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

SC 121/2023

BETWEEN	**WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)** Appellants
AND	**TE KĀHUI AND WHAKATŌHEA MĀORI TRUST BOARD, NGĀI TAI AND RIRIWHENUA HAPŪ, TE UPOKOREHE TREATY CLAIMS TRUST, and TE RŪNANGA O NGĀTI AWA** Respondents
AND	**ATTORNEY GENERAL, TE WHĀNAU-Ā-APANUI, SEAFOOD INDUSTRY REPRESENTATIVES, CROWN REGIONAL HOLDINGS LIMITED, ŌPŌTIKI DISTRICT COUNCIL, BAY OF PLENTY REGIONAL COUNCIL and WHAKATĀNE DISTRICT COUNCIL** Interested Parties
AND	**TE UPOKOREHE TREATY CLAIMS TRUST, TE RŪNANGA O NGĀTI AWA, NGĀI TAI AND RIRIWHENUA HAPŪ, LANDOWNERS COALITION INCORPORATED, TE KĀHUI and WHAKATŌHEA MĀORI TRUST BOARD, NGĀTI MURIWAI and KUTARERE MARAE, NGĀTI RUATAKENGA and NGĀTI PATUMOANA.** Other appellants in Court of Appeal

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Appellants (WKW/Edwards) Submissions on Appeal

20 September 2024

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Summary of Argument

1. The iwi/tipuna application was first drafted by Whakatōhea hapū members as early as 23 February 1999.[1] Its inception was even earlier as an amendment to Whakatōhea iwi Wai 87 Raupatu claim of 1987 filed for and on behalf of the Beneficiaries of Whakatōhea iwi and its underlying hapū at all relevant times[2]. In 2005[3] and again in 2006[4] applications for the Foreshore and Seabed were filed in the names of applicants who were jointly meeting with hapū to appoint representatives to join the applicants.[5] Hapū did not oppose the iwi application. In law tikanga protocols followed by Whakatōhea tipuna are far more than only a matter of etiquette.

2. There was no evidence directed to what was required to end the mandate as a matter of tikanga, and it was not open to the Court of Appeal in the absence of evidence to make any assumptions given that the High Court did not make findings on mandate of any applicants, and evidence relied on to remove the iwi mandate falls well short of what would have been required.

3. In any event it was far from clear that the applications of 2017 filed by individuals of Kahui[6] were mandated at all or held the requisite mana and tribal authority to displace a mandate for an iwi/tipuna application. There is evidence that other applications intended to affirm their whanaungatanga and integrate with the iwi/tipuna application.[7]

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1 Whakatōhea Raupatu Settlement Office COA Tab 298 at 303.01187
2 Application for Customary Rights Order COA Tab 298 at 303.01185[1]
3 Particularised Application … for and on behalf of Whakatōhea COA Tab 299 at 303.01188
4 Māori Land Court Minute Book:91 OPO59 COA Tab 307 at 303.01217
5 Whakatōhea iwi Particularised Application for Customary Rights Order Māori Land Court 2005 COA Tab 299 at 303.01189 [2-4]
6 Te Kahui: Ngāti Patumoana CIV-2017-485-253; Ngāti Ira CIV 2017-485-299; Mokomoko whānau CIV-2017-485-355; Ngai Tamahaua CIV-2017-485-377; Ngai Tamahaua CIV-2017-485-262; Whakatōhea Māori Trust Board/Ngāti Rua Interested Party CIV-2017-485-292
7 Whakatōhea Kotahitanga Waka COA Tab 286 at 301.00012

4. The mandate for the iwi/tipuna application had the support of Whakatōhea rangatira[8] and had been formally reaffirmed at a hui–a-iwi in 2005[9] and by the Māori Land Court in 2006 adding of named applicants.[10] As well it was informally reaffirmed in the 29 witness briefs collected in 2005-2006.[11] Evidence gathering continued up to 2020 numbering 70 witnesses amounting to 3,000 pages of oral and traditional and expert historian testimony on behalf of Whakatōhea iwi.[12]

5. The iwi/tipuna application was the lone 'priority application' and covered the entire rohe moana of the iwi requiring it under s.125 to be considered "ahead of" the Kahui applications which, by the mere fact of their being lodged in 2017, could not remove the iwi mandate. A period of 2 decades passed without dissension or opposition to the iwi application.

6. If the court concludes the mandate has not ended then the Whakatōhea priority iwi/tipuna application either absorbs the individual applications of Kahui in accordance with Whakatōhea iwi whanaungatanga, or removes entirely those applications as an unnecessary impediment to Te Whakatōhea tikanga and kotahitanga/unity set out in Te Ara Tono Report.[13] Or if not, then the overlap between the iwi/tipuna application and the Kahui applications will still need to be determined in accordance with tikanga shared exclusivity, either by this court or by reference back to the High Court.[14] The pathway forward is made more difficult given Te Kahui Upokorehe TUCT refusal to acknowledge

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8 COA Tab 299 at 303.01192

9 Robert Edwards Chairperson, Tu Williams Mihimihi, Hui-a Iwi 2005 Lead up to original Whakatōhea Application COA Tab 301 at 303.01200

10 Robert Edwards for Ngāti Rua; Bruce Pukepuke for Upokorehe; Jim Richardson, John Hata for Ngāti Patumoana; Janey Maloney-Moni for Ngāti Ira; Rita Wordsworth for Ngai Tamahaua COA Tab 307 at 303.01217

11 Vol 2. Supporting Bundle: Briefs of evidence filed in 2005-2006**,** Tony Walzl COA Tab 288 at 302.00508

12 Whakatōhea Iwi Stage One Evidence; COA Tab 135 - Tab 194; Stage One Exhibits; Tony Walzl, COA Tab 286-288; Des Kahotea, COA Tab 289-291

13 Te Ara Tono a guide of Whakatōhea tikanga decision making impacting the tribe as a whole; COA Tab 372 at 313.05136 [2.3]; Whakatōheatanga; at [2.4] Tikanga

14 *Re Edwards (Te Whakatōhea No. 7)* **[**2022] NZHC 2644 COA Tab 56 at 05.00690 [88-101] uncertainty CMT 1 boundaries

any concept of shared exclusivity,[15] and continued insistence that they alone held mana over Ōhiwa Harbour[16] and are a separate iwi to Whakatōhea iwi/tipuna.[17] The stage 2 hearing has manifested some confusion,[18] with multi applications for wāhi tapu largely misunderstood, and the Courts findings of shared exclusivity,[19] along with contradicting argument concerning where CMT 1 angle boundaries lie as between themselves and also other iwi.[20]

7. As to that:

7.1. An iwi/tipuna approach was the only option for existing marine space because of its tikanga, whanaungatanga and kotahitanga process provenance, including the descendants of the living and the deceased.

