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

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

**CIV-2017-404-572**
**CIV-2017-404-568**
**CIV-2017-404-566**
**CIV-2017-404-569**
**CIV-2017-485-305**
**CIV-2017-485-352**
**CIV-2017-485-228**
**[2019] NZHC 2658**

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| IN THE MATTER OF | the Marine and Coastal Area (Takutai Moana) Act 2011 |
| AND | an application of an order recognising Customary Marine Title and Protected Customary Rights |
| BY | Hugh Te Kirui Rihari on behalf of **Ngāti Torehina Ki Mataka Hapū/Iwi of Niu Tireni** |
| | Hokimatemai Kahukiwa on behalf of **Koromatua Hapū of Ngāti Whakaue of Te Arawa Waka Hapū/Iwi of Niu Tireni** |
| | Pereri Mahanga, Pereri on behalf of **Te Waiariki, Ngāti Korora, Ngāti Takapari Hapū/Iwi of Niu Tireni** |
| | Roimata Minhinnick on behalf of **Ngāti Te Ata** |
| | Tamihana Akitai Paki on behalf of **Te Parawhau Hapū** |
| | Bella Thompson on behalf of **Rewha and Reweti Whānau** |
| | David Hugh Peters on behalf of **Te Whakapiko Hapū of Ngāti Manaia & Ors** |

Hearing: 7 October 2019

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| Counsel: | JP Kahukiwa for Applicants:<br>CIV-2017-404-572; CIV-2017-404-568; CIV-2017-404-566<br>CIV-2017-404-569 |
| | CM Hockly for Applicants:<br>CIV-2017-485-305; CIV-2017-485-352; CIV-2017-485-228 |
| | TJ Castle for Applicants:<br>CIV-2017-485-185; CIV-2017-485-188; CIV-2017-485-188;<br>CIV-2017-485-187 (watching brief only) |
| | CF Finlayson QC and AC Dartnall for Gold Ridge Farms Group as an Interested Party |
| | DA Ward and Y Moinfar-Yong for Attorney-General |
| Judgment: | 18 October 2019 |

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**JUDGMENT OF CHURCHMAN J**
**[The Role and Status of the Attorney-General]**

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## Part I

### Introduction

[1] A number of claimants under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) made application under r 10.15 of the High Court Rules 2016 (HCR) for determination of a preliminary issue. The preliminary issue that the Court has been asked to determine is the role and status of the Attorney-General in relation to applications made under the Act for coastal marine title (CMT) or protected customary rights (PCR).

[2] I have reached the following conclusions:

(a) The Attorney-General's right to participate in applications under the Act is derived from the Act itself, which permits the Attorney-General to become an interested party.

(b) The Court also has an inherent jurisdiction to permit the Attorney-General to become an intervener in the public interest.

(c) The Act does not cast the Attorney-General as the defendant in applications and, while the Attorney-General is free to oppose applications or aspects of applications where issues of the public interest justify that, the Attorney-General is not required to be the contradictor in all cases.

(d) The cases relating to the Court's inherent jurisdiction give some guidance as to what can be in the public interest.

(e) The Attorney-General is not obliged to specify in advance the aspect of the public interest that he is representing but, if challenged, needs to satisfy the Court that he has a legitimate interest in an application which justifies the position being taken.

(f) The Attorney-General's role has two components. As a Minister, his role is political, but, as the Senior Law Officer of the Crown, he is required to maintain an independent aloofness. In exercising the role of an interested party under the Act, he does not act in support of any sectional interest but only in the interests of the public generally.

[3] I now explain why I have reached these conclusions.

## Part II

### Background

[4] There are currently some 202 applications under the Act seeking CMT and/or PCR. The applications cover the entire New Zealand coastline and many applications are overlapping. In some areas, there are dozens of overlapping claims with the various claimants each asserting exclusive and continuous exercise of customary rights since 1840.

[5] The Act is a novel and important piece of legislation. It restores to iwi, hapū and whānau the right of access to the Court in relation to claims of customary title that had been removed as a result of the now repealed Foreshore and Seabed Act 2004.

[6] The purpose of the Act is described as being to:[1]

> (a) 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; and
>
> (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
>
> (c) provide for the exercise of customary interests in the common marine and coastal area; and
>
> (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

[7] These purposes are obviously of major importance not only to iwi, hapū and whānau, but to all New Zealanders. There has only been one substantive application for orders heard so far under the Act,[2] although there have been some decisions on interlocutory issues.[3]

[8] During the course of case management conferences (CMCs) held to monitor progress of the claims under the Act, a number of applicants challenged the nature and scope of the role to be played by the Attorney-General with some applicants going so far as to assert that the Attorney-General should not have any role at all as a participant in applications for orders under the Act.

[9] The issue of most concern for the applicants was the fact that the Attorney-General was assuming the role of a contradictor in relation to applications under the Act. In a memorandum dated 7 March 2018, counsel for the Attorney-General had stated:

> Counsel anticipate the Attorney-General may ultimately act as a contradictor in most, but not necessarily all, applications.

[10] Counsel for the Attorney-General clarified this statement in a further memorandum of 11 September 2018 where it was stated:[4]

> 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, the Attorney-General is not precluded from making submissions that might not support, or might not support fully, an application.

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1 Marine and Coastal Area (Takutai Moana) Act 2011, s 4(1).
2 *Re Tipene* [2014] NZHC 2046.
3 Such as *Re Collier & Ors* [2019] NZHC 2096.
4 (Citations omitted).

[11] The memorandum of 11 September 2018 invited counsel for the applicants who continued to have concerns about the role of the Attorney-General to discuss those.

