hapū, kaitiakitanga, tangata whenua, mana whenua, tāonga, taiapure, mahinga mataitai and tikanga Māori. Parliament plainly anticipated that resource management decision-makers will be able to grasp these concepts and where necessary, apply them in accordance with tikanga Māori.[14] In this regard, local authorities and the Environment Court regularly deal with these concepts and their application, and have done so for nearly 30 years. What can be seen from even a cursory review of that case law over that time span is an evolving understanding and application of mātauranga Māori and tikanga Māori. While tikanga Māori is defined in the RMA as "customary values and practices" it has come to be understood as a body of principles, values and law that is cognisable by the Courts.[15]

[65] The AUP is an apt illustration of the stage reached in this evolution. It defines mana whenua by reference to their ancestral rights and kaitiaki responsibilities. It expressly identifies mana whenua participation in decision-making and integration of mātauranga Māori and tikanga into resource management as of "paramount importance" and seeks to ensure that resource management processes in Auckland are informed by mana whenua perspective, including their values, mātauranga and tikanga. It expressly refers to "mauri", "wāhi tapu" and "kōrero tuturu".

[66] The RMA also anticipates that iwi will be involved in policy and plan promulgation and may have delegated to them decision-making functions; that there will be cases where different iwi or hapū may have overlapping areas of interest; and that iwi and hapū with defined customary rights will be specifically provided for where relevant. The Mana Whakahono a Rohe process also enables agreement to be reached about competing iwi claims in respect of overlapping areas of interest. The AUP also

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14 See discussion in *McQuire v Hastings District Council*, above n 4, from [26].

15 See Christian Whata "'Mātauranga Māori' knowledge, comprehension and understanding: Reflection of lessons learnt and contemplation of the future" (2016) RM Theory & Practice 21 and cases cited therein. Some judgments were arguably well ahead of their time – see *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC). As to the cognisability of tikanga Māori as a body of principles, values and law see: *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

recognises the existence of multiple iwi and iwi authorities in Auckland and their respective planning documents. All of this necessarily demands that resource management decision-makers are able to identify, involve and provide for iwi and their mana whenua in accordance with mātauranga Māori and tikanga Māori.[16]

[67] However, when making resource management decisions, local authorities and the Environment Court are not engaged at Part 2 of the RMA in a process of conferring, declaring or affirming tikanga-based rights, powers or authority per se whether in State law or tikanga Māori.[17] Similarly, Part 2 does not expressly or by necessary implication empower resource management decision-makers to confer, declare or affirm the jural status of iwi (relative or otherwise) and there is nothing in the RMA's purpose or scheme which suggests that resource management decision-makers are to be engaged in such decision-making. The jurisdiction to declare and affirm tikanga based rights in State law rests with the High Court and/or the Māori Land Court.

[68] Nevertheless, the Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori where necessary and relevant to the discharge of express statutory duties.[18] To elaborate, as the Privy Council asseverated in *McQuire*, ss 6(e), 7(a) and 8 contain strong directions that must be observed at every stage of the planning process. Where iwi claim that a particular outcome is required to meet those directions in accordance with tikanga Māori, resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond must apply when different iwi make divergent tikanga-based claims as to what is required to meet those obligations. This may involve evidential findings in respect of the applicable tikanga and a choice as to which course of action best discharges the decision-makers statutory duties. To hold otherwise would be to emasculate those directions of their literal and normative potency insofar as concerns iwi.

[69] It is not possible to be definitive about the scope of the jurisdiction to respond to iwi tikanga-based claims, including claims based on asserted mana whenua, in the

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16 Derek Nolan (ed) *Environmental and Resource Management Law* (7th ed, LexisNexis, Wellington, 2020) at [14.24].

17 I use the term "State law" in reference to both the law of the State and common law.

18 As to the relevance of tikanga Māori to the exercise of statutory powers see: *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

abstract. But the operation of s 7(a) dealing with kaitiakitanga is illustrative. Kaitiakitanga is exercised by the hapū or iwi that holds mana whenua over a particular area. As the RMA anticipates, and as this case exemplifies, there will be occasions when there are overlapping iwi interests in the same whenua. Nevertheless, s 7(a) directs that regard must be had to their respective kaitiakitanga. Where the views of those iwi diverge as to the responsibilities of kaitiaki, a decision may need to be made as to which of those views is to apply in the context of that particular application and that may involve evidential findings as to what the iwi consider is required in tikanga Māori. *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*[19] provides a recent example of this dynamic. The Court in that case said:

> [82] Under s 7 we must provide for kaitiakitanga and the ethic of stewardship. "Kaitiakitanga" is defined in s 2 as the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources, and includes the ethic of stewardship. Under the same section, "tangata whenua" in relation to a particular area means the iwi, or hapū, that holds mana whenua over that area. "Mana whenua" means customary authority exercised by an iwi or hapū in an identified area, and "tikanga Māori" means Māori customary values and practices. Sir Wira Gardiner considered that we should identify who has mana whenua over the island and the reef, and given s 2 of the RMA and the contestability between the tribes on the mainland over the issue, we have no choice but to do so. We should stress that, normally, this Court is not required to undertake such an analysis.

[70] In that case, the Court had to determine whose claim to kaitiakitanga should be recognised, and whose rangatiratanga or customary authority and tikanga should be applied in the context of the case before the Court. The Court resolved that Ngāi Te Hapū – Te Patuwai and Te Whānau a Tauwhao are tangata whenua, and therefore, they are the kaitiaki of Ōtāiti with mana whenua over Motiti and its associated islands and reefs. The basis for this finding was explained as follows:

> [85] We make this finding based upon the recognition of their status by all parties and witnesses who appeared before us and based on:
>
> - Their ancestral connections;
> - Their continuous occupation;
> - Their proximity to the reef;

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19 *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73 at [82].

