Ngati Hokopu Ki Hokowhitu v Whakatane District Council

Jump to:	» Judgment » Judgment » Judgment » Judgment » Footnotes
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Party Names:	Ngati Hokopu Ki Hokowhitu, Whakatane District Council
Legal Representatives:	Mr A Green for the Whakatane District Council as applicant; Mr K R M Littlejohn for Te Runanga o Ngati Awa; Mr J Milne for the Whakatane District Council (in its regulatory capacity) as respondent; Mrs M Ashby with Mr M Paul and Mr H Hireme for Ngati Hokopu ki Hokowhitu; Mr M Lane and Ms S Heta for Te Toka Tu Moana o Irakewa

Judgment

Ngati Hokopu Ki Hokowhitu v Whakatane District Council

DECISION

JudgeJ R Jackson (presiding)CommissionerR S Tasker, CommissionerN A Burley

[A] Introduction

[1] It is a matter of national importance to recognize and provide for the relationship of the Ngati Awa and their culture and traditions with their ancestral lands and waahi tapu near Whakatane: that is the effect of section 6(e) of the *Resource Management Act 1991*. The appellants in these proceedings claim that their relationships with the dune lands on the north (left) side of the Whakatane River would be neither recognized nor provided for if the applicants' proposals to establish a marae and housing there are allowed to proceed.

[2] These appeals arise from two applications to the Whakatane District Council as consent authority ("the Council") for resource consents. The first application under the *Resource Management Act 1991* ("the Act" or "the RMA") is by Te Runanga o Ngati Awa (TRONA) a Maori Trust Board established by Act [1] of Parliament in 1988. The application is dated 29 September 1999. The beneficiaries of TRONA are descendants of 21 hapu comprising the iwi of Ngati Awa. The proposal by TRONA is to develop a substantial new marae complex on land located at Piripai in Whakatane. The land is legally described as Lot 2 DP 32234, but is commonly referred to as "the 100 acre block" [2] . It is located immediately to the west of an area known as Opihi Whanaunga Kore ("Opihi") which is an urupa of Ngati Awa and as such a waahi tapu of great significance to the iwi. Opihi contains some 56 acres (22 hectares) and is legally described as allotment 27, Parish of Rangitaiki. Both Opihi and the 100 acre block are contained within what we shall define as "the dune lands": the area bounded by Ohuirehe Road and a residential enclave called Coastlands to the northwest; the sea to the north east; the mouth of the Whakatane River to the south-east beyond a Department of Conservation reserve; the estuary to the south and Orini Stream to the west. These features are marked on the attached map [3] marked "A".

[3] The 100 acre block is at present owned by the Council. TRONA has an agreement ("the sale agreement") with the Council to purchase a large part of the 100 acre block (next to Opihi) for its marae proposal. The current application for the marae development may be the beginning of a larger cultural and educational development for Ngati Awa, although further applications for resource consent would be needed for subsequent stages of the development. Annexed to this decision are copies of two other relevant plans:

- "B" is a layout of the proposed subdivision (Lots 153-156 being the lots to be occupied by the stages of the marae development);
- "C" is a plan showing the layout of stage 1 of the marae development.

[4] In the second application dated 7 February 2000 the Whakatane District Council as landowner ("the second applicant") applied to itself as consent authority for a subdivision consent both to create TRONA's allotments and also to develop 48 new residential sections on part of the balance of the 100 acre block. A further subdivision consent would be required for the second stage of the subdivision. The agreement with TRONA will assist to create (and fund) the

roading and other infrastructure for the development. The second applicant and TRONA maintain that only together can they achieve their objectives for the future of the 100 acre block in the most economic way for each of them. In particular the subdivision of the land will create the block of land that the second applicant has agreed to sell to TRONA for the development.

[5] Both applications for resource consent were heard in June 2000. Consents were granted by independent commissioners, subject to conditions. TRONA has appealed one of the conditions of the consent granted to it. That condition relates to the required colour scheme of the development, and is not relevant to the current appeals. Four other appeals have also been lodged against the consents granted to TRONA and the second applicant. Two of these, by a Mr I W Lysaght and others, were not the subject of hearing by us because the parties are confident they can be resolved by consent.

[6] It is the appeals by two independent Maori groups ("the appellants") that are the subject of this decision. The appellants are a hapu, of Ngati Awa, called Ngati Hokopu ki Hokowhitu ("Hokowhitu" [4]) and a group of individuals called Te Toka Tu Moana o Irakewa ("Te Toka"). The appellants seek that the Council's decision be cancelled, and the resource consents refused.

[7] The hearing by this Court was set down for 3 days in October 2001. At the beginning of the hearing the Court disclosed that one of the Commissioners, Ms Ngaire Burley is affiliated to a neighbouring iwi, Te Arawa, which has not always been on the friendliest of terms with Ngati Awa. No party expressed any concern about that.

[8] It soon became clear that the parties estimation of the hearing time was going to be grossly exceeded, principally because the appellants' witnesses were taking much longer than the 5 to 15 minutes indicated at prehearing conferences. The hearing was adjourned to 2002.

[9] The hearing reconvened in April 2002. By that time Ms Burley had become aware that she was also affiliated, through her grandmother, to Ngati Awa. That was disclosed to all parties in open Court, and none took any exception to her continuing to hear the proceeding. Indeed, for Hokowhitu, Mr Paul welcomed having a person who is tangata whenua as part of the deciding Court. The other two members of the Court are tauiwi [5] from a Ngati Awa perspective.

[10] The principal issues to be decided in coming to a judgement on the ultimate question on each application are:

(1) What matters are to be considered under section 104 (part [C] of this decision)?
(2) How should sections 6 , 7 and 8 of the RMA be applied (part [D])?
(3) Was there a duty to consult in this case (part [E])?
(4) What is the tangata whenua evidence (part [F])?
(5) What is the documentary evidence (part [G])?
(6) Is the 100 acre block believed to be waahi tapu and/or, in part, an urupa (part [H])?
(7) Are the proposed subdivision and development sustainable management which protects the interests of (relevant) Ngati Awa in their ancestral land (part [I])?

[11] After the hearing finished, and because we were slightly confused by some of the written evidence of Mr L R Harvey, a witness for the applicants, we directed that they file a further affidavit by Mr Harvey on certain issues. We received a further affidavit which we have read. No party sought to cross-examine Mr Harvey any further. Instead each of the appellants lodged further submissions which we have considered.

[12] We also subsequently asked the parties whether they had any objection to us reading and considering the Law Commission's Study Paper Maori Custom and Values in New Zealand Law [6] . No party objected. We have found that publication and the Report of the Waitangi Tribunal: The Ngati Awa Raupatu Report [7] of great assistance — the first in confirming or furthering our understanding of some concepts of tikanga Maori, and the second as background to the grievances of the Ngati Awa people.

[B] Background

[13] The dune lands are within the rohe [8] of Ngati Awa, an iwi whose people trace their descent both from the Mataatua waka [9] , and from the earlier ancestor Awanui-a-rangi, for whom they are named [10] . Various hapu of Ngati Awa lived on or around the dune lands for, it appears, hundreds of years before 1840. We attach marked "D" a copy of the Waitangi Tribunal's map [11] showing the distribution of the various hapu in 1840.

[14] In 1866 the 100 acre block was part of a much larger area containing 245,000 acres which was confiscated ("the raupatu") by the Crown from Ngati Awa and other iwi in the Bay of Plenty, for "rebellion".

[15] A few years later, the Crown admitted its wrongful actions (in part) and returned some of the land. Unfortunately, it made things worse by giving pieces of land to different hapu than the original tangata whenua [12] . Thus while, before us, no party challenged the idea that the 100 acre block was ancestral land of some Ngati Awa, there was some disagreement over which hapu's ancestors had mana whenua. Yet another complication is that the land again went out of tangata whenua hands — this time by sale — and was freeholded in the 1930s.

[16] In the 1870's, in an effort to rebuild the iwi's morale and spirits in the face of the confiscation and other difficulties (to use a neutral word) created by the arrivals of Pakeha in the Bay of Plenty, Ngati Awa built a large meeting house [13] named after its canoe — Mataatua. The story of Mataatua wharenui has been described by the Waitangi Tribunal in The Ngati Awa Raupatu Report [14] :

> " … Wepiha Apanui, his father (Apanui Te Hamiawaho), and the Ngati Pukeko chief Hohaia Mata Te Hokia settled upon a plan to pull the people together in their construction of a carved house, utilising that which could not be confiscated — the people's renowned artistry. The house was named Mataatua …
>
> The Mataatua house was symbolic of the need for unity, not only from within Ngati Awa but throughout all who traced descent from the Mataatua waka. The carvers were called in from throughout the Mataatua region, and included persons from Ngai Te Rangi, Tuhoe, Te Whanau-a-Apanui and Whakatohea …
>
> Once this large and beautifully carved house was completed, its fame spread rapidly — not least to the Government, which at that time was seeking some local work of art to display at an exhibition in Sydney of life throughout the British empire. The Government sought the house from Ngati Awa. Opinions vary on what happened. Some say the house was gifted, others that the house was lent for the purpose of the exhibition. Either way, Ngati Awa was in no position to refuse whatever the Government wanted. At the time the house was removed, in 1879, the people were pleading for the return of more land. They were also pleading for the release of those still held in custody on sentences of life imprisonment for murder.
>
> In any event, the house was taken and not returned. It was displayed in Australia, then later in England, and eventually came back to New Zealand for a special exhibition in the South Island, whereafter it was transferred to a museum in Dunedin …
>
> It was part of the claim that the Mataatua house be returned to the Ngati Awa people. We commend the claimants, the government, and the Otago Museum Trust Board for reaching a settlement in that matter during the course of the hearings. The house is now back in Ngati Awa possession."

[17] TRONA's application is for stage 1 of what will be a three stage development of a much larger cultural and educational development for Ngati Awa. The centrepiece of the marae will be the re-erected Mataatua wharenui.

[18] From TRONA's perspective, as explained by its first witness, Dr H M Mead, there are several other important reasons for siting the marae on the site. First, it will be located beside an urupa [15] which is very important to Ngati Awa — Opihi Whanaunga Kore. Dr Mead stated [16] in his evidence to us:

> " … One of the reasons that the Marae is being placed beside Opihi is to enable our people to take care of the urupa and watch over it. It is consistent with cultural practices to have an urupa and marae placed side by side — it makes cultural sense to put them together.
>
> [Further] the Whare Wananga o Awanuiarangi, which carries the name of our founding ancestor Awanuiarangi, will have its main campus placed beside the Mataatua Marae and Opihi. All these institutions are culturally appropriate and lend something to the other. Together they become a powerful cultural presence."

Also [17] :

> "An important factor in the choice of site for the Mataatua Marae Complex was the centrality of the location from a cultural point of view. It is the only site visited by our site delegation from which it is possible to view the significant cultural landmarks that are meaningful to our people. Look to the ocean of Tangaroa and there lies Rurima, Moutohora, Whakaari, and on a good day, Te Paepae o Aotea. Far along the coast, one can see much of the rohe of Mataatua, that is included in the saying Mai I Nga Kuri a Wharei ki Tihirau. On the land are Koohi Point, Toi's Pa, Kaputerangi, behind is Te Tiringa and Putauaki, and moving around there stands Whakapaukorero … "

[19] The 100 acre block is enclosed by the foredunes along the coast to the north and a sandy escarpment to the south

that has a steep southern face up to 14 metres high. The site rises gradually from the landward side of the foredunes up to the high points on the back escarpment. The sandspit is relatively stable, with cycles of accretion and erosion, but with a recent trend to accretion. There are parabolic dunes running through the site in a generally north-south direction. The marae site occupies proposed Lots 153 and 154 (see Plan "B") about 350 metres from the coastal marine area. The vegetation on the site is largely exotic grasses and shrubs. The natural vegetation has been modified by pastoral farming.

[20] Ms A L Nicholas, a landscape architect called for the applicants described the marae proposal as follows [18] :

> "The wharenui will occupy the highest level of the site, with an outlook to the sea and the significant physical features around the site. The wharenui is a simple structure of traditional design, with a floor area of 242 m^2, including the porch. It has a maximum height of 8 metres.
>
> …
>
> The wharekai [dining room] is designed as a showpiece, providing dining and conference facilities to support the function of the marae and cater for major events and hui.
>
> …
>
> There will be an ablutions facility to serve the wharenui and wharekai, with separate male/female facilities, laundry, mattress store, etc.
>
> …
>
> There is one point of access to the site, from the new road to be developed through the adjacent residential subdivision. There are 166 car parking spaces on site: most will be located below the marae area, with a secondary parking area to the south-east of the dining hall. In addition there are 6 bus parks. The parking area will be finished in a mix of cobblestones and gobi blocks to promote stormwater soakage to ground.
>
> …
>
> As part of the marae development, coastal vegetation will be re-established on the site. Perimeter planting will use regional native species for screening and stability. Specimen plants will be used to link with planting in the residential subdivision."

[21] The 100 acre block is zoned Residential A in the transitional district plan, so that the proposed marae development is a discretionary activity under Rule 5.53 as it falls within the definition of "Places of Assembly". Standards relating to height, location, appearance, coverage and parking are set out in the transitional district plan [19] and the proposed development largely complies with these except for:

- The height of the wharekai in relation to the height plane. The building is 10m high, which is less than the permitted maximum height but exceeds the height plane of 8m. However, there is a discretionary provision in Rule 5.6.3(1) for a building to project beyond the height plane by not more than 2m.
- The visitors' toilets are some 1.5m from the nearest boundary with Lot 156. This is less than the 3m required. However, Lots 155 and 156 are to be developed together as part of the marae complex so it is difficult to see how this non-compliance will cause any adverse effects.

[22] The subdivision into residential lots is a controlled activity. However, section 406 of the RMA requires that subdivision consent should not be granted if the Council (or on appeal this Court) considers that the land is not suitable or the subdivision would not be in the public interest: *Murray v Whakatane District Council* [20] .

[C] Section 104: matters to be considered

[23] In deciding whether or not resource consents should be granted we must have regard to the relevant matters identified in section 104 (1) of the Act. In this case they are:

- the effects of the proposals [section 104 (1) (a) and (i)];
- the New Zealand Coastal Policy Statement and the Regional Policy Statement [section 104 (1) (c)].
- the relevant objectives, policies and rules of the transitional district plan [section 104 (1) (d)].
- the relevant regional plans [section 104 (1) (f)].

These matters can be discussed relatively briefly because they are tangential to the real concerns of the appellants

which raise concerns under sections 6 to 8 of the Act. Section 104(1) is, of course, "subject to Part II" so sections 6 to 8 have to be considered and/or applied very carefully and may even outweigh the section 104(1) matters: *Minister of Conservation v Kapiti Coast District Council* [21] .

[24] The New Zealand Coastal Policy Statement contains policies to achieve the purpose of the Act in relation to the coastal environment. General principles relevant to this proposal include [22] that: the protection of the values of the coastal environment need not preclude appropriate use and development in appropriate places.

> "In addition Policy 1.1.1 establishes as a national priority preserving the natural character of the coastal environment. Policy 1.1.3(c) refers to protecting significant places or areas of historic or cultural significance."

[25] We find that those objectives and policies are satisfied by the applicants' design concept for the whole site which is based on the principle of protecting the foredune from outside toe to inside toe by creating a "dune reserve" of 100 metres (minimum) back from the Coastal Marine Area ("CMA"). From the CMA, therefore, development on the site will not be visible. The complex will also provide a transition between development to the west, if allowed, and the urupa and end of the spit to the east. In addition, the cultural significance of the site will be protected and enhanced while providing for Policy 3.2.6 of the Coastal Policy Statement.

[26] The proposed regional policy statement ("the RPS") provides a framework for planning in the region. Section 3.4 of Part I of the RPS refers to the issues in the Rangitaiki to Waiotahi Subregion which includes the 100 acre block. The flood hazard mitigation values of dunes are identified, but the dune lands we are considering are not otherwise identified as having specific significance. There is a policy for recognising and providing for Maori Culture and Traditions' in identical terms to those of section 6(e) of the Act which we discuss later.

