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

SC 121/2023
SC 123/2023
SC 124/2023
SC 126/2023
SC 128/2023
SC 129/2023

BETWEEN **Whakatōhea Kotahitanga Waka (Edwards)**

Appellant (SC 121/2023)

AND **Christina Davis, on behalf of Ngāti Muriwai Hapū**

Appellant (SC 123/2023)

AND **Barry Kiwara, on behalf of Kutarere Marae**

Appellant (SC 124/2023)

[Cont.]

SUBMISSIONS OF TE UPOKOREHE TREATY CLAIMS TRUST AS RESPONDENT

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COUNSEL FOR TE UPOKOREHE TREATY CLAIMS TRUST
CERTIFY THAT, TO THE BEST OF THEIR KNOWLEDGE, THESE SUBMISSIONS ARE SUITABLE FOR PUBLICATION

AND	**The Attorney-General**
	Appellant (SC 126/2023)
AND	**Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea**
	Appellant (SC 128/2023)
AND	**Ngāti Ruatakenga**
	Appellant (SC 129/2023)
AND	**Te Upokorehe Treaty Claims Trust**
	Respondent

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TĒNĀ, E TE KŌTI

I. Introduction

1. In addition to being appellant in SC125/2023, Te Upokorehe Treaty Claims Trust, on behalf of Te Upokorehe, are respondents in the following appeals:

   a. SC121/2023 Whakatōhea Kotahitanga Waka.

   b. SC123/2023 Ngāti Muriwai.

   c. SC124/2023 Kutarere Marae.

   d. SC126/2023 The Attorney-General.

   e. SC128/2023 Te Kāhui.

   f. SC129/2023 Ngāti Ruatakenga.

2. For clarity Te Upokorehe:

   a. Broadly **support** the first and second grounds of appeal by Te Kāhui (SC128/2023) and their submissions in support of that ground, except as qualified in these submissions. Te Upokorehe **oppose** the third ground of appeal.

   b. **Oppose** the appeal brought by the Attorney-General (SC 126/2023).

   c. **Do not take a position** on the appeals by Ngāti Ruatakenga (SC129/2023) or Ngāti Muriwai (SC123/2023).

   d. **Oppose** the appeals by Whakatōhea Kotahitanga Waka (SC121/2023) and Kutarere Marae (SC124/2023).

II. The Test for Customary Marine Title

3. Te Upokorehe agree with the submission for Te Kāhui that s 58(1) creates a single composite test which is best viewed as comprising three limbs or inquiries, [1] which make up a single test which must be interpreted as a whole. Below, each of these limbs are examined to

[1] Submissions for Te Kāhui Takutai Moana, 23 September 2024 at [4.1].

identify what Te Upokorehe say is the correct interpretation of the s 58 test.

A. Limb 1: S 58(1)(a) holds the specified area in accordance with tikanga

4. The essential first step for this limb is the identification of the system of tikanga in the area. Then, as Churchman J held in the High Court, "Whether a specified area can be said to be "held" in accordance with that tikanga, involves a factual assessment that will be heavily influenced by the views of those who are experts in tikanga".[2]

5. The majority of the Court of Appeal held that when interpreting and applying the first limb the focus should be on tikanga, with activities that show control or authority over the area being of relevance.[3] This limb will therefore be met where an applicant group:

   a. presently uses and occupies the area;

   b. in a manner consistent with the nature of that area; and

   c. has control or authority over the area according to their tikanga.

6. Te Upokorehe do not understand that any party takes issue with the Court of Appeal majority's determination concerning this limb. The Attorney-General broadly agrees with the majority interpretation of limb one;[4] while LCI considers that the section is sensibly read as giving primacy to tikanga.[5] Te Upokorehe agrees.

