IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 123/23

BETWEEN	**NGĀTI MURIWAI**
	Appellant
AND	**WHAKĀTOHEA KOTAHITANGA WAKA (EDWARDS), WHAKATŌHEA MAORI TRUST BOARD, TE RŪNANGA O NGĀTI AWA ,TE ŪPOKOREHE TREATY CLAIMS TRUST, and claims brought on BEHALF of NGĀTI RUATAKENGA, NGĀTI PATUMOANA, and NGĀTI IRA**
	Respondents
AND	**ATTORNEY GENERAL, LANDOWNERS COALITION INCORPORATED, TE WHĀNAU-Ā-APANUI, SEAFOOD INDUSTRY REPRESENTATIVES, CROWN REGIONAL HOLDINGS LIMITED, ŌPŌTIKI DISTRICT COUNCIL, BAY OF PLENTY REGIONAL COUNCIL and WHAKATĀNE DISTRICT COUNCIL**
	Interested Parties

Reply Submissions for Ngāti Muriwai (SC 123/23)

18 October 2024

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INTRODUCTION

1. These submissions are the reply submissions filed for Christina Davis on behalf of **Ngāti Muriwai** hapū (SC 123/23).

2. The submissions replied to are the *Submissions for Ngāti Ruatakenga Appeal dated 20 September 2024* (SC 129/24) ('*Ngāti Rua Submissions'*) which appeals against the orders made in relation to Ngāti Muriwai after the Judgment of the Court of Appeal.

3. In the course of these reply submissions reference will be made to the *Submissions on Appeal for Ngāti Muriwai and Kutarere Marae dated 20 September 2024* ("the Ngāti Muriwai/Kutarere appeal submissions").

Ngāti Ruatakenga Appeal

4. The Ngāti Rua Submissions raise two distinct issues in regard to the Court of Appeal Judgement[1] being whether the Court of Appeal was correct in:

   (a) Upholding the High Court award of Protective Customary Rights (PCR) orders to Ngāti Muriwai applicant group under s 51 of the Marine and Coastal Area (Takutai Moana) Act 2011 (*MACA Act*);

   (b) Providing that Ngāti Muriwai could participate in any Customary Marine Title (CMT) order awarded to Whakatohea Applicants groups after a rehearing of the CMT 2 order made by the High Court in the Opotiki area.

5. The argument against these orders set out in the Ngāti Rua submissions is essentially that Ngāti Muriwai are whanau group within Ngāti Rua and as such as a matter of tikanga Ngāti Muriwai cannot not hold any of the recognition orders seperately from Ngāti Rua.

6. The response on behalf of Ngāti Muriwai is that the High Court and the Court of Appeal correctly concluded that Ngāti Muriwai were a group within Whakatohea

[1] *Edwards and ores v Te Kahui and ores* [2023] NZCA 504

iwi separate from Ngāti Rua. Further that the PCR and CMT orders were correctly made.[2]

Relevant orders by the Court of Appeal

7. With regard to the PCR orders the relevant part of the Court of Appeal decision can be found in the Judgement of Miller J at [497]- [513].

8. His Honour upheld the decision of the High Court as follows:

[335] The Judge found that Ngāti Muriwai are an applicant group, entitled to seek a PCR:

[499] Although the [pūkenga] found that Ngāti Muriwai were not a hapū and could not be said to have exclusively used and occupied the specified area from 1840 to the present day, which precluded them from being granted CMT, s 51 does not require an applicant group to have exclusively used and occupied the relevant area from 1840 without substantial interruption.

[336] Ms Feint, appearing for Ngāti Ruatakenga, contended that this was an error because Ngāti Muriwai were not in existence in 1840, so could not have been exercising any rights since that time. In my view the Judge was right to reject this argument. Section 51(1) does not state that the applicant group must itself have exercised the right since 1840. Rather, it requires that the right has been exercised since 1840 and that the applicant group continues to exercise it. As noted earlier, I agree with Churchman J that Ngāti Muriwai are at least a whānau.398 They accordingly qualify as an applicant group.

