I TE KŌTI MANA NUI O AOTEAROA
IN THE SUPREME COURT OF NEW ZEALAND **SC 129/ 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	**NGĀTI RUATAKENGA** (CIV-2017-485-817) **Kaitono pīra/ Appellant**
ME	**CHRISTINA DAVIS ON BEHALF OF NGĀTI MURIWAI** **Kaiurupare / Respondent**

SUBMISSIONS FOR NGĀTI RUATAKENGA APPEAL

Dated 20 September 2024

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

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1 Introduction

1.1 Ngāti Ruatakenga (**Ngāti Rua**) is one of the six extant hapū of Te Whakatōhea awarded Customary Marine Title (**CMT**) by the High Court. Ngāti Rua appeal the Court of Appeal's decision to uphold the High Court's award of a Protected Customary Rights (**PCR**) order to the 'Ngāti Muriwai' applicant group pursuant to section 51 of the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA Act**), and the Court of Appeal's statement in declaration A that 'Ngāti Muriwai' is not precluded from participating in any recognition order granted to Ngā Hapū o Te Whakatōhea.[1]

1.2 In reaching its decision, the Court of Appeal reasoned that the pou tikanga Dr Te Riaki Amoamo's "*opinion that Ngāti Muriwai have no separate identity as a matter of tikanga must be respected*", but then held that "*that concern must yield to the scheme of section 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*".[2]

1.3 Ngāti Rua submit that the Court of Appeal's decision is contrary to the requirement in s 51 that customary rights are exercised "in accordance with tikanga". Ngāti Rua say that issues of mana and identity are integral to the exercise of customary rights according to tikanga. In effect, the applicant group has secured an outcome through the MACA Act that accords 'Ngāti Muriwai' mana and status that it does not have as a matter of tikanga. That cannot be right.

2 Background

2.1 The 'Ngāti Muriwai' applicant group unsuccessfully claimed CMT based on the assertion that they are a hapū. However, the High Court and the pūkenga both (correctly) found that they do not presently have the status of a hapū of Te Whakatōhea.[3] The Court based this finding

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1 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504 (**CA judgment**).

2 CA judgment, at [340] per Miller J.

3 *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772 (**HC Judgment**), **COA [05.00401]** at [459]–[463]. Justice Churchman clarified in his stage two judgment that he had "adopted" the pūkenga's conclusion in this regard; *Re Edwards (Stage Two) (Te Whakatōhea No 7)* [2022] NZHC 2644, **COA [05.00660]** at [473].

in part on the evidence that showed that "it is clear that the other hapū of Whakatōhea do not accept their claimed status".[4]

2.2 After rejecting 'Ngāti Muriwai's' assertion that they are a hapū, Churchman J went onto muse that "[i]t is possible that Ngāti Muriwai are a whānau group even though that is not how they identify themselves".[5] On that basis, the Court awarded PCRs to "Ngāti Muriwai whānau", even though it had no evidence that the particular members of the Ngāti Muriwai grouping are considered a discrete whānau within Ngāti Rua. The Judge also drew inferences as to the nature of the customary rights exercised because there was "relatively little evidence" about the activities or the tikanga involved.[6]

2.3 The evidence showed that the 'Ngāti Muriwai' applicant group comprises some members of the Edwards whānau of Ngāti Rua,[7] who whakapapa to an ancestor Te Paku Eruera (i.e. Edwards). The 'Ngāti Muriwai' name came into existence as a result of a dispute over Te Paku Eruera grazing his own sheep on the Ngāti Rua block Ōpape 3 without benefiting the hapū. Ōpape 3 was the coastal block allocated to Ngāti Rua in 1870 after the raupatu (confiscation). A Crown offical decided to resolve the dispute circa 1881 by carving a piece of land off the Ōpape 3 block for "Paku's people", Eruera and his whānau (22 individuals, 11 adults and 11 children).[8] Eruera named the new subdivision Ōpape 3A "Ngāti Muriwai". Later, in the Native Land Court, Eruera claimed land through Ngāti Rua, Panenehu 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

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4 HC Judgment, at [460]-[461].