7.2. The particular history of Whakatōhea in 1865 the time colonial government waged war against its communities[21] had an iwi wide impact.

7.3. The inclusion of those that would otherwise miss out and areas that would otherwise not be covered.[22]

7.4. A hapūcentric approach as advocated by Kahui overlooks the complexities of a displaced Māori society[23] and its dynamic nature and excludes some members of the iwi who shared[24] the resources at critical times whereby the

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15 Upokorehe 'incorrect assumptions' COA Tab 56 at 05.00703 [136]
16 Upokorehe alone held mana over Ōhiwa COA Tab 56 at 05.00709 [158]
17 Upokorehe more vigorously assert independence as an iwi and not a hapū of Whakatōhea COA Tab 56 at 05.00710[160]
18 Judge commented 'some treated … as if it were a type of appeal' COA Tab 56 at 05.00668[6-8]
19 Court does not have jurisdiction to award … in favour of any other entity other than a CMT group COA Tab 56 at 05.00707 [154]
20 Applicants' uncertainty of boundaries, requesting more time to discuss among themselves COA Tab 56 at 05.00690 [88-89]
21 Tony Walzl, Whakatōhea and the Common Marine Coastal Area COA Tab 286 at 301.00013
22 Ngāti Muriwai; Hiwarau C; Pakowhai; Maromahue; Kutarere; Turangapikitoi; and others originally numbering 22 hapū.
23 Tony Walzl 'the start point 1865 [..] a colonial invasion' COA Tab 286 at 301.00013
24 Tony Walzl 'sharing and exchange of kaimoana COA Tab 286 at 301.00094

kaimoana food basket was a necessity to Whakatōhea survival.[25]

8. The Pūkenga Report[26] did not address the mandate issue and to the extent that the report is relevant to that, it appears to have left open an iwi/tipuna solution.[27]

9. The approach adopted by the lower courts has forfeited both territory[28] people and ignored Te Ara Tono report,[29] a statement of Whakatōhea tikanga on matters affecting the iwi.

10. The Court of Appeal erred in accepting that the 'consensus plans' accurately reflected the definition of CMT 1 in the High Court's No.7 judgment and the attached accompanying map is the only logical representation of that.[30] The accompanying map also accords with the claim that the iwi/tipuna application maintains.[31]

Introduction/Factual Narrative

11. The iwi/tipuna application from its inception featured the effects of the invasion[32] of Whakatōhea iwi and the confiscation of its most fertile lands[33] in 1865. Whakatōhea iwi filed the Wai 87 Raupatu claim to the Waitangi Tribunal in 1987. Wai 87 was then amended in 1999[34] by the same (late) Claude Edwards and other Whakatōhea rangatira and filed in the Māori Land Court.[35] This was well prior to both MACA and the earlier Foreshore and Seabed Act 2004. The Court of Appeal accepted at [275] that

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25 Claude Edwards and Matenga Biddle, 'Because they had no land they turned to our food basket - the moana and the rivers, to feed the whānau'; Adriana Edwards cites 'starvation' among Whakatōhea people COA Tab 286 at 301.00047

26 Pukenga Report. COA Tab 110 at 101.00529

27 Pukenga Report – left open 'work as an **IWI'** COA Tab 110 at 101.00534[g].

28 Kahui Parties disagreement of marine boundaries COA Tab 56 at 05.00693 [99]

29 Te Ara Tono Report COA Tab 372 at 313.05121

30 Attached as Appendix "A"

31 Whakatōhea Iwi Rohe Map COA Tab 68 at 101.00022

32 Tony Walzl Report COA Tab 286 at 301.00050

33 Tony Walzl Report COA Tab 286 at 301.00056

34 Wai 87 iwi claim amended to include Foreshore and Seabed COA Tab 737 at 401.00014

35 Whakatōhea Originating Priority Application COA Tab 737 at 401.00002

Claude Edwards obtained a mandate to bring an application for CMT (or its forerunner equivalent) via a process in accordance with tikanga.

12. That application devolved through the next two statutory regimes thus: first into an application under the 2004 legislation and thence under MACA became a "priority application" transferred under s.125 of MACA to the High Court.

13. At some point for reasons that are not entirely clear, in early 2017 a number of further applications[36] that overlap with the WKW/Edwards priority application were filed by individual members of hapū. A Whakatōhea Māori Trust Board ("WMTB") application[37] was filed. In 2019 the [WMTB] position was that 'we do not represent those claims […] rather to support those claims'.[38] In 2019[39] and again in 2020 the WMTB had difficulty receiving instructions from its hapū as to who wanted to be represented by it.[40] The WMTB agreed the Ngāti Rua applicant could participate as an 'interested party'. The inclusion of the hapū was raised in Case Management Conferences[41] so that it was clarified that particular 'applicant' hapū had not missed out.[42] By 2020 there was said to be 21 such overlapping applications. It is unclear as to whether they were originally intended to be within the iwi/tipuna approach or competing with it.

14. In the case of TUCT Upokorehe the 'iwi' is in direct competition with Upokorehe hapū members of Whakatōhea iwi.[43] Whether Upokorehe is an iwi or a hapū of Te Whakatōhea was not

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36 In 2017 'a flurry of applications' filed; COA Tab 50 at 05.00409 [10]
37 WMTB application April 3, 2017, COA Tab 89 at 101.00371
38 MACA Rotorua CMC Transcript, 19 June 2019, COA Tab 74 at 101.00135
39 MACA Rotorua CMC Transcript, 19 June 2019, COA Tab 74 at 101.00151
40 MACA Rotorua CMC Transcript, 14 July 2020, COA Tab 75 at 101.00233
41 MACA Rotorua CMC Transcript, 14 July 2020, COA Tab 75 at 101.00261
42 MACA Rotorua CMC Transcript, 14 July 2020, COA Tab 75 at 101.00262
43 Josephine Hinehou Mortenson; Bruce Pukepuke; Dean Flavell; COA Tab 155; COA Tab 193; COA Tab 182; COA Tab 194

determined but, if it is to be determined, that should be before the Māori Appellate Court.

