I TE KŌTI MANA NUI O AOTEAROA
IN THE SUPREME COURT OF NEW ZEALAND **SC 123/2023**

I TE TAKE O	an appeal against the decision of the Court of Appeal of New Zealand determining appeals against the judgment of the High Court in *Re Edwards (Te Whakatōhea) (No 2)*
I WAENGA I A	**CHRISTINA DAVIS ON BEHALF OF NGĀTI MURIWAI** **Kaitono pīra/ Appellant**
ME	**NGĀTI RUATAKENGA** Kaiurupare / Respondent

SUBMISSIONS FOR NGĀTI RUATAKENGA IN RESPONSE TO NGĀTI MURIWAI APPEAL

Dated 18 October 2024

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Counsel certifies that to the best of their knowledge, these submissions are suitable for publication.

Table of Contents

TĒNĀ, E TE KŌTI

1. Overview

1.1. The core issue in this appeal is whether the group calling themselves 'Ngāti Muriwai' can obtain a status and rights through the Marine and Coastal Area (Takutai Moana) Act 2001 (**MACA Act**) that they do not hold in tikanga. Ngāti Rua say they cannot.

1.2. The appellants contend that they are entitled to an order for Customary Marine Title (**CMT**), either in their own right or through "participation" in an iwi level title.[1] While their position in the lower courts focused on their asserted identity as a hapū, 'Ngāti Muriwai' now contend that they could be *either* a hapū or a whānau, and that the difference is immaterial to their ability to meet the test for CMT in s 58 as long as they can be broadly located within the "iwi identity".

1.3. In the submission of Ngāti Rua, the appeal misinterprets the requirements of s 58 and is entirely inconsistent with tikanga. Ngāti Rua adopt the submissions of Te Kāhui that the s 58 test for CMT is a single composite test that centres tikanga in its analysis.[2] Ngāti Rua support Te Kāhui's submission that the fundamental question in tikanga is who holds mana whakahaere (political authority at place) over an area.[3] In tikanga Whakatōhea, mana whakahaere flows from hapū authority.

1.4. Ngāti Rua say that 'Ngāti Muriwai' fail at the first hurdle of the s 58 test as they have no independent status as a matter of tikanga. The individuals making up this group are properly recognised as constitutent members of Ngāti Rua and therefore fall under the mana of Ngāti Rua for the purposes of the customary rights recognised under the MACA Act. There is no evidence of Ngāti Muriwai's existence as at 1840 and they are not currently recognised by the hapū of Te Whakatōhea as an independent hapū. 'Ngāti Muriwai' are also not recognised as a separate whānau identity. This lack of status at tikanga fundamentally precludes the ability of 'Ngāti Muriwai' to

1 Submission for Ngāti Muriwai at [94].
2 Submissions for Te Kāhui at [4.1].
3 Submissions for Te Kāhui at [4.1] and [4.3].

exercise mana whakahaere and hold an area in accordance with tikanga. As a result, 'Ngāti Muriwai' cannot meet the test for customary marine title under s 58 of the Act.

1.5. Both the High Court and the Court of Appeal accepted this analysis. They found that 'Ngāti Muriwai' are not a hapū and therefore could not meet the test in s 58 for CMT.[4] Those findings correctly recognised that hapū are the core site of political and legal identity in tikanga Whakatōhea and that customary title rests at the hapū level.

1.6. However, Miller J in the Court of Appeal muddied the waters somewhat by finding that 'Ngāti Muriwai' were a "whānau group forming part of the iwi" and could still participate in a recognition order for Whakatōhea.[5] His Honour stated the nature of their participation should be resolved "in accordance with tikanga."[6] Regrettably, the implications of this finding are unclear, because the position at tikanga is that 'Ngāti Muriwai' *as a group* have no independent existence, which Miller J himself accepted.[7]

1.7. The appellants rely on Miller J's comments to contend that they are entitled to be named on a CMT order as long as they are a constituent part of an applicant group that can meet the test in s 58.[8] The exact basis of this submission is not clear as there is some imprecision in their variable use of the terms "iwi", "hapū" "whānau" and generally "groups" to describe themselves and other parties in this appeal.[9] However it appears the appellants argue that they are part of the iwi and therefore have rights at tikanga that should be recognised by s 58, regardless of whether or not they could independently meet the test.[10] On this basis, the thrust of their submissions is that it is irrelevant whether they formed pre- or post-1840.[11]

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4 HC judgment at [459]-[460] and [465]; CA judgment at [278]-[280] and [340]; HC Stage Two Judgment, [05.00660], at [473].
5 CA judgment at [281].
6 CA judgment at [281].
7 CA judgment at [340].
8 Submissions for Ngāti Muriwai at [92].
9 See for example at [5]-[6] and [92].
10 Submissions for Ngāti Muriwai at [86].
11 Submissions for Ngāti Muriwai at [104].

1.8. Their submission appears to rely on the s 9 definition of an applicant group as "one or more iwi, hapū or whānau."[12] While it is not entirely clear, it appears that the appellants' position is that customary rights flow from iwi to hapū and whānau in a top down manner and that the ability of multiple groups to form a single applicant group means that groups that do not hold customary rights independently are entitled to CMT orders on the basis of their association with others that do.

1.9. In Ngāti Rua's submission, this cannot be correct. This misunderstands the nature of s 9, which is merely a gateway provision taking a permissive approach to how claims may be brought. Their position also misunderstands Miller J's discussion of the significance of multi-party applicant groups as being directed towards exclusivity, and not the more fundamental issue of rights holding as a matter of tikanga. In this way, the appellants' claim continues to ignore the dual issues that 'Ngāti Muriwai' have no independent status at tikanga and further that customary title rests with hapū as a matter of tikanga Whakatōhea. The appellants' submissions incorrectly elevate the iwi identity as the site of political authority.

1.10. For these reasons, it is the submission of Ngāti Rua that the appeal must fail.

2. The role of tikanga in this appeal

2.1. Tikanga is evidently controlling in answering this appeal. It is central to the s 58 test and central to the appellants' claims as to their status and rights for the purposes of CMT.

2.2. It is therefore instructive to set out the position on the relevant tikanga of Te Whakatōhea in relation to mana whakahaere over the takutai moana.

2.3. Before doing so, it is useful to make some preliminary comments on the role of tikanga in these proceedings. As this Court observed in *Ellis v R*, tikanga itself is a "complete system"[13] that is "grounded in its own

[12] Submissions for Ngāti Muriwai at [91]-[92] and [106].
[13] *Ellis v R (Continuance)* [2022] NZSC 114 at [180] per Winkelmann CJ [**Ellis**].

cultural and constitutional context."[14] In this sense, questions of tikanga are legal questions. The legal dimension of tikanga issues in these proceedings is heightened because s 58 incorporates tikanga as a central element of the test for CMT.

