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

**CIV-2017-470-003**
**[2017] NZHC 1886**

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| BETWEEN | ATTORNEY-GENERAL<br>Appellant |
| AND | THE TRUSTEES OF THE MOTITI ROHE MOANA TRUST<br>First Respondent |
| | (Continued next page) |

Hearing: On the papers

Counsel: N C Anderson, R H Dixon and E J Couper for Applicant
B O'Callahan and R B Enright for First Respondents
P Cooney and R Boyte for Second Respondent
S Gepp and M Wright for Royal Forest and Bird Society
L Blomfield for Hawkes Bay Regional Council
J Appleyard for Fishing Industry Interests
J Maassen and M Riordan for Marlborough District Council
J Pou and A Neems for Ngati Makino Heritage Trust, Ngati Ranginui Iwi Incorporated, Ngati Pikiao Environmental Society and Hokianga Collective
R B Enright for New Zealand Maori Council

Judgment: 10 August 2017

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## JUDGMENT (NO 2) OF WHATA J

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*This judgment was delivered by me on 10 August 2017 at 2.00 pm, pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Sarah Dombroski
Deputy Registrar
District Court
Tauranga

*Date:* 10/08/2017

Solicitors: Crown Law, Wellington
Cooney Lees Morgan, Tauranga
Chapman Tripp, Christchurch
Royal Forest and Bird Protection
Sainsbury Logan & Williams, Napier
K3 Legal, Auckland
Cooper Rapley Lawyers, Palmerston North
Tu Pono Legal Limited, Rotorua

AND BAY OF PLENTY REGIONAL COUNCIL

Second Respondent

AND ROYAL FOREST AND BIRD SOCIETY
HAWKES BAY REGIONAL COUNCIL
FISHING INDUSTRY INTERESTS
MARLBOROUGH DISTRICT COUNCIL
NGATI MAKINO HERITAGE TRUST
NGATI RANGINUI IWI INCORPORATED
NGATI PIKIAO ENVIRONMENTAL SOCIETY
HOKIANGA COLLECTIVE

Third Respondents

[1] The Trustees of the Motiti Rohe Moana Trust (MRMT) seek regional planning controls over fishing to maintain indigenous biodiversity and to provide for the relationship of Māori with their taonga. They brought a claim to the Environment Court which declared, in short, a regional council may impose controls on fishing techniques and methods provided the sole or dominant purpose of the control is a specified resource management purpose. The Attorney-General appealed to this Court, claiming s 30(2) of the Resource Management Act 1991 (RMA) expressly exempts fishing from regional council control except in circumstances where control is incidental to provision for other activities in the coastal environment.

[2] Section 30(1)(d) sets out the functions of regional councils in the coastal marine area, including the control of:

> (i) land and associated natural and physical resources:
>
> (ii) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:
>
> ...
>
> (vii) activities in relation to the surface of water:

[3] Section 30(1)(ga) states every regional council shall have the following specific function:

> (ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity:

[4] But s 30(2) states:

> (2) A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.

[5] In order to resolve the appeal, I addressed the two central issues posited by the Attorney-General in submissions:[1]

(a) What is the true scope of s 30(2) of the RMA?

(b) Can regional councils impose controls on fishing to maintain indigenous biodiversity, pursuant to s 30(1)(ga)?

[6] In my judgment of 26 June 2017, I answered those questions as follows:[2]

> [131] A regional council must not exercise the functions specified at s 30(1)(d)(i), (ii) or (vii) to manage the utilisation of fisheries resources or the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs. See the discussion at [107]-[114].
>
> [132] A regional council may exercise its functions to manage the effects of fishing that are not directly related to biological sustainability of the aquatic environment as a resource for fishing needs. See the discussion at [107]-[114].
>
> [133] Subject to the division of responsibility noted at [131] and [132], a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the [Fisheries Act 1996]. See discussion at [115]-[118].
>
> [134] Notwithstanding s 30(2), a regional council may perform its function at s 30(1)(ga) to maintain indigenous biodiversity within the [Coastal Marine Area], but only to the extent strictly necessary to perform that function. See discussion at [119]-[130].