The High Court outcome

15. While the substantive High Court judgment does not directly state that the Edwards priority application was dismissed, the Court of Appeal held that it was implicit in the High Court decision to grant the applications made by the hapū for the same area [274] and that the High Court Judge confirmed this in a subsequent judgment.[44]

The Court of Appeal outcome

16. The WKW/Edwards priority applicants appealed to the Court of Appeal on the basis that the Edwards mandate was never terminated and an iwi/tipuna solution was always the most correct and appropriate in accordance with Te Whakatōhea tikanga. The Court of Appeal held:

    16.1. That Mr Edwards had held the mandate and brought his application as a representative for the iwi application.[45] [275]

    16.2. But by the time the application came on for hearing in the High Court these groups had made their own applications [275]

    16.3. That the six hapū of Te Kahui appeared stating that the WKW / Edwards priority application did not have their support and that having occurred, it could no longer be said that the Edwards application was brought for the

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44 *Re Edwards* (Stay Application) *(Te Whakatōhea No. 4)* [2021] NZHC 3180 at COA Tab 52 at 05.00628 [17(e)]

45 Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board [2023] NZCA 504, [2023] 3 NZLR 252.

iwi, even though it may be that tikanga would call to withdraw the Edwards mandate. [276]

Mandate: what is the tikanga of ending it and what was needed?

17. It is accepted that in many ways "mandate" is an unsatisfactory Eurocentric term but will need to be adopted and fashioned as the nearest label applicable to the tikanga of holding the inherited authority of tipuna. It is far from an ideal synonym. Research on behalf of the WKW/Edwards appellants has been unable to identify an equivalent instance where the 'placing of pou mana' mana tupuna' mana tangata' by multiple rangatira of a tribe and so accorded positions of responsibility to ensure hapū and tribal well-being in accordance with its tikanga,[46] has then been removed on a mere filing of an application by a number of individuals to precipitate a displacement of a tribal iwi mandate.

18. The WKW/Edwards priority application appellants say the iwi/tipuna position on what has occurred is thus:

    18.1. Following the extensive steps taken by the late Claude Edwards to bring an iwi/tipuna application before the Court (a mandate by the iwi which has been inter-generational in terms of its travelling arc and crosses three distinct statutory jurisdictions), 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 their tikanga

    18.2. That would have required an iwi wide process, not some steps taken by individual applicants holding hui separate from others.

[46] Te Ara Tono o Nga Hapū o Whakatōhea Report. COA Tab 372 at 313.05121

18.3. In any event the evidence provided fell well short of clearly ending the iwi mandate.

18.4. And to the extent that their filing discrete applications is suggested to have ended the mandate, it is far from clear that the hapū applications were expressly mandated by the actual hapū themselves or in fact the hui was notified that support for the individual's application was in direct competition to remove and displace the iwi/tipuna application.

19. The Court of Appeal makes what is a remarkable observation at [276]:[47]

> *"It may be that tikanga would call for a process to withdraw Mr Edward's mandate and decide who ought to represent the iwi if only as a matter of etiquette."*

20. With great respect, there is no evidence for the proposition (and the proposition itself is firmly rejected by the WKW/Edwards priority application appellants) that such withdrawal could be dismissed as 'only a matter of etiquette'. It conflates mandate over mana because Mr Edwards carried the mana to bring the (iwi) mandate to the Crown. The mandate however is held by the iwi. Such an observation as that of the Court of Appeal would not be in accordance with tikanga.[48] If kawa is "tikanga wrapped in tapu" a decision to ignore it would be a serious offence. By taking the approach of apparently endorsing the 'withdrawal' and dismissing a tikanga process as only a matter of etiquette, the Court has regrettably exceeded its function when engaging with tikanga,[49] that error being the subject of a number of warning

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47 NZCA 504 at [276]

48 Law Commission (2023). *He Poutama*. NZLC SP24. See discussion, pp.93-94 at [3.128-3.131]

49 *Re Edwards (Whakatōhea Stage Two) No 7* [2022] NZHC 2644 at [14] … that the court does not determine tikanga [..] matter for iwi and hapū and the proper authorities … COA Tab [56] at 05.00660

observations.[50] Te Ara Tono, the definitive document for Whakatōhea, sets out a number of steps where serious decisions affecting the tribe as a whole are made.[51] The document also defines Whakatōhea in the context of the Wai 87 Raupatu claim as all those people (uri) who can trace descent from the named ancestor of any of the hapū or iwi as the "whole claimant group".[52]

21. The Court of Appeal's reference to "etiquette" does not meet or adequately describe the standard and outcome when major decisions affecting the iwi are made which 'commits all of Whakatōhea iwi to a particular course of action that is difficult to reverse'.[53]

22. It was not open to the Court as per [276] in the absence of any evidence to make any assumption about the tikanga position, and particularly to downgrade its importance or significance in terms of representation of iwi, which after all, is the largest tribal structure. The court found the mandate had been created and established: accordingly, there needed to be some evidence provided by each of the Kahui applicants directed to the tikanga required to end it – and there was none.

23. So, what would have been required to end this particular reaffirmed mandate originally obtained in 1999 and later reaffirmed at hui-a-iwi? It is submitted if the mandate was challenged at the very least it needed a proper hui-a-iwi or series of hui specifically addressed to confirming the will of the people (here the iwi) said to be represented by the application. And all the more so because this mandate was iwi wide.

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50 *He Poutama*. NZLC SP24. p.223 at [8.39(e)]
51 Te Ara Tono COA Tab [372] at 313.05139-313.05142
52 Te Ara Tono COA Tab 372 at 313.05135-313.05138[2.2-2.7]
53 Te Ara Tono COA Tab 372 at 313.05153-313.05161[5.0-5.9]

24. In the High Court hearing in the present case (i.e. Stage One) the learned Judge declined to consider mandate or make any determination about hapū mandate,[54] but it did make observations about the late Claude Edwards' role on behalf of the iwi at [4]-[6] including at footnote 4 that the 1999 application had been signed by representatives of all Whakatōhea hapū. The Court of Appeal put it more directly and held that he had once held the iwi mandate.

Confirmation and affirmation of the mandate

25. As outlined above, the Court of Appeal held that the late Claude Edwards once held the mandate "from most or perhaps all of the hapū" [275]. The Court of Appeal noted at [272] that he had brought an application for the entire area on behalf of iwi in 1999 in the Māori Land Court.

