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

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

**CIV-2017-485-320**
**CIV-2017-485-208**
**CIV-2017-485-240**
**[2023] NZHC 301**

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| 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:

Appearances: H C 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
G Melvin for Attorney-General

Judgment: 24 February 2023

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**JUDGMENT OF CHURCHMAN J**

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[1] The applicant, Ngāi Takoto, seeks leave to become an interested party to the applications for recognition orders of Ngāti Kuri Trust Board and Te Rūnanga Nui o Te Aupōuri Trust under the Marine and Coastal Area (Takutai Moana) Act 2011 (the MACA Act).[1]

[2] The applicant accepts and acknowledges this application is being made well after the due date to file a notice of appearance in respect of applications under the MACA Act in accordance with s 104. However, the applicant says the circumstances here are appropriate for the applicant to join as an interested party at a later date.

[1] CIV-2017-485-208 and CIV-2017-485-240 respectively.

## Background

[3] In a minute dated 9 November 2022, noting the inconsistencies between the map attached to Ngāi Takoto's original application, a map filed on 23 August 2021 (the 2021 map), and a revised map filed on 24 May 2022 (the 2022 map), I expressed my view that a strike out hearing should be scheduled for the next available date after 22 November 2022 unless Ngāi Takoto was willing to withdraw the 2022 map, and instead rely on the map filed on 23 August 2021.[2]

[4] On 22 November 2022, the applicant advised that it may be prepared to withdraw the 2022 map and retain their claim area as shown in the 2021 map. The applicant advised that if that were to occur, it would seek leave to become an interested party to other claims under the MACA Act.

[5] As advised, the applicant has now withdrawn their 2022 map and has retained their claim area as shown in the 2021 map. The applicant says the withdrawal of the 2022 map is offered as a pragmatic resolution to matters raised by the Attorney-General.

[6] The applicant now seeks leave to become an interested party to the applications of Ngāti Kuri and Te Aupōuri. In respect of these applicants, I understand that Ngāti Kuri has advised it will abide the decision of the Court in respect of the applicant's application, and that while Te Aupōuri has not advised a position in respect of the applicant's application, it has indicated it is prepared to discuss matters regarding the iwi's respective MACA claim areas kanohi ki te kanohi at a governance level.

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2 *Re Ngā Takoto Iwi* HC Whangārei CIV-2017-485-320, 9 November 2022 (Minute of Churchman J) at [15].

## Jurisdiction under the MACA Act

[7] Section 104 of the MACA Act provides that "[a]ny interested person may appear and be heard on an application for a recognition order if that person has, by the due date, filed a notice of appearance."[3]

[8] The "due date" is not in fact defined in the Act. However, it is clearly a reference to the date by which any application for a recognition order under the Act had to be filed, pursuant to s 100, namely "not later than 6 years after the commencement of th[e] Act". That date was 3 April 2017.

[9] Section 100(2) expressly provides that the Court "must not accept for filing or otherwise consider any application that purports to be filed after that date."

[10] However, in *Re Tipene*, Mallon J held that the Court may permit interested parties to appear and be heard even if they have missed the due date for filing a notice of appearance.[4]

[11] In *Re Rota* it was clearly contemplated that someone whose application could not be accepted for reason of being filed after the due date could join as an interested party to other applications that had been lawfully made.[5] The applicant's barrister failed to submit the application before the due date (5pm on 3 April 2017) and the application was received only on 6 April 2017. In a minute, Mallon J expressed her preliminary view that because the application was not filed in the Court on 3 April 2017, it was not filed within the statutory timeframe. However, she suggested that the claimants "could potentially file a notice of appearance in respect of the Māori council application", the Māori Council having filed an application which purported to extend to the marine and coastal area of the entire country with the claimed intention of protecting Māori interests where applicants failed to meet the statutory timeframe. The applicant's barrister accepted her Honour's preliminary view that the Court did

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3 There is no definition of "interested person" in the Act: *Re Tipene* [2014] NZHC 2046 [*Re Tipene* (27 August 2014)] at [10]; and *Tangiora v Attorney-General* [2014] NZHC 2049, [2015] 2 NZLR 66 at [11].

4 *Re Tipene* (27 August 2014), above n 3, at [22]–[23]; and see *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 [*Re Tipene* (22 December 2016)] at n 74.

5 *Re Rota* [2017] NZHC 1445 at [2(c)].

not have discretion to accept the late application he filed, and advised that the applicant intended to join as interested party to other applications that had been made.[6]

[12] Her Honour, dealing with another issue, namely a submission from another affected party, also stated that party "may wish to become an interested party to [an already existing] application if and when it is progressed."[7]

[13] I have previously granted leave for a party who has filed a notice of appearance and application for leave to appear as an interested party in proceedings late to appear as an interested party.[8] In *Re Edwards (No 6)*, the party in question did not hold the resource consents and did not own the asset affected as at the due date.[9] They therefore could not have filed a notice within the specified time and I considered it was appropriate to grant them leave to appear as an interested party accordingly.[10]

[14] This Court has also previously reserved leave for parties potentially affected by the grant of recognition orders to participate in the second part of the hearing of a claim.[11]

[15] Similarly, though against a slightly different legal backdrop, in *New Zealand Māori Council v Te Kāhui Takutai Moana O Ngā Whānui Me Nga Hapū*, the Court of Appeal granted the Council leave to intervene in appeals brought against the High Court's decision *Re Edwards (Te Whakatōhea No 2)*, though exactly why the Council did not appear in the High Court as an interested party was "not explained".[12] The Court considered the Council's participation could be of assistance to the Court and it was unclear what prejudice, if any, the applicant faced by the delayed application.[13] The Court did recognise the potential for prejudice to the parties by expanding the scope of the appeals and limited the Council's involvement only to the legal issues raised by the parties accordingly.[14]

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6 At [2(c)].
7 At [4].
8 *Re Edwards (No 6)* [2022] NZHC 1160.
9 At [11].
10 At [11]–[12] and [14].
11 See *Re Edwards (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [666].
12 *New Zealand Māori Council v Te Kāhui Takutai Moana O Ngā Whānui Me Nga Hapū* [2022] NZCA 224 at [4].
13 At [17]–[18].
14 At [19].