[12] As a result of the clarification in the memorandum and subsequent discussions, a number of the applicants and an interested party (New Zealand Seafood Industry) withdrew their applications under r 10.15.

[13] By memorandum dated 4 December 2018, counsel for the Attorney-General clarified that it was the intention of the Attorney-General to appear as an interested party in each application and not as an intervener.

[14] The Attorney-General had initially applied to be an interested party in the *Elkington* proceedings,[5] and then applied for a direction that that application be treated as a notice of appearance for all applications. The Court granted that request. The Court subsequently directed that the Attorney-General particularise his position on each application so the Attorney-General filed 202 amended notices of appearance in compliance with that direction.

[15] Some eight applications under r 10.15, on behalf of some 35 different applicants remained unresolved and were set down for hearing.

[16] An interested party, Gold Ridge Marine Farm Group, also subsequently filed an application seeking clarification of the role and status of the Attorney-General. It applied for and was granted leave to participate in the hearing of the other r 10.15 applications.

[17] In response to the application by Gold Ridge Marine Farms, a further applicant sought and was granted leave to participate in the October 2019 hearing.[6]

[18] After a synoposis of submissions dated 24 September 2019 was filed on behalf of the Attorney-General, several further applicants withdrew their applications under r 10.15 with the result that ultimately it was only the applicants represented by Mr Kahukiwa[7] and Mr Hockly[8]

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5 CIV-2017-485-218.

6 John Henry Tamahere on behalf of Ngati Porou Ki Hauraki (CIV-2017-404-556).

7 Ngāti Torehina Ki Matakā (CIV-2017-404-572); Ngāti Whakaue (CIV-2017-404-568); Te Waiariki, Ngāti Korora, Ngāti Takapari (hapū/iwi of Niu Tireni) (CIV-2017-404-566); Ngāti Te Ata (CIV-2017-404-569).

8 Te Parawhau (CIV-2017-485-305); Reweti and Rewha Whānau (CIV-2017-485-352); Te Whakapiko hapū of Ngāti Manaia (CIV-2017-485-228).

who actively pursued their r 10.15 applications. Mr Castle attended the hearing on a watching brief.[9] Gold Ridge Marine Farm Group also pursued their application and counsel for the Attorney-General responded to these various applications.

## Part III

### Relevant provisions of the Act

[19] Before addressing the particular submissions of counsel, it is helpful to set out the relevant provisions from the Act. The purpose of the Act is set out in [6] above. Section 7 of the Act provides that the Act recognises and promotes the exercise of customary interests of Māori in the common marine and coastal area in order to take into account the Treaty of Waitangi. This is a different Treaty provision to that found in other Acts such as the Conservation Act 1987, where the obligation is to interpret and administer the Act so as to give effect to the principles of the Treaty of Waitangi.[10]

[20] Section 104 of the Act provides that any interested party may appear and be heard on an application for a recognition order if that person has, by the due date, filed a notice of appearance. There is no definition of "interested party" in the Act. However, s 102 of the Act sets out on whom applications for recognition orders must be served. This gives some indication as to whom Parliament thought might fall within the category of an "interested party". That section provides:

> The applicant group applying for a recognition order must serve the application on –
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> (a) the local authorities that have statutory functions in the area of the common marine and coastal area to which the application relates; and
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> (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
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> (c) the Solicitor-General on behalf of the Attorney-General; and
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> (d) any other person who the Court considers is likely to be directly affected by the application.

[21] The entities listed in s 102 are clearly not the only entities that parliament envisaged might be interested parties. Section 103 obliges public notification of all applications and

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9 On behalf of Ngai Taiwhakaea Hapū (CIV-2017-485-185); Te Runganga o Rangitane o Kaituna (CIV-2017-485-167); Bouchier (CIV-2017-485-188); Taumata B Block Whānau (CIV-2017-485-187).

10 Conservation Act 1987, s 4.

stipulates the date for an interested party filing a notice of appearance must be not less than 20 working days after the first public notice of the application is published. That clearly is intended to provide entities other than those listed in s 102 with the opportunity to become interested parties and to thereby appear and be heard on applications.

[22] Section 112 of the Act deals with who has a right of appeal against a decision of the Court on an application under the Act. The relevant parts of the section provide:

> (1) A party to a proceeding under this subpart who is dissatisfied with a decision of the Court may appeal to the Court of Appeal on a matter of fact or law.
>
> (2) In relation to a proceeding under this subpart, the Crown–
>
> (a) may lodge an appeal on a matter of fact or law (whether or not it was a party to the proceedings in the Court) and must be treated as a party to the appeal; or
>
> (b) may apply to be an intervener in the proceedings.

[23] Section 112(1) extends the right of appeal to any party to a proceeding. The concept of "any party" must include an interested party.

[24] Section 112(2)(a) recognises that the Crown can be a party to a proceeding under the Act. However, it extends the right of appeal beyond that given to other interested parties. It makes it clear that whether or not the Crown was a party to the proceedings, it is entitled to appeal and must be treated as a party to the appeal.

[25] Section 112(2)(b) also gives the Crown an option to become an intervener in appeal proceedings whether or not it was a party to the original proceedings. The Act therefore provides for the Crown to have more extensive rights to participate in appeals than other interested parties do.

**The arguments**

[26] Mr Kahukiwa and Mr Hockly both advanced arguments which sought to exclude or limit the role of the Attorney-General while Mr Finlayson QC, for the interested party, and Mr Ward, for the Attorney-General, submitted that the statute anticipated the Attorney-General playing a full role in applications. They submitted that role went as far as adopting the role of contradictor and putting applicants for orders under the Act to proof.

