

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 IRA O WAIOWEKA**
(CIV-2017-485-299)
Kaitono pira tuatahi/First Appellant

RĀTOU KO **NGĀTI PATUMOANA**
(CIV-2017-485-253)
Kaitono pira tuarua/Second Appellant

KO **NGĀTI RUATAKENGA**
(CIV-2017-485-817)
Kaitono pira tuatoru/Third Appellant

KO **NGĀI TAMAHUA**
(CIV-2017-485-262)
Kaitono pira tuawhā/Fourth Appellant

First to Fourth Appellants jointly
appealing as **TE KĀHUI TAKUTAI MOANA O
NGĀ WHĀNAU ME NGĀ HAPŪ O TE
WHAKATŌHEA**

[...continued over page...]

**LEGAL SUBMISSIONS ON BEHALF TE RŪNANGA O NGĀTI AWA
AS AN INTERESTED PARTY**

4 October 2024



WHĀIALEGAL

H K Irwin-Easthope | R K Douglas
P 021 931 932 | 027 721 0144
E horiana@whaialegal.co.nz
rahera@whaialegal.co.nz
A PO Box 910, Wellington 6140

COUNSEL:
DAVEY SALMON KC
MILLS LANE CHAMBERS, AUCKLAND
TELEPHONE +64 21 974 873
davey.salmon@millslane.co.nz

ME

TE RUA RAKURAKU on behalf of Ngāti Ira o Waioweka

Kaiurupare tuatahi/First Respondent

JOHN HATA, TE RINGAHUIA HATA AND ANTOINETTE HATA on behalf of Ngāti Patumoana

Patumoana

Kaiurupare tuarua/Second Respondent

NGĀTI RUATAKENGA, hapū of Whakatōhea

Kaiurupare tuatoru/Third Respondent

TRACY FRANCIS HILLIER on behalf of Ngāi

Tamahaua hapū and Te Hapū Titoko o Ngāi

Tama

Kaiurupare/tuawhāFourth Respondent

PITA TORI BIDDLE AND KAREN

STEFANIE MOKOMOKO, on behalf of Te Uri o Whakatōhea Rangatira Mekomoko

Kaiurupare taurima/Fifth Respondent

TE UPOKOREHE TRUST CLAIMS TRUST

AND OTHERS on behalf of Te Upokorehe

Kaiurupare tuaono/Sixth Respondent

ME

TE RŪNANGA O NGĀTI AWA

(CIV-2017-485-196)

Hunga whaipānga/Interested Party

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SUMMARY OF ARGUMENT

*Waiho mā te whakamā e patu.
Waiho hai kōrero i a tātau kia atawhai ki te iwi.*

*Leave them for shame to punish.
Let us acquire fame by being merciful.*

1. This well-known Ngāti Awa whakatauākī highlights a traditional Ngāti Awa connection to Whakaari. An ancestor of Ngāti Awa, Te Tahī-o-te-rangi, was suspected of causing floods on the lowland crops. The people abandoned him on Whakaari. As their canoes disappeared from sight, Te Tahī summoned some friendly taniwha, one of which carried him back to the mainland shore. When the taniwha proposed that they overturn the canoes of the malefactors, Te Tahī uttered the whakatauākī.¹
2. These discrete submissions are on behalf of Te Rūnanga o Ngāti Awa (**Ngāti Awa**) as an interested party to Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea’s (**Te Kāhui**) appeal with respect to the sole ground concerning Whakaari and Te Paepae o Aotea. Ngāti Awa is a respondent to other appeals, including a further ground of Te Kāhui’s appeal, and will respond on those matters in accordance with the timetable on 18 October 2024.²

¹ Joint Brief of evidence of Tā Hirini Moko Haerewa Mead, Dr Hohepa Mason and Te Kei O Te Waka Wirihana Merito, 19 May 2020, at [117] **[[203.01234]]**.

² Ngāti Awa was also listed as an interested party to Te Kāhui’s appeal SC 129/2023 and confirms it does not have an interest in that appeal.

