**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 123/23**

**124/23**

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| BETWEEN | **NGĀTI MURIWAI** |
| | Appellant |
| AND | **KUTARERE MARAE** |
| | 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 |

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**Reply to Attorney- General's Submissions - Ngāti Muriwai (SC 123/23) and Kutarere Marae (SC 124/23)**

**23 October 2024**

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**Instructing Solicitor:**
Tony Sinclair
Ngātahi Law
PO Box 91359
Pakaranga

**COUNSEL ACTING:**
**MICHAEL SHARP**
Barrister
PO Box 5111
MT MAUNGANUI
T: 07 575 7383
E:michael@michaelsharp.co.nz


Counsel for Ngati Muriwai and Kutarere Marae Certify that to the best of their knowledge these submissions are suitable for publication

## INTRODUCTION

1. These submissions are with leave sought to be filed on behalf of appeals on behalf of **Ngāti Muriwai** hapū (SC 123/23) and **Kutarere Marae** (SC 124/23).[1]

2. The submissions are filed in reply to the *Attorney- General's submissions* dated 20 September 2024(**A-G's Submissions**) on the issues of:
   (a) The second limb of the test for customary marine title in s 58 (exclusive use and occupation from 1840 to the present day without substantial interruption) (**Issue 1**);
   (b) The test for protected customary rights in s 51 (**Issue 3**).

3. Where relevant reference will be made in these submissions to the earlier *submissions on appeal* filed by the appellants.[2]

## SUMMARY OF ARGUMENT

4. The *A-G's Submissions* are incorrect in arguing that the approach of majority of the court in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* (**the Court of Appeal Decision**)[3] to the second limb of the s 58 CMT test was in error and the approach by Miller J should be preferred.

5. That the approach by the Court of Appeal to the PCR award to Ngāti Muriwai was clear as to the basis for the award even if it was the case that Ngāti Muriwai was a post 1840 whanau group.[4]

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[1] Leave to file the submissions out of time is sought in accordance with the accompanying memorandum.
[2] *Submissions on Appeal on behalf of Ngati Muriwai and Kutarere Marae dated 20 September 2024*.
[3] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [**Court of Appeal Decision**].
[4] Which is not accepted by Ngati Muriwai.

## Test for CMTs

*6.* At [17]-[19] the *A-G's Submissions* attempt to summarise the approach of the majority of the Court of Appeal to *limb 2* of the CMT test – being that of *exclusive use and occupation from 1840 to the present.*

7. At [18.2] it is stated the position of the majority was that "*An applicant group does not need to demonstrate exclusive use and occupation "from 1840 to the present day"*

8. In reply, this is not strictly correct. The position stated was that the applicant group need not "*demonstrate an intention and ability to exclude other people from coastal areas in circumstances where the law effectively deprived them of that ability".* [5]

9. With respect, this is a recurring error in the approach taken in the A-G's Submissions of suggesting that the majority do not require any form of exclusivity/customary control from 1840 to the present. The actual approach of the majority is to not take into account loss of control due to laws that did not recognise the pre- existing rights of Maori – and in this respect Miller J also took the same approach.[6]

*10.* Similarly, at [19] the A-G's Submissions state that:" *the majority's approach to limb two, coupled with the Court's approach to the burden of proof,59 is that an applicant group need only establish that its use and occupation has been continuous."*

11. This confuses that approach taken by all the members of the Court to *burden of proof* under s 104, with the CMT test. Under the approach to s 104, applicant parties do only have to prove continuous use and occupation from 1840 to satisfy the test. If this is proven the onus will be on some other party to establish that the customary interests of the applicant group "*has ceased to have the necessary character or been substantially interrupted after 1840"* as defined earlier in the

[5] Court of Appeal Decision at [429]
[6] Court of Appeal Decision at [170], [175] and [180].As discussed in the Appeal Submissions, it follows that there is no substantial difference between the approach taken by the Majority and Miller J ([61])

Judgment. [7] In other words, if another party can show that, apart from lack of control caused by laws that did not recognise the customary rights, the applicant group did not control the area from 1840, then the test would not be satisfied.

