IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-160
CIV-2017-485-214
CIV-2017-485-229
CIV-2017-485-273
CIV-2017-485-511
CIV-2017-485-261
CIV-2017-485-248
CIV-2017-485-258
CIV-2017-485-260
CIV-2017-485-211
CIV-2017-485-254
GROUP N, STAGE 1(a) and STAGE 1(b)

[2024] NZHC 536

UNDER THE	the Marine and Coastal Area (Takutai Moana Act) 2011
IN THE MATTER OF	applications for orders recognising Customary Marine Title and Protected Customary rights
	Continued…..

Hearing:	2.15pm on 23 February 2024
Counsel:	(Listed below)
Judgment:	13 March 2024

JUDGMENT OF GRICE J
(Application for amendment to application for recognition orders by Muaūpoko Tribal Authority)

AND	William James Taueki on behalf of Ngāti Tamarangi Hapū (CIV-2017-485-160)
AND	Margaret Morgan-Allen for David Morgan Whānau (CIV-2017-485-214)
AND	Rachael Ann Selby on behalf of Ngāti Raukawa ki te Tonga (CIV-2017-485 229)
AND	Patrick Seymour on behalf of Te Whānau Tima (Seymour) and Te Hapū o Te Mateawa (CIV-2017-485-273)
AND	Chris Shenton on behalf of Te Runanga Ngā Wairiki Ngāti Apa (CIV-2017-485-511)
AND	Muaūpoko represented by Muaūpoko Tribal Authority Incorporated (CIV-2017-485-261)
AND	Trustees of Te Ātiawa ki Whakarongotai Charitable Trust on behalf of Te Ātiawa ki Whakarongotai (CIV-2017-485-248)
AND	Tiratu Williams and Patricia Grace for the owners of Hongoeka Blocks (CIV-2017-485-258)
AND	Te Ātiawa ki Te Upoko o Te Ika a Maui Potiki Trust (CIV-2017-485-260)
AND	Tupoki Takarangi Trust (1999) on behalf of owners of Parangarahu 2B1 and 2C and their descendants (CIV-2017-485-211)
AND	Christopher Henare Tahana, Edward (Fred) Clark, Hayden Tūroa, and Novena McGuckin on behalf of Te Patutokotoko (CIV-2017-485-258)

Counsel:

N R Coates for Ngāti Raukawa ki te Tonga
B R Lyall for Te Whānau Tima (Seymour) and Te Hapū o Te Mateawa (by VMR)
T H Bennion and E A Whiley for Muaūpoko Tribal Authority Incorporated
T N Ahu and A J Samuels for Te Ātiawa ki Whakarongotai
E K Rongo for owners of Hongoeka Blocks

M Houra for Te Ātiawa ki Te Upoko o Te Ika a Maui Potiki Trust (by VMR)
T N Hauraki for Tupoki Takarangi Trust (1999)
No appearance of A K Irwin for Ngāti Tamarangi Hapū
No appearance of David Morgan Whānau
No appearance of C Shenton for Te Runanga Ngā Wairiki Ngāti Apa (self-represented)

Interested parties: E K Rongo for Ngāti Toa Rangatira (Crown engagement)
D A Ward for Attorney General
No appearance for F R Wedde for Manawatū-Whanganui Regional Council, Greater Wellington Regional Council and Kāpiti Coast District Council
No appearance for Dr B D Gilling and R A Soriano for Edward Tautahi Penetito, and Donald Koroheke Tait of Ngāti Kauwhata Crown engagement MAC-01-11-008
No appearance for L L Black for Christopher Henare Tahana and Ors for Te Patutokotoko (Intervener)
No appearance for C F Finlayson KC for Rangitāne o Manawatu Settlement Trust (applied)

Introduction

[1] These proceedings concern claims filed under the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana), relating to the common marine and coastal area from the Rangitīkei River in the north to Tūrakirae in the south (the area). They are referred to as the Group N claims. The applications in the northern part of the area, Stage 1(a), are set down for an eight-week hearing commencing 6 May 2024.

[2] The Group N area (as originally depicted in 2018) is shown in the map attached to this judgment as Appendix A.[1] Since 2018, there have been minor adjustments that have not been mapped yet.

[3] The map attached as Appendix B to this judgment shows the claims to various parts of the area (again, this map relates to the original applications). There are eight applicants in relation to Stage 1(a),[2] and five applicants involved in Stage 1(b).

[4] The present application is made on behalf of Muaūpoko Tribal Authority Incorporated (Muaūpoko or MTA) to amend its recognition order applications filed on 31 March 2017. It seeks to extend its application for a Customary Marine Title order (CMT) to cover the area of its present application for a Protected Customary Rights order (PCR).[3]

[5] The Crown and six applicant parties have filed submissions in relation to Muaūpoko's amendment application. Other parties also opposed. The Crown made submissions to assist the Court in its assessment of the application, but indicated that it will abide with the Court's decision. The other parties seek orders to strike out the amendment application. I refer to all who opposed the application as the respondents, but note that the Crown had a different position to that of the other parties, as outlined above.

---

1 *Re Elkington* HC Wellington CIV-2017-485-218, 21 March 2018 (Minute (No 2) of Collins J).
2 Seven, if Te Pautokotoko is no longer classified as an applicant.
3 The amendment application was indicated in January 2024.

The CMT claim area

[6] Muaūpoko's original applications sought PCRs from the Rangitīkei River to Tūrakirae — the whole of the Group N area. It sought CMT from the Manawatū River south to the Kūkūtauaki block. The area of the PCR application is attached as Appendix C, headed "The Muaūpoko Shared Rohe Moana". The area of the CMT is attached as Appendix D, headed "The Muaūpoko Exclusive Rohe Moana".