2.4. As this Court also recognised in *Ellis,* it is therefore not appropriate to refer to tikanga matters being proved as a matter of fact. However given the nature of tikanga, it "may need to be established and ascertained by evidence".[15]

2.5. Extensive evidence on the relevant tikanga was led in the High Court. This included both evidence of what the relevant tikanga is as a matter of legal principle, and how that tikanga applies to the particular situation as a matter of fact.[16] The findings made by the High Court about this evidence are simultaneously factual and legal findings that answer the central issue in this appeal: what is the position of 'Ngāti Muriwai' "in accordance with tikanga". As a result, the issues of tikanga now before this Court are effectively mixed questions of fact and law that are not easily extracted from each other.

2.6. However, Ngāti Rua further say that this case is not one involving a genuine contest of tikanga-based evidence. Issues of identity and contested mana whakahaere between different groups in te ao Māori are not unfamiliar to the courts and can often engage difficult issues of how judges ought to assess competing tikanga evidence, including differing accounts of whakapapa or interpretations of tikanga values. This is not one of those scenarios.

2.7. As between the parties to this appeal, only Ngāti Rua were able to provide evidence demonstrating the neccessary confluence of factors such as whakapapa, ahi kā roa, and kaitiakitanga to establish their mana whakahaere in relation to the takutai moana for the purposes of s 58. As outlined below, Ngāti Rua presented credible, consistent evidence of the position at tikanga that there are six hapū of Te Whakatōhea that collectively hold mana whakahaere over the Te

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14 At [171] per Winkelmann CJ.
15 At fn 151, per Williams J.
16 The key evidence relied upon is that of Dr David Williams **[203.01055]**, Dr Te Riaki Amoamo **[203.01122]**, and Mereaira Hata **[203.01096]**. The other hapū largely left the issue to Ngāti Rua, regarding it as an internal issue for them to respond to.

Whakatōhea seascape, and that Ngāti Muriwai is not one of those hapū.

2.8. 'Ngāti Muriwai' failed to provide any credible evidence that they have any existence at tikanga or the requisite authority required by s 58. That lack of credibility is reflected in the judge's factual findings in the High Court.

2.9. As a result, Ngāti Rua submit that the High Court's findings in relation to issues of tikanga should be accorded significant weight and should effectively be treated as factual findings that this Court should be hesitant to inquire into. The first instance judge was best placed to assess the credibility and standing of the witnesses that appeared before him, with the assistance of the pūkenga. Those factual findings effectively answer the legal issues in this appeal.

2.10. However, Ngāti Rua also submit that to the extent that the lower courts' legal reasoning is based on questions of tikanga that were *not* the subject of evidence in the High Court, it may be appropriate for this Court to inquire into that reasoning as a question of law. This issue is developed further below at [4] in relation to question of whether Ngāti Muriwai are a whānau as a matter of tikanga.

Tikanga Whakatōhea

2.11. The evidence of Dr Te Riaki Amoamo, a respected tohunga of Ngāti Rua and Te Whakatōhea whānui,[17] was that "in tikanga the customary title and the customary authority (mana and rangatiratanga) rests with the hapū."[18] That tikanga led Dr Amoamo to "support the Court recognising the customary marine title of all six Whakatōhea hapū".[19] This establishes the critical point that the hapū is the central political unit in accordance with the tikanga of Whakatōhea, and it is hapū that are capable of holding mana whakahaere in relation to the takutai moana.

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17 "Te Whakatōhea whānui" means "the entirety of Te Whakatōhea".
18 **COA [203.01122] at [203.01125]** at [2.3].
19 **COA [203.01122] at [203.01125]** at [2.3].

2.12. Dr Amoamo's evidence is consistent with and reinforced by the findings of the pūkenga that the six hapū of Te Whakatōhea have mana whakahaere over the application area — that is, that they hold the area in accordance with tikanga for the purposes of s 58. That conclusion is reflected in the statement by the pūkenga that:[20]

> our simple solution is to go to a tikanga-based poutarāwhare comprising Te Whakatōhea and Ūpokorehe...our poutarāwhare in our opinion *already exists* and is supported by whakapapa, mana whenua, mana moana, ahikāroa, taunga ika, toka kaimoana, tapu, rāhui, tohu moana, practices, experiences, incidents and the like.

2.13. In this statement, the pūkenga highlighted that holding the moana in accordance with tikanga Whakatōhea is controlled by a complex matrix of factors. Other key factors governing customary tenure identified in the evidence include whakapapa (take tīpuna), ahi kā roa (occupation),[21] take taunaha (naming), and take raupatu (conquest).[22] The relevance of the Whakatōhea tikanga of mana ā-hapū is to identify that these factors coalesce into authority in relation to whenua and moana at a hapū level. That is, it is the *hapū* that "hold" the area.

2.14. In the light of the tikanga of mana ā-hapū, much of the evidence and discussion in the High Court and the Court of Appeal is framed from the perspective of whether different applicant groups held the status of hapū.[23] This naturally follows from the fact that hapū status will be, in the tikanga of Te Whakatōhea, central to meeting the test in s 58.

2.15. Nonetheless, recognition of hapū status does not *in and of itself* establish that a group held or currently holds relevant customary rights in accordance with tikanga. That is reflected in the pūkenga report, where the pūkenga acknowledge that the tikanga controlling who is recognised as a hapū has been established since "mai rā anō" and includes, amongst other factors, "mana whenua" and "mana moana".[24] In other words, in the view of the pūkenga, holding of an area in accordance with tikanga indicates hapū status, not the other

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20 HC judgment, Appendix A – Pūkenga Report at 2(b) (emphasis added).
21 Dr Te Riaki Amoamo **COA [203.01122] at [203.01126]** at [3.2].
22 Prof David Williams, **COA [203.01086]-[203.01088]** at [86]-[91].
23 See for example the HC judgment at [424], [430] and [438].
24 HC judgment, Appendix A – Pūkenga Report at 2(d)(iii).

way around (that hapū status alone is determinative of customary rights). In this sense, according to tikanga Whakatōhea, only hapū have the requisite authority to hold mana whakahaere over an area but it is the factors referred to above at [2.12]-[2.13] that ultimately underpin the establishment of mana whakahaere and customary rights. Hapū status and customary title are mutually reinforcing concepts in this regard.

2.16. As a result, it is important that the question of hapū status does not obscure the underlying question that s 58 is actually asking — does the relevant group hold the area in accordance with tikanga? While not much turns on this distinction in a practical sense, a focus on labels of "iwi", "hapū" or "whānau" should not be substituted for a proper analysis of the substance of the customary rights at tikanga that are actually in question under s 58.