B. Limb 2: S 58(1)(b)(i): has exclusively used and occupied [the specified area] from 1840 to the present day

7. To assess whether the test has been met the Court of Appeal considered that the second limb required two further inquiries:

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[2] *Re Edwards Whakatōhea* [2021] NZHC 1025; [2022] 2 NZLR 772 at [131].
[3] *Whakatōhea Kotahitanga Waka (Edwards)* [2023] NZCA 504; [2023] 3 NZLR 252 at [401].
[4] Submissions of the Attorney General, 20 September 2024 at [37].
[5] Submissions by Landowners' Coalition Incorporated (Intervener) in Support of Appeal by attorney General 4 October 2024 [**LCI submissions**] at 3.20.

a. First, whether the customary rights in question existed at 1840 and were exercised by the applicant group.[6]

b. Secondly, whether the applicant group had exclusively used and occupied the area from the proclamation of British sovereignty to the present day, without substantial interruption.[7]

8. The focus of the dispute between the parties to this appeal is on the meaning of "exclusively used and occupied". This is addressed below. However, a preliminary issue is whether s 58(1) is a single test which must be read as a whole - as Te Upokorehe argues - or whether the test comprises two separate parts which require separate things of applicants. The "core submission" of the LCI is that s 58(1)(b) "is a separate and standalone requirement… explicitly *not* governed by analyses of 'in accordance with tikanga'".[8]

9. LCI also made this argument before the Court of Appeal, where Miller J did "not accept that the legislature intended to adopt this stark dichotomy"[9] and considered that "the concept of exclusive use and occupation must be viewed through the lens of tikanga, and not that of the common law alone".[10]

10. Te Upokorehe agrees with Miller J and say that tikanga must inform the reading of s 58(1)(b), as it does s 58(1)(a). It does not follow from the fact that s 58(1)(b)(i) does not contain the word "tikanga" that tikanga is irrelevant to that limb, or subservient to western proprietorial concepts. The limbs of the test need to be read together and in line with the context and purpose of the MACA Act as a whole.

11. Nor is tikanga mutually inconsistent with concepts of exclusivity as manifested through the exclusion of 'others'. Justice Miller showed

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[6] *Whakatōhea Kotahitanga Waka (Edwards)*, above n 3, at [419].
[7] Ibid at [426].
[8] LCI Submissions at 3.21.
[9] *Whakatōhea Kotahitanga Waka (Edwards)*, above n 3, per Miller J at [137].
[10] Miller J at [138].

exactly this through an analysis of exclusivity as a concept within tikanga.[11]

12. Tikanga incorporates principles similar to a proprietary holding within concepts including ahi kā (continuous occupation), and mana whenua (hapū authority over a place).[12] Exclusivity is a fundamental part of tikanga. A group may be considered to have ahi kā and mana whenua over an area, even in the face of disagreement from neighbouring groups.[13] Despite these exclusive concepts, multiple groups can hold an area in accordance with tikanga.[14]

13. Accordingly, Te Upokorehe say that LCI's submission must be rejected.

<u>Exclusive use and occupation</u>

14. In the High Court Churchman J rejected the argument that "exclusive use and occupation" requires an applicant to show an intention and ability to control the area against third parties, finding that the tests along these lines developed in the Canadian cases were inconsistent with the MACA Act and in particular with the notion of holding the area in accordance with tikanga.[15] His Honour also noted that: "English common law cases about possessory title relate to a concept very different to the much more limited property right conferred by CMT in the Act, let alone the concepts in tikanga Māori".[16]

15. The Court of Appeal considered that applicants must establish the existence of customary rights at 1840 through a "strong presence" in the application area at that time, evidenced by historical acts or incidents of occupation. In a departure from the High Court approach, both Miller J and the majority held that evidence of use of resources is not enough to

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[11] Miller J at [146]–[160].
[12] Law Commission *He Poutama* (NZLC SP 24, 2023) at 72.
[13] See *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843; [2022] 3 NZLR 601, and *Ngāti Whātua Orākei Trust v Attorney-General (No 5)* [2023] NZHC 74 at [55].
[14] *Bell v Churton* (2019) 410 Aotea MB 244 (410 AOT 244) at [62].
[15] *Re Edwards Whakatōhea*, above n 2, at [150].
[16] At [152].

meet the CMT test unless it is accompanied by additional evidence of control of the area.[17]

16. The Court of Appeal reached this conclusion despite evidence that in tikanga, rights of control are linked to resources and that the inquiry into CMT "must recognise resource boundaries".[18] Particularly for offshore areas, use of resources is an obvious way to evidence a holding at tikanga. Yet this approach affords much less weight to that evidence.