[16] In *Re Tipene*, the Court allowed the applicant to amend his application under the MACA Act to broaden the applicant group and to refine and reduce the application area.[15] The application was permitted over the Attorney-General's objection, Mallon J holding that the essence of the application had not changed.[16] Her Honour noted the Court should not take an unduly narrow approach to permissible amendments.[17]

[17] *Tangiora v Attorney-General* is also helpful.[18] The issue in that case was not that an application was filed after the due date but rather that the applicant considered the person was not an "interested person".[19] Nevertheless, Mallon J made some helpful remarks.

[18] As her Honour noted, the Act is silent on what is to happen if a person files a notice of appearance outside the due date.[20]

[19] However, her Honour stated:

> [26] It seems likely that the Act intended there to be some flexibility to hear from persons likely to be directly affected by an application, even if they fail to file a notice of appearance by the due date. It also seems likely that the Act intended that the Court retain some control over whether a party claiming an interest in an application is properly a party who should be before the Court, whether they have filed a notice of appearance before or after the due date.
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> [27] As discussed in *Re Tipene*,[21] in my view a person who has not filed a notice of appearance by the due date may nevertheless be permitted to appear and be heard through the exercise of the Court's inherent jurisdiction. In that case the Court will consider such factors as the nature of the case, the nature of the interest claimed, the quality of the information before the Court and practical considerations …

[20] Her Honour concluded:

> [28] I consider that, through these powers, the Court retains sufficient control over whether a person is properly before the Court. A person who can demonstrate a sufficient interest may be included even if they have missed the due date. A person who has signalled their interest through filing a notice of appearance by the due date will be able to be heard unless they have no

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15 *Re Tipene* [2015] NZHC 169 [*Re Tipene* (13 February 2015)].
16 At [16]; and see *Re Tipene* (22 December 2016), above n 4, at [46(c)] and n 80.
17 At [21].
18 *Tangiora v Attorney-General*, above n 3.
19 At [25(c)].
20 At [25(d)].
21 *Re Tipene* (27 August 2014), above n 3.

> legitimate interest at all (that is, if they disclose no reasonably arguable case), or they act in a way that causes prejudice or delay, or is frivolous or vexatious, or is otherwise an abuse of the Court.

[21] Her Honour considered the Act contemplated a "wider rather than narrower approach to who may appear and be heard".[22]

**Decision**

[22] The applicant says the circumstances are appropriate here for its application to join as an interested party to be approved. The applicant says granting its application would assist the other applicants and the Attorney-General to progress the MACA claims in Te Hiku to a speedy resolution.

[23] It also says it would ensure that its MACA application aligns with the area of interest recognised in the settlement of their Treaty land claims, that the applicant does not become vulnerable to the unsubstantiated claims of other claimant groups, and that the outcomes of the MACA Act applications are durable and appropriate in accordance with the Act's purpose, "rather than simply being determined on a 'first-in first-correct' basis."

[24] As noted, the Act does not specify a process for parties to join applications at a later date. However, as I have canvassed above, in respect of such applications there are not the same strict time limits as exist in relation to originating applications for recognition orders under the Act, and such applications for leave to appear as an interested party have been allowed in appropriate circumstances.

[25] I am prepared to grant the present application. The applicant's participation as an interested party will result in the Court being more fully informed than it would be without its participation, and I consider its presence is necessary to justly determine the other applicants' applications here.[23]

[26] I also consider granting the application aligns with the purpose of the Act, in particular to recognise the mana tuku iho exercised in the marine and coastal area by

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[22] *Tangiora v Attorney-General*, above n 3, at [29].

[23] See r 4.1 of the High Court Rules 2016.

iwi, hapū, and whānau as tangata whenua, and to provide for the exercise of customary interests in the common marine and coastal area.[24]

[27] I am also satisfied that granting the application will not prejudice or delay any party (including Ngāti Kuri and Te Aupōuri), given that no steps have yet been taken towards bringing their applications to hearing. By contrast, I accept there would be significant prejudice to the applicant, their mana and their overall wellbeing if the application was not granted. I accept they would suffer difficulties in pursuing their rights and obligations regarding the Te Rerenga Wairua and Manawatāwhi areas if this was so.

[28] Of course, leave to be joined as an interested person following the due date will not always be allowed.[25] However, in this circumstance I consider the application is appropriate.

**Outcome**

[29] Leave for the applicant to become an interested party to the applications of Ngāti Kuri and Te Aupōuri is granted.

**Churchman J**

Solicitors:
The Environmental Lawyers for Ngāi Takoto Iwi
Tukau Law Limited for Trustees of Te Rūnanga Nui o Te Aupōuri

cc: S Wroe for Ngā Uri o Ngāti Kuri

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24 Marine and Coastal Area (Takutai Moana) Act 2011, s 4(1)(b)–(c).

25 See *Re Reeder* [2021] NZHC 2726, [2022] 3 NZLR 304 at n 9, where Powell J refused leave for a party to be joined as an interested person in a minute dated 7 May 2021.