IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC121/2023, SC123/2023, SC124/2023, SC125/2023, SC126/2023, SC128/2023, SC129/2023

BETWEEN	**WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) (SC121/2023)**
AND	**TE KĀHUI AND WHAKATŌHEA MĀORI TRUST BOARD AND OTHER RESPONDENTS**
AND	**WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) AND OTHER RESPONDENTS**

Cont

SUBMISSIONS FOR
TE TĀWHARAU O TE WHAKATŌHEA

Dated this 24thth day of October 2024

Counsel for Te Tāwharau o Te Whakatōhea certifies that, to the best of his knowledge, these submissions are suitable for publication.

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BETWEEN	**KUTARERE MARAE (SC124/2023)**
AND	**WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) AND OTHER RESPONDENTS**
BETWEEN	**TE ŪPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE ŪPOKOREHE IWI (SC125/2023)**
AND	**LANDOWNERS COALITION INCORPORATED AND OTHER RESPONDENTS**
BETWEEN	**ATTORNEY-GENERAL (SC126/2023)**
AND	**LANDOWNERS COALITION INCORPORATED AND OTHER RESPONDENTS**
BETWEEN	**NGĀTI IRA O WAIŌWEKA, NGĀTI PATUMOANA, NGĀTI RUATAKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) (SC128/2023)**
AND	**LANDOWNERS COALITION INCORPORATED AND OTHER RESPONDENTS**
BETWEEN	**NGĀTI RUATAKENGA (SC129/2023)**
AND	**CHRISTINA DAVIS ON BEHALF OF NGĀTI MURIWAI HAPŪ AND OTHER RESPONDENTS**

Introduction

1. These Submissions contextualise the participation of the Te Tāwharau o Te Whakatōhea ("Te Tāwharau") within this stanza of these multifaceted proceedings. The application was initially made by the Whakatōhea Maori Trust Board, however, with the passing of the Whakatōhea Claims Settlement Act 2024, the Trust Board was dissolved and Te Tāwharau o Te Whakatōhea subrogated for the Trust Board.[1]

2. Te Tāwharau are a respondent to all appeals made to this Court.

3. Like the Trust Board, Te Tāwharau is a hapu based iwi organisation upon which, its 6 iwi have 2 representatives. Provision is also made for 4 general represenatives, however the majority of representation is through the hapu.

4. Provision is made to allow for an increase of hapu, however, this is with the consensus of those hapu currently represented.

5. The Trust Board application was made protectively, to ensure that any hapu that had not applied did not miss out. As the proceedings progressed the application was refined to support the inclusion of the following hapū within titles granted within the Whakatōhea rohe:

    a. Ngāti Ngahere;

    b. Ngāti Patumoana; and

    c. Ngāti Ruatakenga.

6. Ngāti Ruatakenga have in all proceedings been separately represented. They are an interested party in their own right, however, due to confusion around the parallel processes to address these claims, an application was made to negotiate but no application was made to the Court. To the extent that submission filed for Ngāti Ruatakenga assert a presence within any title and as rights holders, with representation that is appointed transparently and held accountable to the hapū, they are supported by Te Tāwharau.

[1] SS 180 and 191 Whakatōhea Claims Settlement Act 2024.

Approach of these Submissions and Overarching Position of Te Tāwharau

7. As these submissions are filed late, I have had the opportunity to consider what has been filed by others. The statutory framework and its application has been set out extensively in the submissions of others. Retraversing that ploughed ground at this stage would look like (and probably end up being) a sad attempt to cut and paste the arguments already made by others representing Whakatōhea interests.

8. Rather than rehearsing those arguments, these submissions will seek to provide some high level context to the participation of the Trust Board and now Te Tāwharau within these proceeedings which at its heart seeks to emphasize the ongoing collective exercise of mana by the hapu of Whakatōhea within the rohe. Where necessary, particular approaches that are opposed will be signalled.

9. Te Tāwharau supports the submissions made by other Whakatōhea parties to the extent that they challenge the Attorney Generals interpretation of the recognition test.

10. Te Tāwharau also support the submissions that have been made by Whakatōhea parties relating to the recognition of CMT within navigable rivers in the coastal marine area.

11. Te Tāwharau also take no issue as to the issues that have been raised around the shape of the representation of title holder. The most important thing is that the hapu are represented and the the title is held collectively.

12. Whether or not that is a single title held collectively by the hapu or one title held by the iwi on the basis of hapu representation, it is submitted that practically, we end up in the same place.

13. Te Tāwharau signal that they do have issues about representation as it relates to the High Court's grant of the Ngāti Patumoana hapu title to an individual that refuses to engage with her hapu, however, that is the subject of a separate appeal before the Court of Appeal.

14. Te Tāwharau maintains the position that Te Upokorehe are a hapu of Te Whakatōhea and their attempts to withdraw themselves from the tribal

fabric and exclude Ngāti Ngahere from areas on the basis of its lack of participation within a Court process as part of an effort to fragment the iwi and were rightfully rejected by all Courts[2] and indeed everyone else.