[27] The proposed Regional Land Management Plan [23] establishes an Erosion Hazard zone which includes [24] :

> "All sand country including undulating to steep unstable coastal sand dunes, up to 200m landward from the line of mean high water springs."

The site does not lie within the proposed Erosion Hazard zone. All large scale earthworks were included in the application to the Regional Council — "Environment BOP" — lodged by the Whakatane District Council for the whole of the 100 acre block. Resource consent was granted by Environment BOP for the earthworks on 9 October 2000 in a decision which has not been appealed.

[28] The proposed Regional Coastal Environment Plan has reached the stage where submissions have been considered. This proposed plan does not identify this site as being an outstanding or regionally significant natural feature and landscape. An ASCH (Area Sensitive to Coastal Hazards) applies to a depth of 160m from mean high water mark (springs) in the vicinity of the site. This requirement does not affect the proposed marae. We note that the proposed coastal reserve is only 100 metres wide from the seaward toe of the coastal dune. Potentially therefore, about 60 metres of Stage 2 of the second applicant's subdivision may be within the ASCH. However, we are not considering the proposed Stage 2 here so that is an issue for the future.

[29] Relevant objectives and policies in the proposed Coastal Environment Plan refer to the need to avoid or mitigate adverse effects on landscape and natural character and to protect the characteristics of the coastal environment of special spiritual, cultural and historical significance to tangata whenua.

[30] As to landscape values: the design of underlying earthworks have been modified to reflect the landscape. Planting, and controls on the colour of buildings, are also proposed to address the requirements of the landscape.

[31] We conclude that the proposal will generally achieve the objectives and policies the proposed Regional Coastal Environment Plan and the proposed Regional Land Management Plan, except possibly for the objectives and policies relating to tangata whenua — they raise issues we discuss later.

[32] The transitional district plan provides guidelines in assessing the potential effects [25] of a "Place of Assembly". Effects of noise and traffic are identified by the district plan as the key issues for adjoining activities, with the purpose of preventing nuisance to adjoining properties. The development concept for the whole site, including the marae complex, adjoining residential land and roading pattern has been based on minimising any off-site effects. The appellants raised no issue about these matters, and certainly called no evidence about them.

[33] Finally we should record that, in one of the more grossly insensitive town planning exercises we have heard of, the (transitional) district plan proposes that there be a children's playground on Opihi Whanaunga Kore. That is completely inappropriate and should be changed rapidly if the Council is not yet ready (after 11 years of the RMA) to notify a

proposed replacement district plan.

[D] The application of sections 6(e) , 7(a) and 8 of the RMA

[34] There are three sections in Part II of the RMA of particular relevance to this decision. First, it is a matter of natural importance to recognise and provide for [26] :

> "The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga."

Secondly, we are to have particular regard to kaitiakitanga [27] . Thirdly, we must take into account [28] the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[35] In *Bleakley v Environmental Risk Management Authority* [29] McGechan J considered what is required in law by the requirement in section 6(d) of the *Hazardous Substances and New Organisms Act 1996* to "take into account." He stated:

> "I do not propose to dwell on other judicial interpretations related to other statutes. Some do not easily reconcile. On occasions the phrase has been held to require some actual provision to be made for the factor concerned, but all depends upon context. In this case context is clear and decisive. There is a deliberate legislative contrast between s 5'recognise and provide for' and s 6'take into account'. When Parliament intended that actual provision be made for a factor, Parliament said so. One does not 'provide for' a factor by considering and then discarding it. In that light, the obligation to 'take into account' in s 6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision — to weigh it up along with other factors — with the ability to give it, considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate."

[36] We respectfully consider a similar approach is appropriate to the principles [30] stated in sections 6 to 8 of the Act. In achieving the purpose of the Act there are diminishing notional multipliers (of costs and benefits, or of weights depending on the evaluative metaphor the Court is using) in those sections. The formulae are, in decreasing general order of importance of application:

- to recognise and provide for (section 6);
- to have particular regard to (section 7);
- to take into account (section 8).

In respect of section 7 and 8 matters the Court has a discretion as to whether to provide for the relevant principles in any given situation. Only in respect of the section 6(e) matter is there a duty to provide for it.

[37] Superficially it may look as if, in imposing those differences, Parliament has diminished the importance of the Treaty of Waitangi. In our view that is not so for these reasons: first, sections 6(e) and 7(a) of the RMA actively incorporate the substantive or active protection of those aspects of the Treaty principles which are most relevant to the management of natural and physical resources. In particular, section 6(e) ensures that local authorities (and the Court) must not merely recognise but also provide for the relationship of Maori with their ancestral lands, water, waahi tapu and other taonga. In fact section 6(e) may exceed the Treaty's obligations on the Crown. Perhaps recognising that since the Treaty was signed in 1840 the Crown has not always (to put it generously to the Crown) honoured its obligations, section 6(e) refers not to Maori land as it is at present, but to the relationship of Maori with their **ancestral** lands, water, sites, waahi tapu, and other taonga. Secondly, at least at the Environment Court level, there is some procedural protection of the principles of the Treaty in that the Court's procedures must [31] recognise tikanga Maori where appropriate. That term is defined [32] as meaning "Maori customary values and practices".

[38] In this decision we concentrate on section 6(e) as being, in resource management practice, the most important provision for tangata whenua. We do not consider the principles of the Treaty separately except in relation to consultation. As for kaitiakitanga we consider that later in part [I] of this decision.

Section 6(e) — Relationship with established waahi tapu

[39] As Mr Lane pointed out in his thorough submissions, section 6(e) is not concerned with Maori's ancestral lands, water, sites, waahi tapu, and other taonga in themselves, but with [33] the relationship of Maori and their culture and traditions with those things. The Maori word for relationship is "whanaungatanga". So the use of the word "relationship" in section 6(e) is very important, for [34] :

> "Of all of the values of tikanga Maori, whanaungatanga is the most pervasive. It denotes the fact that in traditional Maori thinking relationships are everything — between people; between people and the physical world; and between people and the atria (spiritual entities). The glue that holds the Maori world together is whakapapa identifying the nature of relationships between all things."

[40] These issues have recently been discussed in *Ngawha Inc v Minister of Corrections* [35] where Wild J stated:

> " … I agree with the Full Court in Bleakley [36] that taonga embraces the metaphysical and intangible (eg beliefs or legends) as much as it does the physical and tangible (eg a treasured carving or mere)."

We respectfully agree.

[41] Wild J then quoted counsel, Mr P J Milne, on section 6(e) as stating [37] :

> " … That [relationship] may require recognition of beliefs, but it will seldom if ever require 'provision' for a belief. That is both because physical works do not interfere with beliefs, and because of the impracticality of the Court providing for relationships with spiritual/metaphysical beings … "

Wild J expressed similar misgivings [38] :

> "I share Mr Milne's difficulty in following how beliefs can be regarded as a natural and physical resource, or how they can be sustainably managed."

[42] Wild J's proposition may be less extreme than Mr Milne's. In our view the latter's is probably wrong, if Maori understanding of "relationships" is imported into the RMA. As those passages in *Ngawha* illustrate, the majority New Zealand cultures tend to take a dualistic view — distinguishing physical and spiritual things, — whereas the Maori world view tends to be monadic: *Kemp v Queenstown Lakes District Council* [39] . In the latter there is no rigid distinction between physical beings, tipuna (ancestors), atua (spirits) and taniwha.

[43] In our view there can be some meeting of the two worlds. We start with the proposition that the meaning and sense of a Maori value should primarily be given by Maori. We can try to ascertain what a concept is (by seeing how it is used by Maori) and how disputes over its application are resolved according to tikanga Ngati Awa. Thus in the case of an alleged waahi tapu we can accept a Maori definition as to what that is (unless Maori witnesses or records disagree amongst themselves). A second set of questions then relates to the application of that value to the physical world.

[44] So in this case we have to examine concepts such as "ancestral land" and "waahi tapu" to see how they have been used historically and are used in practice in relation to the 100 acre block and its surrounds. The RMA gives some assistance by including these definitions [40] :

> "'Mana whenua' means customary authority exercised by an iwi or hapu in an identified area:
>
> 'Tangata whenua' in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area;"

The use of the definite article "the" in the second definition tends to suggest that Parliament contemplated that only one iwi or hapu could have mana whenua over any particular area. Since that interpretation is not inevitable and since the Waitangi Commission has stated that understanding is a fallacy, we proceed on the assumption that more than one hapu may hold mana whenua.

[45] Summarising on section 6(e) — it can be expressed in terms that may assist Maori readers as that local authorities have to recognise and provide for the whanaungatanga between hapu (and other tribal groupings) and their land, water, sites, waahi tapu and other taonga. Three important aspects of this expression of section 6(e) are: first we can avoid reference to culture and traditions because the use of the Maori word "whanaungatanga" incorporates the cultural and traditional dimensions; secondly it emphasizes that it is not the relationships of individual Maori to their taonga that is important, but those of their hapu (or sometimes their whanau — the smaller, family grouping, or, moving upwards, their iwi); thirdly, although section 6 suggests that these relationships must be provided for, it is inherent in the concept that the weaker the relationship, the less it needs to be provided for.

Cultural relativity

[46] Since section 6(e) does refer to Maori culture and traditions we have to be careful not to impose inappropriate "Western" concepts. The appellants expressed concerns about that in various ways. Implicit in much of the appellants'

evidence is the idea that each culture can only be explained in its own terms. This depends on the relativistic notion that classifications in any one language or culture [41] :

> " … are not determined by how the world is, but are convenient ways in which to represent it. They maintain that the world does not come quietly wrapped up in facts. Facts are the consequences of ways in which we represent the world."

That is countered by the realist's view inherent in a sceptical, rational judicial system that the universe, including societies and cultures on this miniscule part of it, has an intrinsic structure which we can describe, albeit only approximately and in a limited fashion.

[47] The witnesses for the appellants tended to express a relativistic argument along the lines that "all interpretations are equally valid". It is trivial that that proposition must apply to itself as well as to other viewpoints. Any account of knowledge that makes the standards of truth or falsity (experiment, evidence and logic) internal to a culture cannot escape relativism. If the claim that "all knowledge is relative" is absolute then it is self-defeating. If it is "relative" it need not be generally applied (and it appears to be regressive). In the latter case the relativist position is only as valid as the realist's view: that where evidence can be tested, the truth or falsity of disputed facts can be ascertained with some accuracy and with some independence from cultural perspectives.

[48] Our way through the cultural relativity impasse is to recognise that each culture has its own (value-laden) systems of traditions and beliefs. In the multicultural society which is New Zealand, two of those "systems" have been given some pre-eminence in the RMA — the legal-economic [42] system in whose language Parliament has largely expressed the Act, and the Maori values referred to in sections 6 , 7 and 8 (and 269) of the Act.

Judgment

Ngati Hokopu Ki Hokowhitu v Whakatane District Council

[49] It is impossible to determine whether values are true or false. As the European Court of Human Rights stated in *Oberschlick v Austria* [43] :

> "The truth of value judgements is not susceptible of proof."

No doubt that is why Courts give judgments not "proofs". At the most we can say values are right or wrong; and of course across cultures that is fraught with difficulties. However, the New Zealand legal system works on the assumption that within most cultures there are branches of scientific and rational knowledge [44] which are testable. Those branches are simply sets of propositions or sentences that stand for possibilities (not certainties [45] — nothing is certain in empirical science or enquiry) accompanied by methods for ascertaining which are likely to be true and which are likely to be false.

[50] As a Court we accept that there are many different belief systems and that we should treat their adherents equally. New Zealand contains many: a Maori belief system; several Christian belief systems; belief systems for many other religions; for animists who believe in the spirits of animals and places; and belief systems for agnostics and atheists. It may be that none of those belief systems can do more than respect and tolerate the others. Many of the adherents of each of those belief systems may believe that their spirits speak to them directly. For them, their values are absolute; they are the Truth, and are not compromisable. From a legal perspective their values are subjective and non-justiciable in any meaningful sense.

[51] However, knowledge systems — sets of testable propositions as we have described them — may be about human behaviour (including belief systems) and can be epistemologically objective. As a consequence, the methods of rational and scientific knowledge can, in a sense, step outside cultures as belief systems and look at them with some objectivity [46] . It will not give absolute knowledge: empirical science cannot do that, but it might provide very useful answers to important practical questions. For example, a scientific or rational approach can look at the values referred to in the RMA and test whether any landscape is "outstanding" [47] and/or "natural", by answering more objective questions as to its geomorphology and ecology as well as at more subjective questions as to how widely beliefs are held.

[52] Even in the confined way we are trying to define rational and/or scientific enquiry, it is possible for a committed relativist to argue that knowledge systems cannot be ranked in terms of more or less accurate accounts of reality. Our answers to that are, first, that we have tried to distinguish between the modest (methodological) claims of rational knowledge propositions [48] as opposed to the substantive claims of many belief systems. Secondly, any account of "knowledge" as a belief system which makes the standards of truth or falsity internal to its own cultural consensus can

as we stated earlier, not escape relativism ("I believe what I believe — you believe what you believe, kei te pai [49] "). Thirdly, belief systems may not be able to be ranked for truth or falsity and it is certainly not the Environment Court's function to do so. Finally, however, individual "factual" propositions about those systems can be assessed for truth and that is our task.

[53] That "rule of reason" [50] approach if applied by the Environment Court, to intrinsic [51] and other values and traditions, means that the Court can decide issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):

- 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 (eg Maori Land Court Minutes) or corroborating information (eg waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issues [52] 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.

In a Court of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are "rules" as to how to weigh or assess evidence.

Evidential issues

[54] The Environment Court may accept any evidence it thinks fit [53] , and it is not bound by the rules of evidence [54] . However, it is worth bearing in mind the purposes of three of those rules, because they are particularly important to our tasks here — they are the rules about hearsay, opinion evidence, and witness bias:

(1) The rule excluding hearsay is based on the proposition that lay witnesses (as opposed to experts) should only give evidence of their first hand knowledge or observation of facts; because

(2) Rules about opinion evidence (bearing in mind that the line between opinion and fact is only one of degree: Judge Learned Hand in *Central Railroad Co v Monahan* [55]) are based on the proposition that lay opinions on anything other than the facts are [56] "meaningless assertions which amount to little more than choosing … sides";

(3) Rules about witness bias generally state that if a witness has an interest in the proceeding, or otherwise shows bias, then those matters go to their credibility.

[55] One of the reasons we wished to remind ourselves of the rules of evidence is because they are normally applied for good reasons. If they are not going to be complied with in any proceedings, then the reasons for which they exist need to be borne in mind. The common law rules are robust, but when the Court hears evidence which does not comply with them it is in danger of travelling in an unfamiliar landscape without a good compass. In particular how can the Court be confident that witnesses are not, consciously or subconsciously, altering their views to strengthen their case? If the Court sets aside the rules of evidence should it call for psychological, anthropological, or other evidence as to causes and likelihood of distortions in lay recollections and opinions, especially where the witnesses have an interest in the outcome?

[56] Against that, we have to bear in mind that Ngati Awa, and Maori generally, have a culture in which oral statements are the accepted method of discourse on serious issues, and statements of whakapapa are very important as connecting individuals to their land. In the absence of other evidence from experts on tikanga Maori, the evidence of tangata whenua must be given some weight (and in appropriate cases considerable, perhaps even determinative, weight). In the end the weight to be given to the evidence in any case is unique to that case.

[57] In these proceedings we heard a good deal of hearsay evidence from Ngati Awa witnesses (both for the appellants and for TRONA) which also included opinion evidence — for example that the 100 acre block is or is not waahi tapu. All those witnesses were biased, in the legal sense, in that they had an interest in the proceedings. Despite that, we have considered the evidence of all the witnesses, whether they qualify as experts on tikanga Maori or not. We will explain later the weight we give to the evidence of various witnesses, except that we do not refer to those witnesses whose evidence was totally irrelevant or unreliable because it was self-contradictory.

