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A Critical Analysis of Re Edwards (Te Whakatōhea (No 2)) — A Sea Change or a Drop in the Bucket?

I. Introduction

In 2021, the High Court issued judgement in a case whose impact cannot be understated. *Re Edwards* was only the second claim to be brought before the Court under sections 58 and 94 of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA), where applicants sought recognition of customary marine title (CMT) in specified sections of the foreshore and seabed.[1] In 2023, the High Court's judgement was appealed to the Court of Appeal in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* – a similarly important judgement that further clarified the role of the Courts in MACA jurisprudence.[2] Around 190 applications for customary interest recognition are before the High Court.[3] Understanding these judgements, therefore, is not only critical – it is imperative.

Both High Court and Court of Appeal judgements are cited as '*Re Edwards Whakatōhea*'. For clarification, in this essay I will use *Re Edwards* to refer specifically to the High Court judgement by Churchman J and I will use *Whakatōhea Kotahitanga Waka* to refer to the Court of Appeal judgement.

In this essay, I will set forth a three-fold proposition. First, I will briefly situate the Marine and Coastal Area (Takutai Moana) Act in its legal and historical context. Second, I will examine the ways in which *Re Edwards* and *Whakatōhea Kotahitanga Waka* clarifies the statutory criteria for CMT recognition, creating a precedent in the way hundreds of further claims are to be dealt with. Third, I will analyse how these cases apply a tikanga Māori-driven lens to MACA implementation, and how te Tiriti o Waitangi fits into this. Finally, I will explore recent developments in this space. In all, I argue that *Re Edwards* represents a sea change – a decision that elevates and gives due recognition to the role of tikanga Māori and its unique position in Aotearoa New Zealand's law.

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[1] *Re Edwards (Te Whakatōhea (No 2))* [2021] NZHC 1025, [2022] 2 NZLR 772.
[2] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252.
[3] Ministry of Justice "Marine and Coastal Area (Takutai Moana) Act 2011 Applications" <www.justice.govt.nz>.

II. The Marine and Coastal Area (Takutai Moana) Act in its Legal and Historical Context

A. How We Got to the Marine and Coastal Area (Takutai Moana) Act 2011

The legal battle over the foreshore and seabed paving the way for *Re Edwards* cannot be divorced from a historical reality of land dispossession, extinguishment of native title, and systematic and violent colonization. While the story begins in 1840, with Article 2 of te Tiriti o Waitangi promising "te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa" – a promise broken by the Crown – for the purposes of this essay I will focus on the contemporary foreshore and seabed debate that begins with *Attorney-General v Ngati Apa*.[4]

Ngati Apa confirmed that the Māori Land Court held jurisdiction to determine the status of parts of the foreshore and seabed – defined as the area between the high-water mark and 12 nautical miles out to sea.[5] This general ruling, on the surface quite narrow, obscures a more fundamental holding: in delineating the role of the Māori Land Court, the Court of Appeal reasoned that "customary rights […] continued at common law to exist until lawfully extinguished".[6] According to Richard Boast, in effect, this decision meant that "it can no longer be said that the foreshore and seabed is 'Crown land' in the Land Act sense".[7] The then-orthodox presumption that the Crown had a dominium-style title over the foreshore had been rebutted by the presumption articulated in *Ngati Apa* that, until the Parliament by express, "crystal clear" words extinguished customary title, it nonetheless persisted.[8]

In 2004, as a response to *Ngati Apa,* the government passed the Foreshore and Seabed Act (FSA), vesting ownership of the foreshore and seabed into the Crown in dominium and effectively overturning *Ngati Apa*.[9] "This bill delivers four-square on our promise," Michael Cullen, then-Deputy Prime Minister, said in the first reading of the Bill. "To protect public access and clarify ownership".[10] Ownership, Cullen said, lay with the Crown "on behalf of all New Zealanders".[11] Don Brash, then-Leader of the Opposition, voted against the Bill, warning "de facto control [of the foreshore and seabed] will be with iwi".[12] The bill did no such thing,

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[4] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 15.
[5] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [91].
[6] At [34].
[7] Richard Boast and Robert Makgill "The Evolution of the Marine and Coastal Area (Takutai Moana) Act 2011" in Marine and Coastal Area Act – Demystifying the Hype (New Zealand Law Society seminar, 2011) 1 at 5.
[8] *Ngati Apa*, above n 5, at [185].
[9] Boast and Makgill, above n 7, at 24.
[10] (6 May 2004) 617 NZPD at 12720.
[11] NZPD, above n 10.
[12] NZPD, above n 10, at 12722.