## Majority substitutes statutory language with its assessment of "just" outcomes

12. In this section from [25]-[26] it is argued in the A-G's Submissions that the majority have adopted their approach as a '*just outcome*' '*without engaging in a genuine, interpretive exercise concerning the meaning of "exclusive use and occupation'*

*13.* With respect, this is an unfair analysis of the majority's approach. They were faced with the difficult task of interpreting the unprecedented test of post colonisation *exclusive use and occupation* and did so by detailed reference to relevant parts of the statutory scheme. [8] For example:

**(a)** By observing that the requirement that that the Treaty of Waitangi was to be taken into account would be inconsistent with a literal interpretation of the control test which would be very difficult to meet ;

**(b)** That the provision under s 59(3) that public fishing and navigation does not of itself preclude a CMT order, indicates that it was parliaments intent that legal restrictions on customary control that did not take into account customary rights were in general not to be taken to preclude a CMT.[9]

*14.* In this and other parts of the submissions the A-G is critical of the majority adopting an approach that is similar to the *Ngāti Appa* approach to customary title whereby once title is established at 1840 it could not lost unless it was legally extinguished or abandoned.

15. In response, the majority's approach did not at any stage expressly adopt the *Ngāti Apa* approach. In any case, the majority's approach is different it from that in *Ngati Apa* in that it does require some aspects of post 1840 control. In any

[7] Court of Appeal Decision at [436]
[8] Court of Appeal Decision at [426]
[9] Miller J adopted the same interpretation at [180]

case, some degree of guidance from *Ngati Apa* was contemplated by the legislature. As noted in the appeal submissions, the record of Parliamentary debates leading up to the passing of the legislation stated that the bill "*provided guidance for the courts based on the remarks of the Court of Appeal in the Ngāti Apa "* .[10]

## The Common Law counterfactual

16. At [27]-[30] the A-G's Submissions argue that the majority's approach (or counterfactual) is not supported by any relevant common law principles.

17. In response, it should be noted that the Majority did not purport to follow a common law approach to customary titles. On occasions they referred to their approach as being consistent with common law authorities, [11] but did suggest they were applying a common law approach.

18. As such the A-G's fairly extensive references to overseas jurisdictions and the issues with establishing common law customary title are largely irrelevant.[12]

19. But to the extent that these references note the difficulties in courts finding customary title over sea areas in the face of public navigation, it is also noted that this was the driver for the *exclusive use and occupation test* first put in the *Foreshore and Seabed* legislation as a way to provide an easier test then that provided by the common law.[13] This suggests that this more facilitative approach to title orders being obtained was also intended by the MACA Act.

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[10] Appeal Submissions [57] *Hansard* Vol 670 Second Reading 16981 **(BOA Tab 6)**

[11] Such as [428] where Ngāti Apa is referred to regarding extinguishment of title. However, as noted above, this was consistent with parliamentary intent,

[12] In respect of the Canadian decisions referred to it should be noted these are not applying the common law but Canadian constitution derived principles of aboriginal rights. In the reference to the Canadian Supreme Court in T*homas and Saik'uz First Nation v Rio Tinto Alcan Inc* obiter comments about the compatibility of public navigation and aboriginal title are noted. However, ultimately this case was decided without reference to Aboriginal title, and the Court did note that was unhelpful for trial judge to have commented on its possibility (-317, 327, 329-333)

[13] In particular the decision of the Australian High Court in *Commonwealth v Yarmirr* (2001) 208 CLR 1 (HCA) .