- The nature of their cultural and customary associations with the reef;
- Their traditional use of the area as a fishing ground; and
- The matter in which they have exercised their kaitiakitanga including through the use of tikanga, their customary values and practices pre and post the Rena disaster.

> [86] It logically follows that Ngāi Te Hapū – Te Patuwai and Te Whānau a Tauwhao have the right to exercise rangatiratanga or customary authority over the reef. Mr Mikaere stated that this position is unchallenged in terms of Motiti and Ōtāiti. The position of Te Whānau a Tauwhao is equally unequivocal. As a result of this finding, it is the tikanga of these hapū that should be applied to Ōtāiti, a matter that becomes important in our consideration of how the mauri of the reef is recovering, if at all.

[71] The Court then acknowledged the different interests of other iwi with relationships to Motiti and the different forms of kaitiaki responsibilities they have and that their connections also required recognition. In the result, the Court resolved that the proposed Kaitiaki Reference Group included membership that recognised their customary association, while ensuring that Ngāi Te Hapū had numerical majority on it. The Court also recognised the different relationships each of the iwi had to Motiti and its associated Islands, while acknowledging the stronger mana whenua and thus kaitiaki status of Ngāi Te Hapū.

[72] The need for caution when making these types of assessments is obvious, as was noted by the Waitangi Tribunal in *The Tāmaki Makaurau Settlement Process Report*.[20] That Tribunal relevantly noted:[21]

> Where there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua, and give all the groups with connections mana in the site. For an external agency like The Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of. It fails to recognise the cultural resonance of iconic sites, and the absolute imperative of talking to people directly about what is going on when allocation of exclusive rights in maunga is in contemplation.

[73] But the statutory obligation to recognise and provide for the relationship of Māori and their culture and traditions with their whenua and tāonga, to have regard to

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20 Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007). See also Rekohu: A report on Moriori and Ngāti Mutunga claims in the Chatham Islands (Wei 64, 2001) at [2], [4] and [13].

21 At 97.

their kaitiakitanga and to take into account the principles of the Treaty of Waitangi, does not permit indifference to the tikanga-based claims of iwi to a particular resource management outcome.[22] On the contrary, the obligation "to recognise and provide for" the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision. To ignore or to refuse to adjudicate on divergent iwi claims about their relationship with an affected tāonga (for example) is the antithesis of recognising and providing for them and an abdication of statutory duty.

[74] I am fortified in this view in the present context, given the clear policy of the AUP to require resource management decision-making to be informed by "Mana Whenua" perspective, including their mātauranga Māori and tikanga. That must inevitably include divergent claims by more than one iwi claiming mana whenua to a particular outcome based on mātauranga Māori and their tikanga.

Part 3 - Procedural Error

[75] The first ground of appeal concerns the decision of the Environment Court to reframe the preliminary question. This engages consideration r 10.21 of the District Court Rules 2014 (DCR) which states:

> **10.21 Orders for decision**
>
> The court may, whether or not the decision will dispose of the proceeding, make orders for –
>
> (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
>
> (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[76] Mr Warren for the appellants (supported by Mr Quinn for the Council) makes four main contentions about the approach taken by the Environment Court:

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22 *McQuire v Hastings District Council*, above n 4.

(a) The Reframed Question does not achieve the object of the preliminary question process, that is, to resolve the key issue raised by the Ngāti Whātua Ōrākei, namely whether the Environment Court has jurisdiction to determine whether any tribe holds primary mana whenua over an area.

(b) The Court's decision to modify the question to "assist in the resolution of the dispute" was not a lawful exercise of the Court's judicial function.

(c) The Court did not have jurisdiction per DCR 10.21 to reframe the question because the parties did not ask for it and the question does not address the key issue raised in the Ngāti Whātua Ōrākei Appeal.

(d) The Court acted unfairly, because it deprived the parties of a proper opportunity to submit on a question that has potentially far greater implications than the Agreed question.[23]

[77] Ms Fraser responds, in short, that:

(a) The answer to the Reframed Question resolves a key pleaded issue, namely the jurisdiction of the Court to take into account relative or layered iwi interests.

(b) The Court's function extends to assisting the parties to resolve the dispute, referring to (among other things) the powers of the Court to govern its own procedure.

(c) The Court's jurisdiction per DCR 10.20 is sufficiently wide to allow a reframed question of law.

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[23] Citing: *Te Whare o Te Kaitiaki Ngahere Inc v West Coast Regional Council* [2015] NZHC 2769; *Schmuck v Northland Regional Council* [2020] NZHC 590; *Ngāti Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA).

(d) There was no substantive unfairness to the appellants because they were given the opportunity to make submissions on the Reframed Question or a preliminary version of it.

Assessment

[78] I do not agree with the first contention by Mr Warren that the Reframed Question (and its answer) does not achieve the objective of the preliminary question process. The Court, in substance, achieved the objective of the Agreed Question; just not in a way sought by the parties. The Court rejected jurisdiction to make generalised statements about the "primacy" of mana whenua (a finding not appealed), but affirmed the Court's jurisdiction to assess their relative interests by reference to the relative strength of the relationship of iwi to the affected area and to make determinations in light of that relative strength.

[79] I also disagree with the second contention about the Court's lack of power to assist the parties to resolution. The Environment Court is purpose-built to assist parties to find (often non-binary) resolution of their disputes. Procedurally, the Court is mandated to achieve cost-effective resolution, avoid undue formality and receive any evidence it considers appropriate.[24] Subject to issues of scope,[25] it is empowered to find solutions that achieve sustainable management (a notoriously broad concept), and it performs a public function, in accordance with the Part 2 directives and in light of community led statutory planning instruments.

