I TE KŌTI MANA NIU O AOTEAROA

IN THE SUPREME COURT OF NEW ZEALAND

SC 121/2023
SC 123/2023
SC 124/2023
SC 125/2023
SC 126/2023
SC 127/2023
SC 128/2023
SC 129/2023

BETWEEN

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)

NGĀTI MURIWAI HAPŪ

KURARERE MARAE

TE ŪPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE ŪPOKOREHE

ATTORNEY-GENERAL

for **TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA**

NGĀTI RUATAKENGA

Appellants

CONT

SUBMISSIONS FOR TE RŪNANGA O TE WHĀNAU
4 October 2024

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Counsel for Te Rūnanga o Te Whānau, Certify that, to the best of their knowledge, these Submissions are suitable for publication.

TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA

WHAKATŌHEA MĀORI TRUST BOARD

NGĀI TAI AND RIRIWHENUA HAPŪ

TE ŪPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE ŪPOKOREHE IWI

TE RŪNANGA O NGĀTI AWA

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)

NGĀTI RUATAKENGA

LANDOWNERS COALITION INCORPORATED

NGĀTI MURIWAI HAPŪ

KUTARERE MARAE

TE RŪNANGA O TE WHĀNAU ON BEHALF OF TE WHĀNAU-Ā-APANUI

BAY OF PLENTY REGIONAL COUNCIL

CROWN REGIONAL HOLDINGS LIMITED

ŌPŌTIKI DISTRICT COUNCIL

SEAFOOD INDUSTRY REPRESENTATIVES

WHAKATĀNE DISTRICT COUNCIL

Respondents

AND **ATTORNEY-GENERAL**

TE RŪNANGA O TE WHĀNAU ON BEHALF OF TE WHĀNAU Ā APANUI

SEAFOOD INDUSTRY REPRESENTATIVES

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TE RŪNANGA O NGĀTI AWA

WHAKATŌHEA MĀORI TRUST BOARD

Interested Parties

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KUPU ARATAKI

1. Te Rūnanga o Te Whānau represents the hapū of Te Whānau a Apanui in these appeals.

2. Te Whānau a Apanui is an iwi in the eastern Bay of Plenty. Through various of its hapū, Te Whānau a Apanui assert mana moana in areas over which Te Whakatōhea (and Ngai Tai) applicants sought customary marine title (**CMT**) in the High Court.

3. The High Court declined to grant CMT to Te Whakatōhea (and Ngai Tai) in respect of the area in and around Whakaari.[1] The Court of Appeal dismissed the cross-appeals of Te Whakatōhea (and Ngāi Tai) that challenged this outcome.[2] Te Kāhui takutai moana o ngā whānau me ngā hapū o Te Whakatōhea (**Te Kāhui**) comprising four of the hapū of Te Whakatōhea have further appealed to Court.[3]

4. Te Whānau a Apanui support the findings of both Courts in respect of the takutai moana surrounding Whakaari. Te Whānau a Apanui say that:

   (a) Mana whenua at Whakaari and the surrounding takutai moana is held by Te Whānau a Te Ehutu, a hapū of Te Whānau a Apanui. Whakaari was transferred to Te Ehutu as a matter of tikanga in the early part of the nineteenth century. This mana has been retained.

   (b) Te Whakatōhea and Ngai Tai have not established any more than a general association with Whakaari including it being a tohu and the fact of tītī gathering during the middle part of the twentieth century.

   (c) The relevant associations with the island and its surrounds are not sufficient to meet the tests for CMT under s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (**the Act**).

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[1] *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025 (**HC Judgement**), **[[05.00401]]** at [661], **[[05.00564]]**.

[2] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [**Court of Appeal Decision**] at [354].

[3] Notice of Application for Leave to bring Civil Appeal for Te Kāhui**, [[05.00861]],** at [2.3] **[[05.00865]].**

KO WAI A TE WHĀNAU A APANUI

5. The appellation Te Whānau a Apanui usually refers to the twelve hapū that have traditionally occupied the lands from Te Taumata o Apanui to Potikirua.[4]

6. The seaward boundary of Te Whānau a Apanui extends to Tauritoatoa, a point beyond Whakaari (White Island) above a submerged reef at the tail end of the Kermadec trench where albatross gather on the surface of the water.[5] The territory of Te Whānau a Apanui (in particular the hapū Te Whānau a Te Ehutu) includes Whakaari and the surrounding takutai moana.[6]

7. To the west of Te Whānau a Apanui are Ngai Tai and to the East are Ngāti Porou. Te Whānau a Apanui does not share a coastal boundary with Te Whakatōhea although they do have close whakapapa connections.

8. Te Whānau a Apanui have applied to the High Court for recognition of CMT and Protected Customary Rights (**PCR's**) but are pursuing the direct negotiation pathway in respect of the majority of their rohe moana.[7] This negotiation has been occurring alongside Te Whānau a Apanui's Treaty of Waitangi settlement negotiations.

9. Te Whānau a Apanui elected not to have their takutai moana rights determined by High Court as part of the Edwards priority application, preferring instead to continue with substantially advanced negotiations with the Crown that commenced shortly after the first iteration of the Foreshore and Seabed Act was passed in 2004. However, it was necessary for Te Whānau a Apanui to participate in the High Court proceedings in order to ensure the protection of its rights at Whakaari (and in other areas of overlap with Te Whakatōhea and Ngai Tai application areas).

TE TURE

10. The legal framework has been extensively traversed in other submissions. We therefore only address those elements of the law that are particularly

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[4] See Affidavit of Rikirangi Gage **[[203.1303]],** at [9] **[[203.01306]]** and Affidavit of Dayle Takitimu **[[203.01330]],** at [20] **[[203.01336]]**.
[5] See Affidavit of Rikirangi Gage at [15], **[[203.01307]]**.
[6] See Affidavit of Rikirangi Gage at [75], **[[203.01315]]**.
[7] Affidavit of Rikirangi Gage at [83] – [94], **[[203.01317]] – [[203.01319]]**.

applicable to the Te Whānau a Apanui position in this case and that we consider bear emphasis.

11. As found by the Court of Appeal there are three "limbs" to section 58(1) and the CMT test.[8] These are that:

    (a) the applicant group must hold an area "in accordance with tikanga" (**Limb One**);

    (b) the applicant group must have "exclusively used and occupied the specified area from 1840 to the present day" (**Limb Two**); and

    (c) there must not be "substantial interruption" (**Limb Three**).

Te Peka Tuatahi | Limb One

12. Limb One has two essential elements. These are that the relevant area of takutai moana be "held" and that it be "in accordance with tikanga". Tikanga and the nature of it (distinct from English proprietary concepts) is central to the application of this limb of the test.

13. The Court of Appeal emphasised activities that "show control or authority over the area" as opposed to simply carrying out a particular activity will be of particular relevance.[9] Te Whānau a Apanui agree. The key issue is whether, as a matter of fact, a group had a sufficiently strong interest to be able to say that it "holds an area in accordance with tikanga". Whilst use, access and historical associations in an area may go towards a "holding", in and of itself that will not be sufficient.

14. The evidence in the High Court is illustrative. For example, a number of Te Whakatōhea witnesses gave evidence about fishing for kahawai at the Motu river mouth and for moki at Whangaparaoa (Cape Runaway).[10] Despite the evidence of Te Whakatōhea access of these areas it was accepted by the witnesses that the Motu river mouth and Whangaparaoa are within the territory of Te Whānau a Apanui and that Te Whakatōhea is permitted to fish in these

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[8] The Court of Appeal Decision at [434].
[9] The Court of Appeal Decision at [140].
[10] For example, Affidavit of Irene Moore, 15 November 2019 **[[201.00053]],** at [5] **[[201.00054]];** Brief of Evidence of Heremaia Warren, 31 January 2005 **[[302.00508]],** at [50] **[[302.00541]]**; and Affidavit of Mandy Mereaira Hata, 1 August 2020 **[[203.01096]],** at [46] **[[203.01120]]**.

areas because of their whakapapa connections with Te Whānau a Apanui.[11] It is ultimately Te Whānau a Apanui that exercises mana over, and therefore "holds", those areas.

