BEFORE INDEPENDENT HEARING COMMISSIONERS IN WELLINGTON CITY

I TE MAHERE Ā-ROHE I TŪTOHUA MŌ TE TĀONE O TE WHANGANUI-A-TARA

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the hearing of submissions on the Wellington City Proposed District Plan, Hearing 1 - Strategic Direction

Muaupoko Tribal Authority Legal submission

Summary

1. The WCC accepts that MTA represents Muaūpoko and that Muaūpoko "have a traditional rohe that includes Te Whanganui a Tara", but the MTA was not consulted in the preparation of the PDP.

2. The MTA has requested amendments to the PDP to reflect important tikanga connections with the region, supported by extensive history and current practices.

3. The MTA maintains that the RMA 1991 requires inclusion of the amendments, noting recent case law on these issues that has emphasised the complexity of tikanga, evolving understandings, and cautioning that councils ought not be involved in making definitive judgments on ancestral connections except in exceptional situations.

The standing of the Muaupoko Tribal Authority

4. Muaūpoko Tribal Authority (MTA) is the mandated organisation for the Muaūpoko Iwi. The MTA represents Muaūpoko for the purposes of the Resource Management Act 1991 (RMA) and is mandated by the Crown for Treaty of Waitangi settlement negotiations and under the Māori Fisheries Act 2004.

5. In 2013 the Muaūpoko Tribal Authority commenced formal Treaty settlement negotiations with the Crown (now paused) over an area of interest which includes Te Whanganui-a-Tara. The Crown recognised the mandate of the MTA in 2013.[1] It signed an agreement relating to common expectations and matters for agreement in December 2013.[2]
6. The MTA is also an Iwi Aquaculture Organisation under the Māori Commercial Aquaculture Claims Settlement Act 2004.

7. Muaūpoko is also an applicant for orders to recognise customary rights in the foreshore and seabed of Te Whanganui-a-Tara under the Marine and Coastal Area (Takutai Moana) Act 2011.[3]

Historic and current information – key points

8. From the materials filed with the panel, the key points are:

9. Muaupoko occupied Te Whanganui a Tara in some form (mostly referred to as Ngai Tara) roughly between 1300-1400 to 1820 AD (ie around 400-500 years). They explored, named (Te Whanganui a Tara, Kaiwharawhara, Te Aro, Te Awakairangi etc), before occupation was heavily disrupted in a few short decades by iwi heke coming to the area with European firearms.

10. The question of who controlled the harbour remained so unsettled in 1839-40 that Te Ati Awa were armed at all times at their residences within the harbour and killings occurred in Heretaunga. A peace agreement/s with Rangitāne was made in late 1840.

11. Historians consider customary rights might have remained at/past 1840 – but this was never tested in early purchases or Court proceedings, since it was with Te Ati Awa only.

12. The Waitangi Tribunal found that Te Ati Awa sold to the NZ Company in order to promote their rights, but had few customary interests to actually sell at that time, and customary title to the harbour was never extinguished by the NZ Company purchase.

13. The Waitangi Tribunal also found that Ngati Toa never had any customary interests in the harbour. The Ngati Toa settlement nevertheless includes a "Statement of Coastal Values" for the harbour.

14. Waitangi Tribunal found that Muaupoko no longer retained customary interests sufficient to found Treaty breaches, but said that cultural connections remained nonetheless:[4]

> *"No Treaty breach findings have been made in relation to Rangitāne and Muaūpoko, because we consider that they lost their rights to land within the Port Nicholson block prior to the arrival of the Crown. Nevertheless, we consider that the long history of occupation of Te Whanganui-a-Tara and the surrounding area by these and related*

[1] https://www.govt.nz/assets/Documents/OTS/Muaūpoko/Muaūpoko-Crown-Recognition-of-Mandate-25-Sep-2013.pdf
[2] https://www.govt.nz/assets/Documents/OTS/Muaūpoko/Muaūpoko-Crown-Expectations-and-Matters-for-Agreement-14-Dec-2013.pdf
[3] CIV-2017-485-261 to be heard in 2024-25.
[4] Waitangi Tribunal (2003) p xxvi.

peoples should be recognised in a meaningful and public way by the Crown, local bodies, and other iwi."

