

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2017-485-283
GROUPS C, D, E

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

IN THE MATTER OF

the Marine and Coastal
Area (Takutai Moana) Act
2011 (the Act)

AND IN THE MATTER OF

an application by the
Ngātiwai Trust Board for
orders recognising
Customary Marine Title and
Protected Customary
Rights (the Applicant)

MEMORANDUM OF COUNSEL FOR THE APPLICANT

Dated 13 April 2018

MAY IT PLEASE THE COURT:

1. This memorandum is filed in response to the Court's Minute (No.2) dated 21 March 2018. It also refers to:
 - a. The Attorney-General's amended Notice of Appearance in respect of these proceedings dated 7 March 2018 (the Amended NoA); and
 - b. The memorandum of Counsel for the Attorney-General filed in respect of all proceedings under the Act on 4 April 2018 (the 4 April Memorandum).

Adjournment sought by the Applicant

2. As a preliminary matter, Counsel for the Applicant notes her Memorandum, dated 31 March 2017 (the 31 March Memorandum), which was filed at the same time as the application that is the subject of these proceedings. A copy of the 31 March Memorandum is **annexed** to this memorandum for the convenience of the Court and other parties.
3. The 31 March Memorandum noted that the Applicant filed these proceedings when it did in order to comply with the statutory deadline of 3 April 2017¹ to protect the rights of those it represents (being Ngātiwai whānau, hapū, marae communities and individuals) and as part of its efforts to restore mauri of the moana. It was noted in the 31 March Memorandum, however, that the Applicant's preference was engage directly with the Crown with a view to negotiating and entering into Recognition Agreements for Protected Customary Rights and Customary Marine Title.²
4. For that reason, Counsel effectively sought that the proceedings be adjourned, with no case management directions made until the Applicant had greater certainty about the direct Crown engagement process. The Applicant gave notice to the Crown of its desire to enter such a process on 31 March 2017.
5. To date, Counsel is instructed, the only response the Applicant has received from the Crown is an acknowledgement of receipt of

¹ Refer to Marine and Coastal Area (Takutai Moana) Act 2011, s100(2)

² Ibid s95

its application. Nonetheless, direct engagement with the Crown remains the Applicant's preferred route and the request for the present proceedings to be adjourned *sine die* is therefore repeated.

6. In addition, since this proceeding was filed, the Applicant has become aware of several applications under the Act made by or on behalf of Ngātiwai whānau, hapū and marae communities. The Applicant supports those applications in principle and believes that they should be given greater priority for hearing than the present proceeding.
7. Counsel acknowledges that adjournment at such an early stage in the proceedings would be very unusual, but submits that it is the statutory requirement that drove the Applicant to file when it did that has created this situation. It is anticipated that the Attorney-General may have a view on this request, though he has not stated one in the Amended NoA or in other memorandum filed to date. In the event that the Attorney-General opposes the request, Counsel seeks an opportunity to make further submissions on the point.
8. The Applicant also appreciates that it may need to reconsider its position on this point in the event that any of the overlapping Applicants seek to have their applications advanced more immediately.

Attendance at a case management conference

9. By paragraph [17](1) of the Court's Minute, Counsel is directed to:

Identify the name of the applicant, their counsel and representative at the case management conference.

10. The Applicant's name and the identity of Counsel are as set out on the cover page of this Memorandum. With respect, whether a representative of the Applicant will attend a case management conference is dependent on the location of that conference.

11. In the 4 April Memorandum (at paragraph 3), Counsel for the Attorney-General seeks a direction that Counsel for applicant in the various proceedings "specify which case management conferences they intend to attend". With respect, Counsel for the Applicant in this proceeding also seeks some clarification from the Court as to its intent and preference with respect to attendance at case management conferences, as it is not entirely clear whether the proposed conference venues were intended to align with the regional case management groupings.
12. Counsel is based in Nelson and attendance at the Nelson conference on 31 May would therefore be most cost-effective for the Applicant, though it is unlikely that a representative would attend. It seems more likely, however, the Court's intent was that all Group A-D (and possibly Group E) applicants should appear or be represented at the conference in Whāngarei on 25 June. If that is the case, Counsel will appear at that conference and it is likely that a representative of the Applicant would also attend.
13. If it is the Court's intent that Group E applicants should appear at the conference in Auckland on 27 June, Counsel would protest the cost burden imposed on the Applicant by the need for attendance at multiple conference. Counsel will, if necessary, appear at the Auckland conference, but clarification is sought from the Court on this point.