15. Another witness for Te Whānau a Apanui, Rikirangi Gage, explained it in these terms:[12]

> Resource use by others may be permitted. However, in the area within which Whānau a Apanui exercise mana, this permission is a privilege and does not establish a right. The hapū of Te Whānau a Apanui maintain the authority and right to retract this permission at any point.

16. What this shows is that not all tikanga based rights are the same. Care therefore needs to be taken to avoid a situation where all associations are treated as being equivalent. There must be a critical evaluation of the strength of the rights being claimed. The potential consequence of not undertaking this evaluation would be to flatten out rights and elevate the position of groups that do not hold mana at the expense of those that do.

17. Te Kāhui in their submissions emphasise the concept of whanaungatanga, inclusiveness and connection.[13] Te Whānau a Apanui agree generally with the centrality of whanaungatanga in the Māori world. However, that concept cannot be romanticised and elevated at the expense of other key relational norms that are fundamental in managing and regulating Māori society.[14] Rikirangi Gage also talks about how even though whakapapa and the interconnection to all living things creates a different relationship with the environment than ownership, "It is not right however to assume there is no tenure system in relation to the lands and seas and recognition of the right to control use and access to areas or their resources." The hapū of Whānau a Apanui still maintained a very complex set of cultural rules relating to access and use of the sea.

18. Whilst "holding an area in accordance with tikanga" must be looked at holistically, it requires understanding the basis of rights and it imports a

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[11] See Cross-Examination of Irene Moore, 9 September 2020 **[[104.01732]],** at **[[104.02070]]** and Cross-Examination of Hemaima Hughes, 18 September **[[106.02832]]**, at **[[106.02919]]**.
[12] Affidavit of Rikirangi Gage 31 July 2020 **[[203.01303]],** at [106] **[[203.01320]].**
[13] Te Kahui Submissions dated 23 June 2024 at **[3.3]** and **[3.4].**
[14] See Te Aka Matua o Te Ture *He Poutama* (NZLC SP24, Wellington, 2023) at p.71.

element of territoriality and mana distinct from mere use. It is understood that this aspect of the test is not significantly disputed amongst the parties.

Te Peka Tuatahi | Limb Two

19. Unlike Limb One, Limb Two, which requires "exclusive use and occupation" from 1840 to the present, does not specifically refer to tikanga. However, there is a strong argument that tikanga is nevertheless relevant to determining exclusive use and occupation. There are four reasons for this.

    (a) Firstly, section 4, which sets out the purposes of the Act, provides, in sections 4(1)(b), (c) and (d) that the purposes include to "recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau as tangata whenua"; "provide for the exercise of customary interests in the common marine and coastal area"; and acknowledge the Treaty of Waitangi (te Tiriti o Waitangi). The nature of the rights referred to in section 4(1)(b) and (c) and accompanying acknowledgement of Te Tiriti in section 4(1)(d) means that tikanga must necessarily be relevant to Limb Two.

    (b) Secondly, although Limb One and Limb Two must be satisfied separately, there is clear overlap between the two limbs. Miller J found that the two limbs are not independent but that "the section establishes a single test which must be interpreted as a whole".[15]

    (c) Limb Two requires that the applicant hold the application area and that the basis upon which that area must be held is tikanga. Limb Two elaborates on Limb One by requiring that, in holding an application area in accordance with tikanga the interest must be sufficiently strong that it amounts to exclusive use and occupation. However, this does not detract from the tikanga basis upon which the interest is derived. Tikanga must therefore remain relevant in making the exclusive use and occupation assessment under Limb Two.

    (d) Thirdly, including tikanga as a consideration in the application of Limb Two is consistent with the general common law approach to customary title, which explicitly directs a Court to avoid making assumptions about

[15] COA Decision at **[137] – [138].**

the nature of customary property, but should instead be concerned "with the facts as to the native property".[16]

(e) Fourth, the common law has developed a presumption that legislation should be interpreted consistently with Te Tiriti o Waitangi.[17] There is also a strong argument that a similar presumption exists in relation to tikanga.[18] In the context of legislation whose purpose is to preserve and recognise Te Tiriti and tikanga based rights, all sections of the Act should be read where possible in a manner that is consistent with both.

20. It is also relevant to the application of Limb Two that the Act expressly contemplates that certain third-party uses do not preclude the existence of CMT. These uses cover most activities commonly undertaken in the marine and coastal area including: activities authorised by a resource consent (section 58(2)); fishing (section 59(3)); and navigation (section59(3)). Section 64(1)(a) also assumes that "accommodated activities", such as significant infrastructure activities,[19] can occur alongside CMT.

21. The level of exclusivity contemplated by Limb Two is therefore not such that an applicant must show the complete absence of use or occupation by third parties. Instead, exclusivity is significantly qualified and a wide range of uses and occupation can occur alongside the existence of CMT.

22. Further, tikanga itself does not contemplate "exclusive use and occupation" in the sense that all third-party use is precluded. Dayle Takitimu (a witness for Te Whānau a Apanui), explained that exclusion is considered a latent right because a level of use and access will be permitted if it is in accordance with

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[16]See *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at [54]; *Re the Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41; and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General [1994] 2 NZLR 20.*

[17]See *Huakina Development Trust v Waikato Valley Authority* [1987] at [223]; *NZ Māori Council v Attorney General* COA [1987] at [655]; *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* SC 2021 at [151]; *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [55]; and *Students for Climate Solutions Incorporated v Minister of Energy and Resources* [2022] NZHC 2116 at [90] – [93].

[18]For example, in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 at [148] and [154] the Court held that legislation will not be interpreted to have extinguished native title rights of Māori unless this is made explicit through 'clear and plain intention'. The general place of tikanga as part of the common law has also recently being affirmed by the Supreme Court in *Ellis v R* [2022] NZSC 114 at [19].

[19]Section 64(2) provides a very broad definition of accommodated activities that can be read alongside CMT.

the tikanga of the iwi.[20] However, it remains at the discretion of the iwi. It follows that, although an iwi may hold mana over an area, and assert a right to exclude others, it does not necessarily need to do so. This is a manifestation of control and authority and in our submission is evidence of "exclusive use and occupation" in accordance with tikanga.

Noho tahi i roto i te mana | Shared exclusivity

23. Whether there is shared exclusivity will be a matter of fact. This is relatively easy to determine where the parties agree. Where there is no agreement the Court is left to make the determination. There was no agreement to shared exclusivity in respect of the area around Whakaari.

24. The key points for the Court in determining whether there is shared exclusivity are:

    (a) Each party must be able to prove that it meets the requirements for CMT under section 48(1)(a) and (b)(i) of the Act.

    (b) The existence of CMT on the part of one group is not contingent upon the agreement of other (potentially competing) applicants.

    (c) It cannot be assumed that all applicant groups have equivalent interests and it is not an answer to the Act's limitations for the Court to treat all claims as if they are the same.

NGĀ TONO | THE APPLICATIONS

25. Only Upokorehe and Ngai Tamahaua (two of the Te Whakatōhea hapū within the poutawhare model) clearly identified a claim for CMT in the takutai moana around Whakaari. In respect of the remaining four:[21]

    (a) Ngāti Ruatakenga initially claimed a small area around Whakaari that they later sought to expand by way of amendment;

    (b) Ngāti Ira did not originally claim CMT in this area but later sought to amend their application to claim the full 12 nm surrounding Whakaari;

[20] Affidavit of Dayle Takitimu, 24 February 2020 **[[203.01330]],** at [64] **[[203.01345]]**.
[21] See High Court Judgment **[[05.00401]],** at [469] – [472] **[[05.00525]]**.

(c) Ngāti Patumoana did not at any stage make a claim in respect of the CMT surrounding Whakaari; and

(d) Ngāti Ngahere were not represented in the proceedings and there was no specific evidence in support of a claim to this area.