[7] Muaūpoko's application to extend the CMT to cover the PCR application area affects both the area of Stage 1(a) and Stage 1(b) of the Group N applications. The Stage 1(b) hearings were due to start on 7 October 2024 for eight weeks.[4]

[8] The division between the areas involved in Stage 1(a) and Stage 1(b) is for expediency but is an artificially imposed divide. Stage 1(a) covers the common marine and coastal area from the Rangitīkei River in the north to Whareroa in the south. Stage 1(b) relates to the area from Whareroa south, taking in the Te Whanganui-a-Tara area in the east, to Tūrakirae Head.

[9] Muaūpoko had not originally made any CMT applications for the Stage 1(b) area. The amendment application for Stage 1(a) extends the application for CMT beyond that sought in the original application from the area north of the Manawatū River to the Rangitīkei River and from the point at the north end of the Kāpiti Island south to Whareroa.[5]

[10] A number of applicants and interested parties filed joint submissions dated 16 February 2024 as follows:

(a) Ngāti Raukawa ki te Tonga (CIV-2017-485-229);

(b) Te Ātiawa ki Whakarongotai (CIV-2017-485-248);

(c) Ngāti Toa Rangatira (MAC-01-12-021);

---

4 An application to adjourn the hearings for Stage 1(b) has been granted.

5 Agreed variations to the Group N area have been made and accurate maps are yet to be filed.

(d) Tiratu Williams and Patricia Grace on behalf of the owners of the Hongoeka Blocks (CIV-2017-485-258); and

(e) Tupoki Takarangi Trust (CIV-2017-485-211).

[11] Additional written submissions supporting the joint submissions were filed on behalf of Te Ātiawa ki Te Upoko o Te Ika a Maui Potiki Trust on 19 February 2024.

[12] The extent to which the application would lead to overlap in CMT claims for those applicants was summarised in the joint submissions as follows:

(a) For Ngāti Raukawa ki te Tonga (CIV-2017-485-229), its entire application area is covered by MTA's application for CMT. Previously, the overlap of CMT applications extended only from the Manawatū River Mouth to Ngāti Raukawa's southern boundary at Kūkūtauaki.

(b) For Ātiawa ki Whakarongotai (CIV-2017-485-248), its entire application area is now covered by MTA's application for CMT, whereas previously only a small overlap of the respective CMT applications existed at its northern boundary, Kūkūtauaki.

(c) For Ngāti Toa Rangatira (MAC-01-12-021), a Crown Engagement pathway applicant and interested party to the Group N proceedings, the MTA application for CMT now covers their area of interest in its entirety within the Group N proceedings. Previously, overlap between Ngāti Toa's Crown Engagement application and MTA's CMT application was from the Manawatū River Mouth in the north, to Kūkūtauaki in the south.

(d) For Tiratu Williams and Patricia Grace on behalf of the Hongoeka block owners (CIV-2017-485-258), the MTA amendment application for CMT now covers their application area in its entirety. Previously, there was no overlap between their CMT application and MTA's application for CMT.

(e) For Tupoki Takarangi Trust (CIV-2017-485-211), the MTA proposed amended application for CMT would cover its application area in its entirety. Previously, there was no overlap between its CMT application and MTA's application for CMT.

[13] Ms Hauraki for the Stage 1(b) applicant, Tupoki Takarangi Trust, emphasised that the whole of the area for which it claimed CMT, which was in general terms the marine and coastal area in the vicinity of Fitzroy Bay, would if the application to amend was granted, be subject to a CMT by Muaūpoko in Stage 1(b). The amendment application insofar as it related to the Stage 1(b) area, she said, was not foreshadowed and had taken her clients by surprise.

The Application

[14] Mr Bennion for Muaūpoko makes a number of submissions which I group for convenience under the following headings:

(a) The amendment is not significant so does not change the essential nature of the 2017 original application given the expansive wording of the 2017 application;

(b) Interpretation of the legislation.

(c) Changes are necessary given the original application was filed under time pressure due to the statutory deadline in 2017.

[15] Mr Bennion opposes the strike out application. He submits that the usual grounds for strike out such as the application being frivolous or an abuse of process are not made out. He said at worst the application is an early signal and made to prevent prejudice at the end of the hearing.

The Responses

[16] Ms Coates, addressing the written joint submissions, led the opposition to the application in oral argument. The other parties who submitted in opposition to the

application supported the arguments she put forward but expanded on some points in various respects. In general terms, the respondents submitted that the original application did not lend itself to the expansive interpretation suggested by the applicant. In addition, they argued that the legislation did not contemplate such a significant amendment before hearing in the circumstances of this case. They also said that they would be prejudiced by such an amendment. The respondents had relied on notification of the Muaūpoko application in its terms and on that basis had fashioned their evidence and applications and commissioned their research. They also pointed out that the material which Muaūpoko relied on to support its extended CMT claims was provided out of context and was untested.

[17] The Crown abided the decision of the court but made submissions on the interpretation of the legislation in relation to amendment applications and also as to the difficulties which might arise should significant amendments be permitted.

The law on amendment applications

[18] Section 107 of the Act allows the court some flexibility in dealing with applications, as follows:

> **107 Court's flexibility in dealing with application**
>
> (1) The Court may, if it considers that an application for recognition of a protected customary right is more appropriately decided as an application for recognition of customary marine title, treat it as the latter.
>
> (2) The Court may, if it considers that an application for recognition of customary marine title is more appropriately decided as an application for recognition of a protected customary right, treat it as the latter.
>
> (3) The Court may strike out all or part of an application for a recognition order or a notice of appearance filed under section 104 if it —
>
> (a) discloses no reasonably arguable case; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the Court.
>
> (4) If the Court strikes out an application under subsection (3), it may by the same or a subsequent order dismiss the application.

(5) Instead of striking out all or part of an application under subsection (3), the Court may stay all or part of the application on such conditions as are considered just.

(6) This section does not affect the Court's inherent jurisdiction.