17. This change in approach makes the Court of Appeal's CMT test more difficult to meet than the approach in the High Court, particularly as applications move away from the mean high-water springs out to sea. As evidenced by High Court decisions since the Court of Appeal judgment, the CMT test is now more difficult to meet where applicants seek rights towards the 12 nautical mile limit.[19] Indeed, it might have been considered that the test was all but impossible to meet towards the 12 nautical mile limit but for the recent decision in *Re Jones on Behalf of Ngāi Tai Iwi*.[20] In that decision, Churchman J surveyed the evidence specific to the applicants and concluded that their CMT should extend to 12 nautical miles, as "any attempt to define a boundary short of the 12 nautical mile limit would be arbitrary and would have no connection with tikanga."[21]

18. Regardless, in Te Upokorehe's submission, the Court of Appeal's approach to this limb was in error.

19. First, Churchman J was correct that the Canadian jurisprudence is of limited assistance to the interpretation and application of the MACA Act due to the different historic and legislative contexts, the fact that the Canadian decisions concern dry land, and the role of tikanga in interpretation. In particular, the test for aboriginal title applied in the Canadian cases applies at the time at which the Crown asserted

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[17] *Whakatōhea Kotahitanga Waka (Edwards)*, above n 3, at [141] and [421]–[424].
[18] At [320].
[19] See the decision of Gwyn J in *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309 at [437] and [544], and of Cull J in *Ngā Hapū o Tokomaru Ākau* [2024] NZHC 682 at [422].
[20] *Re Jones on Behalf of Ngāi Tai Iwi* [2024] NZHC 1373.
[21] At [122].

sovereignty. It therefore requires the applicant group to show exclusive occupation and use *at the time of assertion of European sovereignty*, not at or up to the time their claim is made.[22]

20. There is no suggestion in the Canadian decisions that the existence of aboriginal title requires proof that the intention and ability to exclude others must have been maintained following the assertion of sovereignty. For this reason, these cases address a very different question. They do not support an interpretation of s 58 which requires the same test which in Canada is applied to a historical point in time to be rigidly applied without adaptation to a period spanning the entire post-sovereignty period up until the present day. On the contrary, on their proper reading, these authorities support an approach that reflects the custom of the applicant groups and the context within which they exercise their customary rights. As the majority judgment in *Delgamuukw* notes: "the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty".[23] Logically, where the relevant time period is not the time of sovereignty but the entire period *after*, the test must take into account the context of the aboriginal society across that time period, including the practical and legal constraints imposed by colonial society.

21. Secondly, Te Upokorehe agrees with the Te Kāhui submission that the Court of Appeal (particularly the majority) erred by focusing primarily on physical manifestations of control (i.e. the ability to exclude others insofar as the law allowed) and failing to give adequate weight to spiritual or cultural manifestations of control.

22. Te Upokorehe submits that spiritual manifestations of the intention or ability to control the application area— including rāhui but also an array of other spiritual practices and beliefs – must be weighed alongside physical manifestations and indeed it can be difficult to delineate the two.

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[22] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [155]-[156], [196]; *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257 at [47].
[23] At [156].

23. Australian decisions on native title and customary rights are relevant to the Court's task here.

24. In *Yanner v Eaton,*[24] a member of the Gunnamulla clan used a traditional form of harpoon to catch two juvenile estuarine crocodiles. He was charged with taking fauna contrary to the Fauna Act. He contended, and the Magistrate accepted, that he took the crocodile in exercise or enjoyment of his native title rights and interests and was protected by s 211 of the Native Title Act 1993. Evidence suggested that the taking of juvenile rather than adult crocodiles had "tribal totemic significance and [was based on] spiritual belief".[25] The Magistrate found that by those laws and customs, the appellant's clan and tribe had a connection with the land and waters where the crocodiles were taken.[26]

25. The case was appealed to the High Court of Australia, where it provided an opportunity for the Court to comment on the nature of Aboriginal customary rights. The majority found that native title rights and interests not only find their origin in Aboriginal law and custom, but they also reflect connection with the land. Thus, citing Brennan J in *R v Toohey; Ex parte Meneling Station Pty Ltd,* "Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights" but "traditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it."[27]

26. The majority considered that native title rights and interests "must be understood as what has been called 'a perception of socially constituted fact'". Further, they noted that "An important aspect of the socially constituted fact of native title rights and interests that is recognised by

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[24] *Yanner v Eaton* [1999] HCA 53; 201 CLR 351; 166 ALR 258; 73 ALJR 1518.
[25] At [4].
[26] At [33].
[27] At [37].

the common law is the spiritual, cultural and social connection with the land."[28]

27. Because of this spiritual, cultural and social connection, the majority went on to state that "regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land" and, further it "does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing."[29]

28. While this case was not addressing customary title, it usefully illustrates the importance of the spiritual, cultural and social dimensions to customary rights and the ability for a connection to land to be maintained through the exercise of spiritual and cultural practices.

