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

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

**CIV-2017-404-481**
**CIV-2017-485-221**
**CIV-2017-485-224**
**CIV-2017-485-232**
**CIV-2017-485-259**
**CIV-2017-485-260**
**CIV-2017-485-267**
**Group M Stage 1(a)**

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| UNDER | the Marine and Coastal Area (Takutai Moana) Act 2011 |
| IN THE MATTER OF | an application for orders recognising Customary Marine Title and Protected Customary Rights |

On the Papers

Minute: 27 September 2023

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**MINUTE OF GWYN J**
**(Application to adduce additional evidence from Tony Walzl)**

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[1] The applicants, Ngāi Tūkoko and Ngāti Moe, have applied to adduce additional evidence from Tony Walzl and to recall Mr Walzl as a witness for Ngāi Tūkoko and Ngāti Moe.

## Background

[2] On 14 and 15 September 2023 Mr Walzl presented evidence as an expert witness for Ngāi Tūkoko and Ngāti Moe. On 15 September 2023, in the course of cross examination by counsel for Seafood Industry Representatives (SIR), Mr Walzl gave evidence that there were other aspects of tikanga associated with the takutai moana, in addition to use alone, which meant that place-specific evidence was part only of the narrative about tikanga.

[3] During the course of further cross-examination, Mr Walzl responded to counsel for SIR that he had seen evidence on this issue and could produce it if required.

**Application**

[4] Subsequently, Mr Hirschfeld, counsel for Te Hika o Pāpāuma, sought leave of the Court for Mr Walzl to produce the material he had referred to.

[5] Counsel for Ngāi Tūkoko and Ngāti Moe, Ms Yogakumar, has now filed a memorandum in relation to the additional evidence it is proposed be adduced. The additional evidence comprises statements by tangata whenua concerning their tikanga in relation to the takutai moana. Mr Walzl advises that the statements were originally developed for proceedings under the now-repealed Foreshore and Seabed Act 2005. The statements have been provided to the Court, as an appendix to counsel's memorandum. In addition, Mr Walzl has produced a document which highlights the specific briefs of evidence within those statements, which he says are of relevance to the application now before the Court. The statements as a whole comprise 216 pages; the specific briefs of evidence identified by Mr Walzl for production in this Court comprise 29 pages.

[6] All of the following parties support the production of the additional evidence and the supporting document compiled by Mr Walzl:

(a) Ngāti Kahungunu ki Wairarapa Tāmaki-nui-a-Rua (CIV-2017-485-221);

(b) Rangitāne Tu Mai Rā Trust (CIV-2017-485-224);

(c) Ngāi Tumapuhia-a-Rangi Hapū (CIV2017-485-232);

(d) Ngāti Hinewaka (CIV-2017-485-259);

(e) Te Hika o Pāpāuma (CIV-2017-404-481);

(f) Ngāi Tūmapūhia-ā-Rangi ki Mōtūwairaka Incorporated and Ngāi Tūmapūhia-ā-Rangi ki Okautete Incorporated;

(g) Kawakawa Trust 1D2 Trust; and

(h) Ngāi Tūkoko and Ngāti Moe (CIV-2017-485-267).

[7] The application is opposed by SIR and the Attorney-General.

[8] The principal reasons for those parties' objections is that:

(a) the additional evidence is unsigned and/or incomplete;

(b) the material does not relate to the coastal area that is the subject of this hearing and it is not given by the tangata whenua in this proceeding who have mana moana in relation to the application area;[1]

(c) the evidence was not called in this Court;

(d) they will not have the opportunity to interrogate the additional evidence and cannot assess it in its proper context.

[9] Counsel submit that all of the factors at [8] above mean that the evidence cannot be considered to be reliable, in terms of s 105 of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act).

[10] In addition, Mr Walzl is not able to provide evidence as to tikanga, which should come from tangata whenua witnesses.

**Relevant legal framework**

[11] Section 105 of the MACA Act provides:

**105 Evidence**

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1 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] 1 NZLR 767, at [75].

> In hearing an application for a recognition order, the Court may receive as evidence any oral or written statement, document, matter, or information that the Court considers to be reliable, whether or not that evidence would otherwise be admissible.