26. That mandate was reaffirmed subsequently:

    26.1. Following the commencement of the Foreshore and Seabed Act 2004 the late Mr Edwards filed a further particularised application for a customary rights order in the Māori Land Court on 30 May 2005[55] along with 210 pages of 30 witness briefs following which a three and a half hour Whakatōhea-hui-a–iwi was held on 30 October 2005 specifically directed to verifying iwi support for the "Takutai Moana proceedings".[56] It is noted that that hui was held at Ngāti Rua's Ōmarumutu Marae and Ms Hata[57] was the minute taker. A photographic record was kept, the property rights and ownership of which appear

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54 It should be noted that in *Re Edwards (Whakatōhea Stage Two) No 7* [2022] NZHC 2644 the High Court at [226] found Ms Hata an appropriate person to hold CMT for Ngāti Patumoana. But that finding must be subject to the outcome of these appeals, at least insofar as CMT claims are overlapping. COA Tab 56 at 05.00725 [276]

55 Particularised Application … for and on behalf of Whakatōhea COA Tab 299 at 303.01188

56 Whakatōhea hui-a-iwi 2005 COA Tab 301 at 303.01200

57 Ms Mereaira Hata note taker for Whakatōhea hui-a-iwi for Whakatōhea iwi Foreshore and Seabed application COA Tab 301

to have been considered of some significance vis-à-vis "the protection of tikanga".[58]

26.2. On 29 March 2006 the Māori Land Court directed that a number of named applicants be added to the WKW/Edwards application specifically for Ngāi Tamahaua, Ngāti Ira, Ngāti Rua, Upokorehe and Ngāti Patumoana.[59]

27. Aside from those formal affirmation steps the iwi/tipuna applicants can point to the more informal reaffirmation attributable to the collection of evidence from another 60 witness briefs[60] through to 2020 in addition to the original 30,[61] (including from Ngāti Rua).[62] It should not be overlooked that several of the rangatira who were included in that affidavit evidence, and who were experts in tikanga, mātauranga Whakatōhea and traditions of the takutai moana as it had applied to generations of undisturbed occupation, have since passed, but their knowledge and information that they provided in support of the iwi/tipuna claim remains. The court also overlooked the number of key witnesses who importantly provided evidence in 2005, and again in 2020. If anything, in te ao Māori this embeds the significance of the mandate by reason of the connection of the living with the deceased (who had the knowledge).[63] Nor does it include any inference that can be drawn from the support in response to the public notification steps under the 2004 legislation and the lack of Māori opposition.

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58 Whakatōhea hui-a-iwi 2005 COA Tab 301
59 Māori Land Court Minute Book: 91 OPO 59 COA Tab 307 at 303.01217
60 Whakatōhea Kotahitanga Waka High Court Bundle (2020) Oral and Traditional evidence from Adriana Edwards COA Tab 135 at 201.00001 to Dean Flavell COA Tab 194 at 201.00412
61 Vol 2. Supporting Bundle: Briefs of Evidence filed in 2005 – 2006 COA Tab 288 at 302.00508
62 Several Ngāti Rua witnesses provided evidence; particularly kuia Julie Lux and senior Chair of Ngāti Rua and WMTB Robert Edwards (of that time)
63 *He Poutama*. NZLC SP24. p.38 at [2.45].

The filing of the individual hapū applications – did that end the mandate?

28. Indeed, the fact that the individual hapū applications subsequently filed were initially characterised as augmenting the WKW/Edwards priority application, not displacing it, underscores the continuation of the mandate. In respect of the iwi/tipuna amended applications from 2015 to 2020 see 2015 amended application 18 May 2015 para 2[64] and Schedule 1[65] and 2020[66] with reference to 21 applications that are said to "overlap with Whakatōhea Edwards" – paras 5 and 7 – and being described as "for iwi".

29. A resolution[67] passed at the Ōmarumutu Marae on 23 June 2019 is said to support the MACA application by Ms Hata for the benefit of Ngāti Rua but that minuted resolution is a far cry from years of iwi hui decades earlier, which did not displace the WKW/Edwards mandate:

    29.1. Nowhere does it refer to ending that mandate. Ms Hata's agreement with WMTB was only to have 'interested party' status on that application. The High Court had recorded Ms Hata's position[68] that she could not, after 3 April 2017, file a separate claim in court seeking CMT or PCR. But the short point is that whatever the 23 June 2019 resolution on the Ōmarumutu Marae was intended to achieve, it did not displace the WKW/Edwards iwi mandate. Ms Hata's commentary that her hapū would miss out was not the actual position for Ngāti Rua hapū.[69] The mandate for all the other Whakatōhea hapū

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64 Amended Application on behalf of Whakatōhea, 18 May 2015, COA Tab 66 at 101.00001[2]
65 Schedule One COA Tab 66 at 101.00006.
66 Second Amended Application, 2 June 2020, COA Tab 67 at 101.00011.
67 Ngāti Rua Hapū, Ōmarumutu Marae Hui, Sunday 23 June 2019, COA Tab 560 at 316.06942.
68 *Re Edwards (Te Whakatōhea* [2020] NZHC 1905 [31 July 2020] COA Tab 49 at 05.00398[17].
69 MACA Rotorua Case Management Conference Transcript [19 June 2019] COA Tab 74 at 101.00150; [14 July 2020] COA Tab 75 at 101.00236.

certainly remained in place by actions of hapū[70] members.

29.2. The assertion that the ending of mandate can be inferred from the mere fact that certain individuals filed discrete applications is flawed. Some further evidence is needed from those individuals to displace the iwi mandate, not just a fact that in 2017 an application was filed. For example, there is no evidence of any of the steps set out in *He Poutama* at page 102 to engage with tikanga or their communities. Further, the need for such evidence was specifically raised in the High Court,[71] yet never addressed or answered in the substantive judgment.

30. The mandate of individual members of hapū filing applications is itself confused and messy. In the case of the WTMB its position was unclear to the iwi application[72] but no evidence of a mandate withdrawal from the iwi (and certainly none in accordance with tikanga) was provided.

31. In the case of Ngāti Rua,[73] Robert Edwards appears to have been the affirmed mandated representative for them as per the Māori Land Court Order of 29 March 2006,[74] which never seems to have been withdrawn. If it is claimed that he is not now their representative for failing to report, then it seems there is no explanatory evidence as to how he or the hapū withdrew his status as a hapū representative.[75]

32. In the case of Ngāti Ira, the application has been brought by Te Rua Rakuraku and not the applicant identified in the 2006 order

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70 Robert Edwards, Graeme Riesterer, Barry Kiwara, Muriel Smith Kelly, Tu Williams, Bruce Pukepuke, A Edwards, Josephine Mortenson, Dean Flavell.

