

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

**SC 125/2023
SC 126/2023
SC 128/2023**

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

**TE ŪPOKOREHE TREATY CLAIMS TRUST
Kaitono pira / Appellant (SC 125/2023)**

**ATTORNEY-GENERAL
Kaitono pira / Appellant (SC 126/2023)**

**TE KĀHUI TAKUTAI MOANA O NGĀ
WHĀNAU ME NGĀ HAPŪ O TE
WHAKATŌHEA
Kaitono pira / Appellant (SC 128/2023)**

ME

**TE RŪNANGA O NGĀTI AWA
(CIV-2017-485-196)
Kaiurupare / Respondent**

**LEGAL SUBMISSIONS ON BEHALF TE RŪNANGA O NGĀTI AWA
AS A RESPONDENT**

18 October 2024



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SUMMARY OF ARGUMENT

1. These submissions are on behalf of Te Rūnanga o Ngāti Awa (**Ngāti Awa**) as a Respondent to the appeals of the Attorney-General,¹ Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (**Te Kāhui**),² and Te Upokorehe Treaty Claims Trust (**Te Ūpokorehe**).³ Ngāti Awa's position on the relevant issues / grounds of appeal are as follows:

- (a) Issue 1 – Proper interpretation of section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the **MACA Act**): Ngāti Awa adopts the submissions of Te Kāhui on the proper interpretation of the MACA Act,⁴ which also largely provide the answer to parts of the Attorney-General's appeal that affect Ngāti Awa (and respond to the submissions of the Landowners Coalition Incorporated and the Seafood Industry).
- (b) Issue 2 – The Court of Appeal was correct; Ngāti Awa has interests in the Disputed Area of CMT 1 that warrant a re-hearing: Ngāti Awa has exclusive customary interests in the area between Maraetōtara Stream, east along the Ōhope Spit, to the entrance of Ōhiwa Harbour and out seawards to 12 nautical miles (the **Disputed Area**). Ngāti Awa says the Court of Appeal could have either recognised these interests by granting CMT to Ngāti Awa on an exclusive basis in the Disputed Area, by including Ngāti Awa on the CMT for the Disputed Area with Te Whakatōhea and Te Ūpokorehe, or by remitting the Disputed Area back to the High Court for

¹ "The correct interpretation of s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA), including as applied to offshore locations such as Whakaari and Te Paepae o Aotea, and to applicant groups such as Ngāti Muriwai and Kutarere Marae." Minute of Williams J on case management, 4 July 2024, at [7](a).

² "Should the Court of Appeal have made its own findings in respect of customary marine title (CMT) Order 1, rather than remitting it to the High Court for further hearing." Minute of Williams J on case management, 4 July 2024, at [7](f).

³ "Should the Court of Appeal have remitted CMT Order 2 rather than making its own findings." Minute of Williams J on case management, 4 July 2024, at [7](g).

⁴ Submissions of Te Kāhui as an appellant, 23 September 2024, sections 2 (MACA in summary) and 4 (First ground: the test for customary marine title) excluding paragraphs 4.18 and 4.57.

determination. Ultimately, the Court of Appeal remitted the consideration of the Disputed Area back to the High Court and Ngāti Awa is content for this approach to be taken by the Supreme Court (if the Supreme Court is not minded to make its own determinations).

(c) Issue 3 – Ngāti Awa’s shared interests are clear and accepted in Ōhiwa Harbour; the Court of Appeal was correct and no re-hearing of CMT 2 is necessary: Te Ūpokorehe has challenged the Court of Appeal’s judgment to uphold the High Court’s finding with respect to CMT 2, namely that Ōhiwa Harbour is shared by Ngāti Awa, Te Whakatōhea and Te Ūpokorehe. Ngāti Awa says a shared CMT between these iwi is the only logical outcome on the extensive evidence presented to the High Court (and the Court of Appeal) for Ōhiwa Harbour. The Court of Appeal separately considered CMT 2 and upheld the High Court’s judgment. Ngāti Awa supports this finding and seeks for CMT 2 to be upheld.

2. Ngāti Awa actively participated in the 10 week High Court trial before Justice Churchman and in the Court of Appeal as both an Appellant and Respondent. The Rūnanga, on behalf of Ngāti Awa, elected to participate in the High Court trial in what was, at the time, a new process with uncertain outcomes as an applicant interested party. Its purpose in doing so was to ensure the protection of interests of Ngāti Awa hapū located at the eastern boundary of the Ngāti Awa rohe. This developed into more active participation – particularly at the High Court hearing when processes and potential outcomes crystalised – and when the matter progressed to the Court of Appeal, Ngāti Awa took its own appeal. Ngāti Awa was successful in being jointly awarded CMT with Te Whakatōhea and Te Ūpokorehe in Ōhiwa Harbour; Ngāti Awa supports this award that was upheld in the Court of Appeal via its judgment on CMT 2. Ngāti Awa was also successful before the Court of Appeal in its appeal to overturn CMT 1 on the basis that Ngāti Awa’s interests in the Disputed Area were not appropriately recognised. Ngāti Awa is before this Court as a Respondent to support the judgment of the Court of Appeal with

respect to CMT 1 and CMT 2, and to respond to the Attorney-General's appeal with respect to the proper interpretation of section 58 of the MACA Act.⁵

NGĀTI AWA: RELEVANT NARRATIVE OF FACTS

Te Kākahoroa tū taratahi
ka whati i te hau,
Te Kākahoroa tū pāhekoheko
e kore e whati⁶

*The Toetoe that stands in isolation
will be destroyed by the elements with ease,
however, the Toetoe that grows in mass
will with-stand the wind's destructive forces*

3. Ngāti Awa is an iwi of the Mataatua waka; as explained by Tā Hirini Moko Mead, the late Dr Te Kei Merito and the late Dr Hohepa (Joe) Mason, this whakatauki speaks to both strength and unity in a Mataatua context. The origins of Ngāti Awa in the Bay of Plenty are of "great antiquity".⁷ Ngāti Awa comprises ngā uri o ngā hapū o Ngāti Awa: those who descend from Ngāti Awa tīpuna who exercised customary rights inherited from Awanuiārangi II.⁸ Ngāti Awa's customary territory⁹ includes the islands of Mōtītī, the Rurima islands, Moutohorā (Whale Island), Paepae o Aotea (Volkner Rocks), Whakaari (White Island), Ohakana, and Uretara (both islands being situated in Ōhiwa Harbour); the seas from Waihi Estuary near Maketū to Ōhiwa Harbour; the land, forests, lakes, rivers, and swamps bounded to the north by the coastline from Waihi Estuary to Ōhiwa, to the west from the Waihi Estuary along the Pongakawa River to Lake Rotoehu (including the lake itself and the Rotoehu Forest), from Lake Rotoehu to Te Haehaenga, and including Lake Rotomā to

⁵ Ngāti Awa filed submissions in relation to its interests in the takutai moana surrounding Whakaari and Te Paepae o Aotea on 4 October 2024.

⁶ Kākahoroa was the name for the landscape before the Mataatua waka arrived and it was changed to Whakatane when Wairaka uttered those famous words, *Kia whakatāne ake ahau i ahau*. See also, Joint Brief of Evidence of Tā (Sir) Hirini Moko Mead, Dr Hohepa Mason and Dr Te Kei Merito (**Joint Brief**) **[[203.01215]]**.

⁷ Joint Brief **[[203.01212]]** .

⁸ Or another recognised ancestor of the Ngāti Awa hapu in and around the Ngāti Awa area of interest Ngāti Awa Claims Settlement Act 2005, s 13; Exhibit LTS-4 to the Affidavit of Leonie Te Aorangi Simpson, 1 May 2020 **[[317.07278]]**.

⁹ Ngāti Awa Deed of Settlement. Exhibit LTS-5 to the Affidavit of Leonie Te Aorangi Simpson, 1 May 2020 **[[317.07424]]**.

the Pokohu, Tuararangaia, and Matahina lands to the south to Ōhiwa Harbour.¹⁰

4. Ngāti Awa participated in the priority proceeding under the MACA Act to protect its interests at the East of its customary territory (including Te Paepae o Aotea and Whakaari). Te Whakatōhea border Ngāti Awa to the East, with the respective Coastline interests of Te Whakatōhea, Te Ūpokorehe and Ngāti Awa converging at Ōhiwa Harbour. The broader Mataatua interests of Ngāti Awa, Te Whakatōhea, Te Ūpokorehe and Te Whānau ā Apanui converge in and around Te Paepae o Aotea and Whakaari.
5. The principal areas of overlap in this proceeding for Ngāti Awa are the Disputed Area, Ōhiwa Harbour, Whakaari (White Island) and Te Paepae o Aotea.¹¹ Extensive tikanga evidence was presented in the High Court by three esteemed Ngāti Awa pūkenga: Tā Hirini Moko Mead, the late Dr Te Kei Merito MNZM and the late Dr Hohepa (Joe) Mason QSO by way of joint brief of evidence (the **Joint Brief**).¹² The Joint Brief gave evidence on Ngāti Awa whakapapa, traditional history and the continued exercise of Ngāti Awa tikanga across their rohe moana focusing on the area of overlap as between the *Edwards* priority application (CIV-2011-485-811) and Ngāti Awa’s application area (CIV-2017-485-196). Dr Merito gave oral testimony and presented the Joint Pūkenga Brief on behalf of the deponents.¹³ The previous Te Rūnanga o Ngāti Awa Chief Executive also gave evidence of Ngāti Awa’s more contemporary activities and presented various research reports prepared by Ngāti Awa pūkenga in the context of Ngāti Awa’s Waitangi Tribunal historical inquiry.¹⁴

¹⁰ Ngāti Awa Claims Settlement Act 2005 (the Settlement Act), Preamble. Exhibit LTS-4 to the Affidavit of Leonie Te Aorangi Simpson, 1 May 2020, paragraph 16-19 **[[317.07288-07289]]**.