2.17. This point is critical to understanding that this appeal does not ask the Court to query or dismiss how Ngāti Muriwai choose to self-identify. It is not an issue of self-identity. It is fundamentally a question of *legality.* This Court recently observed in *Nikora v Kruger* that:[25]

> like any exercise of authority, tino rangatiratanga cannot be its own judge. Its parameters must be defined and maintained by reference to applicable principles of equity, legality and tikanga.

2.18. The same principle applies to this proceeding (in the sense that tino rangatiratanga is coextensive with mana as political authority in this context). 'Ngāti Muriwai' cannot make the bare assertion that they have mana whakahaere as a hapū without reference to evidence that establishes that authority as a matter of tikanga.

2.19. At its core this appeal is simply about whether 'Ngāti Muriwai' have mana whakahaere in relation to the takutai moana and can therefore meet the test in s 58. As set out below, the evidence is clear that they do not.

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[25] *Nikora v Kruger* [2024] NZSC 130 at [87].

3. 'Ngāti Muriwai' are not a hapū

3.1. As noted above, while hapū status is not in itself determinative of customary title, tikanga Whakatōhea makes clear that hapū status is inextricable from the holding of customary title. Both the High Court and the Court of Appeal concluded that 'Ngāti Muriwai' are not a hapū, and Ngāti Rua submit these findings should be accepted by this Court.[26] However, the appellants now seek to relitigate aspects of the factual findings.[27] For this reason, and given the intersection between factual and legal issues, these submissions set out the factual findings and the evidence underpinning those findings to make the position clear.

3.2. The evidence showed that the 'Ngāti Muriwai' applicant group comprises some members of the Edwards whānau,[28] who descend from a 19th century tipuna, Te Paku Eruera and his siblings (i.e Edwards), who were members of Ngāti Rua. The 'Ngāti Muriwai' name traces its origins to a dispute between Ngāti Rua and Te Paku Eruera over his grazing of his own sheep on the Ngāti Rua block Ōpape 3 without benefitting the hapū. Ōpape 3 was the coastal block allocated to Ngāti Rua in 1870 following the Crown raupatu (confiscation) of Te Whakatōhea's land. The dispute was resolved by the Crown carving off a piece of Ōpape 3 and allocating it to "Paku's people", being Eruera and his whānau (22 individuals comprising 11 adults and 11 children).[29] The subdivision was allocated on a per head basis, reflecting the individual interests of the 22 people in the Ngāti Rua blocks.[30]

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26 HC judgment at [459]-[460] and [465]; CA judgment at [278]-[280] and [340]; HC Stage Two Judgment, [05.00660], at [473].

27 Submisions for Ngāti Muriwai at [114]-[127].

28 Mereaira Hata stated in evidence that 'Ngāti Muriwai' are not a hapū, and that their members whakapapa to Ngāti Rua; Mereaira Hata EIC **COA [203.01096]** at [13]. Ms Hata elaborated in cross-examination that only some members of the Edwards whānau support the "Ngāti Muriwai" applicant group, and that "many others" supported Ngāti Rua; **COA Transcript [106.02832]**, at 03075/21-25; 03076/1.

29 T Walzl, "Ngāti Muriwai and the Common Marine and Coastal Area, 1865-2019", **COA [304.01569]** at 01586-01587. The Resident Magistrate reported that this arrangement was made with the consent of Ngāti Rua, but there are objections from Ngāti Rua referred to in the historical record and in the Native Land Court; at 01587-01590.

30 T Walzl **"**Ngāti Muriwai and the Common Marine and Coastal Area, 1865-2019" **COA [304.01569]** at 01587-01588, 01590 and 01592-01593.

3.3. Eruera named this subdivision Ōpape 3A 'Ngāti Muriwai'. Later, in the Native Land Court, Eruera claimed land through Ngāti Rua, Panenehu[31] and Ngāi Tai, but not as 'Ngāti Muriwai'. In evidence in one case, he explained that he had used the name 'Ngāti Muriwai' for the 3A block to make clear that his interest in Ōpape 3A came from his Whakatōhea whakapapa, tracing to the ancestress Muriwai.[32] Eruera also agreed that when the Ōpape Native Reserve was originally allocated to the hapū of Te Whakatōhea, he was included in the allocation to Ngāti Rua in Ōpape No. 3.[33]

3.4. As Churchman J found, there was no evidence of the existence of this 'Ngāti Muriwai' identity prior to the the 1870s.[34] There was also very little evidence to suggest that 'Ngāti Muriwai' had any independent existence between the late 19th century up until the 1990s.[35]

3.5. The 'Ngāti Muriwai' name was then resurrected in the 1990s by the late Claude Edwards after he lost his seat on the Whakatōhea Māori Trust Board. At the time, Mr Edwards was in a politically unpopular position after leading a failed Treaty of Waitangi settlement attempt in 1998.[36] As described by the renowned scholar of Whakatōhea, Dr Ranginui Walker, Mr Edwards then "revived the moribund Ngāti Muriwai hapū" in the 1990s as "a tūrangawaewae for himself and his followers".[37]

3.6. Despite these efforts, 'Ngāti Muriwai' has not obtained formal recognition within Te Whakatōhea. They were not represented on the Whakatōhea Māori Trust Board (which elected trustees on a hapū basis

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31 Te Panenehu was the name of the hapū preceding Ngāti Rua; Te Riaki Amoamo **COA [203.01122]** at [4.9].

32 9 Ōpōtiki MB 319-320, **COA [501.00096]** at 00180-00181. Muriwai is the famous ancestress who arrived on the Mātaatua waka and from whom all of Te Whakatōhea descend.

33 9 Ōpōtiki MB 319; **COA [501.00096]** at 00180; Dr Te Riaki Amoamo **COA [107.3341]** at 03378.

34 HC judgment at [445].

35 HC judgment at [445]; see also CA judgment at [280]. For instance, formal petitions by Te Whakatōhea to the Crown seeking compensation for the raupatu in the 1920s list Te Paku Eruera (who was still alive) and his whānau under the Ngāti Rua section of names; **COA [313.05199]** at 05204.

36 Ms Mereaira Hata gave evidence in cross-examination about this event, stating that she asked Claude Edwards about his claim to the Ngāti Muriwai identity following the loss of his position for Ngāti Patumoana. She described her understanding that Claude Edwards "revived Ngāti Muriwai to try and gain position": see **COA Transcript [106.02832]** at 03091/26-27; 03092/3-9.