26. It is significant that most of the hapū of Te Whakatōhea hapū did not initially include Whakaari as being an area over which they claimed CMT. This omission is consistent with the relatively limited nature of the interests Te Whānau a Apanui say Te Whakatōhea have in and around Whakaari.

NGĀ PĀNGA KI WHAKAARI | RELATIONSHIPS WITH WHAKAARI

27. Te Kāhui's appeal is effectively challenging the High Court's factual findings (affirmed by the Court of Appeal) of the nature and extent of Te Whakatōhea interests in the area in and around Whakaari. This requires your honours to delve deeply into the evidence and factual matrix that speaks to the iwi and hapū rights, interests and obligations in respect of Whakaari and their relative strength. We start by summarising the tikanga based relationship that Te Whānau a Apanui have with Whakaari and its surrounds.

Ngā pānga o Te Whānau a Apanui

28. The history of Te Whānau a Apanui's interests in Whakaari can be divided into four phases.

Phase 1: Te Tuku - Te Ehutu acquire mana in Whakaari

29. Te Whānau a Apanui have long acknowledged that Ngāti Awa were the original tikanga holders and customary owners of Whakaari.[22]

30. The primary basis upon which Te Whānau a Te Ehutu assert mana over Whakaari is that in and around the 1820's Whakaari was given to Te Whānau a Te Ehutu by a Ngāti Awa rangatira as "utu" or compensation as Te Ehutu avenged the death of Purahokino, the son of Ngāti Awa chief Te

[22]For example see the Statement of Claim for Wai 225 (a claim on behalf of Te Whānau a Te Ehutu that they were prejudicially affected by the Crown in relation to Whakaari) in Lawrence Tukaki-Millanta "A Report to the Waitangi Tribunal on behalf of Te Whānau a Te Ehutu on the Whakaari Claim" ("**Tukaki-Millanta Report**") **[[324.10908]]**. Note that the link to the Tukaki-Millanta Report at Tab 645 is incorrectly labelled in the Common Bundle as the Boast Report.

Whakapākina.[23]

31. In addition to this being the Te Whānau a Apanui understanding,[24] this account was recorded by Captain Gilbert Mair, a key Crown agent in the Bay of Plenty area who had this account imparted to him by leading kaumātua.[25] The tuku was also acknowledged by Rangitūkehu, a prominent Ngāti Awa Chief, at the later Native Land Court hearing that investigated title to Whakaari in 1867.[26]

32. This type of tuku or gift is one of the "take" or basis upon which claims to land under tikanga can be made.[27] The result was a transfer in accordance with tikanga Māori.[28] It is from that point that Te Whānau a Te Ehutu has maintained customary ownership rights in respect of Whakaari.[29] This tuku is the type of customary transfer contemplated by s 58(b)(ii) of the Act (although this particular tuku occurred before 1840).

33. A tuku is one of the well known and legitimate ways of transferring customary tenure in land. Sir Hirini Moko Mead, for example, mentions a number of events that can form the basis of a customary land transfer including: whenua tuku (gifted land); whenua raupatu (land taken by military conquest); whenua ohakī (a deathbed land grant); and whenua muru (land obtained as compensation for breaking some tribal law).[30] Both David Williams (an expert that gave evidence for Te Kāhui) and the Pūkenga also identify utu as a key tikanga concept.[31]

34. This acquisition was reinforced with subsequent assertions of Te Whānau a Te Ehutu mana that fundamentally impacted how tikanga operated in practice on the island. It was further affirmed by the way that others (including Te

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[23]For the full description of the tuku see account by Gilbert Mair at Appendix 4 of the Tukaki-Millanta Report **[[324.10950]] – [[324.10952]]**. Also see Richard Jennings "Marine and Coastal Area (Takutai Moana) Act 2011 Third Party Interests Report" ("**Jennings Report**") **[[333.15292]],** at [36] **[[333.15389]]**.

[24] Affidavit of Rikirangi Gage [**[203.01303]]**, at [142] - [144] **[203.01326]**.

[25] Tukaki-Millanta Report at [4.1] **[[324.10913]]**.

[26] Tukaki-Millanta Report at [4.2] **[[324.10913]]**.

[27] Affidavit of David Vernon Williams, 30 July 2020 **[[203.01055]]** at [87] – [89] **[[203.01086]] – [[203.01087]]**.

[28] Second affidavit of Rikirangi Gage 31 July 2020 **[[203.01356]]** at [10] **[[203.01358]]**.

[29] Tukaki-Millanta Report at [4.3] **[[324.10914]]**.

[30]Hirini Moko Mead and Te Roopu Whakaemi "Whenua Tautohetohe: Testing the Tribal Boundaries, Research Report" **[[317.07639]]** at **[[317.07645]]** and **[[317.07646]]**.

[31] See Affidavit of Dr David Williams **[[203.01055]]** at [45] **[[203.01070]]**. Also see Pūkenga Report **[[101.00529]]** at **[[101.00537]]**.

Whakatōhea) respected the primacy of the interests of Te Whānau a Te Ehutu in Whakaari.

35. Te Kāhui say that it is a flawed assumption that Whakaari was exclusively Ngāti Awa's to tuku (gift) in the 19th century and/or that a tuku would extinguish the interests of other iwi.[32] This argument is a strawman. It attacks the exercise of a legitimate and recognisable take with no competing counter narrative or take. Further, it is not asserted that the tuku extinguished the interests of Te Whakatōhea. Instead, Te Whānau a Apanui say that Te Whakatōhea are inflating and mis-characterising their interests in Whakaari in a manner not supported by tikanga, history or the evidence.

Phase 2: Te Tāhae - the unjust "sale" and theft of Whakaari

36. In the late 1930s Whakaari was purportedly sold by Te Kepa Toihau and Apanui (a person, not the iwi) to a Danish whaler named Hans Tapsell for two hogsheads of rum.[33] Hans Tapsell married Hine-i-turama of Ngāti Whakaue and together they had six children.[34] In 1867 their eldest son Retireti Tapsell applied to the Native Land Court for title to Whakaari for himself and his older sister Katherine.[35] Retireti Tapsell was a sergeant of police and customs officer at Maketu and was well-known to Māori and Pākehā residents.[36]

37. In October 1867 the Native Land Court sat at Maketu for the first time.[37] The Court awarded a grant of title in favour of Retireti and Kataraina Tapsell.[38] Te Whānau a Apanui consider the award of title issued by the Native Land Court to be deeply flawed and not valid as a matter of tikanga.[39] It resulted in the incorrect and unjust transfer and alienation of Whakaari out of Te Whānau a Te Ehutu hands.[40]

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[32] Te Kahui submissions dated 23 September 2024 at **[5.19].**
[33] Jennings Report at [37], **[[333.15389]]**.
[34] See Jennings Report at [37], **[[333.15389]]** and Richard Boast "A Report to the Waitangi Tribunal on Whakaari (White Island) and Moutuhora (Whale Island)" ("**Boast Report**") **[[324.10797]]**.
[35] Boast Report at **[[324.10823]]**.
[36] Boast Report at **[[324.10821]] – [[324.10822]]**.
[37] Boast Report at **[[324.10823]]**.
[38] Jennings Report at [54] **[[333.15393]]**.
[39] Second affidavit of Rikirangi Gage 31 July 2020 **[[203.01356]]** at [24] **[[203.01362]]**.
[40] It has been suggested that the Tapsell's changed their story so that they "sale" was made to their Māori mother (and not their Pakeha father). This is because at the time a land sale from a Māori to a Pakeha would have been legitimate as the Crown had the monopoly right to purchase land. Other criticisms are the location of the inquiry in Maketu that is in the

38. There are some conflicting accounts in respect of the whakapapa of Te Kepa Toihau and Apanui.[41] Some records say they are from Te Whānau a Apanui and others from Ngāti Awa.[42] Importantly for the purposes of this proceeding, Te Whakatōhea are not present in this narrative.