71 WKW/Edwards closing submissions dated 19 October 2020, p.4 [18(f)].

72 MACA Rotorua Case Management Conference Transcript [14 July 2020], COA Tab 74 at 101.00150

73 Whakatōhea Originating application COA Tab 307 at 303.01217

74 Māori Land Court Minute Book: 91 OPO 59, COA Tab 307 at 303.01217

75 Cross-examination of Robert Edwards, COA Tab 132 at 106.03123; COA Tab 130 at 104.01934-104.01976.

(Janet Maloney-Moni). Yet Te Rua Rakuraku is said in the application to be mandated to "speak for ……. the peoples of Waioweka within the greater Te Whakatōhea rohe" and this was the subject of a motion carried at a "hui-a-hapū" of the WMTB.[76]

33. The application on behalf of TUCT Upokorehe "iwi' provided no evidence from either Tūhoe or Ngāti Awa of acknowledging Upokorehe as an iwi. Upokorehe TUCT 'iwi'[77] remain clearly opposed to any notion of shared exclusivity with other applicants. Upokorehe Hapū of Whakatōhea iwi and the witnesses thereof have been ignored.[78] TUCT appears to have the mandate of the Upokorehe Pre-Settlement Trust, while the Upokorehe hapū of Whakatōhea iwi is removed.

34. The confusion and divisive nature of the question of hapū mandate has manifested itself again, most recently in the course of the applications for prospective costs orders. See the affidavit[79] of Adriana Edwards of 6 September 2024, exhibits B, C, D and E,[80] being statements from kaumātua respectively of each of Ngāti Patumoana, Ngāi Tamahaua, Ngāti Ruatakenga and Upokorehe that in each case their hapū has not mandated any individual to file a MACA claim on behalf of that hapū outside Te Whakatōhea iwi.

The s.125 "Priority": interface with mandate

35. s.125 of MACA, after directing the transfer of all pending applications to the Māori Land Court made under the Foreshore and Seabed Act 2004 to the High Court, provides:

> *"(2) The High Court must treat applications transferred under sub-part (1) as if they were applications made*

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76 COA Tab 85 at 101.00348[9]
77 *Re Edwards (Stage Two) (Te Whakatōhea No. 7)* [2022] NZHC 2644 COA Tab 56 at 05.00781 [425]
78 Whakatōhea Upokorehe Members
79 Affidavit of Adriana Edwards, 6 October 2024
80 Exhibits to A Edwards Affidavit

under sub part (2) for orders recognising protected customary rights.

"(3) The High Court –

(a) Must give priority to applications transferred under this section ahead of any applications made under sub part (2)"

36. Thus, on the plain face of the wording of s.125(3)(a) the High Court should have given priority to the WKW/Edwards application **ahead of** any applications made under subpart (2) – in this case all other applications. The obvious question is what does "priority to….ahead of" mean? Is it procedural (i.e. temporal), or substantive, or both?[81]

37. The starting point is that the words "ahead of" cannot be meaningless and they must have some meaning attributed to them.

38. In summarising the argument for the WKW/Edwards priority applicants in the Court of Appeal that court said [273]:

> *"As [counsel] acknowledged priority status did not mean that the Edwards application must be decided separately from competing applications."*

39. With respect, that summary rather abbreviates the argument. To clarify: it is not asserted that the WKW/Edwards priority application is permitted to meet a different and lesser test from any other application made under sub-part (2), and therefore to the extent that its application overlaps with others for the same area it would somehow be decided separately and to different thresholds. Nor would it mean it had to be decided in a different and earlier hearing first. In that sense it would not be "decided separately".

[81] The High Court appears to have treated it as purely temporal: COA Tab 8

40. But it still must be the case that meaning is given to the words *"priority to…… ahead of any applications made under sub-part (2)"*. The phrase must at least mean that where recent applications overlap, the priority application is to be accorded priority over those. That leads directly to the point here that this application was the only one to seek CMT for the iwi across the entire commonly held rohe moana of the iwi. As a matter of tikanga the iwi/tipuna 'application' will always be given priority as the tuakana/elder holding 'intrinsic inherited rights of iwi, hapū and whānau'[82] and is in accordance with the purpose of the Act[83]' to recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau as 'tangata whenua'. That dovetails back to the mandate matter that the mere fact of filing new applications is claimed to have ended the iwi/tipuna mandate is not in accordance with either tikanga or the Act.

A 'Checkpoint Charlie' on the iwi mandate position and consequences

41. Three possibilities emerge at this point:

41.1. That the court finds the WKW/Edwards iwi mandate has continued;

41.2. That the court finds that it is unclear whether or not the WKW / Edwards mandate has been ended or continues;

41.3. That the court finds that the WKW/Edwards mandate has clearly been ended by the Te Kahui initiatives.

42. Taking those in reverse order, if the outcome is the third possibility, then obviously the appeal (on the mandate issue) will be dismissed in favour of Kahui. If it is the second possibility, then given the absence of critical evidence as to the tikanga of ending the mandate (see paras 17-24 above), presumably that

82 Marine and Coastal Area (Takutai Moana) Act 2011 Preamble (4)
83 Marine and Coastal Area (Takutai Moana) Act 2011 Purpose (4)(1)(b)

issue will need to be determined and may need to be remitted to the High Court for determination (or possibly referred to the Māori Appellate Court under s.99). If it is the first possibility, then:

42.1. The court's conclusion on the s.125 'priority application' issue may dispose of the need to make a determination as between the WKW / Edwards priority application and the Te Kāhui applications that overlap with it;

42.2. But if the court's s.125 'priority application' conclusions do not result in that disposition, the court will still need to then determine that competing overlap issue – i.e. whether or not an iwi/tipuna solution is to be preferred.

Why is an iwi/tipuna solution to be preferred?

43. An iwi/tipuna approach had already garnered support and approval through a tikanga process, see the High Court judgment [4]-[6] and footnote 4.[84]

44. In that regard it is important to note that each of the parties included in the iwi/tipuna application whakapapa to the same ancestors and as has been said elsewhere, the unifying glue of the iwi was blood kin whakapapa and whanaungatanga.[85]

45. An iwi/tipuna approach avoids the need to address any shared exclusivity issues within the iwi. Indeed, the hapū applications that were granted to the selected six groups had not sought shared exclusivity inter se or otherwise and were certainly not inclusive of the unsuccessful applications.

