

**IN THE HIGH COURT OF NEW ZEALAND  
WHANGAREI REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
KI WHANGĀREI TERENGA PARĀOA ROHE**

**CIV-2017-485-320  
CIV-2017-485-208  
CIV-2017-485-240  
CIV-2017-485-290  
CIV-2017-485-237  
CIV-2017-485-245  
CIV-2017-404-578  
CIV-2017-485-268**

UNDER the Marine and Coastal Area  
(Takutai Moana) Act 2011

IN THE MATTER OF an application by Ngāi Takoto Iwi for  
orders recognising Customary Marine  
Title and Protected Customary Rights

On the papers:

Counsel: H Andrews for Ngāi Takoto Iwi  
S Wroe for Ngā Uri o Ngāti Kuri  
S M Downs and J Lang for Trustees of Te Rūnanga Nui o Te Aupōuri  
M Piripi for Te Rūnanga o Te Rarawa  
R Siciliano and K Ketu for Parengarenga A Incorporation and Iwi  
M Sreen for Te Iwi o Te Rarawa ki Ahipara, and Ngāti Tara  
Afeaki for Ngā Hapū o Ngāti Kahu  
G Melvin for Attorney-General

Minute: 9 November 2022

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**MINUTE OF CHURCHMAN J**

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[1] In a minute of 1 July 2022, I addressed the distinction between the map attached to Ngāi Takoto's original application, a map filed on 23 August 2021, and a revised map filed on 24 May 2022. I stated:

[129] As noted above, two aspects of the proposed application area depicted in the 2022 map are inconsistent with the description of the application area in Ngāi Takoto's original application. The original application does not make any

reference to Manawatāwhi, or Te Rerenga Wairua either in its description of the applicant group or in the area to which the application relates.

[130] Those two aspects also substantially increase the size of Ngāi Takoto's application area by adding two new portions in a separate area of the takutai moana. Reference in Ngāi Takoto's memo of 24 May 2022 is also made to "[including] an area off the coast of Te Rerenga Wairau (Cape Reinga) as well as Manawatāwhi (Three Kings Islands)". This indicates Ngāi Takoto are aware that they are adding to the extent of their application area.

[131] I direct that counsel file a memorandum within 14 working days addressing this issue. In the absence of a satisfactory explanation, the matter will be set down for a strikeout hearing in relation to those parts of the application set out in the 2022 map that were not included in the original application and map.

[2] 14 days following 1 July 2022 was 21 July 2022. Following considerable delay, and a change in representation, Ngāi Takoto's substantive response to my 1 July 2022 direction was filed by Ms Andrews on 17 October 2022.

### **Positions of the parties**

#### *Ngāi Takoto*

[3] Ms Andrews, on behalf of Ngāi Takoto, submits broadly that the amendments made by Ngāi Takoto in the 2022 map are permissible amendments. She says that the 2022 map was filed with the intention of ensuring that Ngāi Takoto's application aligns with the area of interest recognised in their Waitangi Tribunal settlement, and so that "Ngāi Takoto does not become vulnerable to the unsubstantiated claims of other claimant groups". She says that outcomes under the Act must be durable and in accordance with the Act's purpose, rather than being determined on a 'first-in, first-correct' basis.

[4] Ms Andrews submits that Ngāi Takoto accepts that the additional areas included in the 2022 map were not included in the previous iterations of their application, and agrees with the law applying to amended applications as established in *Ngāti Pāhauwera*. However, she submits that the number of overlapping applicants and interests in the relevant area goes to whether the 2022 map amounts to a 'fresh' cause of action.

[5] Ms Andrews summarised Ngāi Takoto's position in the following manner:

- (a) In reality, including the Te Rerenga Wairua and Manawatāwhi areas in the 2022 map did not render their application under the MACA a "fresh" or "essentially different" cause of action.
- (b) Even if that were considered to be the case (which is not accepted), in the

circumstances it would not be appropriate or in accordance with natural justice to entertain a strike out application in respect of those areas on the basis of an abuse of process.

- (c) Nor will accepting that Ngāi Takoto's claim area is now as per the 2022 map cause undue prejudice and delay, such that it is possible (or appropriate) to entertain a strike out application on that basis either.

[6] Ms Andrews submits that “Ngāi Takoto’s application clearly signalled their intention to seek protected customary rights and customary marine title recognition orders over the full extent of marine and coastal area adjacent to their land based rohe”. She says that given the Crown’s acknowledgment of their land-based rohe, it should not have been unexpected that Ngāi Takoto would subsequently include the additional areas in their maps. She says that given the time and resourcing constraints faced by applicants, it would be inappropriate and unfair for parties to be punished by way of strike-out. She submits that if Ngāi Takoto considers they have a legitimate interest in the Te Rerenga Wairua and Manawatāwhi areas, they should not be prevented from pursuing that by a strict application of the law.