[19] At the same time the Act prescribes the application and notification process as follows:

101 Contents of application

An application for a recognition order must —

(a) state whether it is an application for recognition of a protected customary right, or of customary marine title, or both; and

(b) if it is an application for recognition of a protected customary right, describe that customary right; and

(c) describe the applicant group; and

(d) identify the particular area of the common marine and coastal area to which the application relates; and

(e) state the grounds on which the application is made; and

(f) name a person to be the holder of the order as the representative of the applicant group; and

(g) specify contact details for the group and for the person named to hold the order; and

(h) be supported by an affidavit or affidavits that set out in full the basis on which the applicant group claims to be entitled to the recognition order; and

(i) contain any other information required by regulations made under section 118(1)(i).

102 Service of application

The applicant group applying for a recognition order must serve the application on—

(a) local authorities that have statutory functions in the area of the common marine and coastal area to which the application relates; and

(b) any local authority that has statutory functions in the area adjacent to the area of the common marine and coastal area to which the application relates; and

(c) the Solicitor-General on behalf of the Attorney-General; and

(d) any other person who the Court considers is likely to be directly affected by the application.

103 Public notice of application

(1) The applicant group applying for a recognition order must give public notice of the application not later than 20 working days after filing the application.

(2) The public notice must include, as a minimum,—

(a) the name of the applicant group and its description as an iwi, hapū, or whānau, whichever applies; and

(b) a brief description of the application, including whether it is an application for recognition of a protected customary right or of customary marine title or both; and

(c) a description of the particular area of the common marine and coastal area to which the application relates; and

(d) the name of the person who is proposed as the holder of the order; and

(e) in the case of an application for recognition of a protected customary right, a description of the right; and

(f) a date that complies with subsection (3) for filing a notice of appearance in support of or in opposition to the application; and

(g) the registry of the Court for filing the notice of appearance.

(3) The date for filing a notice of appearance must not be less than 20 working days after the first public notice of the application is published.

[20] The Court of Appeal provided detailed guidance as to the approach to these provisions in the context of an application to amend as follows:[6]

> [214] Because the nature of the order sought, the identity of the applicant group, the particular part of the common coastal and marine area which is the subject of the application, the grounds relied on and the identity of the proposed holder of the order are all matters that must be specified in the application, any change to an application will require an amendment. Where the change is material, the court must give interested parties an opportunity to be heard on the amendment.
>
> [215] The jurisdiction to amend must be exercised with s 100 of MACA in mind. It provides that an application "must be filed not later" than six years from MACA's commencement, 1 April 2011, and the Court "must not accept for filing or otherwise consider any application that purports to be filed after that date". This is not a limitation period, to be pleaded or not as a defendant

---

6 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 405, [2023] 3 NZLR 252 [*Whakatōhea*] (footnotes omitted).

chooses. It is a statutory bar to the exercise of the High Court's procedural and substantive jurisdiction to consider a new application under MACA.

[216] There were amendments made, or not made but said by opposing parties to be necessary, in this case. Churchman J followed his own interlocutory judgment on a strike-out application in *Re Ngāti Pāhauwera Development Trust*, in which he held that where (as in this case) the amendment does not raise new matters of law but rather introduces new or additional facts, the Court should apply a high threshold when deciding that the amendment is out of time. In that case, he held, following *ISP Consulting Engineers Ltd v Body Corporate 89408*, that the test is whether the amendment changes the "essential nature" of the application.

[217] Ms Feint argued that Churchman J erred by adopting a test which assumes that ordinary rules for pleadings apply. She submitted that amendments to originating applications fall into a separate category, in which the question is whether any prejudice to an opposing party can be met by notice and an opportunity to respond. She sought to distinguish cases dealing with limitation of action and amendments to pleadings on the ground that s 100 is not a limitation provision but rather an ouster clause which must be read strictly.

[218] I do not agree that s 100 is to be treated as if it were a clause ousting judicial review of administrative decision-making. Its reach is confined to the jurisdiction conferred by MACA. I did not take counsel to contend that the Judge could not consider s 100 at all when scrutinising amendments, or when considering whether amendments were necessary. The Court must examine any amended application to ascertain whether it must be considered new, and hence out of time. The question is one of substance, not form. If it were otherwise, an applicant who happens to have brought an application in time might purport to amend it by introducing an unrelated applicant group and an entirely new specified area.

[219] Nor was the Judge wrong to cite authorities dealing with the question whether an amendment introduces a new cause of action for limitation purposes. I accept that s 100 should be interpreted strictly. It bars the exercise of MACA's jurisdiction to recognise customary property rights which are the subject of Treaty guarantees. However, the Judge did interpret s 100 strictly by asking whether an amendment changes the essential nature of the application. He accepted that a flexible approach must be taken to pleadings under MACA and recognised that it would be wrong to take an unduly strict or narrow approach to amendment.

[220] When considering whether any given amendment changes the essential nature of the application, it is necessary to bear in mind several features of the statutory scheme:

(a) An applicant group may comprise several distinct groups which may rely on the connection which any member group has to the affected area. This suggests that amendments are unlikely to change the essential nature of an application where they introduce member groups, or larger groups of which the applicant group is a member. Indeed, Mr Hodder acknowledged this. Amendments to the specified area are in principle permissible, to incorporate the rohe moana of the applicant group.

(b) An application must contain the details specified in s 101(a)–(i). Any change to these matters will likely require an amendment to the application. Subject to that, the basis of the application may be developed in the affidavit evidence of the applicant and other interested parties.

(c) The Court may (but need not) treat an application for CMT as if it were an application for PCR, and vice versa. This modifies the legal nature of the application. Its inclusion in the legislation signals that Parliament contemplated a flexible approach to amendment.

(d) As Churchman J recognised, the Court may accommodate tikanga processes in which applicant groups and opposing parties decide whether to seek shared or separate CMT and agree on who is to hold a recognition order. To permit such processes is consistent with MACA's objective of recognising mana tuku iho in the common coastal and marine area. It allows the Court to accommodate applicants' preferences to structure their holdings so that recognition orders are administered in accordance with tikanga (and without need for judicial intervention).