[E] Consultation

[58] The appellants submitted that there was an obligation under the Treaty of Waitangi on the applicants to consult — not

with TRONA or Ngati Awa — but with any hapu having mana whenua. We agree that there is a duty on an individual applicant to report on consultation with the relevant hapu, but that duty does not arise under the Treaty.

The Treaty of Waitangi

[59] Consultation is not a principle of the Treaty. In *New Zealand Maori Council v Attorney General* [57] the Maori Council submitted that the Treaty embodied eight distinct principles including a duty to consult in relation to acts which might affect taonga. Cooke P stated [58] :

> "A duty 'to consult' was also propounded. In any detailed or unqualified sense this is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down. Moreover, wide-ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty … "

[60] Richardson J stated more fully [59] :

> "What is involved in the application of that fundamental good faith principle of the Treaty must depend upon the circumstances of the case. Mr Baragwanath submitted that an obligation to consult the other Treaty partner and the correlative right to be consulted was itself an implied principle of the Treaty stemming from the obligation of good faith and on the Crown's part from the protective guarantees of Maori interests which come under the Treaty. There are difficulties with that submission when expressed in that way as an absolute duty of universal application superimposed on the consultation which takes place as part of the ordinary political and governmental processes. What matters affecting Maoris are within the scope of the duty and how is the line to be drawn in the conduct of government? With whom is the consultation to occur? … There is, too, the further question as to the form and content of the consultation. In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty … "

[61] More recently in *Moana te Aira te Uri Karaka te Waero v Minister of Conservation and others* [60] — a case not under the RMA but about the classification of reserves under the *Reserves Act 1977* — the High Court has confirmed that:

> " … consultation is not of itself a discrete, substantive Treaty principle. We are, of course, bound by the Court of Appeal and High Court decisions."

[62] The obligations of a consent authority under the Treaty in proceedings under Part VI of the RMA, at least in relation to land use and subdivision consents were, with respect, correctly summarised by the Planning Tribunal in *Hanton v Auckland City Council* [61] :

> "Although s 8 requires consent authorities to take into account the principles of the Treaty, we do not find in its language any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles. Where, as in Haddon's case [62] the consent authority is a Minister of the Crown, then it is to be expected that the Minister's decision would take into account those obligations. But where the consent authority is not a Minister of the Crown, but a local authority or some other person, we do not find authority in s 8 for the proposition that by exercising functions and powers under the Act it is subject to the obligations of the Crown under the Treaty, Rather the consent authority is to take those principles into account in reaching its decision.
>
> The Crown's duty of consultation referred to by the Court of Appeal in the 1989 Judgment [63] was found to exist in a context of sale by the Crown of assets in respect of which the good faith of partners was involved. In our view, the case of a consent authority, not being a Minister of the Crown, receiving and processing a resource consent application is distinguishable in three ways. First, in such a case a consent authority is not disposing of Crown assets in a way that might place them beyond reach of being available to compensate for grievances under the Treaty. Its function is confined to deciding whether a proposed use may be made by whomever of natural and physical resources consistent with their sustainable management. Secondly, the consent authority is following quite a detailed code of procedure which does not overlook the place of the tangata whenua, but which omits any express duty of consultation. Thirdly, the consent authority's function is to act judicially, and consultation with one section of the community prior to a public hearing of those who choose to take part would be inconsistent with that character of its function. With respect, we do not find in the judgment of the Court of Appeal anything which would support Mr Palmer's submission."

Extra confirmation for that can be found in the RMA itself in that notices of requirements for designations do not require consultation: that is implicit in the words "if any" in section 168(3)(e) of the RMA. It is therefore unlikely that Parliament intended that consultation should be compulsory in applications for resource consent. Where the applicant

for resource consent is a Minister of the Crown the position may be different because then the applicant (as a Treaty partner) must consult because this may be a duty in certain circumstances which arises out of the Treaty principles of partnership and good faith: *Beadle v Minister of Corrections* [64] . However that is not the end of the matter, because there are requirements as to consultation within the RMA itself.

Consultation under the RMA

[63] Where the RMA considers there should be consultation with tangata whenua it expressly states so. In clause 3 (Consultation) of the First Schedule to the Act a local authority, when preparing a proposed plan under the RMA, has a duty to consult with:

> "(d) The tangata whenua of the area who may be … affected [by the proposed plan], through iwi authorities and tribal runanga."

A failure to comply may lead to a proposed plan or change being rejected: *Ngati Kahu v Tauranga District Council* [65] .

[64] More relevantly for these proceedings, an applicant for a resource consent is obliged [66] to prepare and lodge an Assessment of Environmental Effects (an "AEE") under the Fourth Schedule. Clause 1 of that Schedule requires the AEE to give:

> "(h). An identification of those persons interested in or affected by the proposal, the consultation undertaken, and any response to the views of those consulted.
> … "

[65] There are two preliminary points:

(1) It is worth noting that the consultation must necessarily take place before the application is lodged with the Council. Therefore any discussion between the applicant and other persons which takes place after the application is lodged, is not "consultation" for the purposes of the AEE report.

(2) That has the effect in these proceedings that two subsequent steps which purported to carry out "consultation" are irrelevant as to whether or not the Fourth Schedule is complied with. First, the sale agreement contains a clause which states:

> "8.4.1 The purchaser [TRONA] undertakes to consult with any such individual Ngati Awa people or hapu of the Ngati Awa people as may lodge objections or appeals in respect of the resource consents [sic] [67] with a view to satisfying any such objections or appeals."

Since such "consultation" is only to occur after objections are filed, and therefore after an application is made, then any report on it must obviously be far too late to be included in an AEE. However, the presence of that clause suggests that both TRONA and the Whakatane District Council had an incorrect understanding of when consultation should take place. Secondly, the consultation suggested by the Court between the 2001 hearing and the resumed 2002 hearing, in reliance on that clause in the sale agreement, and on practice in previous hearings of the Planning Tribunal (*Berkett v Minister of Local Government* [68] ; *Purnell v Waikato Regional Council* [69]) now appears to have been irrelevant as far too late.

[66] Turning to the words of clause 1(h) of the Fourth Schedule: we consider that it is important to note that Part VI of the RMA imposes no invariable obligation on a potential applicant to consult with anyone. The only obligation imposed by the words of the Fourth Schedule, is to **report** on consultation. While that suggests consultation should occur it is silent as to the consequences if it does not.

[67] We respectfully adopt the statement about clause 1(h) by the Planning Tribunal in *Aqua King Ltd and Anor v Marlborough District Council* [70] :

> "The clause requires the applicant to:
>
> (i) Identify those persons interested or affected by the proposal;
> (ii) State what consultation has been undertaken; and
> (iii) The response, if any, to the views, if any, of those consulted.
>
> Clause 1(h) in our view requires more than sending out notice of the application and seeking comment. That is dissemination of information. The provision indicates consultation be undertaken and it requires a response by the applicant to those *consulted* — if there is one. Consultation to be meaningful is more than sending out information to the various iwi about an application, see *Air New Zealand v Wellington International Airport Ltd* [71] … where McGechan J stated:
>
> 'Consultation must be allowed sufficient time and genuine effort must be made … To consult is not merely to tell or present … Consultation is an intermediate situation involving discussion.

There is a useful checklist as to the principles of ideal consultation in *Land Air Water Association and Ors v Waikato Regional Council and Ors* [72] .

[68] Stepping back slightly to see the duty to report on consultation in the context of the AEE as a whole, in our view the purpose of any AEE is whether it identifies, or enables, reasonable readers to identify the significant adverse effects of a proposal. If it does not — and an application for resource consent can be deceptively bland as to consequences if they are not explained — then the AEE needs to be examined carefully to see whether it fails in its function. The requirements of an AEE in respect of consultation are to show that the applicant has considered the possibility that, for cultural, social, or perhaps scientific or other reasons, it cannot itself identify some potential adverse effects that other persons might.

[69] We hold that the primary purpose of paragraph 1(h) in the Fourth Schedule is to show the consent authority what consultation has been undertaken.

[70] The wider statutory context also needs to be considered. First, because section 88(6)(a) of the RMA provides that the AEE only has to be in such detail as corresponds with the scale and significance of the effects of the activity. Secondly, section 92 of the RMA provides a consent authority with the power to require further information. In circumstances where that consent authority is of the opinion that the proposed activity may result in a significant adverse effect on the environment, it may require an explanation of [73] :

> (ii) The consultation undertaken by the applicant;
> … "

The consent authority may also delay the processing of the application while it commissions a report [74] reviewing, for example, issues that might have been raised if consultation had occurred.

[71] However, there is a precondition to the exercise of this power in that the consent authority may require such further information [75] :

> " … only if the information is necessary to enable the consent authority to better understand the nature of the activity … , the effect it will have on the environment, or the ways in which adverse effects may be mitigated."

[our emphasis]

[72] Although the issue has never, to our knowledge, been to the High Court, the cases decided by the Planning Tribunal establish that an AEE can be so defective that there is no valid application for resource consent: *Scott v New Plymouth District Council* [76] ; *Hubbard v Tasman District Council* [77] ; *Wanaka Marina Ltd v Queenstown Lakes District Council* [78] — despite the fact that the consent authority in each case had considered and decided the application.

[73] We hold that if the AEE does not refer to consultation when it should have or if it identifies consultation as having occurred and, on the facts that is incorrect then the same general principle applies and an application for resource consent may in theory be invalid. It is important to note that non-compliance with section 88 is a jurisdictional issue not an issue of the substantive merits. With respect to the Court in *Land Air Water Association v Waikato Regional Council* [79] it appears to us that it may have been conflating the two issues and the differences between consultation (which occurs well before an appeal hearing) and evidence when it stated [80] :

> "The essence of consultation is such that, at the end of the day, we can make an informed decision."

This is not wholly wrong, but it does compress a good deal into one sentence — in particular the obligations when an application is made, with the later need to produce evidence at an Environment Court hearing (which is, of course, contingent on there being an appeal).

[74] Whether or not an AEE is invalid because there is an inadequate report on consultation will depend on the facts and circumstances of the individual case having regard to section 88(6) and section 92(3) of the RMA.

[75] In deciding what the consequences of inadequate consultation or a total failure to consult are, the consent authority (and on appeal the Environment Court) need to bear in mind the place of consultation in the scheme of the RMA. In the *Port Louis Corporation v Attorney General of Mauritus* [81] and *Air New Zealand v Wellington International Airport Ltd* [82] and other cases where a statutory obligation to consult has been discussed, that obligation appears to have been the only opportunity the aggrieved parties had for input into the process and outcome. But, as the Privy Council stated in the Port Louis case [83] :

> " … the nature and the object of consultation must be related to the circumstances which call for it."

[76] The "one chance for input" cases contrast quite strongly with the situation under the RMA. In the latter, a consent authority may, if it is dissatisfied as to the report on consultation in the AEE, ask for further explanation [84] and, if still not satisfied, commission its own report [85] on the potential effects on the environment (including of course reference to section 6(e) and 7(a) matters). Secondly, the whole submission, hearing and appeal process can be invoked by any person who thinks they have an interest in an application and should have been consulted.

[77] We hold that at least for applications for land use consents, only in truly exceptional cases (and we cannot think of an example) would a total failure to refer to consultation mean that an AEE was so defective as to entail that an applicant should start again because the Council or Court had no jurisdiction to consider the application. The more likely consequences of a failure to report on consultation under the RMA will be justified delays under section 92 — and a possible loss of priority as in *Aqua King Ltd v Marlborough District Council* [86] — or, on appeal, an order for costs.

[78] If a party or interested person [87] does raise a jurisdictional issue as to non-compliance with the consultation requirement of clause 1(h) of the Fourth Schedule, then complex matters of fact and judgement need to be assessed, including:

- when is consultation required? (since almost all privately owned land in New Zealand is probably the ancestral land of some hapu, should consultation be required for all resource consent applications?)
- how does a party know who to consult?
- what is the appropriate method of consulting with hapu?
- more specifically in this case, is it relevant that an applicant is a statutory body (in this case TRONA) appointed as trustee for the hapu of Ngati Awa which are its beneficiaries?

Further, it appears [88] that judicial answers to these questions can cause more grief than they assuage even where the Court is the Maori Land Court with a special jurisdiction to advise other Courts under section 30 of *Te Ture Whenua Maori Act 1993* as to who are the most appropriate representatives of a class or group of Maori.

Consultation in these proceedings

[79] In these proceedings the appellants did not raise the issue of lack of consultation as a jurisdictional issue, but as a substantive one. We have held that failure to consult is not an issue of substantive merits. However, because the appellants were not represented by counsel, we now turn to consider whether there is a jurisdictional bar to us considering these proceedings based on an inadequate report or non-consultation on their AEE's.

[80] The second applicant's AEE in respect of the application for subdivision consent states on the issue of consultation:

> **"14.0 CONSULTATION**
>
> 14.1 The location of the site adjacent to the coast, the Opihi urupa, and large residential lots has required particular consideration of the effect on the environment and on potentially affected parties. The concept plan development has proceeded in close consultation with Te Runanga O Ngati Awa.
>
> 14.2 The intention to sell the site through subdivision was notified in accordance with s 230 of the Local Government Act on 25 November 1998. The Council considered the submissions received and resolved to proceed with the process at its meeting on 9 December 1998.
>
> 14.3 Consultation has been carried out through a combination of direct contact with individuals and groups, a public 'open day', and the distribution of a supplement through the 'Whakatane Beacon' …
>
> 14.4 Wider public consultation has taken place from the time that the land agreement was signed. Up to that time, there was a willingness for the development to proceed, but no certainty. The persons consulted and the issues identified are described in this section.
>
> 14.4 Tangata Whenua
>
> The site development has proceeded since December 1996 in full consultation with Te Runanga O Ngati Awa. The first approach to develop the site was made by Ngati Awa and arose in relation to identifying an appropriate site for the rebuilding of Mataatua Whare. The proposed development of the site has proceeded in partnership with the Runanga, which has been consulted over the total proposed earthworks, as well as designing the earthworks on Lots 153, 154, 155 and 156.
>
> In addition to ongoing discussions with Ngati Awa management, the following actions have been taken:
>
> - On 12 July 1999 letters inviting an opportunity to meet and discuss the development of the site were sent to Te Komiti Taiao O Ngati Awa, the Whakatohea Maori Trust Board, Te Kupenga Hou O Ngati Awa, Tuhoe Waikaremoana Maori Trust Board, Mr Layne

Harvey and Ms J Clark of Hokowhitu Marae.

- A meeting was held with two representatives of Te Kupenga Hou O Ngati Awa on 22 July 1999. The main issues raised related to the underlying philosophy of rebuilding the whare, the use of Treaty settlement money for this purpose, and the management of the runanga. The opportunity to develop Ngati Awa land rather than this site was also mentioned. The cultural significance of the land could not be commented on.
- Further letters were sent to Te Komiti Taio (4 and 5 August) and to Hokowhitu Marae (26 July and 5 August). No response from these or the parties other than Te Kupenga has been received.

14.5 Adjoining Landowners

Telephone contact was made with the three landowners immediately west of the site, followed by meetings with them … "

The AEE attached to TRONA's earlier application for land use consent is consistent with that. There was no challenge to the truth of the statements in the AEEs. Strictly speaking we have no power to go further than to decide whether the report on consultation in the AEEs is adequate — and we consider it is. However, since a considerable part of the submissions, evidence and cross-examination was on this issue, we will refer to that.

