I TE KŌTI MANA NUI O AOTEAROA
IN THE SUPREME COURT OF NEW ZEALAND

SC 126/2023

IN THE MATTER OF	an appeal from the decision of the Court of Appeal of New Zealand determining appeals from the judgment of the High Court in *Re Edwards (Te Whakatōhea) (No. 2)*
BY	The Attorney-General
	Appellant
AND	Muriwai Maggie Jones on behalf of Ngai Tai and Muriwai Maggie Jones and Te Aururangi Davis on behalf of Ririwhenua Hapu
	Landowners Coalition Incorporated
	Te Runanga o Ngāti Awa
	Te Ūpokorehe Treaty Claims Trust and others on behalf of Te Ūpokorehe

cont.

SUBMISSIONS ON BEHALF OF NGAI TAI AND RIRIWHENUA AS RESPONDENTS TO THE ATTORNEY-GENERAL'S APPEAL

DATED 18 OCTOBER 2024

Counsel for Ngai Tai and Ririwhenua certify that these submissions contain no suppressed information and are suitable for publication.

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Crown Regional Holdings Ltd

Ōpōtiki District Council

Seafood Industry Representatives

Te Whānau a Harāwaka

Trustees of Te Rūnanga o Te Whānau

Whakatāne District Council

Respondents

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Our coastline has not only sustained our people since the arrival of our waka and tīpuna, but it has also sustained our manuhiri who continue to come to our rohe and our marae. Our association with the coastline began prior to the arrival of our waka, Tainui, but also with Manaakiao as tangata whenua.[1]

Introduction

1. These submissions are filed on behalf of Ngai Tai and Ririwhenua as respondents to the Attorney-General's appeal from the judgment of the Court of Appeal in *Whakatōhea Kotahitanga Waka (Edwards)*.[2]

Summary of Ngai Tai and Ririwhenua submissions

2. The customary marine title (**CMT**) order made in favour of Ngai Tai and Ririwhenua is unaffected by the Attorney-General's submissions as to the effect of previous extinguishing events and the test for protected customary rights. Accordingly, these submissions only respond to the Attorney-General's appeal in relation to the test for CMT or, as this Court has characterised it, the correct interpretation of s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA**).[3]

3. Ngai Tai and Ririwhenua support the Court of Appeal majority's interpretation of s 58 of MACA and submit that a broad and generous construction is appropriate. They say that the narrow interpretation of the second limb of the test for CMT that the Attorney-General seeks is inconsistent with the purpose of the MACA, te Tiriti o Waitangi, and tikanga Māori, and incorrect as a matter of interpretation. By contrast the majority's interpretation reflects the importance of a context-specific approach that is sensitive to tikanga, Te Tiriti and appropriately reflects the purpose of the MACA legislation.

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[1] Oral evidence of Arapeta Mio, 1 October 2020, transcript p 67. 108.03964.
[2] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui* [2023] NZCA 504, [2024] 3 NZLR 252 at [416] **(CA Judgment)**.
[3] Minute of Williams J dated 4 July 2024 at [7(a)-(c)]. The "broad issues" raised by the various appeals before the Court are summarised at [7] of the minute.

Background

Ngai Tai and Ririwhenua

4. Ngai Tai is an iwi descended from Tōrere Nui a Rua of Tainui waka and Manaakiao, a descendant of the people of Toi te Huatahi.

5. Over twenty-seven generations ago, Tainui waka left Hawaiki and voyaged across the seas in search of new whenua. Tainui arrived at Whangaparāoa on the east coast of Aotearoa. While travelling west along the coastline, Tōrere Nui a Rua, a daughter of the captain Hoturoa, came ashore.[4] An earlier explorer and navigator to Aotearoa, Kupe, had told the people leaving on Tainui waka to look out for a young man named Manaakiao, a descendant of the people of Toi[5] who had decided to remain in Aotearoa when Kupe returned home.[6] Tōrere Nui a Rua met Manaakiao and they married. When Tōrere Nui a Rua left Hawaiki, she had gathered sand and stones to bring with her. On her arrival on the coast, she sprinkled the sand and stones, creating a special connection to the rohe that continues through her descendants to this day.[7]

6. Tōrere Nui a Rua and Manaakiao gave birth to Tai, from whom the name Ngai Tai originated.[8] Ngai Tai in Tōrere is made up of three whānau/hapū: Ririwhenua, Ngā Potiki, and Tainui.[9]

7. The rohe of Ngai Tai is between Whakatōhea to the west, Te Whānau-a-Apanui to the east, Te Aitanga ā Māhaki to the south, and Ngāti Porou to the south-east.[10] The current boundaries have changed from the time of Tōrere Nui a Rua and Manaakiao, and are now from Tarakeha at the rock Te Toka o Rutaia in the west to Te Waipuna stream in the east.[11]

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[4] Anthony Patete, Ngaitai ki Tōrere Scoping Report (2014) at [14], Exhibit MJ1 to the Affidavit of Muriwai Maggie Jones, 14 April 2020. 316.06766
[5] Affidavit of Arapeta Mio, 14 April 2020, at [6]. 202.01015.
[6] Affidavit of Te Aururangi Davis, 14 April 2020, at [27]. 202.01001.
[7] Oral evidence of Arapeta Mio, 1 October 2020, transcript p 71. 108.03968.
[8] Anthony Patete, Ngaitai ki Tōrere Scoping Report (2014) at [14], Exhibit MJ1 to the Affidavit of Muriwai Maggie Jones, 14 April 2020. 316.06766.
[9] Affidavit of Te Aururangi Davis, 14 April 2020, at [28]. 202.01001.
[10] Anthony Patete, Ngaitai ki Tōrere Scoping Report (2014) at [18], Exhibit MJ1 to the Affidavit of Muriwai Maggie Jones, 14 April 2020. 316.06766
[11] Affidavit of Arapeta Mio, 14 April 2020, at [57]. 202.01015.