[80] As to the third contention, I accept that DCR 10.21 does not expressly envisage modification of the question mid-hearing. Rather, a two-step process is envisaged, first the formulation of the question and second the determination of the question itself.[26] But, as has often been said about statutory interpretation, "context is everything".[27] Given the very broad remit of the Environment Court to achieve sustainable management, I see no reason (subject to fairness considerations) why the Court could not reformulate a question if that is going to better achieve the object of

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24 Resource Management Act 1991, ss 269 and 276.

25 Section 5. For example, in the context of plan promulgation see *Albany North Landowners v Auckland Council* [2017] NZHC 138, especially from [114].

26 *Innes v Ewing* (1986) 4 PRNZ 10 at 18.

27 *McQuire v Hastings District Council*, above n 4, at [9].

the preliminary question process, that is, the resolution of part or of all of the appeal; bearing in mind also, that it remained open to the Court to refuse to answer the question. Furthermore, as Ms Fraser submits, the main grounds of appeal expressly engage concepts of relative interests and/or layers of interests and how those relative, or layers of, interests are to be factored into RMA decision-making in accordance with ss 6(e), (g) and 8 RMA. The answer to the Reframed Question responds directly to these pleaded grounds.

[81] Turning, then, to the fourth contention – the claim of unfairness. While the Reframed Question was discussed in argument and mooted as a potential approach, the Court did not formally invite submissions on it. The parties were entitled to be heard on a reformulated question, the resolution of which bears on their substantive rights.[28] Also, on such an important matter, dealing with the complex concept of "mana whenua," the parties should have had a full opportunity to be heard on an outcome which was not sought by them. More so, given that, by answering the Reframed Question in the affirmative, the outcome favoured Ngāti Whātua Ōrākei.

[82] But this is not a clear case of substantive unfairness. First, the Environment Court engaged with Counsel on the idea of a "lower grade question" and invited comment on the prospect of it. Second, as Mr Warren conceded, he would not have advanced any materially different argument had the Court invited him to make further submissions directly on point. In short, he would have submitted that, for the same reasons already advanced by him on the issue of primacy, the Court does not have jurisdiction to assess relative strengths of iwi relationships to a particular place and then make RMA decisions based on who had the stronger relationship.

[83] Initially, I was going to dismiss this ground of appeal. But on reflection, and with the benefit of reviewing more carefully the exchanges between Counsel and the Court, I have come to the view that a clearer opportunity should have been afforded to the appellants and Ngāti Whātua Ōrākei to be heard on the Reframed Question and its answer, given the importance of the underlying subject matter. This first part of the appeal is therefore allowed.

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[28] The risks of not doing so were exemplified in *Tainui Māori Trust Board v Treaty of Waitangi Fisheries Commission* [1997] 1 NZLR 513 at 521-522.

[84] In terms of relief, Mr Warren submitted that if I answered this part of the appeal in its favour I must set aside the Court's decision on the Reframed Question and then answer part (b) of the Agreed Question, no. But that belies the fact that the parties have had a full opportunity to be heard on the Reframed Question in this Court, so any procedural unfairness has been remedied. Moreover, if Mr Warren is correct, my preference would have been to refer the matter back for reconsideration to the Environment Court, being the specialist Court. The parties, however, do not want the matter to be referred back and invited me to address the jurisdictional issue with finality. As no party is seeking now to challenge the Environment Court's answer to part (a) of the Agreed Question, I am invited to address part (b) of the Agreed Question (the second issue), and then, if necessary, the Reframed Question (the third issue).

Part 4 – the questions and some answers

The key arguments

[85] Before I address the questions, it is helpful to set out the key arguments for the parties as they relate to both of them.

[86] The appellants and the Council say that there is no jurisdiction to make findings on relative iwi mana whenua. Ngāti Whātua Ōrākei disagree, though they now adopt the approach taken by the Environment Court, that is, a "relative strength of relationship" approach. I will therefore summarise the submissions of parties on both aspects together before moving to answer the Reframed Question.

[87] Mr Quinn led the argument of the issue of jurisdiction and his submissions were adopted by Mr Warren. He submitted that the Environment Court does not have express or implied jurisdiction to determine primacy or the relative strengths of hapū and iwi relationships in an area affected by a proposal. Such an exercise is not necessary to fulfil the Council's regulatory role under the RMA, and it is not the appropriate forum to determine such disputes. The Council's view is that cultural effects of activities can and should be recognised through resource consent conditions without ranking iwi or hapū relative to one another.

[88] Mr Quinn also argued there is nothing in the RMA or any subordinate instrument that requires or expressly enables the determination of primacy or relative strengths of customary associations in different areas,[29] and that if such a jurisdiction was contemplated by Parliament, one would expect that to be made express in the RMA. He also contrasts the express powers of the Māori Land Court under the Te Ture Whenua Māori Act 1993 to determine the relative strengths of iwi and hapū relationships, which the RMA does not enjoy.

[89] Mr Quinn also referred to the provisions of the AUP. He contends the AUP was competently and recently prepared, having regard to Part 2 of the RMA, making it unnecessary to have direct regard to Part 2 in determining consent applications.[30] The thrust, then, of his submission, is that the AUP enables and envisages consideration of tangata whenua views without any need, or provision for, ranking of relative relationships among iwi and hapū to a particular area. He further submits that tangata whenua are best placed to assert their relationship with their whenua and that competing views as to who has customary authority are not matters to be resolved by the Environment Court.