[12] Section 7 of the Evidence Act 2006 is also relevant. Section 7 provides:

> **7 Fundamental principle that relevant evidence admissible**
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> (1) All relevant evidence is admissible in a proceeding except evidence that is—
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> (a) inadmissible under this Act or any other Act; or
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> (b) excluded under this Act or any other Act.
>
> (2) Evidence that is not relevant is not admissible in a proceeding.
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> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[13] Section 99 of the Evidence Act is relevant to the application to recall Mr Walzl to present the evidence. Section 99 provides:

> **99 Witnesses recalled by Judge**
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> (1) In any proceeding, the Judge may recall a witness who has given evidence if the Judge considers that it is in the interests of justice to do so.
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> (2) The Judge may recall a witness under subsection (1),—
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> (a) if there is a jury, at any time until the jury retires to consider its verdict:
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> (b) in any other proceeding, at any time until judgment is delivered.
>
> (3) This section is subject to section 106H (further cross-examination if all evidence of sexual case complainant or propensity witness has been or is to be given by video record made before trial).

## Discussion

*Application to adduce further evidence*

[14] The application of s 105 in relation to unsigned briefs of evidence and a brief of evidence given in earlier proceedings was considered in *Re Ngāti Pāhauwera.* Justice Churchman said:[2]

> [4] One other matter that has arisen in this case is the use of unsigned briefs of evidence, and briefs given as evidence in other, earlier proceedings. Rule 9.76(c) of the High Court Rules 2016 dictates that an affidavit must either be signed by the person making it, or if that person cannot write, have that person's mark set to it by that person.
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> ...
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> [6] [Section 105 of the Act] provides the Court with significant latitude to be flexible in dealing with the evidence adduced in proceedings before it under the Act. I consider that a sensible approach is to assess unsigned and/or older briefs of evidence on the basis of whether or not the assertions and facts stated in those briefs are disputed.
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> [7] An unsigned or older brief of evidence which discusses whakapapa or tikanga that is undisputed between the parties may still be useful and hold some weight in the Court's assessment. However, the Court will be more reluctant to accord significant weight to an unsigned or older brief of evidence that contains facts or assertions that are disputed between the parties.

[15] In *Re Edwards Whakatōhea (No 2)*,[3] the High Court discussed the interaction between s 7 of the Evidence Act and s 105 of the MACA Act, in the context of a submission for the Landowners Coalition that, despite the breadth of s 105, this did not override the requirement in s 7(2) of the Evidence Act that evidence that is not relevant is not admissible. Justice Churchman said of that submission:[4]

> [Counsel] submitted that much of the evidence tendered by applicants established no more than that the applicant had mana tuku iho, which he submitted was not directly relevant to the issues before the Court. He did not refer to any specific evidence. I accept that some of the evidence, particularly in respect of matters that could not be the subject of a PCR recognition order, was of limited relevance, however, *such evidence was generally relevant to broader questions* such as whether or not the applicant group had used or occupied the specified area or had held it in accordance with tikanga. I therefore *do not accept the submission that such evidence should be disregarded*.

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2 *Re Ngāti Pāhauwera* [2021] NZHC 3599 at Appendix 2, [4]-[7] (footnotes and citations omitted).
3 *Re Edwards Whakatōhea (No 2)* [2021] NZHC 1025 at [102] and [103].
4 At [103] (emphasis added).

[16] In this case, I accept, as Churchman J did, that an unsigned brief of evidence and/or a brief of evidence from another proceeding which discusses whakapapa or tikanga may be useful for the Court. I accept that it is not tikanga-specific to this application area, but it does provide a broader tikanga context to the tikanga evidence given in this application. It is not disputed tikanga:[5] as the Attorney-General's submission notes, statements of a similar nature have been given in this hearing. Nor do I understand counsel for SIR to say it is disputed tikanga.

[17] Significantly, the application to adduce the additional evidence is supported by all of the applicant parties and those of the interested parties who exercise their mana moana within the application area(s) and/or have made an application for direct engagement under s 95 of the MACA Act, in relation to part of the application areas. I am therefore prepared to accept that the additional evidence is likely to be "reliable" tikanga evidence (as required by s 105 of the MACA Act).