46. The raupatu suffered by Whakatōhea renders an iwi/tipuna approach particularly apt.[86] This is further discussed at para 50

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84 *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 COA Tab 50 at 05.00408

85 Te Ara Tono o Nga Hapū o Whakatōhea COA Tab 372 at 313.05130

86 Tony Walzl, Whakatohea and the Common Marine and Coastal Area 1865 – 2019 COA Tab 286 at 301.00020 [Part 1]

below, but in short this iwi endured colonial invasion looting[87], redistribution of land and people,[88] creation of and relocation to the equivalent of North American "reservations",[89] loss of agricultural land base, and importantly with use of sea resources and kaimoana becoming of greater significance to the iwi than would otherwise have been the case.

47. An iwi/tipuna approach includes those who would otherwise be disenfranchised and the tipuna captures the full extent of the iwi's rohe[90] – see paras 62-65 below.

Whakatōhea Claims Settlement Act 2024

48. The commencement of the Whakatōhea Claims Settlement Act 2024 ("the Settlement Act") on 4 June 2024 has further underscored the degree to which the lower court outcomes ill fit the particular Whakatōhea circumstances and create more fertile ground for confusion and awkward interfaces. By contrast an iwi/tipuna approach aligns with the statutory framework of the Whakatōhea Claims Settlement Act.[91]

49. Under the Settlement Act at the date of commencement the WMTB was dissolved and its assets were vested in the trustees of a new entity, Te Tāwharau o Te Whakatōhea ("Te Tāwharau") (Settlement Act ss179(1), 180 and 182), which also functions as the mandated iwi organisation (Settlement Act s184)) for the purposes of the Settlement and to hold Settlement assets. Those assets include valuable commercial rights to marine space containing mussel farms with future extension rights.[92] The Settlement Act explicitly enables an inclusive approach that is iwi wide and not confined to the six Te Kahui hapū: see Settlement

87 COA Tab 286 at 301.00051
88 COA Tab 286 at 301.00052
89 COA Tab 286 at 301.00057
90 COA Tab 286 at 301.00057
91 Whakatōhea Claims Settlement Act 2024
92 Whakatōhea Deed of Settlement 27 May 2023 p.160 clause 6.15.

Act s13(1) "any whānau, hapū or group" - the only limiting factor is descent from an ancestor of Whakatōhea in terms of s13(2), and clause 8[93] of the trust deed creates the process for adding further hapū.

50. Under MACA s62 on the lower court judgments the CMT holders (being here the groups who have resisted any expansion of the CMT holding beyond the Te Kahui six hapū), have what is effectively a power to veto, and without any risk of appeal, over any Te Tāwharau application for a resource consent as the mandated iwi organisation. If further hapū are included in Te Tāwharau, and the veto is exercised, regardless of the bona fides of the grounds of exercise, the ability of the whole iwi to share in the benefits of a substantially valuable marine asset is frustrated. The sensible answer is to have the same iwi entity holding the CMT for the benefit of all iwi - Te Tāwharau.

Hapūcentricity?

51. Te Kahui argue for a 'hapūcentric' approach citing Article 2 of Te Tiriti and academic literature characterising the hapū as the effective political and resource holding unit in pre-contact times.

52. It is submitted in response that that is a gross simplification of the complexities of Whakatōhea society and overlooks the dimension to it of tukutuku and its interwoven latticework of reciprocity and connection whereby the whakapapa values every person and weaves the hapū together to form the iwi.[94] Reference can made to the Waitangi Tribunal reports, namely the often-cited Muriwhenua Fishing Report (WAI 22) published in 1988[95] which stated at pp 35-36:

- *"Occasionally, private use rights attached to an agricultural plot, fishing ground or birding tree, but*

[93] Whakatōhea Deed of Settlement 27 May 2023 p.168 clause 8
[94] *He Poutama,* (NZLC SP240), pp.16-17 [1.28]; p.53
[95] Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22. The Tribunal, 1988.

more commonly, rights to resources were owned by a number of people in common, such as a whānau group.

To the whānau group usually 'belonged' ……the small eel weirs on branch streams, small fishing canoes, and some gardens, fishing grounds and shellfish beds in the immediate vicinity. Though they did not formally 'own' the fishing grounds and beds, at least their prior rights of use were respected.

The hapū exercised control over larger units …… larger fishing or seafaring vessels and some specific fishing grounds.

The tribal property was made up of the lands of the various hapū, the lakes, rivers, swamps and streams within them and the adjacent mudflats, rocks, reefs and open sea. The tribe, as the greater social group, incorporated the rights of the lesser groups. …… Cohesion was maintained through an intimate knowledge of blood links, the constant deference to tribal ancestors on formal occasions and regular tribal gatherings, especially to mourn for the dead.

- And at p.37: *"However, as far as the tribe was concerned, it controlled not only the site – specific grounds but the whole of the inland waters and seas adjacent to its tribal lands.*

- And at page 181: *"Accordingly the Māori order related primarily to how resources were used, rather than to how they were owned, and human leadership was combined with spiritual beliefs for the maintenance of control. It does not follow that there was no concept of private rights. There is no doubt that particular sub-groups had special use rights of various places and resource areas, and that areas of sea were as much their properties as cultivations on land……. But they did not own them; they stay in the bloodline; they were not transferable; and all were subject to the over right of the tribe."*

53. The argument that CMT "rights" are closest to the rights of hapū who belong to and maintain the ahi ka is very challengeable in

law and in fact. CMT rights are conferred by statute (refer s62) and hapū cannot claim to be the natural home for rights that previously did not exist. The more meaningful enquiry should be to the relationships between iwi or hapū or whānau on the one hand, and the areas of the takutai moana and its resources on the other[96] where the close connection between relationships and responsibilities is emphasised. There is no evidence in this proceeding that on that basis the position of hapū (or the WMTB for that matter) somehow trumps or supervenes the position of iwi.

54. Nor is there any legal support for a 'hapūcentric' approach in the statute. MACA s.3(2)(a) in its guide to the overall scheme and effect of the Act and elsewhere consistently throughout the Act draws no distinction in respect of customary interests between whānau, hapū and iwi, nor does it do that with reference to the Treaty in s.3(2)(c) or s.7(a).