*Mr Kahukiwa's submissions*

[27] Mr Kahukiwa developed a number of different arguments. He submitted that the "authority and powers [of the Attorney-General] are to be found in the Prerogatives". He explained that by use of the word "prerogatives" he meant "the residue of discretionary power still reposed in the Crown, and which has over time been further limited by the Legislature so that it is no longer capable of extension".[11] Mr Kahukiwa submitted that any intervention by the Attorney-General in a private proceedings could only be for the purpose of upholding the administration of justice (a matter of public interest) where there was a risk of harm to the public interest. He relied particularly on two old English decisions,[12] as well as a more recent English case.[13]

[28] Mr Kahukiwa also submitted that in acting in an "adversarial" way, the Attorney-General was intruding on matters of public policy where he "cannot go". It was submitted that intervention in the application on the grounds of public interest would be best done by utilising the role of an *amicus curiae*.

[29] In relation to the relevant provisions in the Act, Mr Kahukiwa noted that the Act did not specifically prescribe any role for the Attorney-General in its framework other than for the requirement of service under s 102(c). Mr Kahukiwa submitted that the reference in s 10 to the Act binding the Crown limited the exercise by the Crown of its "prerogatives".

[30] In relation to s 104 and interested parties, Mr Kahukiwa noted that it did not mention the Attorney-General and submitted that this meant:

> … its purpose is not meant to apply to the Attorney-General, whether in terms of entitling, or even in terms restricting such an appearance in the first instance. It must then be only intended to cover private persons who wish to appear.

[31] Mr Kahukiwa drew the conclusion that:[14]

> It logically follows that the continuance of the Attorney-General's involvement in any of these proceedings (including the imposition of any restrictions) is therefore at the invitation or permission of the Court in virtue of the Prerogatives, and not in any way connected to and thus "automatic" by virtue of s 104 of the Act.

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11 Citations omitted.
12 *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 485 and *Fender v St John-Mildmay* [1938] AC 1.
13 *Attorney-General v Times Newspapers Ltd* [1974] AC 273.
14 Citation omitted.

[32] Mr Kahukiwa distinguished the Patents Act 2013 and the Copyright Act 1994 from the Act saying that those Acts involved examples of parliament actively granting rights to the Attorney-General to intervene in the manner prescribed in those Acts. He drew the inference that the absence of such prescriptive rights meant that "such rights to act in this manner are not available to that Office at common law". He also noted that both of those Acts clearly identified the aspect of the public interest which justified the specific rights given to the Attorney-General.

[33] Mr Kahukiwa challenged the proposition advanced by the Attorney-General to the effect that the courts permit non-party involvement by the Attorney-General in private proceedings that engage significant public policy issues or that the Attorney-General is entitled to appear in proceedings that are in a novel or developing field of law.

[34] In relation to the appeal rights conferred by s 112(2) of the Act, he submitted:

> This is an appeal right given to the Crown as sovereign. It is explicit. The Crown has a set of unique rights. If Parliament had intended for this right to be given to the Attorney-General in right of the public interest, it would have said so. It is important not to confuse the role of the Crown.

[35] In relation to the requirement in s 102 of the Act that the Attorney-General be served with all applications, Mr Kahukiwa submitted that the reason for this section had nothing to do with the involvement in the applications by the Attorney-General, but was to facilitate members of the public being able to obtain a copy of any application filed by seeking one from the Attorney-General.

*Mr Hockly's submissions*

[36] Unlike Mr Kahukiwa, Mr Hockly did not argue that the Attorney-General could not be an interested party pursuant to s 104. He submitted that the Act did not provide special status for the Attorney-General or guarantee participation in any or all applications. He acknowledged that r 4.27 of the HCR permits a Court, on an application by a party or an intending party, or on its own initiative, to direct that the Attorney-General or the Solicitor-General be served and direct that, with the consent of the Attorney-General, the head of a government department or other officer could represent the public interest.

[37] Mr Hockly noted that ss 4(1)(d) and 7 of the Act referred to the Treaty of Waitangi and submitted that the two Treaty principles of most relevance to the Act were partnership and active

protection. He argued that the Act invoked the Treaty in its "full sense" and in particular the principles of the Treaty and the duties on the Crown which come from the Treaty. Mr Hockly submitted that the role of the Attorney-General acting in the public interest needed to be seen in the context of the Treaty relationship.

[38] The concept of public interest was said not to be an unqualified one, and before a Court allowed government agencies or representatives to participate in proceedings, other than where issues of national security or safety are involved, they were obliged to provide detail of the public interest in respect of which they were acting. Mr Hockly drew the Court's attention to s 274 of the Resource Management Act 1991 which obliges the Attorney-General to clarify what role he intends to play when stating he is acting in the public interest in proceedings before the Environment Court. He submitted that the Court was obliged to take a similar approach in cases under the Act where the Attorney-General had become an interested party and that the Court needed to be satisfied that the public interest relied on was not contrary to the duties placed on the Crown and its agents to act in the spirit of partnership and active protection.

[39] In addressing what public interest the Attorney-General might legitimately seek to represent, he said that because rights of access, navigation and fishing were preserved by ss 26, 27 and 28 respectively, it could not be said that those matters gave rise to issues of public interest. He submitted that the public interest had to be something other than what he described as "misinformed and hysterical views of some members of the public" which included the idea that Māori should have no recognised interest in the takutai moana at all. This last comment is gratuitous as it has never been suggested by anyone that the Attorney-General holds or supports such a view.

[40] Mr Hockly referred to the decision of *Attorney-General v Institution of Professional Engineers New Zealand Inc* and the observations of Collins J in that case that "care must be taken to distinguish between what is genuinely in the public interest and matters that some members of the public might find interesting".[15]

[41] Referring to the ability conferred by s 107 of the Act for the Court to remove a party, including an interested party, Mr Hockly submitted that some of the actions of the Attorney-

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[15] *Attorney-General v Institution of Professional Engineers New Zealand Inc* [2018] NZHC 3211, [2019] 2 NZLR 731 at [68].