The tūrangawaewae tūturu of Ngai Tai is Tōrere; their marae is Tōrere-nui-a-rua.[12] Ririwhenua are based from Tōrere River to Waipuna Stream.[13] Maps and images of the rohe are attached as Appendix One.

8. Ngai Tai share strong connections and whakapapa with their neighbouring iwi.[14] They live alongside and exercise mutual respect for one another's mana and their responsibilities as kaitiaki of their respective rohe.

9. Witnesses for Ngai Tai and Ririwhenua in the High Court shared their whakapapa descending from Tōrere Nui a Rua and Manaakiao, grounding them in an unbroken chain of tīpuna who exercised mana whenua, mana moana and ahi kā roa over their rohe. That unbroken and enduring mana in relation to the takutai continues to this day.

High Court Proceedings

10. In 2017 Ms Muriwai Maggie Jones applied to the High Court for recognition of the customary rights of Ngai Tai and Ririwhenua under the Act.[15] Originally, there was a partial overlap between the areas in Ms Jones' applications and the area identified in the priority application made by the late Claude Edwards, Adriana Edwards and others on behalf of Te Whakatōhea.[16]

11. During the first stage of the substantive hearing of the applications in 2020, the High Court received a written report from Dr Hiria Hape and Mr Doug Hauraki who were appointed as Pūkenga pursuant to s 99.[17] The Pūkenga concluded that Ngai Tai have mana whenua from Tarakeha in

[12] Anthony Patete, Ngaitai ki Tōrere Scoping Report (2014) at [16], Exhibit MJ1 to the Affidavit of Muriwai Maggie Jones, 14 April 2020. 316.06766.
[13] Affidavit of Te Aururangi Davis, 14 April 2020, at [30]. 202.01001.
[14] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 at [307].
[15] Application of Muriwai Maggie Jones on behalf of Ngai Tai Iwi and Te Uri of Ngai Tai for Recognition Orders pursuant to the Marine and Coastal Area (Takutai Moana) Act 2011 and Application of Muriwai Maggie Jones on behalf of Ririwhenua Hapū for Recognition Orders pursuant to the Marine and Coastal Area (Takutai Moana) Act 2011. 101.00358 and 101.00365.
[16] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 05.00401 at [16].
[17] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 05.00401 at [309].

the west to Taumata o Apanui.[18] They confirmed that their findings with respect to Ngai Tai were also intended to include Ririwhenua.[19]

CMT Order in Favour of Ngai Tai and Ririwhenua

12. The High Court held that Ngai Tai established CMT in the area between Tarakeha and Te Rangi: they hold the area in accordance with tikanga and have exclusively used and occupied it from 1840 to the present day without substantial interruption.[20] While it was acknowledged that there was a "*period of disruption*" in the 1840s when Whakatōhea hapū encroached east of Tarakeha, that encroachment did not amount to substantial interruption, nor did it extinguish the ahi kā of Ngai Tai.[21]

13. The High Court dismissed a submission by Ngai Tamahaua who contended that the boundary between Whakatōhea and Ngai Tai was at Te Rangi, not Tarakeha.[22] Ngai Tamahaua was the only applicant group to contest the boundary bordering Te Whakatōhea and Ngai Tai and Ririwhenua. In dismissing Ngai Tamahaua's claim that they shared mana moana with Ngai Tai over the area between Tarakeha and Te Rangi, the High Court noted the position of the other Whakatōhea hapū who recognise Tarakeha as the boundary.[23] The Court and the Pūkenga had regard to the evidence of Te Riaki Amoamo, a senior and respected kaumātua of Whakatōhea, who spoke of seeking permission from Ngai Tai to visit Te Rangi.[24]

14. The High Court's judgment was the subject of various appeals and cross-appeals which were heard by the Court of Appeal in February and March 2023. In that judgment, which is now the subject of this appeal, the Court of Appeal ordered a rehearing of the application for a CMT recognition

[18] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 05.00401 Appendix A – Pūkenga Report at [4(c)(iii)(1)(e)].
[19] Cross-examination of Hiria Hape and Doug Hauraki by counsel for Ngai Tai and Ririwhenua, 9 October 2020, transcript p 38. 108.04601.
[20] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 05.00401at [479].
[21] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 05.00401 at [480].
[22] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 05.00401at [479].
[23] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 05.00401at [586].
[24] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 05.00401 at [587].

order over the area covered by Order 3, between Tarakeha and Te Rangi.[25]

15. Ngai Tai and Ririwhenua did not appeal the Court of Appeal's judgment and accordingly they are respondents in this appeal.