¹¹ Counsel note that the High Court declined to grant orders to Te Whakatōhea, Te Ūpokorehe and Ngāi Tai in respect of Whakaari and Te Paepae o Aotea (see *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 at [466]–[473] and [661] **[[05.00525-05.00526]]**, **[[05.00564]]**. Joint Brief **[COA, Tab 242, 203.01203]**.

¹² Exhibit TT ‘Te Kei Merito korero (English translation)’ **[[203.01203]]**.

¹³ For example, see **[[317.07425]]**; **[[317.07447]]**; **[[317.07477]]**; **[[317.07512]]**; **[[317.07526]]**; **[[317.07639]]**; and **[[318.07723]]**.

6. Ngāti Awa says that this evidence, as highlighted further in these submissions, clearly illustrates that Ngāti Awa meets the tests for CMT in the Ōhiwa Harbour (CMT 2) and the Disputed Area (CMT 1).¹⁵ The evidence can be grouped as follows:
- (a) historical and contemporary expressions of use and occupation of the takutai moana provided by Ngāti Awa witnesses;
 - (b) historical and contemporary expressions of tikanga provided by Ngāti Awa witnesses;
 - (c) the vast majority of the factual conclusions reached by Churchman J in the High Court (aside from in the Disputed Area);
 - (d) conclusions reached by the Court-appointed Pūkenga, including in response to direct questioning, that Ngāti Awa has interests at Ōhiwa; and
 - (e) evidence provided by Te Whakatōhea claimants and adduced by their witnesses that accepts shared interests with Ngāti Awa in the Ōhiwa harbour and provides little on their interests in the Disputed Area.
7. Ngāti Awa's submissions are necessarily factually focused. This is primarily because the majority of these submissions reply to the grounds of appeal that relate to the award of CMT to Ngāti Awa (or not) in CMT 1 and 2. Whilst Ngāti Awa's interests are largely recognised in parts of CMT 1 and 2 by other Applicant groups, they are not recognised by Te Ūpokorehe in parts, such that a detailed examination of Ngāti Awa's extensive evidence given for its interests in both CMT 1 and 2 is required to ensure the Court is clear about the extent of Ngāti Awa's interests in the takutai moana. This is particularly important evidence if the Supreme Court is minded to either uphold the finding of the Court of Appeal in relation to CMT 2 and / or decline to uphold

¹⁵ Ngāti Awa's evidence given to support their interests in the moana surrounding Whakaari and Te Paepae o Aotea is set out in Ngāti Awa's submissions as an Interested Party.

the Court of Appeal's judgment in CMT 1 and instead make findings of its own.

ISSUE 1: PROPER INTERPRETATION OF THE MACA ACT, s 58

8. The Supreme Court granted leave on the following question regarding the interpretation of section 58 of the MACA Act:¹⁶

The correct interpretation of s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA), including as applied to offshore locations such as Whakaari and Te Paepae o Aotea, and to applicant groups such as Ngāti Muriwai and Kutarere Marae.

9. The Attorney-General has appealed the Court of Appeal's judgment saying, in summary, the statutory language used in section 58 is unambiguous in its expression of Parliament's intent, but the majority allowed its view of the Tiriti-consistency of the regime and an unfounded need to protect customary interest to guide it toward an incorrect interpretation that left limb 2 redundant.¹⁷ Ngāti Awa disagrees with the Attorney-General's analysis and is of the view that Te Kāhui's submissions on its own appeal provide a roadmap for the Court to the correct interpretation of the MACA Act.¹⁸ Ngāti Awa makes the following complementary submissions:

- (a) "In law... context is everything."¹⁹ When interpreting the MACA Act, Lord Steyn's well-known direction is

¹⁶ Minute of Williams J, 4 July 2024, at [7](a).

¹⁷ Submissions on behalf of the Attorney-General on Appeal, 20 September 2024, from [17]. This position was adopted by Seafood Industry Representatives (Synopsis of submissions for the Seafood Industry Representatives, 4 October 2024 at [2]) and generally supported by the Landowners Coalition Inc (Submissions by Landowners' Coalition Incorporated (Intervener) in support of Appeal by Attorney-General, 4 October 2024 at [1]). The Landowners Coalition Inc further state that the approach taken by the Majority in the Court of Appeal is tantamount to an illegitimate amendment of the legislation by the judiciary and an overstep of its constitutional role. To the extent that the submissions from the SIRs and LCI adopt or expand upon those of the AG, Ngāti Awa opposes.

¹⁸ Submissions for Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea Appeal, 23 September 2024 (**Te Kāhui Submissions**). The Te Kāhui Submissions include detail of Te Whakatōhea tikanga, and other matters that Ngāti Awa does not adopt (including Te Kāhui's position on CMT 1), but Ngāti Awa supports Te Kāhui's submissions on the correct approach for the legal tests as set out at sections 2 (MACA in summary) and 4 (First ground: the test for customary marine title) excluding paragraphs 4.18 and 4.57 of the Submissions of Te Kāhui as an appellant, 23 September 2024.

¹⁹ *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433, p 447 per Lord Steyn.

particularly relevant. The MACA Act has a specific context and whakapapa of its own, highlighted in part by the Preamble of the Act itself. This context is an important interpretative aid particularly when reconciling the different rights, interests and responsibilities that are provided for in the MACA Act and confirmed explicitly in the purpose to: establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and to recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and to provide for the exercise of customary interests in the common marine and coastal area; and to acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).²⁰

- (b) Interpretation of the MACA Act, particularly section 58, “must not only be viewed through a Pākehā lens.”²¹ The framework in Te Kāhui’s submissions provide an appropriate lens to interpret the MACA Act primarily because the approach properly takes into account the context, the purpose and the language of the MACA Act itself, without interpreting the requirement in section 58 for “exclusive use and interpretation” in a manner that effectively extinguishes customary title by a “side wind”; a valid concern of the Court of Appeal majority.²²
- (c) The interpretative approach contended for by Ngāti Awa, is also supported by the uncontroversial proposition that “tikanga as law” is part of the common law of Aotearoa.²³ As unanimously held by this Court in *Ellis v R*, “tikanga has been and will continue to be recognised in the

²⁰ Marine and Coastal Area (Takutai Moana) Act 2011, s 4.

²¹ As Williams J cautioned in this Court’s consideration of *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [297] when approaching the interpretation of particular sections of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

²² *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui* [2023] NZCA 504, [2024] 3 NZLR 252 (**Re Edwards NZCA**) at [416].

²³ *Peter Hugh McGregor Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 (**Ellis v R**) at [108].

development of the common law of Aotearoa/New Zealand in cases where it is relevant.”²⁴ Critically, the Majority of this Court in *Ellis* also held that: tikanga Māori is the first law of Aotearoa / New Zealand;²⁵ in some cases, tikanga Māori and its principles may be controlling, may influence the development of the common law, and may provide a new way of thinking about new concepts of law;²⁶ as noted at paragraph 9(b), decision-makers must not only view statutory interpretation via a Pākehā lens;²⁷ and it is generally accepted that there is a presumption that statutes are to be interpreted consistently with Te Tiriti as far as possible.²⁸

- (d) The Landowners Coalition argue that the second limb of section 58 was a choice by Parliament to only be led by orthodox principles of what ‘exclusivity’, ‘used’ and ‘occupied’ meant in the context of the takutai moana and that the application of tikanga only comes within the first limb of the test.²⁹ This approach asks the Court to remove tikanga altogether from its assessment of the second limb of the CMT test. To the extent that approach was previously orthodox in New Zealand, it is no longer. The Landowners Coalition position cannot be correct in light of the legislative history, the Supreme Court’s dicta in *Ellis v R*, and *Wairarapa Moana Pouākani Incorporation v Mercury NZ Limited* where the Court held that in tikanga, as in law, context is everything.³⁰ Put simply, the Landowners Coalition position fails to

²⁴ *Ellis v R*, at [19].

²⁵ *Ellis v R*, at [107] – [110] per Glazebrook J; at [168] – [174] per Winkelmann CJ; and at [272] per Williams J.

²⁶ *Ellis v R*, at [118] per Glazebrook J.

²⁷ *Ellis v R*, at [96] per Glazebrook J citing Williams J in *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127; [2021] 1 NZLR 801 at [297].

²⁸ *Ellis v R*, at [98] per Glazebrook J.

²⁹ See Legal Submissions for the Landowners Coalition, 4 October 2024, at [3.17], [3.21], [3.22]-[3.27].

³⁰ *Wairarapa Moana ki Pouākani v Mercury NZ Limited* [2022] NZSC 142, [2022] 1 NZLR 767 at [74]. *Ellis v R*, at [96] per Glazebrook J citing Williams J in *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC.

understand that tikanga Māori forms part of the common law of Aotearoa, and as the Supreme Court recently stated, tikanga being part of the common law of Aotearoa “is a longstanding and uncontroversial proposition.”³¹

- (e) The submissions of the Landowners Coalition also ask this Court to elevate what *it* says is Parliament’s intent (gleaned principally from the words of Hon Chris Finlayson KC in Hansard records),³² instead of the clear purpose and context of the legislative scheme which includes the incorporation of tikanga Māori and acknowledgment of Te Tiriti o Waitangi.