29. The spiritual aspects of customary rights have also been considered in a number of Australian cases relating to native title. Several of these cases are cited by Miller J in his judgment, including *Griffiths v Northern Territory*[30] and *Banjima v Western Australia*.[31]

30. In *Banjima*, the Federal Court of Australia had to consider an application by members of the Banjima language group for a determination of native title under the Native Title Act 1993.[32] In opposition to the application, the State of Western Australia contended, among other grounds, that the claimants had not proved continuity of connection to the claim area, nor exclusive possession. The Court found that the claimants had since sovereignty maintained a relevant connection with their traditional country in accordance with and pursuant to their traditional laws and customs. Further, there was evidence from Banjima witnesses that strangers should ask permission before carrying out any activity on Banjima country and those who do not do so risk serious harm from the

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[28] At [38].
[29] At [38].
[30] [2007] FCAFC 178.
[31] [2015] FCAFC 84.
[32] *Banjima People v State of Western Australia (No 2)* [2013] FCA 868 at [1]. Native title is defined in s 223 of the Native Title Act 1993 and requires, inter alia, "a connection with the land or waters" and that "the rights and interests are recognised by the common law of Australia".

spirits in the country.[33] The Court held the risk of spiritual sanction for unauthorised entry was sufficient to establish exclusivity. Thus, native title existed.[34]

31. There is a direct analogy here with the relationship that Te Upokorehe have with the takutai moana. In the High Court, Te Upokorehe kaumatua and knowledge holder Wallace Aramoana gave evidence about his relationship to the lunar calendar and moana:[35]

> Growing up I was also taught how to navigate by using the stars. We would use the lunar calendar to conserve food depending on the lunar positions. Depending on where the sun rises in the sky, it would tell us what was going to be in season. If it rises over the land that tells us that the berries are in season and that we would need to gather food from the bush. I was taught to know the locations of the fish based on the stars too. I also know how to pinpoint particular wāhi tapu by the stars. It pays to live this way. It's what I teach my kids and I hope they teach it to their kids.
>
> We carry out rāhui over the harbour when they are required. It is often after a death in the sea. Sometimes, if the fish stocks get too low and depleted, we will have a rāhui then. The most recent rāhui we had, was after the tragedy on White Island. Our practice is to speak to the other Iwi about the rāhui and let them know when and for how long we are planning on doing a rāhui. The current rāhui we have in place over Ōhiwa Harbour has been in place for two and a half months and remained in place until 1 February 2020. We see it as a sign of respect for those who lost their lives on White Island.
>
> There are three reasons for having the rāhui for Te Upokorehe. The first is to respect the families of those

[33] At [681]-[690].
[34] At [7].
[35] Affidavit of Wallace Aramoana 24 February 2020 Tab 238; 202.00941 at [13]–[15].

> who lost their lives; the second is to acknowledge the tapu of the location where the death occurred; and the third is to clear away the tapu so that it's safe for people to return.

32. Mr Aramoana also spoke to the spiritual practices that mediate his interactions with the takutai moana:[36]

> I always karakia whenever I do anything in life, because I am very religious. When we go into the sea, I karakia. I also carry out a practice of miming on myself to belittle myself for Tangaroa. I see the sea as Tangaroa's and want to show him that I respect that. I know to leave my mana behind, and Tangaroa will protect me.

33. Te Upokorehe kaumatua Lance Reha echoed this sentiment in his evidence:[37]

> When I was young, I was taught about making your nets safe and having your fishing rods and lines being blessed because you are about to embark in the realm of Tangaroa, so you have to show respect for the moana. You do these practices before going out and they start on the whenua. You do a Karakia before you leave the land. You mimi (urinate) on items to reduce the tapu so that you're safe for Tangaroa, and to make your transition onto the moana safe.