15. The Tribunal also said:[5]

> *"We recognise that tangata whenua also has a broader meaning, and that tangata whenua connections remain for all who can claim them through whakapapa and historical association, but tangata whenua rights are based on current ahi ka. Tangata whenua rights imply 'ownership'; tangata whenua connections do not imply ownership. Tangata whenua rights, and any sense of 'ownership' that went with them, were lost if ahi ka was lost by conquest or abandonment. However, tangata whenua historical connections can remain forever."*

16. In research in 1998 Professor Alan Ward noted, talking about mana as a source of rights:[6]

> *"There remains, however, the question of the mana relating to the fact of hundreds of years of occupation, after that occupation had ended – even after many generations had passed, (and notwithstanding the boundary established by the peace-making of 1840). That former occupation by Ngāti Kahungunu is marked by the place names on the land and the stories associated with them, as many speakers of Muaūpoko, Rangitāne and others have pointed out in recent years, in respect of Te Whanganui-a-Tara. It may well be that this confers interests of a non-property kind. As Mr Nicholson says, raupatu does not necessarily involve the entire extinguishment of all that went before".*

17. In 1992, when the Crown was disposing of surplus railways lands in the Wellington region from the southern coast to Pukerua Bay in the west and Maymorn in the Upper Hutt Valley in the east, Muaūpoko were identified as a group having interests in those areas alongside Ngāti Toa, Ngāti Rangatahi, Rangitāne, Ngāti Ira and Te Atiawa.[7]
18. Muaupoko continue to the current day to be called upon when historic artefacts are found. This includes:

19. Being involved in tikanga surrounding the preservation of a centuries old waka fragment found on the banks of the Hutt River 2006.

20. The recent decision of an expert panel that Muaūpoko should be included in discovery protocols for the Kaiwharawhara ferry terminal development.

21. To be clear, Muaupoko does not accept entirely the Waitangi Tribunal findings from 20 years ago. As discussed below, recent cases before the Courts and the Tribunal accept an evolving understanding of tikanga and how it applies in both RMA setting and Crown settlements.

Further submissions

22. Te Atiawa and Ngati Toa have both opposed the amendments. Ngati Tao on the basis of complexity. Te Atiawa find the proposal to include reference to Muaupoko in the plan, and it

[5] Waitangi Tribunal (2003) p34.
[6] Ditto, p151.
[7] *https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68354911/Reports%20on%20Railway%20Lands.pdf*

seems, any other iwi, to be offensive to them. These responses need to be borne in mind when considering the case law below on issues of this nature that have arisen in Auckland, where Ngati Whatua has maintained that recognising other iwi undermines its very existence in the region.

Section 32 report

23. The Section 32 report discusses the importance of the objectives in this part of the plan and notes:

> *AW-O3 Mana whenua can exercise their customary responsibilities as mana whenua and kaitiaki with their own mātauranga Māori.*
>
> *AW-O4 The development and design of the City reflects mana whenua and the contribution of their culture, traditions, ancestral lands, waterbodies, sites, areas and landscapes, and other taonga of significance to the district's identity and sense of belonging.*

24. Without the amendments proposed, Muaūpoko maintains that these objectives will not be met because most of the Māori history of the area will not be reflected, including place names, and traditions of sites, waterbodies, landscapes, taonga, and mātauranga Māori.