39. After the Native Land Court award there are a number of examples of Te Whānau a Te Ehutu rangatira protesting the alleged sale.[43] There was no collective hapū intention or authority to sell. This is reinforced by the manner in which Te Whānau a Te Ehutu continued to view and use Whakaari. For example, in the 1860's (30 years after the purported "sale") the Crown was under the impression that Whakaari remained the property of Māori.[44] A 1863 Crown file note indicates that Ngāti Awa and Te Whānau a Apanui owned Whakaari and that "2 years ago the native owners were willing to lease White Island, and may be so still".[45] Although leasing was not legal at this point, this clearly shows that these iwi were still acting and transacting as though they owned Whakaari.[46]

40. Despite private ownership Te Whānau a Te Ehutu also continued to use and gather tītī in accordance with tikanga until 1968 when tītī harvesting on Whakaari came to an end.[47]

Phase 3: Te Tono me Te Kore

41. After title was granted in 1867 Whakaari was quickly transferred out of Māori hands and has had a succession of non-Māori owners.

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territory (Te Arawa) of the claim being advanced, is a significant distance from Te Kaha and it is unlikely that Te Ehutu were even aware that the hearing was taking place. They did not participate. There are also questions as to whether Apanui and Toihau had the mandate to alienate the interests of Te Ehutu and what a "sale" meant in customary terms. See Tukaki-Millanta Report at [5.15] **[[324.10922]]**, Boast Report **[[324.10824]] – [[324.10827]],** Jennings Report at [55] – [62] **[[333.15395]] – [[333.15396]]**; and Second affidavit of Rikirangi Gage 31 July 2020 at [24] **[[203.01362]]**.

[41] Second affidavit of Rikirangi Gage 31 July 2020 at [16] **[[203.01360]]**.

[42] Ibid.

[43] Evidence in Chief of Rikirangi Gage 5 October 2020 **[[108.03898]]** at **[[108.04176]] – [[108.04177]]**.

[44] Jennings Report at [38] **[[333.15390]]**.

[45] Ibid.

[46] The reference on the file is to both Ngāti Awa, Te Whānau a Apanui and "Ngai Tawarere". Rikirangi Gage in his second affidavit, 31 July 2020, at [15] **[[203.01360]]** clarifies Ngai Tawarere is an old name for the people from Te Kaha to the Cape.

[47] Report by Tony Walzl on "Whakatōhea and the Common Marine and Coastal Area 1865 - 2019" ("**Walzl Report**") **[[301.00001]]** at **[[301.00258]].**

42. Since then, Te Whānau a Te Ehutu has consistently protested and asserted their interests in Whakaari.[48] These actions are separate to their on-going use of Whakaari and included:

(a) 22 April 1874: Te Ahiwaru a prominent Te Whānau a Te Ehutu rangatira (that was one of the four Te Whānau a Apanui signatories to Te Tiriti o Waitangi) wrote to the Native Department to voice his concerns over the Crown grant of Whakaari.[49]

(b) 27 June 1874: Te Ahiwaru again wrote to the Native Department to voice his concerns over the Crown grant of Whakaari.[50] This letter was forwarded to Judge JA Wilson, who himself had purchased a half share of Whakaari in February of the same year.[51]

(c) 27 July 1878: an application for a rehearing over Whakaari with 38 signatures on it was sent to Chief Judge Fenton.[52] This letter was from key people within Te Whānau a Te Ehutu.[53]. A translation of the Māori text of the letter is as follows:[54]

> To Fenton
>
> Friend, greetings, this is an appeal by us concerning our island Whakaari. We are deeply saddened, and we mourn each year that passes. We were unaware of the fraudulent sale of that island by Apanui. When we finally got news of it, it had already been acquired by the Pākehā Tapsell. We say let Apanui keep his payment, but the island be ours according to the directions of our parents "be steadfast holding on to your island", we uphold that instruction of our parents.
>
> Every year and right up until the present we have gone to the island to harvest its resources. Now we hear the island has been on-sold to Wilson making that the second fraudulent sale of that island. The deceitful thing being that it was done without a Gazette Notice for us to see. When we finally get to hear of it, it's a 'Crown Grant Sanctioned theft' by Retireti. And now we cry aloud, are left deeply hurt and saddened for (the loss) of our island ...

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[48] Tukaki-Millanta Report at [5.1] **[[324.10915]]**.
[49] Tukaki-Millanta Report at [5.5] **[[324.10917]]**.
[50] Tukaki-Millanta Report at [5.6] **[[324.10918]]**.
[51] Ibid.
[52] Boast Report **[[319.08464]]** at **[[319.08499]]**.
[53] Second affidavit of Rikirangi Gage 31 July 2020 at [33] **[[203.01364]]**.
[54] Second affidavit of Rikirangi Gage 31 July 2020 at [10] **[[203.01358]]**.

These assertions were supported by interviews with Te Ehutu kaumātua undertaken by Lawrence Tukaki-Millianta in 1995.[55] Boast in his report on Whakaari also recognised that this was an important text, documenting a deeply felt concern.[56] This letter came to nothing and an annotation on it stated that it was "10 years too late."[57]

(d) 31 October 1879: an objection letter was written to the Crown by Te Hata Kakatuamaro and others regarding Whakaari.[58] Te Hata Kakatuamaro was from Te Whānau a Apanui and has whakapapa to Te Ehutu.[59]

(e) 24 November 1881: Paora Matenga, from Te Whānau a Te Ehutu made an application to the Māori Land Court for Whakaari.[60] The case was called but the application was dismissed on the basis that there was no map accompanying it.[61]

(f) In 1882: there was correspondence from "Te Kaha" (the rohe from which Te Whānau a Te Ehutu come from) that requested the return of an application for a survey of Whakaari so it could be corrected.[62] The Court file was closed in 1882 and never reopened.[63]

(g) 10 September 1884: a petition led by Te Hata Kakatuamaro and 117 others of Te Whānau a Te Ehutu was presented to the House of Representative requesting a further hearing into Whakaari be held in Opotiki.[64]

(h) 17 September 1885: The petition by Te Hata Kakatuamaro and others was presented to the House of Representatives again.[65]

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[55] Tukaki-Millanta Report at [4.4] **[[324.10914]]**.
[56] Boast Report **[[324.10831]]**.
[57] Ibid.
[58] Tukaki-Millanta Report at [5.7] **[[324.10918]]**.
[59] Second affidavit of Rikirangi Gage, dated 31 July 2020, at [37] **[[203.01365]]**.
[60] Second affidavit of Rikirangi Gage 31 July 2020 at [34] **[[203.01365]]** and Jennings Report at [65] **[[333.15397]]**.
[61] Tukaki-Millanta Report at [5.3] **[[324.10917]]**.
[62] Boast Report at **[[324.10832]]** and Second affidavit of Rikirangi Gage 31 July 2020, at [35] **[[203.01365]]**.
[63] Boast Report at **[[324.10833]]**.
[64] Jennings Report at [67] **[[333.15397]]**.
[65] Jennings Report at [67] **[[333.15397]]**.

(i) 25 May 1886: Te Hata Kakatuamaro wrote a letter to the Crown regarding Whakaari.[66] A response was received on 29 June 1886 that in general terms stated that the Crown was unable to re-litigate matters regarding Whakaari. No reasons were given.[67]

(j) 20 July 1886: the Te Hata Kakatuamaro petition referred to Native Affairs Committee was reported back to the House on 20 July 1886 with recommendation that Whakaari had already passed through the Native Land Court by sale.[68]

(k) 12 July 1991: Tiopira Popata Phares on behalf of Te Whānau a Te Ehutu lodged a claim with the Waitangi Tribunal in respect of Whakaari on the basis that the Crown:[69]

i. failed to recognise the mana of Te Whānau a Te Ehutu over Whakaari;

ii. acquired the island from persons other than Te Whānau a Te Ehutu;

iii. failed to acknowledge the protests of Tamatama-a-rangi II (otherwise known as Te Ahiwaru); and

iv. failed to recognise and assure to Te Whānau-a-Te Ehutu the unrestricted and exclusive ownership and management of the geothermal resource upon and under the land.