General to date infringe one or more of the grounds set out in s 107 of the Act, justifying a restriction by the Court on the ability of the Attorney-General to further participate. He referred in particular to the Attorney-General's request at an early stage in the proceedings that all applicants file draft recognition orders, describing such requests as "unsupportive and unsympathetic".

[42] Mr Hockly did not say precisely what role the Attorney-General should play beyond submitting that it "should be closely defined to ensure compliance with Te Tiriti and its principles".

[43] As to the significance of the service obligations in s 102, Mr Hockly submitted that this could be explained on the basis that it ensured the Crown was informed of the existence of claims that might potentially impact on direct negotiations it was engaged in with other claimant groups.

[44] Mr Hockly submitted that by opposing applications or putting applicants to proof, the Attorney-General was not acting in a partnership way as the Crown was obliged to under the Treaty.

[45] As an alternative to adopting an adversarial position, it was submitted that an approach more consistent with the Crown's Treaty obligations would be for the Attorney-General to take a watching brief or to provide some form of administrative support of the process that was being undertaken. He described that as the Attorney-General being present but not dominant.

*Mr Finlayson's submissions*

[46] Mr Finlayson submitted that there is a public interest in ensuring that relief under the Act is granted in appropriate cases only where the statutory criteria have been satisfied. He argued that the Act did not provide for applications to be granted on a "formal proof" basis and that in some cases it was appropriate for evidence to be challenged or tested, or for the status of applicants to be questioned.

[47] His written and oral submissions diverged from the contents of the original r 10.15 appplication which posed as a question, "Should the Attorney-General adopt the role of contradictor in all applications for recognition orders?"

[48] He did not submit that this would be appropriate in all cases, but his position was that the Attorney-General would need to make a decision in each application under the Act whether to become involved and, if so, to what extent. He referred to the potential precedent effects of particular argument or evidence sometimes requiring intervention by the Attorney-General and submitted that it was the Attorney-General's role to ensure that the Court had the benefit of full argument and contradicting opinion when one would not otherwise be offered.

[49] Mr Finlayson referred to the adversarial structure of proceedings in the New Zealand Court system and submitted that, for a proper hearing to occur, cases generally needed to be opposed. He noted that, in relation to many applications under the Act, there may be no individual person or entity for whom the interests at stake from success of a particular application would amount to enough to justify the costs of formal intervention, particularly where interested parties, who are not applicants, do not have the benefit of funding from the Crown. He suggested that this was an example of where the Attorney-General could and should fullfil this role by considering every application and, where necessary, challenging evidence and offering a contradictory argument where one would not otherwise be offered to the Court.

[50] Mr Finlayson noted that in *R v Tipene*, which was the only substantive decision under the Act to date, the Attorney-General participated as an interested party along with Te Rūnanga o Ngāi Tahu and that, as the application in that case was refined by the applicant, the breadth of the grounds of opposition were reduced (ultimately to just the matter of mandate).[16]

[51] As to the role of the Attorney-General, Mr Finlayson submitted that the Attorney-General will invariably represent the public interest, although he acknowledged that, while he or she has a leading role as guardian of the public interest, the Attorney-General does not have a monopoly on that role. In the context of describing the dual roles of the Attorney-General as a Minister and also a law officer, Mr Finlayson referred to the observations of Miller J in *Canterbury Regional Council v Attorney-General* where he said:[17]

> [25] The Attorney is the principal legal advisor to the Crown and the Crown's representative in the Courts, Minister with responsibility for prosecutions, plaintiff or defendant for the Crown in litigation by or against the government, and senior law officer of the Crown. In the first of these capacities he may be heard to explain matters affecting the Crown's prerogatives or public policy, in which the state speaks with one

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16 *R v Tipene*, above n 2.

17 *Canterbury Regional Council v Attorney-General* [2009] NZAR 611 (citations omitted).

> voice, while in the last two he has a special responsibility for the protection of public rights, representing the community and the public interest.

[52] Mr Finlayson submitted that while the Act did not articulate a specific role for the Attorney-General, it was clear from sections such as ss 102 and 104 that a role was anticipated. He noted that the Attorney-General did not need specific authority to seek to intervene in the public interest, referring to *Auckland Area Health Board v Attorney-General* where Thomas J had adopted the test used in the 1970 English case of *Adams v Adams* where Sir Jocelyn Simon said:[18]

> I think that the Attorney-General also has the right of intervention at the invitation or with the permission of the court where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the court.

[53] Mr Finlayson emphasised that the rights which the Attorney-General intervened in order to protect must be the rights of the community in general, not rights of a limited portion. He noted that when acting in a case under the Act, the Attorney-General was not acting as a Minister of the Crown but as the senior government law officer.

[54] In his oral submissions, Mr Finlayson developed an argument based on observations made by the Court of Appeal in *Attorney-General v Ngāti Apa.*[19] The Court of Appeal in that case had held:

(i) The radical title acquired by the Crown on cession of sovereignty was not inconsistent with common law recognition of native property rights, which continued until lawfully extinguished.

(ii) The onus of proof of extinguishment lay on the Crown and the purpose had to be clear and plain.

(iii) The burden on the Crown's title could extend from usufructory rights to exclusive ownership equivalent to fee simple.

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18 *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 at 240, quoting *Adams v Adams (Attorney-General Intervening)* [1970] 3 All ER 572 at 577.

19 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643.