[81] The appellants were very critical of the fact that the second applicant had entered into the sale agreement with TRONA before consultation over the possible development of the 100 acre block occurred. They argued that the two applicants' actions in entering into the agreement showed that neither had an open mind when consulting. We can recognise that minds may be influenced in favour of a proposed development by the time and cost that has been invested in an agreement, but the other factor that needs to be weighed here is that proposing applicants do not want to invest another significant quantity of time and money into consulting about and probably applying for a resource consent if at the end of the process they cannot exercise the resource consent (if granted) because they have no legal (property) right to do so. We hold that a proposing applicant is entitled to protect their position as TRONA did here by entering into an agreement, conditional upon obtaining the necessary resource consents. If a proposing applicant acts in that way then it cannot be said it has a closed mind simply because of that fact.

[82] The second applicant relied heavily on TRONA to carry out the consultation with hapu. In fact we heard evidence from Council witnesses too as to their efforts to consult with the various hapu of Ngati Awa. For its part, TRONA's witnesses stated it consulted by:

(a) discussing the proposals with various kaumatua;
(b) briefing hapu delegates at meetings of TRONA.

[83] For the Council as second applicant Ms A L Nicholas stated that consultation involved the following:

(1) consultation with Ngati Awa which would be described by another witness;
(2) a colour supplement in May 1999 to the "Whakatane Beacon" which is a newsletter sent to every household in the eastern Bay of Plenty;
(3) letters from the Council to various interested groups;
(4) an open day at Coastlands Preschool on 14 July 1999 — and letters before that event to various groups advising them of the open day.

[84] Ms Nicholas was cross-examined by Mrs Ashby as to whether Hokowhitu was consulted. She answered that letters about consultation were sent to a Mrs W Main for the Hokowhitu marae on 8 July 1999; 26 July 1999 and 5 August 1999. That issue was not taken further by the appellants.

[85] For TRONA, Mr H Ranapia gave evidence that he has been its project manager for the marae complex proposal since October 1996. He advised that he had been reporting to the Board of TRONA — composed of hapu delegates — regularly as to where to site the wharenui. In particular he presented a report as to alternative sites to the Board on 8 February 1998, and then a recommendation about an agreement for purchase of part of the 100 acre block in October 1998. That agreement was conditional on resource consents being obtained and was signed on 19 May 1999. He then prepared the application for resource consent with various consultants. He stated [89] :

> "Throughout this entire time, I was reporting to the Board of [TRONA] and the hapu delegates on progress with the application … "

[86] The appellants say the consultation was completely inadequate because proper consultation required:

- consultation with the correct hapu;
- consultation according to tikanga Maori (or Ngati Awa in particular);
- democratic consultation.

Their answer to the argument, for the applicants, that the Court should not interfere in a conflict between TRONA and one hapu (Hokowhitu) is that TRONA has no status according to tikanga Ngati Awa. TRONA is simply a body set up by Parliament for administrative convenience, and the hapu delegates have no standing to be consulted. The first statement is correct, but we have grave doubts about the second.

[87] The hapu delegates are elected by each hapu according to section 6(a) of the *Te Runanga O Ngati Awa Act 1998*. If the delegate does not then report back to the hapu then that failure cannot be blamed on TRONA.

[88] We heard evidence from Ms S Heta and Mrs M Ashby, amongst others, that they had been hapu delegates at various times and had received no, or very little, information about the two applications, especially that for subdivision consent. However, we find on the evidence of Mr H Mason and Mr H Ranapia, Project Manager for TRONA, that the applications were reported on and discussed briefly by the Board of TRONA and its hapu delegates.

[89] We accept that consultation was not perfect. There seems to have been some reliance by the Council on TRONA to carry out the consultation. There appears to have been a less than full disclosure of information to all the tangata whenua by TRONA particularly of the second application (for subdivision and housing). The evidence produced to us by TRONA was very short on written detail — for example no witness produced reports that had been given to board members to take back to their hapu, or that had been sent to marae committees on the proposal for the second applicant's subdivision. We consider, however, that those are matters that should be left to tikanga Ngati Awa. It is not for us to criticise them as undemocratic, let alone as not following tribal protocols.

[90] While the consultation that Ms Nicholas described was more in the nature of disseminating information, she did also include in the AEEs a short section on the responses, or lack of them, of parties to consultation.

Judgment

[91] We conclude that the consultation undertaken was not so inadequate that the applications (or either of them) are invalid.

[F] The tangata whenua evidence

[92] As plan A annexed to this decision shows, there are a number of marae around Whakatane, each being a marae for a different hapu of Ngati Awa. Only one hapu has appealed to this Court — Ngati Hokopu ki Hokowhitu. Individuals affiliated to other hapu are also opposed to the proposals and gave evidence to us.

[93] The first witness for TRONA was Dr H M Mead. In his written evidence he states [90] :

> "I descend from the eponymous ancestor Awanuiarangi II, great-grandson of Toroa, chief of the Mataatua waka. I affiliate to the hapu Te Pahipoto, Ngai Maihi, Ngai Tamaoki, Ngai Taiwhakaea II, Te Rangihouhiri II and Te Tawera.
>
> I am the chairman of Te Runanga O Ngati Awa … (TRONA), a position I have held since 1993. Prior to that I was Deputy Chairman of [TRONA] and its predecessor, the Ngati Awa Trust Board. I represent the urban hapu, Ngati Awa ki Poneke on [TRONA]. I have been involved in Ngati Awa all of my life. I am now 73 years of age."

[94] Dr Mead was Professor of Maori at Victoria University from 1977 to 1991 and is the holder of an impressive array of academic awards and prizes. He became a Fellow of the Royal Society of New Zealand in 1990. Dr Mead introduced the first university course in New Zealand on tikanga Maori in 1980. For that course he wrote a book Nga Tikanga Tuku iho a Te Maori: Customary Concepts of the Maori which is still used at Victoria University. He is writing another book on tikanga Maori and continues to give seminars on the subject. We accept that he is an important authority on the subject of tikanga Maori.

[95] His view on the principal issues in this hearing was [91] :

> "Much of the debate in this consultation has been over the meaning of wahi tapu. However, in my view the more important cultural argument is the return of our ancestors who are represented in the Mataatua wharenui to our tribal land … There is no place more appropriate for these ancestors than next to Opihi Whanaunga Kore. The ancestors are tapu and so is Opihi."

[96] In his later rebuttal evidence Dr Mead explained the concept of "tapu" to us in more detail — that it is associated with people, the environment and places; and that there are many different kinds of tapu. The place where people are buried takes on the tapu of the combined individuals' tapu. If chiefs are buried there then the tapu is very high. He stated that there are many chiefs buried at Opihi.

[97] Dr Mead also stated that tapu places are well-defined and usually named eg Opihi and Ohuirehe. Opihi — which he defined in extent [92] as being Lot 27 — is, in his opinion, extraordinary because it is so large containing 57 acres. He stated that most waahi tapu are very small.

[98] In answer to a rather leading question from Mr Littlejohn:

> "Because of the consequences, was it important for people to know where waahi tapu were?"

He answered:

> "Yes that is why [they were] clearly defined."

[99] Mr H Mason, General Manager of TRONA gave evidence on its behalf. He stated that he is a kaumatua of the Ngati Pukeko, Ngati Rangitaua and Ngati Hokopu hapu of Ngati Awa and was born in Whakatane in 1932. He has been a lecturer at Waikato University and is adjunct professor at Awanuiarangi College.

[100] Mr Mason stated his reasons why he disagreed with the appellants [93] as follows:

> "They argue that the site is an extension of the urupa Opihi Whanaunga Kore, is thus waahi tapu and of such significance that it should not be developed in any way. There are a number of reasons why I do not support this claim.
>
> Firstly, if the 100 acre block 'which was actually sold as 300 acres' was as significant as is claimed by the appellants, then our ancestors would not have alienated it out of Maori ownership, even if it had been part of the original burial ground, albeit left out of the native burial reservation in 1878.
>
> Second, the land designated as an urupa is 56 acres, which, by any standard, is extremely generous. The elders of Ngati Awa are of the opinion that when their ancestors drew the boundary for Opihi Whanaunga Kore they included every bit of land that could be considered urupa or as an extension of the urupa. They would have had a far better idea of the limits of the burial ground at that time than anyone alive today. Thus, what we have at Opihi Whanaunga Kore is an extremely large and generous burial ground whose limits were clearly defined and mapped well over a century ago by our forebears.
>
> Third, in Lot 28, not far from Opihi Whanaunga Kore is another burial ground that is also very old and is also the resting place of many famous ancestors. This burial ground is known as Ohuirehe. This urupa is also clearly defined and fenced in. There is no argument about the land adjoining that urupa being an extension of it or that the surrounding land is waahi tapu. …
>
> The appellants argue that the land next to Opihi is waahi tapu because bones of our ancestors may lie there. I cannot disagree with that possibility — many fierce battles are known to have occurred there in the past, and many bodies lost in the dunes all along the coast. However, the same could be said of much of the land around Whakatane, and for that matter, all over New Zealand in pre European times. Without a thorough, and invasive archaeological investigation, no one can confirm or deny this suggestion.
>
> However, I do not believe that is necessary for present purposes because it is well accepted by the elders of Ngati Awa that notwithstanding this possibility, Lot 28 is not part of Opihi Whanaunga Kore. Although given its history the land is extremely important to Ngati Awa, and its return eagerly awaited, it is not waahi tapu.
>
> The elders of Ngati Awa are mindful of the fact that during any development at the site, it is quite possible that some human remains might be unearthed. If this is the case, the tohunga will be asked to remove the remains and re-inter them at Opihi. There is a condition on the resource consents to this effect. If, and when this happens, the places where such remains are re-interred will be marked."

[101] Mr L R Harvey affiliates (in Ngati Awa) to the hapu of Te Patutatahi — Ngai Taiwhakaea II, Ngati Hikakino, Ngai Te Rangihouri II, and to Te Tawera. He was [94] also a principal in a law firm and a member of TRONA's finance committee. Mr Harvey has discussed matters with many kaumatua — many deceased — but some still living. Of those he identified two as having given evidence to the Court in these proceedings: Dr Mead and Mr Tutua.

[102] Mr Harvey described [95] why he was of the opinion that the waahi tapu area of Lot 27 (Opihi) did not spill into the 100 acre block. To the contrary, on a trip into the area the bounds of the urupa were shown to him by Te Kuiti Ratahi as being well into Lot 27 from its western edge.

[103] Mr Harvey stated that, prior to colonisation, Taiwhakaea II and Ngati Pukeko (Ngai Tonu) were the dominant hapu in Whakatane, with the former more on the left bank of the Whakatane River and the latter on the right bank. Ngati Hokopu came into being after Europeans arrived [96] :

> "Their name derives from the practice of selling-guns — 'hoko-pu' which only occurred here in the 1820's. Prior to that time the ancestors of present day Ngati Hokopu derived their rights through [other] Ngati Awa tipuna … "

[104] As for the position of the relevant hapu (as he saw them) about development on the 100 acre block he stated [97] :

> "Since the time of the Ngati Awa hearings before the Waitangi Tribunal in 1994, we have talked about our claims, negotiations and related matters within our community at Paroa [including Ngai Taiwhakaea, Ngati Rangihouhiri, and Ngati Hikakino]. We have probably had more hui about these subjects than most, because we have particular claims that concern our hapu and no others. So, during the last eight years, I would have attended and organised numerous hui at each of our three marae to talk about the negotiations, the settlement and the Mataatua project. During that period, I have seen little if any opposition from our hapu and marae. While individuals are of course entitled to their own position and may object to the whole settlement process, in my experience, this has not been the position of our three marae at Paroa. If there have been any changes in opinion by the hapu and marae, then those changes will only be very recent.
>
> For example, I know that during the last 12 months, both Te Rangihouhiri II and Hikakino marae committees have endorsed the Mataatua proposal in its proposed location and some have even gone so far as to pass resolutions at their meetings in support of the project. I know this because I was present when those discussions were held and when that support was given.
>
> As far as the Councils housing proposal is concerned, the position is less clear-cut. The hapu have been well aware of the Council's residential aspirations for this land for many years. However, at the time those aspirations became public in the 1970s, and then part of the district plan in the 1980s, the concerns of tangata whenua were rarely given much weight. Granted, there was much opposition and resentment of the proposal, especially considering it proposed a playground over the urupa Opihi. This was anathema to us.
>
> The opportunity now with this joint application is to substantially modify the extent of the damage that the historic aspirations for the use of this land would have. A large area of this traditional Ngati Awa land will be returned to Maori ownership, and Opihi will be protected from residential development. To me and many of our people, the marae will help us with the long term maintenance of Opihi. Having our marae next to the urupa will give us a real role in protecting Opihi."

[105] Mr R Reneti gave evidence for TRONA in te reo translated by a sworn interpreter [98] . He stated that he was born in July 1931 and that Taiwhakaea and Rangihouhiri are his marae. He knows the dune lands having ridden over them (on horseback) since he was a child. Apart from Opihi he does not consider them to be waahi tapu. He was not aware of an urupa called Utaira or Utaora.

[106] Mr H Kingi gave evidence for TRONA, again in te reo. He is affiliated to Ngati Pukeko and Ngati Hokopu. Through the interpreter he expressed his umbrage for the rangatahi of Ngati Pukeko about the evidence of Mr Kopae and Mr Fairlie who had said there was strong opposition by rangatahi to the Marae Mataatua proposal. He said neither was representing Ngati Pukeko. He stated in cross-examination by Mr Paul that he had not attended hui of te Huinga Rangatahi (the Youth Council of TRONA). Mr Kingi stated that Mr Mason speaks for Ngati Pukeko.

[107] Mr P Ngaropo gave oral evidence for the applicants. He is 33 years old, and his main hapu is Te Tawera. After reciting his whakapapa, he gave evidence on two issues — his knowledge of tikanga and of waahi tapu. As to the first he said he had spent 15 years travelling amongst the elders of Ngati Awa to find out who the kaumatua are. Of those he identified, the following are relevant to this decision because they gave evidence to us:

- Mr C Bluett for Ngati Hokopu (Wairaka);
- Mr H Mason for Ngati Pukeko;
- Mr R Reneti for Taiwhakaea.

Referring to his knowledge of tikanga he stated why he believed those people to be kaumatua. He was not challenged on these issues.

[108] He acknowledged in cross-examination that he was a co-author of a publication [99] called "Wahi Tapu Sites of Ngati Awa". This states [100] :

> "Opihiwhanaungakore is the entire area located on the sand dune peninsula across the estuary at the Whakatane Heads. This area is a sacred burial ground extending west along the coastline, it includes Te Akau, the stretch of beach west of the Whakatane river outlet to a point east of Papakangahorohoro (Coastlands Beach). This is one of the most significant historical sites in the Whakatane area, owing to the nature of its residents, buried at this place are some of the most important chiefs in Ngati Awa history."

That is an ambiguous statement as to the extent of Opihi because it does not state clearly what the western boundary is — only that it is "a point east of" Coastlands Beach. Such a point may include the 100 acre block or exclude it. The unnumbered map in the publication shows Opihi as being on what appears to be Lot 27 but close to the 100 acre block.

[109] In summary Mr Ngaropo's evidence on whether the 100 acre block is waahi tapu tends to support the appellants rather than TRONA. On the other hand it is very vague. Further, Mr Ngaropo for reasons not clear to us, supports the establishment of a marae on the 100 acre block.

[110] Mr S Tutua gave evidence for TRONA. He was born in 1933 and affiliates principally to Ngai Taiwhakaea. He described himself as a kaumatua through age although he was reluctant to do so. He said:

> "We have a saying: 'A kumara never speaks of its own sweetness'."

His role in relation to the Mataatua wharenui is as a carver carrying out restoration work.

[111] He was asked by TRONA's counsel Mr Littlejohn whether it is offensive for the wharenui complex to be built on the 100 acre block. He replied:

> "I find it very appropriate that the marae should be near Opihi; most of our marae have a cemetery around; it would protect the area."

Similarly he thought that to have people living in the area would be to Ngati Awa advantage.