37 Ranginui Walker *Ōpotiki-mai-tawhiti: capital of Whakatōhea* (Penguin Books, North Shore, 207), **COA [501.00021]** at 00023.

for the six recognised hapū). That position continues under the recently formed post-settlement governance entity, Te Tāwharau o Te Whakatōhea, which consists of representatives from the six recognised hapū and a number of general representatives.[38]

3.7. Dr Te Riaki Amoamo gave extensive traditional history evidence for Ngāti Rua,[39] commencing with his ancestor Tautūrangi alighting from the Nukutere waka and establishing his people at Ōpape and Ōmarumutu, where they remain over 30 generations later. Dr Amoamo robustly rejected the 'Ngati Muriwai' evidence, explaining that the whakapapa relied on by witnesses for Ngāti Muriwai was in fact Ngāti Rua whakapapa.[40] Dr Amoamo referred to Ngāti Muriwai as a "subdivision" of Ngāti Rua that came into being by the creation of Ōpape 3A. He noted that, in comparison to other traditional hapū of Ngāti Rua,[41] 'Ngāti Muriwai' is "a late arrival to be called a subdivision of Ngāti Ruatakenga".[42] Implicitly, Dr Amoamo was highlighting that while the tribal landscape within Te Whakatōhea has always been dynamic, Ngāti Muriwai are not a genuine part of that landscape. Dr Amoamo regarded a marae as a marker of hapū status,[43] and noted that 'Ngāti Muriwai' had never built a marae on Ōpape 3A, but instead continued to attend the Ngāti Rua marae as "part of Ngāti Rua."[44]

3.8. In effect, the evidence demonstrated clearly that the contemporary 'Ngāti Muriwai' identity is a constructed one, created for specific political purposes in the 1990s, with reference to the historical use of

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38 See https://tewhakatohea.co.nz/about-us/. It should be noted for the sake of completeness that 'Ngāti Muriwai' were included in "Te Ara Tono", a document prepared by the Whakatōhea Hapū Raupatu Process Working Party concerning the process for settlement negotiations; **[313.05121].** However, that inclusion did not follow through to representation on Te Tāwharau.

39 Dr Te Riaki Amoamo **COA [203.01122]**

40 The whakapapa evidence for 'Ngāti Muriwai' is set out in Dr Des Kahotea's report, **COA [304.01503]** at 01516-01517 (whakapapa 3 is identical to that at [4.12] of Dr Amoamo's evidence **COA [203.01122]**). Dr Kahotea gave independent expert evidence for 'Ngāti Muriwai' but noted at 01516 that his source for this whakapapa was Adriana Edwards, a claimant for the WKW application and who gave evidence in support of Ngāti Muriwai. Refer also to the cross examination of Dr Te Riaki Amoamo, **COA [107.3341]** at 03378/12-20; 03392/25-30; 03395/23-30.

41 Dr Amoamo referred to "18 subdivisions" of Ngāti Rua including Ngāti Kairingo, Ngāti Mihi, Ngāi Tahimaui, Ngāti Tukupara, Ngāti Ururoa, Ngāti Uea and Te Urukotia: **COA [107.03341]** at 03378/13-20

42 **COA [107.03341]** at 03378/19-20.

43 **COA Transcript [107.03341]** at 03395/33; **COA Transcript [107.03341]** at 03382/9-10.

44 **COA Transcript [107.03341]** at 03396/2-4; 03379/8-11. See also the cross- examination at 03379/21-28 concerning Nepia Tipene's tipuna Rangimātānuku signing te Tiriti o Waitangi for Ngāti Rua.

the appellation 'Ngāti Muriwai' for a land block. Dr Amoamo was unequivocal that 'Ngāti Muriwai' have no separate identity at tikanga and that view was supported by witnesses for Ngāti Rua, Ngāti Ira, Ngāti Patu[45] and the pūkenga.[46] Dr Amoamo's expertise based on his impressive knowledge of whakapapa and kōrero tuku iho was acknowledged by both the High Court judge and the pūkenga.[47]

Narrative Advanced by 'Ngāti Muriwai'

3.9. In contradistinction to the rich and credible history presented for Ngāti Rua, Ngāti Muriwai advanced several different (and contradictory) historical narratives based on threads of tenuous historical information and bare assertion to support their claim to be a long standing hapū of Te Whakatōhea.[48]

3.10. The first narrative advanced was that Ōmarumutu Marae was originally a 'Ngāti Muriwai' pā, and that 'Ngati Muriwai' had invited their Ngāti Rua relations to come and live there with them there following the burning down of a Ngāti Rua whare at Whitikau.[49] 'Ngāti Muriwai' contended that the two groups subsequently lived together at Ōmarumutu before splitting into separate groups following the raupatu in the 1870s.[50]

3.11. Churchman J found that the evidence for Ngāti Muriwai on this point was "clearly incorrect"[51] and instead endorsed Dr Amoamo's evidence that Ōmarumutu is on the site of an ancient pā, and that Ōmarumutu has always been a Ngāti Rua marae, which is clear from the fact that the wharenui that stood prior to 1901 was named Ruatakenga, after the eponymous ancestor of Ngāti Rua.[52]

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45 HC judgment at [461].
46 HC judgment at [459].
47 The pūkenga recorded Dr Amoamo as a pou tikanga for Ngāti Rua and Whakatōhea: HC Judgment, Appendix A — Pūkenga Report at [5](b), and also referred to his expertise in rattling off whakapapa, refer to transcript **[108.03898]** at 4581/ 20-27. Churchman J referred extensively to Dr Amoamo's evidence in his decision.
48 HC judgment at [439]. See Nepia Tipene EIC **COA [201.00295]** at 00296 at [4].
49 Nepia Tipene EIC **COA [201.00295]** at 00298 at [25]; Adriana Edwards EIC **COA [201.00285]** at 00290 at [8]; Christina Davis EIC **COA Transcript 104.01732** at 02247/15-17.
50 See HC judgment at [441], referring to the submissions for Ngāti Muriwai.
51 HC Judgment, at [462].
52 Te Riaki Amoamo EIC **COA Transcript [106.02832]** at 03242/30-33; 03243/1-12/14-33; 03244/11-29. In cross-examination, Nepia Tipene conceded he was unaware that the whare had previously been called Ruatakenga. Nepia Tipene **COA Transcript [105.02270]** at 02331/24-34; 02332/1-3.