34. These practices, and the fact that Te Upokorehe holds this knowledge, are relevant considerations for the Courts in determining CMT. Spiritual connections are also relevant to the relationship that Te Upokorehe have with the wāhi tapu in their rohe, in particular where applicants for wāhi tapu protections must show, under s 78(2) of the MACA Act, their connection with the wāhi tapu and that the proposed restrictions on access are necessary to protect the wāhi tapu.

35. Turning back to *Banjima,* evidence used to point towards the existence of traditional boundaries included that the group commonly cited

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[36] At [23].
[37] Affidavit of Lance Terence Horopapera Reha 25 February 2020 Tab 240; 202.00948 at [3].

mountain ranges as references that marked the transition from one language group identity to another.[38] Boundary information was knowledge had been "handed down from the forefathers".[39] In much the same way Te Upokorehe have handed down information concerning wāhi tapu, and the positioning of traditional markers to mark the location of fishery grounds and other resources.[40]

36. Finally, it is worth mentioning the *Akiba*[41] litigation which concerned a native title claim by Torres Strait Islanders over a large part of the Torres Strait. Given the claim related to a marine area it was necessary for the Court to grapple with how the applicants could establish the necessary "connection" with the area. The Federal Court on appeal upheld the findings of the primary judge that the necessary connection could be established based on evidence of use of the area and spiritual and cultural connections.[42]

37. While acknowledging the differences between the Australian law relating to native title and the MACA Act, Te Upokorehe submit that spiritual and cultural manifestations of control are relevant to a finding of exclusive use and occupation of the specified area.

38. This approach is consistent with Miller J's finding that the inquiry as to exclusivity "must be sensitive to the methods that were and are available to assert mana" and to "the practice of whanaungatanga and the existence of whakapapa linkages which mean that other groups may not have been physically excluded from the specified area but rather used its resources with permission—even if granted because of whanaungatanga or manaakitanga obligations—of the applicant group".[43]

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[38] At [184].
[39] At [188].
[40] Evidence of Maude Edwards, Te Upokorehe Cultural Report Transcript of Hearing 29 September 2020 at 106–107.
[41] *Commonwealth v Akiba* [2012] FCAFC 25.
[42] This aspect of the case was not in issue in the subsequent appeal to the HCA, *Akiba v Commonwealth* (2013) 250 CLR 209.
[43] *Whakatōhea Kotahitanga Waka (Edwards)*, above n 3, at [162].

39. Finally here, Te Upokorehe say the majority of the Court of Appeal were correct that regard must be had to how the Crown's exercise of kāwanatanga disrupted existing systems of take, and to the scheme and purpose of the MACA Act.[44] The majority suggested several relevant (and non-exhaustive) contextual factors at their paragraph [426]. In effect, this additional context means that applicant groups do not need to demonstrate an ability to physically exclude other people from coastal areas in circumstances where the law effectively deprived them of that ability.[45]

40. We now turn briefly to the substantial interruption inquiry.

C. Limb 3: Without Substantial Interruption

41. The MACA Act does not define 'substantial interruption'. In the High Court several matters were raised as potentially amounting to substantial interruption of the applicants' exclusive use of the takutai moana: raupatu; resource consents in the application area granted prior to 1 April 2011; permanent structures in the application area; and third-party use and occupation.

42. If the Court is persuaded that the first limbs of the test are met, the Court may draw an inference that the CMT test is met. This makes practical sense—to require otherwise means that applicants would be asked to, in essence, prove a negative.

43. If another party raises a potential substantial interruption, then the burden falls on that party to demonstrate that interruption.[46] The party raising substantial interruption must show, on the balance of probabilities, that either the group's connection with the area and control over it has been lost as a matter of tikanga, that their use and occupation was substantially interrupted by lawful activities in the area done

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[44] At [426].
[45] At [429].
[46] At [228].

pursuant to statutory authority, or the applicant group have ceased to have the necessary character to meet the test.[47]

44. Whether lawful activities disrupt the use and occupation of a group will depend on a factual inquiry into the nature and extent of the interruption.[48]

45. It is submitted that, once raised, this requires a careful, granular assessment of whether there has been a substantial interruption in fact. This must be a high bar to meet, coming as it does with the prospect of permanent loss of the possibility of gaining rights for iwi, hapū and whānau when a purpose of the MACA Act is to give legal expression to customary rights.