Overlapping applications

14. By paragraph [17](2) of the Court's Minute, Counsel is directed to:

Record whether or not the applicant agrees with the Attorney-General's latest assessment as to which applicants overlap with the priority proceedings.

15. None of the priority proceedings referred to in paragraph [8] of the Minute deal with areas in the vicinity of the Ngātiwai takiwā and the Applicant in this proceeding has no view in relation to them.

Draft recognition orders

16. By paragraph [17](3) of the Court's Minute, Counsel is directed to:

Set out draft recognition orders that each applicant seeks.

17. Paragraph [12] of the Minute records that the Attorney-General requires all applicants to amend their applications to include draft recognition orders, and that this is a matter that will be dealt with at the case management conference.
18. The Court's attention is respectfully drawn to s.109(1) of the Act which requires an applicant group "in whose favour the Court grants recognition of a protected customary right or customary marine title" to submit a draft order for approval by the Registrar of the Court. Counsel also notes that, in the only proceedings under the Act that have yet been substantively determined,³ the applicant was not required to file a draft order until sometime after the Court's grant of recognition of customary title was substantively determined.⁴
19. Counsel submits that s.109 of the Act reflects Parliament's acknowledgement that the content of a recognition order will emerge in the course of the proceedings and will follow – rather than precede – the Court's grant of recognition of the relevant rights. *Re Tipene* illustrates this, in that further discussion was required (after the Court's substantive decision) between the applicant in those proceedings and those he represented, as to who the ultimate holder of the order should be.
20. Notwithstanding this, Counsel has filed a draft recognition order with this Memorandum, noting that many of the details of the order will emerge as the proceedings continue. Accordingly, leave is sought to amend the draft order as required.

³ *Re Tipene* [2016] NZHC 3199.

⁴ *Re Tipene* [2017] NZHC 2990, particularly [35] and [36], which specify matters to be included in the draft order submitted for sealing.

Map

21. By paragraph [17](4) of the Court's Minute, Counsel is directed to file with this memorandum:

...a map that clearly identifies the boundaries of the application area on a current topographical map, so that the location of the boundaries and the compass bearing of the boundary lines between the seaward and landward boundaries is identifiable.

22. A map which satisfies these requirements is **annexed** to this memorandum.

Compliance with section 51 and other provisions of the Act

23. By paragraph [17](5) of the Court's Minute, Counsel is directed to:

Identify what steps applicants propose to take to address the Attorney-General's concerns about non-compliance with the Act, and in the particular, s 51(2) of the Act.

24. Section 51(2) of the Act describes types of activities that excluded from the statutory definition of Protected Customary Rights. The Applicants acknowledge that the Court cannot make orders with respect to such activities. Counsel notes, however, s 59(1)(ii) & (2) of the Act which records that, notwithstanding s 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the exercise of non-commercial customary fishing rights from 1840 to the present day may be taken into account in determining whether customary marine title exists. The same must be true, it is submitted, of evidence of the exercise of other activities, even if those activities are excluded from the definition of Protected Customary Rights.
25. Counsel also draws the Court's attention to the template application and affidavit which were prepared by the Ministry of Justice and circulated to prospective applicants in the period leading up to the statutory deadline for filing (annexed to this memorandum). While Ministry staff were careful to inform

recipients that they were not providing them with legal advice, the templates were widely used by both legal counsel and self-represented applicants.

26. Counsel's instructions on this matter have been to take those steps that are necessary to protect the rights of Ngātiwai whānau, hapū and marae communities, but to do so in a manner that imposes the least possible drain on scarce tribal resources. In these circumstances, Counsel maintains that it was appropriate to utilise the template that had been provided, even if questions could be asked with respect to its consistency with some provisions of the Act.
27. For these reasons, Counsel submits that no steps need be taken at this point to address the issues raised by the Attorney-General. However, leave is sought to amend the application, if necessary, once research has been completed.