ISSUE 2: NGĀTI AWA’S CUSTOMARY INTERESTS IN THE DISPUTED AREA OF CMT 1 (COASTLINE)

10. The question the Supreme Court has granted leave on is:³³
- Should the Court of Appeal have made its own findings in respect of customary marine title (CMT) Order 1, rather than remitting it to the High Court for further hearing.
11. This question arises from Te Kāhui’s appeal. Te Kāhui’s position is that CMT 1 should not have been remitted.³⁴ Te Kāhui seeks an order reinstating CMT Order 1.³⁵ Ngāti Awa opposes this position and the relief sought.
12. The fundamental issue for Ngāti Awa in relation to this ground is that its customary interests in the Disputed Area of CMT 1 have not been recognised or provided for through an award of CMT. Ngāti Awa’s position is that its customary interests in the Disputed Area meet the test for CMT. Ngāti Awa continues to support a re-hearing of CMT 1 as both correct and necessary in the interests of justice and intends to participate in any re-hearing granted to properly preserve its interests in the Disputed

³¹ *Ellis v R*, at [108].

³² See Legal Submissions for the Landowners Coalition, 4 October 2024, at [3.11]-[3.13].

³³ Minute of Williams J, 4 July 2024, at [7](f).

³⁴ Te Kāhui submissions at [6.1]-[6.2]; Notice of application for leave to bring civil appeal for Te Kāhui, 16 November 2023, at [2.6](c) **[[05.00867]]**.

³⁵ Notice of application for leave to bring civil appeal for Te Kāhui, 16 November 2023, at [4.1](b) **[[05.00868]]**.

Area.³⁶ The Court of Appeal agreed that Ngāti Awa’s interests had not been sufficiently considered and specifically noted the wealth of evidence on the record detailing Ngāti Awa’s interests in the Disputed Area.³⁷ On the basis of that evidence, the Court of Appeal determined that “Ngāti Awa have an arguable claim, at least, to the area” and a re-hearing was justified.³⁸

The Disputed Area

13. The Disputed Area is depicted in the **Appendix** to these submissions.³⁹
14. The Disputed Area is part of Ngāti Awa’s traditional rohe. The overwhelming evidence is that Ngāti Awa’s interests extend from the Ōhiwa harbour mouth west along the Ōhope Spit and past where the Maraetōtara Stream meets the coastline.⁴⁰ Notwithstanding, Te Whakatōhea and Te Ūpokorehe were awarded CMT in this area and Ngāti Awa was not. Ngāti Awa does not accept shared interests with Te Whakatōhea and/or Te Ūpokorehe in the Disputed Area. Ngāti Awa’s position is that the customary interests of Te Whakatōhea, Te Ūpokorehe and Ngāti Awa converge at Ōhiwa Harbour, a natural geographical convergence point, not Maraetōtara Stream and not along the Ōhope Spit.⁴¹ The convergence of iwi at the Ōhiwa Harbour is also consistent with previous Waitangi Tribunal finding that “... taking a broad view... to the east of the Ngāti Awa heartlands, Ngāti Awa merged with Whakatōhea and Tūhoe at Ōhiwa Harbour, and that the harbour itself was shared by all three.”⁴²

³⁶ In the alternative, if the Supreme Court is minded to itself make findings and grant relief with respect to CMT, Ngāti Awa has set out the options it sees as available to the Court at paragraphs [34(b) and [50(b)(ii).

³⁷ *Re Edwards NZCA* at [293].

³⁸ *Re Edwards NZCA* at [292]–[293].

³⁹ It is also set out in *Re Edwards NZCA* at 161.

⁴⁰ Dr Merito gave evidence that the name of the entrance to the stream is “Te Toatoa” and that the urupā to the East of the stream is called Maraetotara (Exhibit TT ‘Te Kei Merito korero (English translation)’ [[**502.00544**]]. See also, Stage 1 Hearing Transcript (Part 8), 6 October 2020, lines 23 to 33 [[**108.04281**]]; See also Exhibit YY ‘Information Sign for Maraetotara Urupa’ [[**502.00629**]].

⁴¹ As emphasised in the oral testimony of Ms Leonie Simpson, see Transcript, 6 October 2020, lines 6-20 [[**108.04302**]]. As also provided for in the Joint Brief at [77] [[**203.01220**]].

⁴² Ngāti Awa Raupatu Report (Waitangi Tribunal) at 11.3 [[**316.06970**]].

Ngāti Awa’s tikanga evidence in the Disputed Area

15. Ngāti Awa’s claim to the Disputed Area is based on whakapapa, ahi kaa roa, mana, kaitiakitanga, and conquest since 1840 to present day. Ngāti Awa brought evidence of these matters before the High Court, primarily through the evidence of Tā Hirini Moko Mead, Dr Te Kei Merito and Dr Joe Mason.

Whakapapa

16. Ngāti Awa’s whakapapa connections to the area of coastline between Maraetōtara Stream and the Ōhiwa Harbour are set out:
- (a) by Tā Hirini Moko Mead, Dr Te Kei Merito and Dr Joe Mason in the Joint Brief;⁴³
 - (b) further in the oral testimony of Dr Merito⁴⁴ and Ms Leonie Simpson;⁴⁵ and
 - (c) in historical research reports completed by Ngāti Awa in the 1990s.⁴⁶

Ahi kaa roa

17. Keeping the home fires burning requires use and occupation.⁴⁷ Ngāti Awa presented evidence to the High Court of its constant connection along the Ōhope coastline including:
- (a) Many pā, and other sites of significance, along the Ōhope Spit and towards the Maraetōtara stream.⁴⁸

⁴³ See Joint Brief at [39]-[42] **[[203.01212]]**, [45](b) and (c) **[[203.01213]]**, [59]-[64] **[[203.01216-01218]]** and [81]-[83] **[[203.01221]]**.

⁴⁴ Oral Testimony of Dr Te Kei Merito, Stage 1 Hearing Transcript (Part 8), 6 October 2020, lines 6-16 **[[108.04282]]**.

⁴⁵ Oral Testimony of Leonie Simpson, Stage 1 Hearing Transcript (Part 8), 6 October 2020 lines 12-33 **[[108.04264]]** and lines 1-9 **[[108.04265]]**.

⁴⁶ See reports completed by Te Roopu Whakaemi Kōrero o Ngāti Awa such as ‘Whenua Tautohetohe: Testing the Tribal Boundaries’ **[[317.07639]]**; ‘Ohope Reserve’ **[[318.07723]]**; and ‘Ohiwa’ **[[318.07931]]**.

⁴⁷ Noting the High Court applied a tikanga based approach to “use and occupation” and held that does not require persons to have had to be living in the area abutting the common marine and coastal area since 1840 to the present day. (See *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 at [172] – [173] **[[05.00453-00454]]**).

⁴⁸ Joint Brief at [114], **[[203.01229]]**.

- (b) Papakāinga abutting the common marine and coastal area on the Ōhope Spit, particularly in and around Ihukatia.⁴⁹ The Ihukatia Trust manages land on behalf of the descendants of Te Rangitukehu (of Ngāti Awa) whose relationship with the area was established through fishing and food gathering processes.⁵⁰
- (c) Historical reports of kaimoana collection and using the common marine and coastal area in and around Ōhope Spit.⁵¹
- (d) Settlement redress in and around Ōhope Spit, including the exclusive Nohoanga site just to the West of the Ōhiwa Harbour mouth⁵² and the co-management of the Ōhope Reserves and Tauwhare Pā.⁵³
- (e) Land ownership and management by Māori land trusts and Te Rūnanga o Ngāti Awa, to the East of Maraetōtara which includes but is not limited to Treaty settlement land. While the Ngāti Awa Farm, also located in this area, was returned to Ngāti Awa through a negotiated process, this was separate from the Treaty Settlement. As detailed in the evidence of Ms Simpson, Ngāti Awa land east of Maraetōtara is largely in Māori title.⁵⁴

⁴⁹ First affidavit of Leonie Te Aorangi Simpson, 1 May 2020 at [86](c)-(d) **[[203.01194]]**. Exhibit SS - Te Runanga o Ngati Awa - Map of Ohiwa Harbour "Sections 1-2 and Nohoanga Entitlement" **[[502.00543]]**.

⁵⁰ As clarified in oral testimony of Ms Leonie Simpson see Oral Testimony of Leonie Simpson, Stage 1 Hearing Transcript (Part 8), 6 October 2020 lines 7-11 **[[108.04297]]**. Under cross-examination, neither Dr Kahotea (Stage 1 Hearing Transcript (Part 3), 7 September 2020 **[[104.01775-01783]]**) nor Mr Stirling (Stage 1 Hearing Transcript (Part 5), 17 September 2020 **[[105.02703-02704]]**) were able to substantiate that Te Rangitukehu received this award for other reasons. In addition, Mr Stirling accepted that Ngāti Awa were at Ōhiwa in and around that time (Stage 1 Hearing Transcript (Part 5), 17 September 2020 **[[105.02704]]**).

⁵¹ See reports prepared by Te Roopū Whakaemi Kōrero o Ngāti Awa for the Waitangi Tribunal at **[[317.07512]]**; **[[318.07723]]**; and **[[318.07931]]**.

⁵² Exhibit SS, "Te Runanga o Ngati Awa – Map of Ōhiwa Harbour "Sections 1-2 and Nohoanga Entitlement"" **[[502.00543]]**.

⁵³ First affidavit of Leonie Te Aorangi Simpson, 1 May 2020 at [62](a) **[[203.01188]]**.

⁵⁴ Affidavit of Leonie Simpson, 1 May 2020, at [88] **[[203.01195]]**.