Rehearing of Application for CMT Order in Favour of Ngai Tai and Ririwhenua

16. The High Court reheard the application by Ngai Tai and Ririwhenua for a CMT recognition order between Tarakeha and Te Rangi on 29 April 2024. In a written judgment issued on 28 May 2024, His Honour Justice Churchman determined that Ngai Tai and Ririwhenua were entitled to an order for CMT in respect of the area covered by Order 3.[26]

17. On 26 June 2024, the Attorney-General filed an appeal against the High Court's judgment. On 15 August 2024, in response to a memorandum on behalf of the Attorney-General, His Honour Justice Palmer made a direction to defer the scheduling and hearing of the Crown's appeal until this Court's judgment in the present appeal is available.

18. The balance of the area that is the subject of an application by Ngai Tai and Ririwhenua for recognition orders under the Act remains to be determined. That area is not the subject of the present proceedings.

Submissions on appeal

19. The legal framework of the MACA has been traversed in other submissions. In summary, the Act seeks to achieve a scheme which protects the legitimate interests of all New Zealanders in the marine and coastal area while also recognising Māori customary rights or authority and providing for Māori to exercise their customary interests.[27] MACA provides for recognition of three types of customary interests in the common marine and coastal area: participation rights in conservation processes, protected customary rights, and CMT.

[25] CA Judgment at [356] and [25(c)].
[26] *Muriwai Maggie Jones on behalf of Ngai Tai Iwi and the Uri of Ngai Tai* [2024] NZHC 1373.
[27] *Re Tipene* [2016] NZHC 3199 at [26].

20. The scope and effect of CMT is contained in s 60 and the rights conferred by a CMT order are set out in s 62. A court may only make an order recognising CMT if it is satisfied that the applicant meets the requirements of s 58.[28]

21. Under s 58(1), CMT exists in the specified area if the applicant group:

    a. Holds the specified area in accordance with tikanga; and

    b. Has, in relation to the specified area, —

        i. Exclusively used and occupied it from 1840 to the present day without substantial interruption; or

        ii. Received it, at any time after 1840, through a customary transfer in accordance with subsection (3).[29]

22. The matters that may be taken into account in determining whether CMT exists in a specified area are set out in s 59 and include:

    a. Whether the applicant group and any of its members—

        i. Own land abutting all or part of the specified area and have done so, without substantial interruption, from 1840 to the present day;

        ii. Exercise non-commercial customary fishing rights in the specified area, and have done so from 1840 to the present day.[30]

23. The use of the specified area for fishing or navigation by persons who are not members of the applicant group does not, of itself, preclude the applicant group from establishing the existence of CMT.[31]

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[28] *Re Tipene* [2016] NZHC 3199 at [36], citing the Marine and Coastal Area (Takutai Moana) Act 2011, s 98(2).
[29] Marine and Coastal Area (Takutai Moana) Act 2011, s 58(1).
[30] Marine and Coastal Area (Takutai Moana) Act 2011, s 59(1).
[31] Marine and Coastal Area (Takutai Moana) Act 2011, s 59(3).

24. The burden of proof to establish CMT is set out in s 106. The elements that the applicant group must prove do not mirror the indicia of CMT listed in s 58(1). An applicant group must prove that the specified area:

    a. Is held in accordance with tikanga; and

    b. Has been used and occupied by that group either from 1840 to the present day or from the time of a customary transfer to the present day.[32]

25. MACA contains a presumption in the case of every application for a recognition order that, in the absence of proof to the contrary, a customary interest has not been extinguished.[33]

The Court of Appeal majority correctly interpreted the second limb of s 58

26. The Court of Appeal majority determined that it was possible to interpret s 58 consistent with the purpose of MACA by "*reading it in a manner that is sensitive to the materially different frameworks that applied before proclamation of sovereignty in 1840, and from proclamation of British sovereignty onwards*."[34] The applicant group, the majority considered, must have had the intention and ability as a matter of tikanga to control access to the relevant area by other groups.[35] Use of a particular resource in an area alone would not amount to exclusive use and occupation of the area. Rather, a "*strong presence*" is required, manifested in acts of occupation that could reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, or was under the stewardship of the claimant group.[36]

27. A claimant group's ability to meet this requirement, the majority found, will not necessarily be defeated by evidence of access to the area or use

[32] Marine and Coastal Area (Takutai Moana) Act 2011, s 106(2).
[33] Marine and Coastal Area (Takutai Moana) Act 2011, s 106(3).
[34] CA Judgment at [418].
[35] CA Judgment at [421].
[36] CA Judgment at [422].

of resources in that area by other Māori groups.[37] Consistent with the reference in the Act's preamble to tikanga and manaakitanga, the majority observed that "*full account will need to be taken of the core tikanga values of whanaungatanga and manaakitanga in order to understand the basis on which other groups were present in the area*."[38] Evidence that a group has permitted access to its land or resources by other groups will be reflective of the exercise of their mana/control in the area which supports rather than undermines a claim to CMT.[39]

28. Ngai Tai and Ririwhenua support this interpretation, noting it is also consistent with expert evidence in the High Court from Professor Emeritus David Williams who explained that:

> "*resource boundaries were conceived of lineally, and radially, with rights or authority radiating from a central heart to uncertain fringes*."[40]

29. Similarly, the Waitangi Tribunal considered the context of overlapping rights in the *Tūranga Tangata, Tūranga Whenua* Report:

> "*A difficulty occurs today when people, both Māori and Pākehā, try to translate this customary network of rights and connections into an environment of "straight-line" boundaries.* ***Resource rights were complex, convoluted, and overlapping. They almost never phased cleanly from hapū to hapū as one panned across the customary landscape. Instead most resource complexes had primary, secondary and even tertiary right holders from different hapū communities, all with individual or whānau interests held in accordance with tikanga, and therefore by consent of their respective communities.*** *All rights vested and were sustained by the currency of whakapapa.*"[41] (Emphasis added).