[7] I set aside the declaration made by the Environment Court as I considered it could lead to unqualified incursion into the sustainable utilisation of fisheries resources under the Fisheries Act 1996 (FA) and the functions performed under that Act.

[8] I indicated at [137] of the judgment that I was not minded to make any formal declaration, particularly given the broad subject matter affected by such a declaration.

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1 These slightly paraphrased the issues posited by Crown counsel in submissions, namely "First issue: the scope of s 30(2) RMA" and "Second issue: the relationship between s 30(1)(ga) and (2) RMA."

2 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429.

[9] I invited submissions, nevertheless, as to the form of a declaration and to assist the parties indicated a declaration might take the following form:

> A regional council and the Minister of Conservation must not exercise functions in respect of the coastal marine area specified at s 30(1)(d)(i), (ii) and (vii) of the Resource Management Act 1991 to control land, occupation of coastal space or activity on the surface of water in order to manage the utilisation of fisheries resources and/or effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs.
>
> A regional council and the Minister of Conservation may exercise functions in respect of the coastal marine area to manage the effects of fishing not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs, but only to the extent strictly necessary to manage those effects.
>
> Subject to the division of responsibility noted above, a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996.
>
> The function of maintaining indigenous biodiversity stated at s 30(1)(ga) of the Resource Management Act 1991 is permissible within the coastal marine area, but only to the extent strictly necessary to perform that function.

[10] I now have the submissions of the parties.

**Proposed revisions**

[11] The Attorney-General seeks changes to improve the clarity of the declaration and to remove surplusage. The Fishing Industry Parties submit the Court could not make a final declaration given the number of findings, but offered a revised declaration in the event I was going to make one.

[12] In a joint memorandum MRMT, the New Zealand Māori Council, Ngati Makino Heritage Trust[3] and the Royal Forest and Bird Protection Society of New Zealand Inc seek a final declaration and make a number of discrete suggestions regarding the form of that declaration, particularly as it relates to tangata whenua interests. They submit clarity is needed in order to assist people and communities, including tangata whenua, when they engage with resource management planning processes.

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[3] Composed of the Ngati Makino Heritage Trust, the Makatu Taiapure Committee, Ngati Ranginui Iwi Incorporated Society, Ngati Pikiao Environmental Society, and the Management of the Hokianga o Ngā Whānau Hapū Collective.

[13] A copy of the suggested revisions is set out in appendices for completeness.

**The councils**

[14] The Bay of Plenty Regional Council (BOPRC) and Marlborough District Council submit that a formal declaration is unnecessary. The BOPRC supports the reasons I gave for not making a declaration and it also considers any declaration will be unable to properly distil the relevant reasoning in my decision.

[15] Mr Maassen for the Marlborough District Council submits in this case, where the Court indulged a somewhat abstract and hypothetically argued set of points, a declaration would give the illusion the law is being set by the Court, not applied. He adds the subject matter is not amenable to paraphrasing, and the parties have endeavoured to polish the declaration as if it was an enactment. Mr Maassen contends the Court is acting appropriately in declining to make a formal declaration, and the parties are giving the Court a fraught task that will absolve them of the need to work out the substantive issues on a case by case basis, as required by the RMA.

**Assessment**

[16] With the benefit of submissions, I am fortified in my view that a final declaration should not be made. Any final declaration on the broad, essentially hypothetical questions[4] posed by the Attorney-General runs the risk of overreach or oversimplification.