[112] He described an old pa site — dating "from man-eating days" — on the dune lands or west of them called Otamauru. It had two urupa quite close by — Ohuirehe and Utaora. He said as to the latter:

> "No one seems to know where it is — I may be the only one."

Later he said that Utairoa (correctly Utaora) is not on the 100 acre block. He stated that he had on occasion ridden across the 100 acre block knowing where Opihi was.

[113] Of Mr M Paul's description of the tangata whenua being the people of five hapu — Ngati Hokopu, Ngati Hokowhitu, Ngati Pukeko, Taiwhakaea and Ngati Wharepaia — he said that view was tikanga Pakeha after the raupatu. He said tikanga Maori is that the land is Taiwhakaea. Further, there is only one Ngati Hokopu and that is at Wairaka.

[114] He was asked whether he had ever shown where Opihi was to younger people he said "yes" — from the Heads he had pointed across the river.

[115] Later, Mr Mason was recalled to give rebuttal evidence. He reaffirmed that the dune lands excluding Lot 27 are able to be developed for people to live on. He said:

> "All the land is tapu because it is the land my ancestors were living on, which is different from the concept of tapu as used now."

[116] Mr M Paul, a kaumatua of Ngati Hokopu ki Hokowhitu and Ngati Pukeko gave oral evidence in Maori for Hokowhitu. His evidence was translated during the hearing into English by a sworn interpreter, Mr Kruger. He stated that the 100 acre block and Opihi are both part of a larger area which is all waahi tapu. His reasons for believing that were:

(1) His father told him that not until one could see Taiwhakaea marae (well north along the coast) was one allowed to fish off the beach because of the presence of a graveyard on the land from the time of the epidemic;

(2) Another elder, Mr Haimona, who operated a barge on Whakatane River and harbour, said that the whole area from Taiwhakaea marae to the spit is sacred land. Mr Haimona said when there was a great epidemic affecting the Ngati Awa people he would take the dead people out of the harbour and along the coast to be buried. The bodies were taken to the high tide mark and buried there.

There was some confusion over details, because from Mr Paul's evidence it sounded as if the epidemic was in the 1930's whereas Mr Mason suggested it was earlier (perhaps the Spanish flu epidemic after 1918). Mr Paul too was

vague about where if at all, bodies were buried on the 100 acre block, when he gave his evidence in chief. However in answer to a rather leading question from Mr Lane he seemed to suggest [101] that Lot 28 contained “hilly areas” in which he had understood burials to have taken place.

[117] Mr H Hireme gave a written brief of evidence and additional oral evidence-in-chief for Ngati Hokopu ki Hokowhitu. He is aged 40 and is a member of Ngati Hokopu and Ngati Hokowhitu He is a lecturer in philosophy at Massey University. During 1997 and 1998 Mr Hireme was the delegate to TRONA for the council of young people — Te Huinga Rangatahi [102] . Mr Hireme was critical of the role of TRONA as a separate entity which is a creature of the State. He reminded us that the Treaty of Waitangi protects the rights of hapu. He was aware that some kaumatua say that Lot 28 is not waahi tapu, but others say all the land west of the Whakatane heads (and between the river and the sea) is waahi tapu. He prefers the latter view because he regards the former as [103] :

> “ … redefin[ing] traditional beliefs and values for purely social, economic, or political expediency [which] is to contribute to our own cultural genocide … ”

That is characteristic of the overt political note to Mr Hireme's evidence. In his further evidence-in-chief he stated [104] :

> “ … what happens is [that] you subjugate knowledges from that genealogical history as part of the colonising process. What we are seeing now is a very strong need by rangatahi in particular to reconnect themselves with those beliefs, those values, those practices, those meaning systems and that a consequence of colonisation in that space has been that those values had become lost and so what we are seeing now is almost a resurrection of those subjugated knowledges. I don't mean particularly in a knowledge sense but in terms of meaning systems, beliefs and values.”

We like the distinction he is making here: there is a useful distinction between knowledge and beliefs: as we have suggested, the former does not consist of absolute statements, but of sets of testable sentences; beliefs on the other hand may be absolute or relative, but are not able to be proved true or false.

[118] The living kaumatua whose information Mr Hireme relies on as establishing that the 100 acre block is waahi tapu are Mr C Bluett, Aunty Dini Jaram, and Mr M Paul.

[119] Mr M Ta Rau, aged 40, affiliates principally to Taiwhakaea which he identified as one of only three hapu with mana whenua over the land between the Whakatane River and the Taiwhakaea marae. He stated that all that land (which includes the 100 acre block) is waahi tapu, and that there are two urupa within it, Opihi and Utaira. He had been told this by his (now deceased) tipuna (Mr Reneti and his younger brother H Reneti, as well as by Pikau Aukaha, and Semi Himone).

[120] As for the living kaumatua of Taiwhakaea, Mr Ta Rau described them as having parted from tikanga, at least in part because they went away to be educated. Those kaumatua included Mr S Tutua and Mr R Reneti (both of whom later gave evidence to us). He disagreed with Mr Mason's earlier evidence that only a small part (4 acres) of Lot 27 was the urupa, Opihi. In fact in Mr Ta Rau's view part of the 100 acre block was an urupa. He appeared partly to explain the difference between his belief and that of Mr Mason with his statement that each whanau has its own burial place. Further he said if human bones are found on the 100 acre block then they are in the right place. He did not know how it would be possible for anyone to lift the tapu. From Opihi to Taiwhakaea marae is waahi tapu in his view.

[121] Mr T Meihana — affiliating to Ngati Rangitaua a hapu of Ngati Pukeko — gave oral evidence that his grandfather (Aperahama Meihana) gave as his korero that from the mouth of the river as far as the eye could see was waahi tapu.

[122] Mr P Fairlie gave written evidence that he is Ngati Pukeko. Much of his written evidence related to consultation issues, and communication within TRONA, and between TRONA and the hapu it represents.

[123] Mr Te Oneone Hona, gave oral evidence that he is Te Patuwai and Ngati Pukeko. He gave evidence that in the early 1990's Ngati Awa ran a series of wananga around the marae to familiarise people with raupatu claims. He then stated:

> “ … I can remember clearly korero from some kaumatua that all that area [including the 100 acre block] was waahi tapu …
>
> Now those same kaumatua are saying ‘K#o [105] , it is not waahi tapu’.”

[124] Mrs M M Ashby of Ngati Hokopu and Ngati Pukeko descent gave written evidence of the desecration of Opihi in recent years. She also produced Maori Land Court records to which we will refer later. She drew from those documents her belief that another urupa — Utaora — could be within the 100 acre block. She spoke of her uncle, Mr C Kingi, who told her that he carried out a traditional burial “ … outside the boundary lines”. Presumably by this Mrs Ashby meant

outside of Lot 27 and within the 100 acre block.

[125] Mr R Kopae affiliates to Ngati Rangitaua, Ngati Pukeko and Ngati Taiwhakaea, amongst others. He said that a respected kaumatua (later identified by him as Mr Tutua) had passed on to him that all of the land west of the Whakatane River was Opihi.

[126] Ms S Heta affiliates to Ngati Pukeko. Her evidence was mainly about relationships between TRONA, other committees of Ngati Awa and the Whakatane hapu of Ngati Awa and relevant only to the question of consultation (between TRONA and the hapu, and between the Council and the hapu).

[127] Finally for the appellants we received an affidavit from Mr C Bluett, possibly the most senior of Ngati Awa kaumatua. Mr Bluett stated that:

> "1. From the Heads west no-one can say that the land is not wahi tapu, nor be sure that it is wahi tapu, without evidence to prove it.
> 2. What we do know is that there have been battles fought there and Opihi-whanaunga-kore was a designated burial ground for Ngati Hokopu and Ngati Pukeko but exactly where is hard to identify.
> 3. In my view I wonder why we are taking the wharenui there in the first place. I have not been asked for my thoughts on the matter."

Apparently Mr Bluett was not well enough to come to Court to be cross-examined on this statement. As it stands it does not assist us except that it is interesting that Mr Bluett refers to "evidence" rather than "belief".

[128] We find that there is no general widely held belief amongst Ngati Awa that the 100 acre block is waahi tapu. There are no waiata or whakatauki (proverbs) so localised as to identify that land separately. On the whole we consider the evidence of the witnesses for TRONA to be more detailed and internally consistent. The witnesses for the appellants who referred to their tipunas' accounts of burials in an epidemic in the 1930s seem to have skipped a generation. We had no independent evidence of an epidemic at that time.

[G] The documentary history of the 100 acre block and surrounding area

[129] Following the raupatu in 1866, some of the confiscated land was returned to the hapu comprising Ngati Awa. Due to the incompetence and/or ignorance of Crown officials there was confusion over which hapu was getting what land. As Mr Harvey stated [106] :

> "Still more recently, post 1880s, the Crowns confiscation and then resettlement policies altered traditional hapu lands and reconstituted who were tangata whenua in the hapu sense, for these lands. This was an error on the Crown's part and they are to recognise this in the soon to be completed deed of settlement between Ngati Awa and the Crown. The Waitangi Tribunal has already found that the Crown's actions in doing this were a breach of the Treaty of Waitangi."

[130] In the end special legislation — the *Whakatane Grants Validation Act 1878* — was passed to validate the allocation of (inter alia) Lot 28 of the Rangitaiki Reserves in trust for the "Ngati Awa tribe Whakatane section".

[131] As to the initial protection of Opihi-whanaunga-kore under "European" law Mr Mason wrote that [107] :

> "Lot 27 … was set aside as a native burial reserve by a proclamation dated 29 January 1878 under the *Confiscated Lands Act 1867*. It is a burial reserve for the Ngati Awa ki Whakatane and Pukeko tribes. A Crown grant was made on the 19th of June 1878 vesting the land in trustees."

He identified the trustees as contemporary chiefs: Wepiha Apanui, Hori Kawakura, Romana Tautari and Meihana Koata. It is an important part of the case for the applicants that those chiefs would not have tolerated any land which was part of the urupa being excluded from it. Thus the 56 acres set aside in Lot 27 by European survey included more than was necessary to encompass the boundaries of Opihi as perceived by Ngati Awa.

[132] Elsdon Best's *History of the Tuhoe* apparently contains a map showing the whole of the dune lands as "Burial Ground" which was given to us by Ms Heta in her final submissions.

[133] In 1907 section 28B1 containing 2,150 acres was subdivided out of the Rangitaiki Reserves and allocated in the following shares by the Native Land Court [108] :

Ngati Wharepaia	632 shares

Ngati Hokopu	694 shares
Ngai Taiwhakaea	916 shares.

[134] Mr Harvey states [109] :

> "On 19 June 1935 an application for partition of Rangitaiki 28B1 was heard before the Native Land Court. The application concerned proposals to sell part of the land and the objections of those who did not wish to sell. The sellers were owners affiliating to Ngati Hokopu and the non-sellers were owners affiliating to Ngai Taiwhakaea … "

[135] The Native Land Court made the following orders [110] :

> "After discussion the partition was agreed to. It was decided to cut out the two urupa's and vest them in all the owners and to cut the block into two sections, one for Taiwhakaea hapu and the other for N-Hokopu …
>
> Order for portion to be called Lot 28B1A Parish of Rangitaiki to contact about 285 acres 3r16p cut off by a line drawn parallel to the western block boundary at such a distance eastwards of it as will cut off the required area. Ten acres for the Urupa's have to be deducted from the area of both on the one side where they appear and the shares are allotted on the basis of that area being deducted for the whole of the owners subject to right of way 1/2 chain wide appurtenant to the Rangitaiki 28B1C or D or which end and whichever of them falls within the outer boundary in favour of the following or their representative …
>
> Order for portion to be called Lot 28B1B Parish of Rangitaiki to contain 400-2-1 or thereabouts being the land on the eastward side of the block after cutting out the 28B1A Block in favour of all the remaining owners of their representatives subject to ROW to urupa.
>
> Order for two portions to represent urupa's known as Ouirehe and Utaire [sic] each to contain 5 acres to be cut out in the most convenient shape. Appurtenant to each is to be a right of way half chain wide in most convenient position to nearest road over the land and whose outer boundaries it chances to fall.
>
> The Ohuirehe cemetery will be called Lot 28B1C Parish of Rangitaiki to contain 5 acres and the Utaire [sic] cemetery will be called Lot 28B1D to contain 5 acres in favour of all the present owners of the Rangitaiki 28B1 Block of their representatives."

[136] The most important document identifying the location of Utaora urupa is the memorandum dated 19 May 1936 from the Registrar of the Native Land Court to the Chief Surveyor. This stated [111] :

> "At the recent Whakatane sitting one of the chief owners, Te Keepa Karanema, informed the court that in company with one of the other principal owners and Mr Rand of Whakatane they had located the site of the Ouirehe [sic] cemetery. A written statement to this effect was filed supported by a tracing prepared by Mr Rand. **Keepa also stated that the Utaora cemetery lies to the west of the school area thus placing it outside the 28B1B2 block**. This being so and in view of the evidence now filed regarding 28B1C, it is thought that you may be in a position to compile a plan sufficient to complete title to Lot 28B1B2, the sold area."

(Emphasis added).

[137] Mr Harvey who, as a trustee of an urupa within the school site at Ohuirehe, is well-placed to know where it is, swears that [112] the school site is west of Ohuirehe Road. Therefore the Utaora urupa must be further west again.

[138] That is important evidence because Hokowhitu relied on some passages from a 1978 decision of the Maori Land Court about parts of Lot 28 (in which the 100 acre block is situated). Judge Durie (as he then was) stated [113] :

> "Parish of Rangitaiki Lot 28B1c has been defined by survey and is known as Ohuirehe urupa. Utaira [sic] urupa was never defined, and was never cut out. It seems likely that it must lie within certain parcels of adjoining non-Maori land, but no orders have been signed and sealed with respect to it, and although an order can be identified in the minute, it may be that nothing can be done about Utaira urupa now."

Judge Durie then made the following comment in his order [114] :

> "The Deputy Registrar's attention is drawn to the fact that the location of Parish of Rangitaiki allotment 28B1D has not been defined and that that may well be a bar to any further dealings stemming from Parish of Rangitaiki

> Lot 28B1. He will please so note that fact against the appropriate memorial schedule. As a title improvement exercise he will also please investigate the position, seek the location of the area by deduction if possible, confer with the Executive for the possible identification of the urupa upon the ground, and report with a copy to the Executive."

It appears from Mr Harvey's evidence that no such investigation was ever carried out.

[139] In his affidavit Mr Harvey states [115] :

> "WITH respect to the learned judge, when considering the memorandum of the Registrar of the Native Land Court dated 19 May 1936 which refers to the evidence of Te Keepa Karanema Tawhio and the evidence of Aniheta Ratene given in 1978, his statement that Rangitaiki 28B1D Utaora urupa 'must lie within certain parcels of adjoining non-Maori land' is not supported by the evidence. Indeed, with respect to His Honour, his statement is in fact contrary to the evidence provided by the leading tangata whenua witnesses of their generation on these matters for that region, namely Te Keepa Karanema Tawhio and Aniheta Ratene. There is simply no evidential basis on which His Honour Judge Durie could base such a statement. Te Keepa Karanema Tawhio and Aniheta Ratene were unequivocal in their evidence that, apart from Ohuirehe urupa itself, the remaining urupa were west of the school site, Rangitaiki 28A."

[140] We cannot see that Aniheta Ratene's evidence is unequivocal, but we agree that Te Keepa Karanema Tawhio's evidence leads to the inference that Utaora urupa is not in the 100 acre block (because that land is east of 0huirehe Road).

[141] Mr Harvey's conclusion about Utaora urupa was [116] ;

> "HAVING undertaken extensive research concerning the location of Utaora urupa, Rangitaiki 28B1D over almost ten years, including careful review of both documentary and oral sources, it is my view that Utaora urupa is definitely west of the old Otamauru school site, which itself is west and some distance from Ohuirehe Road. I base this assessment on:
>
> (a) the evidence of Te Keepa Karanema Tawhio from 1935-1936;
> (b) the evidence of Aniheta Ratene from 1978; and
> (c) my own scrutiny of the documentary sources."