Officer response – s42A report

25. The Section 42A report notes:

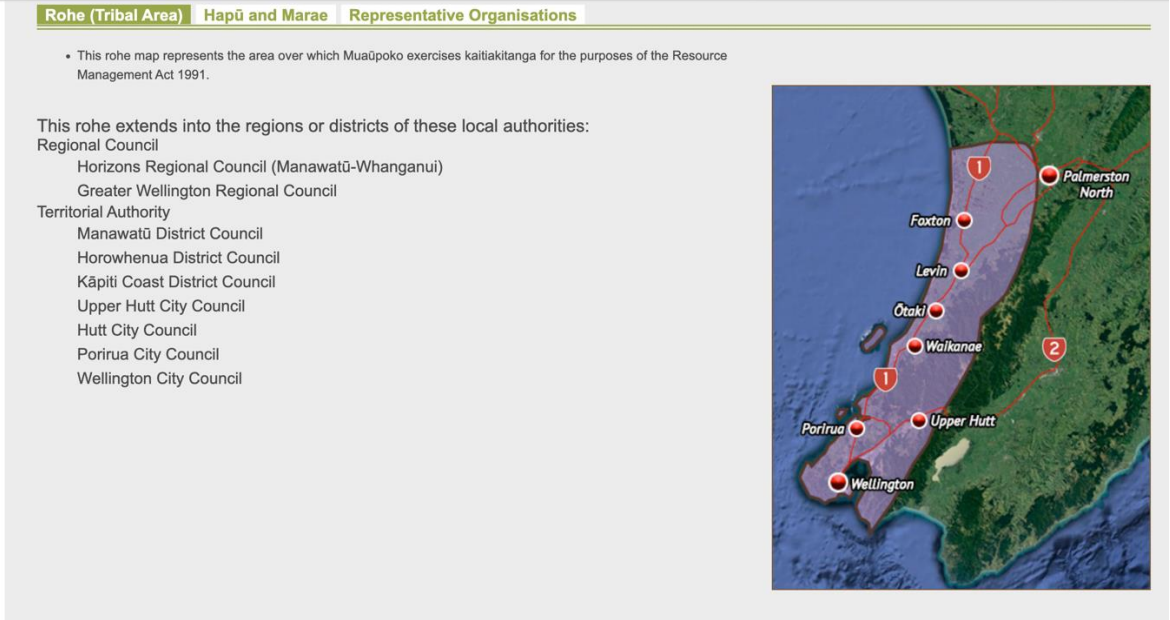
> *776. .... It is acknowledged that Muaūpoko Tribal Authority Inc (and Muaūpoko iwi) have a traditional rohe that includes Te Whanganui a Tara. However, the Council recognises the following iwi authorities as mana whenua of Wellington City for the purpose of the plan prepared under the RMA:*
> *a) Taranaki Whānui represented Port Nicholson Block Settlement Trust; and*
> *b) Ngāti Toa Rangatira represented by Te Rūnanga o Toa Rangatira Incorporated.*

26. With respect, this does not address the substance of the Muaupoko amendments or the failure to engage the iwi in the development of the plan. Council officers have not explained their approach to the definition of tangata whenua and mana whenua. This is not a straightforward matter, as we address below.

1. Nor have Council officers explained how or why they have ignored statutory information provided to them under s35A of the RMA 1991. Information about Muaupoko and its area of customary interests required by section 35A to be collected by the Crown and provided to local authorities for their information.

27. Muaupoko means literally head of the fish. The Muaūpoko area of interest stretches from the Rangitikei River to Turakirae (Cape Palliser) in Te Whanganui-a-Tara (Wellington Harbour). Te

Puni Kōkiri's Te Kāhui Māngai site identifies this Muaūpoko area of interest and includes the map below:[8]



2. The extent of Muaūpoko's interests reflects to a significant extent its close relationship with Ngati Apa and Rangitane, also of the Kurahaupo waka, whose combined control over this part of the island was relatively consistent over centuries before the disruptions of European settlement.

Matter of national importance

3. Section 6(e) RMA 1991 refers to "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga."

4. This relationship does not need to be a mana whenua relationship to be a matter of national importance.

5. The interests recognised under para (e) are not determined by legal ownership or property rights. In this regard, the Waitangi Tribunal comments about the need to provide for continuing ancestral connections with Te Whanganui-a-Tara is significant (even if Muaupoko insists that the Tribunal under-estimated the strength of those connections at 1840 and beyond).

Recent relevant decisions on s6(e) matters

6. Several recent decisions address the issues that the Muaūpoko submission raises.

[8] www.tkm.govt.nz/iwi/muaupoko/#. The site records that "Te Kāhui Māngai also assists the Crown in meeting its obligations to local authorities under section 35A of the Resource Management Act 1991." Namely, to "provide to each local authority information on the iwi authorities within the region or district of that local authority and the areas over which 1 or more iwi exercise kaitiakitanga within that region or district". And local authorities are obliged to include this information in their records (s35A(2)(b)).

Ngati Maru decision[9]

7. This 2020 decision of the High Court was concerned with consent conditions for a project in the Auckland CBD requiring recognition of 19 groups claiming mana whenua in Auckland including through "the placement of 19 pou whenua" and:

> *[9] …. all 19 iwi authorities to establish a Forum and prepare a Kaitiaki Engagement Plan with the assistance of the Forum to "assist Mana Whenua to express tikanga, fulfil their role as kaitiaki, and establish the engagement process before, during, and after the completion of construction activities".*