3.12. Secondly, the 'Ngāti Muriwai' witnesses argued that there had previously existed a hapū known as "Ngāti Muriwai-a-Rua", being a combined hapū that later split into 'Ngāti Muriwai' and Ngāti Rua.[53] Their source for this contention was a singular reference in Māori Land Court minutes in 1976, when the Court placed Ōmarumutu Marae into a Māori reservation in the name of Ngāti Rua.[54] The Registrar's minutes of the judicial conference state that Tiwai Amoamo[55] referred "to the original name of Ngāti Muriwai a Rua but asks that the marae be set aside for the common use and benefit of Ngāti Rua only".[56] This was *not* a formal statement given in evidence, or a verbatim transcript, and it is not clear precisely what Tiwai Amoamo was referring to in this regard, or whether he was speaking in English or te reo Maori.[57] The same set of minutes record that the "Porikapa and Edwards families are Paku's people" and that they had mistakenly been left out of the ownership list of the marae originally (presumably due to the split of Opape 3A). The Court was requested to order their inclusion in the ownership list so that "the marae represent <u>all</u> Ngati Rua", and the Court did so.[58]

3.13. Thirdly, during the High Court hearing, historian Tony Walzl undertook research into a disparate reference in Dr Ranginui Walker's book to "a" Ngāti Muriwai having been located at Te Kaha between 1800 and 1830.[59] On the basis of this reference, it was postulated that 'Ngāti Muriwai' had left the Whakatōhea region at some point to live with Te Whānau-a-Apanui at Te Kaha and had returned to Waiaua in the

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53 Nepia Tipene EIC **COA [201.00295]** at 00300 at [39]-[40]. See also HC judgment at [450] and [456].

54 **COA [501.00063]** (original handwritten minutes) and **COA [501.00074]** (typed).

55 Tiwai Amoamo is the father of Te Riaki Amoamo: Dr Te Riaki Amoamo EIC **COA [203.01122]** at 01124 at [1.2].

56 **COA [501.00074]** at 00075. See also the reference to this statement in the Court's final decision at 00077.

57 If speaking in te reo, it is possible that he was using "ā" in the possessive sense to denote that 'Ngāti Muriwai' were "of" Ngāti Rua.

58 **COA [501.00074]** at 00078. Emphasis in original. Nepia Tipene contended in oral evidence that the inclusion of the Edwards and Porikapa whānau into the ownership list was an "assimilation" of 'Ngāti Muriwai' into Ngāti Rua. However he accepted in cross examination that the Edwards and Porikapa whānau whakapapa to Ngāti Rua. Nepia Tipene EIC **COA [105.02270**] at 02311/25-30. Nepia Tipene XE **COA [105.02270]** at 02320/9-13; 02321/28-30.

59 The reference was contained in 11 Ōpotiki MB Book 118 170, relating to a Te Kaha title investigation: **COA [501.00030]** and is referenced by Ranginui Walker in *Ōpōtiki-mai-tawhiti:* **COA [501.00024].** See Tony Walz EIC **COA Transcript [103.01249]** at 01568/11-18 and 01570-01584.

Whakatōhea rohe at some time in the 1800s.[60] Mr Walzl provided the Native Land Court minutes that showed there had indeed been a group called Ngāti Muriwai at Te Kaha, although their whakapapa from Muriwai was on a different line, and Mr Walzl conceded in cross-examination that there was no available whakapapa information to determine whether this Ngāti Muriwai was related to Te Whakatōhea or had any connection to Te Paku Eruera.[61] The 'Ngāti Muriwai' witnesses did not have any whakapapa evidence to support this claim,[62] but Dr Amoamo's evidence was that he knew of no whakapapa connecting Te Paku Eruera's whānau to Te Kaha.[63] Dr Amoamo also pointedly observed that, even if 'Ngāti Muriwai' had come from Te Kaha, they would have had no customary rights independently of Ngāti Rua because they were living on "the customary land of Ngāti Ruatakenga".[64] In any event, given the prominence of the ancestress Muriwai, it cannot be assumed that the Te Kaha group were the same people; there have been multiple hapū referred to as 'Ngāti Muriwai' across the Mātaatua confederation, as Mr Walzl conceded.[65]

3.14. Finally, in closing submissions in the High Court, 'Ngāti Muriwai' latched onto the argument that a customary transfer of rights had occured through a tuku from Ngāti Rua to Ngāti Muriwai post-1840, meaning they were entitled to a CMT under s 58(3).[66] However, as Churchman J correctly found, there was simply no evidence of a customary tuku before the Court, and his Honour also noted that the submission "is also contradicted by counsel's submission that they shared the rohe (including the marae) with Ngāti Rua rather than used it exclusively".[67]

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60 T Walz "Ngāti Muriwai and the Common Marine and Coastal Area, 1865-2019", **COA [304.01569]** at 01584; Tony Walzl EIC **COA Transcript [103.01249]** at 01584/16-21. See also Christina David EIC **COA Transcript [104.01732]** at 02238/25 and 02249/5-7; Adriana Edwards EIC **COA Transcript [105.02270]** at 02359/31-34; 02360/1-3.

61 **COA Transcript [103.01249]** at 01587/4-18; Nepia Tipene XE **COA [105.02270]** at 02326/10-11; Christina Davis EIC **COA Transcript [104.01732]** at 02261/11-20.

62 See for example Adriana Edwards XE **COA Transcript [105.02270]** at 02364/19-25.

63 Dr Te Riaki Amoamo EIC **COA Transcript [106.02832]** at 03242/4-14; **COA Transcript [107.03341]** at 03387/25-32.

64 Dr Te Riaki Amoamo XE **COA Transcript [107.03341]** at 03392/22-30.

65 **COA Transcript [103.01249]** at 01586/16-25.

66 HC judgment at [456].

67 HC judgment at [457].

3.15. In the round, these tenuous threads of evidence must be viewed in the context that emerged during cross-examination that the witnesses for 'Ngāti Muriwai' simply did not know their whakapapa and could not relay any compelling historical traditions.[68] 'Ngāti Muriwai's' claim is based on a few passing and decontextualised references to 'Ngāti Muriwai' in the historical record, whilst attempting to downplay their glaring absence of kōrero tuku iho. As such, the overwhelming conclusion is that 'Ngāti Muriwai' are not, and have never been recognised as a hapū of Te Whakatōhea as a matter of tikanga.

The High Court's Factual Findings

3.16. The appellants now claim in this Court that the High Court judge did not make factual findings about the status of 'Ngāti Muriwai', but merely made "observations of the evidence" referred to above.[69] With respect, this is not a tenable submission. It is clear from the High Court judgment that Churchman J did not find the evidence for 'Ngāti Muriwai' credible, and preferred the consistent and well supported position of Ngāti Rua. His Honour also specifically found that aspects of the evidence for Ngāti Muriwai were "clearly incorrect"[70], that aspects of their factual submissions were not supported by evidence[71] or were internally contradictory.[72] While the judge did not make individual conclusions on each factual claim advanced by Ngāti Muriwai (perhaps out of sensitivity), nor did his Honour make any positive findings in their favour. Nonetheless, it is contextually clear his Honour did not accept their evidence from his conclusion at [465] that "Ngāti Muriwai have not established that they, along with the six hapū of Whakatōhea, held a specified area in accordance with the requirements of s 58(1)(a)." [73]

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68 In cross examination, Nepia Tipene conceded he was relying on the evidence of the expert historical witnesses for Ngāti Muriwai, Dr Kahotea and Mr Walz: Nepia Tipene XE **COA Transcript [105.2270]** at 02326/1-11.

