

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2011-485-817
CIV-2017-485-185
CIV-2017-485-299
CIV-2017-485-262
CIV-2017-485-377
CIV-2017-485-253
CIV-2017-485-292
CIV-2017-485-355
CIV-2017-485-201
CIV-2017-485-196
CIV-2017-485-270
CIV-2017-485-272
CIV-2017-485-269
CIV-2017-485-238**

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

IN THE MATTER applications for recognition orders for
Customary Marine Title and Protected
Customary Rights

Counsel: T Castle for Ngāi Taiwhakaea (CIV-2017-485-185)
A Sykes for Ngāti Ira o Waiōweka (CIV-2017-485-299)
C Panoho-Navaja and J Alexander for Ngāi Tamahau
(CIV-2017-485-262) and Te Hapū Titoko o Ngāi Tamahau
(CIV-2017-485-377)
T Bennion and O Ford-Brierley for Ngāti Patumoana
(CIV-2017-485-253)
K Feint KC and S Fletcher for Ngāti Ruatakenga
(CIV-2017-485-292)
K Ketu for Te Uri o Whakatōhea Rangatira Mokomoko
(CIV-2017-485-355)
B Lyall and H Swedlund for Te Ūpokorehe Treaty Claims Trust
(CIV-2017-485-201)
H K Irwin-Easthope for Te Rūnanga o Ngāti Awa
(CIV-2017-485-196)
E Rongo for Ngāi Tai (CIV-2017-485-270) and Ririwhenua Hapū
(CIV-2017-485-272)
A J Sinclair and B Cunningham for Whakatōhea Kotahitanga
Waka (CIV-2011-485-817)
M Sharp for Ngāti Muriwai Hapū (CIV-2017-485-269)
C Leauga for Te Whānau a Harawaka (CIV-2017-485-238)

Interested Parties:
R Roff and C Barnett for Attorney-General
R Boyte for Bay of Plenty Regional Council
T Waikato for Ōpōtiki District Council
T Greensmith-West for Whakātane District Council
Seafood Industry Representatives (no appearance)

Minute: 27 November 2023

MINUTE OF CHURCHMAN J
[Case Management Conference – Whakatōhea]

[1] In my judgment in this matter of 27 June 2023¹ I directed the Registrar to schedule a further case management conference for these matters in February 2024.

[2] That judgment directed parties to file and serve compliant maps and amended documents containing the amendments referred to in the judgment no later than two weeks before the date set for the CMC.

[3] Since that judgment the Court of Appeal has issued its decision on the appeal from the Stage 1 judgment in this matter.²

[4] The findings in the Court of Appeal decision have implications for what needs to be further addressed. Some of the matters will be relatively easily dealt with. For example, the Court of Appeal decision confirmed that the Coal Mines Act 1903 was effectively overruled by s 11(3) of the Marine and Coastal Area (Takutai Moana) Act. The practical result of this is that the beds of navigable rivers are now available for inclusion in Customary Marine Title (CMT). This is obviously subject to the entitlement the CMT being established and there being no substantial interruption. This has implication for the Court's findings in relation to claims for CMT in respect of the Waioeka River. It is appropriate that the parties affected have the opportunity to make submissions on issues arising.

¹ *Re Edwards(Whakatōhea) & Ors* [2023] NZHC 1618.

² *Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kāhui & Whakatōhea Māori Trust Board & Ors* [2023] NZCA 504.

[5] The Court of Appeal also directed the rehearing of CMT areas 1 and 2.

[6] Arrangements will need to be made to identify all the issues that are live in any rehearing and to consider matters such as whether the rehearing of CMT in area 1 needs to occur simultaneously with the rehearing of CMT in relation to area 3.

[7] While the Court of Appeal rejected Ngāi Muriwai's contention that they were entitled to a grant of CMT in their own right³ he held that they were at least a whānau group forming part of the wider iwi and said that they might participate in a recognition order granted to an applicant group of which they form part provided members of that group are able to meet the s 58(1) criteria. Miller J indicated that Ngāi Muriwai's participation in CMT ought to be resolved among a successful applicant group of which they form part and in accordance with tikanga. The consequences of that finding will need to be addressed. Logically this exercise will need to wait until the rehearing in relation to CMT Area 1 has been held and it has been established whether any iwi or hapū group of which Ngāi Muriwai form part qualify for an award of CMT.

[8] The Court of Appeal also directed that the High Court consider Te Ūpokorehe's claim to exclusive CMT from Maraetotāra to the Waiōeka River.

[9] It appears that in the Court of Appeal Te Ūpokorehe modified their position that had been advanced in the High Court and were "prepared to accept that CMT may have been held at an iwi level offshore". Te Ūpokorehe will need to amend their application in the High Court so that it synchronises with the position they have advanced in the Court of Appeal.

[10] It appears from the observations in the Court of Appeal⁴ that the rehearing of area 1 will involve Ngāi Awa, Ūpokorehe, and the Whakatōhea iwi. Whereas the rehearing of area 3 will just involve Ngāi Tai. That fact may favour two separate hearings.

³ At [281].

⁴ At [268].

[11] As noted⁵ the Court of Appeal indicated that Ngāti Awa will need to decide how they will participate in any rehearing. Therefore, they need to elect whether they wish to participate as an applicant seeking CMT or merely as an interested party opposing overlapping claims of CMT.

[12] It is possible that any rehearing of CMT area 1 may be further divided. The Court of Appeal held:⁶

... Because the High Court did not squarely address the s 58 test, (the rehearing) extends to that part of Te Whakatōhea rohe moana that is not the subject of Te Ūpokorehe's appeal.

[13] This is the part of the takutai moana to the east of Waiōeka river as far as Tarakeha and out to the 12 nautical mile limit.

[14] As Ngāti Awa and Te Ūpokorehe made no claim to this particular area and Ngāi Tai did not appeal the High Court's decision, it may be appropriate to hold a discrete rehearing in respect of this area.

[15] As Miller J⁷ observed, Te Kāhui and the Board will need to amend their applications to specify that they relate to an area between Maraetōtara in the west and Tarakeha in the east on a joint exclusive basis.

[16] The Court of Appeal also indicated⁸ that any rehearing of the CMT orders 1 and 3 extended to the issue of whether or not there had been a substantial interruption in particular whether commercial or recreational fishing amounted to substantial interruptions.

[17] In relation to protected customary rights (PCR) the Court of Appeal⁹ allowed the appeal by Ngāti Patumoana who will need to submit a draft order and Ngāti Ruatakenga will also need to submit a draft PCR order.

⁵ At [294].

⁶ At [295].

⁷ At [296].

⁸ At [329].

⁹ At [350].

[18] There may be other discrete matters arising from the Court of Appeal's judgment that the parties believe also need to be covered by way of rehearing.

[19] It is appropriate that the various matters arising from the Court of Appeal's judgment and those matters arising from this court's judgment on 27 June 2023 are addressed at the February case management conference.

[20] Accordingly, I direct that a case management conference in this matter take place in the High Court at Auckland commencing at 10 am on 8 February 2024. Counsel wishing to attend by way of VMR should make contact with the Registrar to facilitate that. In addition to the memoranda required in the June 2023 judgment, all counsel whose clients are affected by the Court of Appeal decision should file and serve memoranda, no later than two weeks prior to 8 February 2024 responding to the issues raised above and also identifying any other issues that they wish the Court to address arising from the Court of Appeal's decision.

Churchman J