30. The majority determined that the question of whether a group has exclusively used and occupied the area without substantial interruption must be approached having regard to "*the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga, and having regard to the scheme and purpose of*

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[37] CA Judgment at [424].
[38] CA Judgment at [424].
[39] CA Judgment at [424].
[40] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025, 05.00401 at [289].
[41] *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025,05.00401 at [291], citing Waitangi Tribunal, *Tūranga Tangata, Tūranga Whenua: The Report on the Turanganui a Kiwa Claims* (WAI 814, 2004) at [18].

MACA."[42] Relevant factors include the nature of the customary rights in issue, the *"frequent and generous exercise of manaakitanga by whānau, hapū and iwi in favour of other Māori groups, and in favour of European settlers*," the guarantee of tino rangatiratanga in article 2 of te Tiriti, the Crown's arrogation to itself of the power to control access to customary lands, the longstanding and widely-held (but incorrect) view that there could be no customary rights or interests in the common marine and coastal area, and the express provision in s 59(3) allowing for the use of the area by people who are not members of the applicant group for fishing or navigation.[43]

31. The majority rejected the submission that any substantial third party access to, or fishing in, an area would demonstrate that the applicant group did not hold the area exclusively without substantial interruption. Rather, the majority considered, s 58(1)(b) can be read as requiring that the applicant group's use and occupation of the area was not substantially interrupted by the lawful activities of others.[44] Substantial interruption will fall to be determined on a case-by-case basis. The majority provided some "*broad indications*" of when that might arise, including where a group has ceased to use or occupy an area for such an extended period that ahi kā roa is no longer maintained as a matter of tikanga, or where an Act of Parliament authorises use or occupation of the area by another person without the permission of the customary owner.[45]

32. Ngai Tai and Ririwhenua say the Court of Appeal majority correctly interpreted the second limb of the test in s 58 in light of MACA's purposes, te Tiriti, and tikanga. They further say that the Attorney-General's proposed narrow interpretation of the second limb of s 58 is inconsistent with MACA, tikanga and te Tiriti and incorrect as a matter of interpretation.

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[42] CA Judgment at [426].
[43] CA Judgment at [426(a)-(f)].
[44] CA Judgment at [428].
[45] CA Judgment at [431]-[433].

A broad and generous construction is appropriate

33. The Court of Appeal majority found that the best available reading of s 58 is one that respects both its text and its purpose.[46] Accordingly, a broad and generous construction is appropriate.

34. The preamble and sections 4 and 7 of the Act make it clear that the Act as a whole is intended to reflect te Tiriti. It is well-established that Treaty clauses should not be narrowly construed but must be given a broad and generous construction.[47] While the Attorney-General contends that "*the Court's task is not to evaluate whether the Act breaches the Treaty*,"[48] Ngai Tai and Ririwhenua say it is entirely appropriate for the Court to endeavour to interpret legislation in a manner consistent with te Tiriti.

35. A flexible interpretation is also consistent with the nuanced and context-specific nature of tikanga. As recorded in the Statement of Tikanga of Tā Hirini Moko Mead and Tā Pou Temara appended to *Ellis v The King*, tikanga "*has a flexible dimension*" and when a matter arises for resolution, "*recourse is always had to the fundamental principles that underlie tikanga as well as drawing on historical precedent and how tikanga has been recognised in similar situations*."[49]

36. The MACA's broader textual context reflects the fact that tikanga is an integral part of its operation. It is a statute about te takutai moana, an area of great significance to Māori, and as such tikanga ought to provide an important interpretative overlay to the whole Act.

37. Ngai Tai and Ririwhenua say that the plain language of the second limb of s 58 requires a nuanced interpretation that is consistent with tikanga. Further, a broad approach would recognise mana tuku iho consistent with

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[46] CA Judgment at [434].
[47] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [151], citing *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) at 518 and *Ngai Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48]-[54].
[48] Submissions on behalf of the Attorney-General on Appeal at [35].
[49] Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara, 31 January 2020 at [32] and [33] appended to *Ellis v The King* [2022] NZSC 114.

the purposes of MACA set out in s 4 as well as tikanga such as ahi kā roa, and the exercise of manaakitanga and whanaungatanga.

38. The Attorney-General urges a narrow interpretation of the second limb of s 58 which is inconsistent with the purposes of MACA and with te Tiriti. This interpretation is based on the supposed "*clear and unambiguous requirement*" to prove exclusive use and occupation.[50]

39. The Attorney-General recognises, however, that the language of s 58 is plainly not "*clear and unambiguous*" as evidenced from the acknowledgement that:

> "*the concept of exclusive use and occupation clearly does not require complete exclusion of third parties, because the Act presumes the exercise of public rights of access, fishing and navigation are compatible with the concept of exclusivity. The Act also does not require the establishment of an unbroken chain of exclusive use and occupation from 1840 to the present day because it contemplates some level of interruption to exclusive use and occupation over time*."[51]

40. The Attorney-General asserts that the majority's interpretation of the second limb does "*violence*" to the text of s 58, referring to the Court of Appeal's judgment in *Urlich v Attorney-General*.[52] The Attorney-General's reliance on *Urlich* is misplaced. In that case the Court of Appeal determined that s 40(5) of the Public Works Act 1981 could bear its ordinary meaning "*without offending either the general purposes … or the duty of active protection of rangatiratanga over whenua Māori,*" because s 41 of the Public Works Act and s 134 of Te Ture Whenua Māori Act 1993 provided a "*more flexible approach*" that would enable the Crown to "*do justice to tangata whenua*."[53] The availability of a flexible approach under ss 41 and 134, the Court of Appeal held, meant that Treaty repugnancy could be avoided.[54] Accordingly, s 40(5) could be given its ordinary meaning without the risk of Treaty repugnancy.