9. His Honour then went to observe that counsel did not take issue with the fact that the customary activities recognised in the PCR order – collecting firewood, stones ,shells and aquatic plants- and whitebaiting – were carried out by Ngāti Muriwai. The objection being, on the evidence of **Te Teriaki Amoamo**, that these rights were of Ngāti Rua which Ngāti Muriwai formed part of.[3]

[2] Subject to issues regarding the CMT order raised in the Ngāti Muriwai/Kutarere appeal submissions.
[3] [339]

10. Miller J rejected this argument upon the basis that:

[341] In my view that concern must yield to the scheme of s 51, which contemplates multiple overlapping rights and allows any iwi, hapū or whānau group to obtain a PCR if the right has been exercised since 1840 and the applicant group continues to exercise it in accordance with tikanga. The legislation contemplates that PCRs may be recognised for groups which did not exist in 1840, so long as someone to whom the applicant has a relevant connection has continuously exercised the relevant customary right in the particular area since then and has done so in accordance with tikanga. That policy decision may be taken to reflect post-1840 changes in Māori society which are well illustrated in these appeals. There were once 22 hapū of Whakatōhea and only six (counting Te Ūpokorehe) of those remain today. At the same time, as Mr Bennion, for Ngāti Patumoana, pointed out, new and apparently substantial whānau groups have established themselves. Ngāti Muriwai are such a group. They say that they affiliate to the area and the iwi, but not to Ngāti Ruatakenga.

[342] I agree with Churchman J that Ngāti Muriwai are eligible for PCRs and otherwise met the s 51 criteria.405 Ngāti Ruatakenga's appeal will be dismissed.

11. With the CMT order, the background is set out in detail in the Ngāti Muriwai/Kutarere appeal submissions.[4]

12. In short, after finding that Ngāti Muriwai were not entitled to a CMT in their own right, His Honour then went on to make findings that nether the less they could hold a CMT as part of another group:

[281]However, Ngāti Muriwai are at least a whānau group forming part of the iwi. They cannot meet the s 58(1) criteria themselves, but I accept Mr Sharp's submission that they should not be disregarded when it comes to the issue of a recognition order for Whakatōhea. As explained above at [204], they may participate in a recognition order granted to an applicant group of which they form part, provided members of that group are able to meet the s 58(1) criteria. Their participation in CMT ought to be resolved among a successful applicant group of which they form part and in accordance with tikanga

[4] The Ngāti Muriwai/Kutarere appeal submissions [88]-[94]

Who are the Ngāti Rua Appellants?

13. In addressing the Ngāti Rua submissions it is relevant to firstly clarify who has raised these point on appeal.

14. In effect the appeal is raised by **Mereaira Hata** who filed an appearance in the High Court as an i*nterested party* said to be on behalf of Ngāti Ruatakenga.[5] The actual recognition orders made in favour of Ngāti Ruatakenga as an applicant group in the High Court was pursuant to a separate application made by the Whakatohea Trust Board[6] which was made to support orders for Whakatohea groups. The Trust Board has not filed an appeal against the Court of Appeal Judgment.

15. As noted in the Ngāti Muriwai/Kutarere Marae appeal submissions[7], the issue as to who has had the mandate from Ngāti Rua to bring an application for recognition orders, and subsequently bring appeals on behalf of the hapu, has contested and is an issue in the appeal brought on behalf of the Edwards/WKW appellants. In this regard Ngāti Muriwai supports the argument that the Edwards/WKW application holds the mandate in these proceedings for Ngāti Rua through **Robert Edwards** who is the chair of the Ngāti Rua hapu committee and representative for Ngāti Rua on the Whakatohea Trust Board.[8]

16. The issue of mandate aside, it is submitted that **Meriara Hata** does not have the support of all of Ngāti Rua hapu in bringing this appeal. As an illustration, reference is made to the evidence given by **Robert Edwards** in the High Court that Ngāti Muriwai have a separate identity to Ngāti Rua.[9]

17. What is evident is that this appeal, and the appeal to the Court of Appeal, are driven by the whanau of Mereaira Hata. In this regard the main witness relied upon in the appeal is Te Teriaki Amoamo who is Meriana Hata's uncle.

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[5] COA Tab
[6] COA Tab
[7] [113]
[8] Together with Mereaira Hata.
[9] COA evidence of Robert Edwards **(Tab 151)** at 104.02140 and Cross examination by K Feint **(Tab 152)** at 104.02144, 104.02146

18. In this regard during the High Court hearings **Te Teriaki Amoamo** provided the large bulk of the evidence arguing that Ngāti Muriwai were just a whanau of Ngāti Rua and counsel for **Mereaira Hata** the bulk of the cross examination of other witnesses on this issue. In total this evidence and the evidence Ngāti Muriwai introduced in response took up a significant part of the hearings.