We accept that evidence because first no other witness gave us anything like the same amount of detail about the location of Utaora urupa (or rather, as to where it is not), and secondly it is based on earlier independent evidence.

[H] Conclusions as to waahi tapu/urupa issues

Should we follow kaumatua?

[142] During the hearing we were concerned that perhaps recognising and providing for section 6(e) matters meant that we should have to follow the opinions of the most senior kaumatua as to whether the 100 acre block was waahi tapu. That would entail determining which hapu's kaumatua were more relevant, and which kaumatua were the most senior. We were concerned that to do otherwise would mean that we were making our own, heavily if not fully, Eurocentric opinions on matters which are the core of Maori culture.

[143] Concerned about our enquiries as to identification and ranking of kaumatua, Mr Lane for Te Toka submitted that we should not over-romanticize the status of kaumatua, and that many of his group would now qualify as kaumatua being themselves in their forties and fifties, and grandparents.

[144] In the result, we have concluded that for us, in legal proceedings, to rely on kaumatua, simply because they are kaumatua, as having special authority which should carry great weight is wrong for a number of reasons. First, it would be hurtful and personal for an outside authority to make findings about those matters of status which are essentially for an iwi or hapu to determine. Secondly, because the values which go to determine who is kaumatua are essentially value-laden they are non-justiciable. Thirdly, even if those difficulties could be resolved, to rely on the most senior kaumatua would be to abdicate from the responsibilities of the Court to act judicially. Fourthly, relying on kaumatua evidence (where the kaumatua do not have expertise, and of course many may be experts) is unnecessary in most cases where there is evidence which infringes the rules of evidence less strongly. Fifthly, the enquiry by the Court can be limited to investigation of more factual propositions in the way we have attempted to describe more fully in part [D] of this decision.

[145] We are reassured that other divisions of the Environment Court have, on less philosophical but more traditional grounds, come to the same conclusion. In *Te Rohe Potae O Matangirau Trust v Northland Regional Council* [117] the Planning Tribunal stated:

Judgment

Ngati Hokopu Ki Hokowhitu v Whakatane District Council

> "Our own understanding of the law is that it is sometimes necessary for a consent authority to make findings about the existence and nature of waahi tapu, and of cultural and spiritual attitudes to water and other taonga, as part of the process of deciding a resource consent application; and in those cases the question has to be decided in the same way as the consent authority decides any other question of fact, on evidence of probative value. On such matters the evidence of kaumatua is frequently helpful, especially where there is no conflict. However where claims are challenged, the question is not to be resolved simply by accepting an assertion of belief or tradition by a kaumatua or by anyone else. The consent authority, and this Court on appeal, has then to hear the witnesses that the parties call, whether kaumatua, kuia, or others who have testimony to give which may assist in deciding the question. The consent authority or the Court has then to make a finding on the balance of probabilities. The Court has the advantage that in its proceedings witnesses are cross-examined."

[146] In *Te Kupenga o Ngati Hako Inc v Hauraki District Council and Waikato Regional Council* the Environment Court stated [118] :

> "For Te Kupenga it was said that the kaumatua had no mandate to speak for Te Kupenga or on behalf of Ngati Hako. But as Mr Mikaere observed, it is the content of their knowledge and recollections, rather than the representation issue, which carries weight in relation to Te Kupenga's waahi tapu assertions."

The Court concluded [119] :

> " … All things considered, we are satisfied that the historical background advanced on behalf of the company is accurate and credible by contrast with that proffered for Te Kupenga. Hence, while we are prepared to accept that the views of lay witnesses called for Te Kupenga were motivated through genuine concerns that the company's proposals would undermine the mana of a cherished ancestral area, the rationale for those concerns must be independently weighed and placed in perspective against the overall circumstances of the case. That is the Court's function, acting as independent arbiter for the whole community. To do otherwise would mean accepting without appropriate inquiry the assertions of Te Kupenga, with a consequential slant towards the veto-concept eschewed by the Court of Appeal in *Minhinnick* … "

We respectfully agree with the approach in those cases and as restated recently in the case of *Beadle and Others v Minister of Corrections* [120]

Who were the experts on tikanga Ngati Awa in these proceedings?

[147] With respect to all the other witnesses we only heard from two persons on tikanga Ngati Awa who impressed us as having sufficient expertise or knowledge of Ngati Awa belief systems to give us some confidence in their opinions: Dr Mead and Mr Harvey. It is important to note that we are not finding that other Ngati Awa witnesses who gave evidence are not experts (in the legal sense) on their tikanga. It is simply that the evidence of witnesses like Mr Mason was too brief for us to be able to ascertain whether they do qualify as experts on that subject. We recognise too that on tikanga there cannot be a sharp dividing line between persons who qualify as "experts" in a legal sense and those who do not. It is a matter of judgement in each case.

[148] Dr Mead is clearly one of New Zealand's leading experts on tikanga Maori and tikanga Ngati Awa. We have some reservations about accepting his evidence completely because of his interest in the proceedings: he is, after all, chairman of the applicant TRONA.

[149] In many ways the most objective evidence came from Mr Harvey. Admittedly Mr Harvey too had an interest in the outcome of the case, but he impressed us as an objective witness despite that. Where his evidence might be seen as subjective — the claim by Taiwhakaea to be tangata whenua — he readily stated that hapu are generally not objective on those issues.

Who are the hapu with mana whenua?

[150] Who is the relevant Maori tribal grouping(s) whose relationships (whanaungatanga) with the 100 acre block we should be considering? We have already accepted the appellants' contention that TRONA is not a tribal grouping but is a structure imposed by Parliament on Ngati Awa and its constituent hapu for the purposes of administrative convenience.

[151] While we accept that the dune lands in general, and Opihi in particular, are important to Ngati Awa we heard no evidence from anyone claiming to speak for Ngati Awa as a whole. Instead, all the individual Maori witnesses whakapapa [121] to different hapu — most of the relevant ones are shown on Appendix A. Accordingly we find that it is the relationship of the hapu to the 100 acre block which is most important for this case. The most relevant hapu are:

Ngai Taiwhakaea
Ngati Rangihouhiri
Ngati Hikakino
Ngati Pukeko

[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 [122] :

> "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."

[153] A similar theme was expressed by Mr Harvey when he wrote [123] :

> "Taiwhakaea II and Te Patutatahi (which includes our Te Rangihouhiri II and Hikakino sides) are and will always be tangata whenua of this land. I mean that word in our traditional and customary sense. It belongs to the hapu descended from these tipuna namely Taiwhakaea II, and through his descendants, Te Rangihouhiri II and Hikakino. But to avoid any doubt, it is Taiwhakaea II who are the tuturu tangata whenua of this land, in my opinion.
>
> IN 1865 [124] , the government gave some of the lands it had confiscated to hapu who did not have customary interests. Those groups now claim tangata whenua status in those areas just because of that Crown grant. A Crown grant does not make you tangata whenua."

[154] Some support for Mr Harvey's claims are the maps in the Waitangi Tribunal report. Map 3 (Annexure "D" to this decision) shows that in 1840 Ngati Hokopu were located at the western end of Ohiwa Harbour, and not in the Whakatane catchment at all. The next map [125] shows Te Patutatahi, now replaced in name by Taiwhakaea [126] , as tangata whenua.

Is the 100 acre block generally believed by Ngati Awa to be waahi tapu?

[155] We hold that *for the purpose of these proceedings* the 100 acre block is believed by Ngati Awa, and in particular by the most relevant hapu having mana whenua to be neither part of an urupa, nor waahi tapu, for these reasons:

(1) There is only one hapu — Ngati Hokopu ki Hokowhitu — appealing against the Council's decision. We find it is considered by other Ngati Awa, on the evidence given to us, to have little mana whenua in respect of the land;
(2) The documentary evidence and the evidence of Mr Tutua satisfies us that Utaora urupu is west of Ohuirehe Road and therefore not on the 100 acre block;
(3) We prefer the evidence of Mr H Mason, Mr R Reneti, Mr S Tutua — all kaumatua in their respective hapu — and pre-eminently Dr H Mead, over the evidence called for the appellants (that Opihi does not extend onto the 100 acre block at waahi tapu). We have two reasons for that preference:
    - the knowledge of tikanga Maori and tikanga Ngati Awa possessed by Dr Mead;
    - the greater detail in the knowledge and beliefs of the appellants' witnesses.

[156] The criticisms (in italics) by the appellants of the applicants' evidence and our consideration of them are as follows:

(1) *Some of the applicants' witnesses had previously (according to the appellants) pointed out the whole of the dune lands as being a tapu place, but now they were changing their mind for reasons of expediency*. We consider that is unfair to the kaumatua we have identified for two reasons: first if they stood at the southern side of the Whakatane River and stated that "the land over there is sacred" — that is correct because the 57 acres of Opihi is highly tapu. Secondly, as Mr Mason acknowledged, all ancestral land is tapu in one (weaker) sense. But as we have pointed out, according to both Dr Mead and the Law Commission Report there are degrees of tapu. We hold that land is not waahi tapu simply because it is ancestral land.

(2) *There is a generation gap between the tipuna and the current rangatahi (generally represented by the appellants) filled by the current kaumatua who went away to be educated and lost their roots. By contrast the appellants claim to be*"re-indigenizing". We consider that is offensive to Dr Mead and Mr Mason in particular. They are both men who have made real efforts to bridge cultures, explaining concepts of each to the other. The cultural relativism of the appellants (best expressed by Mr Hireme but implicit in other witness evidence) can only lead to sterile circularity and intolerance.

(3) *The Maori evidence for the applicants was tainted by interest or bias*. We have several difficulties with this: first it is difficult to see what is meant by this since there was no suggestion that Dr Mead or Mr Mason or any of the other TRONA witnesses would be benefiting personally from the siting of the Wharenui and the housing on the 100 acre block; secondly, if it was intended to mean that their evidence was tainted by an emotional commitment to having Mataatua Wharenui and housing on the 100 acre block, then we find that the appellants' witnesses were just as interested in the opposite way.

[157] There is no corroborating independent evidence for the proposition that the dune lands are believed to be waahi tapu. There is more detailed consistent evidence that there may be skeletons along the highwater mark of the beach north west of Opihi. Given the 100 metre reserve proposed back from that line we consider the applicant's proposal will not affect that area.

[158] In fact the independent historical evidence suggests that the 100 acre block and the dune lands generally (except for the defined urupa) are not waahi tapu because: first, the rangatira who cut out Opihi originally did not consider it necessary to reserve more than the 57 acres; and secondly, after the dune lands came back into Ngati Awa ownership, individuals sold them again in the 1930's.

[159] Other matters we have considered are that the dune lands were grazed by the cattle and ridden over by the horses of tangata whenua as Mr Reneti and Mr Tutua confirmed. We realise that point is slightly ambiguous because they conceded that from time to time cattle had been allowed to graze on Opihi and one or two other urupa in the dune lands because of the lack of fencing.

[160] Finally, we do not overlook the plans in Mr Ngaropo's book, nor that from Elsdon Best. However, as we have said, Mr Ngaropo's evidence about his map was vague. Further, we have no evidence as to where the information on Elsdon Best's map came from, or how accurate it might be. More precise evidence is derived from the minutes of the Maori Land Court as discussed.

[161] We find that, on the evidence before us, the 100 acre block is not widely believed to be waahi tapu, nor is it widely believed to contain any part of the urupa known as Utaora and Opihi.

[I] Section 105(1): Overall consideration

[162] The purpose of a judicial hearing by the Court is to hear both sides impartially to analyse the issues, to consider the evidence dispassionately, to apply the correct legal tests and make a decision that, in its judgment, achieves sustainable management of the resources of, and proposed for, the 100 acre block. As a check on the rigour of its process the Court has to give reasons for its decision.

[163] If we understand the appellants' general arguments correctly there was a suggestion that the Council's decisions did not take a holistic view of the problem, and that if we did take such a view recognising the relationship of Ngati Awa to its land we would have to cancel the Council's decision.

[164] In our view the idea that there is a Maori holistic [127] view of the world which is to be contrasted with a "Eurocentric" dualistic view of the world in the RMA is quite wrong for several reasons. First, the RMA is approaching holism in its single purpose [128] of promoting the sustainable management of natural and physical resources. It is ironic that the RMA is criticised in these proceedings as not being sufficiently holistic, when the more tenable criticism (although it is not for us to make) is that the RMA is too vague and holistic and asks functionaries to make decisions which are

essentially non-justiciable.

[165] Secondly, there are tensions between making an holistic decision and making a reasoned judicial decision. Certain aspects of the whole always have to be identified so they can be analysed and considered and their contribution weighed. Unless a decision simply says either "Yes" or "No" it is literally impossible to give a strictly holistic description of any set of facts. Every language takes shortcuts in describing what its culture considers are the salient features of facts and things. So, often when a decision is criticised as not being holistic it simply means the critic does not agree with the outcome of the decision and/or the relevance and importance of one or more of the factors considered and/or is of the opinion that other factors, either not considered or given little weight, are more important.

[166] Further, since the RMA provides a checklist in Part II (which may be supplemented by the objectives, policies and methods of plans) it is an error of law not to consider a relevant matter on that list according to the proper test. So the Part II matters have to be particularised and the weight given to them in any particular case identified.

[167] In the end a consent authority's overall decision is a matter of judgement, not precise arithmetic, nor resolvable on the balance of probabilities: *Shirley Primary School v Telecom Mobile Communications Ltd* [129] referring to *Commissioner of Police v Ombudsman* [130] .

[168] We consider that a fair and representative statement of the most relevant hapu's views was given by Mr Harvey when he stated [131] :

> "Historically, our people have never supported housing on this land, because it is our land and it was wrongly taken from us. However, we accept that we can only do so much to remedy this situation now. We cannot force the Council to sell the balance of the land back to us, even if we could afford it. We also acknowledge that without the development of the balance of the land for housing, it would be difficult for Ngati Awa to complete the infrastructure development necessary for the Mataatua Complex. This, and the protection of Opihi, are paramount to us."

[169] We heard evidence from Mr Ta Rau that Ngati Taiwhakaea no longer supported the applicants' proposals. As against that Mr Tutua, a kaumatua of the hapu, stated that the hapu did support the proposals.

Alternatives

[170] An applicant under the RMA is not required to establish that the proposed site is the best possible site: *Dumbar v Gore District Council* [132] . We respectfully adopt the passage in the Environment Court's decision in the *Land Air Water case* when it concluded that [133] :

> "• Clause 1(b) of the Fourth Schedule applies only where it is likely that an activity will result in any significant adverse effect on the environment.
> • Clause 1(b) applies only to [the applicant] and not to the consent authorities and their consideration of the application. By reason of section 290(1) of the Act, clause 1(b) likewise does not apply to this Court in its consideration of the appeals.
> • The applications as filed must be determined upon their own merits."

[171] Of course it was the case for the applicants that there were no adverse effects from their proposals. As it happened we heard some evidence as to consideration of alternative sites.

[172] Dr Mead wrote that alternatives to siting the wharenui Mataatua on the dune lands were considered. He stated [134] :

> "Five other sites were considered, examined and appraised in terms of advantages, disadvantages and priorities. Some cost less for the land, but far more for infrastructure. Some were too distant from Whakatane, or were too small, bearing in mind the future stages of the development. Others were too close to an existing marae and would have been seen as a threat. In the end there was really only the Piripai site that met all our requirements (financial, location, size, cultural importance). It also had the added advantage that it would allow TRONA to follow its long standing policy of recovering lost land of Ngati Awa.
>
> An important factor in the choice of site for the Mataatua Marae Complex was the centrality of the location from a cultural point of view. It is the only site visited by our site delegation from which it is possible to view the significant cultural landmarks that are meaningful to our people. Look to the ocean of Tangaroa and there lies Rurima, Moutohora, Whakaari, and on a good day,
>
> Te Paepae o Aotea. Far along the cost, one can see much of the rohe of Mataatua, that is included in the

> saying Mai I Nga Kuri a Wharei ki Tihirau. On the land are Koohi Point, Toi's Pa, Kaputerangi, behind is Te Tiringa and Putauaki, and moving around there stands Whakapaukorero."

