
IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2016-485-770

IN THE MATTER OF

an application by TE RŪNANGA O
NGĀTI WHAKAUE KI MAKETŪ
INCORPORATED, for and on behalf of
Ngāti Whakaue ki Maketū Hapū, for
recognition orders under the Marine and
Coastal Area (Takutai Moana) Act 2011

(AND OTHER PROCEEDINGS
LISTED IN THE SCHEDULE TO THIS
MEMORANDUM)

MEMORANDUM OF COUNSEL CLARIFYING ROLE OF ATTORNEY-
GENERAL AS AN INTERESTED PARTY TO ALL PROCEEDINGS

11 September 2018

Judicial Officer: Collins J

CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Person/s:
D A Ward / G L Melvin
Damen.Ward@crownlaw.govt.nz / Geoffrey.Melvin@crownlaw.govt.nz

MAY IT PLEASE THE COURT:

Introduction

1. A number of applicants have applied under r 10.15 of the High Court Rules for a separate hearing on the role and status of the Attorney-General in the proceedings under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).¹
2. While any such applications regarding the role and status of the Attorney-General were to be filed before 30 August 2018,² some applicants have sought an extension of time. The Attorney-General files this memorandum without prejudice to his right to respond to any matters that late applications might raise.
3. This memorandum seeks to clarify the Attorney-General's position on his status and role in proceedings under the Act. The Attorney-General hopes that this clarification will remove the necessity for the Court to rule on the r 10.15 applications.
4. If, however, the applicants indicate they wish to proceed with their applications, the Attorney-General reserves his ability to respond directly to the applications and the relevant case law in accordance with any timetable the Court sets for that purpose.
5. This memorandum also addresses briefly the interlocutory application dated 6 September 2018 by the Seafood Industry Representatives concerning the role of the Attorney-General.

¹ The Attorney-General has been served with applications by Te Rūnanga o Ngāti Whakaue ki Maketū Incorporated (CIV-2016-485-770), Tamihana Paki (CIV-2017-485-305), Tahuāroa-Watson whānau, Pektapu hapū, (CIV-2017-485-172), Louisa Te Matekino Collier & Ors (CIV-2017-485-398), Cletus Manu Paul (CIV-2017-485-512 and CIV-2017-485-513), Elvis Shayne Reti (CIV-2017-485-515) and David Potter (CIV-2017-485-514), Te Rua Rakuraku (CIV-2017-485-299), Angeline Greensill (CIV-2017-419-83), Arapeta Hamilton (CIV-2017-485-277 and CIV-2017-485-276), Joseph Robert Kingi (CIV-2017-404-537), Rihari Dargaville (CIV-2017-404-538 and CIV-2017-404-539), Mai Maria Nova (CIV-2017-404-573), Michael John Beazley (CIV-2017-404-574 and CIV-2017-485-378), Anī Taniwha (CIV-2017-485-249), Hugh Te Kiri Rihari (CIV-2017-404-572), Hokimatemai Kahukiwa (CIV-2017-404-568), Pereri Mahanga (CIV-2017-404-566) and Roimata Minhinnick (CIV-2017-404-569).

² Minute (No. 5) of Collins J [First Case Management Conferences], 18 July 2018, at [35] and [36].

6. For completeness, counsel note that the Attorney-General considers that r 10.15 does not properly apply in these circumstances. He wishes to reserve his position on r 10.15 at present.

The Attorney-General's status and role in the proceedings under the Act

7. The applications to the Court under s 100 of the Act for recognition orders are originating applications. The Attorney-General is not a defendant to the applications.
8. The Attorney-General understands his involvement in each application is that of an interested party. Applicants were required to serve their applications on the Solicitor-General on behalf of the Attorney-General³ and the Attorney-General has filed a notice of appearance in respect of every application.⁴
9. As an interested party, the Attorney-General understands his role is to represent the public interest in the proceedings under the Act. In that respect, he intends to support the purpose of the Act as set out in s 4 of the Act. The purpose of the Act is to:
- 9.1 establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand
 - 9.2 recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whanau as tangata whenua;
 - 9.3 provide for the exercise of customary interests in the common marine and coastal area, and
 - 9.4 acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).
10. The Attorney-General considers the fulfilment of this role may involve:
- 10.1 assisting the Court (through legal submissions) with the Attorney's view of the interpretation and application of the Act;

³ Section 102(c) of the Act.

