Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

15 August 2025

MEDIA RELEASE

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) AND OTHERS v NGĀTI IRA O WAIOWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) AND OTHERS (JUDGMENT (NO 2))

(SC 121/2023, SC 123/2023, SC 124/2023, SC 125/2023, SC 126/2023, SC 128/2023, SC 129/2023)

[2025] NZSC 104

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

This is the second of two judgments relating to claims to customary rights in the harbours, river mouths, beaches and seascape of the eastern Bay of Plenty. The first judgment, *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hāpū o Te Whakatōhea* [2024] NZSC 164, [2024] 1 NZLR 857, addressed the meaning of s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). That section sets out the test for the making of customary marine title (CMT) orders, one of the two types of orders provided for in MACA to recognise customary interests. The second type of orders are protected customary rights orders (PCRs). These relate to an activity, use or practice meeting the test in s 51.

This judgment resolves the remaining issues on the seven separate appeals which were heard together. The issues include whether recognition orders can be granted under MACA in relation to navigable rivers within the marine and coastal area, and the application of the s 58 test and other provisions in MACA to the specific separate appeals brought before this Court.

Background

For the detailed background, reference should be made to this Court's first judgment. For present purposes, it is sufficient to note that it was common ground between the parties that, in 1840, Māori held pre-existing rights in what MACA terms the "common marine and coastal area". We noted that it was also common ground that, in 2004 immediately before the enactment of the Foreshore and Seabed Act 2004, at least some of those rights were still held by their descendants. The Foreshore and Seabed Act extinguished those rights and replaced them with a limited system of statutory recognition. MACA formally revived those extinguished rights and replaced them with a limited system of statutory recognition.

We address more comprehensively the background as necessary under each of the issues discussed below. A full list of the parties is set out in Appendix A of this judgment.

Issues

The remaining issues are dealt with under the following headings: navigable rivers; status of the Edwards application; Te Upokorehe—claim to exclusive rights; application by Ngāti Muriwai; status of Kutarere Marae; Whakaari and Te Paepae o Aotea; disposition in the Courts below.

Navigable rivers

One of the orders for CMT made by the High Court in these proceedings, CMT Order 1, included the confluence of the Waiōweka and Ōtara rivers. It is accepted the relevant portion of those rivers is navigable. The definition of "marine and coastal area" in MACA includes the beds of rivers that are part of the coastal marine area as that term is defined in the Resource Management Act 1991. However, under ss 51(1)(c) and 58(4) of MACA, orders for CMT and PCRs cannot be granted in respect of customary title or rights that are "extinguished as a matter of law". The issue is whether s 261(2) of the Coal Mines Act 1979 (1979 Act), and its predecessor, s 14(1) of the Coal-mines Act Amendment Act 1903, extinguished customary title and rights in respect of the beds of navigable rivers.

The High Court determined that the 1979 Act extinguished customary rights and title in the beds of navigable rivers, relying on this Court's judgment in *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 *(Paki (No 1))*. On this basis, it was unable to make recognition orders in relation to the area in question. The Court of Appeal overturned the High Court's decision on the basis that, if customary rights and title in the beds of navigable rivers had been extinguished, they were resurrected by s 11(3) of MACA, which provides that the Crown and local authorities are divested of title as owner of the common marine and coastal area. The Attorney-General appealed this decision.

Supreme Court judgment and result

The Supreme Court concluded the High Court was wrong to rely on *Paki (No 1)* as authority that s 261(2) of the 1979 Act extinguished customary rights and title in the beds of navigable rivers. The effect of s 261(2) was not at issue in *Paki (No 1)* and the question of whether that section extinguished customary property interests was left open.

Applying settled principles of statutory interpretation, the Court concluded in this appeal the wording of s 261(2) of the 1979 Act is not sufficiently clear to extinguish customary rights or title to the beds of navigable rivers. The key statutory language is declaratory, not confiscatory, and is essentially the same as that of the relevant provisions unanimously held by the Court of Appeal in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) not to have confiscatory effect with regard to Māori customary land. The legislative history of the relevant provisions supports this conclusion.

As customary rights and title to the beds of navigable rivers were not extinguished by s 261(2) of the 1979 Act, the beds of navigable rivers meet MACA's definition of "marine and coastal area" and recognition orders may be made in relation to them, so long as the other statutory requirements are met. Given this conclusion, the Supreme Court did not need to consider whether s 11(3) of MACA resurrected customary title or rights.

Accordingly, the Supreme Court dismissed the Attorney-General's appeal but for different reasons from those in the Court of Appeal.

Status of the Edwards application

An application was made by the late Claude Edwards and other hapū representatives under the Foreshore and Seabed Act 2004 on behalf of Te Whakatōhea for recognition of the iwi's customary rights in the marine and coastal area within its rohe, specifically in the eastern Bay of Plenty around Ōpōtiki. With the enactment of MACA that application was automatically transferred to the High Court under s 125 to be dealt with under the new regime. Subsequently, various hapū and other groups within Te Whakatōhea took the view that recognition orders should be held at hapū (rather than iwi) level. In 2017 they made their own applications under MACA. That has led to two umbrella groups forming within the proceedings, namely, Whakatōhea Kotahitanga Waka (Edwards or WKW), and Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (Te Kāhui).