[90] While Mr Quinn accepts that the Council must "face up" to the complex issues it now faces, he emphasised the Council discharges that obligation in ensuring the decision-making process is properly informed by the views of those groups affected by the process, not by ranking the strength of their relative interests, especially as consent conditions in these circumstances can be crafted to address cultural effects without one particular group being adversely affected.[31]

[91] He also maintains, however, that "it is not practically possible for the Council or the Environment Court, to quantify relative to other iwi and hapū, the customary authority of Ngāti Whātua Ōrākei". He referred to *The Tāmaki Makaurau Settlement Process Report*, who noted that the layers of interest are complex and intense, and to the decision of the Environment Court in *Tuwharetoa Māori Trust Board v Waikato*

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29 Citing the observations to this effect in *Minhinnick v Minister of Corrections* EnvC Auckland A043/2004, 6 April 2004 at [117]-[118].

30 See *R J Davidson Family Trust v Marlborough District Council*, above n 5.

31 Citing *Auckland City Council (formerly Auckland Regional Council) and others v Auckland Council (formerly Manukau City Council) and others* [2011] NZEnvC 77, [2011] NZRMA 347 at [35]-[37].

Regional Council, wherein the Court stated that it was "not the commissioners' task to resolve "mana whenua status" and nor is it ours."[32] He referred also to the difficulties inherent in applying Māori concepts and the reluctance of the Courts to apply them in a way that is based more on phrasing of the English than the customary understanding, and that the concept needs to be considered in its broader cultural context, rather than taking a Pākehā compartmentalised approach.

[92] Mr Quinn also submits that the purpose of resource consent conditions is not to determine the relative strengths of hapū/iwi relationships. He says that a condition must be directly connected to an adverse effect on the environment. He then submits that a condition stating or implying that a particular group holds primary mana whenua to address cultural effects would not be directly connected to an adverse effect of the activity on the environment, because it is not necessary to determine relative status to address any customary effects of an activity. He adds that conditions can be crafted to address cultural effects arising from the proposed activity without the conditions themselves adversely affecting Ngāti Whātua Ōrākei.

[93] Mr Warren also contends that the RMA does not give councils, consent authorities, or the courts any jurisdiction to determine the primacy or relative strengths of iwi relationships within any rohe. He submitted that those decision-makers can only look at the relationships each iwi or hapū entity has individually to a certain area or resource, and grant resource consent conditions which accord with the nature of those relationships. He says that the combined effect of ss 6,7 and 8 of the RMA is that any Māori group (or individual for that matter) that has a requisite interest in the application, is entitled to be heard and to have that interest and their relationship recognised and provided for. He says it would be wrong to read them as requiring primacy or relative strength of relationship.

[94] Mr Warren also cites a number of cases as examples of judicial reluctance in the past to make mana whenua determinations where competing interests exist,[33] as

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32 *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 93 at [128].

33 See for example *Paihia and District Citizens Assn Inc v Northland Regional Council* Planning Tribunal Decision A77/95; *Tawa v Bay of Plenty Regional Council* Planning Tribunal Decision A18/95; *Kaiawha v Bay of Plenty Regional Council* [2010] NZRMA 193 (EnvC); *Hokio Trusts v Manawatu-Wanganui Regional Council* [2016] NZEnvC 185; *Hokio Trusts v Manawatu-Wanganui Regional Council* [2017] NZHC 1355, (2017) 20 ELRNZ 426; *Luxton v Bay of Plenty*

well as the Waitangi Tribunal's report – *The Tāmaki Makaurau Settlement Process Report*, which heavily criticised the Crown's actions in giving primacy to certain iwi interests over others in settling historic grievance claims in this rohe.[34]

[95] Panuku took a neutral position in these proceedings. It will abide by the decision of this Court. The only point counsel wished to make was, if this Court was to find a material error of law in the Environment Court's decision, it would prefer this Court to decide the issue of jurisdiction, as opposed to reverting the decision back for redetermination.

[96] Ms Fraser responded that the RMA framework, under Part 2 in particular, sets out a number of directions relating to Māori issues.[35] She submitted that the RMA does give explicit jurisdiction to make determinations as was envisaged by the Environment Court. She notes that the RMA expressly requires decision-makers to assess the cultural effects of resource consent applications, which must include the effect on the different relationships that individual iwi and hapū have with natural and physical resources. Ms Fraser also emphasised that the jurisdiction as framed is not a general one, and can only be invoked in circumstances such as the present, where there are competing interests and the relative strengths of iwi and hapū relationships are relevant to assessing cultural effects and imposing conditions to manage such effects.

[97] Moreover, Ms Fraser submitted consent authorities are frequently required to consider and determine complex issues that involve competing evidence, and that it is part of their role to engage with complexity and resolve competing evidence where relevant to resource consent proposals (including consent conditions). In this regard, she submitted cultural effects are no different from other environmental effects.

[98] In addition to that point, Ms Fraser pointed out that iwi and hapū can and will have different relationships within an area that therefore require different forms of recognition and provision, and like other submitting groups, cannot all agree on certain conditions. Thus, if decision-makers are confined to giving equal weight to evidence

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Regional Council Planning Tribunal Decision *A49/94*; *Tūwharetoa Māori Trust Board v Waikato Regional Council*, above n 32.

34 Waitangi Tribunal, above n 20, at 2 and 109.

35 Namely, ss 5, 6(e) and (g), 7(a), and 8.

from iwi and hapū submitters, they will be unable to appropriately resolve issues which are squarely before them. The primary point of Ms Fraser's submissions is that the notion of varying relationships is (or should be) uncontentious, and there is no reason why consent conditions should not recognise and provide for the different levels of association, when raised by relevant evidence as to cultural effects of a proposal. She also submitted that the Environment Court is in fact well-equipped to consider and weigh competing evidence on environmental effects, including tikanga evidence on cultural effects.