⁴ See s 103(2)(f) of the Act.

- 10.2 providing relevant evidence (if any) the Crown holds; and
- 10.3 advising the Court of the progress of applications for recognition agreements that overlap with applications to the High Court
11. The Attorney-General sees his role in the proceedings under the Act as having some resonance with interventions in New Zealand Bill of Rights Act litigation, particularly in the early development of the jurisprudence.
12. Reflecting the desire to support the purpose of the Act, the Attorney has to date put considerable effort into assisting the workability of the process, including, for example, the provision of indicative maps of application areas and a range of supporting tables and schedules.
13. The Attorney-General acknowledges that his memorandum of 7 March 2018 states, “Counsel anticipate the Attorney-General may ultimately act as a contradictor in most, but not necessarily all, applications”. Counsel regret that this has led to a misunderstanding of the Attorney-General’s position. To be clear, the Attorney-General does not consider it is his role to oppose applications in the public interest, or that the public interest requires him to oppose applications; but, as perhaps might be suggested in the applicants’ memoranda,⁵ the Attorney-General is not precluded from making submissions that might not support, or might not support fully, an application.
14. It remains to be seen as to whether the Attorney-General will take an active role in each application. However, where the Attorney-General does take an active role, if he considers that the statutory criteria for recognition orders are met, he will make that submission to the Court. Similarly, if the Attorney-General considers the criteria are not met, he will make that submission to the Court. To restate the point, any submission the Attorney-General makes will be with the intention of giving effect to the purpose of the Act.

⁵ See, for example, “Memorandum of Counsel for Te Rūnanga o Ngāti Whakaue ki Maketū Incorporated in support of an Interlocutory Application for Determination of Preliminary Questions of Law”, 30 August 2018.

15. The particular submissions the Attorney-General will make will be reviewed and refined on a case by case as each proceeding develops.

Attorney-General's notices of appearance

16. The Attorney-General notes the criticisms that some applicants have made in respect of the notices of appearance he has filed.
17. The Attorney-General's notices of appearance highlight what the Attorney-General considers to be particular defects in the way applications have been pleaded. The Attorney-General drafted the notices of appearance mindful of s 103(2)(f) of the Act, which implies a notice of appearance should be in support of or in opposition to the application.
18. It is submitted that the position the Attorney-General has taken to date in his notices of appearance has been appropriate as a matter of pleading and procedure. As counsel indicated repeatedly at the case management conferences, and as reaffirmed in this memorandum, the Attorney-General will keep his position in relation to each application under review. The notices of appearance do not represent the Attorney-General's final view in respect of the applications before the Court.

Interlocutory application by the Seafood Industry Representatives

19. The Seafood Industry Representatives have also applied to the Court pursuant to r 10.15 of the High Court Rules for an order determining the role and status of the Attorney-General in the proceedings. The particular questions the Seafood Industry Representatives ask the Court to determine are:
 - 2.1 What is the role and status that the Attorney-General considers he will perform in the negotiations that are now provided for in the Court's timetabling; and
 - 2.2 How does the Attorney-General propose that affected parties such as the Seafood Industry will:
 - (a) have appropriate visibility of the evidence that is relied on and which underpins any negotiations; and

- (b) have an appropriate opportunity to ensure that their interests are appropriately considered as potential negotiated outcomes are being discussed, prior to any settlement or agreement being finalised?