(e) Any amendment may affect interested parties who have an interest in the exercise of rights that MACA confers on a successful applicant group. Those rights are substantive, and the class of interested parties is not confined to iwi, hapū and whānau groups. Natural justice must be observed. It is possible that any prejudice to an interested party from late amendment will not be adequately met by an opportunity to respond in the proceeding.

Analysis

[21] I now consider the issues raised by the applicant under the headings referred to above:

The amendment is not significant so does not change the essential nature of the 2017 application given the expansive wording of the 2017 original application

[22] This argument is fashioned to respond to the Court of Appeal's comments in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* (*Whakatōhea*) that whether an application for amendment is a new application is a matter of substance. If it is new and material it will be out of time.[7]

> [218]… The Court must examine any amended application to ascertain whether it must be considered new, and hence out of time. The question is one of substance, not form. If it were otherwise, an applicant who happens to

[7] *Whakatōhea*, above n 6 at [218]..

> have brought an application in time might purport to amend it by introducing an unrelated applicant group and an entirely new specified area.

[23] Mr Bennion said the application must be considered in the context of customary rights with the backdrop of the Kurahaupō waka, which has relevance to Rangitāne, Ngati Apā and Muaūpoko claimant, as against the Tainui waka relationship, which has relevance to the Ngāti Raukawa and Ngāti Toa interests.

[24] Mr Bennion submitted that the amendment seeks only joint CMT, not CMT to the exclusion of all other parties. He points to Muaūpoko's 2017 application which refers in a number of places to its claim for rights as being "shared rohe moana". Mr Bennion put the argument in various ways, but at its heart was the contention that the references to "shared rohe moana" were a clear indication that Muaūpoko intended its PCR application to be for CMT that was shared with others. He said this is supported by other wording in the grounds of the application. In addition, Mr Bennion said the application requirements under s 101 did not require the applicant to file any maps or coordinates. It was merely required to provide notice of an application for rights. This point appears to suggest that the argument is that precision was not required in the original application, therefore general references in an application, such as to "shared rohe moana" can be taken as supporting a very wide interpretation of the original application.

[25] In essence, Mr Bennion submitted that the amendment did not significantly change the substance of the original application.

[26] In response, the respondents who filed the joint submissions said that the 2017 application is not susceptible to the interpretation promoted by Mr Bennion. They say the formulation of the application was important as it specified the rights sought. It was on the basis of the application that the notification required under the Act was promulgated, and that notification was relied upon not only by the respondents but also by others who might have been interested. It informed the research that they commissioned and their evidence.

[27] Ms Coates for the respondents said the amendment as sought would not only prejudice the parties and deprive them of natural justice, but also stretch their

resources. The time and cost expended to date in preparing evidence and undertaking research has been based on the original application.

[28] Mr Ahu pointed out that the reference to "shared rohe moana" merely acknowledged there were other applicants for rights. Another possible interpretation was that "shared rohe moana" referred to sharing among the interests related to Muaūpoko.

[29] Mr Ahu said the 2017 application for PCRs did not signal an application for joint CMT nor CMT of any nature. The CMT application was separately itemised and described. He emphasised that the public notification process was designed to ensure there was notice to the world of the nature of the applications, and persons intended to be notified would respond accordingly. Mr Ahu said the proposed amendment meant that the notification process would need to be redone in order to ensure natural justice was observed.

[30] Mr Ahu also submitted that his client would need to consider the provision of evidence in order to squarely address the amended application and thus protect his clients' interests in the proposed expanded area. He said that they did not accept there was any shared customary rights, nor any evidence to justify the position amendment sought by Muaūpoko at this stage.

[31] Ms Hauraki pointed out that her clients were only participants in the Stage 1(b) and were presently in negotiations with the Crown, having supported the adjournment of the hearing of Part 1(b) of the Group N applications. If the amendment were granted her clients would need to review all of their evidence and whether they would need to participate in Stage 1(a). While Stage 1(a) and (b) were to be held separately, for administrative efficiency her clients would likely also need to participate in Stage 1(a), as evidence and determinations as to evidence given at the first stage may well affect fundamental issues concerning CMT in Stage 1(b), given the expanded area now sought to be included in Muaūpoko's CMT. Any amendment would certainly affect the ambit of the trust's research and evidence, which until now had been based on an assumption that no claim was made by Muaūpoko in relation to the area included in Stage 1(b).

[32] Ms Hauraki said any extension of the CMT claim into the Stage 1(b) area was not soundly based. In any event, the evidence required if the amendment were granted would stretch her client's resources and any response was not possible in the short time before the hearing. Ms Hauraki pointed to the concerns highlighted in *Whakatōhea*.[8]

[33] Dr Ward for the Crown emphasised the different nature of the legal rights attaching to CMTs compared to those attaching to PCRs. He pointed to the majority comments of the Court of Appeal in *Whakatōhea* describing the CMT rights:[9]

> [391] CMT, provided for in subpt 3 of pt 3, is the most extensive form of statutory right provided for under MACA. CMT is a (non-alienable) interest in land. A group that holds CMT over a specified area does not have the right to exclude people from that area: public rights of access, navigation and fishing are, as already mentioned, expressly carved out and protected by ss 26–28. But a group that holds CMT has certain rights set out in ss 60 and 62 of MACA including permission rights under the Resource Management Act 1991 (dealt with in ss 66–70 of MACA) and certain conservation statutes (ss 71–75); a right to protect wahi tapu and wahi tapu areas (ss 78–81); prima facie ownership of newly found taonga tūturu (s 82); ownership of certain minerals (ss 83–84); and the right to create a planning document for the area (ss 85–93). These statutory rights are described in more detail by Miller J above at [134]–[135].
>
> …
>
> [417] We accept the submission of LCI and the Attorney-General that it is clear from the language of s 58, and from the legislative history, that CMT is a territorial interest in an area. It is the statutory interest in land into which MACA translates interests that the common law would recognise as territorial in nature, not simply as use rights. But LCI's submission goes much further: it would result in many customary rights of a territorial nature being lost in translation, in a manner that we consider cannot be reconciled with ss 4–7 of MACA or with the assurances and principles set out in the 2010 consultation document that preceded it.