Further affidavit evidence

28. By paragraph [17](6) of the Court's Minute, Counsel is directed to:

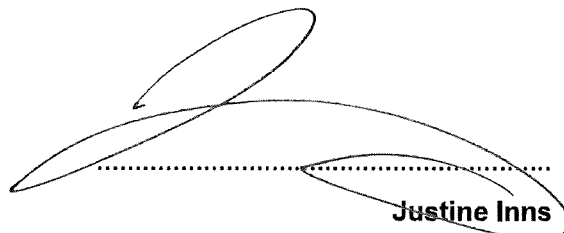
Identify what further affidavit evidence will be filed and when.

29. The Applicant has secured Ministry of Justice funding to support the progress of these proceedings or the progress of direct engagement with the Crown as referred to in paragraph 3 above. Work has begun on the development of a research plan that will support the interests of Ngātiwai whānau, hapū and marae communities, and meet the requirements of the funder. Until that plan is complete and research has advanced to some point, it isn't possible to propose a timetable for filing of evidence.
30. In addition, Counsel respectfully reiterates the request for an adjournment, as set out above, so that the Applicant can first seek recognition of Ngātiwai rights through direct engagement with the Crown and support the progress of proceedings filed by Ngātiwai whānau, hapū and marae communities.

Overlapping applications

31. At paragraph 8 of the Amended NoA, the Attorney-General objects to the Applicant's assertion that, to the extent that parts of the area covered by its application overlap those of other iwi, hapū and whānau, those should be regarded as potentially having been jointly, exclusively used and occupied by those parties since 1840. The Attorney-General's objection is noted, but not accepted by the Application. Counsel submits that this is a mixture of mixed fact and law that may require specific consideration in due course.

13 April 2018



Justine Inns
Counsel for the Applicants

TO: the Registrar of the High Court

AND TO: Counsel for the Attorney-General

AND TO: Parties that have filed Notices of Appearance

AND TO: Other Case Management 'Group C, D and E' Applicants

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

CIV-2017-

IN THE MATTER OF

the Marine and Coastal
Area (Takutai Moana) Act
2011 (the Act)

AND IN THE MATTER OF

an application by the
Ngātiwai Trust Board for
orders recognising
Customary Marine Title
and Protected Customary
Rights.

MEMORANDUM OF COUNSEL FOR THE APPLICANT

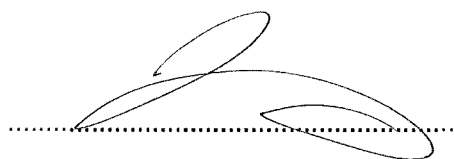
Dated 31 March 2017

OCEANLAW NEW ZEALAND
PO Box 921, Nelson
Telephone: 03 548 4136
Solicitor acting: Justine Inns
EMAIL: justine@oceanlaw.co.nz

MAY IT PLEASE THE COURT:

1. Applications for Recognition Orders under the Marine and Coastal Area (Takutai Moana) Act 2011 are required to be filed no later than 3 April 2017.¹ The Applicant has filed its Application for Recognition Orders for Protected Customary Rights and Customary Marine Title within the statutory time frame.
2. The Applicant has also sought to engage directly with the Crown with a view to negotiating and entering into Recognition Agreements for Protected Customary Rights and Customary Marine Title.² The Applicant also intends to seek Crown funding to complete research in support of the Application.
3. The Applicant will serve the Application and publicly notify the application in accordance with the Act,³ following which Notices of Appearance may be filed in accordance with the Act.⁴
4. In light of the Applicant's desire to engage directly with the Crown in order to reach Recognition Agreements, the Applicant respectfully requests that the Court will not be seeking case management directions until there is greater certainty about the direct Crown engagement process and progress.⁵

31 March 2017

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a smaller, looped flourish.