46. The majority of the Court of Appeal noted that they "found it exceptionally difficult to reconcile the text of s 58(1)(b) with the purpose of MACA",[49] and considered that the literal reading of the terms in the test would simply extinguish customary interests in many cases.[50]

47. The Court considered, convincingly, that it would be illogical if, to meet the CMT test, an applicant group would need to show rights that "extended to precluding access, navigation and fishing by settlers and others in order to qualify for statutory rights which do not confer that level of control over the area".[51] The Court therefore concluded that s 58(1)(b) "can and should be read as requiring that the applicant group's use and occupation of the area was not substantially interrupted by *lawful* activities carried on by others".[52]

48. This additional context means that, on the Court of Appeal's test, applicant groups do not need to demonstrate (under any of the three limbs of s 58) an ability to physically exclude others in circumstances where the operation of the law has deprived them of that ability,[53] nor

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[47] At [434].
[48] At [433].
[49] At [416].
[50] At [416].
[51] At [430].
[52] At [428].
[53] At [429].

will unlawful activities constitute interruption. Actions in breach of Te Tiriti o Waitangi, or of tikanga, may also, depending on context, fall into this category.[54]

49. Further, as the MACA Act allows for public rights of access, navigation and fishing, the majority considered such actions by third parties will not interrupt the customary rights that found CMT.[55]

50. This holds whether such third-party use was due to manaakitanga on the part of relevant groups, or as a result of "Anglocentric assumptions" by third parties about their right to do so that Māori were "unable to resist".[56]

III. Other Grounds or Appeals

A. Te Kāhui Third Ground of Appeal – CMT 1 Should Not Have Been Remitted

51. Te Upokorehe's submissions in support of their appeal set out why CMT 2 should have been remitted to be reheard, alongside CMT 1. Those submissions are relied on here and do not need to be repeated.

52. Te Upokorehe say that given the errors of fact and law that were made in determining *both* CMT 1 and CMT 2 the Court of Appeal was correct to remit CMT 1 for rehearing – the only error was not to also remit CMT 2.

53. Te Upokorehe has been very clear as to its claim to exclusive rights over its rohe throughout the hearings. The group does not accept the submission that it is impossible to delineate discrete territories held by different iwi or hapū in the rohe moana. A rehearing is required.

B. Whakatōhea Kotahitanga Waka (Edwards) (SC 121/2023)

54. The 'Whakatōhea Kotahitanga Waka' (**WKW**) appellants maintain that they alone have a mandate to progress an "iwi wide" application, and that, at [18.1]:

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[54] At [426].
[55] At [426].
[56] At [426].

> There is no evidence that any particular step has been taken by anyone over the two or more decades to end that mandate in accordance with tikanga.

55. This is incorrect. There is substantial evidence on the record which the WKW appellants have failed to engage with.

56. At all times Te Upokorehe has progressed their application individually, outside of the various 'clustering' of applicants that has taken place—the example of the WKW group being one. The record shows:

    a. There is no reliable evidence to show Te Upokorehe support for an "iwi wide" application in the first place. It is correct that Te Upokorehe kaumatua Charles Aramoana was one of the original signatories to the 1999 Māori land Court Claim. This is relied upon by the appellants without acknowledging (as was put to witnesses in the High Court) that Mr Aramoana withdrew Te Upokorehe support in September 1999.[57] The Court was alive to Mr Aramoana's actions, making reference to withdrawal of support, with Churchman J recording at footnote 4 that:

    > This application was originally signed by representatives of all Whakatōhea hapū including Mr Charlie Aramoana on behalf of Ūpokorehe although he withdrew his support on 7 September 1999.

    b. Adriana Edwards, the named applicant for the WKW application, was questioned on this point. Further, a letter from TUTCT to Ms Edwards dated 16 January 2016 was attached to the evidence of Te Upokorehe witness Maude Edwards.[58] This letter stated:

    > Te Upokorehe does not recognise your application, because it is in direct conflict with

[57] Cross-Examination of Tuwhakairiora Williams, Hearing Transcript 9 September 2020 at 38.
[58] 2020 Common bundle, Tab 432, 8260–8261.