Mana

18. Ngāti Awa presented evidence to the High Court that shows it has mana, and continues to exercise it, over the Disputed Area:

- (a) Tā Hirini Moko Mead, Dr Te Kei Merito and the Dr Joe Mason, in their evidence spoke to the relationships between the iwi, areas of influence, and where mana was held. This included confirming, as the High Court did, that mana over Ōhiwa was held collectively.⁵⁵
- (b) Tatau pounamu (peace agreements) reached over the years, that cement the convergence of the customary interests at Ōhiwa Harbour not Maraetōtara, including between:
 - (i) Te Keepa Toihau (of Ngāti Awa) and Kape Tautini (of Te Whakatōhea) in the 1840s;⁵⁶
 - (ii) Te Keepa Toihau (of Ngāti Awa) and Titoko (of Te Whakatōhea) in the 1860s;⁵⁷ and
 - (iii) in 1991, between the rangatira of Ngāti Awa and Te Whakatōhea including Tā Hirini Moko Mead and Charles Aramoana who agreed:⁵⁸

That the boundary between Whakatohea and Ngāti Awa be defined by a line which begins at Te Rae o Kanawa and proceeds to the mouth of the Nukuhou River, follows the river to Matekerepu; crosses to Tirotirowhetu and thence to Te Roto o Matamoe thence follows the confiscation line to Maunga Whakamanawa.

That this line determines Mana Whenua and Mana Moana of Whakatohea which lies to the east of the line and **the Mana Whenua and Mana Moana of Ngāti Awa which lies west of the line.** (emphasis added)

⁵⁵ Joint Brief at [77] **[[203.01220]]**; see also [75]-[114] **[[203.01220-01229]]**. See *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 at [331] **[[05.00493]]**, [660](b) **[[05.00564]]**.

⁵⁶ Joint Brief at [93] **[[203.01224]]**. See also Bruce Stirling's report 'Bruce Stirling, Te Mana Moana o Te Kāhui Takutai Moana o ngā whenua me nga hapū of Te Whakatōhea: Historical Issues' at [46], **[[307.02700]]**.

⁵⁷ Joint Brief at [94], **[[203.01224]]**.

⁵⁸ Exhibit RR 'Te Runanga o Ngati Awa - "Motion That the boundary between Whakatohea and Ngati Awa..." **[[501.00542]]**. See also Joint Brief at [112]-[113] **[[203.01228]]**.

- (c) Historical examples, provided largely through reports, of Ngāti Awa exercising mana in the area through actions of rangatira (both historically and present day).⁵⁹

Kaitiakitanga

19. Ngāti Awa presented evidence detailing how it exercises kaitiakitanga within the Disputed Area (and Ōhiwa Harbour) including historical reports of collecting kaimoana and using the common marine and coastal area in and around Ōhope Spit,⁶⁰ and Ngāti Awa's environmental work in and around the Disputed Area and into Ōhiwa Harbour, which is often led by Te Rūnanga o Ngāti Awa.⁶¹

Conquest

20. Ngāti Awa also presented historical reports about the significant number of battles in and around Ōhiwa, including along the Ōhope coastline in the Disputed Area.⁶²
21. The Joint Brief details the battles between Ngāti Awa and Te Whakatōhea and particularly the battles between the 1820s and 1840s which focused on the eastern side of the Ōhiwa Harbour.⁶³ Battles of significance include the 1823 battle between Tūhoe and Te Whakatōhea, and a battle at Onekawa (on the Eastern side of the Harbour) in 1828 where, on Ngāti Awa's evidence, Ngāti Awa was successful.⁶⁴ Tā Hirini Moko Mead also examined the battles which occurred along this coastline in his work

⁵⁹ See Tā Hirini Moko Mead's work in 'Whenua Tautohetohe: Testing the Tribal Boundaries' **[[317.07639]]**; the Oral Testimony of Leonie Simpson (Stage 1 Hearing Transcript (Part 8), 6 October 2020 where she discusses the whakapapa of Mereaira Bluett **[[108.04247-04249]]** and the whenua along Ōhope Spit **[[108.04296-04298]]**; See also, the report prepared by Te Roopu Whakaemi Kōrero o Ngāti Awa on the Ōhope Reserve **[[318.07723]]** which also details some of the battles in and around Ōhiwa.

⁶⁰ See reports prepared by Te Roopu Whakaemi Kōrero o Ngāti Awa for the Waitangi Tribunal at **[[317.07512]]**; **[[318.07723]]**; **[[318.07931]]**.

⁶¹ Affidavit of Leonie Simpson, 1 May 2020 **[[203.01167]]**. See also Oral Testimony of Leonie Simpson, Stage 1 Hearing Transcript (Part 8), 6 October 2020 **[[108.04264-04265]]**.

⁶² See Tā Hirini Moko Mead's work in 'Whenua Tautohetohe: Testing the Tribal Boundaries' **[[317.07639]]**. See also, the report prepared by Te Roopu Whakaemi Kōrero o Ngāti Awa on the Ōhope Reserve **[[318.07723]]** which also details some of the battles in and around Ōhiwa.

⁶³ Joint Brief at [85]-[97] **[[203.01222]]**.

⁶⁴ Oral testimony of Ms Leonie Simpson, Stage 1 Hearing Transcript (Part 8), 6 October 2020, lines 15 to 20, **[[108.04302]]**.

‘Whenua Tautohetohe: Testing Tribal Boundaries’ (1994).⁶⁵ These battles, and their significance for the task before this Court, are addressed at paragraphs [27]–[31].

22. Ngāti Awa accepts that the Disputed Area was highly contested at different points in time. Ngāti Awa’s position, however, is that the evidence, on balance, favours Ngāti Awa holding the customary interests in the Disputed Area and the various inter-tribal interests converging at Ōhiwa Harbour as at 1840.

Pūkenga Report accepts Ngāti Awa interests in Disputed Area

23. Mr Doug Hauraki and Dr Hiria Hape were the Court appointed Pūkenga for the High Court proceedings.⁶⁶ The Pūkenga sat alongside Churchman J and provided advice in respect of questions of tikanga, ultimately producing a report on the particular questions posed by the Court.⁶⁷ The Pūkenga report focuses on Te Whakatōhea’s interests (as the priority afforded to the Edwards application meant that it was a largely Te Whakatōhea focused inquiry). The Pūkenga report addresses how those Te Whakatōhea interests could be provided for based on tikanga.
24. The Pūkenga were cross-examined on their report and provided written answers to questions of cross-examination on 15 October 2020 (including answers to questions from Churchman J and from counsel for Ngāti Awa).⁶⁸ Counsel note that these answers were not included in the final judgment nor were the content of the answers reflected in the findings of the High Court. In these answers, Dr Hape helpfully clarified that Ngāti Awa has interests east of Maraetōtara, to Ōhiwa, and along the Ōhope Spit.⁶⁹ For

⁶⁵ ‘Whenua Tautohetohe: Testing the Tribal Boundaries’ **[[317.07639]]**.

⁶⁶ Marine and Coastal Area (Takutai Moana) Act 2011, s 99(1)(b) enables the Court to obtain the advice of a court expert (a pūkenga) where a question of tikanga arises.

⁶⁷ The substantive Pūkenga Report was annexed to the High Court Judgment as Appendix A **[[05.00814]]**. Counsel note that the appendices to the Pūkenga Report are available at **[[101.00544-00549]]**.

⁶⁸ See Memorandum of counsel for Te Rūnanga o Ngāti Awa regarding further questions for Pūkenga **[[101.00512]]**; Minute (No.33) of Churchman J re Whakatōhea hearing [Additional questions for pūkenga] **[[101.00614]]**.

⁶⁹ Joint Response of the Pūkenga to further written questions of cross-examination, 15 October 2020 at [2](a)(i), **[[101.00518]]**.

Ngāti Awa, the key points made by the Pūkenga via written answers to cross-examination include:⁷⁰

- (a) Ngāti Awa already has a stake in the ground due to being awarded lands on both sides of Maraetōtara Stream;
- (b) based on tikanga, Ngāti Awa has interests east of Maraetōtara Stream and these include Tauwhare Pā, the Ngāti Awa Farm and along Ōhope Spit where there are reserves and waahi tapu; and
- (c) the lands past the camping grounds along Ōhope Spit and to the mouth of the Ōhiwa Harbour, were shared.

25. However, despite the Pūkenga expressly acknowledging Ngāti Awa's interests in the Disputed Area, this did not flow through into the High Court's judgment. Counsel submit that the Court of Appeal was correct in determining that Churchman J erred in:

- (a) not applying the Pūkenga's answers in cross-examination when adopting the Pūkenga's findings in full;
- (b) not having regard to the Pūkenga's answers in cross-examination when finding that, as a matter of tikanga, the takutai moana between Maraetōtara and Tarakeha was shared as between the six hapū of Te Whakatōhea (despite the Pūkenga recognising Ngāti Awa customary interests in the Disputed Area)⁷¹; and
- (c) not applying the Pūkenga's findings when stating that "I also accept the Pūkenga's poutarāwhare approach and their conclusions that, in accordance with tikanga the six Whakatōhea hapū hold the area from Maraetōtara to Tarakeha. The findings are expressly subject to the

⁷⁰ Joint Response of the Pūkenga to further written questions of cross-examination, 15 October 2020 at [2](a)(i), **[[101.00518]]**.