Justine Inns

Counsel for the Applicant

¹ Refer to Marine and Coastal Area (Takutai Moana) Act 2011, s100(2)

² Ibid s95

³ Ibid ss102 & 103

⁴ Ibid s103(3)

⁵ HCR7.1(8)

Ngatiwai MACAA Map



Sourced from Topo250 Map series.
Crown Copyright Reserved

- Legend**
-  Ngatiwai Rohe
 -  Detail box

Without Prejudice. Not Government Policy. For discussion purposes only. To be deleted before application is made to the High Court

**IN THE HIGH COURTS OF NEW ZEALAND CIV-2017-
WELLINGTON REGISTRY**

IN THE MATTER OF

the Marine and Coastal
Area (Takutai Moana) Act
2011 (the Act)

AND IN THE MATTER OF

an application by
[Appointed Representative]
for an order recognising
Customary Marine Title
and Protected Customary
Rights.

APPLICATION BY *[APPOINTED REPRESENTATIVE]*

**FOR RECOGNITION ORDERS PURSUANT TO THE MARINE
AND COASTAL AREA (TAKUTAI MOANA) ACT 2011**

Dated *[Date]*

The purpose of this document is to provide a template for applicants seeking a simplified High Court application process and is intended as a guide only. The provision of this information is no indication of the merits of a group's application and the use of this information does not guarantee an application's success.

Without Prejudice. Not Government Policy. For discussion purposes only. To be deleted before application is made to the High Court

- To: The Registrar of the High Court at *[Wellington]*;
- and to: *Local authorities (Regional and/or District Councils) with statutory functions in the application area)*
- and to: *Local authorities (Department of Conservation, Department of Internal Affairs, Environment Protection Agency, MBIE, NZ Petroleum and Minerals) with statutory functions relating to land adjacent to the application area)*
- and to: The Solicitor General on behalf of the Attorney-General.

This document notifies you that:

1. *[Appointed Representative]* will apply to the High Court for an order pursuant to s98 of the Marine and Coastal Area (Takutai Moana) Act 2011 (“the Act”) to recognise the *customary marine title* and/or *protected customary rights of [Applicant Group]*.

Protected Customary Rights

2. *[Applicant Group]* ancestors utilised the common marine and coastal area for *[Make a list. Examples include:*
 - *non-commercial fishing (utilising nets, hinaki and hand-lines to catch kuaka (snipe), kanae, kahawai, pioke, araara, patiki, tamure, mango, eels and other fish).*
 - *non-commercial seeding and harvesting of shellfish (including pipi, cockles, oysters, mussels, scallops, karahu, toheroa, tuatua, tuangi, pupu, paapaka)*
 - *activities related to spiritual practices (such as rahui);**]*

The purpose of this document is to provide a template for applicants seeking a simplified High Court application process and is intended as a guide only. The provision of this information is no indication of the merits of a group’s application and the use of this information does not guarantee an application’s success.

Without Prejudice. Not Government Policy. For discussion purposes only. To be deleted before application is made to the High Court

- *planting and cultivating plant species in CMCA wet margins (such as flax, tī kouka, pingao);*
- *gathering edible and aquatic plants;*
- *extracting non-nationalised minerals for non-commercial purposes;*
- *collecting hāngi stones for non-commercial purposes;*
- *collecting driftwood and other natural resources for non-commercial purposes;*
- *temporary camp-sites for ceremonial activities in the CMCA;*
- *tauranga waka.*

The Applicant Group:

3. The *[Applicant Group]* whakapapa to *[Eponymous Ancestor(s) and link to the application area]*. *[Any further description of your Applicant Group]*. *[Appointed Representative]* was appointed to make this application for and on behalf of the *[Applicant Group]* on *[Date]*.

Area to which the application relates:

4. The area to which this application relates is the common marine and coastal area (as defined in s9 of the Act) that is bounded:
 - a. on the landward side by the line of mean high-water springs;
 - b. on the seaward side by the outer limits of the territorial sea;
 - c. on the *[north/south/east/west]*ward side by a line that extends from the coast abutting *[first land-mark]* *[including/excluding any islands]* to the outer limits of the territorial sea; and
 - d. on the *[north/south/east/west]*ward side by a line that extends from the coast abutting *[second land-mark]* *[including/excluding any islands]* to the outer limits of the territorial sea.