[173] The consideration of alternatives was confirmed by Mr H Ranapia who was called by TRONA.

[174] Ms Nicholas' conclusion on the substantive issues is that both applications may be granted because they achieve the purpose of the Act. There was no expert evidence for any other party which disagreed with Ms Nicholas on the substantive issues. Mr C I Kemeys is an equally experienced planning consultant who came to similar conclusions to Ms Nicholas.

[175] It is possible that human remains (koiwi) will be uncovered in the 100 acre block during the course of preparation work for building, or subsequently. If we grant consent, there appear to be clear protocols in proposed conditions to assist in that situation. The principal reason that skeletons may be found is that the dune lands generally, were a "battle" or skirmishing ground on many occasions according to some of the witnesses. It is also possible that some of the victims of the flu epidemic in the early 20th Century may have been buried on the block but we consider they are much more likely to be closer to the high water mark, as stated by several witnesses. That area will be included in the proposed reserve [135] and thus the koiwi will be able to lie in peace.

Kaitiakitanga

[176] This term is defined in section 2 of the RMA as follows:

> "'Kaitiakitanga' means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship:"

[177] The appellants were strongly critical of TRONA's claim that by siting the Mataatua wharenui in particular and the marae generally on the 100 acre block, Ngati Awa would act as kaitiaki [136] of Opihi. The appellants were unhappy with the body appointed by the Parliament, that is TRONA, setting itself up as kaitiaki.

[178] There was evidence about the neglect of Opihi, partly due perhaps to the fact that all the registered trustees had been dead for some years. We were given a document recording an order [137] of the Maori Land Court made on 18 January 2002 which appointed 12 individuals (8 of whom gave evidence to us) as joint trustees of Opihi:

> " … for the benefit of the Ngatiawa (Whakatane section) and Ngati Pukeko Tribes as a Native Burial Site."

Those of the appellants who were trustees (including Messrs Ta Rau, Fairlie, Kopae, Meihana, Te Weeti and Hireme) considered they were kaitiaki.

[179] It seems to us that the trustees appointed by the Maori Land Court (another Government appointed Court) can have no more status as kaitiaki than TRONA. It appears to us more likely that the relevant hapu with mana whenua must be kaitiaki under tikanga Maori.

New Zealand Bill of Rights Act

[180] Another argument for Te Toka was based on the preservation of the rights to freedom of expression and practice of a religious minority — relying on sections 13 and 20 of the *New Zealand Bill of Rights Act 1990*. Mr Lane submitted that the "land based" spiritual beliefs and practices of Te Toka needed to be protected by refusal of grant of resource consent. We have no positive jurisdiction under the *Bill of Rights Act 1990*. Certainly our decisions must be consistent with it [138] but we cannot find that a person's exercise of their property rights on the 100 acre block, if not illegal otherwise under the RMA, would in themselves be a breach of the human rights of Te Toka's members unless there were off-site effects as discussed in *Zdrahal v Wellington City Council* [139] .

Section 406 of the RMA

[181] Mr Lane submitted for Te Toka that we should refuse consent to the subdivision under section 406 of the RMA as being against the public interest. However, in our view, the matters he raises are effectively considered in our consideration of the applications for land use and subdivision consents already discussed.

[182] We cannot escape the fact that in the end most substantive decisions under the RMA do involve value judgements.

But at least the Court can set out the rational (and occasionally scientific) findings which it has made and considered and the emphasis it puts on each. The parties and other readers of the decision can then make up their own minds whether the Court is being reasonable, or whether it is simply rationalising.

[183] Some of the appellants' witnesses questioned the Court's rights to make such value judgments concerning Maori issues. There was a paradoxical quality to these suggestions since it is the appellants who are asking the Court for relief. The crude answer is that Parliament gave the Court power (on appeal from local authority decisions) to make such decisions. The Court of Appeal has stated that the Environment Court is "the representative of New Zealand society as a whole": *Watercare Services Ltd v Minhinnick* [140] . We would not wish to place too much emphasis on our role, because when the Court of Appeal has disagreed with the Environment Court then it has stated that it is an error of law for the Environment Court to "espouse" a "watchdog role": *Mullen v Parkbrook Holdings Ltd* [141] .

[184] Mr Lane submitted that the Land Air Water Association case [142] and *Heta and Others v Bay of Plenty Regional Council* [143] were both incorrect as a matter of law because the Environment Court does not have jurisdiction to find whether or not land is waahi tapu. He stated:

> "If governments can determine the customary laws of Indigenous peoples then we are essentially terminated for we have nothing to bind us."

[185] We observe first that we are not the Government. New Zealand has an important convention [144] 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.

[186] Mr Lane and some of the witnesses suggested that granting resource consents in these cases would cause generations of discord within Ngata Awa because they involve dislocation of tipuna [145] , the desecration of a waahi tapu, increased population pressure on the entire area, and the prevention of a religious minority practicing land based spirituality.

[187] That could be a self-fulfilling prophecy, but it need not be. We find that the answers to the appellants' concerns are that:

(1) There will be little or no dislocation of tipuna in fact, since first Opihi Whanaunga Kore does not extend onto the 100 acre block and, secondly, other tipuna are more likely to be in the undisturbed 100 metre strip along the north western edge of the block;
(2) The tipuna should be better protected in Ngati Awa eyes since the people as a whole will be there in Mataatua wharenui to care for them;
(3) The building of houses and the Mataatua Wharenui will not desecrate an urupa, since there is none on the 100 acre block;
(4) The population of the area will definitely increase, but instead of people driving across the dune lands, the marae will block access to Opihi and the proposed reserve seawards of the houses will stop driving across the last 100 metres of the 100 acre block;
(5) Any appropriate religious practice can be carried out on Opihi.

[J] Outcome

[188] Taking all relevant considerations into account, and providing for the relationship of Ngati Awa and its hapu with the 100 acre block as part of its ancestral land we find that the purpose of the Act will be achieved if the Council's decisions are confirmed. Under section 105(1) of the Act resource consents for land use and subdivision are granted subject to resolution of the outstanding appeals.

[189] Accordingly the proceedings are adjourned until the outstanding technical appeals are resolved.

[190] Costs are reserved.

[191] We would like to thank the parties' representatives for their guidance during the case. Counsel, of course, carried out their responsibilities with proper professionalism. As for the other representatives: Mr Lane, for his often unruly group Te Toka Tu Moana o Irakewa gave us submissions which we value for their thoughtfulness and comprehensiveness.

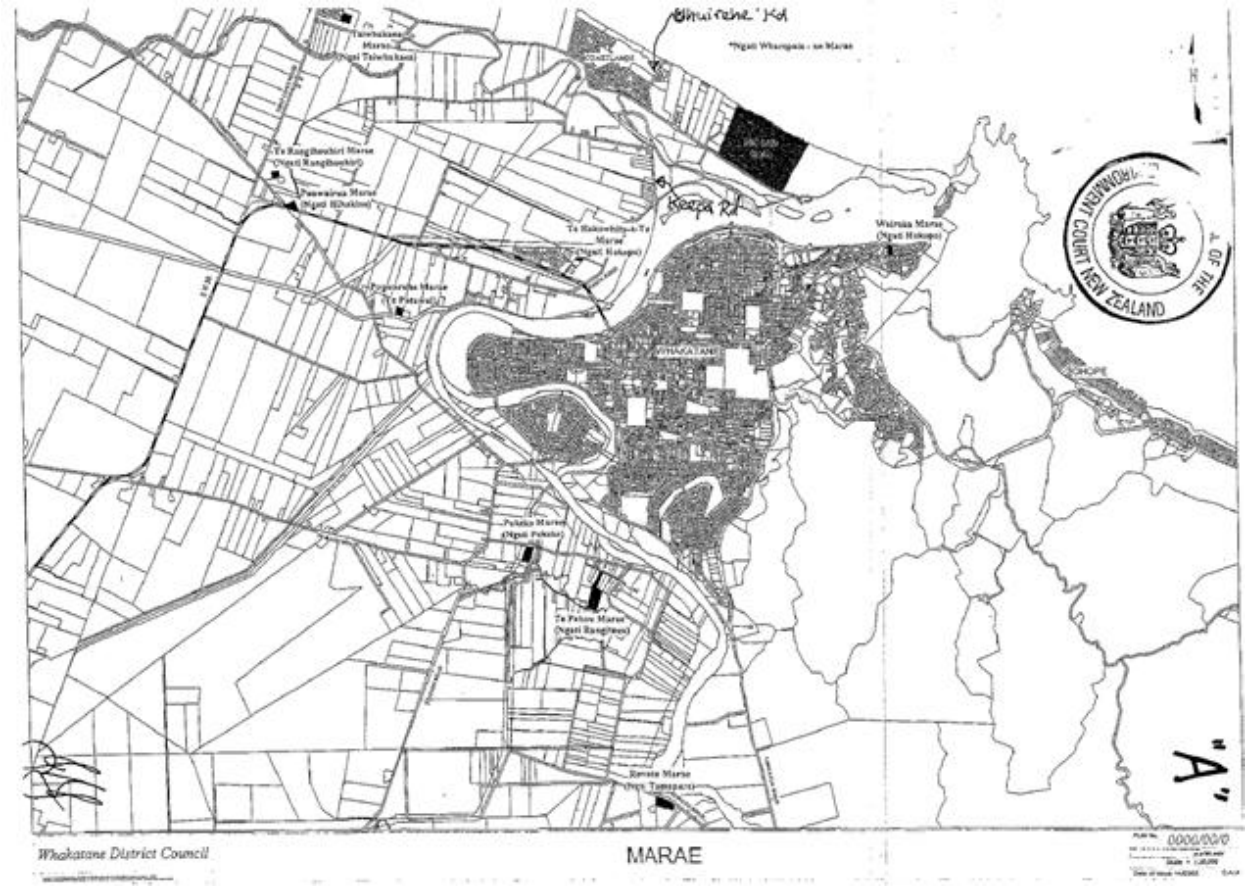
For Ngati Hokopu ki Hokowhitu, we appreciated the courtesy shown to the Court by Mrs Ashby, Mr Paul, and Mr Hireme. We appreciate that it is not easy to represent a party when not only are you each giving evidence, but are passionately involved in the outcome of the proceedings as well, and all this before a Court you may consider has no role in tikanga Ngati Awa at all.

[192] Finally, we remind the parties that the resource consents we have confirmed are permissive only. We are not directing that the Mataatua wharenui be built on the 100 acre block, nor that the land be subdivided. We are deciding only that if that is what the applicants want to do, then that would achieve sustainable management of the natural and physical resources of the dune lands, and would also, on Ngati Awa evidence, recognise and provide for the relationship of Ngati Awa with their ancestral lands.

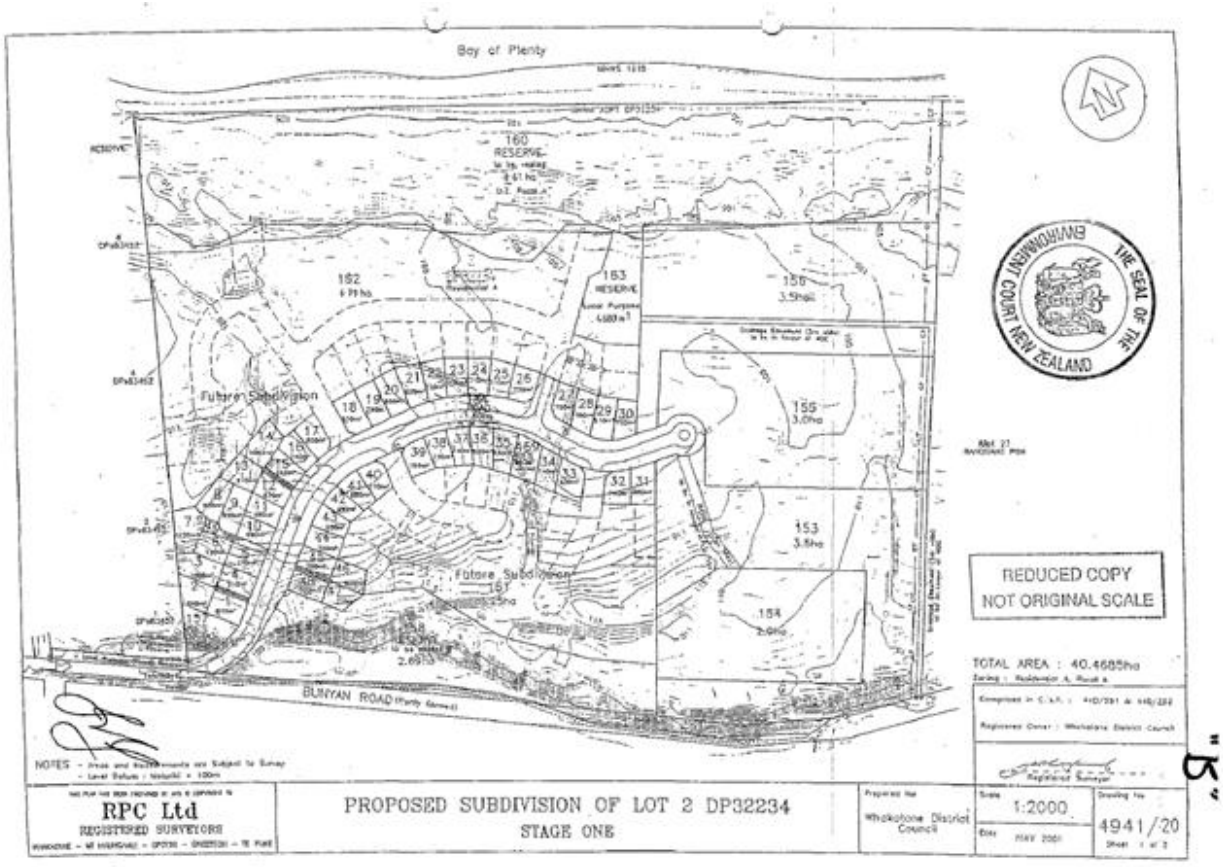
Annexures:

A Locality plan;
B Proposed subdivision plan;
C Proposed marae layout plan (Stage 1);
D Distribution of Ngati Awa hapu in 1840.