⁷¹ *Re Edwards (Te Whakatōhea) No.2* [2021] NZHC 1025 at [180], [319]-[321] **[[05.00455]]**, **[[05.00490]]**.

qualification that the interests of the poutarāwhare were shared with Ngāti Awa in west Ōhiwa Harbour.”⁷²

Te Whakatōhea’s own evidence recognises Ngāti Awa’s interests in the Disputed Area

26. Te Whakatōhea’s own evidence supports that the iwi groups converge at Ōhiwa Harbour, not Maraetōtara Stream.
27. Te Whakatōhea evidence showed a discrepancy between the historical articulation of the Whakatōhea rohe given by Te Hoeroa Horokai and Heremia Hoera and a more recent articulation.⁷³ Historically, Te Horo was given as Te Whakatōhea’s western boundary, not Maraetōtara. There is a geographical difference between the point “Te Horo” articulated as the boundary in the original application filed in 1999 by the priority Edwards applicant,⁷⁴ (and in the evidence of a number of Whakatōhea witnesses historically in the Sims Commission⁷⁵) and the point now marked on Te Whakatōhea and Te Ūpokorehe applications as “Maraetotara”. This is most starkly shown by a comparison of the map annexed to the priority application filed in 1999,⁷⁶ and the revised map filed in July 2020.⁷⁷ The difference is also shown on those maps presented through the evidence of Dr Des Kahotea.⁷⁸ Te Horo is a hill in the Ōhiwa Harbour and Maraetōtara is a stream that flows into the moana at a point further West from Ōhiwa along Ōhope beach.
28. Te Whakatōhea witness Te Riaki Amoamo explained the difference between the two points when justifying why the

⁷² *Re Edwards (Te Whakatōhea) No.2* [2021] NZHC 1025 at [331], **[[05.00493]]**.

⁷³ Affidavit of Te Ringahua Hata for Ngāti Ira o Waiōweka, 21 February 2020 at [93]-[99] **[[202.00637-00640]]**; Affidavit of Te Ringahua Hata for Ngāti Patumoana, 29 January 2020 at [14]-[15] **[[201.00440-00442]]** noting Dr Ranginui Walker’s articulation of Te Whakatōhea’s territory.

⁷⁴ Application to the Māori Land Court for Investigation of Māori Customary Land, 6 April 1999 **[[401.00002]]**.

⁷⁵ Namely the evidence of Te Hoeroa Horokai and Heremia Hoera as set out in the affidavit of Te Ringahua Hata, 21 February 2020 at [93]-[99] **[[202.00637-00640]]**.

⁷⁶ Application to the Māori Land Court for Investigation of Māori Customary Land, 6 April 1999 **[[401.00002]]**.

⁷⁷ Third Amended Application by Claude Edwards (deceased), Adriana Edwards and others on behalf of Te Whakatōhea **[[101.00020]]**.

⁷⁸ Report of Dr Desmond Kahotea, Figure 36, **[[302.00851]]**, See also Figure 37 **[[302.00860]]** and Figure 38 **[[302.00861]]**.

historical reference points from those Whakatōhea rangatira expressed in the 1920s as “Te Horo”, are now replaced with “Maraetōtara”. Mr Amoamo stated that the coastal boundary went from Te Horo to Maraetōtara due to the battle between Tūhoe and Whakatōhea at Maraetōtara (citing Te Rupe’s involvement).⁷⁹ Te Whakatōhea witness, Ms Te Ringahua Hata, confirmed that same view.⁸⁰ Counsel for Ngāti Ira o Waioweka, in High Court closing submissions, also confirmed this difference in the points.⁸¹ The conclusion seems to be that because of events that do not relate to Ngāti Awa and in which Ngāti Awa neither lost nor conceded land or mana, Maraetōtara should now be preferred for the purposes of the tests under the Act. Ngāti Awa does not accept this.

29. The evidence establishes a narrative in which Ngāti Awa continued to assert its mana at Ōhiwa and never conceded that mana. The battle referred to by Mr Amoamo occurred in 1823. Mr Amoamo accepted, through cross-examination, that whilst 1823 was the date of a battle at Maraetōtara between Tūhoe and Whakatōhea, Ngāti Awa was not involved and further battles continued with Ngāti Awa over Ōhiwa Harbour (to the East of Maraetōtara).⁸² In oral testimony, Ms Leonie Simpson reiterated that whilst Maraetōtara may be a site of an 1823 battle between Tūhoe and Whakatōhea, this is not a significant battle for Ngāti Awa (and did not involve Ngāti Awa). There were a range of other battles of significance between 1823 following this battle, including a battle at Onekawa (on the Eastern side of the Harbour) at 1828 where, on Ngāti Awa’s evidence, Ngāti Awa was successful.⁸³ These were traversed in historical research reports and those reports completed by Ngāti Awa pūkenga in

⁷⁹ Oral testimony of Mr Te Riaki Amoamo, Stage 1 Hearing Transcript (Part 6), 23 September 2020 **[[106.03228]]** . See also the Oral Testimony of Te Ringahua Hata, Stage 1 Hearing Transcript (Part 7), 25 September 2020, lines 5 to 18 **[[107.03612]]** and the Affidavit of Te Ringahua Hata for Ngāti Ira o Waiōweka at [93]-[99] **[[202.00637-00640]]**.

⁸⁰ Affidavit of Ms Te Ringahua Hata, 21 February 2020 at [99] **[[202.00640]]**.

⁸¹ Closing Submissions on behalf of Ngāti Ira o Waioweka (NZHC), at [2.8].

⁸² Cross-examination of Mr Te Riaki Amoamo, Stage 1 Hearing Transcript (Part 6), 24 September 2020 **[[107.03423-03424]]**.

⁸³ Oral testimony of Ms Leonie Simpson, Stage 1 Hearing Transcript (Part 8), 6 October 2020, lines 15 to 20, **[[108.04302]]**.

the context of Ngāti Awa's Waitangi Tribunal hearings.⁸⁴ The Joint Brief also details the battles between Ngāti Awa and Te Whakatōhea post-1823 which focused on the Eastern side of the Ōhiwa Harbour.⁸⁵

30. Counsel submit that preferring a more recent description of the Whakatōhea boundary does not satisfy the tests under the MACA Act which require the area to be held in accordance with tikanga since 1840 to the present day. Further, if Maraetōtara was the boundary point resulting from the 1823 battle then arguably the Whakatōhea rangatira would have reflected that in the evidence given in the 1920s. Instead they make specific reference to Te Horo, being a hill in the Ōhiwa Harbour. Again, this aligns with Ngāti Awa's evidence that the inter-tribal interests converged at Ōhiwa Harbour, not a point in Ōhope.
31. The evidence of those Te Whakatōhea and Te Ūpokorehe witnesses on the Western side of their own application areas was focused on those customary practices in and around Ōhiwa Harbour. There was hardly any evidence presented of customary practices exercised in and around the common marine and coastal area at the point marked Maraetōtara Stream. In addition, there is very little evidence of Te Whakatōhea customary practices in and around the Ōhope beach front in the Disputed Area.

The Court of Appeal was correct to order a re-hearing

32. The High Court erred in not considering the overwhelming evidence before the Court of Ngāti Awa's interests in the Disputed Area, and in holding that ngā hapū o Te Whakatōhea had met the test for CMT and have shared exclusivity solely between the hapū of Te Whakatōhea within the Disputed Area.
33. The High Court's error has an element of oversight, as it was not based on a rigorous analysis of the evidence concerning the Disputed Area. Given the complex nature of the range of issues before the Court, and the length of the Coastline at issue

⁸⁴ See for example [[317.07477]]; [[317.07512]]; [[317.07639]]; [[318.07723]]; [[318.07931]]; [[319.08119]]; and [[322.09573]].

⁸⁵ Joint Brief at [85]-[97], [[203.01222-01225]].

(particularly in comparison to the Disputed Area), a relatively small sliver falling through the cracks may be unsurprising. However, this is an incredibly important issue for Ngāti Awa, as evidenced by its stance in the High Court and the subsequent (successful) appeal it took to the Court of Appeal.

34. The Court of Appeal was correct to order rehearing of CMT 1. However, if this Court sought to substitute the Court of Appeal's decision for its own:
- (a) Ngāti Awa seek orders overturning the finding that ngā hapū o Te Whakatōhea and Te Ūpokorehe met the test for CMT in the Disputed Area and amending the area jointly held by ngā hapū o Te Whakatōhea and Te Ūpokorehe to start at Te Rae o Kanawa (at the Ōhiwa Harbour mouth) to Tarakeha, and granting Ngāti Awa CMT on an exclusive basis in the Disputed Area.
 - (b) In the alternative, if the Court concludes that the CMT test was met by Te Whakatōhea, Te Ūpokorehe and Ngāti Awa, orders are sought to include Ngāti Awa in the Disputed Area between the point the High Court refers to as the mouth of the Maraetōtara Stream to Te Rae o Kanawa (at the Ōhiwa Harbour mouth) on a shared exclusivity basis.⁸⁶

ISSUE 3: CMT 2 SHOULD BE UPHeld WITH NGĀTI AWA'S INTERESTS RECOGNISED

35. The question the Supreme Court has granted leave on is:⁸⁷
- Should the Court of Appeal have remitted CMT Order 2 rather than making its own findings.
36. This question arises from Te Ūpokorehe's appeal. Te Ūpokorehe's position is that CMT 2 should have been remitted to the High Court alongside CMT 1.⁸⁸ Te Ūpokorehe seeks an order remitting

⁸⁶ This is not Ngāti Awa's preference, as its evidence is that Ngāti Awa alone hold the Disputed Area in a manner that warrants a grant of CMT but Ngāti Awa accept that is ultimately the Court's decision based on the evidence before it and applying that evidence to the s 58 test.

⁸⁷ Minute of Williams J, 4 July 2024, at [7](g).

⁸⁸ Te Ūpokorehe submissions as an appellant, 20 September 2024 at [9]-[14] and [35]-[42]; Te Ūpokorehe application for leave at [2].