[55] From these comments, Mr Finlayson drew the conclusion that as all of the applications had the potential to affect the radical title held by the Crown in the coastal marine area, they are questions which necessarily involve the Crown and which justified Crown representation on such applications.

[56] Mr Finlayson submitted that there was a general public interest when the Court was dealing with questions of title and property. He argued that in situations where the Court has to consider whether or not customary title in an area where there is port activity has been extinguished, the Crown may hold relevant information which should appropriately be produced by the Attorney-General.

[57] Mr Finlayson accepted that the Court's role under the Act was not an inquisitorial one such as a Commission of Inquiry or the Waitangi Tribunal and referred to applicants having to discharge the burden of proof.

*Mr Ward's submissions*

[58] Mr Ward made it clear that the Crown saw its right to be involved in these proceedings arising either as an interested party under s 104 of the Act or as an intervener. He opposed any attempt to restrict the scope of the Attorney-General's involvement.

[59] He noted that the Courts had developed a number of principles where the Attorney-General had sought to appear as a non-party in private proceedings. These included:

(a) non-party involvement is permitted in proceedings that engage significant public policy issues;

(b) the concept of issues that engage the public interest was one that had developed over time;

(c) the significance and nature of the issues and rights concerned was relevant;

(d) issues involving the administration of justice, including the interpretation of statutory judicial powers to declare rights or remedies, were important;

(e) the interaction between public and private rights was a matter of public interest;

(f) where proceedings were in a novel or developing field of law, that tended to favour involvement by the Attorney-General; and

(g) intervention had been permitted in disputes between Māori relating to Treaty of Waitangi settlements and claims for customary rights.

He submitted that applications under the Act raised all of these issues.

[60] Mr Ward indicated that the Attorney-General sought to provide the Court, through legal submissions, with the Attorney-General's view of the interpretation and application of the Act to the facts; to provide relevant evidence held by the Crown; and to advise the Court on the progress of applications for recognition agreements that overlapped with applications to the High Court.

[61] He stated that the Attorney-General was in a position to provide assistance to the Court on points with which private parties may not be able to assist. In response to what had been a criticism of the Attorney-General's position, he stated that the Attorney-General did not seek to protect or promote the interests of any one group to the exclusion of others. Rather, the intent was to discharge its position as interested party or intervener consistently with the purpose of the Act, which included the protection of "the legitimate interests of all New Zealanders" in the marine and coastal area.

[62] In relation to the issue of whether or not the Attorney-General needed to specify a particular "public interest" before it could participate as an interested party or intervener, Mr Ward pointed to the fact that prior New Zealand cases where the Attorney-General had been granted leave to intervene such as *ENZA Ltd v Apple & Pear Export Permits Committee* had not required this.[20] He distinguished between questions of public policy and of public rights, and said that if either were engaged the Attorney-General was entitled to intervene, submitting that the Court in *ENZA* had rejected an invitation to construe the concept of "public policy" narrowly. Mr Ward noted that in the *ENZA* case, the Attorney-General had made submissions about the interpretation of the relevant regulations and their application to the facts.

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20 *ENZA Ltd v Apple & Pear Export Permits Committee* (2001) 15 PRNZ 303.

[63] As to public policy issues potentially raised by applications under the Act, Mr Ward submitted that questions regarding the relationship between tikanga Māori, common law and statute, were matters of general public importance, as was the fact that applications engaged Treaty of Waitangi principles.

[64] In support of the submission that novel and complex issues arose, Mr Ward referred to the fact that the Court has yet to determine a multi-party application under the Act and that novel and complex issues are likely to arise in relation to such applications. He also submitted that in the case of *Re Tipene,* the Attorney-General had been actively involved in the proceedings, including presenting evidence in cross-examining witnesses, and had been able to assist the Court with legal submissions.[21] Mr Ward referred to the fact that the Attorney-General had expertise and knowledge not available to other parties, including its role in s 95 determinations, and submitted that the Attorney-General was the only party appearing before the Court in relation to applications who did not have a sectional or specific interest. He acknowledged the duty on the Attorney-General when making submissions in pursuit of the Crown's interests to ensure that its submissions were "accurate, objective, and restrained, and founded firmly on a tenable exposition of the applicable legal principles".[22]

[65] Mr Ward submitted that the Crown had conducted, and would continue to conduct research into rights and interests in the common marine and coastal area. He said that the most sufficient and helpful means of placing this material before the Court was for the Attorney-General to be an interested party or intervener, and for this material to be presented as evidence, with the ability of the Court, applicants and interested parties to question the Attorney-General's witnesses on it.

[66] Mr Ward did not accept the argument which had been advanced by applicants that the structure of the Act, and in particular the preservation in the Act of matters such as rights of access, navigation and fishing,[23] eliminated the need for any potential engagement by the Attorney-General in proceedings under the Act. He referred to the public interest in the proper administration of justice, and the fact that the application of novel law to facts necessarily

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21 *Re Tipene,* above n 2.

22 John McGrath QC "Principles of Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1988) 18 NZULR 197 at 206.

23 See ss 26-28 of the Act.

engaged interpretive questions, including those relating to the Crown's obligations under the Treaty of Waitangi.

[67] In relation to claims such as those advanced by Mr Hockly, he submitted that there was no basis in law for the Court to assess the Treaty consistency of the Attorney-General's position in advance of the hearing of evidence in relation to any application where such an assertion was being made.

[68] Mr Ward acknowledged that the Court had an inherent jurisdiction to set terms on which any interested party or intervener may participate in a hearing, and also acknowledged that if the Attorney-General adopted a position which other parties said was wrong or unlawful, then the Court would be able to rule on such an issue. However, he maintained that this was properly done at the end of the hearing and not before the hearing started.