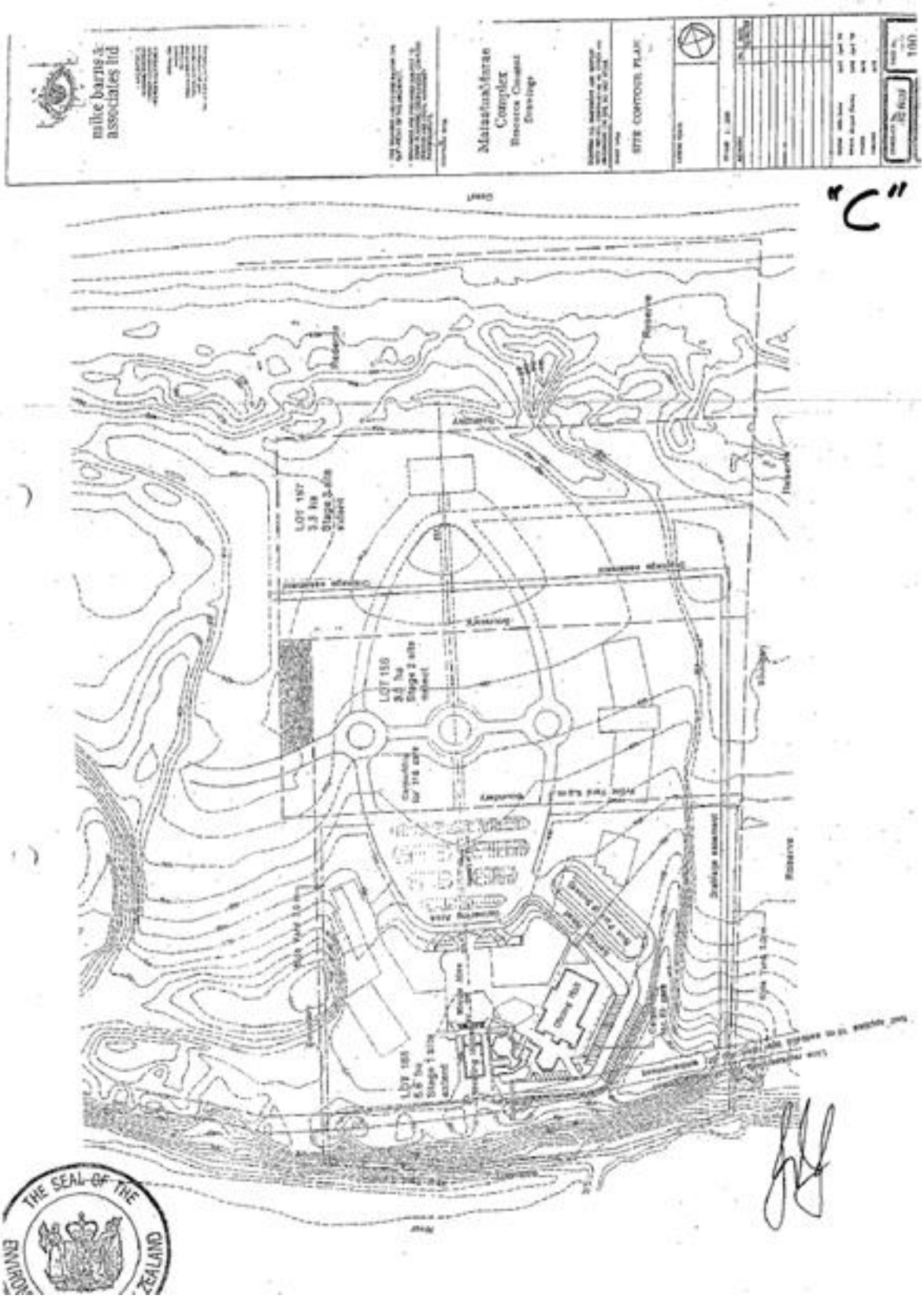
A



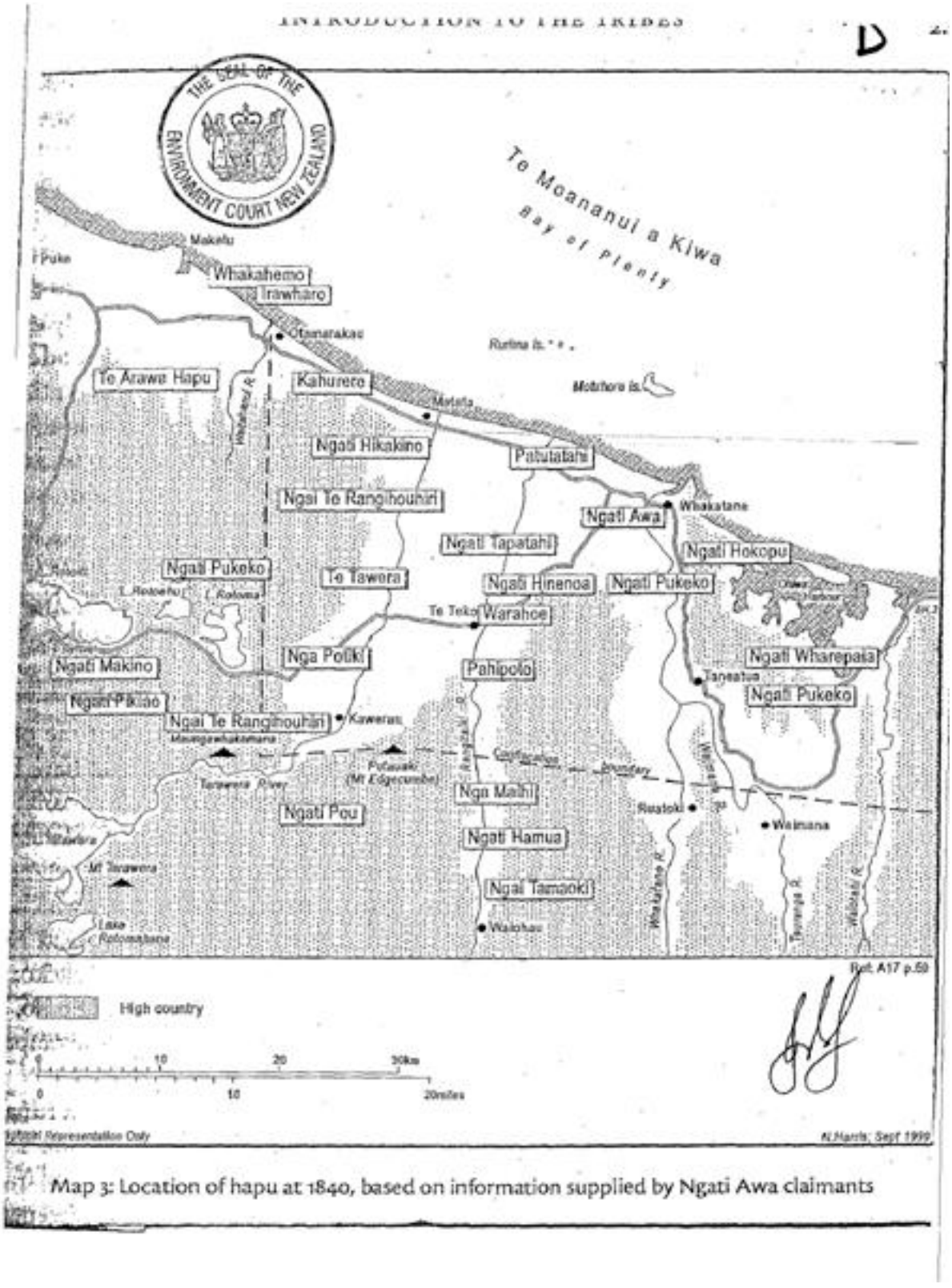
B


Bay of Plenty
160 RESERVE
152
153 RESERVE
156 3.5ha
155 3.0ha
153 3.5ha
154
Future Subdivision
Future Subdivision
BUNYAN ROAD
ENVIRONMENT COURT NEW ZEALAND
THE SEAL OF THE
REDUCED COPY
NOT ORIGINAL SCALE
TOTAL AREA : 40.4685ha
NOTES
RPC Ltd
REGISTERED SURVEYORS
PROPOSED SUBDIVISION OF LOT 2 DP32234
STAGE ONE
Whakatane District Council
1:2000
4941/20

C


mike barns & associates ltd
Matauhu/Murau Complex
Resource Consent Drawings
SITE COMMON PLAN
"C"
Reserve
Roadside
Drainage easement
Reserve
THE SEAL OF THE
NEW ZEALAND

D



Map 3: Location of hapu at 1840, based on information supplied by Ngati Awa claimants

Footnotes

1 New Zealand Statutes 1988/227.

2 It is known historically to Lands and Survey Records as Lot 28B1B2 and to tangata whenua as “Rakauwhakapae”.

3 "A" is a copy of Exhibit 10.1 "Marae" as produced by Mr C I Kemeys.
4 We use the abbreviation "Hokowhitu" rather than "Ngati Hokopu" since the appellant is a sub-hapu of the latter.
5 "foreign race"A Dictionary of Maori LanguageH M Williams, 6th Edition [Government Printer, Wellington 1957] cited as [Williams] hereafter.
6 March 2001, Wellington.
7 Wai 46, October 1999.
8 "boundary" [Williams].
9 "canoe" [Williams].
10 The Ngati Awa Raupatu Report Waitangi Tribunal Report 1999 (Wai 46) p 14.
11 The Ngati Awa Raupatu Report Waitangi Tribunal Report 1999 (Wai 46) p 15.
12 The Ngati Awa Raupatu Report Waitangi Tribunal Report 1999 (Wai 46) p 99.
13 In Maori a "wharenui".
14 WAI 46 dated 9 October 1999 at p 100.
15 "burying place" [Williams] ("graveyard").
16 H M Mead's Evidence-in-chief, paragraphs 18 and 19.
17 H M Mead's Evidence-in-chief, paragraph 23.
18 A L Nicholas' Evidence-in-chief, paragraphs 5.2 to 5.7.
19 Rules 5.4 to 5.20.
20 [1997] NZRMA 433 (Elias J).
21 [1994] NZRMA 385.
22 NZCPS General Principle 2 [p.2].
23 Relevant under section 104(1)(e) of the Act.
24 Proposed RLMP para 10.4.iii.
25 Relevant under section 104(1)(a) and (i) of the RMA.
26 Section 6(e) RMA.
27 Section 7(a) RMA.
28 Section 8 RMA.
29 [2001] 3 NZLR 213 at paragraph [73] (HC).
30 As identified by the heading to Part II of the RMA.
31 Under section 2G9(3) of the Act.
32 Section 2 of the RMA.
33 Quoting the words of section 6(e) of the RMA.
34 Maori Custom and values in New Zealand Law NZ Law Commission para 130 citing an unpublished paper written for the Commission by Joseph Williams ("He Aha Te Tikanga Maori").
35 [2002] NZRMA 401 at para [41] (HC).
36 [2001] 3 NZLR 213.
37 [2002] NZRMA401 at para [31].
38 [2002] NZRMA 401 at para [49].
39 [2000] NZRMA 289 at para [62].
40 Section 2 of the RMA.
41 HackingThe Social Construction of What? (Harvard University Press, Cambridge, Massachusetts, 1999) p 33.
42 It is arguable that these are two systems in themselves.
43 European Court of Human Rights (Ser A, No 204)(1995) 67.
44 Not necessarily value free.
45 Although it is possible to argue that a scientific probability of (say) 99.999999% is a better bet than a metaphysical certainty.
46 This is not a position of abject or pious reverence for science. Scientific knowledge contributed after all, to gas chambers in concentration camps, to Hiroshima and Nagasaki, to chemical weapons and various ecological disasters.
47 Section 6(b) of the RMA.
48 See paragraph 49 above.
49 Signifying consent *[Williams]*, or 'that's ok' in order to treat each other with respect, and not trample on others' mana. In the end the Court may still have to decide the issue.
50 Hammond J in *TV3 Network Services v Waikato District Court Council* [1997] NZRMA 539 at 548.
51 Section 7(d) of the RMA.
52 See HackingThe Social Construction of What (Harvard University Press, Cambridge, Massachusetts, 1999) p 34.
53 Section 276(1)(a) of the RMA.
54 Section 276(2) of the RMA.
55 11 F 2d 212, 213-214 (2d Cir 1926).
56 Notes on US Federal Rule 702.

[1987] 1 NZLR 641 (Court of Appeal).
At page 665.
At pages 682-683.
High Court, Auckland M360-SW01, Harrison J, 19/2/02 at paragraph [61].
[1994] NZRMA 289 at 301.
(1993) 1B ELRNZ 8; [1994] NZRMA 49.
NZ Maori Council v Attorney-General [1989] 2 NZLR 142 .
Decision A74/2002.
[1994] NZRMA 481.
Section 88(4) of the RMA.
This should, we assume, be 'applications'.
Decisions A103/95 (interim) and A6/97 (final).
Decision A85/96.
[1995] NZRMA 314 at 318.
High Court, Wellington, CP 403/91, 6 January 1992.
Decision A110/01 at paragraph 453.
Section 92(2)(a) of the RMA.
Section 92(2)(c) of the RMA.
Section 92(4) of the RMA.
Decision W91/93.
Decision W1/95.
Decision C98/98.
Decision A110/01.
Decision A110/01.
[1965] AC 1111 (PC).
High Court, Wellington, CP403/91, 6 January 1992.
[1965] AC 1111 at 1124 (Lord Morris of Borth-y-Gest).
Section 92(2)(a)(i) of the RMA.
Section 92(2)(2)(c) of the RMA.
[1995] NZRMA 314.
Under section 274 of the RMA.
Judge C Wainwright "Maori representation issues and the Courts" — a paper for a conference on Roles and Perspectives in the Law, Wellington 5-6 April 2002.
H Ranapia, Evidence-in-chief paragraph 23.
H M Mead, Evidence-in-chief paragraphs 1 and 2.
H M Mead Evidence-in-chief paragraph 29.
See paragraph [2] of this decision.
H Mason Brief of evidence paragraphs 20-26.
At the time he gave evidence. In September 2002 he was sworn in as a Judge of the Maori Land Court.
L R Harvey, Evidence-in-chief, paragraphs 38 and 39.
L R Harvey, Evidence-in-chief, paragraph 9.
Evidence-in-chief of L R Harvey, paragraphs 51 to 54.
Mrs Kutia.
Two pages from this — p 7 and a map are Document 29.1 on the Court's record.
"Wahi Tapu Sites of Ngati Awa" p 7.
Notes of evidence p 98.
Section 8 *Te Runanga o Ngati Awa Act 1988*.
H Hireme, paragraph 14.
2002 Notes of evidence p 37.
"No" [Williams].
L H Harvey, Evidence-in-chief, paragraph 10.
H Mason, Evidence-in-chief, paragraph 14.
L R Harvey, para 32, referring to the Maori Land Court Minute Book Whakatane 9 pp 268-269.
Affidavit of L R Harvey dates 20 May 2002 paragraph 4.
Native Land Court Whakatane Minute Book pp 25-30.
Paragraphs [11] to [15] and Annexures "D" to "F" of the affidavit of L R Harvey dated 20 May 2002.
Annexure "D" to the affidavit of L R Harvey dated 20 May 2002 at paragraph 11.
Volume 68 Whakatane Minute Folio 59. The references to "Utaira" are, according to Mr Harvey, incorrect, and should be to "Utaora".

114 68 Whakatane MB 60-61.
115 L R Harvey, Affidavit dated 20 May 2002 paragraph 30.
116 L R Harvey, Affidavit dated 20 May 2002 paragraph 30.
117 A107/96 at pp 11-12.
118 Decision A10/2001 at paragraph [87].
119 Decision A10/2001 at paragraph [100].
120 Decision A74/2002 at paragraphs [380] to [385], [405] and [409].
121 Loosely: “gave their genealogies”.
122 H M Mead, Brief of evidence, paragraph 30.
123 L R Harvey, Brief of evidence, paragraphs 56 and 57.
124 We think Mr Harvey has the year wrong — see paragraph [129] above.
125 WAI 46 (dated 9 October 1999) at Map 4.
126 WAI 46 (dated 9 October 1999) at p 16.
127 Holism: “the theory that certain wholes are to be regarded as greater than the sum of their parts.” The Concise Oxford Dictionary (Clarendon Press, 1990) p 562.
128 Section 5 of the RMA.
129 Reported at [1999] NZRMA 66 [see paragraphs (117)-(120).
130 [1988] 1 NZLR 385 at 391 (CA per Cooke P).
131 Evidence in chief of L R Harvey paragraph 55.
132 Decision W189/96.
133 Decision A110/01 paragraph [74].
134 H M Mead, Brief of evidence, paragraphs 22 and 23.
135 See paragraph [25] above.
136 “guardians”.
137 96 Whakatane Minute Book 158-161.
138 Section 4 *New Zealand Bill of Rights Act 1990*.
139 [1995] NZRMA 289 (HC, Greig J).
140 [1998] NZRMA 113 at 125 (CA).
141 [1999] NZRMA 23 at 34 (CA).
142 Decision A110/01.
143 Decision A93/2000.
144 Montesquien's “Separation of Powers”.
145 “Ancestors” [*Williams*].