but both Cullen and Brash's statements reflect a period of time, post-*Ngati Apa*, fraught with the illusionary, false spectre of the loss of public access to beaches and persisting lies of an imminent Māori takeover of 'our' harbours and coastlines.[13] The bill was not popular with Māori. A hīkoi beginning in the Far North ended with 20,000 people marching down Lambton Quay in Wellington for its last leg: "Māori seabed *for shore*", they advocated.[14]

In 2004, the Waitangi Tribunal criticised the FSA as "clearly [breaching] the principles of the Treaty of Waitangi", but further contended that the Act "fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state".[15] Such was the anger that had arisen that in 2011 the National-led government passed MACA. "This bill is another step in our collective pursuit of Treaty justice", Tariana Turia said at the bill's third reading.[16] But she stressed that the journey "is a lifelong one" – and "the challenge now is to test the law".[17] *Re Edwards* was the second case – but by far the most important – to do just that.

B. How the Marine and Coastal Area (Takutai Moana) Act Works

MACA provides for two methods in which customary marine title (CMT) can be recognised: first, the Crown may enter into agreement with an applicant group.[18] The second avenue – which is the focus of the action in *Re Edwards* and its appeal – consists of an applicant group applying to the High Court for a recognition order.[19] CMT recognizes applicant groups' interests in land and provides certain accompanying statutory rights such as, but not limited to, permission rights under the Resource Management Act; conservation permission rights; ownership of specified minerals; and a right to protect wāhi tapu and wāhi tapu areas.[20] It is important to note that the rights conferred by CMT falls short of the rights accompanied by fee simple title – a point the Waitangi Tribunal considers is discriminatory, failing to give effect to the principles of active protection and equity, therefore violating the Treaty of Waitangi.[21] Nonetheless, Churchman J granted three CMTs to six applicant groups. To determine whether CMT exists for applicant groups, MACA requires these groups to "[hold] the specified area in

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[13] Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, Penguin, Auckland, 2004) at 381.
[14] At 404.
[15] Wai 1071, above n 4, at xiv.
[16] (24 March 2011) 671 NZPD at 17628.
[17] NZPD, above n 16.
[18] Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act), s 95.
[19] Section 98.
[20] Section 62.
[21] Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023) at 237.

accordance with tikanga" and to have "exclusively used and occupied [the specified area] from 1840 to the present day without substantial interruption".[22] Importantly, the Act clarifies that "it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished".[23] I will examine how *Re Edwards* and *Whakatōhea Kotahitanga Waka* clarifies these provisions in turn.

III. How the Courts Clarify Section 58

A. s 58(1)(a) – "Holds the Specified Area in Accordance with Tikanga".

In the High Court, counsel for the Attorney-General and the Landowners' Coalition submitted that s 58(1)(a), to "[hold] the specified area in accordance with tikanga", should be read as two distinct requirements: first, applicants must show they have "[held] the specified area", then they must show this was "in accordance with tikanga".[24] This interpretation was rejected by Churchman J, relying on distinctions between tikanga Māori conceptions of "holds" and Western legal conceptions.[25] Counsel for the Landowners' Coalition, Chris Finlayson, who was the Minister-in-Charge of the MACA Bill in 2011, submitted that "the Court must be satisfied the evidence shows a proprietary or proprietary-like holding" of the area in which the applicant group seeks CMT recognition.[26] The Court held this orthodox, common law reading of "holds" would "severely restrict the possibility of a successful application".[27] For this reason the High Court held that s 58(1)(a) should be read as one clause, rejecting the Landowners' Coalition and Attorney-General's plea to infuse this specific statutory criterion with European proprietorial concepts. In *Whakatōhea Kotahitanga Waka*, the Court affirmed this approach, drawing from the Māori Land Court's interpretation of a similar provision in the Te Ture Whenua Māori Act: "there is no connotation of ownership," the Court said. "But rather that it is retained or kept in accordance with tikanga".[28]

B. s 58(1)(b) – "Exclusive Use and Occupation Since 1840 Without Substantial Interruption".

Section 58(1)(b) is the more difficult provision, where the High Court attempts to clarify what "exclusive use and occupation" and "without substantial interruption" means in the context of

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[22] MACA Act, s 58(1).
[23] Section 106(3).
[24] *Re Edwards*, above n 1, at [109].
[25] At [144].
[26] At [113], [115].
[27] At [129].
[28] *Whakatōhea Kotahitanga Waka*, above n 2, at [140].