5 HC Judgment, at [500] and [512]. The Court of Appeal accepted this finding; CA judgment at [281].

6 HC Judgment, at [502], [512].

7 Mereaira Hata stated in evidence that 'Ngāti Muriwai' are not a hapū, and that their members whakapapa to Ngati Rua; M 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.

8 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.

the interests in Ōpape 3A came from his Whakatōhea whakapapa.[9] Muriwai is of course the famous ancestress who arrived on the Mātaatua waka, and from whom all of Te Whakatōhea descend.[10] The context of this new identity being created as a result of a Crown official's decision to solve a dispute is important, because it shows it did not occur as the result of an organic evolution within the hapū.

2.4 The creation of the Ōpape 3A block circa 1881 is the first historical reference to the name 'Ngāti Muriwai' in the context of Te Paku Eruera's whānau.[11] The High Court found (and the Court of Appeal accepted) that there was no evidence of "a" 'Ngāti Muriwai' before 1870: Churchman J found that "[t]here was in fact no evidence relating to Ngāti Muriwai at Waiaua or elsewhere in the Whakatōhea rohe between 1840 and the 1870s".[12]

2.5 Even after the creation of Ōpape 3A, there is little to no evidence on record as to the existence of a group calling itself 'Ngāti Muriwai' between the late nineteenth century and the 1990s.[13] However, there is evidence to the contrary indicating that the Edwards whānau continued to affiliate to Ngāti Rua.[14] It is also clear that 'Ngāti Muriwai' have never obtained formal recognition as a hapū within Te Whakatōhea. They are not represented on Tāwharau o te Whakatōhea, the recently formed post-settlement governance entity

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9 9 Ōpōtiki MB 319-320, **COA [501.00096]** at 00180-00181. In other words, it was only in relation to Ōpape 3A that Eruera called himself Ngāti Muriwai. B Stirling EIC, **COA [105.02270]** at 02647, lines 20-33, and 02648, lines 1-18.

10 Refer to Whakapapa o Te Whakatōhea **COA [501.00382]**.

11 As many iwi and hapū whakapapa to Muriwai and Mātaatua, the expert historian Tony Walzl (who gave evidence for Ngāti Muriwai whānau) conceded that a historical reference to "a" Ngāti Muriwai could not safely be assumed to be a reference to the 'Ngāti Muriwai' applicant group; **COA Transcript [103.01249]**, at 01586 /13-25. Mr Walzl also conceded that there was "no evidence" on whether Ngāti Muriwai had acquired any customary rights as Ngāti Muriwai; **COA Transcript [103.01249]**, at 01587/ 26-32.

12 HC Judgment at [445].

13 HC Judgment at [445]; and CA Judgment at [280].

14 For example, when Te Whakatōhea submitted petitions in 1926 seeking justice for the raupatu, the lists of the hapū members supporting the petition recorded Te Paku Eruera and his whānau on the Ngāti Rua list; **COA [313.05199]** at 05204.

established to receive the 2024 Whakatōhea Treaty of Waitangi settlement, nor on the Whakatōhea Maori Trust Board before it.[15]

2.6 Churchman J cited the view of the renowned scholar and historian of Whakatōhea, Dr Ranginui Walker, that the late Claude Edwards (who originally filed the Edwards' application) "revived the moribund Ngāti Muriwai hapū" in the 1990s as a "tūrangawaewae for himself and his followers" after he lost his position on the Whakatōhea Māori Trust Board following the failed Treaty of Waitangi settlement of 1998.[16]

2.7 Dr Te Riaki Amoamo, who was acknowledged by both the pūkenga and Churchman J for his expertise as a pou tikanga for Ngāti Rua and Te Whakatōhea,[17] gave whakapapa evidence for Ngāti Rua stretching back more than 30 generations to the arrival of the Nukutere waka almost a millennium ago.[18] Dr Amoamo explained that the 'Ngāti Muriwai' whakapapa cited by expert witness Dr Des Kahotea was actually Ngāti Rua whakapapa.[19] In conclusion, Dr Amoamo was adamant that 'Ngāti Muriwai' do not have a separate identity, but rather are a "subdivision" of Ngāti Rua, and he was supported in that view by other witnesses from Ngāti Rua, Ngāti Ira and Ngāti Patu.[20]