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[50] Submissions on behalf of the Attorney-General on Appeal at [20].
[51] Submissions on behalf of the Attorney-General on Appeal at [32].
[52] Submissions on behalf of the Attorney-General on Appeal at [3], [36].
[53] *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [56].
[54] *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [62].

41. In contrast with *Urlich*, the Attorney-General's proposed interpretation of s 58 cannot be justified on the basis that a separate, Tiriti-consistent interpretation is available here which would avoid Treaty repugnancy.

42. It is no answer for the Attorney-General to contend that a narrow interpretation can be justified on the basis that "*underlying customary interests continue to exist, even if a group is unsuccessful in obtaining customary marine title (or protected customary rights), and such groups continue to have the right to participate in conservation processes afforded by s 47 of the Act*."[55] This submission is contrary to one of the stated purposes of the MACA which is to "*give[s] legal expression to customary interests.*"[56] To suggest that MACA should be interpreted in such a way that means that customary interests are not given legal expression is to disregard that purpose of the legislation.

The Attorney-General's proposed interpretation relies on repealed legislation

43. The Attorney-General urges an interpretation of the second limb of the test in s 58 that would require "*evidence of an intention and capacity… to control an area against third parties*" despite the statute being silent as to any such requirement, in contrast with the repealed Foreshore and Seabed Act 2004.[57]

44. Section 32(2)(a) of the Foreshore and Seabed Act 2004 provided that a group would be regarded as having had exclusive use and occupation of an area of the public foreshore and seabed only if:

    a. The area was used and occupied, **to the exclusion of all persons who did not belong to the group,** by members of the group without substantial interruption in the period that commenced in 1840 and ended with the commencement of this Part; and

    b. The group had continuous title to contiguous land.

45. As the Court of Appeal majority observed, the requirement to prove the exclusion of all persons who did not belong to the applicant group was

[55] Submissions on behalf of the Attorney-General on Appeal at [33].
[56] Marine and Coastal Area (Takutai Moana) Act 2011, s 4(2)(c).
[57] Submissions on behalf of the Attorney-General on Appeal at [42].

removed from the MACA.[58] The Attorney-General's submissions do not explain why this test which was not replicated from the "*severely discriminatory*" 2004 Act, should be read into its replacement when Parliament decided not to include it. Ngai Tai and Ririwhenua submit that such an interpretation is plainly wrong.

The majority's interpretation reflects the importance of a context-specific approach

46. The Attorney-General says that the majority's interpretation of the second limb gives the requirement of exclusive use and occupation from 1840 to the present day "*no work to do*" and significantly narrows the criteria for what may amount to a substantial interruption.[59]

47. The majority's judgment, however, is clear that a Tiriti-consistent interpretation of the second limb of s 58 requires applicant groups to establish a "*strong presence*" in the area that is manifested in "*acts of occupation that could reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group*."[60] Accordingly, what an applicant is required to prove is highly context and fact specific and requires evidence of their use and occupation of the takutai moana area.

48. The majority observed that this strong presence requirement will be more difficult to establish in marine areas as opposed to coastal areas due to their nature and the different ways in which each area can be used. Similarly, the requirement will be:

> "*more difficult to demonstrate in respect of offshore areas visited only occasionally (for example, to fish) than shallower areas close inshore that could be (and were) observed and controlled from coastal settlements, and used on a regular basis (for example, coastal inlets frequently used for collection of shellfish and shallow-water fish species, transport, rongoā (medicine) and other activities).*"[61]

[58] CA Judgment at [415].
[59] Submissions on behalf of the Attorney-General on Appeal at [3].
[60] CA Judgment at [422].
[61] CA Judgment at [422].

49. The majority's interpretation is also consistent with the High Court's observations as to the relevance of context when considering notions of occupation, use, and continuity. In *Re Tipene*, Mallon J remarked that "*remoteness, the environment, and changes in technology are all relevant*" and may provide an explanation for "*periods of no or occasional use while nevertheless maintaining a connection to the land*."[62]

50. The central importance of context when assessing exclusive use and occupation was emphasised in *Re Reeder*. Powell J noted that interpretation of what amounts to exclusive use and occupation includes the context of the Act itself, the nature of the physical environment over which the rights in issue are exercised, and the nature of the tikanga under which the specified area is said to be held.[63] His Honour explained that because the common marine and coastal area comprises foreshore and seabed:

> "*outside of any permanent structures access will otherwise be transitory, predominantly for the purposes of navigation or fishing, or walking when the tide is out. How the applicable tikanga deals with these types of activities will be of central importance*."[64]