20. The A-G's Submissions also suggest the majority's approach can be distinguished from that in *Ngāti Apa* in that the majority "*appear to assume that the entirety of the takutai moana is subject to extant customary rights that would necessarily translate into customary marine title today*"

21. With respect this is not correct. For example, the majority discussed that it may be difficult to establish exclusive use and occupation in offshore areas.[14]

## *Exclusivity "from 1840 to the present day" is not an impossible test*

22. At [31]-[32] the A-G argues that the proper test is " t*he concept of exclusive use and occupation requires both an externally-manifested intention to control the area as against third parties (both Māori and non-Māori) and the capacity to do so"*

23. The A-G further submits that this test does not mean that "few areas" will be able to meet the test, as suggested by the majority in the Court of Appeal.

24. In support reference is made to the decision by the High Court in *Re Reeder* where CMT orders were made for the Rangataua harbour in Tauranga.

25. In response, the test argued for by the A-G was not applied by the court in *Re Reeder.* The approach to post 1840 exclusive use and occupation was essentially the same as the majority in the Court of Appeal. Powell J after considering the objectives of the legislation concluded that: "*the requirement for exclusive use and occupation in s 58(1)(b)(i) does not in fact require exclusivity, nor indeed, given the "without substantial interruption" component, use and occupation that is either continuous or constant.*" [15]That the exceptions for public access and fishing " *reflects the nature of the CMCA and makes it clear the interpretation must be informed by the relevant tikanga.*"[16]

[14] [422]-[423]
[15] [35]
[16] [36] It is also noted in the Re Reeder Judgment that the Crown did not take any issue with this approach.

26. The A-Gs submissions go on to note that the test does not require full exclusion of third parties as public fishing, navigation and access are allowed. However the submissions do not go on to analyse and apply the rationale for these exceptions, as majority and Miller J in the Court of Appeal have. That being that this indicates a general policy approach that legal rights granted to the public without regard to customary rights cannot represent a failure of the CMT control test.

### *Non-recognition is not extinguishment*

*27.* In this section in [33]-[34] the A-Gs submissions argue that : *The majority wrongly characterise the effect of not satisfying the test for customary marine title as an "extinguishment.* Reference is made to the comments by Miller J that a distinction needs to be made between underlying customary interests restored under s 6 of the Act and the legal interests they are translated to.

*28.* In response, the reference by the Majority to 'extinguishment' was in the context of comparing the legal recognition of customary rights under the common law with those legally recognised under the Act.[17] It is submitted that this is a valid comparison as under s 6 customary interests extinguished by FASA are " restored and given legal expression" under the Act. To the extent that they are not given legal expression through recognition orders or otherwise[18], then it accurate to say they remained extinguished under the MACA Act.

### *Court's task is to implement the Act*

29. At [36.2] the A-Gs submissions argue that the Majority have taken a treaty compliant approach when this is not required under the Act.

*30.* In response, the reference by the Majority was the requirement under the Act to 'take account of the Treaty of Waitangi, and that taking an interpretation that would fail to recognise 'many customary rights' would be inconsistent with this requirement. [19] Although not expressed in such terms by the Majority, this

[17] [416]
[18] Including katiakitanga recgnised for Conservation areas under s 47.
[19] [427]

approach would be consistent with a *Trans- Tasman Resources* approach, noted in note 115 of the A-G's Submissions, of references to the treaty in legislation being used as an interpretative guide.

## The correct interpretation of s 58

31. At [37]-[43] the A-G's submissions set out what is said to be the correct interpretation of the s 58 CMT test, including exclusive use and occupation from 1840. However, it is not clear what test is being proposed.

32. With s 58(1)(a) the test supported by all the Court of Appeal of customary control at present was supported. In the Appellant's submissions it is argued that this goes beyond the Maori Land Court *holding in accordance with tikanga* approach in imposing the control element. These arguments will not be repeated here.