2.8 Drawing the threads together, the 'Ngāti Muriwai' identity did not exist at all prior to 1870. It was constructed in response to Crown actions

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15 Te Whakatōhea have always elected trustees on the basis of hapū representation, with members registered to one of the six hapū. The Whakatōhea Maori Trust Board was established in in 1952 to hold assets from the raupatu settlement; Te Whakatōhea Deed of Settlement of Historical Claims, 27 May 2023, historical account, at [1.11]-[1.14] (accessed at https://www.tearawhiti.govt.nz/te-kahui-whakatau-treaty-settlements). Te Tāwharau was established in 2024 to hold the Treaty settlement assets, as well as the assets and liabilities of the Whakatohea Māori Trust Board; refer Whakatōhea Claims Settlement Act 2024, s 182. Te Tāwharau elect their trustees to represent the six hapū, as well as general representatives. https://tewhakatohea.co.nz/about-us/

16 Ranginui Walker, *Ōpotiki-mai-tawhiti: capital of Whakatōhea* (Penguin Books, North Shore, 2007), **COA [501.00021]** at 00023. The extract states that Mr Edwards had lost his position as representative of Ngāti Patu and was no longer welcome at Ngāti Rua.

17 Churchman J cites Dr Amoamo's evidence extensively. HC Judgment, Appendix A - Pūkenga Report, at [5](b), noting the "high esteem" in which they held him amongst others, and also at [2](b) relying on his whakapapa evidence.

18 T Amoamo EIC, **COA [203.01122]**.

19 The whakapapa evidence for 'Ngati Muriwai' is set out in Dr Des Kahotea's report, **COA [304.01503]** at 01516-01517. Refer also to cross-examination of Te Riaki Amoamo; **COA Transcript [107.03341]**, at 03378/ 12-20; 03392/25-30; 03394/23-30.

20 HC Judgment, at [461].

that caused tension among the people of Ngāti Rua, and resulted in Te Paku Eruera seeking to delineate his interests from those of the rest of Ngāti Rua through the partition of Ōpape 3A. It is notable that his decision to do so was in direct response to concerns from the wider Ngāti Rua hapū that his individual sheep farming operation was not consistent with the collective tikanga of the hapū.[21] After the 1880s, the name 'Ngāti Muriwai' fell into abeyance, and has only been reasserted in recent times.

2.9 It is therefore implicit that 'Ngāti Muriwai's' claim to customary rights since 1840 was made on the basis of customary rights actually held and exercised *by Ngāti Rua*. In other words, the claim could only be made because of and through their Ngāti Rua whakapapa, and their occupation of the Ngāti Rua rohe. Indeed, the 'Ngāti Muriwai' applicants were explicit that their rights were derivative with the argument they belatedly advanced in High Court closing submissions that Ngāti Rua had made a customary transfer of rights to them pursuant to s58(3) (even though they presented no evidence establishing such a transfer and Ngāti Rua strongly opposed that having occurred).[22]

2.10 The issue that Ngāti Rua have with 'Ngāti Muriwai' being awarded PCRs is that they are exercising customary rights as members of a Ngāti Rua whānau under the mana of Ngāti Rua, but using the prefix "Ngāti" in an attempt to forge a new identity. This undermines the mana of Ngāti Rua.

2.11 In te reo Māori, "Ngāti" is a prefix for a tribal group.[23] Te Paku Eruera's decision to name his Ōpape 3A block 'Ngāti Muriwai' can be considered akin to the use of this prefix to create informal names like Ngāti Pōneke to identify social or community groups that have formed around a particular kaupapa. The mere use of such a name does not however elevate a grouping to hapū status as a matter of tikanga.

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21 Walzl [**304.01569**], at 01586, quotes a source as saying Ngāti Rua objected to Paku grazing sheep on their land "unless they gave the whole hapū an interest", following which lawsuits for trespass ensued.