69 Submissions for Ngāti Muriwai at [78].

70 HC judgment at [462].

71 HC judgment at [455] and [457].

72 HC judgment at [457].

73 This statement also highlights that Churchman J was alive to the coextensive nature of hapū status and mana whakahaere, capturing both the label and the substance of the rights, as discussed above at **[2.11]-[2.19]**. The factual conclusions in the judgment are further reinforced by Appendix B, where Churchman J set out the whakapapa evidence that the Court relied upon. This appendix sets out the whakapapa of Ngāti Rua but does not discuss the whakapapa of 'Ngāti Muriwai'.

3.17. Churchman J also relied on the pūkenga's opinion that 'Ngāti Muriwai' do not presently have the status of a hapū of Te Whakatōhea because they are not recognised as such by the extant hapū.[74] The pūkenga recognised that Māori communities are dynamic and that new hapū can emerge and others fade away. They explained that appropriate tikanga processes could allow groups such as 'Ngāti Muriwai' to evolve in the future to become recognised as a hapū of Te Whakatōhea.[75]

3.18. In short, the High Court found that 'Ngāti Muriwai' are not a hapū, have never been a hapū, and therefore do not have customary authority over the takutai moana in accordance with the tikanga of Te Whakatōhea.[76] In Ngāti Rua's submission, it is not now open to this Court to overturn those factual findings. Those factual findings are conclusive as to the legal issues.

3.19. In the Court of Appeal, Miller J stated that counsel for Ngāti Muriwai "did not manage to detract" from the substance of Churchman J's factual findings.[77] Significantly, his Honour concluded that "Mr Amoamo's opinion that Ngāti Muriwai have no separate identity as a matter of tikanga must be respected."[78]

4. 'Ngāti Muriwai' are not a "whānau"

4.1. Given that 'Ngāti Muriwai' strenuously contended in the High Court that they were a hapū, there was no evidence before the Court that they have a recognised whānau identity. Despite this lack of evidence, the High Court and Court of Appeal both concluded 'Ngāti Muriwai' could be a whānau group.[79] Churchman J was somewhat equivocal, stating that "[i]t is possible that Ngāti Muriwai are a whānau group even though that is not how they identify themselves".[80] This approach

74 HC judgment at [458]-[459]. See also Stage Two Judgment [05.00660], at [473], where Churchman J stated that he had adopted the pūkenga's conclusion.
75 HC judgment, Appendix A — Pūkenga Report at 2(d)(ii). In cross-examination, the pūkenga said that it was a "conversation" that "has to be had" within the iwi; **COA Transcript [108.03898]** at 04580, 04583.
76 HC judgment at [465].
77 HC judgment at [280].
78 CA Judgment at [340].
79 HC judgment at [499]-[500]; CA judgment at [281] and [341].
80 HC judgment at [500].

was endorsed in the Court of Appeal, where Miller J concluded that 'Ngāti Muriwai' are "at least a whānau group forming part of the iwi".[81]

4.2. It is evident from the position in tikanga that whānau status is ultimately irrelevant to meeting the test in s 58, since in Te Whakatōhea it is hapū that hold mana whakahaere over the takutai moana. However, the Court of Appeal appeared to place weight on 'Ngāti Muriwai's' whānau status in suggesting they may participate in CMT in some form, and this forms the basis of much of the appellants' submissions in this Court.

4.3. It is submitted that both the High Court and the Court of Appeal fell into error in assuming that "iwi" "hapū" and "whānau" are a vertical cascade of identities. Miller J's use of the phrase "at least" suggests a view that if hapū status is not achieved then a group must be a whānau. This fails to appreciate that in fact the nature of community identity within te ao Māori is complex, dynamic and often lateral, depending on context.[82] "Iwi" "hapū" and "whānau" are not neccessarily mere subdivisions of each other. They are better characterised as repositories of political and social authority, that interact with broader political communities depending on context. Ability to assert mana, draw on whakapapa connections and create new relationships are all relevant to that dynamic. This reflects the point made earlier that there should not be an undue focus on labels in these proceedings – the key issue is the substance of rights in issue.

4.4. Historian Dr Angela Ballara addresses this point in her seminal work *Iwi*. She explains it is a mistaken notion that "iwi are divided into hapū and hapū into whānau"[83] or that whānau inevitably evolve into hapū as they grow. Ballara attributes this hierarchical view of tribal structure as arising from "rigid and static structual models created by ethnologists of the late 19th and 20th century".[84]

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81 CA judgment at [281].

82 See for example the comments of Hirini Moko Mead cited in *He Poutama* (NZLC, SP24, 2023), Appendix 2 Natalie Coates and Horiana Irwin-Easthope "Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors" [**He Poutama, Appendix 2]** at [6.61].

83 Angela Ballara *Iwi: The Dynamics of Māori Tribal Organisation from c 1769- c 1945* (Victoria University Press. Wellington, 1998) at 30, citing the work of Steven Webster.

84 Ballara at 18-19.

4.5. Dr Ranginui Walker has also observed that the view of Māori society being organised vertically by whānau, hapū and iwi is:[85]

> simplistic and incomplete. It suggests that the social units in Māori society were static, that the tribal polities were immutable and that kinship was the 'only' basis for association. This was not the position. Māori society has always been characterised by dynamism and adaption. Accordingly the types of iwi groupings varies.

4.6. Like Ballara, Dr Walker has noted that whānau may become hapū as they grow but that this is "not automatic" and is dependent on a range of factors, including mana.[86] He described the whānau as the "basic social unit in Māori society", an "extended family" made up of generations that could number up to twenty or thirty people depending on context.[87] Just as whānau do not inevitably become hapū, it does not follow that any group not achieving hapū status is therefore a whānau.

4.7. The fundamental point is that the "whānau" is a specific social unit at tikanga. That is also implict in the view of Tā Timoti Karetu and Tā Wharehuia Milroy that whānau have their own mana.[88] Not every group of related individuals is a "whānau" in the sense of having identifiable mana within the wider community. The precise boundaries of whānau status, like hapū status, are a matter of tikanga, variable across the motu, and as discussed above, are dynamic with the particular tikanga context.