[99] After the hearing, the parties also filed detailed submissions on other parts of the RMA relating to Māori, including the provisions I have addressed in Part 2 of this judgment. They were of considerable assistance to me but it is necessary only to observe that the parties maintain that their respective positions on the jurisdiction of the resource management decision-makers to make decision about relative mana whenua are unaffected or reinforced by these other provisions.

Primary mana whenua – Agreed Question part (b)

[100] To repeat, Agreed Question part (b) states:

> Does the Environment Court have jurisdiction to determine whether any tribe holds primary mana whenua over an area the subject of a resource consent application:
>
> …
>
> (b) where relevant to claimed cultural effects of the application and the wording of resource consent conditions.

[101] As I have said, there is nothing in Part 2 of the RMA that empowers resource management decisions-makers, including the Environment Court to confer, declare or affirm tikanga based rights, powers and/or authority per se. As Messrs Warren and Quin submitted, the jurisdiction to undertake that important task for the purposes of State law sits with the High Court and the Māori Land Court.[36]

[102] However, as I have also explained, when exercising functions under the RMA, the Environment Court is necessarily engaged in a process of ascertainment of tikanga

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[36] The affirmation of tikanga Māori per se in Te Ao Māori is for Māori.

Māori in order to discharge express statutory duties to Māori. Thus, where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e), (g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond still applies when different iwi make divergent claims as to what is required to meet those obligations, and this may mean a choice has to be made as to which of those courses of action best discharges the statutory duties under the RMA. As *Te Ngai Hapu* aptly illustrates, that may (for example) require evidential findings about who, on the facts of the particular case, are kaitiaki of a particular area and how their kaitiakitanga, in accordance with tikanga Māori, is to be provided for in the resource manage outcome.

[103] That does not mean the answer to part (b) of the Agreed Question is "yes", even if it is recalibrated to address whether the Environment Court has jurisdiction to make evidential findings about "primary mana whenua" status for the purpose of meeting the statutory directions at ss 6(e), 7(a) and 8 or other obligations to Māori. As the Waitangi Tribunal made clear in *The Tāmaki Makaurau Settlement Process Report*, the concept of primary mana whenua is highly controversial, and a preliminary question concerning jurisdiction based on it is ill-conceived, or as the Environment Court found, "misdirected". What that concept means in tikanga Māori or in State law is not settled and so provides an uncertain reference point for a preliminary question about jurisdiction.

[104] To illustrate, in the present case, "primary mana whenua" is not defined by the parties. I was not assisted by the agreed factual matrix which simply refers to "primacy" and to "primary mana whenua (customary authority)" without further explanation or clarification as to what is meant by "primary" "mana whenua" or primary "customary" authority in tikanga Māori.

[105] I (unfairly on reflection) invited counsel for Ngāti Whātua Ōrākei to assist me on what was meant by "primary mana whenua" in tikanga Māori. She, responsibly, did not attempt to offer an inexpert opinion on that difficult subject matter. So, I have considered whether this problem is addressed by adopting Professor Williams' definition of "mana whenua" – that is:

> ... the notion of territorial rights or authority over land. The concept can loosely be equated with the Pākehā idea of jurisdiction.

[106] He notes that mana whenua and ahi kā are closely related, and that a group cannot have mana whenua without ahi kā, and losing ahi kā (through raupatu, for example) or failure to maintain it would erode a group's mana whenua. Mr Blair also says that primacy of "mana whenua" should to be read as including "the primacy of our customary authority and rangatiratanga", but it does not mean exclusive, and "the rights that go with being the ahi kā iwi also comes with obligations to manaaki to visitors."

[107] "Primary mana whenua" and rights of ahi kā might then be said to mean the iwi that hold the primary jurisdiction over land with concomitant obligations of manaakitanga. But, with respect to the evident clarity of Professor Williams' learned opinion, the transferability and applicability of Pākehā jural concepts such as "jurisdiction" and "primacy" to "mana whenua" still needs to be worked out at the finer grain, in light of the applicable tikanga Ngāti Whātua Ōrākei and to the extent that there are other iwi are affected, the applicable tikanga of those iwi, before the recalibrated preliminary question can be meaningfully answered.

[108] The problem of cross-cultural definition is referred to in Mr Quinn's submissions as an added reason to exclude jurisdiction.[37] But that would rarely, if ever, be a reason to exclude jurisdiction while at the same time purporting to discharge the RMA's express obligations to, among other things, recognise and provide for the relationship of Māori and their culture and traditions with their taonga. However, I think it is a reason to require clarity as to the meaning of the tikanga concept in issue before resolving the issue of jurisdiction. Furthermore, as the Environment Court suggested, resolution of issues of the present kind will normally require evidence, for example, about mana whenua rights and interests according to tikanga Māori.[38]

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37 Mr Quinn cited a helpful article on this issue: Catherine Iorns Magallanes "The Use of Tangata Whenua and Mana Whenua in New Zealand legislation: Attempts at Cultural Recognition" (2011) 42 VUWLR 259.

38 *Ngāti Whātua Ōrākei Whai Maia Ltd v Auckland Council*, above n 1, at [91].