33. With the s 58(1)(b) test the A-G's submissions state:

> *As for limb two, the Attorney largely agrees with Miller J's approach. The concept of exclusive use and occupation was drawn from Canadian law, and the drafters had in mind that an applicant would demonstrates its "capacity to exclude others from the area". While tikanga Māori may inform the interpretation of limb two, it does not take precedence over the common law concepts that Parliament has drawn upon or permit elements of the statutory test to be disregarded.*[20]

*34.* The submissions then go under the heading *exclusive use and occupation* on to refer to Canadian tests of pre colonisation aboriginal title, which were applied by the Court of Appeal to the *first leg* of s 58(1)(b). These being based around the ability to exclude other customary groups.[21]

*35.* With the second leg of s 58(1)(b) - *exclusive use and occupation from 1840*- the submissions say that the applicant group need not prove they can exclude third party use as there are presumptions against public fishing, navigation and access. But as discussed above, the submissions do not go to rationalise why

[20] [38]
[21] [39]-[40]

these or any other third party use may or may not defeat the CMT test. They do not mention the rationale drawn by all the Court of Appeal bench that this shows the intent not to take into account laws granting third party rights that did not consider customary rights.

*36.* Instead the submissions then talk about an assessment 'in the round' and goes on to give a number of examples that are considered to be consistent with satisfying the control test- none of which involve Maori controlling third parties exercising access or use rights. [22] Also noted are references by Miller J to examples of customary control given by Maori which are accepted as being primarily relating to other Maori.[23]

*37.* The submissions then go on to conclude that:

*"To avoid doubt, the Attorney submits the test requires an intention and ability to control and exclude both Māori and non-Māori. If parliament had intended "exclusive use and occupation" to apply as against other Māori groups only, it is reasonable to assume that it would have made that clear. "*

38. As such it appears to the A-Gs argument that there is a presumptive meaning of *"exclusive use and occupation"* as being used in its conventional common law sense of defining property rights[24] and this is not displaced by any indication in the legislation to the contrary.

*39.* This argument does not take into account the approach adopted by Miller J, as discussed in the legal submissions[25], that common law concepts used to legally recognise customary rights are *sui generis* and need not be interpreted in their conventional legal sense. As also discussed in the appeal submissions, this approach has been applied by Miller J and the majority as not taking into account third party use allowed by laws that did not take into account customary rights.[26]

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[22] [42]
[23] [43]
[24] As discussed at note [130]
[25] [22] and [59]
[26]26

*40.* Unlike the approach suggested in the A-Gs submissions, this provides an interpretation of the post 1840 CMT test that is consistent with the scheme of the Act.

## Substantial Interruption

41. At [45] – [47] the A-Gs submissions argue that *substantial interruption* it is not constrained as the Majority suggest. Rather it is an issue as "it factually interrupts a group's exclusive use and occupation."

42. In response, the issue of what is substantial interruption comes back to the proper interpretation of exclusive use and occupation

43. If the proper interpretation of the term is as found by the Court of Appeal, as not including where customary rights are not taken into account in providing others with rights to the area, then the Majority approach of substantial interruption being limited to where customary rights are expressly accounted for and extinguished is also correct.[27]

44. If on the other hand the A-G's property law based interpretation of exclusive use and occupation is correct, then any third party incursion allowed by law that prevents the group from controlling use of the area could be seen as a *substantive interruption*.

*45.* This distinction is borne out by what the A-G says are examples of substantial interruptions in their submissions. For example, wharf structures, outfall pipes and shipping lanes as found to be substantial interruptions in the High Court decision in *Re Pahuwera.*[28] In none of these cases were these legal incursions into the MACA expressed as to override customary rights. As such, based on the approach of the Court of Appeal, these should not be in themselves considered as substantial interruptions.

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[27] As is the other alternative of the applicant group abandoning their rights of ahi ka.

[28] *Re Ngāti Pāhauwera* [2021] NZHC 3599 detailed in notes 158 and 159.

*46.* It is submitted however that these situations can develop into substantial interruptions if as a result of the nature of the incursions the applicant group eventually abandons their connection to the area – and as such this falls under the second category of substantive interruptions as set out by the majority of the Court of Appeal.