51. The importance of context can be seen from the Ngai Tai and Ririwhenua evidence before the High Court that established their presence in the area since (before) 1840, manifested in acts of occupation capable of being interpreted as demonstrating the area belongs to, is controlled by, or is under their exclusive stewardship. Ngai Tai witnesses gave evidence of the tikanga that is followed when they go to the shore and the teaching of kaitiakitanga and manaakitanga.[65] They described their obligations of kaitiakitanga and how they look after the area for future generations.[66] They work very closely with Ōpōtiki District Council and are "very fussy" about the care of their beach.[67] Ngai Tai have a very

[62] *Re Tipene* [2016] NZHC 3199 at [149].
[63] *Re Reeder* [2021] NZHC 2726 at [31].
[64] *Re Reeder* [2021] NZHC 2726 at [36].
[65] Oral evidence of Arapeta Mio, 108.03973.
[66] Oral evidence of Arapeta Mio, 108.03987, Oral evidence of Muriwai Jones at 108.04025
[67] Oral evidence of Muriwai Jones at 108.04029.

respectful relationship with their moana which reflects intergenerational expectations.[68]

52. The relationship of Ngai Tai with their neighbours, and their corresponding respect for the rohe of one another also shows that their iwi neighbours recognise the exclusive takutai moana area of Ngai Tai and Ririwhenua. For example, Te Riaki Amoamo, a senior kaumātua of Whakatōhea, gave evidence about seeking the permission of Ngai Tai to visit Te Rangi:

> *Q. Now taihoa Mr Amoamo. He pātai taku. You talk in your footnote about visiting Te Rangi with Waka Huia when the television programme was made a few years ago and I wanted to ask you whether the practice of walking in the footsteps of those in front of them is still adhered to today?*
>
> *A. It's not adopted by this generation today but it's the history that was laid down by the ancestors that arrived to Aotearoa at that time, but I ask Wiremu Maxwell, the kaumātua of Ngāi Tai if we could go there. He said you cannot go there when the tide is high tide and until it's low tide. So he arranged a time for Whakatōhea to go there. So we went there and as soon as we turned into the cove and Ngāi Tai was there to pōwhiri us, to welcome us.*[69]

53. Contrary to the Attorney-General's assertion that the majority's interpretation leaves "*no work*" for the second limb of s 58, the legal test requires and Ngai Tai and Ririwhenua have presented evidence showing they have exclusively used and occupied the specified area from 1840 to the present day without substantial interruption. The findings of the pūkenga supported the evidence showing their longstanding and multifaceted relationship with their takutai moana. No evidence was presented to suggest the customary interests of Ngai Tai or Ririwhenua have been extinguished.

Conclusion

54. The Court of Appeal majority correctly interpreted the second limb of the test for CMT in line with the purpose of MACA and consistency with te

[68] Oral evidence of Muriwai Jones at 108.04044.
[69] Oral evidence of Te Riaki Amoamo, 106.02953.

Tiriti and tikanga Māori. A broad and generous construction is appropriate taking into account the physical characteristics of the takutai moana and the detailed and nuanced evidence produced to support applications for recognition orders.

55. Ngai Tai and Ririwhenua seek the following orders:

    a. Dismissing the Attorney-General's appeal;

    b. Costs; and

    c. Any other relief the Court sees fit.

Mokotā - B R Arapere / A Gordon / E K Rongo
Counsel for Ngai Tai and Ririwhenua

LIST OF AUTHORITIES

Legislation

Foreshore and Seabed Act 2004, s 32

Marine and Coastal Area (Takutai Moana) Act 2011, preamble and ss 4, 58, 59, 98, 100, 106