22 HC Judgment, at [456].

23 Te Aka Māori dictionary, accessed online at https://www.maoridictionary.co.nz/.

3 Can rights be recognised under the MACA Act if to do so is contrary to tikanga?

3.1 Ngāti Rua says the essence of the Court of Appeal's error is set out at [340]–[341] of Miller J's judgment. Miller J accepted the expert evidence of Dr Amoamo that Ngāti Muriwai "have no separate identity as a matter of tikanga"; but then stated that "that concern must yield to the scheme of s 51" and therefore upheld the High Court's finding that 'Ngāti Muriwai' are eligible for PCRs. In simple terms, the effect of this finding is that a PCR order, which is a "customary right", can be permitted under MACA even if the "customary law" — tikanga — would not permit the same. Ngāti Rua say that cannot be right.

3.2 This error is replicated at [281] of the Court of Appeal's judgment, where Miller J accepted that Ngāti Muriwai may participate in a recognition order for CMT, with that participation "to be resolved among a successful applicant group of which they form part and in accordance with tikanga". The precise meaning of this statement is opaque: it could mean participate as members of Ngāti Rua or it could suggest that 'Ngāti Muriwai' may participate as an independent grouping. If the latter is the intended meaning, this fails to recognise that their status as members of a Ngāti Rua whānau precludes them from exercising independent mana for the purposes of participating in the CMT order. They remain under the mana of Ngāti Rua as the collective in which rangatiratanga and kaitiakitanga resides.[24]

3.3 Ngāti Rua say that there are two separate but interrelated problems with the Court of Appeal's reasoning as a matter of tikanga:

(a) First, although a whānau group may be awarded a PCR, 'Ngāti Muriwai' do not identify as a whānau, but as a hapū – that is clear from their adoption of the prefix Ngāti. As a matter of logic, it does not follow that 'Ngāti Muriwai' must be recognised as a whānau just because they have not achieved their desired status as a hapū. The issue is that their asserted mana and identity is contested by Ngāti Rua and Te Whakatōhea full stop. The courts need to be careful

[24] As the pūkenga observed, no one misses out because everyone is included in the poutarāwhare through their whakapapa to the hapū that comprise the pou; HC Judgment, Appendix A - Pūkenga Report, at [2(d)(iv)].

to avoid prematurely conferring a status that usurps the process of achieving recognition in tikanga.

(b) Secondly, a whānau cannot exercise customary rights independently of the hapū collective to which they belong. The relationship is reciprocal: the exercise of customary rights is subject to the hapū's kaitiakitanga obligations to protect the environment, including through regulating the use of resources. It is inconsistent with tikanga for 'Ngāti Muriwai' to be able to assume a separate identity in order to exercise Ngāti Rua's customary rights – that is, rights to gather resources in the Ngāti Rua rohe by virtue of their Ngāti Rua whakapapa.

3.4 Fundamentally, the Court of Appeal's judgment has unmoored tikanga from its own constitutional context and failed to recognise it as a coherent legal system, treating it rather as a collection of customary practices. This misstep is evident in Miller J's tacit endorsement at [338] of the High Court finding that 'Ngāti Muriwai' practised the relevant activities "in accordance with tikanga" because processes such as the saying of karakia and the exercise of manaakitanga in sharing gathered resources were followed. With respect, this reduces tikanga to constituent practices and fails to appreciate that there is antecedent tikanga that controls the holding of those rights. In this context, it is the hapū mana and rangatiratanga that governs the exercise of relevant rights and it is in this sense that the phrase "in accordance with tikanga" must be understood. Members of the Edwards whānau may practise the relevant activities but, to do so in accordance with tikanga means that they may only do so under the mana of Ngāti Rua, that is, as members of Ngāti Rua. Tikanga cannot be extracted from its constitutional context, that is, the hapū mana and rangatiratanga that necessarily governs the exercise of relevant rights.

3.5 This Court in *Ellis v R (Continuance)*[25] definitively affirmed that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa. The way that development continues is therefore of critical importance to tāngata whenua and to all New

[25] *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

Zealanders, whether through judge-made common law or with reference to the statutory incorporation of tikanga, as in the present case. As recognised by a majority of the Court in *Ellis,* courts must take particular care to preserve the integrity of tikanga as a cohesive system of substantive law and legal process and to avoid impairing the operation of tikanga in its own right.[26] Ngāti Rua's appeal seeks to ensure that tikanga is recognised in its full constitutive context as a cohesive system of law that "flows out of the matrix of iwi, hapū and whānau relationships that fundamentally frame the Māori world".[27]

4 Statutory scheme for PCRs

4.1 The central question in this appeal is the proper meaning of "in accordance with tikanga" for the purposes of meeting the s 51 test and with reference to how Ngāti Muriwai may "participate" in a CMT order.