19. It is also significant that none of the Whakatohea applicants groups who were successful in obtaining recognition orders in the High Court have appealed against the orders made in favour of Ngāti Muriwai.

20. Overall it is submitted that in considering the appeal against the Ngāti Muriwai orders it is relevant to keep in mind that it has only been raised by a part of Ngāti Rua hapu within Whakatohea Iwi.

Reference to Primary Appeal submissions

21. The Ngāti Muriwai/Kutarere Appeal submissions contain a section that address the apparent presumption by Miller J in the Court of Appeal Judgment that Ngāti Muriwai were an independent post 1840 whanau group.[10] This section broadly addresses the arguments put forward in the High Court by **Meraira Hata** that Ngāti Muriwai were a whanau of Ngāti Rua. These reply submissions will cross reference the appeal submissions where relevant.

22. In the summary these submissions set out the issues as:

    (a) There is a history of a Ngāti Muriwai travelling from the Whakatohea area to Te Kaha to engage in battles there and returning to live with Ngāti Rua in the 1820s-30s period. Ngāti Muriwai say that this is the same as the present hapu but Meraira Hata says there is no proof of this.

    (b) When the Opape Reservation areas were being allocated in the 1870s the Ngāti Muriwai people were initially included in the area allocated for Ngāti Rua but in the final allocation this area was split between Ngāti Rua and Ngāti Muriwai. Meraira Hata says that this was because of an argument over Ngāti Muriwai grazing sheep which led to that whanau splitting from Ngāti Rua and

[10] From [111].

forming a new hapu. Ngāti Muriwai say that records show them as identifying as a separate hapu before any grazing disputes and they asked for a separate allocation because they were a separate group.

(c) There is evidence that after the reserve allocations Ngāti Muriwai and Ngāti Rua continued to live together at Omaramutu Marae under the name Ngāti Muriwai- a – Rua and had separate wharekai. Meraira Hata does not accept this is the case.

(d) In 1975 when Omaramutu Marae was placed within a Maori Reservation by the Maori Land Court the Ngāti Rua owners of the land said that although the marae had been used by Ngāti Muriwai-a – Rua group they wanted the reservation made for only Ngāti Rua. Ngāti Muriwai witnesses say that they felt alienated from Omaramutu after this and used other Whakatohea marae.

Background Submissions

23. At **[2]** of the Ngāti Rua Submissions there are submissions made as to what is claimed to be the relevant evidence and findings was in the High Court and inferences drawn from the claimed evidence and findings.

Submissions that the Pukenga found that Ngāti Muriwai was not a hapu

24. At **[2.1]** it is argued that the High Court and Pukenga found that Ngāti Muriwai do not have the status of hapu within Whakatohea. This is not correct.

25. The relevant evidence from the Pukenga was in answer to questions from counsel regarding their reference in their report to an example of tikanga given by Te Riaki Amoamo that 'true Whakatohea hapu' had two blocks of land in the Opape Reserves – and development block and a hill block – and Ngāti Muriwai had only one block and "therefore only one leg".11 Counsel then asked whether they heard the evidence that Ngāti Muriwai did not get a hill block because they accepted a larger coastal block, and in response they said that they "didn't know that". They then agreed that Ngāti Muriwai's decision in this regard was a matter of tikanga, and went on to say:

[11] COA 101.00543

A "Whereas the tikanga we saw didn't say that they actually did. They married in yes. Their origins were from two other places, as I remember from the evidence. But this is a conversation, like a lot of other conversations, that has to be had.

Q Through a process with all of the iwi?

A. Yes.[12]

26. The relevant comments on this Pukenga evidence in the High Court Judgment is that:

[459] Implicit in this finding by the pukenga is that Ngāti Muriwai does not presently have the status of a hapū of Whakatōhea.[13]

27. With respect the High Court Judge is incorrect in this view that the Pukenga made a 'finding' and it was that Ngāti Muriwai were not a hapu. They were answering a question about reserve allocations and makes no reference to their hapu status.[14]

28. It is further noted that in the Court of Appeal Judgment Miller J in assessing whether Ngāti Muriwai could hold a CMT in its own right, did not need to address the Pukenga report because the High Court Judge did not rest his conclusions on it, and he had already held that the Pukenga did not answer the question as to who held the area in accordance with tikanga.[15]

