

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

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

**CIV-2011-485-821**

IN THE MATTER OF      the Marine and Coastal Area (Takutai  
Moana) Act 2011

IN THE MATTER OF      an application by the Trustees of the  
Ngāti Pāhauwera Development Trust  
TORO WAAKA, TUREITI MOXON,  
CHAANS TUMATAROA-CLARKE,  
REX ADSETT, GERALD ARANUI,  
AMIRIA TOMOANA and TOM KEEFE  
on behalf of NGĀTI PĀHAUWERA for  
Customary Marine Title, Wahi Tapu  
Protection and Protected Customary Rights

Teleconference:      14 October 2020

Counsel:              R N Smail and E James for Trustees of the Ngāti Pāhauwera  
Development Trust  
L Underhill-Sem for Ngāti Pārau  
G Erskine and M Sreen for Ngai Tahu o Mōhaka Waikare  
K Anderson and M Dicken for Maungaharuru-Tangitū Trust  
B Lyall for Mana Ahuriri Trust  
G Melvin for Attorney-General (Interested Party)

Minute:                14 October 2020

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**MINUTE (NO. 10) OF CHURCHMAN J**

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[1]      A telephone conference was held today primarily to address issues arising in relation to the appointment of a pukenga. The Court also addressed issues relating to an electronic bundle and variation of the timetable order.

*Pukenga*

[2]      Four candidates have been nominated by the parties:

- (a) Dr Robert Joseph: Dr Joseph was nominated by Ngai Tahu o Mōhaka Waikare (Ngai Tahu) on 22 May 2020. He has a tribal affiliation to Ngāti Kahungunu. Maungaharuru-Tangitū Trust (MTT) raised queries as to the effect of the tribal affiliation and also queried whether Dr Joseph had undertaken work for Ngai Tahu.
- (b) Dr Des Kahotea: Dr Kahotea was nominated by Ngāti Pāhauwera on 3 June 2020. He has no tribal affiliation to any applicant group. MTT raised queries about his experience in tikanga and fluency in te reo.
- (c) Dr Tom Roa: Dr Roa was nominated by MTT on 22 May 2020. He has no tribal affiliation to any applicant group. The Attorney-General raised a query as to the fact that Dr Roa was also a member of the Waitangi Tribunal. Mr Erskine raised a similar query submitting that counsel obliged to cross-examine a pukenga would then feel uncomfortable having to appear before them in the Tribunal.
- (d) Dr Ruakere Hond: Dr Hond was nominated by MTT on 22 May 2020. He is also a member of the Waitangi Tribunal, and Mr Melvin for the Attorney-General, and Mr Erskine for Ngai Tahu, raised the same reservations about him.

[3] Ms Smail indicated that her client was unsure whether a pukenga should be appointed at all and expressed a view that tikanga evidence should be assessed by the Court on the basis of the tikanga evidence given the parties. She was also unsure as to the role to be played by the pukenga and what questions might be asked of them.

[4] Mr Erskine supported the proposition that there be a panel of pukenga appointed.

### *Analysis*

[5] As the Court indicated in the minute relating to the appointment of pukenga in the Whakatōhea case,<sup>1</sup> there is no reason in principle why someone who is, or has been, a member of the Waitangi Tribunal should not also be appointed a pukenga in an appropriate case. Being a member of the Tribunal on an Inquiry relevant to the subject matter of an application under

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<sup>1</sup> *Re Te Whakatōhea Minute (No. 21) of Churchman J*, 4 August 2020.

the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) may make it inappropriate for such a person to be appointed.

[6] The fact that counsel may be uncomfortable in cross-examining a pukenga who happen to be a member of the Waitangi Tribunal and then appearing before that person in the Waitangi Tribunal is not, of itself, something that would necessitate disqualification from appointment as a pukenga. However, and where there are a range of suitable candidates available, it is a factor that may be taken into account.

[7] While the Court endeavours to accommodate the views of the parties to a proceeding in respect of who is an appropriate candidate, it is not always possible to achieve complete consensus.

[8] One factor that the Court would then be entitled to have regard to, would be the level of opposition or support for the particular candidates and whether that support or opposition is objectively justified.

[9] As indicated both by this Court in the *Whakatōhea* case and by Mallon J in *Re Tipene*,<sup>2</sup> the fact that a pukenga may have some tribal affiliation with one or more of the parties involved in a proceeding under the Act is also not, of itself, a disqualifying factor and may indeed, in some cases, be desirable. However, it is another factor that the Court, in appropriate cases, is entitled to have regard to when considering who to appoint as a pukenga.