8. The Court noted the key concern of Ngati Whatua:

> *[110] ….. It is useful to repeat his actual concern here:*
>
> *Given the proposal was for 19 Pou Whenua, which reflects the Wider Iwi, Ngāti Whātua Ōrākei took this as another example of the erosion of our customary rights and the elevation of status of many other iwi who cannot claim any customary rights to the land in the Auckland CBD to the same extent as Ngāti Whātua Ōrākei. We had no choice but to object to the proposals in the strongest possible terms.*
>
> *In Māori terms a turangawaewae or 'place to stand', is a place that is indisputably your land and water and a place where your tikanga or world view prevailing is fundamental. If Ngati Whatua Orakei has no turangawaewae or any place where its views matter the most (and more than any others at all), then it essentially is no longer Māori and it certainly is no longer Ngāti Whātua Ōrākei. If even in our very heartland, the central Auckland Isthmus and the CBD, we are simply accorded the same status as the Wider Iwi, then our very being as Māori and as Ngāti Whātua Ōrākei is undermined.*

9. Whata J determined that the issue was not which iwi was pre-eminent or dominant in an area but:

> *[111] …. It requires an examination of whether, having regard to tikanga Ngāti Whātua Ōrākei, the pou whenua condition is undermining their very being as Māori and as Ngāti Whātua Ōrākei and if so, whether the imposition of a condition of this kind serves the sustainable management purpose, and accords with the directions at ss 6(e),7(a) and 8."*

10. Councils under the RMA should not be in the business of 'ranking' iwi, but:

> *engaged in a process of ascertainment of tikanga Māori in order to discharge, among other things, the duty at s 6(e) to recognise and provide for the relationship of Māori and their customs and traditions with their whenua and other tāonga.*

11. The Court commented on the Auckland plan and noted:

> *[125] I agree that the AUP does not envisage the ranking of iwi. However, the clear overarching policy of the AUP is to require resource management decision-making to*

[9] *Ngāti Maru Trust v Ngāti Whātua Ōrākei* [2020] NZHC 2768: https://ngatiwhatuaorakei.com/wp-content/uploads/2020/10/Ngati-Maru-Trust-ors-v-Ngati-Whatua.pdf

be informed by "Mana Whenua" perspective, including their mātauranga Māori and tikanga. That must logically include taking into account and responding to claims by iwi to have their mana whenua recognised and provided for in terms of their mātauranga Māori and tikanga, even when those views conflict with the views of other iwi.

12. The Court also noted that thinking was not fixed on the issue of these cultural values:

> *[64] The RMA is replete with references to kupu Māori, including Māori, iwi, hapū, kaitiakitanga, tangata whenua, mana whenua, tāonga, taiapure, mahinga mataitai and tikanga Māori. Parliament plainly anticipated that resource management decisionmakers will be able to grasp these concepts and where necessary, apply them in accordance with tikanga Māori. In this regard, local authorities and the Environment Court regularly deal with these concepts and their application, and have done so for nearly 30 years. What can be seen from even a cursory a review of that case law over that time span is an evolving understanding and application of mātauranga Māori and tikanga Māori.*

13. On the issue of mana whenua, the Court quoted the Waitangi Tribunal in *The Tāmaki Makaurau Settlement Process Report* where the Tribunal noted:

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

Ngati Whatua litigation[10]

1. This case examined the same issues from the perspective of Crown Treaty settlements.

2. Ngāti Whātua Ōrākei sought a declaration from the Court that they had ahi kā and mana whenua in relation to specified land in central Tāmaki Makaurau (Auckland) at tikanga.

3. After an 11 week hearing the High Court determined that it was prepared to make declarations that Ngati Whatua had that status, but also, that other groups contested that status.

4. The Court noted contested evidence over the meaning of customary terms. For example:

> *[182] Tāmati Kruger's evidence is that ahi kā roa, meaning permanency, is "the presiding principle that will legitimise mana whenua and take whenua". He*

[10] *Ngāti Whātua Ōrākei v* Attorney-General (No 4) [2022] NZHC 843: https://assets.maorilawreview.co.nz/ngati_whatua_orakei_trust_v_attorney-general_no.4_2022_nzhc_843.pdf and see also declarations in decision No 5: at https://www.courtsofnz.govt.nz/assets/cases/2023/2023-NZHC-74.pdf

distinguishes ahi kā or ahi kā roa, a permanent presence, from ahi tahutahu (or ahi teretere), an occasional presence, and from ahi mātaotao, a rare presence like camping. A cold fire could be relit with effort but ahi weto was a completely extinguished fire. Tāmati Kruger emphasises that mana is not held "over" land or atua or people but only follows from actions fulfilling responsibilities to the land, atua or people. Te Kurataiaho Kapea's evidence is that the mana whenua of an iwi goes hand in hand with their permanency in that place.