55. In the case of Te Whakatōhea, their particular history points more towards the appropriateness of an iwi/tipuna approach with common marine territory rather than a hapūcentric one.[97] The history concerned is the confiscation that caused Whakatōhea iwi to turn to the use of the takutai moana as their lifeline following the loss of much of their agricultural land. Further, the raupatu meant that displaced hapū moved onto land originally associated with other hapū. Some hapū were relocated to reserves near Ōpape which further disrupted older hapū groupings and led to the development of new villages, relationships and patterns of living.[98] Ranginui Walker makes a similar observation that hapū

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96 *He Poutama* (NZLC SP240), p.31 [2.21]

97 COA Tab 286 at 301.00058

98 Ballara, A. (1998). *Iwi: The dynamics of Māori Tribal Organisation from C 1769 to C 1945*, Wellington: Victoria University Press, 1998.

were not static and were too dynamic to sustain rigid hapū collectives.[99]

56. Mark Derby, the Crown's expert historian, in evidence observed that there did not seem to be a single paramount chief of Whakatōhea, but there did appear to be a group of rangatira making decisions for the tribe – for example the signing of Te Tiriti in 1840 by 7 chiefs who described themselves as being of "the tribe of Whakatōhea" notwithstanding that they had hapū affiliations across 5 of the WMTB hapū, with some having multiple affiliations and one none. He also noted in his report the emergence of the tribal identity in the 17th late century, large scale tribal fishing in 1900, and setting a tribal boundary in the early nineteenth century.[100]

57. Tony Walzl in his evidence[101] "Whakatōhea and the Common Marine and Coastal Area 1865-2019" recorded from interviews that in the inshore areas there were certainly places where whānau and hapū had special rights, but there was also a large degree of sharing among hapū of the tribe in that they felt that they could take kaimoana from anywhere in the tribal area.

58. Records show the iwi held the inland Native Land Court land blocks in the 19th century,[102] which would seem to dispel any tikanga issue with iwi holding MACA title.

59. An iwi/tipuna solution recognises in a way that a hapūcentric approach does not (on account of the latter's outcome of haves versus have-nots') that this journey is a common struggle by a people with a common territorial base, who whakapapa to a common ancestress, Muriwai, from a common waka and having

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99 *He Poutama* (NZLC SP24). p.56.[3.35]

100 Customary Use and Third-Party Use and Occupation" COA Tab 686 at 326.11768 and 326.11832 [49]; COA Tab 686 at 326.11833 [51]; COA Tab 686 at 326.11793 [20].

101 COA Tab 286 at 301.00078 and 301.00281 ("all Whakatōhea were able to access or share in the resources of the coast")

102 Walker, R. (2001). *Ōpōtiki – Mai Tawhiti*, pp. 137-140.

suffered a common catastrophe visited upon them indiscriminately and enduring the washing machine of displacement.

The Pūkenga Report – does it have a role in the appeal issue?

60. The Pūkenga Report[103] does not appear to address the mandate issue and insofar as it has any relevance to the appeal it appears to leave open an iwi/tipuna solution:

- it chose not to directly answer question (3) posed by the High Court [311] choosing instead to refer to *"all groups consider their right according to the tikanga they feel applies,"* and to more hui being *"essential"*[104] and suggested a *"tikanga-based poutarawhare"* as a *"simple solution" that could* comprise "*Te Whakatōhea and Upokorehe for the rohe from Maraetotara in the west to Tarakeha in the east."*[105]

- observed that that poutarāwhare would decide how it addresses the interests of *"all other applicant groups as well as each hapū's affairs going forward."*[106]

- said that there should be just one CMT title[107]

- appeared to acknowledge the intention of the original Trust Board application

- appeared to acknowledge the intention of the original Trust Board application *"that no one from Maraetotara to Tarakeha would be excluded"*[108]

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103 Pukenga Report on the Tikanga Process and Appendices COA Tab 110 at 101.00529
104 COA Tab 110 at 101.00538 4(iii)(1)
105 COA Tab 110 at 101.00533 (2)(b)
106 COA Tab 110 at 101.00534 (e)
107 COA Tab 110 at 101.00533 (d)
108 COA Tab 110 at 101.00533 (d)(i)

- and rather confusingly added this self-limiting statement:

- *"Our poutarāwhare also does not determine who is a whānau, a hapū or an iwi. For us that is a tikanga that has been in place mai rāno - for ever and a day that fulfils certain criteria of tikanga, Some are these are whakapapa, whenua and ahikāroa status as well as mana whenua, mana moana, marae and tikanga around the full gambit of kaimoana gathering across all rohe and takutai-moana under discussion."* [109]

- And clearly states the poutarāwhare can include through their relationships the following applicants under the Whakatōhea iwi:

- *"our poutarāwhare also addresses the position regarding the Mokomoko whānau, the Hiwarau C Block, Kūtarere Marae the Pākowhai and other similar applicants. That is, their interests can be accommodated by the component part or parts of our poutarāwhare. That is for example, by their relationship to one or more parts of the poutarāwhare or their inclusion within existing ones."* [110]

- *"Finally, and with regards all applicants, there were repeated suggestions and requests for all applicant interests to work as an **IWI**." (**Pukenga emphasis**)* [111]

61. At the very least, the Pūkenga Report is ambiguous as to whether it envisaged that the six groups constituting the poutarāwhare held application areas in accordance with tikanga to the exclusion of any other applicants (including the iwi/tipuna application), or whether it envisaged a continuing process involving further hui that was inclusive of other groups and in relation to one title.

Has the 'Selected Six' outcome short-changed the iwi?

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109 COA Tab 110 at 101.00534 (d)(iii)
110 COA Tab 110 at 101.00534 (d)(iv)
111 COA Tab 110 at 101.00534 (g)

62. There are two reasons why it has.

63. Firstly, the WKW/Edwards priority application was amended in accordance with the 2011 Act and included further evidence that continued to be gathered. That application still covered a larger area than the CMT awarded to the selected six. Thus, for the iwi as a whole, the outcome is a diminution in what can be considered the iwi rohe moana for MACA purposes. The WKW/ Edwards priority application was the only one to seek CMT for the entire rohe moana of the iwi, and that covers a greater area that the combined areas granted to the selected six.

64. Secondly the award to the selected six means that other members of the iwi who ought to have the ability to participate are excluded. None of the six groups within Te Kahui supported the WKW/Edwards proposal that a trust would be formed in due course to hold the CMT for the whole iwi – rather they proposed that it would be held by two representatives for each of the selected six: Court of Appeal [275]

65. Accordingly, the approach that has been adopted by the High Court and the Court of Appeal has forfeited both territory and the iwi that ought to have been included.