4.2 The wording of s 51 itself compels the conclusion that, for a PCR to be awarded, it must be a right "that… is exercised… *in accordance with tikanga*". If the accepted expert evidence on tikanga was that the rights here are not being exercised in accordance with tikanga, that should have been the end of the inquiry.

4.3 Similarly, the scheme and purpose of MACA compel this conclusion. It is accepted that multiple groups can have PCRs for similar rights, which overlap in the same area — tikanga is inclusive and whakapapa connections may permit a range of groups similar rights *according to tikanga*.[28] However, it would be odd if an Act intended to better recognise those rights, and the tikanga that governs them, led to outcomes not permitted by that very tikanga.[29]

4.4 This conclusion is underscored by two further points arising from the statutory scheme. First, s 51 requires the PCR to have been exercised *since 1840*, which firmly situates the customary rights as residing in the hapū or whānau exercising them from that date (even though s 51

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26 *Elllis*, at [120] and [122] per Glazebrook J; at [181] per Winkelmann CJ and at [270]-[272] per Williams J.
27 *Ellis,* at [170] per Winkelmann CJ.
28 Compare CA Judgment, at [341].
29 MACA 2011, preamble and s 4. Ngāti Rua adopt the analysis of the scheme of the MACA Act in Te Kāhui's submissions.

also permits evolution of the right). On the basis of the evidence that 'Ngāti Muriwai' did not come into existence until the creation of the Ōpape 3A block, 'Ngāti Muriwai' have to rely on Ngāti Rua's exercise of customary rights since 1840 to establish a right to PCRs, notwithstanding the opposition from Ngāti Rua to them having separate rights.

4.5 Secondly, an applicant group is defined as "one or more iwi, hapū, or whānau groups" (s 9). Pursuant to s 101, any applicant must describe the applicant group and identify the particular area to which the application relates. Public notice is required of the name of the applicant group and its "description as an iwi, hapū, or whānau, whichever applies" (s 103(2)(a)). The statutory notification requirements show that Parliament acknowledges the importance of mana and identity to Māori through imposing a transparent process that requires applicants to nail their colours to the mast.

5 Mana and identity in tikanga

5.1 Miller J appears to have considered that it was permissible to depart from the tikanga evidence that 'Ngāti Muriwai' did not have a separate identity because, in his view, the MACA Act requires a permissive approach to inclusiveness to reflect evolutions in group identity over time. This also seems to explain the Court's holding that 'Ngāti Muriwai' might "participate" in a CMT even if they had no basis in tikanga for doing so.[30] Miller J justifies this as being a policy decision by Parliament to reflect changes in Māori society over time.[31] With respect, Ngāti Rua say that it cannot have been Parliament's intention to effect social engineering in this way. Tikanga *already* has well established laws governing the changing of group identity, and for determining relationships and obligations at place.[32]

5.2 As s 51 itself makes clear, the customary rights held by groups may evolve over time in the way that they are used. So too groups may change and evolve according to well-established processes in tikanga — the pūkenga acknowledged that 'Ngāti Muriwai' *could* become a

30 CA Judgment, at [291].
31 CA Judgment at [204] and [341].
32 See (for example) Edward Taihakurei Durie "Custom Law" (Waitangi Tribunal, 1994) at 12–30.

hapū, but they considered 'Ngāti Muriwai' would first need to legitimise that status by achieving internal recognition from the hapū of Te Whakatōhea.[33] They noted that the criteria in tikanga to determine who is a whānau, hapū, or iwi have been in place mai rā ano (forever), and include whakapapa, whenua and ahi kā roa status. Ngāti Rua submit that the pūkenga's expert opinion accurately captures the position: the door is not closed on new hapū emerging, or old ones being revived,[34] 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.[35] Given the central importance of whanaungatanga to Māori society, formation of a new group identity cannot occur within a vacuum, since it affects the mana of the established hapū.[36]

5.3 Significantly, as this Court recognised in *Wairarapa Moana*, "tikanga is as much about right or tika processes as it is about tika outcomes".[37] Ngāti Rua submit that to obtain a PCR order, 'Ngati Muriwai' would have to first establish their status through a tikanga-consistent process within Ngāti Rua and Te Whakatōhea *before* the statutory scheme can recognise their mana. Even then, they would need to show that the particular rights claimed under the PCRs sought are rights that properly fall for exercise under the mana of that newly established status. That type of evolution is evidently gradual in nature and therefore necessarily far removed from the rights in question before this Court.