CMT recognition. They handle these issues separately. First, as the Court of Appeal points out, *Re Edwards* does not explicitly clarify the parameters of "exclusive use and occupation" in s 58(1)(b) – but it is clear from Churchman J's analysis of s 58(1)(a) that "exclusive" does not refer to the idea of exclusion in the Western proprietary sense – the "intention and ability to exclude others".[29] This is incompatible, the High Court reasoned, with the tikanga Māori principles of manaakitanga and whanaungatanga.[30] The Court of Appeal believed Churchman J was wrong to define exclusivity on this basis – the idea of iwi and hapū excluding other groups from their rohe was not uncommon.[31] Instead, the Court believed exclusivity, under s 58(1)(b), should require "externally-manifested intention to control the area as against other groups and the capacity to do so".[32] High Courts must be "sensitive to the methods [applicant groups use] to assert mana", drawing on manifestations of whanaungatanga, lines of whakapapa, and kaitiaki relationships.[33] This provision can be contrasted with the FSA's provisions for the granting of territorial customary rights, which defined "exclusive use and occupation" as use and occupation "to the exclusion of all persons who did not belong to the group" – a difficult hurdle to overcome as it sought to lock Māori into a Western legal framework.[34] In comparing MACA and the FSA, the evolution is clear: the common law has evolved in order to more fully account for tikanga and the recognition of customary interests. Instead of a narrow reading of MACA that interprets exclusivity in line with that pled by the Crown, both Courts are open to a reading that does not simply include tikanga Māori but centres it.

Second, the idea of "without substantial interruption" raised eyebrows in the Committee of the Whole House stage of MACA's passing in 2011. Green MP Catherine Delahunty, for example, pointed out "a limited list of hapū […] may be able to pass this test", while Labour MP Maryan Street similarly remarked this criterion is "extremely difficult for iwi to prove".[35] Then-Government Minister Dr Wayne Mapp interjected, perhaps offhandedly, "it's one of the easiest things to prove".[36] It is clear from Churchman J's judgement that it is not easy – instead, it is a question of fact that must be analysed case-by-case in accordance with local tikanga and RMA conditions. Importantly, the High Court and Court of Appeal agree that raupatu of

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[29] At [91].
[30] *Re Edwards*, above n 1, at [174].
[31] *Whakatōhea Kotahitanga Waka*, above n 2, at [146].
[32] At [162].
[33] At [162].
[34] Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 147.
[35] (16 March 2011) 670 NZPD at 17320-17321
[36] At 17321.

adjoining dry land does not constitute "substantial interruption".[37] In coming to these conclusions, the Court reckons with a historical legacy of land dispossession and confiscation that dates back to 1840, understanding the ways this confiscation is tied to the ability of iwi and hapū to assert mana where the Crown has "expropriated", "confiscated" and "land grabbed".[38]

IV. Re Edwards, Tikanga, and te Tiriti o Waitangi

Churchman J recognises that MACA does not restore pre-existing customary rights.[39] This admission is important because it reveals the limits of *Re Edwards* and *Whakatōhea Kotahitanga Waka* – judges are bound by the constraints of an Act where the predominance of tikanga Māori must be read-in. Churchman J nonetheless finds a way to give effect to te Tiriti o Waitangi and, arising out of that, tikanga Māori.

First, te Tiriti o Waitangi forms the bedrock for the analyses in *Re Edwards* and *Whakatōhea Kotahitanga Waka* – even if there are few references to te Tiriti in the cases themselves. Article 2 of te Tiriti promises Māori tino rangatiratanga over taonga, whenua, and other resources. In these cases' explicit recognition of tikanga Māori, there is always an implicit recognition of the fact that the right to exercise control over their own rohe, over the use of tikanga Māori, is protected by and underscored by te Tiriti o Waitangi.[40] It is imperative to understand this – tikanga Māori and te Tiriti o Waitangi are inextricably bound.