3. Ngāti Awa’s evidence, led by Ngāti Awa rangatira and pūkenga Tā Hirini Moko Mead, Dr Te Kei Merito and Dr Joe Mason, was that the moana surrounding Whakaari and Te Paepae o Aotea are shared areas as between the iwi of Mataatua (in this case, Te Whakatōhea, Te Whānau a Apanui and Ngāti Awa). In that regard, Ngāti Awa is supportive of Te Whakatōhea’s interests being recognised in Whakaari and Te Paepae o Aotea, alongside interests of Ngāti Awa and Te Whānau-ā-Apanui through an award of customary marine title (**CMT**) under the Marine and Coastal Area (Takutai Moana) Act 2011.

WHAKAARI AND TE PAEPAE O AOTEA

4. The question the Supreme Court has granted leave on in relation to Whakaari and Te Paepae o Aotea is:³

Did the Court misinterpret or disregard evidence of Whakatōhea’s connections to Whakaari and Te Paepae o Aotea when finding that Te Whānau-ā-Apanui had superior rights in the marine and coastal area around those places?

5. Ngāti Awa’s position on the question is that:
 - (a) Te Whakatōhea, Ngāti Awa and Te Whānau-ā-Apanui, as iwi of Mataatua, all have customary interests that meet the test for CMT in the common marine and coastal area surrounding Whakaari and Te Paepae o Aotea.⁴
 - (b) The Supreme Court could either determine the customary interests now through the award of a CMT, remit the matter back to the High Court for a re-hearing with guidance as to the application of the test for CMT, or dismiss the appeal (whilst continuing to preserve the rights of Ngāti Awa and Te Whānau-ā-Apanui).

³ Minute of Williams J, 4 July 2024, at [7(e)].

⁴ Acknowledging that Te Whānau-ā-Apanui does not seek to make a claim for Te Paepae o Aotea.

Te Kāhui appeal – ground two

6. Te Kāhui say that the Court of Appeal failed to:⁵
 - (a) reflect the context-specific sensitivity of tikanga, which will be attuned to the nature of the area in question and the relationship of iwi/hapu with it;
 - (b) properly understand and apply the principles of tikanga concerning taonga tuku iho of immense spiritual significance; and
 - (c) correctly understand and apply the evidence.
7. Ngāti Awa and Te Kāhui are largely aligned on the outcome sought in this ground of Te Kāhui's appeal.⁶ Te Kāhui have expressed Te Whakatōhea tikanga throughout their reasoning in relation to this ground of appeal, such that some points are not wholesale adopted as Ngāti Awa tikanga was expressed through their evidence presented at trial. For completeness, Ngāti Awa takes no issue with the way in which Te Kāhui has framed the issue at paragraphs [5.3]-[5.5] of their submissions,⁷ and Ngāti Awa endorses Te Kāhui's submission that there was no tikanga basis for concluding that Te Whānau-ā-Apanui have "mana" such that it would preclude other iwi sharing CMT at Whakaari.⁸
8. Ngāti Awa's evidence on Whakaari and Te Paepae o Aotea was primarily given by Ngāti Awa rangatira and pūkenga, Tā Hirini Moko Mead, Dr Te Kei Merito and Dr Joe Mason.⁹ Their joint uncontested evidence was:¹⁰

⁵ Submissions for Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea Appeal, 23 September 2024 (**Te Kāhui Submissions**), at [5.2].

⁶ Noting Ngāti Awa does not accept shared interests in Whakaari and Te Paepae o Aotea with Ngāi Tai, of Tainui Waka, which is explained at paragraph [13].

⁷ Aside from the inclusion of Ngāi Tai.

⁸ Te Kāhui submissions at [5.17].

⁹ Joint Brief of evidence of Tā Hirini Moko Haerewa Mead, Dr Hohepa Mason and Te Kei O Te Waka Wirihana Merito, 19 May 2020, **[[203.01203]]**.