CMT 2 to the High Court.⁸⁹ Ngāti Awa opposes Te Ūpokorehe's position and the relief sought on the basis that Ngāti Awa submits the High Court and the Court of Appeal were correct to grant a shared CMT to Ngāti Awa, Te Whakatōhea and Te Ūpokorehe for the Ōhiwa Harbour in CMT 2. The Court of the Appeal clearly appreciated the difference between CMT 1 and CMT 2 and, on review of the evidence and the High Court judgment, determined that the High Court was correct to make the findings that it did. This is particularly clear in the Court of Appeal's paragraph [324]:⁹⁰

LCI's argument extends to Order 2. As I see it, that is in a different category. Ōhiwa Harbour is a shallow estuary surrounded by lands held by applicant groups and the evidence shows that the waters and the surrounding land are replete with sites of significance to those groups. My reservations about the adequacy of evidence of rights to offshore fishing grounds do not extend to this area and there is no uncertainty about the external boundary. **The applicant groups, including Ngāti Awa, have shown that the Harbour has been continuously held in accordance with tikanga since 1840.** There appears to have been some evolution of internal boundaries, but this may reflect shifting alliances rather than any loss of control. The applicant groups generally have recognised one another's mana over specific local areas and sites. **I am sufficiently satisfied that the applicant groups have together occupied the area to the exclusion of others.** For reasons given at [330] below, I am not persuaded that there has been substantial interruption. Lastly, the tikanga process which has been followed in the High Court to achieve consensus among applicant groups and interested parties is appropriate for the reasons I have given earlier. **The statutory criteria have been met. LCI's appeal will be dismissed so far as it pertains to Order 2.**

[emphasis added; footnotes omitted]

37. The current Te Ūpokorehe challenge to CMT 2, at least as against Ngāti Awa, was not before the Court of Appeal. Whilst Te Ūpokorehe's cross-appeal included opposition to the grant of CMT to Ngāti Awa⁹¹ prior to the Court of Appeal hearing, Te

⁸⁹ Notice of application for leave to bring civil appeal for Te Kāhui, 16 November 2023, at [4.1](b) **[[05.00868]]**. Te Ūpokorehe did not challenge CMT 2 in the Court of Appeal; the challenge to CMT 2 was taken by the Landowners Coalition (and therefore the relevant part of the Court of Appeal's judgment with respect to CMT 2 is in response to the Landowners Coalition appeal).

⁹⁰ *Re Edwards NZCA*, at [324].

⁹¹ Notice of Cross-Appeal by Te Ūpokorehe Treaty Claims Trust, 15 June 2021 **[[05.00050]]**.

Ūpokorehe confirmed it no longer pursued the ground of appeal challenging title being granted to Ngāti Awa in Ōhiwa Harbour on a joint basis.⁹² Accordingly, except for a discrete ground of appeal regarding Ngāti Ngāhere, Te Ūpokorehe did not challenge the factual findings of the High Court in favour of the successful applicant groups at Ōhiwa Harbour. Instead, Te Ūpokorehe advanced a case that the successful applicant groups could be awarded overlapping CMT orders rather than one joint CMT order.⁹³ Te Ūpokorehe did not seek specific relief overturning or seeking the remittance of CMT 2. Accordingly, Miller J correctly recorded that CMT 2 (Ōhiwa Harbour) was no longer in dispute amongst the applicant groups and was therefore only challenged at the hearing by the Landowners Coalition.⁹⁴

38. It appears that Te Ūpokorehe is now arguing that it alone should be granted CMT in Ōhiwa Harbour. Another interpretation of Te Ūpokorehe's submissions is that there can be multiple CMTs granted in Ōhiwa Harbour, and Te Ūpokorehe meets the test for CMT to be granted its own CMT (whist acknowledging others may also meet the test for their own CMT). This point should be clarified. In any event, due to the position Te Ūpokorehe took in the High Court, essentially that it holds Ōhiwa Harbour exclusively, Ngāti Awa has approached this ground of appeal to ensure that the Court has before it the extensive evidence Ngāti Awa presented and tested during the High Court trial to ultimately be successful in being granted CMT in Ōhiwa Harbour alongside Te Ūpokorehe and Te Whakatōhea. Ngāti Awa

⁹² Legal Submissions for Te Ūpokorehe Treaty Claims Trust (NZCA), 16 December 2022, at [4].

⁹³ Legal Submissions for Te Ūpokorehe Treaty Claims Trust (NZCA), 16 December 2022, at [7]–[74]. Additionally, Te Ūpokorehe opposed the appeal by the Landowners Coalition in the Court of Appeal challenging the finding of shared exclusivity in Ōhiwa Harbour and supported the High Court's findings that multiple applicant groups had met the test for CMT under the concept of shared exclusivity (Legal Submissions for Te Ūpokorehe Treaty Claims Trust (NZCA), 16 December 2022, at [7] and [8])

⁹⁴ *Re Edwards NZCA* at [25](b). This was confirmed by Miller J following a recall application by Te Ūpokorehe, Miller J further confirming that "the decision to uphold Order 2 was not an oversight...The position in argument before us was that Te Ūpokorehe accepted that applicant groups, including Ngāti Awa, had shared interests in the Ōhiwa Harbour. They made an exception for only one hapū, Ngāti Ngāhere, who as Te Ūpokorehe saw it had failed to adduce evidence of their interest" (*Whakatōhea Kōtahitanga Waka (Edwards) & Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2023] NZCA 644 (14 December 2023) at [4]–[5]).

maintains this determination of the High Court was correct and that Ōhiwa Harbour, as a natural geographic coalescing point on the Coast, is where the customary interests of Ngāti Awa, Te Ūpokorehe and Te Whakatōhea meet.

Ngāti Awa’s tikanga evidence in Ōhiwa Harbour

39. Te Ūpokorehe’s assertion that “there is very little evidence of the exercise by other groups of kaitiakitanga within Ōhiwa, let alone on a continuous basis since 1840, in contrast to the extensive evidence on this subject from Te Ūpokorehe”⁹⁵ is not borne out on the evidence. Of all of the areas examined by the High Court, Ōhiwa Harbour had one of the richest intertwined tribal narrative and evidential records showing clearly that Ngāti Awa, Te Ūpokoreke and Te Whakatōhea have used that area since 1840 to the present day.
40. Ngāti Awa accepts shared customary interests with Te Whakatōhea (and Te Ūpokorehe, to the extent that they are a separate group) in the Ōhiwa Harbour since 1840. Ngāti Awa’s claim to the Ōhiwa Harbour is primarily based on whakapapa, ahi kaa roa, mana, kaitiakitanga and conquest since 1840 to present day. The evidence from Ngāti Awa is clear that particular hapū of Ngāti Awa also occupied the area in and around Ōhiwa namely Ngāti Hokopū and Te Wharepaia from 1840-present day.⁹⁶ These hapū maintain a presence, either through living there, collecting kaimoana and / or exercising kaitiakitanga, today. The evidence of Ngāti Awa, given primarily through the evidence of Tā Hirini Moko Mead, Dr Te Kei Merito and Dr Joe Mason before the High Court of this in Ōhiwa Harbour made this plain.

Whakapapa

41. Ngāti Awa’s whakapapa connections to Ōhiwa through Te Hapū Oneone, Tairongo and Ngā Ariki were not challenged. Those Ngāti Awa hapū with connections to Ōhiwa in this regard are set out in the Joint Brief and the further material provided by

⁹⁵ Te Ūpokorehe submissions as an appellant, 20 September 2024 at [41].

⁹⁶ Minute of Churchman J, 8 March 2024 at [33].

Ms Leonie Simpson in oral testimony.⁹⁷ Tā Hirini Moko Mead, Dr Te Kei Merito and Dr Joe Mason recorded the following hapū of Ngāti Awa as having connections to Ōhiwa post 1840:

Ngā Ariki would then become one of the principal groups occupying around Ohiwa. In time, Ngā Ariki became the Ngāti Awa hapū, Ngāti Hokopu and Te Wharepaia. The maintained prominence in the Ohiwa and Ōhope region supported by Ngāti Awa whānui.⁹⁸

...

A census in 1867 by Special Commissioner J.A. Wilson records that 89 people of Ngāti Hokopu and Te Wharepaia were living at Ōhope and Ohiwa.⁹⁹

Ahi kaa roa

42. Ngāti Awa presented evidence to the High Court that shows it has had a constant connection to Ōhiwa through use and occupation from the 1840s until the present day:

(a) Examples of Ngāti Awa rangatira detailing their rights to Ōhiwa in the Compensation Court hearings include:

(i) Kepa Toihau and his daughter Mere Aira living at Tauwhare Pā and Ohakana Island in the 1840s. Mere Aira had a union with Kape of Te Whakatōhea which was an important peace making gesture.¹⁰⁰

(ii) Papakāinga abutting the common marine and coastal area on the Ōhope Spit, particularly in and around Ihukatia.¹⁰¹ The Ihukatia Trust manages land on behalf of the descendants of Te Rangitukehu (of Ngāti Awa) whose

⁹⁷ See Exhibits UU **[[502.00550]]** and VV **[[502.00552]]** which set out various lines of whakapapa to those persons who were living and using Ōhiwa in and around 1840. Noting Ms Simpson herself is a descendant of Te Kepa Toihau. See also the oral testimony of Ms Simpson, Transcript, 5 October 2020, p 92 to 94 **[[108.04247-04249]]**.

⁹⁸ Joint Brief, at [81] **[[203.01221]]**.

⁹⁹ Joint Brief, at [98] **[[203.01225]]**.