In the High Court, two CMT orders were made, CMT Order 1 and CMT Order 2. WKW was not included in either CMT order. The Court of Appeal upheld the High Court's decision not to include WKW in the CMT Orders. In the Supreme Court, WKW challenged this decision on the basis that the Edwards application had and maintains an iwi-wide mandate. That mandate has not been ended in a tikanga-consistent way, and WKW also argued that an iwi-wide approach is appropriate in the case of Te Whakatōhea. Alternatively, WKW argued, that even if the subsequent applications are valid, the Edwards application has substantive priority over other applications under s 125(3) of MACA. Section 125(3) provides that the High Court must "give priority" to transferred applications.

Supreme Court Judgment and Result

The Supreme Court determined that the Courts below were correct not to recognise the mandate originally given to the Edwards application. The hapū do not support the Edwards application. Further, where, as here, the takutai moana rights are held at the hapū level, and it is clear that the iwi no longer speaks for the hapū of Te Whakatōhea on those rights it cannot be said the application is being brought for the hapū. While an iwi-wide approach may be preferable, how rights under a CMT are to be expressed, and the holder of any such CMT, are matters to be determined by the successful groups. The Supreme Court encouraged the determination of these matters out-of-court in accordance with tikanga processes.

Additionally, the fact an application was transferred under s 125 of MACA does not provide it substantive priority over other applications. Section 125(3) gives transferred applications temporal priority only.

Accordingly, the Supreme Court has dismissed WKW's appeal.

Te Upokorehe—claim to exclusive rights

Te Upokorehe assert exclusive rights over the relevant common marine and coastal area within and surrounding the Ōhiwa Harbour, and object to their joint inclusion with Te Whakatōhea hapū in CMT orders relating to that area.

The High Court granted CMT Order 1 jointly to Te Upokorehe, the groups making up Te Kāhui, and Ngāti Ngāhere; and CMT Order 2 to those groups and Ngāti Awa. The High Court also concluded that while jointly held CMT orders are available under MACA, separate overlapping CMT orders in relation to the same area are not. On appeal, the Court of Appeal remitted CMT Order 1 for reconsideration in the High Court on the basis that the High Court did not consider Te Upokorehe's argument that it holds part of the relevant area to the exclusion of other groups. Te Upokorehe did not challenge the inclusion of Te Kāhui groups in CMT Order 2 and withdrew its appeal against Ngāti Awa's inclusion in that Order. In terms of CMT Order 2, the Court of Appeal unanimously upheld the High Court's conclusion that separate overlapping titles were not available under MACA; and found by majority that shared CMT could be available even where one applicant group claims rights to the exclusion of others.

Te Upokorehe challenged the Court of Appeal's decision not to remit CMT Order 2; and its conclusion that separate overlapping CMTs are not available under MACA.

Te Upokorehe also challenged the inclusion of Ngāti Ngāhere, another of the claimant groups, in CMT Orders 1 and 2, on the basis that there was insufficient evidence to satisfy s 58. This argument was not accepted in the Court of Appeal.

Supreme Court judgment and result

In terms of CMT orders being made over areas where there is shared exclusivity, the requirement was for the court to be satisfied, as a matter of fact, that the applicant groups hold the customary rights in accordance with s 58 of MACA. Questions regarding matters of entitlement as between groups where views differ are best resolved through a tikanga process undertaken over time. The Court also upheld the concurrent findings of the Courts below that separate overlapping CMTs in relation to the same area are not permissible under MACA.

The Supreme Court upheld the Court of Appeal's conclusion that Te Upokorehe had not shown it held mana exclusively in relation to the Ōhiwa Harbour. This Court confirmed that the evidence relied on by Te Upokorehe to substantiate its claim was consistent with shared exclusivity, and reflective of the nature of the seascape and the strong links between groups in the rohe. Te Upokorehe currently has a claim in the Waitangi Tribunal, as part of Wai 1750, alleging breaches of the principles of the Treaty of Waitangi in relation to the Ōhiwa Harbour and abutting land. If any findings of the Tribunal cast real doubt on or contradict the Supreme Court's conclusions, a legislative response or, less desirably, a recall of this judgment may be necessary.

The Supreme Court also agreed with the Court of Appeal that there was sufficient evidence for Ngāti Ngāhere to meet the s 58 test for inclusion in CMT Orders 1 and 2.

On these bases, the Supreme Court has dismissed Te Upokorehe's appeal.

Application by Ngāti Muriwai

Ngāti Muriwai says it is a hapū of Te Whakatōhea. In 2017, the daughter of Claude Edwards applied for recognition orders for both CMT and PCR on Ngāti Muriwai's behalf. This was opposed by Ngāti Ruatākenga, which sees Ngāti Muriwai as part of its hapū and unable to hold recognition orders independently.