[109] It appears that the parties proceeded before the Environment Court on the basis that "primary mana whenua" means "pre-eminence or dominance".[39] But what that means in a resource management context is also ambiguous. Does it mean Ngāti Whātua Ōrākei has a power of veto in terms of recognition of other iwi interests in resource management matters? Does it mean that Ngāti Whātua Ōrākei is to be regarded as authoritative in terms of effects on iwi and Māori, including the appellants? Or does it mean, as it did in *Te Ngai Hapu*, that Ngāti Whātua Ōrākei tikanga applies in relation to the affected area? It may even be a combination of all of these interpretations, or none of them at all. The answer to the jurisdictional question is likely to be different depending on which of these (or other innumerable possible) outcomes is envisaged. It could not extend to a right of veto given the longstanding principle that Part 2 does not confer a right of veto.[40] It might, on the facts of a particular case, mean that the views of iwi could be authoritative in terms of adverse cultural effects,[41] or that the tikanga of that iwi ought to be applied.[42]

[110] All of this serves to emphasise that when iwi make mana whenua-based claims, those claims must be clearly defined according to tikanga Māori, directed to the discharge of the RMA's obligations to Māori and to a precisely articulated resource management outcome. In this regard, I apprehend that the largely unqualified claim to pre-eminent mana whenua status per se by Ngāti Whātua Ōrākei diverted the decision-makers from their primary task of ascertainment of the applicable tikanga Māori for the purpose of discharging the RMA's duties to Māori. In fairness to Ngāti Whātua Ōrākei, Mr Blair has articulated the claim, the duty and the resource management concern with some precision. It is useful to repeat his actual concern here:

> Given the proposal was for 19 Pou Whenua, which reflects the Wider Iwi, Ngāti Whātua Ōrākei took this as another example of the erosion of our customary rights and the elevation of status of many other iwi who cannot claim any customary rights to the land in the Auckland CBD to the same extent as Ngāti Whātua Ōrākei. We had no choice but to object to the proposals in the strongest possible terms.

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39 At [81].
40 *Watercare Services Limited v Minhinnick* [1998] 1 NZLR 294 (CA) at 305.
41 See for example: *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council*, above n 15.
42 *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, above n 19.

> In Māori terms a turangawaewae or 'place to stand', is a place that is indisputably your land and water and a place where your tikanga or world view prevailing is fundamental. If Ngati Whatua Orakei has no turangawaewae or any place where its views matter the most (and more than any others at all), then it essentially is no longer Māori and it certainly is no longer Ngāti Whātua Ōrākei. If even in our very heartland, the central Auckland Isthmus and the CBD, we are simply accorded the same status as the Wider Iwi, then our very being as Māori and as Ngāti Whātua Ōrākei is undermined.

[111] In my tentative view, this concern raised by Mr Blair does not require a determination that Ngāti Whātua Ōrākei is "pre-eminent or dominant". It requires an examination of whether, having regard to tikanga Ngāti Whātua Ōrākei, the pou whenua condition is undermining their very being as Māori and as Ngāti Whātua Ōrākei and if so, whether the imposition of a condition of this kind serves the sustainable management purpose, and accords with the directions at ss 6(e),7(a) and 8. When framed in this way, no serious issue of jurisdiction arises.

[112] In any event, my answer to the second issue is in three parts:

(a) The Environment Court does not have the jurisdiction under Part 2 of the RMA to confer, declare or affirm tikanga-based rights, powers and/or authority.

(b) The Environment Court may make evidential findings about tikanga-based rights, powers and/or authority insofar as that is relevant to discharge the RMA's obligations to Māori.

(c) I otherwise refuse to answer part (b) of the Agreed Question without the benefit of full argument and evidence on the meaning of "primary mana whenua" and its relevance to the decision-making exercise.

The Reframed Question

[113] For ease of reference, the reframed question is:

> When addressing the s 6(e) RMA requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, does a consent authority including the Environment Court have jurisdiction to determine the relative strengths of

> the hapu/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions.

[114] I preface this discussion by expressing similar concerns about the justiciability of this question in the abstract, untethered to a specific fact situation and evidence. Indeed, as I have noted, it is not possible to be definitive about the scope of the jurisdiction to respond to iwi tikanga-based claims, including claims based in asserted mana whenua and relative strength, in the abstract. However, I am satisfied that a qualified answer may be given to the Reframed Question which adequately addresses this issue.

The answer

[115] It should be evident from the discussion above, that my answer to the Reframed Question is "yes", subject, however, to the important qualification that a relative strength claim must be clearly defined according to tikanga Māori and mātauranga Māori, clearly directed to the discharge of an obligation to Māori under the RMA, and precisely linked to a specific resource management outcome. These factors are important to ensure that relational claims are not simply an invitation to confer, declare or affirm tikanga based rights, powers and authority.

[116] Another illustration assists to understand the process to be undertaken by the decision-maker. The approach adopted in *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council* is regarded by some leading commentators as a leading authority on the "appropriate metrics for assessing conflicting evidence from within the Māori system".[43] In this case, the Court had to determine whether a proposal by Te Rūnanga o Ngāti Awa ("TRONA") to develop a new marae complex within "dune lands" at Piripai in Whakatane should be granted. The appellants, a hapū of Ngāti Awa, called Ngāti Hokopu ki Hokowhitu, and a group of individuals called Te Toka, claimed that the dune lands were within the rohe of Ngāti Awa and contained an urupa that is a wahi tapu of great significance to the iwi. There was, however, disagreement among

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[43] See for example: Joe Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 21.

the hapū of Ngāti Awa as to the existence of the wahi tapu at this location and extensive evidence was given on behalf of the parties about this issue.

[117] To resolve this dispute, the Court developed the following methodology for assessing divergent claims about iwi and hapū values and traditions, that is by listening to, reading and examining (amongst other things):

> [53] ...
>
> - whether the values correlate with physical features of the world (places, people);
> - people's explanations of their values and their traditions;
> - whether there is external evidence (e.g. Maori Land Court Minutes) or corroborating information (e.g. waiata, or whakatauki) about the values. By 'external' we mean before they become important for a particular issue and (potentially) changed by the value-holders;
> - the internal consistency of people's explanations (whether there are contradictions);
> - the coherence of those values with others;
> - how widely the beliefs are expressed and held.
>
> (footnotes omitted)

[118] One of the key tasks that had to be undertaken by the Court was to identify the mana whenua of the affected land. The Court framed that the question to be answered in this way:

> [150] Who is the relevant Maori tribal grouping(s) whose relationships (whanaungatanga) with the 100 acre block we should be considering?