*47.* However, this will be a matter of degree. For example in the *Re Pahuwera* cited of an outlet pipe polluting the area to a degree that the applicant group no longer fished in the area, this was found to be a substantial interruption despite evidence that the applicant group were still involved in trying to restore the area. It is submitted that tact of kaitiakitanga clearly showed continuing connection and customary control, so should not have been considered as a substantive interruption.

*48.* Similarly, the reference in the A-G's submissions to Miller J stating that despite s 59(3) a degree of public fishing and navigation could still amount to substantial interruption, can only be sensibly rationalised where there is an *abandonment* of an area by the applicant group because they can no longer fish or navigate themselves because of the scale of public use.

## ISSUE 3 – TEST FOR PROTECTED CUSTOMARY RIGHTS

49. At [57]-[64] the A-G's submissions seek clarification on the approach applied by Miller J in dismissing the appeal against the PCR orders for Ngāti Muriwai.

50. In this regard submissions on the approach stated in the Court of Appeal judgments concerning PCR or CMT orders for groups who may have developed since 1840 have been made in the appellant's appeal submissions. [29] There have also been relevant submissions made in the *Ngāti Muriwai submissions in reply* to the Ngāti Ruatakenga appeal against the orders. There is no need for these submissions to be repeated here.

51. However, as an additional matter, the A-G's interpretation of s 51 as being intended to include post 1840 groups exercising customary rights which were

[29] [101]-[110]

exercised at 1840 but have had a form of 'customary transfer' over time to the new group[30], is supported.

*52.* The A-G seeks clarification because it is not clear what 1840 group that Ngāti Muriwai has a 'relevant connection' with so as to receive a customary transfer.[31] In particular, it is said that:"*There was no assessment as to whether Whakatōhea (the iwi) has exercised the relevant customary rights in the area since 1840 in accordance with tikanga, or whether Ngāti Muriwai has a relevant connection such that it could rely on Whakatōhea's exercise of any such rights since 1840."*[32]

*53.* In response, Miller J at [341] of his judgment is referring to the tumultuous changes of groups within Whakatohea iwi which went from 22 hapu in 1840 to 6 of these surviving [33] and with "new and apparently substantial whanau groups having established themselves". Of the totality of the customary rights exercised over the MACA in the iwi rohe in 1840, there would necessarily be a degree of new groups taking on as a matter of tikanga rights which may be been specifically exercised by now defunct hapu groups, or more generally being accepted as sharing rights that all iwi members are entitled to.

*54.* Within this process, it is submitted that it is not necessary for a new group to forensically trace from which group the customary rights within the iwi it now exercises originated from, or how it was transferred.

*55.* In this respect, of relevance is the approach taken by Canadian courts where the exercise of pre- sovereignty cannot be proven, a continuous exercise of rights to the present day can infer that they existed at time of sovereignty.[34] Also, the approach where post sovereignty the original 'bands' within a tribe have been so distorted that the appropriate approach is for the tribe as a whole to hold rights.[35]

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[30] [64]
[31] [62]
[32] Footnote 207
[33] On the view of Miller J. Ngati Muriwai say that they were also a hapu at 1840.
[34] *Tsilhqot' in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 258 at [45]-[46]
[35] T*silhqot'in Nation v British Columbia* 2007 BSCS 1700 [457] discussed in the appeal submissions at [107].

*56.* In the appeal submissions it is submitted that on the evidence Ngāti Muriwai was a hapu at 1840 and continues to be one today, and that Miller J was in error in seeming to presume it was a post 1840 whanau group.

*57.* However, even if Miller J was correct in making this presumption, it is submitted that his judgement is clear on the basis of the PCR orders were made to Ngāti Muriwai as group t*hat affiliates with area and the iwi* but not with Ngati Ruatakenga or any other hapu group.

Dated: 23 October 2024

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**M J Sharp**
Counsel for the Ngāti Muriwai and Kutarere Marae