(l) 1992: Te Whānau-a-Te-Ehutu opposes the White Island Marine Protected Area Bill.[70]

(m) 1993: Te Whānau-a-Te-Ehutu opposes the review of the Offshore Island in the Bay of Plenty until the Waitangi Tribunal has made its findings and recommendations.[71]

43. Te Kāhui say that the Te Whānau a Apanui's claim is flawed as it incorrectly assumes that customary rights ossify at particular moments in history through

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[66] Tukaki-Millanta Report at [5.9] **[[324.10919]]**.
[67] Tukaki-Millanta Report at [5.9] **[[324.10919]]**.
[68] Tukaki-Millanta Report at [5.11] **[[324.10920]].**
[69] See Statement of Claim for Wai 225 in the Tukaki-Millanta Report **[[324.10936.]]**
[70] Tukaki-Millanta Report at [5.18] **[[324.10923]]**.
[71] Tukaki-Millanta Report at [5.1] **[[324.10915]]**.

the transfer of Native Land Court titles and "ownership" of land is not relevant to proving CMT rights in the sea.[72] First, the Act sets out that ownership of land is an express matter that can be taken into account in assessing customary marine title.[73] Second, Te Whānau a Apanui acknowledge the deep limitations in the Native Land Court process (as illustrated in the outcome in the case of Whakaari itself.) However, they rely on the written record associated with the ownership narrative as it captures valuable aspects of history. What this record shows is that Te Whānau a Te Ehutu have long asserted a tikanga based claim to customary ownership over Whakaari and they have continued to assert that mana and their interests in various forums. No other iwi have done this. Apart from the operation of the tītī regulations, these other iwi are simply not present in the customary ownership and mana narrative of Whakaari. This absence is telling. As stated by Rikirangi Gage "There's only one tui singing in the bush".[74]

Phase 4: Ngā tikanga tua atu i te tuku - Tikanga beyond the tuku

44. The evidence clearly shows that since the tuku was made, Te Whānau a Te Ehutu has had, and continued to assert, mana whenua over Whakaari and accordingly held it in accordance with tikanga.[75] This mana whenua was acknowledged by the Pūkenga.[76] Whakaari (and the takutai moana between the island and the mainland) is treated by Te Whānau a Apanui as an extension of their whenua (land). There are examples in the evidence of where Te Whānau a Apanui have used Whakaari and the seas surrounding it and exercised their mana in this area.

45. For example, Whakaari was used by Te Whānau a Te Ehutu as a vital outpost.[77] During the siege of Toka-a-kuku pā at Te Kaha (which predated the signing of Te Tiriti) it was noted that the people of Te Kaha "replenished

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[72] Te Kahui Submissions at [5.19].
[73] See section 59(1)(i) of the Act.
[74] Evidence in Chief of Rikirangi Gage 5 October 2020, **[[108.03898]]** at line 22-23 **[[108.04181]]**.
[75] Second affidavit of Rikirangi Gage 31 July 2020, at [38] **[[203.01366]]**.
[76] Pūkenga responses to further written questions, 15 October 2020 **[[101.00518]]** at [2.d.ii.2] **[[101.00520]]**.
[77] Tukaki-Millanta Report at [3.3] **[[324.10912]]**.

their provisions during the night by canoes which went to Tōrere via White Island".[78] In another account it was similarly noted that:[79]

> To maintain the supplies of food necessary to feed the garrison, the Apanui people would paddle their canoes to Tōrere via White Island at night returning before daylight laden with the precious provisions.

46. Further, as an illustration of mana, Te Whānau a Apanui have accounts of defending and chasing people outside of their rohe, including beyond Whakaari. For example, Rikirangi Gage gave evidence that when a canoe took a short cut crossing inside Te Whānau a Apanui waters near Cape Runaway the message was passed quickly through to Te Kaha and one of the chiefs, Te Mangokaitipua, gave chase.[80] Te Mangokaitipua caught up with the waka of Northern group just past Whakaari. A battle ensued on the water and the Northerners were killed. The dead were brought back to Kopuakoeaea at Maungaroa also near Te Kaha and the bodies hung up in the Pohutukawa trees there.[81]

47. The evidence further shows that Te Whānau a Te Ehutu rights to harvest tītī have "been exercised since the time of the ancestors".[82] In the Fenton letter by Te Ahiwaru he refers to frequenting Whakaari every year to "mahi ngā rawa o taua motu" ("harvest resources from that island").[83] This reference to resources extends beyond just tītī. This is supported by 1995 evidence of Te Whānau a Te Ehutu kaumātua that refers not only to tītī gathering on Whakaari but also the "exploitation of the abundant fisheries around Whakaari" and that "Whakaari was also renowned for its hapuku [groper] grounds".[84]

48. There is also clear evidence that consent was required by other iwi before visiting Whakaari. Internal Crown correspondence disclosed in the evidence of a Crown witness states that:[85]

> Whakaari (White Island) is claimed principally to Kepa Tamarangi and Apanui of Whakātane (Ngāti Awa) and to [illegible] of Ngatawairere. Te Raukokore [near] Cape Runaway. Apanui sold his right to [Mr] Tapsall [sic] many years ago but as far as I remember it was never brought

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[78] Ibid.
[79] Ibid.
[80] First affidavit of Rikirangi Gage, 21 February 2020, at [96] **[[203.01319]]**.
[81] Ibid.
[82] Tukaki-Millanta Report at [6.1 – 6.3] **[[324.10925]] – [[324.10926]]**.
[83] Second affidavit of Rikirangi Gage 31 July 2020, at [10] **[[203.01358]]**.
[84] Tukaki-Millanta Report at [6.7] **[[324.10927]]**.
[85] Jennings Report at [44] **[[333.15391]]**.

> before the Land Commissioner Court. Although the natives have never permanently resided on the island they have visited periodically for the purpose of catching birds, for which the island is famous. **[No] native [tribe ever visits] the island for the purposes of Bird catching without first [obtaining] the consent of the [Chiefs above mentioned.]** The Green Lake is a wāhi tapu, and the burying place of their Chiefs. It has often been the cause of fighting.

49. The reference to Ngaitawairere and Raukōkere are references to Te Whānau a Apanui.[86] This Crown account is consistent with how the tītī regulations in the 1960's worked in practice. That is, there was a priority order and Te Whānau a Apanui had first rights to catch tītī on Whakaari.[87] Heremaia Warren (of Te Whakatōhea) in 2005 described it as follows (emphasis added):[88]

> The tikanga for using White Island used to be (when the season was ready to be opened), that the people who had first claim on White Island was Te Whānau a Apanui. **To the Māori around here, that was their island**. I do not know why, but it was always known that Te Whānau a Apanui had first rights …
>
> It's a bit still like our tikanga with the moki which was the same. When the moki were running up and down the Cape. The Cape people were out first, they had their tikanga with the first fish being hung in the tree and all that sort of stuff. When they had been out once they would send word, "Whakatōhea can you come in now", **we were allowed in** and then the next Iwi would come in, then others, and they would open it to the rest. But for that first one, *it was* **theirs,** they had the first round. It was the same for mutton birds, they had the first shot at mutton birds.

50. This evidence from Mr Warren is describing mana in action. Although Whakaari has been used as a "mahinga kai" or place for gathering resources by others (including tribes such as Ngāti Ranginui who are based in Tauranga),[89] that is not equivalent to the mana that Te Whānau a Te Ehutu have in Whakaari. As articulated by Rikirangi Gage "distant relatives would be invited or welcomed to partake in the bounty but that in no way created rights of any sort".[90]

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[86] Second Affidavit of Rikirangi Gage, 31 July 2020, at [15] **[[203.01360]]**.
[87] See: First affidavit of Rikirangi Gage, 21 February 2020 at [18] **[[203.01307]]**; Brief of Evidence of Heremaia Warren, 31 January 2005 at [47] **[[302.00540]]**; Affidavit of Muriel Ngahiwi Kelly Smith, 18 November 2019 **[[201.00154]]** at [25] **[[201.00158]]**; Cross Examination of Mr Robert Edwards 8 September 2020, **[[104.01732]]** at line 23 **[[104.02159]]**. Cross Examination of Te Riaki Amomo 25 September 2020, **[[107.03497]]** at line 29 **[[107.03500]]**.
[88] Brief of Evidence of Heremaia Warren, 31 January 2005, **[[302.00508]]** at [47] **[[302.00540]]** and at [50] **[[302.00541]]**.
[89] Tukaki-Millanta Report at [6.8 and 6.9]] **[[324.10928]]**.
[90] First affidavit of Rikirangi Gage, 21 February 2020, at [149] **[[203.01328]]**.