¹⁰ Joint Brief of evidence of Tā Hirini Moko Haerewa Mead, Dr Hohepa Mason and Te Kei O Te Waka Wirihana Merito, 19 May 2020, at [115]-[118] and [128], **[[203.01234]]** and **[[203.01236]]**.

Ngāti Awa hold strong connections to Whakaari (White Island). Whakaari was held by Ngāti Awa Rangatira Wepiha Apanui and Te Keepa Toihau and was subsequently awarded by the Native Land Court to Retireti Tapsell and Katherine Simpkins (his wife) following an examination in the Native Land Court of purported ownership rights transferring to Tapsell. Our kōrero, supported by our research, confirms that this transaction was unlikely to have been one that took the form of a transfer of property but rather an allowance to use the land. Whakaari remains in private ownership.

Historically, our people used Whakaari as a source of resources (e.g. for bramble sharks and birds).

There is also a well-known Ngāti Awa whakatauki connected to Whakaari. An ancestor of Ngāti Awa, Te Tahī-o-te-rangi, was suspected of causing floods on the lowland crops by his magic. Therefore, the people abandoned him on Whakaari. As their canoes disappeared from sight, Te Tahī summoned some friendly sea monsters, one of which carried him back to the mainland shore. When the sea monsters proposed that they overturn the canoes of the malefactors, Te Tahī uttered the following saying:

*Waiho mā te whakamā e patu. Waiho hai korero i a tatau
kia atawhai ki te iwi.*

*Leave them for shame to punish. Let us acquire fame by
being merciful.*

We continue to exercise mana over Whakaari and Ms Simpson's evidence details this further. In particular, we were actively involved in leading the response to the recent and tragic Whakaari eruption.

...

Whakaari is another example of an area that in our view is exclusively in the domain of the Mataatua iwi. Ngāti Awa asserts significant mana in relation to the island and the moana surrounding it but the sharing of it with our Mataatua whanaunga is reflected in the outcome of the Ngāti Awa application to the Maori Land Court.

9. The uncontested evidence of the pūkenga also spoke of the "considerable significance" of Te Paepae o Aotea for all Mataatua.¹¹ Ngāti Awa made the application to the Māori Land Court to confirm the status of Te Paepae o Aotea as a Māori Reservation as the Government had previously been using the rocks for target practice.¹² Those Ngāti Awa rangatira involved

¹¹ Joint Brief of evidence of Tā Hirini Moko Haerewa Mead, Dr Hohepa Mason and Te Kei O Te Waka Wirihana Merito, 19 May 2020, at [119], **[[203.01235]]**.

¹² Joint Brief of evidence of Tā Hirini Moko Haerewa Mead, Dr Hohepa Mason and Te Kei O Te Waka Wirihana Merito, 19 May 2020, at [120], **[[203.01235]]**.

ensured that the orders ultimately made by the Māori Land Court included all Mataatua; the land was vested in Toroa and it was set aside as a reservation for all the iwi of Mataatua.¹³

10. Dr Merito presented evidence in person on behalf of the Ngāti Awa pūkenga at the High Court trial. There was no cross-examination of Dr Merito in relation to the evidence given on Whakaari or Te Paepae o Aotea.¹⁴
11. Leonie Simpson, the previous Manahautu (Chief Executive) of Ngāti Awa, also gave evidence on both Whakaari and Te Paepae o Aotea. Ms Simpson's evidence:
 - (a) Annexed a number of historical reports completed over the years that addressed Ngāti Awa's connection to their moana, including Whakaari and Te Paepae o Aotea.¹⁵
 - (b) Provided detail of modern-day Ngāti Awa connections with Whakaari, including the previously run White Island Tours, a subsidiary of Ngāti Awa Group Holdings Ltd (the commercial subsidiary company of Te Rūnanga o Ngāti Awa) which had an exclusive landing license for sea-based tours to Whakaari.¹⁶
 - (c) Confirmed that Ngāti Awa tōhunga placed a rāhui following the 2019 eruption encompassing the

¹³ Joint Brief of evidence of Tā Hirini Moko Haerewa Mead, Dr Hohepa Mason and Te Kei O Te Waka Wirihana Merito, 19 May 2020, at [122], **[[203.01235]]**; Affidavit of Leonie Te Aorangi Simpson on behalf of Te Rūnanga o Ngāti Awa, 1 May 2020, at [53]-[54], **[[203.01186-01187]]**.
¹⁴ Stage 1 Hearing Transcript (Part 7 of 7): 1-9 October 2020 **[[108.04283-04295]]**.