[34] Miller J in *Whakatōhea* describes CMT as the most extensive form of statutory right provided for under MACA. He notes that "CMT is a (non-alienable) interest in land.[10] It is a territorial right, not merely a usage right."[11]

---

8 *Whakatōhea,* above n 6, at [220(c)].
9 *Whakatōhea,* above n 6 (footnotes omitted).
10 Marine and Coastal Area (Takutai Moana) Act 2011 [the Act], s 60(1).
11 *Whakatōhea*, above n 6, at [134].

[35] I agree with the arguments of the respondents, including the Crown. The wording of Muaūpoko's 2017 application does not suggest that it is CMT being sought over the expanded area which is the subject of the application. Its 2017 application specifically describes the areas for which rights of CMT, as opposed to PCRs, are sought. It says:

> **THIS DOCUMENT NOTIFIES YOU THAT:**
>
> 1. The Muaūpoko Tribal Authority Incorporated on behalf of the applicant group, Muaūpoko, will on 31 March 2017 apply to the Court for:
>
>   1.1. A protected customary rights order under the Marine and Coastal Area (Tukutai Moana) Act 2011 (the Act) relating to a particular area of the common marine and coastal area, as defined in s 9 of the Act, from Turakirae (Sinclair Head) in the south (latitude: -41.362541 and longitude: 174.716671) to the northern side of the Rangitikei River mouth in the north (latitude: -40.293275 and longitude: 175.222406) bounded by on the landward side by the line of mean high-water springs and on the seaward side by the territorial sea and including the common marine and coastal area surrounding Kapiti Island, Motungarara Island, Tahoramaurea Island, Tokomapuna Island and Mana Island (the Muaupoko Shared Rohe Moana). The northern and southern most point of the Muaupoko Shared Rohe Moana are marked in the map attached and labelled **Appendix A**; and
>
>   1.2. A customary marine title order under the Act relating to a particular area of the common marine and coastal area from the southern side of the Kukutauaki block in the south (latitude: -40.852254 and longitude: 175.033922) to the northern side of the Manawatū River mouth in the north (latitude: -40.444171 and longitude: 175.217836) bounded by on the landward side by the line of mean high-water springs and on the seaward side by the territorial sea (the Muaupoko Exclusive Rohe Moana). The northern and southern most point of the Muaupoko Exclusive Rohe Moana is approximately marked in the map attached and labelled **Appendix B.**

[36] The references in those clauses to "Muaūpoko Shared Rohe Moana" and "Muaūpoko Exclusive Rohe Moana" appear to refer to the differences between CMT (exclusive) and PCR (shared).

[37] None of that wording which stipulates the nature of the applications would alert a reader to the fact that Muaūpoko intended the PCR application to be an application for rights in the nature of a CMT. The reason for using the "exclusive" and "shared" descriptors could be that the PCRs sought were recognising that the

rights did not exclude the rights of other claimants. In contrast, the description "Exclusive Rohe Moana", which is referred to in the context of the CMT application, was intended to indicate that Muaūpoko seeks to exclude any CMT claimed by others in the relevant area. The descriptors "exclusive" and "shared" respectively could also reflect that the CMT rights are more in the nature of territorial rights, whereas PCRs are of a more usuary nature which allows for usuary rights to also be held by others.[12] As Mr Ahu said, the reference could be to sharing among factional interests related to Muaūpoko or included in its application.

[38] Mr Bennion also pointed to cl 3 of the application, which lists the rights it has exercised in the shared rohe moana as grounds for the PCR orders. This clause immediately follows cl 2, which stipulates that "[t]he Muaupoko Shared Rohe Moana is inclusive of the Muaupoko Exclusive Rohe Moana".

[39] Clause 3 does include some rights only available through CMT authority over the relevant area. In my view that does not convert the PCR application into a CMT application. As cl 2 says the CMT application area, described as the "Exclusive Rohe Moana", is included in the "Shared Rohe Moana" area for which the PCRs are sought, so it is likely the rights listed are intended to support the CMT application in the areas for which it is specifically sought in cl 1.2 of the 2017 application. In addition, the grounds upon which CMT is sought are separate and the respective grounds make specific reference to the statutory provision for the relevant order sought, as follows:

> **GROUNDS ON WHICH THE PROTECTED CUSTOMARY RIGHTS RECOGNITION ORDER IS SOUGHT**
>
> 8. Muaupoko, through the Muaupoko Tribal Authority Incorporated seeks a protected customary rights recognition order on the grounds that its protected customary rights relating to the Muaupoko Shared Rohe Moana may be recognised by an order of the Court made on an application under section 100 of the Act.
>
> 9. Pursuant to s 98 of the Act, the Court may make a recognition order if it is satisfied that the application for protected customary rights meets the requirements of s 51(1) of the Act.
>
> 10. The Applicant Group meets the requirements in s 51(1) of the Act because it:

[12] *Whakatōhea*, above n 6, at [134].

10.1. has exercised the rights before and since 1840;

10.2. continues to exercise those rights in the Muaupoko Shared Rohe Moana in accordance with tikanga in either exactly the same or a similar way, or in a way that has evolved over time; and

10.3. is applying for rights that have not been extinguished as a matter of law.

GROUNDS ON WHICH THE CUSTOMARY MARINE TITLE RECOGNITION ORDER IS SOUGHT

11. Muaupoko through the Muaupoko Tribal Authority Incorporated seeks a customary marine title recognition order on the grounds that its customary marine title relating to the Muaupoko Exclusive Rohe Moana may be recognised by an order of the Court made on an application under s 100 of the Act.