[119] There is nothing in this question that suggests the Court is arrogating to itself the power to designate or rank iwi or hapū or mana whenua. The Court was simply discharging the functions that it must in accordance with ss 6(e) and 7(a). The Court went onto say:

> [152] There is a large issue as to whether the two branches of Ngati Hokopu located at Wairaka Marae and Te Hokowhitu-a-Tu Marae have significant mana whenua in respect of the 100 acre block. Of the appellant Ngati Hokopu ki Hokowhitu, Dr Mead wrote:

> *With respect to the appellant Ngati Hokopu Ki Hokowhitu, I note that it is part of Ngati Hokopu of Te Whare o Toroa marae at Wairaka. This group is referred to as Ngai Hokopu ki Hokowhitu o Tu (Ngati Hokopu of the Maori Battalion). It was out of our deep respect for the soldiers of Ngati Awa who served in two World Wars and especially in the Maori Battalion that the elders of Ngati Awa offered the group a place on the Ngati Awa Trust Board and then TRONA. The group is not a hapu of the same order as Taiwhakaea II, Nga Maihi, Ngai Pukeko or Te Pahipoto. Rather, they are an offshoot of Ngati Hokopu. The Court should be aware that the principal hapu Ngai Hokopu of which this group is an offshoot, supports the proposed development and has done so from the very beginning, when the idea was discussed and developed.*
>
> (footnotes omitted)

[120] This passage is significant also because it exemplifies that the assessment is not about ranking hapū, but about a fact-based evaluation, in this case, supported by evidence of a renown pūkenga of tikanga Ngāti Awa.

[121] The Court also, correctly in my view, emphasised:

> [185] We observe first that we are not the Government. New Zealand has an important convention that the Courts are separate and completely independent of the Government. Secondly we are not determining – and this is very important – what is tikanga Ngati Awa. We are stating – on evidence from Ngati Awa (whether direct or indirect) – that at this time, and for these proceedings, the tikanga is, more likely than not, that the 100 acre block is, and since before 1840 has been, ancestral land but not waahi tapu. That narrow finding is important because there is a common misconception that the Environment Court is taking over the definition of Maori concepts and their application to specific areas or things. The Court is not – the idea is nonsensical if the meaning of a word is the way it is used.
>
> (footnotes omitted)

[122] Similarly, when the Court evaluates the relative strength of relationships it is not determining what is tikanga Māori. The Court is simply stating that, at a particular time, on the available evidence, it is more likely than not that the relationship of an iwi is stronger than another iwi in relation to a particular area. It is important to add that what this means, in any individual case, still needs to be worked out, having regard to the views of all affected iwi. I am satisfied therefore that the Court was correct to answer the Reframed Question in the affirmative.

[123] Given the care and effort that the Council and the appellants have put into this part of their argument, I propose now to address each of their main propositions.

Nothing in the RMA purports to confer on local authorities the power to rank iwi, and if Parliament intended to confer such jurisdiction, it would have done so expressly, as it has in the Te Ture Whenua Māori Act 1993

The ranking of iwi is not necessary to discharge the Environment Court's functions

[124] I do not accept the premise of these propositions, namely, that the Environment Court is engaged in a process of conferring status or ranking iwi per se. Rather, as I have said, the Environment Court engaged in a process of ascertainment of tikanga Māori in order to discharge, among other things, the duty at s 6(e) to recognise and provide for the relationship of Māori and their customs and traditions with their whenua and other tāonga. Conversely, indifference to a claim by an iwi to mana whenua and what that means to that iwi, is the antithesis of recognising and providing for their relationship with that whenua.

The AUP does not allow the ranking of iwi

[125] I agree that the AUP does not envisage the ranking of iwi. However, the clear overarching policy of the AUP is to require resource management decision-making to be informed by "Mana Whenua" perspective, including their mātauranga Māori and tikanga. That must logically include taking into account and responding to claims by iwi to have their mana whenua recognised and provided for in terms of their mātauranga Māori and tikanga, even when those views conflict with the views of other iwi.

It is not practically possible for the Council or the Environment Court, to quantify relative to other iwi and hapū, the customary authority of Ngāti Whātua Ōrākei

[126] While the complexity of the overlapping iwi interests in Tāmaki Makaurau is well-known, it is not possible in the context of a preliminary question about jurisdiction to make a coherent, let alone definitive, finding about whether a Council or the Court is practically able to quantify relative authority. Moreover, the proposition proceeds from an inaccurate premise, namely, that Councils assessing relative strength are engaged in a quantitative exercise. Any finding as to relative

strength will only ever be of a qualitative kind, evident for example in *Ngāi Te Hapū Inc*[44] and in *Beadle v Minister of Corrections*.[45]

Consent conditions can be imposed to recognise mana whenua without ranking iwi

[127] I agree, and nothing I say here should be taken to suggest that conditions must or should be framed in way that purports to rank iwi per se.

Local authorities can recognise and provide for iwi relationships with their taonga without assessing the relative strengths of that relationship

[128] I agree, and they often do, but that does not preclude local authorities or the Court from assessing relative strength where that claim is properly grounded in tikanga Māori, is directed to the discharge the RMA's duties to Māori and is precisely linked to a particular resource management outcome. To hold otherwise is to fetter the capacity of iwi to inform decision-makers of what they consider to be important to them and what they consider is tika.

