

**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 Mokokoko  
   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:                        4 August 2020

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**MINUTE (NO. 21) OF CHURCHMAN J  
[Appointment of pukenga and live streaming]**

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**Background**

[1]      By minute of 8 July 2020, I set out the preliminary views of the Court in relation to the appointment of a pukenga in respect of the Edwards (Whakatōhea) priority hearing. That minute also set out some draft questions which the pukenga might address.

[2] At the case management conference (CMC) held in Rotorua on 15 July 2020, counsel made further submissions on matter to do with pukenga. Further written submissions have also been received.

### **Agreement**

[3] All applicants and interested parties support the appointment of a pukenga and there is also considerable support for appointment of a panel of pukenga.

[4] There was broad agreement that the four proposed questions set out [21] of the Court's minute of 8 July 2020 were generally appropriate although some suggestions for rewording of those questions were made.

[5] The four candidates remain as detailed in the memorandum of 8 July, namely Dr Kihi Ngatai, Professor Pou Temara, Dr Hiria Hape and Mr Doug Hauraki.

### **Eligibility of candidates**

[6] At the CMC, Ms Roff, counsel for the Attorney-General, raised the question of whether it was appropriate for Professor Temara to be appointed because he was currently a member of the Waitangi Tribunal. Dr Ngatai has also been a member of the Tribunal.

[7] There is no suggestion that any of the proposed pukenga were members of the Waitangi Tribunal involved in the Marine and Coastal Area (Takutai Moana) Act 2011 inquiry in respect of which the Stage 1 report was issued on 29 June 2020.

[8] For the reasons set out in the minute of 8 July, the level of independence normally required of a High Court expert witness is not required of a pukenga and membership of the Waitangi Tribunal, whether current or historical, would not disqualify an otherwise qualified appointee.

[9] However, in the memorandum filed by Mr Gear on behalf of an application by Ngai Te Rangi Settlement Trust, dated 7 July 2020, he confirms that he has filed a brief of evidence in support of that application from Dr Ngatai. It would not be appropriate for Dr Ngatai to be both a witness called on behalf of an applicant and a pukenga.

[10] As there is widespread support for a panel rather than just a single pukenga, I appoint two pukenga, Mr Doug Hauraki and Professor Pou Temara. Both bring a breadth of experience in te ao Māori, knowledge of tikanga Māori, and they have the ability to articulate that knowledge.

### **Questions for pukenga**

[11] A memorandum dated 21 July 2020 filed on behalf of Te Kāhui Takutai Moana o ngā whānau me ngā hapū o Te Whakatōhea (Te Kāhui) suggested amending the first question by replacing the words “is practised” with the word “applies” so that the question reads, “What tikanga does the evidence establish applies in the application area?” This amendment was supported by some other applicants. I make that amendment.

[12] Included in this question would be advice on how the tikanga identified by the pukenga operates in relation to the Takutai Moana. If the pukenga come to the conclusion that there are differences in the applicable tikanga of the various applicant groups, they should identify those differences and explain any relevant impact that the differences have in relation to the question of which applicant or applicants holds the specified area in accordance with tikanga.<sup>1</sup>

[13] In a memorandum dated 28 July 2020, counsel for the Whakatōhea Kotahitanga Waka applicants raised a number of tikanga questions. They are detailed questions and are likely to be considered by the pukenga as part of addressing the four broad questions set out in the Court’s minute of 8 July 2020 (as amended in [11] above). But it is up to the pukenga to decide which of the issues raised in the memorandum of 28 June 2020 are relevant.

[14] As indicated to counsel at the Rotorua CMC, the questions in respect of which advice is sought from the pukenga are likely to be refined as the hearing progresses and issues are either clarified or agreed. At this early stage in the proceedings, the Court is not going to prescriptively define all of the issues that advice may be sought from the pukenga on in case matters of tikanga emerge during the hearing which had not been anticipated.

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<sup>1</sup> Section 58(1)(a) Marine and Coastal Area (Takutai Moana) Act 2011.

[15] The pukenga should also feel free to suggest to the Court additional questions which they believe are required to be answered in applying s 58 of the Act.

### **Discharge of role by pukenga**

[16] The issue of the identity of the pukenga and the questions to be referred to them was raised by the Court with counsel some months ago. However, difficulties caused by the COVID-19 lockdown restrictions meant that substantial progress in addressing these issues was not made until the Rotorua CMC in July. This has meant that it has not been possible to finalise the identity of the pukenga and the nature of the issues they are to report on in sufficient time so as to allow them to prepare a preliminary report prior to the hearing commencing on 17 August 2020.

[17] Some counsel have submitted that there should be a “tikanga” process at the start of, or towards the start of the substantive hearing. It was even suggested that the first two weeks of the hearing should be devoted to such an exercise, and it was implied that this process should take place between the pukenga and the various applicants’ experts without any involvement of the Court or counsel.

[18] The Court sees some merit in, at some stage during the hearing or afterwards, a meeting between pukenga and the experts on tikanga to be called by the parties (akin to the process of “hot tubing” between experts mandated in the High Court Rules). However, this is likely to be most productive once the real issues in relation to tikanga have been identified. It is therefore more likely to occur later in the hearing rather than at the commencement.

[19] The Court notes that a similar exercise took place in the recent Supreme Court *Ellis* hearing. However, this was an out-of-court process which the Court was not involved in. There is no reason why, in this case, such an out-of-court process could not take place prior to (or even during) the Court hearing if the parties wished to engage in it.

[20] The pukenga will ultimately file a report addressing the four questions (as amended) set out in [21] of the Court’s minute of 8 July 2020 and such other questions as

they may have been asked for their advice on. The applicants will then be accorded an opportunity to file written submissions in respect of the content of that report.

[21] It is expected that the pukenga will attend for the duration of the hearing. If counsel for any of the applicants, or other applicants' witnesses, would wish to communicate with the pukenga, the appropriate protocol to follow is for such a request to be made through the Registrar with directions as to how it should occur to be made by the Judge.

### **Live streaming**

[22] At the Rotorua CMC, and in memoranda filed subsequently, several counsel requested that the Court consider the possibility of live streaming all or part of the hearing. The justification for this request was that this would allow members of the applicant group who, for health or other reasons, were unable to travel to Rotorua for the hearing, to observe what was happening. Some counsel also indicated that, if such a service was available, they would not necessarily attend those parts of the hearing that were less relevant to their clients but participate by AVL.

[23] There are a number of technical difficulties created by the fact that the hearing venue is not a Court however, the Registrar has been able to arrange for a VMR network connection that can accommodate up to 100 viewers at a time. The link would be suspended if any witness needs to give evidence by AVL, but otherwise full coverage can be obtained.

[24] Those wishing to take advantage of the VMR should contact the Registrar, Tom Roughan to arrange for that to occur.

**Churchman J**