[10] As to whether there should be a single pukenga or a panel of pukenga, the number and complexity of issues raised in the hearing, the number of applicants, and the nature of the issues that they are called upon to address, as well as the particular qualities of the candidates for appointment as a pukenga, will determine whether a single pukenga or a panel is required.

[11] In the *Whakatōhea* case, the nature of the issues involved, the size of the hearing and the broad consensus among counsel influenced the Court in appointing a panel of two pukenga. Those factors do not seem to be present in this case and the Court is not convinced that the appointment of more than one pukenga is required.

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<sup>2</sup> *Re an application by Tipene* [2015] NZHC 2923.

[12] During the course of the teleconference, the Court was able to address Ms Smail's concerns about the role of the pukenga. It is intended that the pukenga will answer a series of questions. The questions are similar to those used by the Court in both the *Tipene* and *Whakatōhea* cases. It may also be that additional questions are asked of the pukenga in relation to issues arising from matters discussed at the hearing.

[13] Counsel are also to be given the opportunity to comment on the proposed questions. That does not mean that counsel can veto proposed questions or insist that additional questions be asked. They are entitled to be consulted and to have their views considered.

### *Analysis*

[14] The candidate in respect of whom the least number of issues was raised was Dr Kahotea. In respect of the reservation by MTT about Dr Kahotea's expertise in tikanga and fluency in te reo, the Court has had advantage of having heard and seen Dr Kahotea give evidence for applicants in the *Whakatōhea* proceedings. The Court is satisfied of his fluency in te reo and his knowledge of tikanga. No other grounds were suggested by any party that might have disqualified him.

[15] The queries raised by various of the parties in respect of Dr Joseph, Dr Roa and Dr Hond, are matters that it is appropriate for the Court to consider. Other than for the issues raised, all candidates would have the qualities required of a pukenga. It is therefore a matter of choosing between four suitable candidates. None of the parties objected to Dr Kahotea's appointment and there were some residual reservations about each of the other candidates. Dr Kahotea therefore meets the criteria of having the support of the parties involved in the proceeding. Accordingly, he is appointed as pukenga in this matter.

[16] The issue of whether any appointee would be required to attend continuously throughout the entire duration of the hearing was raised by counsel. There is no automatic assumption that a pukenga should be required to be personally present in Court throughout the entirety of the hearing. Whether that is appropriate will depend on a number of things including whether the pukenga is able to prepare a report (or draft report) prior to the commencement of the hearing; whether the pukenga believes it is necessary for them to hear all of the evidence

given orally or just some of it; or whether the pukenga would wish to be physically present or participate by VMR or some other electronic link.

[17] Dr Kahotea's appointment is conditional upon him, if he should be required, to be available throughout the hearing. Counsel for Ngāti Pāhauwera who nominated him are to confirm that with him and advise the Registrar accordingly.

[18] In terms of the proposed questions to be put to the pukenga, the following questions are identified for discussion:

- (a) What tikanga does the evidence establish applies 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?

[19] Counsel are required to provide their written feedback on these proposed questions no later than 5 pm on 21 October 2020.

#### *Electronic bundle*

[20] There was broad agreement that an electronic bundle is appropriate. Mr Melvin is to liaise with the other counsel in relation to the preparation of such a bundle. The use of an electronic bundle does not obviate the need for the filing of a hard copy of the case. The responsibility for preparing and filing that hard copy, unless agreed otherwise, rests with the priority applicant.

## *Timetable*

[21] Ms Smail objected to the amendment made to the timetable following the teleconference of 5 June 2020.<sup>3</sup> It was submitted that 3.5 weeks was insufficient for Ngāti Pāhauwera to assemble and file any reply evidence to that filed by the Attorney-General.

[22] The Court varied the timetable directions largely as a result of difficulties the parties had experienced arising out of the COVID-19 lockdown. The directions as varied represented a compromise designed at ensuring that the hearing was able to proceed as timetabled (a matter of some moment to Ngāti Pāhauwera), and that parties whose evidence preparation had been adversely affected by the COVID-19 restrictions were not overly disadvantaged.

[23] The Court is not persuaded that a time of 3.5 weeks is inadequate to prepare and file reply evidence to that of the Attorney-General. At this stage, it is unknown as to what, if any, reply evidence may be required. If this case follows the same pattern as the *Whakatōhea* hearing, there may be very little need for any reply evidence.

[24] Mr Melvin, for the Attorney-General, has indicated that if some of the evidence is able to be filed ahead of the timetable date, it will be. If that is able to occur, then that may address some of Ms Smail's concerns. However, I am not convinced that any formal amendment to the timetable needs to be made.



**Churchman J**

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<sup>3</sup> *Re Ngāti Pāhauwera Minute (No. 7) of Churchman J*, 11 June 2020.