Ngā pānga o Te Whakatōhea

51. Te Whānau a Apanui consider that Te Whakatōhea have overstated the nature and extent of their interests in Whakaari. This is supported by the evidence which shows that the interests of Te Whakatōhea at Whakaari are not equivalent to those of Te Whānau a Apanui.

52. The table below assess Te Whakatōhea's claims:

Interest	Analysis
He tohu	There were a number of Te Whakatōhea witnesses that gave evidence of Whakaari being a tohu (a weather map or sign that indicates things to come).[91] Whilst being able to read and interpret a natural feature could perhaps be said to show mana and kaitiakitanga over the people that may subsequently be warned not to go there, it does not denote mana, authority and influence *over that feature*. Given the general closeness of Māori to the natural world and their personification of it, it cannot be the case that iwi can claim mana over every landmark or significant natural feature that they can see or interpret.
Traditional stories	In the evidence there were traditional narratives around Whakaari from Te Whānau a Apanui, Ngāti Awa, Te Arawa, Ngāti Tuwharetoa and Tūhoe.[92] No such narrative was evident from either Te Whakatōhea or Ngai Tai. Te Kāhui refer to an origin story that recounts Whakaari arising from the deep after Maui had first touched fire as an example of a whakapapa connection to the island.[93] There is, however, no evidence that this origin story derived from Te Whakatōhea. This story appears in the 1830's in a written piece by Joel Polack. Whilst Bruce Stirling (who provided historical evidence for Te Kāhui in the High Court) refers to the Polack account as showing the "links between Whakatōhea and Whakaari"[94] in cross-examination Mr Stirling accepted that the Polack account does not

[91] See: Affidavit of Te Ringahuia Hata (Ngāti Patumoana), 29 January 2020, **[[201.00436]]** at [117] **[[201.00462]]**; Evidence in Chief of Eru Koopu (Pakowhai hapū), 10 September 2020, **[[104.02182]]** at **[[104.02184]]**; Affidavit of Rua Rakuraku (Ngāti Ira), 19 February 2020, **[[202.00601]]** at [60]-[61] **[[202.00614]]**; Affidavit of Hemaima Hughes (Ngāti Ira), 30 January 2020, **[[201.00476]]** at [44] **[[201.00489;** Walzl Report citing 2019 evidence from am Anthony Stevens **[[301.00001]]** at **[[301.00158]];** Cross Examination of Julie Lux, 18 November 2019, **[[104.02178]]** at **[[104.02179]]**.

[92] Jennings Report, at [29] **[[333.15387]]**. Boast Report at **[[319.08470]] – [[319.08475]].**

[93] Te Kāhui Submissions dated 23 September 2024 at **[5.6].**

[94] Bruce Stirling "Te Mana Moana o Te Kāhui Takutai Moana o ngā whenua me ngā hapū o Te Whakatōhea" ("**Stirling Report**") **[[307.02683]]** at [345] **[[307.02804]]**. Anna-Marei Kurei in her Affidavit 19 February 2020 **[[202.00560]]** at [15] **[[202.00566]]** also refers to this account.

	mention Te Whakatōhea in relation to Whakaari at all.[95] Anna-Marie Kurei for Ngāti Ira also pointed to the Polack account.[96]
Boundary markers	Te Kāhui claim that Whakaari serves as a "boundary marker" for their traditional rohe.[97] They point to the waiata "Maruhia atu". However, consistent with the primary evidence provided by Te Whakatōhea on its association with Whakaari, this waiata refers to Whakaari as a tohu. As per above, this does not indicate mana over an area. Therefore whilst expressions such as waiata capture and convey knowledge, the mere mention of a place within a waiata does not necessarily correlate to mana or that it forms part of the traditionally understood territory. Matters such as the context, composer and words are relevant to meaning and significance. Te Riaki Amoamo (Whakatōhea kaumatua) did broadly refer to the "customary seascape" of Ngāti Ruatakenga as including Whakaari.[98] However, in cross-examination it was conceded that in respect of the ocean area that multiple groups can see the same points from the coastline and that the idea that you can control everything you can see in respect of the ocean does not apply.[99] This was therefore a general description and it cannot be taken to stand for the proposition that the area is part of their rohe such that they have mana and authority over it vis a vis others.
Kaitiakitanga	Te Kāhui say that Court of Appeal failed to appreciate the connection between the status of Whakaari (and Te Paepae o Aotea) as a taonga and the consequential kaitiakitanga obligations.[100] There was no evidence that spoke specifically to Te Whakatōhea having kaitiakitanga obligations and how that kaitiakitanga was exercised in respect of Whakaari (and its surrounds). There was a broad general assertion by one Te Whakatōhea witness that "It is through practices like karakia, waiata rāhui etc, that we have maintained our mana motuhake to Whakaari".[101] However, the only substantive examples given were the waiata Maruhia at (which refers to Whakaari simply as a tohu) and the rāhui placed as a result of the 2019 eruption (discussed below).
Rāhui	Te Kāhui say that the "best evidence of the exercise of mana whakahaere by Whakatōhea" was the rāhui following the 2019

[95] Cross-Examination of Bruce Stirling 17 September 2020 **[[105.2694]]** at [p.12-13] **[[105.02695]] – [[105.02696]]**.
[96] Affidavit of Anna-Marei Kurei, 19 February 2020, at [15] **[[202.00566]]**.
[97] Te Kahui Submissions dated 23 September 2024 at **[5.7].**
[98] Affidavit of Te Riaki Amoamo, 3 August 2020 at [5.1] **[[203.01131]].**
[99] Cross examination of Te Riaki Amoamo **[[107.03498]] – [[107.03459]]**.
[100] Te Kahui Submissions dated 23 September 2024 at **[5.8].**
[101] Affidavit of Te Rua Rakuraku, 19 February 2020, **[[202.00601]]** at [61] **[[202.00614]]**.

	eruption.[102] Of the six Te Whakatōhea hapū there was evidence that Te Ūpokorehe and Ngai Tamahaua placed a rāhui.[103] The characterisation by Te Kāhui of Mr Amoamo's role is not quite correct.[104] Te Kāhui say that if Te Whānau a Apanui had superior rights then it might be expected that they would have been responsible for placing the rāhui and objected to Whakatōhea placing one.[105] These propositions were not put to Te Whānau a Apanui witnesses. The Whakaari eruption and the resulting rāhui were exceptional circumstances based on the scale of the tragedy, the multiple deaths (including Māori, Pākehā and international people), it was high profile and it occurred during the summer when the ocean is at peak use.[106] As explained by Mr Robert Edwards (of Te Whakatōhea), Ngāti Awa were the first to place a rāhui in respect of Whakaari because they were there operating on Whakaari and at the coalface of the tragedy.[107] He goes on to acknowledge that this did not indicate any form of exclusive mana.[108] Dayle Takitimu similarly said that not only did Te Whānau a Apanui also place a rāhui but it was an unusual tragedy and not a reflection of exclusive or even shared mana whenua.[109] Given the tragic context and number of deaths it would not have been appropriate for Te Whānau a Apanui to raise inter-iwi mana and territory based issues. However, in another context (such as an attempting placing of an environmental rāhui in and around the island) based on the strong interests of Te Ehutu, that may have elicited a strong response.
Fishing grounds	There was one fishing ground identified by Te Whakatōhea on a map within the 12 nautical miles surrounding Whakaari. The ground was located close to Whakaari itself and was used by parties who went to gather tītī.[110] Te Kāhui assert that the majority in the Court of Appeal falsely applied a dichotomy of territorial versus resource rights that they claim is "not legitimate in tikanga".[111] However, there was a