29. It is submitted that this approach was a particularly appropriate approach regarding any groups hapu status as the Pukenga did not make an assessment f the status of any group. any comments The Pukenga in their report, in answer to the question as to who were the Iwi, hapu or whanau groups named Ngāti Muriwai and other groups but did not distinguish their status.[16]

[12] COA 108.04582-3
[13] High Court Judgment [459]
[14] As discussed in the Ngāti Muriwai/Kutarere Marae Appeal submissions from [111]
[15] Court of Appeal Judgment [279]
[16] COA 101.00539

Submissions that other hapu did not accept Ngāti Muriwai

30. The Ngāti Rua submissions also refer to comments by the High Court Judge that "*is clear that that other hapū of Whakatōhea do not accept their claimed status*".[17] It is submitted that that there was no basis for this comment.

31. In this regard Churchman J also goes to say that witnesses from 3 hapu "gave evidence of why they did not accept Ngāti Muriwai's claim" but only specifically mentioned the evidence of **Te Riaki Amoamo.**[18]

32. While apart from Mr Amoamo, there were some general comments from individuals from other hapu that they did not accept the hapu status of Ngāti Muriwai, there was no evidence that other Whakatohea hapu had made such decisions as a group.

33. Once again it is telling that Miller J in assessing the relevant evidence as to the position of Ngāti Muriwai, did not rely on these comments by Churchman J.[19]

34. Generally, the situation with the view of other Whakatohea groups as to the status of Ngāti Muriwai is complex given the historical background, as summarised in the Ngāti Muriwai/Kutarere Appeal submissions. [20] In this regard it is particularly noted that:

    (a) The post - colonial structure of Whakatohea is complex with the iwi going from 22 hapu to a smaller number of groups[21];

    (b) In 1950 the Government set up the *Whakatohea Trust Board* with 6 hapu being given right to nominate board members. Under the board regulation the board was able to determine which groups made up Whakatohea but apparently have never done so.[22]

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[17] High Court Judgment [460]
[18] High Court Judgment [461]

[19] Court of Appeal Judgment [279]

[20] Ngāti Muriwai/Kutarere Appeal submissons from [111].
[21] **BOA Tab 8** R Walker *Opotiki- Mai – Tawhiti: Capital of Whakatōhea* (Penguin Books, North Shore, 2007)p 141.
[22] Further to s 26 of the *Maori Purposes Act 1949* the trust board is established "for the benefit of Whakatohea Tribe and their descendants". Under the applicable regulations (*Whakatohea Trust Board Regulations 1951* Reg 12 the board was to define what groups were in Whakatohea.

(c) In more recent times there have been attempts within Whakatohea to define its constituent groups for treaty settlement purposes. For example, in the 1990s 'iwi working party' made up of nominations from the 6 WTB hapu for treaty settlement purposes decided to accept Ngāti Muriwai as the '7th hapu' of Whakatohea.[23] Of more recent times during the vote on the proposed Whakatohea settlement Ngāti Muriwai voted as a separate hapu.

(d) In the Whakatohea post settlement entity *Te Tauwharau* although at this state only the 6 WTB hapu have specific seats on the board there is provision to add further hapu[24], and there are also general iwi representatives.[25] Also the trust is for all Whakatohea whanau and hapu groups and not just the 6 WTB hapu.[26]

(e) Although there may be an issue as to whether some of other hapu accept Ngā another hapu in Whakatohea, there is no question that Ngāti Muriwai is accepted as a group within Whakatohea. And at having over 1000 members is one of the larger groups.[27]

35. It is also relevant that at the High Court hearing the issue of who were or were not a hapu of Whakatohea was never raised by the parties as a specific issue that the court should determine. There was no focused expert evidence as to what defines a hapu. As such, for this reason alone, the High Court should not be seen as having made a determination on the issue, as suggested in the Ngāti Rua submissions.

Submissions regarding the history of Ngāti Muriwai

36. Further in **Part 2** of the Ngāti Rua submissions there are submissions regarding the evidence and findings as to Ngāti Muriwai's history.