¹⁵ Affidavit of Leonie Te Aorangi Simpson on behalf of Te Rūnanga o Ngāti Awa, 1 May 2020 **[[203.01167]]**; Exhibit LTS-15 Richard Boast, Whakaari (White Island) and Moutohorā (Whale Island): A report to the Waitangi Tribunal **[[319.08464]]**; Exhibit LTS-20 David Armstrong and Brent Parker, Whakaari (White Island) **[[321.09481]]**; Exhibit LTS-24 Selection of Media Releases regarding rāhui following Whakaari eruption **[[321.09537]]**.

¹⁶ Affidavit of Leonie Te Aorangi Simpson on behalf of Te Rūnanga o Ngāti Awa, 1 May 2020, at [57], **[[203.01187]]**.

Whakatāne, Ōhope and Ōhiwa coastlines, and Rurima, Moutohorā and Te Puia o Whakaari islands.¹⁷

- (d) Explained that Ngāti Awa played a lead role, alongside civil defence and other partners, in the response to the 2019 Whakaari eruption including by providing accommodation, food, financial, social and cultural support to victims, their families and the wider community.¹⁸
- (e) Confirmed that the official name of Te Paepae o Aotea was “Volkner Rocks” for a number of years. This was changed through the Ngāti Awa Treaty of Waitangi Settlement.¹⁹ Ngāti Awa applied to the Māori Land Court in the 1990s to confirm that Te Paepae o Aotea was Māori Land.²⁰

12. Ngāti Awa’s tikanga and customary evidence made it clear that their historical and contemporary tikanga connections to Whakaari and Te Paepae o Aotea were strong and met the test for CMT. Ultimately, Churchman J in the High Court determined that it was unnecessary for him to determine the strength of either Ngāti Awa’s or Te Whānau-ā-Apanui’s claims due to the positions taken by the parties at the High Court and his findings in relation to Te Whakatōhea and Ngāi Tai.²¹ Ngāti Awa’s wish to continue with its claims to Whakaari was preserved.²²

¹⁷ Affidavit of Leonie Te Aorangi Simpson on behalf of Te Rūnanga o Ngāti Awa, 1 May 2020, at [59], **[[203.01188]]**; Exhibit LTS-24 Selection of Media Releases regarding rāhui following Whakaari eruption **[[321.09537]]**.

¹⁸ Affidavit of Leonie Te Aorangi Simpson on behalf of Te Rūnanga o Ngāti Awa, 1 May 2020, at [58], **[[203.01187]]**.

¹⁹ Affidavit of Leonie Te Aorangi Simpson on behalf of Te Rūnanga o Ngāti Awa, 1 May 2020, at [48(b)], **[[203.01185]]**; See also Ngāti Awa Deed of Settlement, clause 5.10.

²⁰ Affidavit of Leonie Te Aorangi Simpson on behalf of Te Rūnanga o Ngāti Awa, 1 May 2020, at [53]-[54], **[[203.01186-01187]]**.

²¹ *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 at [466]-[478], **[[05.00525-00527]]**

²² *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 at [478], **[[05.00527]]**.

13. Ngāti Awa oppose recognition of shared exclusivity to Whakaari and Te Paepae o Aotea with Ngāi Tai and Ririwhenua Hapū (of Tainui waka). It was also confirmed by Ms Muriwai Jones, the named applicant on behalf of Ngāi Tai and Ririwhenua Hapū, in answers to cross-examination by counsel in the High Court that Ngāi Tai did not seek CMT at Whakaari.²³ Ngāi Tai have not appealed the Court of Appeal decision, but this submission is made for completeness on the basis that Te Kāhui has submitted the application of shared exclusivity should include Ngāi Tai; this is opposed by Ngāti Awa on the basis that the evidence of the Ngāti Awa pūkenga was that Whakaari and Te Paepae o Aotea are taonga for Mataatua.