Case law

Re Tipene [2016] NZHC 3199

Re Reeder [2021] NZHC 2726

Re Edwards (Te Whakatōhea No. 2) [2021] NZHC 1025

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127

Urlich v Attorney-General [2022] NZCA 38, [2022] 2 NZLR 599

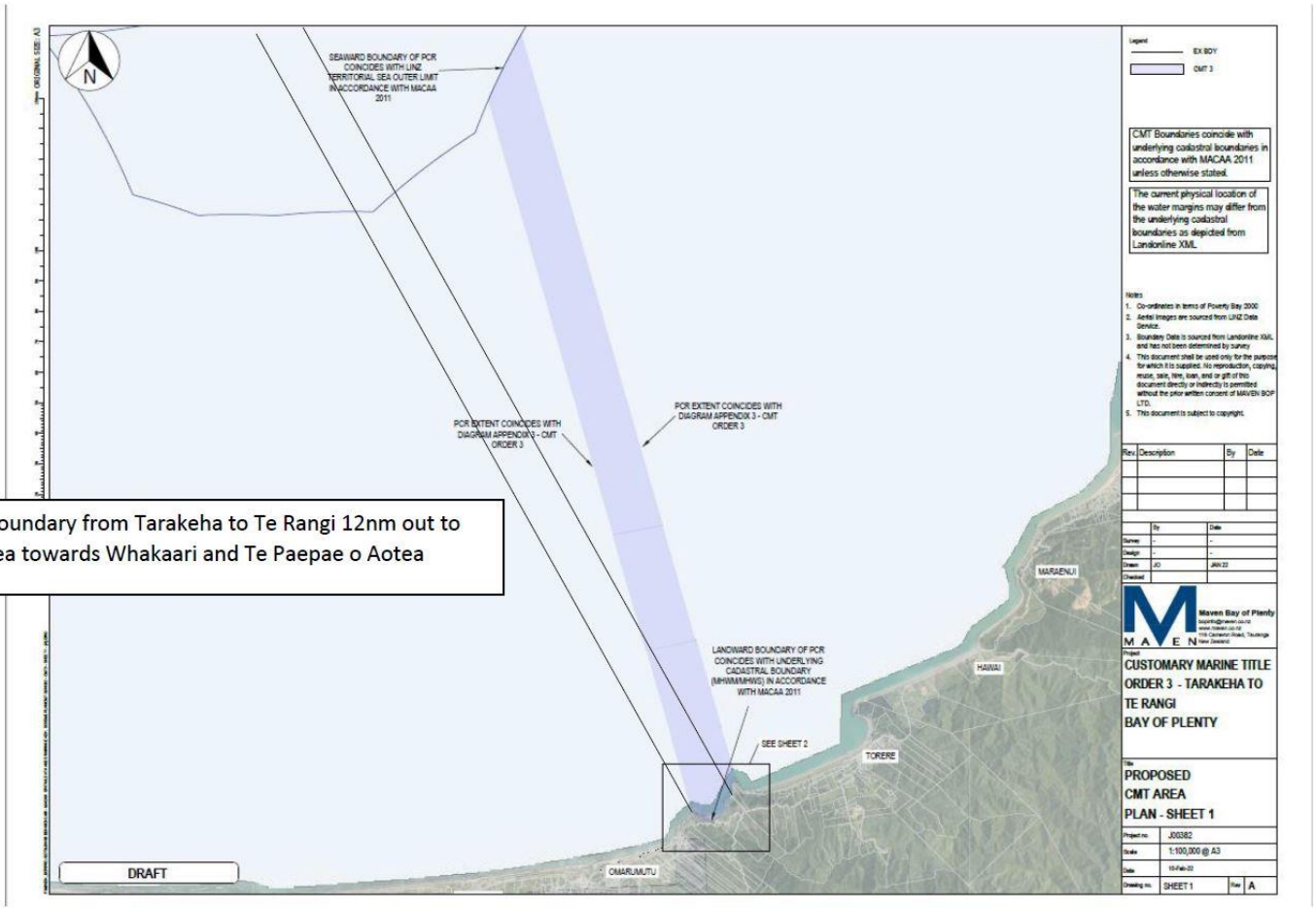
Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara, 31 January 2020 appended to *Ellis v The King* [2022] NZSC 114

Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui [2023] NZCA 504, [2023] 3 NZLR 252

Muriwai Maggie Jones on behalf of Ngai Tai Iwi and the Uri of Ngai Tai [2024] NZHC 1373

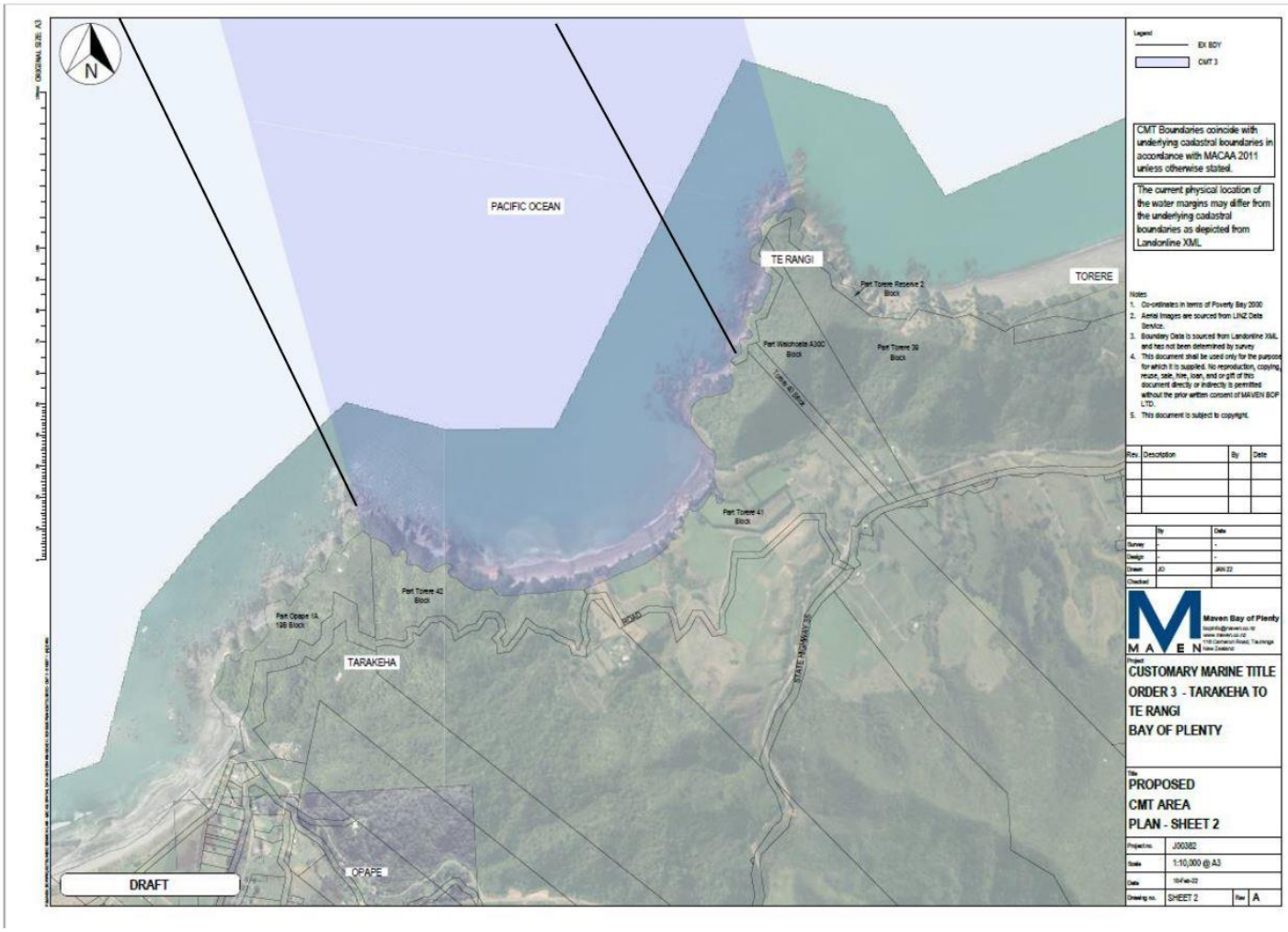
Appendix One – Maps and Images of Ngai Tai and Ririwhenua rohe