[23] R Walker *Opotiki- Mai – Tawhiti: Capital of Whakatōhea* (Penguin Books, North Shore, 2007) **(COA Tab 742)** p 142-3.
[24] *Te Tauwharau Deed of Trust https://tewhakatohea.co.nz/about-us/* Clause 8.1
[25] Above *Clause 3.2*
[26] *Above p 12*
[27] **COA** Tab 162 14 September 2020 p examination in chief of N Tipene by M Sharp

37. It is submitted that the Ngāti Rua submissions on the evidence and findings on Ngāti Muriwai history is incorrect in the following respects:

(a) At **[2.3]** it is submitted that the evidence showed that Ngāti Muriwai is made up of 'some members of the Edwards whanau who whakapapa of Te Paku Eruera.

(b) This is not correct and the evidence from Ngāti Muriwai members that their tipuna is **Eru Pōnaho** the grandfather of Te Paku Eruera.[28] **T**here is also evidence of other whanua, such as that of **Porikapa**, making claims for Ngāti Muriwai during the 1880s**.**[29]

(c) It is further alleged at **[2.3]** that Ngāti Muriwai arose from a dispute with Ngāti Rua during the allocations of Opape Reserves in the 1880s and received their own reserve.

(d) This is not correct in that Ngāti Muriwai were included in the Whakatohea Tribal Register in 1874.[30] Also, since the hearings evidence of letters has been obtained sent on behalf of Ngāti Muriwai asking for a subdivision of the reservation in the late 1870s, before sheep were introduced.[31]

(e) Further at **[2.3]** reference is made to Paku Eruera claimed land in the Native Land Court through various hapu not Ngāti Muriwai.

(f) In response, the other whakapapa links that allowed these claims, such as to Ngai Tai which allowed Ngāti Muriwai to claim into the Whitikau block against the opposition of Ngāti Rua, distinguished Ngāti Muriwai from Ngāti Rua and illustrated that they were separate groups.[32]

(g) At **[2.4]** it is submitted that there was no evidence of the whanau of Paku Eruera being part of a Ngāti Muriwai before the allocation of the Opape

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[28] Ngāti Muriwai/Kutarere Appeal submissons [123].
[29] P McBurney *Ngāti Wai Authority Trust Oral and Traditional History Report* January. (CFRT commissioned report) [1174-75]. Detailing how Porikapa in 1880 claimed interests in the Whitikau block for Ngāti Muriwai individuals as Nga Tai.
[30] Ngāti Muriwai/Kutarere Appeal submissons [124].
[31] P McBurney *Ngāti Wai Authority Trust Oral and Traditional History Report* January. (CFRT commissioned report) [1163-4]
[32] Ngāti Muriwai/Kutarere Appeal submissons [123].

reservations. Reference was made to the Historian Tony Walzl saying it could not safely be assumed that the pre 1840 Ngāti Muriwai referred in historical report were the same group;

(h) In response, Tony Walzl gave evidence that the history of Ngāti Muriwai going to and from Te Kaha in the 1820s and 30s was consistent with the account by Dr Ranginui Walker in his book *Ōpōtiki-Mai-Tawhiti* that this was the same group that were allocated the Opape reserves but he could not make any further conclusions.[33]

(i) It is further noted that fact that **Ranginui Walker** being an esteemed Whakatohea historian concludes that they are the same group, holds significant weight. Similarly, when the High Court refers to the quote from Ranginui Walker of the "moribund Ngāti Muriwai hapū" being revived in the 1990s, Ranginui Walker in his book goes on to discuss his view that the Ngāti Muriwai hapu that did exist had married into Ngāti Rua by 1950s. [34] While this may not be accepted by Ngāti Muriwai, it again reflects the view by Dr Walker that Ngāti Muriwai were a historic separate hapu of Whakatohea.

(j) Further at **[2.4]** reference was made to the comments by the High Court Judge about the lack of evidence about Ngāti Muriwai between 1840-70.

(k) In response these comments were in response to submissions by counsel as to the general lack of records in that period.[35]

(l) At **[2.5]** it is submitted that there is "little to no evidence" of Ngāti Muriwai from the late 19th century to the 1990s.

(m) In response there is significant evidence of how Ngāti Muriwai lived with Ngāti Rua at Omaramutu Marae as a 'Ngāti Muriwai- a – Rua' group. Most significantly from Tiwai Amoamo, Te Riaki Amoamo's father, in the Maori

[33] Ngāti Muriwai/Kutarere Appeal submissons [117].
[34] High Court Judgment [464]
[35] High Court Judgment [444]

Land Court hearing in the 1970s.[36] There was also evidence that the two groups had separate wharekai up to the 1960s.[37]

Submissions that Ngāti Muriwai are part of Ngāti Rua

38. At **[2.8]-[2.9]** the Ngāti Rua submissions 'draw the threads together' to conclude the evidence and findings show that Ngāti Muriwai are but a whanau of Ngāti Rua. However, as noted above, these conclusions are drawn from a misleading summary of evidence and findings.