20. With respect, the question the Seafood Industry Representatives ask the Court to determine in para 2.1 of their interlocutory application is misguided. The engagement process is not a judicial-based process and it is not appropriate for the High Court to supervise the role and status of the Attorney-General in that process in the way the Seafood Industry Representatives ask. In any case, recognition agreements are entered into between applicants and the “responsible Minister”, which term means “the Minister of the Crown who, with the authority of the Prime Minister, is for the time being responsible for the administration of any provision in the Act”.⁶ The Attorney-General is not the responsible Minister as the Act defines that term. To be clear, however, the Attorney-General’s interest is in seeing the purpose of the Act fulfilled irrespective of which pathway – engagement or the High Court – applicants choose to take.
21. The Seafood Industry should address its questions in para 2.2 of its interlocutory application to the MACA Unit within the Ministry of Justice, which administers the engagement process.


Next steps

22. The Attorney-General is hopeful that the clarification set out in this memorandum obviates the need for a hearing of the r 10.15 applications. If the parties who have filed r 10.15 applications continue to have concerns about the status and role of the Attorney-General in the proceedings before the Court, counsel for the Attorney-General are available to discuss those with counsel for those parties, if that would assist.

⁶ Section 9 of the Act.

23. If, however, the applicants wish to proceed with their r 10.15 applications, the Crown will file further submissions in accordance with any timetable the Court directs.

11 September 2018


D A Ward / G L Melvin
Counsel for the Attorney-General

TO: The Registrar of the High Court of New Zealand.

AND TO: The applicants and Seafood Industry Representatives.

SCHEDULE

Applications and Court numbers

COURT No.	APPLICANT
CIV-2017-404-537	Joseph Robert Kingi on behalf of Nga Puhi nui tonu, Ngati Rahiri, Ngati Awa, Ngai Tahuhu and Ngaitawake
CIV-2017-404-538	Rihari Dargaville on behalf of New Zealand Maori Council members
CIV-2017-404-539	Rihari Dargaville on behalf of Ngati Kauwau, Ngati awa Whangaroa
CIV-2017-404-566	Pereri Mahanga on behalf of Te Waiariki, Ngati Korora, Ngati Takapari hapu/iwi of Niu Tiren
CIV-2017-404-568	Hokimatemai Kahukiwa on behalf of Koromatua Hapu o Ngati Whakaue of Te Arawa waka
CIV-2017-404-569	Roimata Minhinnick on behalf of Ngati Te Ata
CIV-2017-404-572	Hugh Te Kiri Rihari on behalf of Ngati Torehina ki Mataka hapu/iwi of Niu Tiren
CIV-2017-404-573	Maia Maria Nova on behalf of Ngai Tahuhu, Ngati Tuu, Ngati Kukukea
CIV-2017-404-574	Michael John Beazley on behalf of Ngati Rehua/Ngatiwai ki Aotea and related hapu
CIV-2017-419-83	Angeline Greensill on behalf of Tainui hapu o Tainui waka
CIV-2017-485-172	Tahuaroa-Watson whanau, Puketapu Hapu
CIV-2017-485-249	Ani Taniwha for Ngati Kawau, Ngati Kawhiti, Ngati Haiti and Ngaitupango hapu of Whangaroa
CIV-2017-485-276	Arapeta Hamilton on behalf of Ngati Rongo o Mahurangi
CIV-2017-485-277	Arapeta Hamilton on behalf of Ngati Manu and its hapu Te Uri Karaka and Te Uri o Raewera
CIV-2017-485-299	Te Rua Rakuraku on behalf of Nga hapu o Ngati Ira o Waioweka Rohe
CIV-2017-485-305	Tamihana Akitai Paki on behalf of Te Parawhau Hapu
CIV-2017-485-378	Michael John Beazley on behalf of Ngati Maraeariki and hapu (Ngati Raupo, Ngati Kahu and Ngati Poataniwha) and Ngati Rongo and hapu (Ngati Ka and Ngati Waitaua)
CIV-2017-485-398	Louisa Te Matekino Collier & Ors on behalf of Ngati Kawau and Te Waiariki Korora
CIV-2017-485-512	Cletus Maanu Paul on behalf of all Maori
CIV-2017-485-513	Cletus Maanu Paul on behalf of Manu Paora whanau
CIV-2017-485-514	David Potter on behalf of the Tangihia Hapu
CIV-2017-485-515	Elvis Shayne Reti