4.8. In this way, it is critical to understand the distinction between the literal translation of the word "whānau" into the English "family" and the role and significance that can be ascribed to "whānau" from a tikanga perspective. The distinction is perhaps best captured by the recent judgment of this Court in *Nikora v Kruger,* where the Court

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85 He Poutama Appendix 2 at [6.64],citing *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (HC Auckland, CP 395/93, CP 122/95 & CP 27/95, 4 August 1998, Paterson J), First affidavit of Professor Ranginui Walker in support of the second to fourth plaintiffs in relation to the hearing of the preliminary question (28 January 1998) at 6.1.

86 Ranginui Walker *Ka Whawhai Tonu Mātou: Struggle without End* (2nd ed, Penguin, Auckland, 2004) at 65.

87 Walker, at 64.

88 He Poutama Appendix 2 at [6.25] citing *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (HC Auckland, CP 395/93, CP 122/95 & CP 27/95, 4 August 1998, Paterson J), Affidavit of Professor James Te Wharehuia Milroy and Professor Timoti Samuel Karetu for the Treaty of Waitangi Fisheries Commission in relation to hearing of preliminary question (unsigned) at [13].

remarked on the conceptual difference between "a community defined by common descent" and "a group of individuals who just happen to be related" (in the context of tribal title to land).[89]

4.9. This dynamism should not be mistaken for ambiguity or inconclusiveness. The point to be drawn from such dynamism is that *identity* is important; it is an aspect of mana. Ngāti Muriwai have claimed an identity *as a hapū* that has been rejected on the basis of the tikanga evidence. As Miller J stated in the Court of Appeal, "Mr Amoamo's opinion that Ngāti Muriwai have no separate identity as a matter of tikanga must be respected".[90]

4.10. The evidence did establish that the individuals who form the group claiming the 'Ngāti Muriwai' identity are descendants of Te Paku Edwards and his relations included in the Ōpape 3A block. It is not disputed that they have familial ties. Ms Mereaira Hata, a tohunga of the Hāhi Ringatū and claimant for Ngāti Rua, explained in evidence that today while some of the Edwards whānau support Ngāti Muriwai, others support Ngāti Rua.[91] Dr Amoamo made a similar comment[92] and the 'Ngāti Muriwai' witness Nepia Tipene also agreed that some whānau (such as the "Tai whānau") affiliate with Ngāti Rua rather than 'Ngāti Muriwai'.[93] This evidence in itself indicates that the Edwards whānau or the Tai whānau are established identities within Ngāti Rua, while 'Ngāti Muriwai' are a grouping of members of the Edwards whānau claiming a contemporary hapū identity.

4.11. The mistake in the Court of Appeal's approach is underscored by Miller J's comment at [340] that, as a whānau, Ngāti Muriwai "affiliate to the area and *the iwi,* but not to Ngāti Ruatakenga". As noted above, community relationships within te ao Māori do not *necessarily* mean whānau and hapū exist on a gradated hierarchy. Whānau may

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89 *Nikora v Kruger* [2024] NZSC 130 at [62]. Counsel acknowledge this was in the slightly different context of discussing the significance of a particular mode of land ownership.

90 CA judgment at [341].

91 Mereaira Hata EIC **COA [203.01096]** at 01102 at [13]; Mereaira Hata **COA Transcript [106.02832]** at 03035/8-10; 03072/23-27; 03073/1-4. At 03084/19-25, Ms Hata referred to the Ōpape 3A land being allocated to the whānau of Eru Ponaho and that the Ponaho whānau chose to associate with the Ngāti Muriwai hapū and 'self-ascribe however they choose'. This indicates the distinction between the whānau identity and the hapū identity in Ms Hata's understanding.

92 Dr Te Riaki Amoamo XE **COA Transcript [107.03341]** at 03398 line 5-8.

93 **COA Transcript [105.02270]** at 02323/3-8.

whakapapa to more than one hapū, for example. However, it is difficult to understand, especially without any evidence, how Ngāti Muriwai could associate directly with the iwi independent of any hapū identity. The clear evidence before the Court was that the iwi identity is constructed through hapū, and therefore there is no iwi identity independent of the hapū. As Ms Mereaira Hata explained, the hapū have independent mana but can "hold hands and join together as an iwi" if they so choose.[94]

4.12. Ultimately, the complicated dynamic of community relationships and identities in te ao Māori simply reinforces the point that the particular tikanga that is relevant to these proceedings must be established in evidence. The focus of the evidence was on whether 'Ngāti Muriwai' were a hapū, not whether they are a whānau, and the fact that they use the prefix "Ngāti" is an implicit assertion that they continue to covet hapū status.[95] In this context, it was not therefore open to the lower courts to conclude that 'Ngāti Muriwai' are a whānau. The lower courts placed significance on that mistaken identity for the purposes of the legal test. In Ngāti Rua's submission this Court should therefore overturn that finding as question of law.

5. The Correct Interpretation of the s 58 Test

5.1. The factual finding that Ngāti Muriwai are not a hapū should, in effect, be the end of the matter. It inescapably follows that 'Ngāti Muriwai' failed to satisfy the first hurdle of the test in s 58(1)(a). They do not hold an area in accordance with the tikanga of Whakatōhea *because* they are not a hapū, they do not have the relevant mana whakahaere, and they did not exist as of 1840.

5.2. Regrettably, the Court of Appeal placed weight on the assumption that Ngāti Muriwai are a "whānau" and indicated that Ngāti Muriwai should therefore be able to "participate" in any CMT awarded to the hapū of Te Whakatōhea in some capacity. This is set out at [281] where Miller J concluded that:

94 Mereaira Hata XE **COA Transcript [106.02832]** at 03057/2-5.
95 Submissions for Ngāti Rua on appeal at [2.11].

> ...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.

5.3. Miller J's precise meaning is opaque. It is not clear if his Honour means that they should have some formal status on the order, or merely participate as constituent members of a group that holds CMT. If the former, what is the rationale for naming one whānau, but not others? Whatever the meaning, Miller J's view appears to be motivated by a concern to be inclusive, which in itself shows a misunderstanding of the whakapapa: *all* of Te Whakatōhea are included if the constituent hapū hold CMT, as the pūkenga correctly recognised.[96]

5.4. The appellants contend that 'Ngāti Muriwai' are entitled to be named on a CMT order as long as they are part of an applicant group that has at least one member that can meet the s 58 test. They rely on Miller J's judgment at [281] and the earlier discussion in [204]:

> MACA recognises that members of an applicant group may enjoy differing degrees or kinds of mana over the area specified in their application. That is implicit in the ability to claim through a member group. They may nonetheless share — if they so choose — in a single CMT over that area. It is a necessary condition of such a recognition order over a specified area that one or more of the group's member groups has exclusively used and occupied each part of the area since 1840. Subject to that requirement, MACA claims can accommodate changes in iwi, hapū or whānau groups since 1840.