[102] Te Kahui submissions dated 23 September 2024 at [**5.13]**.
[103] See Ibid as well as Affidavit of Rua Rakuraku at [62] **[[202.00614]]**.
[104] See Affidavit of Te Riaki Amoamo **[203.01122]** at **[203.01135]** and Cross-examination of Te Riaki Amoamo **[107.03409] at [107.03412]**. Mr Amoamo was involved not in placing but in *lifting* the rahui. It is also not clear that he was referring to Te Whakatohea placing a rahui all the way out to Whakaari. His emphasis was on the mussel farm.
[105] Te Kahui submissions dated 23 September 2024 at [5.12]**.**
[106] Cross Examination of Mr Robert Edwards 8 September 2020, **[[104.01732]]** at [p.86] **[[104.02157]]**.
[107] Ibid at [p.87] **[[104.02158]]**.
[108]Ibid [p.87-88] **[[104.02158]] – [[104.02159]]**.
[109] Ibid [p.87-88] **[[104.02158]] – [[104.02159]].**.
[110] Exhibit A to the Affidavit of Moka Apiti "Map Book" **[[309.03687]]** at **[[309.03696]]**.
[111] Te Kahui submissions dated 23 September 2024 at **5.14**.

	significant amount of evidence that resource use does not always equate to mana or a territorial based claim.[112] The Court of Appeal was therefore correct that when looking at resource use more is needed. It is necessary to understand the basis for that use and how it is exercised vis a vis others.
"Naming"	Te Kāhui say that the Court failed to appreciate that "naming" fishing grounds is an expression of the mana of Whakatōhea. The only reference to the importance of naming an area in the evidence was where David Vernon Williams talks about "take taunaha".[113] However, the naming of fishing grounds was not imputed significance in the evidence.
"Patrolling the territory"	Te Kāhui point to an even where a Ngāi Tamahaua tipuna took a double hulled waka out to meet Cook "off Whakaari".[114] They assert that this corroborates "mana whakahaere" exercised by Whakatōhea in the vicinity of Whakaari and they label it "patrolling the territory". We say this is a stretched conclusion to draw in the context in which this engagement occurred.
Gathering tītī	Te Whakatōhea evidence on gathering tītī is largely limited to the operation of the tītī regulations that were in force from the early 1950s to 1968.[115] Various witnesses for Te Whakatōhea, however, recognised that Te Whānau a Apanui had a primacy in terms of order (they were always the first in the tītī season to go

[112] For example, Heremaia Warren (of Te Whakatōhea) talked about the concept of "mana manuhiri" and having to "stick to their rules, you did it their way, you did not come in and takahe or trample all over what they wanted you to do". See Cross-examination of Heremaia Warren, **[[105.02602]] at [[105.02604]]**. Rikirangi Gage also explained that "Resource use by others may be permitted. However, in the area within which Whānau a Apanui exercise mana, this permission is a privilege and does not establish a right. The hapū of Te Whānau a Apanui maintain the authority and right to retract this permission at any point". See Affidavit of Rikirangi Gage, **[[203.01303]] at [[203.01320]]**.

[113] Affidavit of David V Williams,**[[203.01055]] at [[203.01088]].**

[114] Te Kahui submissions dated 23 September 2024 at **5.16.**

[115] References in the written historical record (as captured by Dr Walzl, Mr Stirling and Mr Derby) do not contain any specific references to Te Whakatōhea or its hapū fishing or gathering tītī in and around Whakaari prior to the tītī regulations. Where the reports characterised the written historical record as making a connection between Te Whakatōhea and Whakaari the source documents show that the references were in fact to "Māori" or "natives" and could have equally been referring to Te Whānau a Apanui. See: Cross-Examination of Bruce Stirling 17 September 2020 **[[105.02270]]** at **[[105.02696]]**; and Cross Examination of Tony Walzl 31 August 2020 **[[102.00620]]** at [p.93-94] **[[102.01210]] – [[102.01211]]**. The only customary evidence on use prior and separate to the operation of the titi regulations was a generic reference by Carlo Hemoana Gage in his affidavit 13 February 2020, **[[201.00505]]** at [56] **[[201.00517]]** that stated that Ngāti Ira went to Whakaari for titi "since time immemorial". However, Mr Carlo Gage in his affidavit in reply, 31 July 2020, **[[202.00646]]** at [13] **[[202.00649]]** affirmed that their position aligns with Te Kou Rikirangi Gage's affidavit in respect to mana whenua and mana moana rights.

	out to island) and that the island was considered "theirs".[116] There was also evidence that the Te Whakatōhea right to gather tītī was subject to the permission of Te Whānau a Apanui.[117] The Pūkenga acknowledged that there was "tikanga significance" in the priority order that had Te Whānau a Apanui going first to get tītī.[118]

53. In addition to this analysis, during the course of the hearings a number of key concessions were made from Te Whakatōhea witnesses in respect of the area in and around Whakaari:

(a) At the very least, Whakaari and the area in and around Whakaari is non-exclusive and shared.[119]

(b) That interests in an area can be relative and of a different nature and strength.[120]

(c) Ms Edwards (the priority applicant for Te Whakatōhea) conceded that:

i. Te Whānau a Apanui have primary interests in Whakaari;[121]

ii. "shared iwi interests" would depend on the position of Te Whānau a Apanui";[122]

iii. the interests of Te Whakatōhea must be held alongside and arguably subject to the interests of Te Whānau a Te Ehutu;[123]

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[116] Brief of Evidence of Heremaia Warren, 31 January 2005, **[[302.00508]]** at [47] **[[302.00540]]** and [50] **[[302.00541]]**. Cross Examination of Mr Robert Edwards 8 September 2020, **[[104.01732]]** at [p.96, line 24] **[[104.02167]].**

[117] See Brief of Evidence of Heremaia Warren, 31 January 2005 **[[302.00508]]** at [47] **[[302.00540]]** and [50] **[[302.00541]].**

[118] Pūkenga responses to further written questions, 15 October 2020 **[[101.00518]]** at [2.d.ii.1] **[[101.00520]]**.

[119] Cross Examination of Adriana Edwards 8 September 2020 **[[104.01732]]** at [p.21] **[[104.01885]]** (**Edwards Applicant**); Cross Examination of Rua Rakuraku 19 September 2020 at [p.45, line 29 **[[106.02878]]** (**Ngāti Ira Applicant**); Cross Examination of Karen Mokomoko 22 September 2020 at [p.118, line 7] **[[106.03185]]** (**Mokomoko Applicant**); Cross Examination of Tracy Hillier 25 September 2020 at [p. 56, line 15] **[[107.03549]]** (**Ngai Tamahaua Applicant**); and Cross Examination of Te Riaki Amomo 25 September 2020 at [p. 5, line 6] **[[107.03498]] (Ngāti Ira).**

[120] Cross Examination of Karen Mokomoko 22 September 2020 at [p.118, line 7] [**[106.03185]]** and [p.119. line 18] **[[106.03186]]**.

[121] Cross Examination of Adriana Edwards 8 September 2020 at [p.22] **[[104.01886]]**.

[122] Ibid at [p.43] **[[104.01907]]**.

[123] Ibid at [p.22] **[[104.01886]]**.

iv. 'it was like' Te Whānau a Apanui had kaitiakitanga over Whakaari and would signal to Whakatōhea when they could go out.[124]

(d) Mr Reha for Te Upokorehe conceded that Te Whānau a Apanui have mana kaitiaki on Whakaari.[125]

(e) Mr Wallace Aramoana (Te Ūpokorehe) recognised the mana of Te Ehutu on Whakaari.[126]

(f) Mr Heremaia Warren (a Te Whakatōhea kaumatua) who had first-hand experience of the tikanga of gathering tītī at Whakaari confirmed in 2005 evidence that Te Whānau a Apanui had the first claim on Whakaari and that "To the Māori around here, that was their island".[127] Whilst Te Kāhui is correct that this comment was made in the context of a discussion around resource use, it is consistent with the history of the island that Te Whānau a Apanui held customary tenure and that Te Whakatōhea would be "allowed in".