[69] In relation to the claim that some notices of appearance filed on behalf of the Attorney-General were out of time, while denying that, he noted that the Court had an inherent jurisdiction to permit interveners to join proceedings that was not subject to the time limits in s 103 of the Act and the Court had, in fact, exercised that jurisdiction in favour of interested parties in the case of *Tangiora v Attorney-General*.[24]

## Part IV

### Analysis

[70] The Attorney-General can become involved in private proceedings in a number of ways:

(a) a statute may expressly or impliedly authorise it;

(b) pursuant to the Court's inherent jurisdiction as facilitated by rr 4.27(e) and 7.43A(2) of the HCR;

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[24] *Tangiora v Attorney-General* [2014] NZHC 2049, [2015] 2 NZLR 66 at [26]-[28]; see also *Re Tipene*, above n 2, at [22]-[23].

(c) by lending his name to a relator application.[25]

[71] The starting point in this case is an analysis of the relevant provisions in the Act.[26]

[72] Contrary to the arguments of Mr Kahukiwa, I find that the rights of the Attorney-General to intervene in proceedings under the Act do not come from what he describes as "the Prerogatives". Neither do I accept the argument that the reason why s 102 of the Act required the Attorney-General to be served with all applications was to facilitate members of the public obtaining a copy of the application by asking for one from the Attorney-General. There was no evidence of that occurring in practice, nor is there anything in Hansard that would support such an intention.

[73] In relation to Mr Hockly's submission that the purpose of including s 102 in the Act was because the Crown was engaged in direct negotiation with some claimant groups, and the service obligation would result in the Crown being informed about the existence of claims that might potentially impact on the direct negotiations, again, this is not something supported by any discussion recorded in Hansard. The Attorney-General is one of four parties listed in s 102 as parties who are required to be served. The other three are the local authorities with statutory functions in the relevant common marine and coastal area or in an area adjacent to the common marine and coastal area, as well as any other person that the Court thinks is likely to be directly affected by the application.

[74] The theme that ties these four entities together is that they are affected by the application or likely to be. It is obvious that the framers of the Act required service on the Attorney-General, via the Solicitor-General, not so as to facilitate members of the public obtaining copies of the various applications from him but because they anticipated that he would be affected and, like the other entities required to be served, might apply to be an interested party.

[75] Section 102 also needs to be read in the context of all the other provisions of the Act that potentially impact on the role of the Attorney-General. Section 104 is the most significant of these provisions. There is nothing in the wording or purpose of the Act that would support

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25 Although this is rare in New Zealand. Collins J in *Attorney-General v Institution of Professional Engineers New Zealand Inc*, above n 15, at footnote 44 stated there had only been two relator proceedings in New Zealand in the past 40 years.

26 Those provisions are detailed at [19]-[25] above.

a contention that the concept of "interested party" in s 104 refers to interested parties other than the Crown. The appeal provisions in s 112 also support the conclusion that the statute was intended to confer on the Crown extensive rights of involvement on appeal, even if the Crown had not been involved in the case at first instance.

[76] I do not accept Mr Kahukiwa's argument that s 112(2) confers rights on the Crown but not the Attorney-General. The Attorney-General is the Senior Law Officer of the Crown and the person through whom the Crown acts, either when it is sued or when it wishes to intervene in proceedings.[27]

[77] I note that in *Tangiora v Attorney-General*, the High Court noted that the Act neither sought to define "interested persons" nor did it require a person to have an interest in the proceeding that was different from an interest in common with the public generally, and that these factors favoured a wider rather than a narrower approach to whom could appear and be heard.[28] The Court refused to strike-out a notice of appearance filed by the Council of Outdoor Recreation Associations of New Zealand Inc on the basis that it appeared to be genuinely interested in the marine and coastal area, and it was premature to say it had no legitimate interest for the purposes of the Act.

[78] In *Re Tipene*, the Court did not question the entitlement of the Attorney-General to appear as an interested party, or to oppose aspects of the application.[29]

[79] The inevitable conclusion is that the relevant provisions of the Act, as set out in [19]-[25] above, anticipate that the Crown, acting through the Attorney-General and Solicitor-General, can appear and be heard as an interested party in the same way as any other interested party can. Their rights of appeal are considerably more extensive than other interested parties.

*Restrictions on Attorney-General*

[80] Having determined that the Attorney-General comes within the s 104 concept of interested party, it is necessary to consider what principles guide participation by the Attorney-

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27 See the observations of Miller J in *Canterbury Regional Council v Attorney-General* set out at [51] above.
28 *Tangiora v Attorney-General*, above n 24.
29 *Re Tipene*, above 2.

General and whether or not the principles developed in relation to intervention by the Attorney-General pursuant to the inherent jurisdiction of the Court apply in the present case.

[81] Section 104 does not prescribe how an interested party can participate in an application for a recognition order beyond stating that they may "appear and be heard". However, interested parties (including the Attorney-General) are not the defendants in applications under the Act.

[82] While the Court in *Tangiora v Attorney-General* took a broad approach to the nature of an interest that an interested party might have to justify that status, the Court indicated that there were some limits.[30] The Court expressed the view that it:[31]

> … seems likely that the Act intended that the Court retain some control over whether a party claiming an interest in an application is properly a party who should be before the Court …

[83] The Court also specifically referred to the criteria in s 107 of the Act for striking out all or part of a notice of appearance and concluded:[32]

> A person who has signalled their interest through filing a notice of appearance by the due date will be able to be heard unless they have no legitimate interest at all (that is, if they disclose no reasonably arguable case), or they act in a way that causes prejudice or delay, or is frivolous or vexatious, or is otherwise an abuse of the Court.