5.4 The Court's judgment cuts across tikanga by imposing a perceived policy decision to force inclusivity (or at least permit it), irrespective of the position in tikanga. That is unsupported by the legislative history or purpose of MACA. It is not tika for a group to use, or be allowed to

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33 HC Judgment, Appendix A - Pūkenga Report at [2(d)]. See also HC Judgment at [458]–[459]. There are examples in modern times of new hapū emerging or old ones being revived. In the Ngāti Awa raupatu claim, a deliberate decision was made by the tribal leadership to revive old hapū and to create new ones that are represented on Te Rūnanga o Ngāti Awa. See Waitangi Tribunal, *The Ngāti Awa Raupatu Report* (Legislation Direct, 1999), at 16.

34 For the avoidance of doubt, Ngāti Rua does not accept that Ngāti Muriwai are an 'old' hapū, capable of 'revival'.

35 HC Judgment, Appendix A - Pūkenga Report at [2(d)(ii)-(iii)].

36 Edward Taihakurei Durie "Custom Law" (Waitangi Tribunal, 1994) at 17, and generally 12-30; Tā P Temara, affidavit dated 24 January 2022, at [16].

37 *Wairarapa Moana*, at [86].

use, statutory processes to legitimise a status that a group does not in fact have in tikanga. That would distort tikanga.

6 PCRs are in reality Ngāti Rua's customary rights

6.1 The clear expert evidence of Dr Amoamo was accepted by both lower courts. The Edwards whānau simply have "no separate identity" or mana by which they can be awarded rights *as 'Ngāti Muriwai'.* In this context, the relevant rights are rights of Ngāti Rua, and it is through their Ngāti Rua whakapapa that members of the Edwards whānau may exercise those rights. Therefore, any rights they exercise are through, and must be exercised in accordance with and under, the mana whakahaere, kaitiakitanga and manaakitanga of Ngāti Rua. The *exercise* of certain practices as a "right" must be distinguished from the *source* of the right to exercise that practice.

6.2 Though the judgment is unclear, the effect of Miller J's reasoning appears to be that the test for PCR (and, perhaps, "participation" in CMT) depends solely on whakapapa — so because members of the Edwards whānau whakapapa to Ngāti Rua, they are entitled to a PCR order (and perhaps to participate in a CMT) in the Ngāti Rua rohe. This is not the test for customary rights in tikanga. Whilst whakapapa is part of the matrix, the approach in tikanga is considerably more nuanced. Whakapapa is intertwined with the political authority or mana that constitutes a grouping capable of holding rights, and the exercise of ahi kā to maintain those rights. As Professor David Williams observed in his evidence, "the distinctive aspect" of tikanga is that "one's rights as an individual or whānau derived from the collective land holding unit – usually the hapū".[38] Hence, the values of whanaungatanga, utu and kaitiakitanga were central to maintaining both the collective right and customary rights held by whānau or individuals within the collective.

6.3 The critical point is that all customary rights to which the MACA Act applies exist in a normative framework of political and constitutional authority underpinned by the concept of mana. To be held in accordance with tikanga, the PCR order ought to flow from the hapū that exercises the mana whakahaere and kaitiakitanga at place. The

[38] Prof D Williams, **COA [203.01055]**, at [81].

order must therefore be in the name of that hapū as the customary group, or alternatively, in the name of a whānau or other group who exercise those rights under the mana of that hapū, and *critically*, recognise that mana as controlling their exercise of the rights. Ngāti Rua does not therefore contest that it is possible under s 51 for a PCR to be in the name of a whānau, as long as it is accepted at hapū level that the particular rights should be practised by that particular whānau as a matter of hapū tikanga. This stipulation is in itself an affirmation of the mana of the hapū and recognises that tikanga operates in a web of interdependent relationships between iwi, hapū and whānau. It is appropriate that the test for PCRs recognises the flexibility and fluidity of how rights were and are exercised in practice in this way. However, and critically, this stipulation also distinguishes 'Ngāti Muriwai's' application as inappropriate because they seek to exercise the relevant PCR rights under their own claimed mana to do so, and fail to recognise that the mana of Ngāti Rua as the hapū is in fact controlling in this context.