Kaiwharawhara development – Covid fast-track decision[11]

1. This recent decision concerned the Kiwirail ferry terminal redevelopment.

2. The panel determined that Muaūpoko should be included in consent conditions regarding archaeological finds since the development might, as a matter of logic, uncover taonga of importance to Muaūpoko.

3. The panel also determined that Muaūpoko should not be involved in advising on design of the terminal, but urged te Ati Awa and Ngati Toa to include them through manaakitanga.

4. The limits of a manaakitanga approach are demonstrated by the Te Ati Awa submission finding it offensive to mention by name other iwi in the district plan.

Statutory acknowledgments

5. Both the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009 and the Ngati Toa Rangatira Claims Settlement Act 2014 include statutory acknowledgments in Te Whanganui a Tara. The Council must consider those when making its plans and may incorporate them as information in the plans.

6. They are not exclusive. For example section 37 of the 2009 Act provides:

> ***37 The Crown not prevented from providing other similar redress***
> *(1) The provision of the specified cultural redress does not prevent the Crown from doing anything that is consistent with that cultural redress, including—*
> *(a) providing, or agreeing to introduce legislation providing or enabling, the same or similar redress to any person other than Taranaki Whānui ki Te Upoko o Te Ika or the trustees; or*
> *(b) disposing of land.*
> *(2) However, subsection (1) is not an acknowledgement by the Crown or Taranaki Whānui ki Te Upoko o Te Ika that any other iwi or group has interests in relation to land or an area to which any of the specified cultural redress relates.*

7. In relation to Te Whanganui a Tara, the acknowledgments present a complex picture of the relevant interests. The Taranaki Whānui statement for Wellington Harbour refers only to fishing interests and occupation established 'just prior to colonisation':[12]

[11] Kaiwharawhara Wellington Ferry Terminal Redevelopment decision report: https://www.epa.govt.nz/fast-track-consenting/referred-projects/kaiwharawhara-wellington-ferry-terminal-redevelopment/the-decision/
[12] https://www.govt.nz/assets/Documents/OTS/Taranaki-Whanui-ki-Te-Upoko-o-Te-Ika/Taranaki-Whanui-Deed-of-Settlement-Documents-19-Aug-2008.pdf

Wellington Harbour

The harbour was one of the highways used by Taranaki Whanui ki Te Upoko o Te Ika. At the time of pakeha settlement in 1839, it was crowded with waka of all types and was used for transport, fishing and sometimes warfare.

The harbour was a very significant fishery both in terms of various finfish and whales as well as shellfish. The relatively sheltered waters of the harbour meant that Maori could fish at most times from simple waka. The rocks in and around the harbour were named such as Te Aroaro a Kupe (Steeple Rock), Te Tangihanga a Kupe (Barrett's Reef) and so on. There were takiwa for whanau around the harbour and each had associated fisheries such as for ngōiro (conger eel). Each marae around the harbour had its rohe moana and the associated fishery. Pipitea Pa was named for the pipi bed in its immediate rohe moana. There are places within the harbour which were special for certain species such as kingfish and hapuku. Matiu Island had several pa or kainga situated around the island, each of which had a rohe moana to provide the food source to sustain them. Other resources came from the harbour including the seaweed such as karengo (sea lettuce), the bull kelp (rimurapa) and many others along with shellfish used variously at the pa. The mouths of the streams held their special resources such as the inanga (whitebait), piharau (lamprey) kahawai and tuna (eel).

The freshwater sources of the harbour were well known and highly prized not only by Taranaki Whanui ki Te Upoko o Te Ika, but also by the European traders who would fill water barrels while their sailing ships were anchored in the harbour. It is noted that these freshwater puna are still used to supply fresh water to Matiu/Somes.

The bed of the harbour is associated with the pa including Te Aro, Pipitea, Pito-one/Te Tatau o te Po, Waiwhetu, Owhiti, Hikoikoi, as well as those pa such as Kaiwharawhara, Ngauranga and others which were around the harbour just prior to colonisation.

8. The corresponding statement in the Ngati Toa settlement reads:

Wellington Harbour (Port Nicholson)

Wellington Harbour has high cultural, historical, spiritual and traditional significance to Ngati Toa Rangatira.