39. In fact in the evidence this view is only really taken by Te Riaki Amoamo as noted in [2.7] of the Ngāti Rua submissons.

40. The position taken by Mr Amoamo is accurately summed up by Miller J in rejecting the appeal against the PCR orders for Ngāti Muriwai, where he observed that it was the exercise of rights by Ngāti Murwai that concerned Te Riaki Amoamo:

> *[340] Mr Amoamo's opinion that Ngāti Muriwai have no separate identity as a matter of tikanga must be respected. He is a tohunga with deep knowledge of the practice of tikanga. He traces Ngāti Muriwai's whakapapa directly through Ngāti Ruatakenga. I accept that there are strong kinship connections. Kin relationships are not optional .But it is the very existence of the right for Ngāti Muriwai, rather than the manner of its exercise, that concerns him.*

41. The Ngāti Rua submissions are critical of both Justice Churchman in the High Court and Justice Miller in the Court of Appeal for reaching findings that Ngāti Muriwai if not a hapu, are still a separate whanau group from Ngāti Rua within Whakatohea.[38]

42. However, these findings reflect the reality of the evidence, that irrespective of the status of Ngai Muriwai as either a hapu or whanau group, they have over time to the present operated as a group within Whakatohea iwi independently of Ngāti Rua or any other hapu group.[39]

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[36] Ngāti Muriwai/Kutarere Appeal submissons [119].
[37] Ngāti Muriwai/Kutarere Appeal submissons [121].
[38] Ngāti Rua Submissions [2.2] in relation to the award of PCR orders to Ngāti Muriwai separate from Ngāti Rua by Churchman J. And at [3.2] where Miller J in making a provision for Ngāti Muriwai in a CMT was criticized for failing to recognise that Ngāti Muriwai's status as a Ngāti Rua whanau.
[39] This is also consistent with the comments by the Pukenga referred to above where they appear to view Ngāti Muriwai as a group who have come into the area and married into the iwi.

43. Specifically:

(a) Historically they have exercise of rights within the Whakatohea takutai moana as reflected in the PCR orders, within their own group, and not through Ngāti Rua hapu.

(b) They have made political decisions as to their participation within the iwi within their own group. For example voting on the proposed treaty settlement as Ngāti Muriwai;

(c) After historically sharing Omaramutu Marae with Ngāti Rua, after the 1970s Maori Land Court hearing created a marae reservation solely for Ngāti Rua, Ngāti Muriwai have tended to use Kutarere Marae, which is accepted as marae for all Whakatohea.

44. Also, as discussed in the Ngāti Muriwai/Kutarere Appeal submissions, Ngāti Muriwai have different whakapapa and group affiliations to Ngāti Rua.[40] Both groups have Whakatohea whakapapa but Ngāti Muriwai also have other whakapapa and connections, such as to the to the neighbouring Nga Tai iwi. As discussed above, this allowed Ngāti Muriwai individuals to claim into the neighbouring Whitikau block, through the whanau of **Eru Pōnaho** and others, against opposition from Ngāti Rua and others in Whakatohea in the 1880s. Of relevance is the account given by Ranginui Walker in his book of Eru Panaho and two others returning from a Whakatohea battle against Ngāti Muru during the musket wars in the 1820s, and **Eru Pōnaho** being attacked by one of his accomplices because he "actually belonged to Ngai Tai", after which **Pōnaho** " found refuge wit**h** Ngāti Rua at Waiaua". [41] This account illustrates how Ngāti Muriwai had close connections with but were a separate group from Ngāti Rua before 1840.

Submissions that Court of Appeal made error in not recognising tikanga

[40] Ngāti Muriwai/Kutarere Appeal submissions [123]
[41] **BOA Tab 8** R Walker *Opotiki- Mai – Tawhiti: Capital of Whakatōhea* (Penguin Books, North Shore, 2007)pp 42-43.