5.5. Ngāti Muriwai also contend on this basis that it is immaterial whether they developed as a post-1840 hapū or post-1840 whānau, as long as they are part of an applicant group that does satisfy the 1840 requirement.

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[96] HC Judgment, Appendix A, Pūkenga Report, at [2(d)(iv)]. And see their response to Mr Sharp's cross-examination of what that paragraph meant, at **[108.03898]** at 04579/19, saying "The tikanga shows that they are actually part of the construct".

5.6. However, the submissions for Ngāti Muriwai fail to appreciate that the context of this paragraph is Miller J's conclusion that the Act recognises shared exclusivity. Miller J is clearly stating that multi-party applicant groups that hold an area in accordance with tikanga will not fail at the exclusivity hurdle if they collectively share the area to the exclusion of all others. In doing so, his Honour appropriately recognises that the way that exclusivity is mediated internally between the applicant group may change over time as iwi, hapū and whānau groups change, but that this should not be a barrier to the recognition of long standing customary title.

5.7. It does not follow from this statement that a group that cannot meet the first limb of s 58(1)(a) independently will still be entitled to a CMT order if they join a multi-party applicant group. Holding an area in accordance with tikanga is fundamental to the entire CMT scheme and Ngāti Muriwai fail at this very first hurdle because they are not a hapū and have no identity at tikanga. Ngāti Muriwai's appeal in this regard is essentially premised on the fact that, even though Te Whakatōhea tikanga recognises that only hapū can hold mana whakahaere, they can obtain mana whakahaere as a whānau through their inclusion in an applicant group consisting of hapū. That cannot be right.

5.8. The submissions for Ngāti Muriwai on this issue rely on the fact that s 9 of the Act defines an applicant group as "one or more iwi, hapū or whānau groups".[97] This formed part of the logic of the Court of Appeal's findings at [204] that the Act recognises shared exclusivity because s 9 contemplates multiple parties bringing a single application.

5.9. However, s 9 does not mean that whānau groups *must* be recognised as holding mana whakahaere for the purposes of CMT. It is a broad and permissive definition section. To the extent that s 9 allows whānau to be applicants for CMT, this simply recognises that there may be areas where the relevant tikanga recognises that customary title/ mana whakahaere can be held at the whānau level.[98] Section 9 is a gateway provision and should not be rather be seen as controlling how

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97 At [92].

98 An example being *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559.

the s 58 test is met. Section 58(1)(a) is clear that tikanga itself is controlling in that regard.

5.10. This is reinforced by the fact there is no definition of iwi, hapū and whānau in the Act. The Act leaves those concepts to be controlled by tikanga, thereby coalescing with the central focus on tikanga in s 58. As noted above, the holding of customary rights and a group's status as a matter of tikanga will often be coextensive and inextricable. Once again, it is the substance of the tikanga-based rights and not the surface level labels that are ultimately important here. That is consistent with the dynamic nature of Māori community relationships.

5.11. Regardless, 'Ngāti Muriwai's' position must also confront the reality that they are not part of any applicant group that can meet the s 58 test. In Ngāti Rua's submission, this is where the Court of Appeal fundamentally misdirected itself. 'Ngāti Muriwai' simply have no identity *as 'Ngāti Muriwai'* as a matter of tikanga and therefore cannot piggy back that discrete identity into the Te Kāhui applicant group through their individual status as members of Ngāti Rua. To the extent that this was Miller J's intended meaning, Ngāti Rua respectfully submit the Court of Appeal erred.

5.12. Ngāti Rua accept that the *individual* persons making up Ngāti Muriwai are "part of an applicant group" only in so far as they are members of Ngāti Rua. They will therefore have a role in the operation of any CMT awarded to Ngāti Rua, as hapū members, in accordance with Ngāti Rua tikanga. Churchman J adopted this approach in ruling that 'Ngāti Muriwai' are not entitled to participate in a rehearing as a separate group and stated that "the resolution of any role Ngāti Muriwai may have under tikanga is a matter to be resolved directly between Ngāti Muriwai and the successful applicant group that they may be a part of."[99] That finding is itself consistent with the Court of Appeal comment that MACA "implicitly adopts the premise that internal governance is a matter for the [applicant] group to decide in accordance with tikanga".[100] It is apparent Churchman J interpreted Ngāti Muriwai as being "part of an applicant group" in the sense of

[99] Minute of Churchman J 8 March 2024.
[100] CA judgment at [207].

being subsumed under the mana and identity of Ngāti Rua. In Ngāti Rua's submission, this is the correct approach.

5.13. The appellants submit that if the Court of Appeal's judgment is that "Ngāti Muriwai could join with other Whakatōhea groups to form an applicant group to hold a CMT for the iwi, then Ngāti Muriwai would have no issue with this".[101] However, as already discussed, it has been well established that tikanga Whakatōhea does not recognise customary title at an iwi level, but requires that mana ā-hapū is recognised.[102] Further, just as 'Ngāti Muriwai' are not a whānau of Ngāti Rua, they cannot establish that they are a whānau of Te Whakatōhea independently of any hapū identity, as explained above at [4.11].

5.14. Finally, for completeness, Ngāti Rua address the appellants' claim that a stricter test under s 58 was applied to their application.[103] This is plainly incorrect. It is evident that the majority did not specifically address the 'Ngāti Muriwai' appeal because they endorsed Miller J's disposal of that appeal.[104] The majority recognised that it was unneccessary to depart from Miller J's disposal, and the appeal therefore fell down at the first hurdle and did not reach the stage of considering exclusivity and substantial interruption, which was the primary point of difference in the Court's reasons. The precise meaning of "holds" land was also ultimately irrelevant because the Court of Appeal recognised that Ngāti Muriwai have no separate identity as a matter of tikanga.

6. Conclusion

6.1. The fact that the 'Ngāti Muriwai' issue consumed a good deal of hearing time at the trial is an indication of the sensitivity of mana and identity issues in te ao Māori. Ngāti Rua are engaged in this appeal because it undermines their mana if their whakapapa, traditional history, and customary rights become distorted by the false narratives that the appellants are advancing. This Court ought to be alive to the inherent

101 Submissions for Ngāti Muriwai at [94].
102 See above at [2.11] and [4.11].
103 Submissions for Ngāti Muriwai at [3] and [44]-[48].
104 CA judgment at [360].

risks of legal processes under the MACA Act being coopted by groups seeking to achieve a status that they do not otherwise have in tikanga. It is submitted that it is beyond the Court's role to force the inclusion of 'Ngāti Muriwai' into the CMT orders: to do so would mean the Court inappropriately intruding into the realm of tikanga by becoming an active player in a dispute that is being played out within Ngāti Rua and Te Whakatōhea whānui. The appeal should be dismissed.

Dated 18 October 2024

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