[7] Ms Andrews seeks a direction that Ngāi Takoto’s claim area is accepted as being shown by the 2022 map, and confirmation that there will not be a strike-out hearing. In the alternative, she submits that Ngāi Takoto would be prepared to withdraw the 2022 map in favour of the 2021 map, and seek to become an interested party in respect of Te Aupōuri and Ngāti Kuri’s applications.

### *Responses*

[8] Ngāti Kuri filed a memorandum stating that they would abide by the decision of the Court, but that:

NKTB does not support Ngāi Takoto’s latest iteration becoming part of their claim. They have not discussed it with NKTB and it is not consistent with what has been provided by them in the past.

[9] Te Aupōuri filed a memorandum stating:

At this stage, Te Aupōuri oppose the application to extend the Ngāi [Takoto] application area, pending further kanohi-ki-te-kanohi discussions between Te Aupōuri and Ngāi [Takoto].

Te Aupōuri seek to hold further discussions with Ngāi [Takoto] to understand and discuss the reasoning behind the application, and to explore how the overlapping claims issues arising from the application could be managed.

Once those discussions have taken place, Te Aupōuri will seek to update the Court as to whether their objection remains or is resolved.

[10] Te Rūnanga o Te Rarawa, and Parengarenga A Inc, filed memoranda providing that they will abide by the decision of the Court, given they have no overlapping interests with Ngāi Takoto in the relevant areas. Ngāti Tara and Te Iwi ō Te Rarawa ki Ahipara provided a similar response. Nga Hapū o Ngāti Kahu indicated that they did not have any views on the matter.

[11] Mr Melvin provided submissions on behalf of the Attorney-General, indicating that the Attorney-General will abide by the Court's decision, and sought leave to participate in any strike-out hearing on a 'watching-brief' basis. However, Mr Melvin submits that:

- (a) the Treaty Settlement process is distinct from the Act;
- (b) reliance on assumed knowledge of an applicant's land-based interests cannot overcome the difficulty that the Act requires an applicant to identify the particular area of the common marine and coastal area to which the application relates;
- (c) Ms Andrew's submissions directly challenge the Court's findings in *Ngāti Pāhauwera*; and
- (d) the number and nature of overlapping claims in the area is not relevant to the permissibility of Ngāi Takoto's amended application area.

## **Discussion**

[12] On 1 July 2022, I expressed the view that in the absence of a satisfactory explanation from Ngāi Takoto, the matter would be scheduled for a strike-out hearing. Notwithstanding the considerable delay in addressing this issue, such an explanation is still absent. I do not accept any of Ms Andrews' submissions and nor has my view changed since 1 July 2022.

[13] The Act provides clearly that an application for recognition orders must identify the particular area of the common marine and coastal area to which the application relates.<sup>1</sup>

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<sup>1</sup> Marine and Coastal Area (Takutai Moana) Act 2011, s 101(d).

While Waitangi Tribunal material may be offered as evidence in attempting to establish the requirements of ss 51 and/or 58, it has no relevance in respect of the procedural or administrative requirements of the Act. The number of overlapping applications in the relevant area does not affect the situation.

[14] Ms Andrews seeks to establish that it would be unfair, and in breach of natural justice principles, if the 2022 map did not stand. In this sense, she also seeks to have Ngāi Takoto treated differently to other applicants who have sought similar amendments to their application areas in the past. In my view, that would be unfair. As I have previously stated:<sup>2</sup>

The Act, as set out in s 4 and the preamble, is intended to establish a durable scheme that will ensure inalienable and enduring legal rights and interests for Māori whānau, hapū, and iwi over the coastal marine environment to which they are intrinsically connected through mana, rangatiratanga, kaitiakitanga and whanaungatanga.<sup>3</sup> The durability of this legislation, and this purpose, is weakened if impermissible material changes are allowed to be made to applications under the Act after the limitation period has long since passed, because it may undermine the applications of other whānau, hapū, and iwi. Again, as observed by Mallon J, the Court must not take an unduly narrow approach to permissible amendments, but they must in fact, be permissible.

[15] Accordingly, it is my view that a strike-out hearing should be scheduled, unless Ngāi Takoto are willing to withdraw the 2022 map, and instead rely on the map filed on 23 August 2021. As such, I direct the Registrar to schedule a strike-out hearing for the next available date after 22 November 2022.

[16] Should Ngāi Takoto file a memorandum withdrawing the 2022 map prior to 22 November 2022, that date may be vacated. All overlapping applicants should be provided the opportunity to be heard in the event that a strike-out hearing occurs. The Attorney-General may participate on a ‘watching-brief’ basis.

## Churchman J

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<sup>2</sup> *Re Ngāti Pāhauwera (Strike-out application)* [2020] NZHC 1139 at [72].

<sup>3</sup> Marine and Coastal Area (Takutai Moana) Act 2011, s 4 and preamble; See also Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004) at [2.1.5].