Position of Te Whānau-ā-Apanui

14. It is anticipated that Te Whānau-ā-Apanui will continue to assert primary interests in Whakaari such that a finding of shared exclusivity, even with Ngāti Awa, would be resisted by Te Whānau-ā-Apanui.
15. Ngāti Awa does not accept the Te Whānau a Ehutu interpretation that there was a customary tuku for Whakaari (as anticipated will be advanced by Te Rūnanga o Te Whānau). Mr Rikirangi Gage, the primary witness for Te Whānau-ā-Apanui on Whakaari, agreed that further discussion needed to be had between Ngāti Awa and Te Whānau a Ehutu.²⁴ The persons involved in the alleged tuku were also closely related, as Mr Gage's evidence highlights²⁵ (as well as Ms Simpson's evidence as to Ngā Ariki whakapapa lines).²⁶ In that regard, there is a different interpretation on

²³ Stage 1 Hearing Transcript (Part 7 of 7): 1-9 October 2020, Cross-examination of Muriwai Jones, 2 October 2020, p 8, from line 25 **[[108.04039]]**.

²⁴ Stage 1 Hearing Transcript (Part 7 of 7): 1-9 October 2020, Cross-examination of Te Kou Rikirangi Gage, 5 October 2020, p 51, from line 23 **[[108.04206-04208]]**.

²⁵ First Affidavit of Te Kou Rikirangi Gage, 21 February 2020, at [19]-[33] **[[203.01307-01309]]** and [40]-[46] **[[203.01310-01311]]**; Second Affidavit of Te Kou Rikirangi Gage, 31 July 2020 **[[203.01356]]**.

²⁶ Exhibit VV filed during Stage 1 Hearing, 06 November 2020, Te Rūnanga o Ngāti Awa - Whakapapa Chart beginning with Te Whānau a Apanui on left side **[[502.00554]]**.

the same set of facts available—namely that there was no tuku but that those persons Te Rangitukehu was referring to were all related primarily through Ngā Ariki whakapapa.²⁷ Ngāti Awa says this strengthens their connections and argument with respect to their customary interests in Whakaari.

RELIEF

16. Ngāti Awa’s legal position in relation to Whakaari and Te Paepae o Aotea is currently preserved, in that the High Court did not determine its claims and the Court of Appeal dismissed Te Kāhui’s appeal on Whakaari and Te Paepae o Aotea.²⁸
17. Ngāti Awa submits there are three options for the Court in terms of relief:
 - (a) Allow the appeal and make orders for CMT now: If the Court is minded to do this, Ngāti Awa respectfully submit that the evidence also supports a finding that Ngāti Awa jointly holds Whakaari and Te Paepae o Aotea with those iwi of Mataatua, namely Te Whakatōhea and Te Whānau a Apanui.
 - (b) Allow the appeal and remit the matter back to the High Court: Ngāti Awa’s interests would be preserved through this option.²⁹ Ngāti Awa would seek to participate in any re-hearing.
 - (c) Dismiss the appeal: Ngāti Awa’s interests would be preserved through this option.³⁰ Whakaari and Te Paepae o Aotea would therefore be heard in the

²⁷ Second Brief of Te Kou Rikirangi Gage, **[[203.01356]]**; Exhibit VV **[[502.00554]]**

²⁸ *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 at [478], **[[05.00527]]**. Noting the comment of the NZCA that “Te Whanau-a-Apanui have mana over Whakaari to an extent that precludes the other iwi sharing CMT there” despite Churchman J’s preservation of Ngāti Awa’s claims, *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 at [315].

²⁹ Ibid.

³⁰ Ibid.

context of Ngāti Awa's substantive application,
currently set down to be heard in May 2025.

DATED this 4th day of October 2024

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