The seaward boundary

66. The Court of Appeal found that WKW's argument that Churchman J's CMT order (Order 1 so named by Miller J at [25] as covering the area from Maraetōtara to Tarekeha) extended to the common marine and coastal area around Whakaari was not an available reading of the judgment under appeal.

67. The Court of Appeal made that finding in footnote 31 to paragraph [25] of its judgment dated 18 October 2023 under [2023] NZCA 504.

68. In a memorandum dated 13 March 2023, Miller J said, inter alia:

- "*The Court was referred to a number of plans. However, there does not appear to be a single plan showing:*

  a) The areas covered by order 1, 2 and 3 (including the 12-mile limit)

  b) The Disputed Area claimed by Ngāti Awa

  c) The common coastal and marine area around Whakaari and Te Paepae o Aotea

  d) The Te Upokorehe claim area

  The Court asks that counsel identify such a plan in the record, if there is one, alternatively liaise and provide the Court with a plan which can be appended to the judgment (meaning it cannot rely on colour coding)"[112]

69. The Court of Appeal appended the plans ("the consensus plans") to its judgment dated 18 October 2023 under [2023] NZCA 504 marked "CMT AREAS" and "NGATI AWA COASTLINE DISPUTED AREA".

70. In a memorandum dated 23 May 2023 to the Court of Appeal, the appellants *Edwards*, *Delamere*, *Davis*, *Kiwara*, and *Flavell* dissented from the consensus opinion collated by Crown Law as to the boundaries of CMT 1 as awarded by Churchman J in his Honour's No 2 judgment [2021] NZHC 1025 and identified more precisely in his Honour's No 7 judgment [2022] NZHC 2644.

71. The No 7 judgment defined CMT 1 as follows:

"*[9] There were three different geographic areas where specified applicants met the tests set out in s 58 of the Act for CMT:*

(a) CMT 1: a jointly held order for Ngāti Ira o Waiōweka, Ngāti Patumoana, Ngāti Ruatakenga, Ngāi Tamahaua, Ngāti Ngāhere and Te Upokorehe from Maraetōtara in the west to Tarakeha in the east and out to the 12 nautical mile limit;

[112] Email received Chris Abraham - Deputy Registrar – 13/03/2023 2:04pm

.....

[102] I have concluded that the appropriate approach is to:

(a) survey the western boundary of CMT 1 as beginning at the midpoint of the Maraetōtara Stream, angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit;[113]

(b) survey the eastern boundary of CMT 1 as the tip of the Tarakeha headland (where it is already depicted on the Maven maps), angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit;"[114]

72. The consensus plans do not accord with the CMT 1 definition in the No 7 judgment because the western and eastern boundaries are not depicted therein as ceasing at the 12-nautical-mile limit but at some arbitrary limit ceasing at 12 nautical miles from the mainland coast. The words "the 12 nautical mile limit" can meaningfully refer only to the territorial 12-nautical-mile limit. See appended plan showing the full extent of the western and eastern boundaries as defined in the No 7 judgment.

73. A literal reading of para [102] a. of the No 7 judgment gives a western boundary of CMT 1 "ceasing at the 12-nautical mile limit", which occurs at only one point, 12 nautical miles seawards beyond Whakaari.

74. Likewise, a literal reading of para [102] b. of the No 7 judgment gives an eastern boundary of CMT 1 ceasing at the 12 nautical mile limit, which occurs at only one point, 12 nautical miles seawards from Tarakeha.

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113 COA Tab 56 at 05.00694 [102(a)]
114 COA Tab 56 at 05.00694 [102(b)]

75. These literal readings logically lead to the illustration in the appended map depicting a CMT area eastward around Whakaari and Te Paepae o Aotea.

76. However, paras [467] to [469] of the No 2 judgment ([2021] NZHC 1025) appear to exclude Whakaari and Te Paepae o Aotea from consideration for a CMT award to Whakatōhea, the court noting that "only two of the hapū in the pūkenga's poutarāwhare (Ngāi Tamahaua and Te Upokorehe) clearly identified a claim for CMT in the takutai moana around Whakaari and Te Paepae o Aotea."

77. Further, para [337] of the No 7 Judgment stated, "Te Paepae o Aotea was not within the area of the CMT awarded at Stage One".[115]

78. The illustration in the appended map accurately reflects the position that Whakaari and Te Paepae o Aotea are excluded from CMT 1. The eastern boundary does not completely cease at the 12 nautical mile limit but follows the 12 nautical mile limit around the intruding tongue of international waters into the territorial sea and after that interruption resumes its heading towards the midpoint of Whakaari.

79. The CMT 1 area as defined in the No 7 judgment is thus in the shape of a triangle with an apex at the coastline of Whakaari and a bite taken out of the eastern side of the triangle by the intrusion of a tongue of the high seas into the CMT 1 area.

80. This CMT 1 area coincides with the area of the Whakatōhea Māori Trust Board application.

81. The WKW (*Edwards*) applicants contend that the Court of Appeal was wrong in accepting that the consensus plans accurately

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115 *Re Edwards (Stage Two) (Te Whakatōhea No. 7)* [2022] NZHC 2644 COA Tab 56 at 05.00760 [337]

reflected the definition of CMT 1 in the No 7 judgment and that the appended map accurately reflects the CMT 1 definition in the No 7 judgment.

82. Moreover, the WKW applicants maintain their claim to the whole of the area bounded in the west by the mid-point of the Maraetōtara Stream and in the east by the tip of Tarakeha headland, with western and eastern boundaries extending due north from those points on the mainland coast as far as the outer limit of the territorial sea, including the takutai moana around Whakaari and Ōhiwa Harbour.

83. Counsel submits that not only does the appended map represent an available reading of Miller J's Order 1 but that it illustrates the only logical representation of CMT 1 in the No 7 judgment.

Relief and Costs

84. If the appeal on mandate is successful, the relief options are covered in paragraph (42) and (49). Given the nature of the appeal contest is essentially 'in rem' and between the iwi/tipuna application and some constituent members of the iwi, as was the case in the Court of Appeal no orders for costs are sought.

Dated 20 September 2024

R.J.B. Fowler KC Tony Sinclair Brett Cunningham
Counsel for WKW/Edward Appellants

APPENDIX A

101.00022