[17] As Mr Maassen noted, the Court of Appeal in *Electoral Commission v Tate* authoritatively dealt with the Court's scope to make declarations, observing:[5]

> A Court may, of course, decline to make a declaratory judgment or order under the Declaratory Judgments Act 1908. Section 10 expressly provides that the jurisdiction conferred upon the Court to give or make a declaratory judgment or order shall be discretionary and that the Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order. There may be a number of sound reasons why a declaratory

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4 The Attorney-General's position at the hearing was "a close scrutiny of actual (rather than hypothetical) controls against the language of s 30(2) is required in any case." However the Attorney-General was concerned that the draft declaration might be taken to be definitive, even if not finally adopted by me.

5 *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA) at [30].

> judgment or order should be refused. Examples of grounds on which such judgments or orders have been declined are cases where the question is one of mixed law and fact, or where the question is an abstract or hypothetical question, or where the order would have no utility.

[18] The Court observed further that:[6]

> ... With respect to statutes, the Courts have the function of authoritatively construing legislation, that is, determining the legislation's legal meaning so far as is necessary to decide a case before it. ... It is the Courts' task to interpret and enforce provisions which confer rights, or impose duties, or vest powers in named persons or bodies, including governmental agencies. In discharging this task they are giving effect to the will of Parliament. ... To the extent that the task is not discharged a person or body may be deprived of a statutory right, or may fail to perform a statutory duty, or may be divested of an intended power. Consequently, it is imperative that persons or bodies have access to courts of law to determine the rights, duties or powers which Parliament has conferred on them by statute.

[19] The Court in that case was dealing with a specific question, namely whether the secretary of a political party was required, pursuant to s 214C of the Electoral Act 1993, to forward to the Electoral Commission a return of the party's election expenses. This turned on the extent to which the Act empowered the Electoral Commission to make such a request. The High Court refused to make a declaration because the meaning of the section was unclear. The Court of Appeal considered this was not a valid basis for refusing to make a declaration. It held that the Electoral Commission could provide a form to the secretary of each political party requesting a breakdown of the party's election expenses, which they were then required to complete, and gave a declaration to that effect.

[20] By comparison, in this case, I was not invited to interpret the scope of a statutory power in light of, or for the purpose of application to a particular set of facts. Rather, I was invited by the Attorney-General to define the scope of s 30(2) and the relationship between s 30(1)(ga) and (2) without regard to any particular fact scenario.

[21] For the reasons expressed at length in the judgment, I resolved that primacy is generally afforded to the FA on the sustainable utilisation of fisheries resources and the management of the effects of fishing on the biological sustainability of the

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6 At [31].

aquatic environment as a resource for fishing needs, but the two Acts envisage overlapping control of fishing and the effects of fishing. The legality of control in disputed areas will need to be worked out at the finer grain, including in respect of rules relating to Māori matters or interests and the application of s 30(1)(ga). As Ms Dixon submits, RMA Schedule 1 hearings are the appropriate forums for such analysis.

[22] Finally, I do not accept that a declaration brings greater clarity to the general public than the answers provided at [131]-[134], upon which any declaration might be based. Conversely, a declaration may give the illusion, as Mr Maassen suggests, of finality when closer scrutiny in the particular circumstances of the case may be required.

**Clarification**

[23] I would, however, make three comments for clarification:

(a) My draft declaration must not be read as a de facto declaration. On reflection, as Mr Cooney submitted, the draft declaration does not fully or accurately capture the guidance afforded by the judgment.

(b) The overview at [7] – [16] and the answers at [131]-[134] (repeated at [6] above) provide a more accurate summary of the outcome of my judgment, including the cross-references made in those paragraphs to the reasoning which underpins them.

(c) The references to "as a resource for fishing needs" and "strictly necessary" are simply summary expressions for fully developed reasoning in other parts of the judgment, in particular [107]-[114] and [129]-[130] respectively. Those phrases should not be treated as if they are statutory enactments.

**Outcome**

[24] I decline to make a formal declaration.