¹⁰⁰ As recorded in a number of sources including Mr Bruce Stirling's report for Te Kāhui at [308] **[[307.02793]]**.

¹⁰¹ First affidavit of Leonie Te Aorangi Simpson, 1 May 2020 **[[203.01167]]**.

relationships with the area was established through fishing and food gathering processes.¹⁰²

- (iii) Exercising kaitiakitanga over Ōhiwa Harbour.¹⁰³
- (iv) Evidence included in the historical reports of collecting kaimoana and using the common marine and coastal area in and around Ōhope Spit and Ōhiwa.¹⁰⁴
- (v) Oral testimony of Ms Simpson and Dr Merito of gathering kai at Ōhiwa, including having whānau locations to gather kai.¹⁰⁵
- (vi) Settlement redress in and around Ōhiwa Harbour including the exclusive Nohoanga site just to the West of the Ōhiwa Harbour mouth¹⁰⁶ and the co-management of the Ōhope Reserves and Tauwhare Pa.¹⁰⁷

Mana

43. Ngāti Awa's position is that no one group can sustain a claim of exclusivity to Ōhiwa from 1840 today and that mana to Ōhiwa is held collectively between Ngāti Awa, Te Ūpokorehe and Te Whakatōhea.¹⁰⁸ Ngāti Awa says it has predominant interests in the western side of the Ōhiwa Harbour. That predominance is

¹⁰² As clarified in oral testimony of Ms Leonie Simpson who noted that Beverley Hughes (who lives at the papa kainga at Ihukatia) told her this and Ms Hughes was told by their kaumātua Himiona Hunia, Puti O'Brien and Tunu Raimona, see Stage 1 Hearing Transcript (Part 8), 6 October 2020 lines 7-11 **[[108.04297]]**. Under cross-examination, neither Dr Kahotea (Stage 1 Hearing Transcript (Part 3), 7 September 2020 **[[104.01775-01783]]**) nor Mr Stirling (Stage 1 Hearing Transcript (Part 5), 17 September 2020 **[[105.02703-02704]]**) were able to pinpoint a reference to Te Rangitukehu receiving this award for "political considerations". In addition, Mr Stirling accepted that Ngāti Awa were at Ōhiwa in and around that time (Stage 1 Hearing Transcript (Part 5), 17 September 2020 **[[105.02704]]**). See paragraph 48 below.

¹⁰³
¹⁰⁴ See reports prepared by Te Roopū Whakaemi Kōrero o Ngāti Awa for the Waitangi Tribunal at **[[317.07512]]**; **[[318.07723]]**; and **[[318.07931]]**.

¹⁰⁵ Oral testimony of Ms Leonie Simpson, Transcript, 6 October 2020, lines 15 to 33 **[[108.04308]]**.

¹⁰⁶ Exhibit SS - Te Runanga o Ngāti Awa - Map of Ōhiwa Harbour "Sections 1-2 and Nohoanga Entitlement" **[[502.00543]]**.

¹⁰⁷ First affidavit of Leonie Te Aorangi Simpson, 1 May 2020, at [62](a) **[[203.01188]]**.

¹⁰⁸ Joint Brief, at [76] and [77] **[[203.01220]]**.

manifested through the lived reality of those Ngāti Awa uri primarily at Ōhiwa – their land and homes are on the Western side and that is the area of the marine and coastal area that they have the strongest connection to and use the most,¹⁰⁹ and where Ngāti Awa exercise kaitiakitanga. It does not mean they do not have or maintain connections to Ōhiwa at large. Nor does it mean others are not connected to these areas historically.

Manaakitanga

44. This was evidenced through the sharing of resources at Ōhiwa, and, particularly in more modern times, working collaboratively with other hapū and iwi exercising kaitiakitanga over Ōhiwa Harbour.¹¹⁰

Conquest

45. The historical reports before the High Court and the Court of Appeal, describe a range of battles in and around Ōhiwa, predominantly prior to 1840. Tā Hirini Moko Mead also examines this in his work Whenua Tautohetohe but did not suggest this area was a “no mans land”.¹¹¹ Ultimately, following the period of unrest and the Musket Wars, whilst there was still jostling for power, things were much more settled in and around 1840.

Te Whakatōhea’s and Te Ūpokorehe’s own evidence recognises Ngāti Awa in Ōhiwa Harbour

46. Te Whakatōhea and Te Ūpokorehe witnesses accepted, either through their applications or through cross-examination, shared customary interests at Ōhiwa based on both whakapapa and

¹⁰⁹ See oral testimony of Ms Leonie Simpson explaining some of the Ngāti Awa landownership in and around Ōhiwa, Transcript, 6 October 2020, **[[108.04296-04298]]** and Affidavit of Ms Simpson at [88] **[[203.01195]]**.

¹¹⁰ As acknowledged by Ms Josephine Mortenson under cross-examination confirming the three iwi on the Ōhiwa Strategy Forum, Transcript, 9 September 2020, **[[105.02396-02397]]**.

¹¹¹ First affidavit of Leonie Te Aorangi Simpson, 1 May 2020, Exhibit LTS-11, Hirini Moko Mead and Te Roopu Whakaemi Korero o Ngāti Awa, Whenua Tautohetohe: Testing the Tribal Boundaries, Research Report No. 13, June 1995 **[[317.07639]]**. See also cross-examination of Mr Mark Derby who conceded that Mr Battersby had misunderstood Professor Mead’s explanation of whenua tautohetohe, the correct interpretation being that it is not wise to describe the zone as a “no man’s land”. Transcript, 8 October at lines 3 to 30 **[[108.04526-04528]]**.

occupation.¹¹² A number of parties usefully clarified in their High Court closing submissions that shared interests with Ngāti Awa are accepted in Ōhiwa Harbour.¹¹³ Some Te Ūpokorehe witnesses appeared to maintain that others were at Ōhiwa under their mana but then accepted that they had not read all of the evidence Ngāti Awa witnesses had filed in the proceeding that set out the connection to Ōhiwa.¹¹⁴ Te Ūpokorehe's position was continued in their High Court closings. It is submitted that it is not an available conclusion on the facts that Te Ūpokorehe alone holds Ōhiwa in accordance with tikanga for the purposes of meeting the CMT test.

47. Nor is it an available conclusion that Te Ūpokorehe alone is kaitiaki.¹¹⁵ A number of the examples given by Te Ūpokorehe, as evidence of their kaitiakitanga in and around Ōhiwa, were also carried out by Ngāti Awa, namely:

(a) Assisting with the 2014 Whale Stranding (noting that Ms Simpson clarified in oral testimony that Ngāti Awa was

¹¹² Cross-examination of Ms Tracy Hillier, Transcript 25 September 2020, at lines 27 to 29 **[[107.03548]]**; Cross-examination of Wallace Aramoana, Transcript 29 September 2020, **[[107.03750]]**; Cross-examination of Te Ringahuaia Hata (Ngāti Ira o Waioweka), Transcript 30 September 2020, **[[107.03852]]** and Te Ringahuaia Hata (Ngāti Patumoana), Transcript 2 October 2020, **[[108.04130]]**; Cross-examination of Maude Edwards, Transcript 1 October 2020, p 31 to 34 **[[108.03928-03931]]**; Cross-examination of Dean Flavell, Transcript 1 October 2020, p 56 and 57 **[[108.03953-03954]]**. Cross-examination of Ms Josephine Mortensen, Transcript 9 September 2020, **[[105.02395-02396]]**; Cross-examination of Ms Muriel Kelly, Transcript 10 September 2020, p 49 **[[104.02120]]**; Cross-examination of Mr Donald Graeme Riesterer, Transcript 10 September 2020, p 65 **[[104.02136]]**; Cross-examination of Mr Hetaraka Biddle, Transcript 23 September 2020, p 76 and 77 **[[106.03297-03298]]**.

¹¹³ See Closing Submissions of Ngāti Ira o Waioweka at [2.4], [2.19.1] and [2.35]; Closing Submissions of Te Uri o Whakatōhea Rangatira Mokokoko at [2.5](a); Closing Submissions of Edwards, 19 October 2020, at [47]; Closing Submissions of Hiwarau C, 19 October 2020, at [18] and [34]; Closing Submissions of Ngāti Ruatakenga, 19 October 2020, at [8] and [134]; Joint Closing Submissions for Ngāi Tamahaua hapū and Te Hapū o Titoko o Ngāi Tama, at [97] and [171]; Closing Submissions for the Whakatōhea Māori Trust Board, 21 October 2020, at [25]; and Closing Submissions of the Whakatōhea Kotahitanga Waka Claimants, 19 October 2020, at [99](d), [116](a) and [120].

¹¹⁴ Notably Ms Kahukore Baker who stated she had read the evidence of Ms Simpson but on questioning, could not recall key aspects of Ms Simpson's evidence in respect of Ōhiwa (Transcript, 29 September 2020, p 54 to 56, **[[107.03673-03675]]**) and cross-examination of Ms Maude Edwards (Transcript, 1 October 2020, p 31 to 34, **[[108.03928-03931]]**).