[84] The High Court of New Zealand has an extensive history of exercising its inherent jurisdiction to permit the Attorney-General to intervene in private actions where there are questions of public interest or public policy.[33] Therefore, it seems that if the Attorney-General is able to point to some genuine aspect of the public interest, then he would not fall foul of the factors set out in s 107 that might justify the striking out of all or part of a notice of appearance.

[85] There are a number of factors which the Courts have previously recognised as being matters of public interest that are present in this case.

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30 *Tangiora v Attorney-General*, above n 24.
31 At [26].
32 At [28] (citation omitted).
33 Articulated in cases such as *Canterbury Regional Council v Attorney General*, above n 17; and *Attorney-General v Institution of Professional Engineers New Zealand Inc*, above n 15.

[86] The legislation is new and, as yet, largely untested. In a case related to an application under the Foreshore and Seabed Act 2004, where a company controlled by trustees of the Te Uri o Hau Settlement Trust sought an interim order and judicial review proceedings to set aside a decision of the Environment Court, the High Court granted leave for the Attorney-General to intervene saying:[34]

> [3] Mr Irwin appears for the Attorney-General. This morning, I gave leave for the Attorney to intervene. I did so because issues of public policy arose in relation to principles of the Treaty of Waitangi and the Foreshore and Seabed Act 2004, which have not previously been the subject of a decision of this Court in the present context.

[87] At least until the Court has been able to hear a number of applications, including multi-party overlapping claims, and give some guidance as to the principles to be applied, the novelty of the legislation and the significant issues of public policy raised (including issues relating to the Crown's Treaty of Waitangi obligations) would justify the Attorney-General participating as an interested party. Once the law has become settled, there may well be less justification for extensive participation by the Attorney-General.

[88] A contentious issue in this case is whether the public interest justifies the Attorney-General putting an applicant to proof. The Act does not convert the Court's function into an inquisitorial one from an adversial process. Neither is the Act structured in such a way as to make the granting of CMT or PCR a matter of formal proof. The Act does contain an evidential onus to the effect that there is a presumption that customary rights have not been extinguished unless the contrary is proved.[35]

[89] The Act is unlikely to have mentioned the concept of proof to the contrary unless it anticipated that this might actually occur. Realistically, the only entity in a position to prove that is the Crown.

[90] There is force in the Attorney-General's submission that the Attorney-General is the only party to applications under the Act who does not have a position or interest. Other interested parties cannot be expected to advocate for anything other than what they perceive to be their own interests. It is in the interest of the proper administration of justice (and therefore

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34 *Environs Holdings Ltd v Environment Court at Auckland* [2009] NZRMA 340.
35 Marine and Coastal Area (Takutai Moana) Act, s 106(3).

the public interest) that applicants for orders under the Act meet the criteria set out in the Act for obtaining such orders. The Crown does not breach its Treaty obligations merely because the Attorney-General challenges aspects of an application as was done in *Re Tipene*.

[91] It is wrong to say that, simply by questioning whether the criteria set out in the Act have been met, the Crown is acting in an impermissibly adversarial way. The Act expressly contemplates that, in some cases, there may be proof that a customary right has been extinguished. It also anticipates that applicants will need to establish by evidence, which can be challenged by other applicants or interested parties, that they meet the criteria set out in s 58 of the Act.

[92] However, this does not mean that it is in the public interest for the Attorney-General to act as contradictor in all applications for recognition orders. Indeed, the Attorney-General appears to have acknowledged this and has modified the position initially set out in the memorandum of 7 March 2018.

[93] While an important component of the role of the Attorney-General in litigation under the Act may be to provide the Court with evidence that is relevant and helpful, or to give the Court input on s 95 agreements that may potentially be relevant to the application the Court is dealing with, the right to appear and be heard on proceedings necessarily involves the Attorney-General, in appropriate cases, being able, in the public interest, to test whether a particular application meets the statutory criteria.

[94] Mr Hockly submitted that the Attorney-General had overstepped the bounds of appropriate conduct by filing a memorandum in March 2018 seeking from the Court directions that all applicants provide draft recognition orders and updated maps, and raising issues about adequacy of evidence.

[95] Section 109(1) relates to draft recognition orders and provides that an applicant group to whom the Court grants a recognition order must submit a draft order for approval, but the Act does not require that to occur at any stage earlier in the process.

[96] At the time of the March 2018 memorandum, the constraints around funding may not have been as acute as they have become and, should the Crown now suggest to the Court that

applicants who have not obtained Crown funding, and in particular, applicant groups that have not obtained any Treaty settlement, be required to undertake expensive procedural steps, the Court might be unwilling to sanction such a request. However, in relation to the March 2018 suggestion, it was the Court, and not the Attorney-General, that made the ultimate determination as to which of the suggestions were appropriate and which were not.

[97] In measuring the appropriateness of the Attorney-General's actions and the public interest, it is important to remember that, as acknowledged by a number of r 10.15 applicants, the Attorney-General's role is one of independent aloofness. The public interests that the Attorney-General represents as an interested party are interests of all of the public, such as assistance to the Court in the interpretation and application of novel legislation in an important area of the law. Such interests cannot appropriately be categorised as "non-Māori interests". All New Zealanders, including the applicants, have an interest in seeing that the law is carefully developed, applied consistently and fairly, and that the purposes of the statute are met by the granting of such orders as meet the criteria in the Act.