12. Pursuant to s 98 of the Act, the Court may make a recognition order if it is satisfied that the application for customary marine title meets the requirements of s 58 of the Act.

13. The Applicant Group meets the requirements in s 58 of the Act because it:

    13.1. holds the Muaupoko Exclusive Rohe Moana in accordance with tikanga;

    13.2. has, in relation to the Muaupoko Exclusive Rohe Moana, exclusively used and occupied it from 1840 to the present without substantial interruption to its exclusive use and occupation; and

    13.3. the customary marine title has not been extinguished as a matter of law.

14. In terms of matters that may be taken into account in determining whether the Applicant Group's customary marine title exists in the Muaupoko Exclsuive Rohe Moana:

    14.1. the Applicant Group have owned land abutting the Muaupoko Exclusive Rohe Moana and have done so, without substantial interruption, from 1840 to the present day; and

    14.2. the Applicant Group have exercised non-commercial customary fishing rights in the Muaupoko Exclusive Rohe Moana and have done so from 1840 to the present day.

[40] Nothing in the tenor of the 2017 application filed, including the grounds for the CMT and PCR recognition rights, indicates that a CMT recognition order was sought over the whole Group N application area. The 2017 application would not put persons reading it on notice that Muaūpoko was actually applying for CMT over the area for which the application says it applies for PCR.

[41] Earlier in the Group N proceedings, Churchman J rejected an argument that an applicant could reserve the right to extend an application.[13] The Court of Appeal has also confirmed that placeholder applications which are non specific are unfair to other applicants and inconsistent with the scheme of the Act.[14] Those decisions reinforce my view that an interpretation in this case that the PCR application can be read as a CMT application is flawed.

[42] The applicant's first argument in support of the application for amendment fails. The 2017 application does not lend itself to an interpretation that it was in fact an an application for CMT orders over the entire area now sought to be included in the amendment application.

[43] In light of that finding, I now consider the issue of whether the amendment proposed is significant and thus changes the essential nature of the application.

[44] In my view the amendment proposed is significant for a number of reasons including:

(a) Geographical: it increased Muaūpoko's CMT application area by 50 per cent of the total area covered by the Group N claims. It was a 100 per cent increase in the area of the original Muaūpoko CMT application in the Stage 1(b) area, and approximately a 33 per cent increase in the Stage 1(a) area of the original application.

(b) Change in the legal nature of the application: the nature of CMT is territorial. It relates to authority and carries with it significant rights, compared to PCRs which are more in the nature of usuary rights. These differences are significant.[15] Dr Ward emphasised the change in legal character which would result from the amendment sought. He noted

13 *Re: Marine and Coastal Area (Takutai Moana) Act 2011. Application by William Janes Taueki on behalf of Ngāti Tamarangi Hapū of Muaūpoko Iwi*. CIV -2017-485-160. Minute of Churchman J, 31 July 2023

14 *Paul v Attorney General* [2022] NZCA 443 at [62].

15 *Whakatōhea*, above n 6, at [134].

that it was relevant that different tests are required to establish CMT as opposed to PCR under the legislation.

(c) Prejudice: the extent of the overlap in CMT applications proposed by the amendment and the consequent prejudice accruing to the other parties who had settled their evidence and commissioned their research on the basis of the original application, was significant. The timetable was already tight and the applicants have largely filed their evidence. There is insufficient time available to the hearing for the parties to respond to an amended application of the significance that is sought here.

(d) Process issues: an amendment of the nature sought would require as a matter of natural justice the other parties to the Group N applications to reconsider their evidence, whether to commission new research, and the extent of their participation in each stage. This would involve delays while positions were being considered. Even if it were possible that the hearings could commence in May 2024 as planned, a review of the timetable would be necessary. This is tight already. The parties would need to expend more resources and time on the process issues and any other matters that required consideration due to the amendment. Consideration would also need to be given more generally as to whether further general notification should be given due to the amendments.

[45] I have referred to the overlapping CMT claims which would result from the proposed amendment and geographical extension of the claim. I accept the respondents' (excluding the Crown) submission that they would be required to reconsider the evidence and research to date. The resultant change in coverage for the CMT application has taken most parties by surprise. Ms Hauraki indicate that her client had had no inkling that Muaūpoko were interested in or could support a claim in her client's CMT area. That suggests the dynamics of the relationships which would be the subject of evidence in the proceedings would need to be

reconsidered, inevitably requiring the parties to re-evaluate their evidence and possibly look to put new research and evidence before the court.

[46] Ms Sullivan supported the submissions of the respondents and the Crown. She submitted that tikanga was an important factor here that needed to be played out. She also noted that the input of the pūkenga was an important part of any application and was missing at this stage.

[47] Dr Ward said that the Crown would not need to commission additional expert evidence for the hearing beyond the adjustment of mapping evidence. However, Crown counsel anticipated additional cross examination would be required and additional material from Waitangi Tribunal reports may need to be added to the bundle.

[48] Mr Bennion points to *Re Reeder* as authority in support of allowing amendment applications.[16] However, as the respondents point out, the two applications for amendment in those proceedings were of a different nature to those sought here. In that case one amendment was the subject of no formal determination at all but appears to have been agreed between all parties in recognition of the negotiated alliances which occurred in the course of the proceeding. This was an example of where an amendment might be appropriate, as contemplated by the Court of Appeal in *Whakatōhea.* It recognises a coming together of groups so the requisite amendments to the specified area are made, "to incorporate the rohe moana of the applicant group."[17]

[49] Following the hearing in *Re Reeder*, the Judge made timetabling directions that any application for PCR by a CMT claimant in a case where it appeared to the judge the evidence suggested such an application might be appropriate. The Judge directed a further process to allow any amendment to be made and for the other parties to be heard in response to it. This dealt with any prejudice to other parties

---

16 *Re Reeder (Ngā Pōtiki Stage 1)* [2021] NZHC 2726, [2022] 3 NZLR 304.
17 *Whakatōhea*, above n 6, at [220(a)].

and allowed the observation of natural justice, a matter to which the Court of Appeal was alert in *Whakatōhea*.[18]

[50] Section 107 contemplates that the Court should have flexibility, but only if it should "more appropriately decide" that the application for recognition of a PCR should be a recognition of the CMT or vice versa.