¹¹⁵ First affidavit of Leonie Te Aorangi Simpson, 1 May 2020, at [89]-[94] **[[203.01196-01198]]**.

also involved in Ōhiwa Harbour and around Ōhope Beach; Ms Simpson also clarified further that Ramari Stewart, who assisted with the practices following the stranding, is of Ngāti Hokopū descent).¹¹⁶

- (b) Site visits in and around Ōhiwa with local authorities.¹¹⁷
- (c) Ngāti Awa's membership to the Ōhiwa Implementation Forum.¹¹⁸
- (d) Ngāti Awa's membership to Mai i Nga Kuri a Whareki Tihirau (the Bay of Plenty Regional Iwi Fisheries Forum).¹¹⁹
- (e) Ngāti Awa's involvement in the mussel restoration project led by Dr Kura Bourke (who is of Ngāti Awa descent).¹²⁰
- (f) Like Te Ūpokorehe, Ngāti Awa has its own environmental management plan (Te Mahere Whakarite Taiao o Ngāti Awa) that has extensive commentary on Ōhiwa Harbour and its importance for Ngāti Awa.¹²¹

CMT 2 should be upheld (as the Court of Appeal accepted)

48. Ngāti Awa accepts shared customary interests as between Ngāti Awa, Te Whakatōhea and Te Ūpokorehe and has maintained those tatau pounamu reached between Te Kepa Toihau and Titoko in 1857¹²² and then the subsequent agreement in 1991 between the rangatira of Ngāti Awa and Whakatōhea.¹²³ Whilst

¹¹⁶ Oral testimony of Ms Leonie Simpson, Transcript, 6 October 2020, p 27 and 28 **[[108.04300-04301]]**.

¹¹⁷ Oral testimony of Ms Leonie Simpson, Transcript, 6 October 2020, p 28 **[[108.04301]]**.

¹¹⁸ First affidavit of Leonie Te Aorangi Simpson, 1 May 2020, at [93](b) **[[203.01196-01198]]**.

¹¹⁹ Oral testimony of Ms Leonie Simpson, Transcript, 6 October 2020, p 64, from line 25 **[[108.04437]]**.

¹²⁰ Cross-examination of Kahukore Baker, Transcript, 29 September 2020, at page 53-54 **[[107.03672-03673]]**.

¹²¹ First affidavit of Leonie Te Aorangi Simpson, 1 May 2020, LTS-3 **[[317.07177]]**.

¹²² Exhibit LTS-11, Hirini Moko Mead and Te Roopū Whakaemi Kōrero o Ngāti Awa, Whenua Tautohetohe: Testing the Tribal Boundaries, Research Report No. 13, June 1995 **[[317.07639]]**.

¹²³ Exhibit RR - Te Runanga o Ngati Awa - "Motion That the boundary between Whakatohea and Ngati Awa..." **[[502.00542]]**.

Te Ūpokorehe has attempted to play down the significance of this later agreement, and its genesis, it was significant and those who signed it at the time were clearly all rangatira of Ngāti Awa, Whakatōhea and Te Ūpokorehe.¹²⁴ As acknowledged by the Pūkenga in their Report to the Court, this is an example of tikanga in practice.¹²⁵

49. Finally, if the evidence on the record is clear that groups shared an area to the extent of meeting the test for CMT under the MACA Act, it cannot be the case that one party can essentially thwart recognition based on their own contemporary views. The evidence needs to be assessed against the tests under the MACA Act and, if parties jointly meet those tests, then shared exclusivity is made out and a joint CMT can be awarded. Ngāti Awa says that is what can be confirmed with respect to the award of CMT to Ngāti Awa, Te Whakatōhea and Te Ūpokorehe in the Ōhiwa Harbour.

RELIEF

50. Ngāti Awa seeks:
- (a) Issue 1: Te Kāhui’s interpretation of the MACA Act to be preferred by the Supreme Court (noting the additional submissions made by Ngāti Awa at [9]).
 - (b) Issue 2: This Court to uphold the Court of Appeal’s judgment ordering a rehearing of CMT 1. However, if this Court sought to substitute the Court of Appeal’s decision for its own:
 - (i) Ngāti Awa seeks orders overturning the finding that ngā hapū o Te Whakatōhea and Te Ūpokorehe met the test for CMT in the Disputed Area and amending the area jointly held by ngā hapū o Te Whakatōhea and Te Ūpokorehe to start at Te Rae o Kanawa (at the Ōhiwa Harbour

¹²⁴ As accepted through cross-examination of Ms Maude Edwards, see Transcript, 1 October 2020, p 28 and 29 **[[108.03925-03926]]**.

¹²⁵ Pūkenga report, at [vi], p 14 **[[101.00542]]**.

mouth) to Tarakeha, and granting Ngāti Awa CMT on an exclusive basis in the Disputed Area.

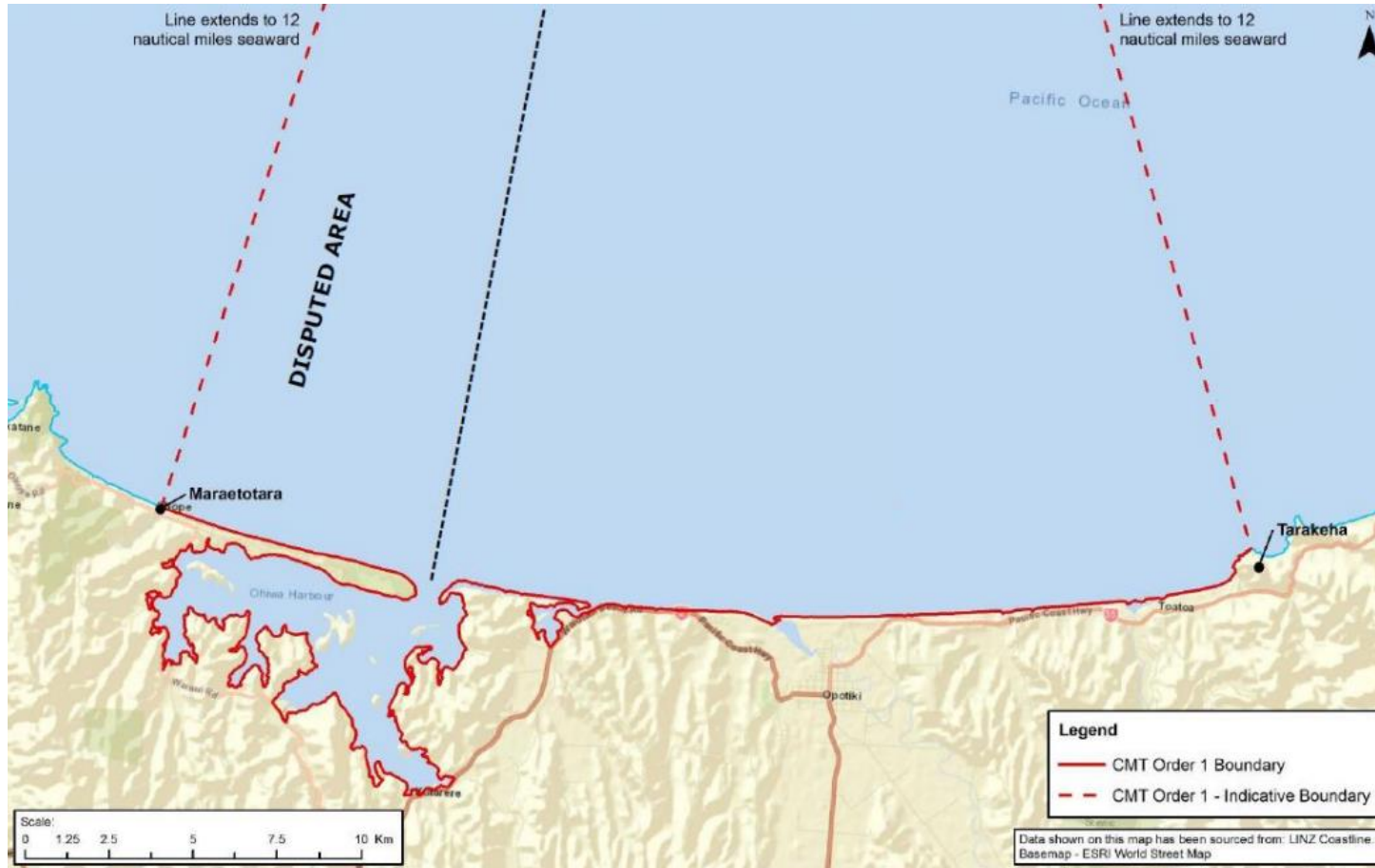
- (ii) In the alternative, if the Court concludes that the CMT test was met by Te Whakatōhea, Te Ūpokorehe and Ngāti Awa, orders are sought to include Ngāti Awa in the Disputed Area between the point the High Court refers to as the mouth of the Maraetōtara Stream to Te Rae o Kanawa (at the Ōhiwa Harbour mouth) on a shared exclusivity basis.¹²⁶
- (c) Issue 3: This Court to uphold the Court of Appeal's judgment with respect to CMT 2 (Ōhiwa Harbour) being held on a shared basis between Ngāti Awa, Te Whakatōhea and Te Ūpokorehe.

DATED this 18th day of October 2024

D M Salmon KC / H K Irwin-Easthope / R K Douglas
Counsel for Te Rūnanga o Ngāti Awa

¹²⁶ This is not Ngāti Awa's preference, as its evidence is that Ngāti Awa alone hold the Disputed Area in a manner that warrants a grant of CMT but Ngāti Awa accept that is ultimately the Court's decision based on the evidence before it and applying that evidence to the s 58 test.

APPENDIX – DISPUTED AREA



AUTHORITIES

Legislation

1. Marine and Coastal Area (Takutai Moana) Act 2011

Cases

2. *Peter Hugh McGregor Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239
3. *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433
4. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801
5. *Wairarapa Moana ki Pouākani v Mercury NZ Limited* [2022] NZSC 142, [2022] 1 NZLR 767
6. *Whakatōhea Kōtahitanga Waka (Edwards) & Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2023] NZCA 504, [2023] 3 NZLR 252
7. *Whakatōhea Kōtahitanga Waka (Edwards) & Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2023] NZCA 644