(g) Mr Robert Edwards (a Te Whakatōhea kaumatua and Chairperson of the Whakatōhea Trust Board) when asked in cross examination whether interests in Whakaari are "even" he responded "Well, I would like to think that they were all even, whether they are or not is another story."[128] This is a concession that the reality may be different from his perspective.

54. There were very few Te Whakatōhea witnesses that made assertions of mana in Whakaari.[129] Those that did either did not identify a "source" of this mana or conceded in cross-examination that they did not in fact have mana.[130]

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[124] Ibid at [p.43] **[[104.01907]]**.
[125] Cross Examination of Lance Reha 30 September 2020 at (p. 76), line 5 – 10] **[[107.03341]]** at **[[107.03834]]**.
[126] Cross Examination of Wallace Aramoana **[[107.03751]] at [[107.03751]]**
[127] Brief of Evidence of Heremaia Warren, 31 January 2005 at [46] **[[302.00508]] [[302.00540]]**. "Their" was a reference to Te Whānau a Apanui.
[128] Cross Examination of Robert Edwards **[[104.02157]] at [[104.02161]]**
[129] Rua Rakuraku in his affidavit dated 19 February 2020 at [56] **[[202.00614]]** claimed "mana whakahaere" and "mana taketake" to Whakaari. Adriana Edwards in her second affidavit dated 18 November 2019 at [22] **[[201.00149]]** refers generally to Whakatōhea having mana from Maraetotara to Te Rangi and out past Whakaari. Te Ringahuia Hata in Cross-examination **[[107.03853]] at [[107.03858]]** assert that "we all have mana out at Te Puia o Whakaari".
[130] In cross-examination on 18 September 2020 Rua Rakuraku admitted that Ngāti Ira are not claiming to have mana in Whakaari seat at (p.46) **[[106.028979]].** For completeness we note that in re-examination he attempted to reassert that Ngāti Ira had mana on Whakaari. However, he qualified that by saying he still needed to talk to Rikirangi Gage.

55. Te Kāhui seem to make much of Te Riaki Amoamo's point that he "never saw any signs" on Whakaari saying one was entering Te Whānau a Apanui territory.[131] This is an odd emphasis given that there is no evidence of Te Whakatōhea having pou whenua or signs either on the mainland or on Whakaari, areas over which they claim mana whakahaere.

56. Finally, it is worth pointing out some Ngāi Tai witnesses also acknowledged Te Whānau a Te Ehutu's claim in Whakaari. For example, Muriwai Maggie Jones (the applicant for the Ngāi Tai claim) indicated in cross-examination that they were only seeking PCR's rather than CMT as an acknowledgement that others had stronger interests. She acknowledged Te Whanau a Te Ehutu interests.[132]

TE RIPOATA O NGĀ PŪKENGA

57. Two Pūkenga were appointed by the High Court under section s99(1)(b). The Pūkenga did not have the opportunity to prepare a report prior to the hearing but instead produced a short report that was received by the parties the morning after oral evidence concluded. Cross-examination of the Pūkenga commenced that same afternoon. Because of time constraints Te Whānau a Apanui were not able to cross-examine the Pūkenga but instead filed written questions for response.

58. Although the Pūkenga list Whakaari as being an area in respect of which a number of groups have interests, they clarified in response to written questions from Te Whānau a Apanui that this was not intended to indicate that all of those groups hold Whakaari in accordance with tikanga.[133] That is, their report simply reflected where interests were "claimed" by the respective groups based on the information provided.[134] Based on this, no definitive conclusions about the nature and extent of rights and interests in Whakaari

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See Cross-Examination of Te Rua Rakuraku **[106.02878] at [106.02882].** In cross examination on 8 September 2020 Adriana Edwards admitted that any mana they had was not exclusive and that the evidence indicates Te Whānau a Apanui have primary interests in Whakaari at (p.22), line 6 **[[104.01886]]**

[131] Te Kahui Submissions dated 23 September 2024 **at 5.24**.

[132] Cross-Examination of Muriwai Maggie Jones **[[108.04041]] at [[108.04043]].**

[133] Pūkenga Report at p.10 **[[101.00538]]**.

[134] Pūkenga responses to further written questions, 15 October 2020 at [2.d.ii.4] **[[101.00520]]**.

could be drawn from the Pūkenga Report. It does not define the nature or extent of those interests as a matter of tikanga.

59. However, of key relevance to Te Whānau a Apanui was the recognition by the Pūkenga that:

    (a) not all groups share the same level of interest as Te Whānau a Apanui;[135]

    (b) there is tikanga significance in the fact that Te Whānau-ā-Apanui [Te Whānau a Te Ehutu] was always first to go to Whakaari for tītī or kuia and other resources;[136] and

    (c) that Te Whānau a Te Apanui have mana whenua in Whakaari.[137]

60. The Pukenga did not make the same acknowledgements in respect of other iwi.

61. Te Whānau a Apanui say that the decision by the High Court and Court of Appeal to decline CMT for Te Whakatōhea and Ngai Tai in respect of the takutai around Whakaari is consistent with the Pūkenga findings and the extensive evidence the Court had heard over the course of the long hearing.

KUPU WHAKAMUTUNGA

62. CMT is a blunt tool that is incapable of reflecting all of the nuances of CMT. It therefore does not follow that the response to every layer of tikanga should be for the Court to grant CMT to all parties that claim tikanga based associations in an area. If this were the case then Te Whakatōhea would be able to claim CMT across almost the entire rohe of Te Whānau a Apanui up to Whangaparaoa, even though there is no question that this is the territory of Te Whānau a Apanui. Similarly, Te Whānau a Apanui could claim CMT interests in Ohiwa harbour, well outside their rohe.

63. As recognised by Te Kāhui, there is a difference between CMT which is more of a territorial type right and PCRs', which is more akin to a use type right. There are some tikanga relationships that will not satisfy either test. No matter

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[135] Pūkenga responses to further written questions, 15 October 2020 at [2.d.ii.4] **[[101.00520]]**.
[136] Ibid [2.d.ii.1] **[[101.00520]]**.
[137] Ibid [2.d.ii.3] **[[101.00520]]**.

the outcome under the Act, tikanga will continue to operate and guide relationships between parties and the takutai moana outside of CMT.

64. The role of the Court is to unpick and assess whether each of the relevant layers meet the relevant CMT threshold tests. In this case, if the Court stands back and assess the evidence as a whole, it is clear that different iwi have different relationships and strengths of interests in Whakaari and the associated takutai moana. In our submission, both the High Court and Court of Appeal correctly concluded that Te Whakatōhea (and Ngai Tai) interests in the takutai moana surrounding Whakaari are "in the nature of resource rights and more appropriately dealt with by way of PCR".[138]

65. This conclusion is consistent with the evidence, which the High Court had the benefit of hearing over 10 hearing weeks. While Te Whakatōhea and Ngai Tai have asserted various tikanga related associations with Whakaari, those association are different in nature to the associations of Te Whānau a Apanui, which all parties accept hold mana at Whakaari.

66. Te Whānau a Apanui say that neither the Te Whakatōhea or Ngai Tai applicants can say that they hold the takutai moana around Whakaari "in accordance with tikanga". Even if the Court were to find that this prong of the CMT test is satisfied, the acknowledged strong interests of Te Whānau a Te Ehutu mean that they cannot satisfy the exclusive use and occupation requirement.

67. Accordingly, the appeal that seeks to overturn the Court of Appeal and decision of the High Court to have CMT awarded in relation to the area around Whakaari, must be declined.

DATED at Whakatane this 4th day of September 2024.

M K Mahuika / N R Coates /
Counsel for the Trustees

[138] High Court Judgment at [474] and [475] **[[05.00526]]** and get COA judgement.