The purpose of this document is to provide a template for applicants seeking a simplified High Court application process and is intended as a guide only. The provision of this information is no indication of the merits of a group's application and the use of this information does not guarantee an application's success.

Without Prejudice. Not Government Policy. For discussion purposes only. To be deleted before application is made to the High Court

5. The area includes the common marine and coastal area surrounding the following islands: *[list any relevant islands in the application area]*.

Grounds on which the protected customary rights order is sought:

6. The grounds on which this order is sought are that :
- a. *[Applicant Group]* being a coastal group has relied heavily on *[list your inshore fish and shellfish food sources here]* and wetland food stocks foraged by whānau in the estuaries and coastal margins; and
 - b. *[Applicant Group]* fishermen sought the deep water fish *[list your deepwater fish sources]* that were not available around the inner shoreline; and
 - c. *[Applicant Group]* also undertakes the following activities in the common marine and coastal area: *[list other activities you want protected such as rongoā collecting, bird snaring, transport, transfer of knowledge of hapu marine culture, trade, communication, seasonal kaimoana exchange, access to gardens on land, bird snaring, tangihana, social interaction, manaakitanga and ope mara (labour movement)]*
 - d. *[Applicant Group]* has undertaken these activities listed above since *[known date prior to or at 1840]* and continues to undertake these activities in the application area, albeit in some instances using modern equipment, and in accordance with tikanga.
7. *[Applicant Group]* will provide more information once funding for research and legal representation is secured.

Grounds on which the customary marine title application is made:

8. The grounds on which this order is sought are that:

The purpose of this document is to provide a template for applicants seeking a simplified High Court application process and is intended as a guide only. The provision of this information is no indication of the merits of a group's application and the use of this information does not guarantee an application's success.

Without Prejudice. Not Government Policy. For discussion purposes only. To be deleted before application is made to the High Court

- a. *[Applicant Group]* has held the application area in accordance with tikanga since *[Date]*.
 - b. *[Applicant Group]* has exclusively used and occupied the application area from *[Date]* to the present day without substantial interruption.
9. *[Applicant Group]* will provide more information once funding for research and legal representation is secured.

Contact Details:

6. The *[Appointed Representative]* for *[Applicant Group]* is:
[Name]
[Postal Address]
[City]
7. This application relies on s51(1), s58, s98-113 of the Act and the affidavit of *[Tribe]* kaumātua.

Dated at _____ on the *[Day]* of *[Month]*, *[Year]*

[Contact Person]

The purpose of this document is to provide a template for applicants seeking a simplified High Court application process and is intended as a guide only. The provision of this information is no indication of the merits of a group's application and the use of this information does not guarantee an application's success.

Without Prejudice. Not Government Policy. For discussion purposes only. To be deleted before application is made to the High Court

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

CIV-2017-

IN THE MATTER OF

the Marine and Coastal
Area (Takutai Moana) Act
2011 (the Act)

AND IN THE MATTER OF

an application by
[Appointed Representative]
for an order recognising
Customary Marine Title
and Protected Customary
Rights.

**AFFIDAVIT OF *[Kaumātua]*
IN SUPPORT OF *[APPLICANT GROUP'S]* APPLICATION FOR
RECOGNITION ORDERS FOR PROTECTED CUSTOMARY
RIGHTS AND CUSTOMARY MARINE TITLE**

Dated

The purpose of this document is to provide a template for applicants seeking a simplified High Court application process and is intended as a guide only. The provision of this information is no indication of the merits of a group's application and the use of this information does not guarantee an application's success.

Without Prejudice. Not Government Policy. For discussion purposes only. To be deleted before application is made to the High Court

I, *[Name]*, of *[Home Town]*, swear/affirm that

Introduction

1. [Please tell the Court your age, upbringing, whakapapa, spouse and children, education, career, relationship to the *[Appointed Representative]*]
2. *[What do you know about the Appointed Representative]*
3. [What is the *[Appointed Representative]* is asking you to do?]