A well known narrative tells of how Wellington harbour was formed by nga taniwha Ngake and Whataitai. Ngake escaped, forming the entrance to the harbour and, as the water shallowed from what is now Wellington Harbour, Whataitai became stranded. The body of Whataitai became the hills close to the harbour entrance. The soul of W hataitai left him in the form of a bird named Te Keo. Mount Victoria is known by Maori as Tangi Te Keo or the weeping of Te Keo.

Ngati Toa Rangatira's claim to the Wellington Harbour region is primarily based upon their early invasion of the region during the 1820s and their political and military influence, rather than occupation. Ngati Toa Rangatira also traded with the settler community at W ellington and sent produce to Wellington by sea.

Harataunga was an important source of large trees suitable for the construction of waka. These waka were fashioned in the area and tested in Te Whanganui a Tara. Te Whanganui a Tara was also important in conjunction with the Hutt River as access to and from Porirua and the developing Wellington town.

The Harbour is also an important source of kai moana.

9. This also acknowledges an interest based on invasion in the 1820s. It refers to a 'well known' narrative, and places named thereafter - which is a Ngai Tara / Rangitāne narrative.

10. The Ngati Toa settlement also contains a statement regarding the Hutt River and its tributaries which contains the statement:

Although Ngati Toa Rangatira did not remain in the area after this invasion, the Hutt River continued to be important to the iwi following their permanent migration and settlement in the lower North Island in the late 1820s and early 1830s. The relationship of Ngati Toa Rangatira to the Hutt Valley and River was not one defined by concentrated settlement and physical presence. Rather, the iwi felt their claim to the land was strong based on the powerful leadership of Te Rauparaha and Te Rangihaeata and the relationship they had with iwi residing in the Hutt Valley who had been placed there by Ngati Toa in the 1830s. For some years these iwi in the Hutt Valley paid tribute of goods such as canoes, eels and birds to Te Rauparaha and Te Rangihaeata.

Ngati Toa Rangatira have a strong historical connection with the Hutt River and its tributaries, and the iwi consider that the river is included within their extended rohe and it is an important symbol of their interests in the Harataunga area.

11. Ngati Toa Rangatira focus on a 'strong historical connection' an 'extended rohe' and no actual occupation to assert these claims.

12. Neither settlement or acknowledgments refer to the peace agreements of 1840 as a source of rights.

13. Consequently, in Te Whanganui a Tara, if we analyse the evidence about customary connections to date there is a complex of overlaying interests that does not neatly and mixed bag of interests:

    a. Centuries of interaction of Kurahaupo groups prior to 1820 that the Waitangi Tribunal says must continue to be noted

    b. Some limited rights gained by Te Ati Awa at 1840, but leveraged through a land sale, and occupation thereafter

    c. No customary rights for Ngati Toa, even through conquest (according to the Tribunal), but their significance in the district acknowledged in their Treaty settlement. And a claim of rights through conquest asserted (it seems contrary to the Tribunal findings).

    d. Neither Te Ati Awa nor Ngati Toa citing peace agreements as a source of interests.

Conclusion

14. The Council accepts that Muaūpoko have a traditional rohe that includes Te Whanganui a Tara.

15. The Council approach, which seems to mirror the approach of Te Ati Awa and Ngati Toa, that s6(e) refers only to 'mana whenua' and that both groups have mana whenua from around 1830s due to conquests at that time – with Ngati Toa relying entirely on conquest without occupation and references in its subsequent Treaty settlement.

16. Recent case law has highlighted the complexities of the definitions of tangata whenua, mana whenua and tikanga under the Act.

17. The plan already refers to iwi in the area prior to Te Ati Awa and Ngati Toa. Begging the question of who they are.

18. Without these amendments, there is essentially no protection for Muaupoko in relation their taonga in Te Whanganui a Tara.

19. Recognition of Muaupoko's significant and ongoing cultural interests in Te Whanganui a Tara does not in any way threaten the continued existence of groups with substantial Treaty settlements here, which are enshrined in statutes.

20. The fact that it might make planning in Te Whanganui a Tara slightly more complex is not a reason to fail recognise this matter of national importance. Nor is the situation in Te Whanganui a Tara very complex. In Auckland, 19 customary groups have cultural interests that require some recognition in the Auckland CBD.

21. If the Council decides not to amend as proposed, the Council will be, in effect, determining the relative strength of Muaupoko customary interests against the overwhelming evidence before it, and contrary to the recent case law that it is not the role of the Council at the planning stage to be making any such final determinations, unless in some manner that threatened in some very substantial way, the rights and interests of other groups to have their connections recognised as a matter of national importance.

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Tom Bennion
Counsel