The Environment Court has previously refused to make determinations about mana whenua status

[129] I accept that the Environment Court has shown reticence about, and on occasion refused to make, determinations about mana whenua status.[46] In matters involving such complexity, that reticence is entirely understandable and in many, if not most, cases it will be unnecessary to make any inquiry of this kind. I also note that in two of the cases cited by counsel, *Tawa v Bay of Plenty Regional Council* and *Tuwharetoa*, the Court was responding to claims that certain iwi should be excluded from the consideration or that it was necessary only to hear from certain iwi. Those Courts were correct to reject those claims.[47] To the extent those authorities are being advanced for a broader proposition that the Environment Court can never inquire into

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44 *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*, above n 19.

45 *Beadle v Minister of Corrections* EnvC Wellington A74/02, 8 April 2002.

46 *Paihia and District Citizens Assn Inc v Northland Regional Council*, above n 33; *Kawhia v Bay of Plenty Regional Council*, above n 33; *Hokio Trusts v Manawatu-Wanganui Regional Council*, above n 33, *Luxton v Bay of Plenty Regional Council*, above n 33.

47 *Tawa v Bay of Plenty*, above n 33, at [35]-[36]; *Tūwharetoa Māori Trust Board v Waikato Regional Council*, above n 32, at [128]-[129].

relative mana whenua status in order to respond to divergent iwi claims, I disagree, for the reasons already expressed.

[130] I would also observe that from the earliest cases, the Courts have recognised the difficulties inherent in making assessments of this kind, but have not excluded that possibility altogether. *Luxton v Bay of Plenty Regional Council* is invariably the authority most cited for the proposition that the Courts avoid making any findings about mana whenua.[48] The Tribunal (as it then was) there said:[49]

> … this Tribunal would avoid, *if possible*, making any findings about the status of a particular tribal authority, or about the scope of a whanau's rights as tangata whenua, or about which hapu might have traditional or customary interests in a particular area.

[131] The capacity to make assessments of relative status was affirmed by the High Court in *Friends and Community of Ngawha Inc v Minister of Corrections*. In that case, Wild J said:[50]

> [70] …..
>
> [a] Whilst s 2 of the Act does not expressly mandate the finding of primary kaitiaki and additional kaitiaki, such an approach is not at all inconsistent with s 2. Indeed, it seems to me to exactly accord with it. If the Court is to give effect to s 7(a), then it must first determine who are the kaitiaki. Guardianship, in Tikanga Maori, can involve degrees, and the exercise of stewardship at different levels. It is only kaitiaki who can tell the Court what they consider kaitiakitanga and the views of the kaitiaki who have most recently and closely exercised stewardship over the land patently carry the greatest authority.

Conditions stating a particular group holds primary mana whenua to address cultural effects would not be directly connected to an adverse effect of the activity.

[132] Conditions purporting to state that a particular group holds mana whenua are likely to be ultra vires insofar as the condition is simply about declarations of mana whenua or rights per se. But conditions that seek to recognise and provide for the relationship of mana whenua with their whenua or other tāonga may well be connected

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48 See *Tawa v Bay of Plenty*, above n 33 and *Paihia and District Citizens Assn Inc v Northland Regional Council*, above n 33.

49 At 6 (emphasis added).

50 *Friends and Community of Ngawha Inc v Minister of Corrections* [2022] NZRMA 401 at [70].

to an effect of the activity on the environment, including an effect on mana whenua who form part of that environment. This point is exemplified by the following passage taken from *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council*:[51]

> [302] We conclude that the Port opening missed entirely the basic premise of the appellants' cases. Namely, that they have a long established, well-recognised, and vital relationship with Te Awanui and Mauao. Te Paritaha and Panepane.
>
> [303] It was accepted, and we have concluded, that the modification to these areas will adversely impact on that relationship. The Port's original opening case did not even acknowledge the rangatiratanga of iwi. This focuses under Section 5 of the Act in two ways:
>
> [a] Enabling the cultural values of tangata whenua by recognising and providing for the relationship (Section 6(e)); and
>
> [b] Avoiding, remedying or mitigating any adverse impact on that relationship to such an extent that we are satisfied the application with conditions meets the purpose of the Act.

Conclusion

[133] Overall therefore, in regards to the third issue, I am satisfied that when addressing the s 6(e) RMA requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, a consent authority, including the Environment Court, does have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions. But any assessment of this kind will be predicated on the asserted relationship being clearly grounded in and defined in accordance with tikanga Māori and mātauranga Māori and that any claim based on it is equally clearly directed to the discharge of the statutory obligations to Māori and to a precise resource management outcome.

Outcome

[134] The appeal is allowed in part. The Environment Court should have afforded the parties a formal opportunity to submit on the Reframed Question.

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[51] *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402. See also Nolan, above n 16, from [14.18].

[135] My answer to part (b) of the Agreed Question is in three parts:

(a) The Environment Court does not have the jurisdiction under Part 2 to confer, declare or affirm tikanga based rights, powers and/or authority.

(b) The Environment Court may make evidential findings about tikanga based rights, powers and/or authority insofar that is relevant to discharge the RMA's obligations to Māori.

(c) I otherwise refuse to answer part (b) of the Agreed Question without the benefit of full argument and evidence on the meaning of "primary mana whenua" and its relevance to the decision-making exercise.

[136] My answer to the Reframed Question is yes, provided that the claim based on relationship strength is clearly grounded and defined in accordance with tikanga Māori and mātauranga Māori, and any claim based on it is directed to the discharge of the statutory obligations to Māori and to a precise resource management outcome.

[137] I am not minded to award costs given the public interest nature of the appeal. Submissions may, however, be filed, no longer than three pages in length.