[51] I conclude that the application to amend before the Court introduces a CMT application which would be fresh, different and change the character of the application.[19] The amendment sought would result in an application for substantially different rights over a much-expanded area with significantly different legal consequences than the original application had contemplated. This is a situation where the amendment sought at this time is "in substance a new application" and an amendment would be contrary to the interests of justice vis-à-vis other applicants and interested parties.

Testing of the evidence

[52] Mr Bennion submits that available material indicated that Muaūpoko had a claim for CMT in the area proposed to be included. He handed up material for that purpose, including Waitangi Tribunal reports and a report of Dr O'Malley, an historian who would be giving evidence in this matter.

[53] Mr Ahu said the evidentiary threshold required by s 107(1) of Takutai Moana was not met, given the summary nature of the application and the lack of testing of the material on which Muaūpoko relied in support of its position. For instance, Muaūpoko pointed to the report of Dr O'Malley in the Waitangi Tribunal as supporting the application. However it was only an excerpt from the witness' report and there was no context given. Mr Ahu noted that Dr O'Malley's evidence was apparently not accepted by the Tribunal on the point for which the report was submitted. Mr Ahu said a summary application for amendment was not the forum to test material of that nature.

---

18 *Whakatōhea*, above n 6, at [220](e).
19 *Whakatōhea*, above n 6, at [61].

[54] I agree with Mr Ahu's submissions. The court is not in a position to assess the material handed up. At this stage it could not consider whether the PCR should be treated as a CMT application as contemplated by s 107

Interpretation of the legislation

[55] Mr Bennion says that section 107 of the Act allows the court to amend the application at any time. The Court of Appeal in *Whakatōhea* emphasised the need for the court to be flexible in dealing with amendments to any application.[20] It said that the court must examine any amended application to ascertain whether it must be considered new and hence out of time.

[56] Treating the originating application process governing the applications before the court as defined by formal pleadings is too narrow an approach and was not endorsed by the Court of Appeal in *Whakatōhea*.[21] The Court of Appeal nevertheless emphasised that s 100 (the statutory limitation provision) should be interpreted strictly.[22] It also emphasised that prejudice may accrue to other parties, therefore it is incumbent on the court to allow any applications which have merit to be made as soon as possible in order to give the other parties an opportunity to respond.

[57] The proper interpretation of the statute requires the applicant to indicate at the time of filing whether they are seeking PCR and/or CMT; to describe the customary right; to outline the particular area to which the application relates; and specify the grounds of the application. The application must be supported by an affidavit that sets out in full the basis upon which the applicant group claims to be entitled to the recognition order.[23] The application must be publicly notified and served.[24] These notification requirements enable affected parties to respond, prepare evidence and commission research as appropriate.

---

[20] *Whakatōhea*, above n 6, at [219].
[21] *Whakatōhea*, above n 6, at [217] and [218].
[22] At [219].
[23] The Act, s 101.
[24] The Act, ss 102 and 103.

[58] Given the nature of the application, the Court at this stage could not consider whether it might be appropriate to undertake any consideration under s 107. To reach the point of consideration as to whether a PCR application might be treated as a CMT application requires a proper testing of the evidence. In the present circumstances that is unlikely to arise until after the substantive evidence is before the court and not at a pre-trial stage when the evidence has not been called nor tested.

Changes since the application was filed

[59] The application was filed in 2017. The respondents submitted that there had been six years advance notice of the statutory deadline in which to prepare applications. The recognition order process was unique and did not adopt in full the approaches of other jurisdictions. Mr Bennion submitted that the law was uncertain at the time of the filing of the applications and since then it had been clarified, particularly in relation to the ability to hold joint CMT.

[60] As Dr Ward submitted, the same applies to most other new legislation. In any event, he said there was considerable material and information surrounding the development of the legislation which in its final form did incorporate some elements in common with overseas jurisdictions.

[61] Muaūpoko was in the same position as all other applicants. That there was time pressure is not a ground for an amendment application to be made nearly seven years after the filing of the application.

[62] The Waitangi Tribunal report on Takutai Moana says that the statutory deadline is a breach of Te Tiriti o Waitangi/the Treaty of Waitangi, however that is a matter for the Crown and is part of the legislation. This factor does not add weight to the amendment application.

Strike out application

[63] The respondents (excluding the Crown) say the strike out application should be granted, particularly if the Court considered it appropriate not to determine Muaūpoko's application at this stage and adjourn it until the end of the hearing.

[64] I do not consider it is appropriate to leave the application to be dealt with at the end of the hearing when the relevant evidence would be before the Court. To do so could create substantial uncertainty for the parties. The application must be dealt with now on the material before the Court.

[65] As I have determined that the application must be dismissed on its merits it is not necessary to consider the strike out application. This case differs from that of *Paul v Attorney-General,* where the use of a "holder" application over the whole of the country was inconsistent with the scheme of the Act.[25] The main issue in this case was the interpretation of the 2017 application. I do not consider that it is necessary to strike out the application and the better course is to dismiss it on its merits.

[66] Accordingly, I dismiss the application to strike out.

Conclusion

[67] The application for amendment is dismissed for the reasons set out in this judgment. It introduces a CMT application which would be fresh, different and change the character of the original application. It would result in an application for substantially different rights over a much-expanded area with significantly different legal consequences than the original application contemplated. This is a situation where the amendment is "in substance a new application". In addition, an amendment would be contrary to the interests of justice vis-à-vis other applicants and interested parties.

[68] The application for strike out is also dismissed.