45. This lack of recognition of the evidence regarding Ngāti Muriwai in the Ngāti Rua submissions underscores the further submissions in **Part 3** of the Ngāti Rua submissions that the Court of Appeal have made an error in making recognition orders in favour of Ngāti Muriwai. In **[3.1]** the central issue was put in terms that Miller J had accepted the expert evidence of Te Riaki Amoamo that Ngāti Muriwai "had no seperately identity as a matter of tikanga" but then contradicted this by finding that his concerns must yield to the scheme of the act. This submission, and the rest of the case in the Ngāti Rua submissions, is based on the mistaken basis that the court has accepted Mr Amoamo's evidence that Ngāti Muriwai was part of Ngāti Rua.

46. The rest of the arguments in part 3 of the submissions are premised upon the basis that as a matter of tikanga a whanau cannot exercise rights independently of the hapu collective to which they belong.[42]

47. However, in his decision on rejecting the appeal on the PCRs Miller J is clear in his view that although the customary rights exercised by Ngāti Muriwai for which PCR orders were granted may have been exercised by another group in 1840, and Ngāti Muriwai had developed as a group since then, they can be recognised as presently exercising the rights.[43]

48. As discussed in the Ngāti Muriwai/Kutarere Appeal submissions, in making these findings Miller J seems to have presumed that Ngāti Muriwai was a post 1840 whanau group. It has been submitted that this presumption was 6 not warranted on the evidence. But this aside, the finding by Miller J that this does not make any difference the outcome of the orders for PCRs and CMTs is supported for the reasons set out in the Ngāti Muriwai/Kutarere Appeal Submissions.44

49. In **Part 4** of the Ngāti Rua submissions the issue is raise that Ngāti Rua do not agree to Ngāti Muriwai exercising PCR rights that belonged to Ngāti Rua. [45]

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[42] [3.2]-[3.5]
[43] Miller J's rationale is discussed in more detail in the Ngāti Muriwai/Kutarere Appeal Submissions at [101]-[103].
[44] Ngāti Muriwai/Kutarere Appeal Submissions at [104]-[110]
[45] [4.4]

50. In response, it is not accepted by Ngāti Muriwai that the PCR rights granted to them ever 'belonged' to Ngāti Rua or that there is any opposition to the exercise of such rights from Ngāti Rua outside of Mr Amoamo and his whanau. But even if the rights once were exercised through Ngāti Rua, as explained by Miller J, s groups within Whakatohea may evolve so that they may exercise of the rights.

51. In Part 5 of the Ngāti Rua submissions it is submitted in regard to the CMT and PCR rulings that new groups may evolve within Whakatohea, "but as a matter of tikanga it requires discussion on the marae and the agreement of the hapū of Te Whakatōhea, and primarily Ngāti Rua"[46] The Pukenga report is referred to in support in the claim that they said that Ngāti Muriwai would have to obtain the support of the existing hapu of Whakatohea.

52. As discussed above, this is not what the Pukenga stated in their evidence. But in any case, there is no evidence of Whakatohea tikanga that all the original hapu have to agree to new groups evolving. This would be particularly problematic given the history of 22 original hapu at 1840 being reduced over time.

53. In this regard reference is made in the Ngāti Rua submissions to the example of Ngāti Awa where a number of new hapu and revived old ones have been recognised.[47] In response, it is submitted that Ngāti Awa is an example of an iwi being open to recognise the reality of changes in constituent groups over time. By contrast, as noted above, Whakatohea has been anchored in the 6 hapu model established when the Government established the Whakatohea Trust Board in the 1950s and has not taken formal steps to decide who presently makes up Whakatohea.

54. **Ranginui Walker** in his book discussed decisions by iwi groups to move to recognise further groups – being not only Ngāti Muriwai but also Kutarere Marae and Waiotahe marae.[48] But these moves have not been followed through and, in contrast with Ngāti Awa, Whakatohea iwi remains stuck in a post- colonial trust

[46] [5.2]
[47] Note 33
[48] R Walker *Opotiki- Mai – Tawhiti: Capital of Whakatōhea* (Penguin Books, North Shore, 2007) **(COA Tab 742)** p 142-3

board tikanga that have resulted in disputes such as surround Ngāti Muriwai festering.