Applicant

4. [Tell the Court what activities you have been involved with relating to kaimoana and any other activities undertaken in the application area.]
5. [How have you worked with the *[Applicant Group]* in the application area.]
6. [What are your responsibilities to the *[Applicant Group]*.]

Tikanga Information

7. [What can you tell us about the *[Applicant Group]* tikanga around activities in the takutai moana?]
8. [Tell us what you know about protected customary rights of *[Applicant Group]* in the Takutai Moana]
9. [Tell us what you know about customary marine title of *[Applicant Group]* in the Takutai Moana]

SWORN/AFFIRMED at *[Town]* this *[Day]* of *[Month]* *[Year]*

[Your name]

Before: Justice of the Peace/ Solicitor / Registrar of the High Court,
[Town]

The purpose of this document is to provide a template for applicants seeking a simplified High Court application process and is intended as a guide only. The provision of this information is no indication of the merits of a group's application and the use of this information does not guarantee an application's success.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2017-485-283
GROUP C, D, E

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

IN THE MATTER OF

the Marine and Coastal
Area (Takutai Moana) Act
2011 (the Act)

AND IN THE MATTER OF

an application by the
Ngātiwai Trust Board for
orders recognising
Customary Marine Title
and Protected Customary
Rights

**ORDER RECOGNISING CUSTOMARY TITLE AND PROTECTED
CUSTOMARY RIGHTS PURSUANT TO SECTION 98 OF THE
MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011**

Dated xxx

**ORDER RECOGNISING CUSTOMARY TITLE AND PROTECTED CUSTOMARY
RIGHTS PURSUANT TO SECTION 98 OF THE MARINE AND COASTAL AREA
(TAKUTAI MOANA) ACT 2011**

BEFORE The Honourable Justice xxx on xxx

UPON Application by the Applicants pursuant to s 100 of the Marine and Coastal Area (Takutai Moana) Act 2011 ("the Act") dated 31 March 2017 [and/or any subsequent amended Application], and for the reasons set out in [the Judgement of this Court dated XXX or the joint memorandum of the parties dated xxx], **THIS COURT ORDERS THAT:**

1. The whānau, hapū and iwi of Ngātiwai have Customary Marine Title over the area shown on the plan attached to this Order as Schedule 1 ("the Area").
2. The whānau, hapū and iwi of Ngātiwai hold the following Protected Customary Rights in relation to the Area:
 - (a) Rangatiratanga;
 - (b) Kaitaikitanga;
 - (c) Mana/authority to impose and remove rāhui;
 - (d) Vessel landing, navigation and mooring;
 - (e) Gathering traditional foods and other natural resources (other than rights and resources to which s 51(2) of the Act applies);
 - (f) Non-commercial aquaculture, including reseedling and enhancement; and
 - (g) Access to and control of wāhi tapu.
3. The scale, extent and frequency of the above Protected Customary Rights are more fully described in Schedule 2 to this Order.
4. The sites and areas shown on the plan(s) attached to this Order as Schedule 3 are recognised as wāhi tapu and wāhi tapu areas.
5. The wāhi tapu and wāhi tapu areas will be subject to the prohibitions and restrictions set out in Schedule 2 to this Order.
6. For the purposes of this Order "whānau, hapū and iwi of Ngātiwai" means xxx.

7. The Holder of this Order, on behalf of whānau, hapū and iwi of Ngātiwai ("the Holder") is [the Ngātiwai Trust Board or another party].
8. The contact details for the Holder, on behalf of whānau, hapū and iwi of Ngātiwai are:

xxx

BY THE COURT:

.....
(Deputy) Registrar

Sealed this day of xxx

Schedule 1

[Map annexed to the Memorandum of Counsel dated 13 April 2018]

DRAFT

Schedule 2

Description of Protected Customary Rights

[xxx]

Limitations on the scale, extent, or frequency of the exercise of the Protected Customary Rights (if any)

[xxx]

Prohibitions or restrictions applying to wāhi tapu and wāhi tapu areas

[xxx]

Schedule 3

[Map of wāhi tapu and wāhi tapu areas]

DRAFT