[69] Costs are reserved. If they are sought any application should be filed and served with submissions by memorandum within 7 days of the date this judgment and any reply within a further 7 days.

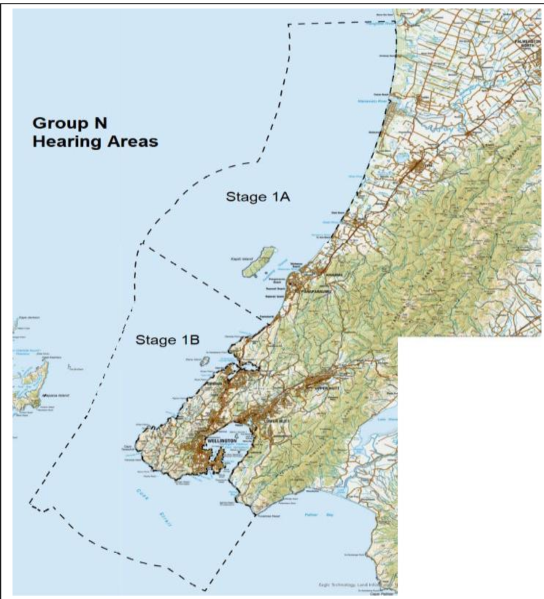
---

[25] *Paul v Attorney-General*, above n 14.

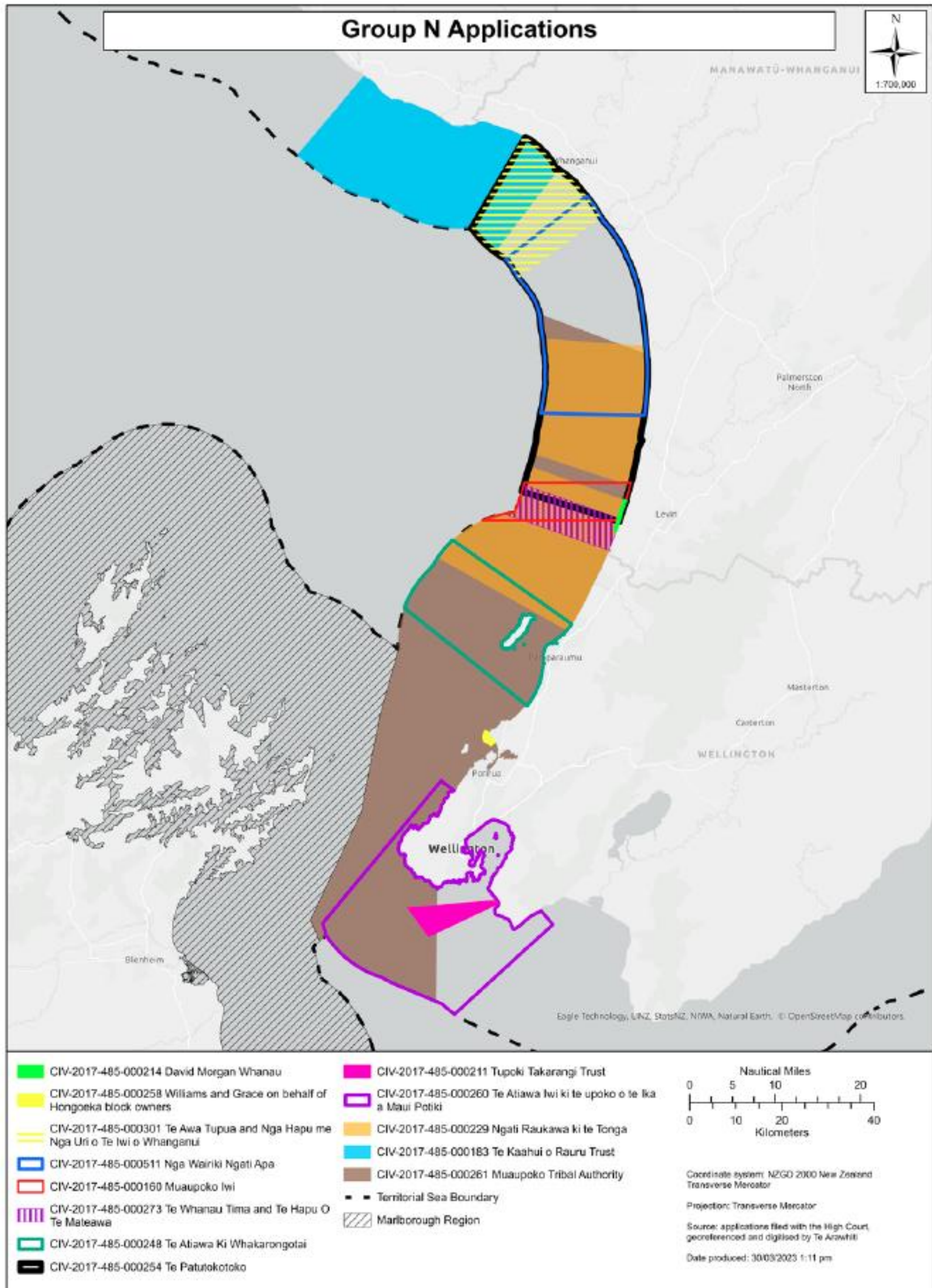
Grice J

Solicitors
Kāhui Legal, Rotorua and Wellington
Black Law, Wellington
Bennion Law, Wellington
Whaia Legal, Wellington
Oranganui Legal Limited, Paraparaumu
Crown Law, Wellington
Bundle Findlay, Wellington
Thompson O'Neil & Co, Eltham

APPENDIX A

The current Group N hearings exclude the area north of the Rangitīkei river. The hearing area is divided into: **Stage 1(a)** from the Rangitīkei River in the north, and Whareroa in the south; and, **Stage 1(b)** Whareroa to Turakirae Head.	

APPENDIX B



APPENDIX C

The Muaupoko Shared Rohe Moana

APPENDIX D

The Muaupoko Exclusive Rohe Moana