6.4 The importance of this point is best illustrated by the fact that PCR holders have certain rights under the MACA Act, such as resource consent rights in s 55(2). If a resource consent application affected the exercise of any of the PCRs awarded to 'Ngāti Muriwai', Ngāti Rua say that is an issue that ought to be brought back to Ōmarumutu Marae for kōrero and collective decision-making by the hapū, not determined by the whānau unilaterally. It is not "tika" for a whānau to acquire decision-making rights that they do not hold in tikanga through the auspices of a PCR.

6.5 Customary rights cannot be exercised by whānau or individuals independently of the hapū to which they belong, because the hapū is responsible for ensuring the mauri and wellbeing of the environment and the people in it, and sustainable management of resources. Likewise, a whānau exercising resource use rights is obliged to respect their hapū's kaitiakitanga as to the manner in which the activity is undertaken.[39] An illustration of the need for hapū oversight arose in relation to the 'Ngāti Muriwai' PCR to whitebait in the Waiaua River.[40] During the Stage Two hearing, the 'Ngāti Muriwai' witness conceded

39 Prof D Williams, **COA [203.01055]**, at [66].
40 HC Judgment, at [506], [669](a)(ii).

under cross-examination by Ngāti Rua's counsel that the mouth of the river was wāhi tapu and therefore whitebaiting could not take place there. The PCR could no longer be granted on that basis, even though the 'Ngāti Muriwai' applicant group made a subsequent (unsuccessful) attempt to retract the concession.[41]

7 Conclusion

7.1 Given that 'Ngāti Muriwai's' application relied on Ngāti Rua's customary rights, it cannot be right that they can successfully obtain a PCR order in the face of opposition from the rights holder in tikanga (i.e. Ngāti Rua). The only difference between the PCRs that 'Ngāti Muriwai' wish to exercise and the rest of Ngāti Rua is that the former wish to assume a new identity separate from the collective.

7.2 The distortion of tikanga created by the lower Courts' approach will invariably affect subsequent MACA PCR applications. If applicant groups are able to create new identities in order to be awarded PCRs (or participate in CMT) without having the necessary foundation in tikanga to do so, that will both change the substantive nature of the rights awarded (because they will no longer be "customary rights" in tikanga) and significantly broaden the groups able to claim PCRs. If litigation is used to achieve such evolution, that will in turn invariably create tensions between hapū and whānau given the disruption of tikanga that will have occurred. The recognition of mana and identity is a highly sensitive issue within te ao Māori, and indeed is fundamental to the existence of tikanga and of discrete political authority. It is not the role of the courts to legitimise new identities that are not recognised at tikanga, nor can it have been Parliament's intention to direct the courts to do so. That is clear from the s 51 requirement that PCRs are exercised "in accordance with tikanga".

7.3 It is therefore critical that the Court of Appeal's misstep is addressed to ensure that the courts have clear guidance going forward on what it means to act "in accordance with tikanga". The primary counterbalance to the concerns about the misappropriation of tikanga raised in *Ellis* was that "tikanga has its own integrity and will continue

[41] *Re Edwards (Stage Two) (Te Whakatōhea No 7)* [2022] NZHC 2644, [05.00660], at [479]-[487].

as a force in the lives of Māori people and communities…with or without the common law".[42] But the practical effect of the Court of Appeal's approach is a distortion of tikanga that will impact on the mana of the relevant communities and therefore damage that independent integrity. In effect, 'Ngāti Muriwai' have been permitted to use court processes to legitimise their claimed status as an independent grouping. This is the very antithesis of this Court's warning in *Ellis* and must be strenuously guarded against as a matter of fundamental importance to all iwi, hapū and whānau and indeed all New Zealanders.

Dated 20 September 2024

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[42] *Ellis*, at [271] per Williams J.