Preliminary Issues

15. A brief exerpt from the summary of the historic account captured in the Whakatōhea Claims Settlement Act 2024[3] is provided to place these applications within a context of consideration.

16. Whakatōhea raNgātira signed Te Tiriti o Waitangi on 7 May 1840. By 1864, they were thriving in all respects having built infrastructure and political organisations to deal with economic and social change.

17. In 1865, Crown forces invaded the Whakatōhea rohe adopting a scorched earth policy destroying the Whakatōhea economy and infrastructure. Their people were subjected to attrocities, non-combatants were killed, their raNgātira were killed while in custody, the bodies of their raNgātira were desecrated in front of the iwi and were then taken with an intention to offend the iwi. At Te Tarata they suffered from a calvary charge and those that were killed were placed into an unmarked mass grave.

18. In 1866, the raNgātira Mokomoko was convicted and executed for a murder that he is deemed to have never committed.[4]

19. The Crown invasion and land confiscation was part of a raupatu that ethnically cleansed Whakatōhea from their rohe forcing a translocation onto the Opape and Hiwarau Maori Reservations.

20. This summary of early contact is not provided in an effort to rerun the settlement process by Te Tāwharau in any means, however it does provide a context to what follows in the 154 year Whakatōhea pursuit of justice for attrocities inflicted on an innocent tribe.

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[2] Court of Appeal Decision at para [288]
[3] SS 8 and 9 Whakatōhea Claims Settlement Act 2024
[4] See Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013
Te Ture mō Mokomoko (Hei Whakahoki i te Ihi, te Mana, me te Rangatiratanga) 2013, and s407 Crimes Act 1961.

21. Importantly, various arms of the judiciary, and their treatment of Whakatōhea feature within the long list of greivances that have been imposed on their people.

22. Courts such as the Compensation Court, the Native Land Court , Old Land Claims Commissions which were purportedly established to compensate maori or recognise the interests of Whakatōhea were imposed in a way that diminished and erode the ability of Whakatōhea to exercise raNgātiratanga and have individualised and fragmented the iwi and its hapu.

23. The waves of statutory development and interpretation promising a restoration of rights that have followed have instead ensured a creeping confiscation of the substance of raNgātiratanga over their while recognising rights and interests over a reconstructed illusory shadow of what was once held.

24. The Attorney General submissions reflect this paradigm by asserting the second limb be read as an insurmountable hurdle that the Court of Appeal categorised as 'exingushment by side wind'.[5]

25. Also signifincant is that as these applications have come before this Court, uri of Whakatōhea sit on both sides of the appeals, fighting against each other for representational rights or asserting to exclude others based on relative strengths of interests within the rarified atmospheres of the court room removed from the Whakatōhea institutions of authority.

26. This highlights that the adverserial nature of these 'restorative' processes, pitting those seeking the recognition of rights against each other, while non participation resulted in a non-recognition and then an extinguishment of rights and interests.

27. The Attorney-General asserts that non-recognition is not extinguishment. It is in this regard that the parallels with the Native Land Court are important to consider given the acknowlegement by the Crown that the land tenure system imposed under the Native Land Laws forced Whakatōhea bo participate in the Native Land Court process that was the only means to

[5] Submissions On Behalf of The Attorney-General on Appeal dated 20 September 2024 para [18]

obtain 'legally recognisable' title that was protected from the claims of others.[6]

28. Te Tāwharau have been asked to fund both sides of this internecine conflict in pursuit of the illusion of raNgātiratanga created within a process that has been imposed upon Whakatōhea by the Crown.

29. That the High Court created winners and losers within a paradigm of successful and unsuccessful Whakatōhea applicants perhaps highlights this best and it is against this backdrop that attention is directed to the stark parallels between this process and that of the prejudicial Native Land Court.

Tensions within the Statutory Framework

30. The inconsistencies highlighted above are inherent within the statutory framework that this Court must now deal with. It is theses inconsistencies which create significant tensions within its interpretation and create ambiguity within the purported intention and purpose of the Act..

31. As the Court of Appeal reflects, the Act makes it clear that tikanga is primary to the consideration of application, whether that related to the exercise of *mana tuku iho* and the way that connections are 'held' or seen to be 'interupted'.[7]

32. The Court of Appeal, however, also found that the recognition of mana tuku iho in accordance with tikanga, is translated within the framework to forms of statutory entitllement which do not amount to ownership and are subject to the public having certain rights.[8] In transforming the rights, the Court of Appeal found that:

> holder of CMT does not have many of the rights that are commonly associated with ownership of land, and does not have some of the rights that (on the evidence before us) seem likely to have existed as a matter of tikanga in some parts of the foreshore and seabed as at 1840.[9]

[6] S9(20) Crown Acknowledgements, Whakatōhea Claims Settlement Act 2024
[7] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 [Court of Appeal Decision] at] at [435(a)] per Cooper P and Goddard J.
[8] Court of Appeal Decision at [p385]- [387]
[9] Court of Appeal Decision at [387]

33. The Court of Appeal goes on to note that the new statutory rights don't even reflect the content of customary rights, they just provide a voice, and not a decision making one.[10]

34. In a sense, tikanga is important at the begining but then is removed at the end.

35. Reflecting on the submissions made for the Attorney General suggests that an applicant needs to show more than a 'relevant connection' that amounts to more than use and occupation to obtain a right that provides a voice.