Section 99 of MACA provides for two ways in which a Court can seek opinions or advice on issues of tikanga: the Court may seek the binding advice of the Māori Appellate Court, or appoint pūkenga.[41] Pūkenga are "living persons who retain the mātauranga […] passed down to them by their ancestors" – their advice is not binding but is relied upon to a significant extent by Churchman J.[42] The role and appointment of pūkenga under s 99 of MACA had been clarified by Mallon J in *Re Tipene* [2015] NZHC 2923, an interlocutory judgement specifically focusing on the appointment of a Rakiura tikanga Māori expert. The Crown argued pūkenga should, first, be widely acknowledged as holding expertise in tikanga; have an awareness of the regional variations of tikanga; and not have direct interest in the litigation.[43] The Court, as

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[37] *Re Edwards*, above n 1, at [270]; *Whakatōhea Kotahitanga Waka*, above n 2, at [95].
[38] Wai 2660, above n 21, at 210.
[39] *Re Edwards*, above n 1, at [32].
[40] See, generally: Wai 2660, above n 21, at 13; pūkenga report in *Re Edwards*, above n 1, at 909.
[41] MACA Act, ss 99(1)(a)-(b), 99(2).
[42] *Re Edwards*, above n 1, at [308]; MACA Act, s 99(1)(b).
[43] *Re Tipene* [2015] NZHC 2923 at [6].

a matter of statutory interpretation, considered the fundamental requirement should be "knowledge and expertise in tikanga".[44] Tikanga Māori experts need not be completely severed from interest in the litigation, the Court argued – this is impractical. Mallon J instead considered that the provision of this advice in the first place "must outweigh" the independence or conflicts of interests of Court-appointed pūkenga, due to the primacy of tikanga in s 58 litigation.[45]

Throughout this essay I have explored other ways the Court gives effect to tikanga – through interpretations of 'holds', of 'exclusivity', and of substantial interruption. There are various other examples of tikanga recognition in *Re Edwards*: 'shared exclusivity', affirmed in *Whakatōhea Kotahitanga Waka*; the Court's tracing of the role of tikanga in common law in *Takamore*, *Trans-Tasman Resources Ltd*, and *Ngawaka*; recognition that the Court is not "a final arbiter" of tikanga values and more.[46] I use the appointment of pūkenga instead as a microcosm for the way the Courts respect and attempt to foreground tikanga Māori in s 58 determinations – as affording it status as its own source of law rather than simply a complement to, or subordinate to, Western law.

V. Developments Post-Court of Appeal

On April 17, 2024, the Supreme Court granted leave to appeal *Whakatōhea Kotahitanga Waka* in "general terms".[47] This appeal would likely authoritatively clarify the bounds of s 58 for the approximately 190 customary rights recognition claims waiting to be heard before High Courts across Aotearoa.[48] This is contingent, however, on the actions of the current Coalition Government. Within the coalition agreement between the National Party and the New Zealand First Party is a promise to "amend section 58 of [MACA] to make clear Parliament's original intent, in light of the judgement of the Court of Appeal in [*Whakatōhea Kotahitanga Waka*]".[49] It is unclear what exactly the amendment will include – but, based on the Coalition Government's policies to date, which includes disestablishing Te Aka Whai Ora; subjecting Māori wards to referendum; removing co-governance from public service delivery; and requiring government departments have their primary name in English – it is unlikely that the

[44] At [24].
[45] At [26].
[46] *Re Edwards*, above n 1, at [168], [273-278], [301]; *Whakatōhea Kotahitanga Waka*, above n 2, at [208].
[47] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana o Ngā Whānau Me Ngā Hapū o Te Whakatōhea* [2024] NZSC 33 at [1].
[48] Ministry of Justice, above n 3.
[49] Audrey Young, "Foreshore and seabed – Govt set to overturn Court of Appeal judgement" *The New Zealand Herald* (online ed, New Zealand, 27 November 2023).

government will amend MACA in a way that truly gives effect to the promises of te Tiriti nor the hope of *Re Edwards*.

VI. Conclusion

I have argued that *Re Edwards* and *Whakatōhea Kotahitanga Waka* represents a significant step forward in the way Māori customary rights are recognised. The rejection by Churchman J of the plea by the government to foreground Western conceptualisations of MACA – in effect, to severely restrict the reading of s 58 to make the test more difficult for applicant groups to overcome – is significant. But the story is not yet over. In 1840, Māori signed te Tiriti o Waitangi. A violent colonisation of New Zealand ensued "predicated on assumptions of racial, religious, cultural and technological superiority".[50] *Re Edwards* attempted to broaden the scope of MACA to give further effect to tino rangatiratanga and tikanga Māori to understand and right these continuing wrongs – but the sea change embedded within *Re Edwards* is at risk. The story is not yet over. The legal fight over rights to the foreshore and seabed endures, and as Ranginui Walker opined, "the struggle without end continues".[51]

[50] Walker, above n 13, at 9.
[51] At 8.