

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

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

CIV-2011-485-817

IN THE MATTER OF	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	an application for an order recognising Customary Marine Title and Protected Customary Rights
BY	the late Claude Augustin Edwards (deceased), Adriana Edwards and others on behalf of Te Whakatōhea

On the papers:

Counsel: T Sinclair and B Cunningham for Te Whakatōhea
A Sykes and J Chaney for Ngāti Ira o Waioweka Rohe
R Siciliano and K Ketu for Whānau a Mekomoko
C Linstead-Panoho and R Clark for Ngāi Tamahaua and
Te Hapū Titoko o Ngāi Tamahaua
T Bennion and G Davidson for Ngāti Patumoana

Minute: 8 July 2020

MINUTE (NO. 18) OF CHURCHMAN J

[1] On 30 March 2020, I directed the parties to file and serve memoranda no later than 30 April 2020 regarding the appointment of a pukenga under s 99 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). The Court has received several memoranda, some well after the date requested.

[2] The memoranda have addressed both the identity of who the pukenga should be and also the issue of what the pukenga should do.

Identity of pukenga

[3] There are essentially four different submissions:

- (a) the applicant has filed submissions which are supported by Hiwarau (CIV-2017-485-375), Ngāti Muriwai (CIV-2017-485-269), Pakowhai (CIV-2017-485-264), and Whānau a Apanui (CIV-2017-485-278);
- (b) the Kahui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea Group (Te Kahui) represents Ngāti Ira o Waioweka (CIV-2017-485-299), Ngai Tamahaua Hapū (CIV-2017-485-262), Te Hapū Titoko o Ngāi Tamahaua (CIV-2017-485-377), Ngāti Patumoana (CIV-2017-485-253), and Te Whānau a Mokomoko (CIV-2017-485-355);
- (c) Te Upokorehe (CIV-2017-485-201); and
- (d) Te Rūnanga o Te Whānau (CIV-2017-485-318)

[4] All applicants who filed memoranda supported in principle the appointment of a pukenga. Some provided the names of potential pukenga, others provided the names along with a CV, and some provided the names, a CV and an indication of whether the proposed pukenga had been consulted about their availability and confirmed that they were in fact available.

[5] Whakatōhea and supporting iwi nominated Kihi Ngatai, provided a copy of his CV and confirmed that he had been spoken to and was available on the scheduled hearing dates. Mr Ngatai has whakapapa links to Tauranga-Moana iwi, Ngaiterangi, Ngāti Ranginui, and Ngāti Pukenga.

[6] Te Kahui proposed Professor Pou Temara and Dr Hiria Hape. They confirmed that both had consented to act in the role of pukenga. A brief summary of each was set out in the memorandum and they said curricula vitae can be provided if required. There was no information as to whether either were available on the hearing dates.

[7] Te Upokorehe nominated Doug Hauraki who has whakapapa links to Ngāti Porou, Ngāti Kahungunu and Ngā Puhi. The memorandum submitted that it was an important consideration that Mr Hauraki was not from an iwi that bordered the Te Upokorehe rohe (being Whakatōhea, Ngāti Awa, and Ngāi Tahu).

[8] As at the date of the filing of the memorandum on behalf of Te Upokorehe, no other memoranda had been filed and counsel sought an opportunity to make submissions on any other nominations that might be made.

[9] In a memorandum of 13 May 2020, counsel for Te Rūnanga o Ngāti Awa withdrew the earlier nomination of Mr Te Kei Merito, but did not comment on other nominees.

[10] In a memorandum of 4 May 2020, counsel for Te Rūnanga o Te Whānau indicated that they supported both Professor Pou Temara and Doug Hauraki and were neutral as to the appointment of Dr Hiria Hape.

Criteria for appointment

[11] The jurisdiction to appoint a pukenga comes from s 99(1)(b) of the Act. This section specifies that a pukenga may be appointed in accordance with the High Court Rules 2016. In order to be eligible for appointment, the pukenga must be someone who “has knowledge and experience of tikanga”.

[12] Although the Act does not specify what tikanga the pukenga must have knowledge and experience of, a purposive interpretation of the Act would indicate that it can only refer to the tikanga relevant to the area that is the subject of the application or applications concerned.

[13] The use of the conjunction “and” indicates that the pukenga must have both knowledge (in the theoretical sense) and experience (something that is acquired by living and applying the knowledge) of tikanga.

[14] Because s 99(1)(b) makes it clear that pukengas are appointed “in accordance with the High Court Rules 2016”, the provisions of those rules in relation to the appointment

of expert witnesses are also relevant. The primary relevant provision is HCR 9.36. HCR 9.36(3) provides:

A Court expert in the proceeding must, if possible, be a person agreed upon by the parties and, failing agreement, the Court must appoint the Court expert from persons named by the parties.

[15] HCR 9.36(4) refers to such experts being “independent”.

[16] The issue of whether the requirement in HCR 9.36 for Court appointed experts to be “independent” means that anyone appointed as a pukenga must be independent in the sense of having no relationship, association or interest connected with the parties or a subject matter of the application was considered in detail by this Court in the case of *Tipene*.¹ In that case, the Attorney-General had objected to the appointment of a proposed pukenga on the basis that she had an ownership interest in two islands that were the subject of the application. The Court considered the differing requirements of s 99 of the Act and HCR 9.36 and ultimately concluded that:²

In this important legislation, obtaining the advice of a person with relevant knowledge and experience must outweigh the need for strict independence in the sense of someone with no relationship, association or interest connected with the parties or the subject matter of the application.

[17] I adopt the same approach.

[18] Some of the submissions made by applicants in relation to who may be an appropriate pukenga have discounted individuals nominated on the basis that they are not entirely “independent”. As was concluded by Mallon J in *Tipene*, absolute independence is not required and what is more important is that the pukenga have both knowledge and experience of the relevant tikanga. When assessing weight to be given the evidence of a pukenga, the Court will be able to factor in any connection that the pukenga may have with one or more party.

¹ *Re an application by Tipene* [2015] NZHC 2923.

² At 6 [26].

Outcome

[19] On the basis of the information presently available to me, I have formed the preliminary view that Mr Kihi Ngatai possesses the required knowledge and experience for appointment as a pukenga in this matter. He is also the only nominee whose availability for the hearing dates has been confirmed.

[20] At the forthcoming CMC in Rotorua, there will be an opportunity for all parties involved in these proceedings to express their views on the possible appointment of Mr Ngatai as pukenga in this matter.

Questions for pukenga

[21] I wish to receive further submissions on the nature of the questions to be asked of the pukenga. It is possible that the content of the questions will be refined as the hearing progresses and the important issues of tikanga are identified. However, the following questions would seem to be of assistance:

- (a) What tikanga does the evidence establish is practised in the application area?
- (b) Which aspects of tikanga should influence the assessment of whether or not the area in question is held in accordance with tikanga?
- (c) Which applicant group or groups hold the application area or any part of it in accordance with tikanga?
- (d) Who, in fact, are the iwi, hapū or whānau groups that comprise the applicant group?

[22] Counsel appearing at the Rotorua CMC who are involved in the Whakatōhea priority fixture should come prepared to discuss these issues.

Churchman J