[18] Mr Scott submits that the proposed evidence is not responsive to the cross-examination from which this application arose. Counsel notes that the questioning of Mr Walzl concerned the need to identify evidence about the seaward boundary of the application area (12 nautical miles from the coast). The proposed evidence does not go to that.

[19] I think that is to construe the issue too narrowly. The proposed evidence does go to the concept of rohe moana, and the indivisibility of mana whenua and mana moana, which provides a general context to the Court's more specific consideration of use and occupation in the application area.

[20] I do not think admission of the further evidence intrudes on the role of the pūkenga, as SIR and the Attorney-General appear to suggest. Dr Joseph will in due course provide his advice to the Court, pursuant to s 99 of the MACA Act, on the tikanga that the applicants submit is relevant.

[21] I accept that Mr Walzl is not able to give evidence as an expert on tikanga. However, as Mr Walzl acknowledges, when he provided this evidence in the *Ngāti*

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5 *Re Ngāti Pāhauwera* above n 2, Appendix 2 at [7].

*Pāhauwera* hearing, he gave the evidence not as an expert on tikanga, but rather as a practitioner observing in the Waitangi Tribunal jurisdiction for more than 40 years.[6] Mr Walzl also stated that his evidence was based on material he had read in proceedings under the MACA Act.

[22] I conclude that the proposed evidence should be admitted. It is of course a question for the Court what weight to place on that evidence. The weight will necessarily be limited, given the limitations which are noted by the opposing parties and recorded at [8] above, and having regard to the advice that will be provided by the pūkenga.

*Application to recall Mr Walzl*

[23] The Attorney-General submits that, if the Court is minded to allow the evidence in, it is not necessary or appropriate for Mr Walzl to be recalled to adduce that evidence, because it comprises tikanga-related statements made by tangata whenua witnesses, and Mr Walzl is not a tikanga expert.

[24] Section 99 of the Evidence Act is relevant to the application to recall Mr Walzl to present the evidence. The application of that provision was considered in *Pilgrim v Attorney-General (No 29)*.[7] In that case, Chief Judge Inglis in the Employment Court noted:[8]

> The decision is necessarily a pragmatic one, dependent on the circumstances of the particular case. The importance of the evidence is a relevant factor. Also relevant is whether it emerged in a way that was not anticipated and the significance of the potential lines of cross-examination. Against this the Court should take into account the general impact of requiring a witness to be recalled, such as delay to the proceedings.

[25] I accept Ms Yogakumar's submission that this situation can be distinguished from *Young v Tower Insurance Ltd*,[9] where the High Court declined an application to recall a witness. In that case Gendall J noted there was no unexpected turn of evidence,

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6 Notes of Evidence, 923.
7 *Pilgrim v Attorney-General (No 29)* [2023] NZEmpC 26 at [2] and [3] (footnotes and citations omitted).
8 At [3] (citations omitted).
9 *Young v Tower Insurance Ltd* [2016] NZHC 2176 at [12]-[14].

and no "newly revealed issues or facts of importance".[10] On the other hand, the points at issue had been before the parties for some time, and allowing recall of the witness would cause delay.

[26] It seems to me that in this case, the evidence in question did emerge in a way that was not anticipated. The subject matter of the evidence is important, at least in a general sense. As noted above, the question of weight will be for the Court's assessment. Given the hearing is only at the halfway point, there will be no delay to the proceeding in having Mr Walzl recalled.

[27] If Mr Walzl were to be recalled in week five of the hearing, all parties would have had an opportunity to read the material to be admitted in advance and prepare to cross-examine him on the additional evidence.

[28] I accept, given Mr Walzl's own acknowledgement that he is not an expert on tikanga, that cross-examination of him cannot serve the same purpose as cross-examination of the authors of the briefs of evidence being introduced. Nevertheless, it provides an opportunity to question Mr Walzl about the provenance of the briefs.

[29] I conclude it is appropriate to grant leave to recall Mr Walzl.

**Conclusion**

[30] Leave is granted to recall Mr Walzl as a witness for Ngāi Tūkoko and Ngāti Moe and for Mr Walzl to produce the 29-page summary of the additional evidence.

**Gwyn J**

[10] At [11].