*Public interest*

[98] There is no provision in the Act equivalent to s 274 of the Resource Management Act which would require the Attorney-General, at the time of filing a notice of appearance as an interested party, to specify the nature of the public interest. However, if the standing of the Attorney-General (or any other interested party) is challenged, then the Attorney-General will need to establish a legitimate interest in the particular application. In accordance with the approach taken by Mallon J in *Tangiora v Attorney-General*, the Court is likely to take a wider rather than narrower approach when considering this issue.[36]

[99] There is also nothing in the Act that requires the Attorney-General to identify some form of "harm", as submitted by Mr Kahukiwa, as a prerequisite to becoming an interested party. The cases relied upon by Mr Kahukiwa in support of such a proposition relate to the Court's inherent jurisdiction to permit the Attorney-General to become a party to proceedings rather than a situation where a statute authorises that.

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36 *Tangiora v Attorney-General*, above n 24, at [29].

[100] Counsel for the Attorney-General and the Interested Party have referred to different aspects of the public interest. I am not persuaded that Mr Finlayson's argument about the Crown's interest in the radical title to the coastal marine area would, of itself, be a sufficient public interest. That is because the Act clearly contemplates the existence of customary marine title. An order by the Court on an application under the Act will not suddenly create a new title but merely declare that the customary title (or protected rights) existed in accordance with tikanga prior to the Crown obtaining radical title in 1840 and has not been extinguished.[37] Such a declaration does not affect the Crown's radical title, or at least not in a way that justifies the intervention by the Attorney-General.

[101] However, the Attorney-General has, in respect of these applications, been able to point to a number of aspects of the public interest, which the Courts have accepted in cases involving the exercise of the inherent jurisdiction of the Court, as justifying involvement by the Attorney-General.

[102] The Court of Appeal, in the case of *Attorney-General v Car Haulaways (NZ) Ltd*, described the concept of public interest as a "yardstick of indeterminate length".[38] It is not always easy to define. But there are a number of factors which have previously been accepted by the New Zealand Courts as being in the public interest that are present in this case. The balancing of private and public rights, and the interaction of those rights within a statutory scheme was identified in the case of *ENZA Ltd v Apple & Pear Export Permits Committee*.[39] Issues of public policy relating to the principles of the Treaty of Waitangi in the context of then novel legislation was acknowledged in *Environs Holdings Ltd v The Environment Court at Auckland* as falling within that category.[40] Issues of the jurisdictional boundary of the Māori Land Court were in a similar category in *Attorney-General v Māori Land Court.*[41] Already in proceedings under the Act, an issue has arisen as to the boundaries of the jurisdiction of the High Court and the Māori Appellate Court under the Act.[42]

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37 See *Minister of Conservation v Māori Land Court* [2007] 2 NZLR 542 at [94].
38 *Attorney-General v Car Haulaways (NZ) Ltd* [1974] 2 NZLR 331 at 335.
39 *ENZA Ltd v Apple & Pear Export Permits Committee*, above n 20.
40 *Environs Holdings Ltd v The Environment Court at Auckland*, above n 34.
41 *Attorney-General v Māori Land Court* [1999] 1 NZLR 689 at 690.
42 *Re Collier,* above n 3.

[103] The public interest has also been held to justify the Attorney-General's intervention in disputes between Māori groups or individuals involving the Treaty of Waitangi and customary rights issues.[43]

[104] It is also clear that litigation under the Act raises matters of general public importance, not the least of which is the relationship between tikanga Māori, common law and statute.

[105] In addition to the categories of "public interest" recognised by the Courts in cases invlolving the inherent jurisdiction to permit the Attorney-General to participate in private proceedings, there are also some particular aspects of litigation under the Act that would favour the Attorney-General participating in applications under the Act. One is the fact that the Crown is engaged in a separate but parallel process of direct engagement pursuant to s 95 of the Act. All of such applications overlap with applications made by other applicant groups to the Court. The Attorney-General may be able to provide information to the Court about the direct engagement matters that is of assistance to the Court and to overlapping applicants.

[106] With the application of resources and expertise at its disposal, particularly in (but not limited to) areas such as mapping, the Attorney-General may again be able to assist both the Court and applicants.

## Part V

### Conclusion

[107] The Act authorises the Attorney-General to file a notice of appearance as an interested party. As an interested party, the Attorney-General is permitted to appear and be heard in respect of applications in which he has filed a notice of appearance. The Attorney-General has filed such a notice in respect of all 202 applications. The right to appear and be heard includes the right to make legal submissions, call evidence and cross-examine witnesses.

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[43] See *Te Ngai Tuahuriri Runanga v Te Runanga o Ngai Tahu* HC Christchurch CP 187/97, 13 May 1998; *Greensill v Tainui Māori Trust Board* HC Hamilton M117/95, 17 May 1995.

[108] The Attorney-General is not a defendant in applications under the Act. His right to participate in applications is not unfettered. If the standing of the Attorney-General is challenged, he will need to demonstrate a legitimate interest in the application.

[109] The Act does not constitute the Attorney-General the "contradictor" in respect of all applications. However, he is permitted to submit to the Court that, in respect of any particular application, the statutory tests have not been met or for some other reason that application should fail. It may be that, after the early cases have established or clarified the applicable principles, the need for the Attorney-General to adopt such a position is reduced.

[110] The Attorney-General acts as an interested party in the interests of all of the public (including Māori). He is not permitted to advocate for a particular sectional interest and his submissions must at all times be "accurate, objective and restrained, and founded firmly on a tenable exposition of the applicable legal principles".[44]

[111] The Court retains jurisdiction to control the participation by the Attorney-General or any other interested party in proceedings,[45] and any submissions made by him carry no more or less weight than submissions made by applicants or other interested parties. Ultimately, it is for the Court, not the Attorney-General, to determine whether or not an application should be granted.

**Costs**

[112] Clarifying the nature of the role of the Attorney-General in proceedings under the Act is a matter of significance to all parties to applications. It is appropriate for costs to lie where they fall.

**Churchman J**

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44 See John McGrath QC, above n 22.
45 Section 107(3).

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