The High Court concluded that Ngāti Muriwai had neither been a hapū of Te Whakatōhea, nor was presently a hapū, and as such failed the s 58 test for CMT under MACA. The High Court granted Ngāti Muriwai's claim for PCRs in respect of certain activities. The Court of Appeal found that Ngāti Muriwai failed to satisfy the CMT test in its own right, but upheld the High Court's decision as to PCRs. Before this Court, Ngāti Muriwai appealed the CMT decision, while Ngāti Ruatākenga and the Attorney-General appealed the decision as to PCRs.

Supreme Court judgment and result

The Supreme Court concluded that Ngāti Muriwai is entitled to bring an application as an applicant group under s 9 of MACA, as it is, at least, a whānau applicant group. It is otherwise entitled to participate in the CMT orders in accordance with the requirements in s 58. How these rights are to be given effect is a matter for the hapū of Te Whakatōhea and Ngāti Muriwai to consider and determine in accordance with tikanga.

Accordingly, the Supreme Court has allowed Ngāti Muriwai's appeal.

The Courts below were correct to award PCRs to Ngāti Muriwai. On the strictest view of its status, it is entitled to PCRs as an applicant group. The necessary continuity requirement in s 51 was also established.

On this basis, the Supreme Court has dismissed the appeals of Ngāti Ruatākenga and the Attorney-General.

Status of Kutarere Marae

Kutarere Marae, another of the claimant groups, describes itself as a community established in the 1930s by whānau who had been displaced from their traditional lands. Its eponymous marae and surrounding community are situated near the base of the Ōhiwa Harbour. It seeks recognition of rights to a CMT agreement by negotiation with the Crown, rather than through the courts. The High Court determined that that Kutarere Marae did not qualify as an applicant group under s 9 of MACA as, on its own evidence, it is not an iwi, hapū or whānau group. The Court of Appeal upheld this decision.

Supreme Court judgment and result

From the evidence, the Supreme Court concluded that Kutarere Marae consists of multiple whānau groups, with its primary tribal connections being with Te Whakatōhea. For the purposes of negotiation with the Crown, it is an applicant group under MACA. That conclusion

does not predetermine whether Kutarere Marae should succeed in establishing either PCRs or CMT.

Accordingly, the Supreme Court has allowed Kutarere Marae's appeal.

Whakaari and Te Paepae o Aotea

In the High Court, Te Whakatōhea applicant groups and Ngāi Tai claimed CMT in the area around Whakaari and Te Paepae o Aotea. The High Court dismissed the application on the basis that the applicant groups did not satisfy the test for CMT orders under s 58 of MACA in relation to Whakaari and Te Paepae o Aotea. The Court of Appeal upheld this decision.

The Supreme Court, focusing on evidence relating to tītī (muttonbird) harvesting, fishing and the spiritual significance of Whakaari, determined that the Court of Appeal did not apply the necessary contextual analysis which required taking into account, among other matters, the offshore, uninhabitable nature of Whakaari and Te Paepae o Aotea. The evidence showed an overlapping matrix of rights and interests, administration and control in relation to these areas of the takutai moana. In failing to address the contextual aspect, the Court of Appeal asked and answered the wrong questions and overlooked evidence which could demonstrate a holistic relationship of control with the seascape. The Court determined it was not possible or appropriate to determine whether CMT should be granted.

Accordingly, the Supreme Court has allowed Te Kāhui's appeal. The question of whether the test for CMT under s 58 of MACA in regard to Whakaari and Te Paepae o Aotea is remitted for reconsideration by the High Court.

Disposition in the Courts below

Remittal of CMT Order 1

Te Kāhui appealed the Court of Appeal's decision to remit CMT Order 1. The Supreme Court concluded the Court of Appeal was correct, on the basis that there is at least consensus between the affected parties that there is a need to reconsider part of the CMT area. Te Upokorehe's argument of exclusive rights, and the fact that the current order covers an area over which it does not seek recognition, can be best addressed by the High Court. The High Court on remittal will also be able to address the implications of this Court's conclusions on the issue of navigable rivers on the boundary of CMT Order 1.

On this basis there was no need for the Court to determine WKW's appeal regarding the boundaries of CMT Order 1.

Accordingly, the Supreme Court dismissed Te Kāhui's appeal on this aspect.

Boundaries of CMT Order 2

The High Court made CMT Order 2 in relation only to the western part of the Ōhiwa Harbour. It is unclear what was intended regarding the Harbour's eastern part.

The Supreme Court agreed with the successful applicants in relation to CMT Order 2 that, for simplicity, there should only be one CMT order relating to the Ōhiwa Harbour. The Court formally amended CMT Order 2 to capture the Ōhiwa Harbour in full.

Contact person:
Sue Leaupepe, Supreme Court Registrar (04) 914 3613