36. It is difficult to reconcile how the Attorneys reading of the scond limb can achieve the purposes of recognising mana tuku iho exercised in the marine and coastal marine area by maori.

37. It therefore follows that such a reading would necessarilly result in an extinguishment by sidewind, which ought to be avoided at all costs.

Ngāti Ngahere

38. Ngāti Ngahere chose not to acitvely participate in the process on the basis that the intricate relationships that connect the people of Whakatōhea to the moana rely on the coming together of the independant interests of its constituent hapu. The relevant example that highlights this best is perhaps the origin of Ngāti Patumoana and Ngai Tamahaua.

39. So while Ngāti Ngahere might not have been exceptionally active in their participation, it cannot be said that they are absent in the process. They were part of an application, were reflected in evidence and were recognised the recomendations of the Pukenga and ultimately in the findings of the High Court and the Court of Appeal which rejected a claim by Upokorehe to have them excluded.[11]

40. Each hapu unique in itself and in their respective standing and perspectives, yet inseparably linked within a tapestry of relationships that come together in a Poutarawhare in which the Pukenga suggested for a title which was reflected in the Stage 1 finding. This was reflective of the

[10] Court of Appeal Decision at para [389]
[11] Court of Appeal Decision at para [288]

Whakapapa charts referred to in the Court by Mr Teriaki Amoamo which highlight an interconnectedness and interdependance within the hapu and iwi.

41. Counsel for Te Upokorehe seeks to rely on a word count throughout the record to assert a lack of Ngāti Ngahere interest. The tabulation of evidence, however, does the inverse of what counsel for Te Upokorehe seeks to do and shows 18 pages of Ngāti Ngahere referenced interest reflected in the evidence, including, significantly, the description of the Whakatōhea rohe by Hoeroa Horokai before the Sim Commission.

42. Much of this evidence was not challenged in cross examination.

43. In short, nobody has taken the submission to exclude Ngāti Ngahere from the Whakatohea fabric seriously. Neither should this court.

To Remit CMT1 but not CMT2

44. The Court of Appeal's decision to remit CMT1 and not CMT2 on its face could look irrational and suggest that an internal inconsistency of approach has been adopted.

45. When considering the Te Upokorehe appeal however, the approach is somewhat understandable. Notwithstanding that Te Upokorehe received lands in the Opape Native Reserve, Te Upokorehe Treaty Claims Trust appealed the inclusion in a shared CMT asserting that it opposed the inclusion of Te Upokorehe:

> on an order from Maraetōtara in the west to Tarakeha in the east when they only sought an order from Maraetōtara in the west to the Waiōweka River in the east.[12]

46. To be clear, Te Tāwharau supports the inclusion of Te Upokorehe within the wider Whakatōhea CMT rohe on the basis that respective areas can be sorted internally.

47. This is, however, a case of having to be careful with what you ask for because you just might get it. Te Upokorehe Claims Trust asked for the opportunity to extract Te Upokorehe from CMT1 and the Court provided it.

[12] Para 36 Synopsis of Submissions for Te Upokorehe Treaty Claims Trust Dated: 16 December 2022

48. Nobody on the other hand sought to be removed from CMT2 and the Court dismissed appeals relating to it. On that basis, it would be somewhat impractical to order a rehearing over a topic in which the appeal was dismissed.

Whakatōhea Connections to Whakaari

49. Te Tāwharau support the inclusion of Whakatōhea within any CMT surrounding Whakaari. The island sits within the application that was made by the Trust Board and evidence in support was given by Mr Amoamo and Mr Robert Edwards.

50. Submissions made by Whakatōhea parties are supported in this respect.

51. Te Tāwharau consider that the Court of Appeal seems to have formed a perception of a superiority of relative interest for Te Whanau a Apanui which derived from a transaction that Whakatōhea took no part in.[13] It is difficult to see how this is a relevant consideration in a determination that would extinguish Whakatōhea interest. While superiority of interest could show a reason for inclusion in a title, however, as the strengths of interest wax an wane through the rohe the granting of shared titles shows that collectivity can still exist. It shouldn't, therefore, necessarilly be a reason for exclusion of interest, especially within the context of a recognition of resource usage rights surrounding the islands.

52. The application in this area is hard to deal with given that Te Whanau a Apanui were not pursuing their application in this proceeeding, rather, they were participating to exclude the recognition of others.

53. Te Tāwharau support the appeals relating to the exclusion of Whakatōhea from this area.

Concluding Comments

54. It is important that this Court does not interpret the legislative regime in a way that echoes past judicial bodies that have operated to cause great prejudice to Whakatōhea.

[13] Court of Appeal Decision at para [312]

55. To do so would revisit the travesty of the past in a new and contemporary way.

56.

24th day of October 2024

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