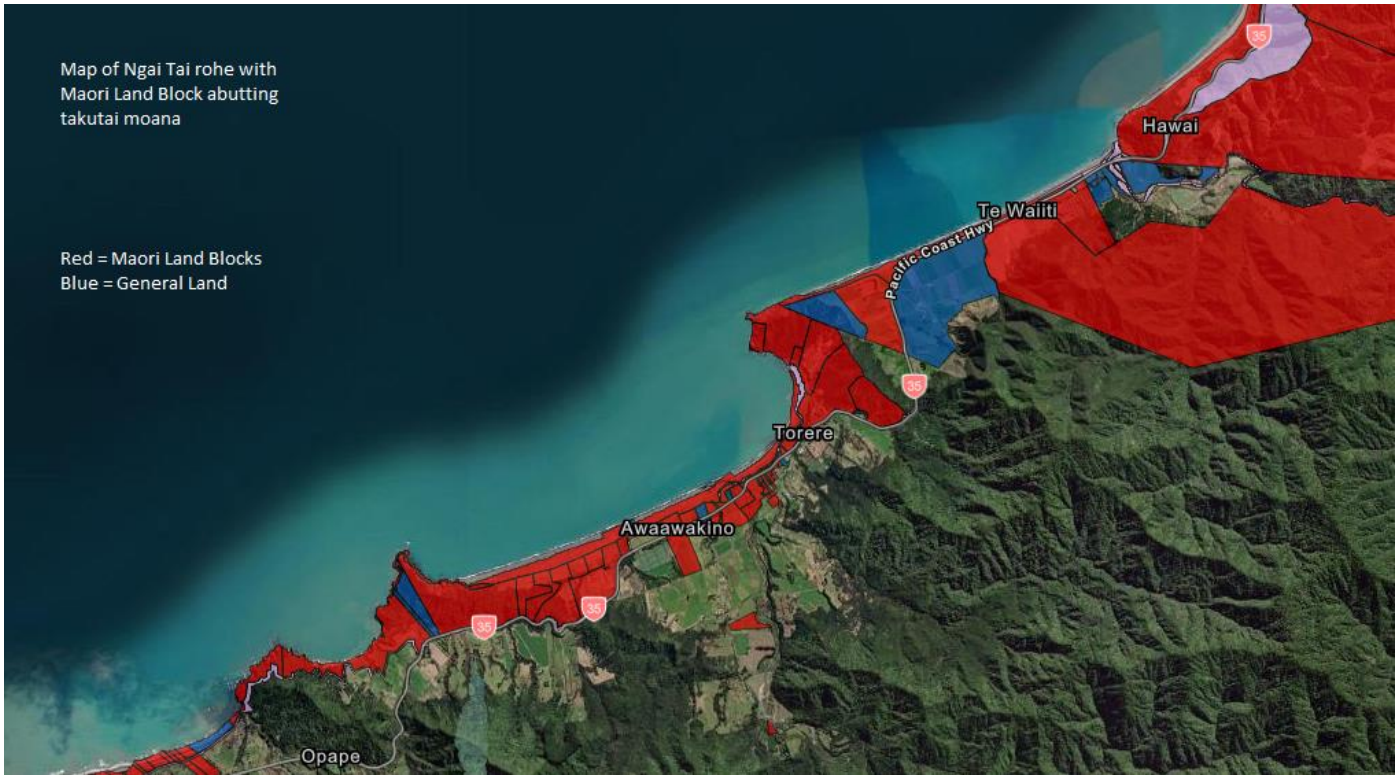
CMT 3 Survey – boundary at Tarakeha and Te Rangi out to 12nm



Boundary from Tarakeha to Te Rangi 12nm out to sea towards Whakaari and Te Paepae o Aotea

CMT 3 Survey – boundary at Tarakeha and Te Rangi




Map of Ngai Tai rohe with
Maori Land Block abutting
takutai moana
Red = Maori Land Blocks
Blue = General Land
Hawai
Te Waiiti
Pacific Coast Hwy
Torere
Awaawakino
Opape