55. In **Part 6** of the Ngāti Rua submissions the same argument that Ngāti Rua 'own' rights awarded to Ngāti Muriwai are repeated in the context of a discussion the *exercise* of rights must be distinguished from the *source* of the rights.[49]

56. In response it is submitted that a useful discussion as to the source of customary rights in the takutai moana can be found in the reference by Miller J [50] to the Waitangi Tribunal's *Muriwhena Report*. This discusses that whanau may have use rights to specific fishing spots, hapu exercised control over larger fishing grounds and iwi undertaking larger fishing expeditions and journeys and exercising an 'overright' over how the rights of whanau and hapu are exercised.

57. It is submitted that these observations from the Waitangi Tribunal reflect Whakatohea tikanga that customary rights to the takutai moana are held collectively through the iwi. In this regard in the appeal submissions filed in the Court of Appeal on behalf of Ngāti Muriwai/Kutarere[51], there is an analysis of the tikanga related evidence complied by the Crown from the High Court hearings. The bulk of the evidence referred to iwi control and use of the takutai moana. The only exception was the evidence of **Te Riaki Amoamo** who referred to Ngāti Rua having its own distinct area of the takutai moana. Even this view was eventually overtaken by the acceptance of all the hapu group applicants, including for Ngāti Rua, that the CMT area was shared.[52]

General approach to eligibility for Recognition orders

58. It is also submitted that if this hierarchy of of iwi/hapu/whanau rights in the Takutai moana does apply in the Whakatohea rohe then the following would apply in regard to appropriate recognition orders:

[49] [61]
[50] Court of Appeal Judgment [221] referring to the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) [Muriwhenua fishing report] at 35–37.
[51] BOA Tab 10
[52] Above [82]-[83]

(a) With PCRs it may be appropriate to make an order for a whanau within a hapu. This is on the basis that that whanau has use rights for an activity, such as a particular fishing place, which is not also held by other whanau within the hapu. This is effectively what the High Court and Court of Appeal found in dealing with the Ngāti Murwai PCR orders[53];

(b) With CMTs a whanau within a hapu would not normally be included within a CMT order as the customary control of the takutai moana would be held by hapu collectivising as an iwi. But if a grouping of whanau that may not meet the traditional definition of a hapu still currently collectivises as part of the iwi then they may share in an iwi CMT. This is effectively what Miller J has found in regard to Ngāti Muriwai's participation in a CMT.[54]

59. In this regard a key issue in the application of the legislation is how the terms *whanau, hapu and iwi* are defined and applied. In the Ngāti Murwai/Kutarere Appeal Submissions, it was argued that this should take into account how traditional Maori groups have evolved in modern times.[55]

60. With particular the reference the concept of 'hapū' is defined in *Te Mātāpunenga* as:

This term refers to the primary political unit of in traditional Maori social organisation at the time of contact with Europe and America, a relatively stable and cohesive grouping consisting of a number of whanau sharing descent from a common ancestor.[56]

61. Certainly the whanau that make up Ngāti Muriwai would consider that they meet this definition. [57] Whether the iwi formally accept this is a matter of hui. However in the interim it is submitted that the Court of Appeal is correct in finding that they

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[53] High Court Judgment at [500]
[54] Subject to the points of clarification discussed in the Ngāti Murwai/Kutarere Appeal Submissions.
[55] [104]-[110]. In particular referring to the approach taken in Canada as per the *Tsilhqot'in case*
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[56] *Te Mātāpunenga A Compendium of references to the concepts and institutions of Maori Customary Law (2013) p 71- 73*

[57] As would the members of Kutarere Marae.

are at least a whanau group and as such given their background entitled to PCR and CMTs orders as ordered.

Closing comments

62. In summary it is submitted that the appeal arguments against the PCR and CMT orders made in favour of Ngāti Muriwai can be dismissed simply on the basis of upholding the findings made in the High Court and the Court of Appeal that the customary rights underlying those orders are exercised within Whakatohea iwi seperately from Ngāti Rua. Specifically, with this appeal being on issues of law, it can be concluded that there was no error in the approaches taken in these decisions.

63. It is further submitted that even if the Ngāti Rua submissions are found to be right in arguing that Ngāti Muriwai are a whanau that are part of Ngāti Rua, then this alone would not prevent them from being eligible for PCR orders.

64. If alternatively the court considers that the outcome of the appeals would turn on whether Ngāti Muriwai meet the definition of a hapu or whanau group, given that there has been no proper determination of theses issues in the courts below, it is submitted that the proper course would be to refer the matters back to the High Court for determinations on these issues.

Dated: 18 October 2024

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