## Appendix A: Crown's revised declaration

1. A regional council and the Minister of Conservation must not exercise the functions specified at s 30(1)(d)(i), (ii) and (vii) of the Resource Management Act 1991 in order to manage:

   (a) the utilisation of fisheries resources; and/or

   (b) the effects of fishing on the biological sustainability of the aquatic environment.

2. A regional council and the Minister of Conservation may exercise the functions specified at 30(1)(d)(i), (ii) and (vii) of the Resource Management Act 1991 to manage the effects of fishing in the coastal marine area not directly related to the biological sustainability of the aquatic environment, but only to the extent:

   (a) demonstrably necessary to manage those effects; and

   (b) the exercise of such functions does not duplicate functions performed under the Fisheries Act 1996.

3. Subject to the division of responsibility noted above, a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996.

4. A regional council may exercise the function in s 30(1)(ga) of the Resource Management Act 1991 to manage the effects of fishing in the coastal marine area but only to the extent:

   (a) demonstrably necessary for maintaining indigenous biological diversity; and

   (b) the exercise of that function does not duplicate functions performed under the Fisheries Act 1996.

**Appendix B: Fishing Industry Parties' revised declaration**

1 *A regional council and the Minister of Conservation must not exercise the functions in respect of the coastal marine area specified at s 30(1)(d)(i), (ii) and (vii) of the Resource Management Act 1991 ~~to control land, occupation of coastal space or activity on the surface of water~~ in order to manage:*

(a) *the utilisation of fisheries resources; ~~and/~~or*

(b) *the effects of fishing on the biological sustainability of ~~the aquatic environment as a resource for fishing needs~~ any fisheries resources.*

2 *A regional council and the Minister of Conservation may exercise their functions ~~in respect of the coastal marine area~~ to manage the effects of fishing ~~not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs~~ outside the scope of the restriction in paragraph 1 but only to the extent: ~~strictly necessary to manage those effects~~*

(a) *demonstrably necessary;*

(b) *strictly confined to the object of the control; and*

(c) *the exercise of such functions does not in substance duplicate controls capable of being lawfully imposed under the Fisheries Act 1996.*

3 *~~Subject to the division of responsibility noted above, a~~A regional council and the Minister of Conservation may exercise all functions in respect of matters Māori, provided ~~they~~ their functions:*

(a) *are exercised consistently with paragraphs 1 and 2; and*

(b) *are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996.*

4 *A regional council and the Minister of Conservation may exercise functions ~~The function of maintaining indigenous biodiversity stated at~~ in s 30(1)(ga) of the Resource Management Act 1991 to manage the effects of fishing in the coastal marine area ~~is permissible within the coastal marine area,~~ but only to the extent: ~~strictly necessary to perform that function~~*

(a) *demonstrably necessary to maintain indigenous biological diversity;*

(b) *strictly confined to the object of the control; and*

(c) *the exercise of that function does not in substance duplicate controls capable of being lawfully imposed under the Fisheries Act 1996.*

**Appendix C: MRMT & ors' revised declaration**

A regional council and the Minister of Conservation must not exercise functions in respect of the coastal marine area specified at s 30(1)(d)(i), (ii) and (vii) of the Resource Management Act 1991 to control land, occupation of coastal space or activity on the surface of water in order to manage the utilisation of fisheries resources and/or effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs.

A regional council and the Minister of Conservation may exercise functions in respect of the coastal marine area to manage the effects of fishing not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs~~, but only to the extent strictly necessary to manage those effects~~.

Subject to the division of responsibility noted above, a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for recognition of customary fishing, iwi rights and some aspects of rangatiratanga in Part 9 of ~~Māori interest under~~ the Fisheries Act 1996. Controls that provide for those aspects of the Māori relationship with the marine environment that do not relate to current or future take are not provided for under the Fisheries Act 1996, and may be the subject of regional council controls.

The function of maintaining indigenous biodiversity stated at s 30(1)(ga) of the Resource Management Act 1991 is permissible within the coastal marine area~~, but only to the extent strictly necessary to perform that function~~.