> the mana whenua & mana moana of Te Upokorehe within our rohe.
>
> As Te Upokorehe holds mana whenua and mana moana, it is our right to progress our taku taimoana claim through either Crown engagement or through the High Court.
>
> Te Upokorehe lwi has instructed their legal counsel…to prepare a legal challenge to Adriana Edwards Seabed and Foreshore High Court application.

c. There is no evidence to show that, had a mandate been granted in the first place, it had been sustained. Te Upokorehe witness Kahukore Baker recorded in evidence in the High Court that:[59]

> At the Te Ūpokorehe May 2017 hui ā-iwi, a month after all Marine and Coastal Area Act applications had to be filed, Te Ūpokorehe was advised that a second application had been filed on our behalf.
>
> Te Ūpokorehe had no knowledge of this. The hui then advised that the application should be withdrawn, and a resolution was passed that, "The application TUTCT filed is the only application mandated by Te Ūpokorehe.

57. As submitted by Counsel for Te Upokorehe in closing submissions in 2020:[60]

> Te Upokorehe witnesses have been clear. Today, Te Ūpokorehe identify as an Iwi with five hapū, and five marae. There have been individuals of Te Ūpokorehe in support of

[59] Kahukore Baker, Hearing Transcript 9 September 2020 at 16.
[60] Final Closing Submissions for Te Upokorehe 7 December 2020 at [9].

other applications, but no other applicant group has claimed to represent Te Ūpokorehe as an individual entity, nor were the applicants challenged on this point.

58. If the WKW appellants considered that Te Upokorehe lacked mandate, the time to raise that was in the High Court in 2020. They failed to do so and cannot now seek to relitigate this matter in this Court. This appeal is founded on incorrect assertions as to evidence, and general dissatisfaction with the outcome of the decision in *Re Edwards Whakatōhea*. Their appeal should be dismissed.

C. Kutarere Marae (SC 124/2023)

59. Barry Kiwara, purportedly on behalf of Kutarere Marae, appeals the Court of Appeal determination that Kutarere Marae were not entitled to a CMT. The appeal appears to focus on the impact that this finding may have on a future direct engagement that Mr Kiwara may seek with the Crown under the Act.[61]

60. Justice Churchman, and Miller J after him, were perfectly entitled to weigh and assess the evidence that Mr Kiwara put forward in support of the application he has taken. Putting aside issues as to whether his application is brought as a whānau or a hapū grouping, it is Te Upokorehe tikanga that the marae are not able to make decisions about the mana whenua and mana moana of the lands outside the marae gates. This is because the mana whenua and mana moana there resides with Te Upokorehe, not Kutarere Marae. This tikanga was accepted by Mr Kiwara in cross-examination.[62] No evidence was provided by Mr Kiwara to show what support among Te Upokorehe, if any, he holds. Consequently, any decisions affecting the mana whenua and mana moana of Te Upokorehe lands and moana are made by Te Upokorehe

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[61] Submissions on Appeal for Ngāti Muriwai and Kutarere Marae 20 September 2024 at [72].
[62] Hearing Transcript, 7 October 2020 at 41.

as a whole. At tikanga, Kutarere Marae is not the appropriate group to hold an order under the MACA Act. The appeal should be dismissed.

Dated: 18 October 2024

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Counsel for Te Upokorehe Treaty Claims Trust

List of Authorities

<u>Cases</u>

New Zealand

1. *Bell v Churton* (2019) 410 Aotea MB 244 (410 AOT 244)
2. *Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupare ki Tokomaru* [2024] NZHC 682
3. *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843; [2022] 3 NZLR 601
4. *Ngāti Whātua Orākei Trust v Attorney-General (No 5)* [2023] NZHC 74
5. *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772
6. *Re Jones on Behalf of Ngāi Tai Iwi* [2024] NZHC 1373
7. *Re Ngāi Tūmapūhia-a-Rangi Hapū Inc* [2024] NZHC 309
8. *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504; 3 NZLR 252

Canada

9. *Delgamuukw v British Columbia* [1997] 3 SCR 1010
10. *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257

Australia

11. *Akiba v Commonwealth* [2013] 250 CLR 209
12. *Commonwealth v Akiba* [2012] FCAFC 25
13. *Banjima People v State of Western Australia (No 2)* [2013] FCA 868
14. *Banjima People v State of Western Australia* [2015] FCAFC 84
15. *Griffiths v Northern Territory* [2007] FCAFC 178
16. *Yanner v Eaton* [1999] HCA 53; 201 CLR 351; 166 ALR 258; 73 ALJR 1518

<u>Reports</u>

17. Law Commission *He Poutama* (NZLC SP 24, 2023)

<u>Statutes</u>

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