IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20130010017

	UNDER	Section 30 of Te Ture Whenua Māori Act 1993
	IN THE MATTER OF	Ngati Pu – Determine Representation of Ngāti Pu for the purpose of consultation on lands and marine issues with Ngati Huarere ki Whangapoua
	BETWEEN	EDWARD SHAW AND LINDA CHALMERS FOR NGĀTI PU Applicant
	AND	NGĀTI HUARERE KI WHANGAPOUA Respondent

Hearing: 1 December 2015
123 Waikato Maniapoto MB 54-147 dated 17 May 2016
Heard at Thames

Appearances: Mr Hirschfeld for the applicant
Mr Majurey for Ngāti Maru

Judgment: 14 July 2016.

DETERMINATION OF JUDGE M J DOOGAN, MR ROBERT KOROHEKE AND MR WAIHOROI SHORTLAND

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[1] This is an application to determine representation for Ngāti Pu. The application seeks an order pursuant to s 30, Te Ture Whenua Māori Act 1993.

[2] The application was filed by Mr Edward Shaw and Dr Linda Chalmers on behalf of Te Rūnanga o Ngāti Pu Incorporated Society (the Rūnanga). They sought an order in favour of the Rūnanga to establish negotiations, consultations and funding allocations in respect of Ngāti Pu:

> … and in particular to provide certainty as to who may have an appropriate and legitimate mandate which has been underscored by order of the Court (in those negotiations, consultations, funding allocations etc.

[3] The order was sought with respect to Ngāti Huarere ki Whangapoua. It was said to be necessary to provide certainty so that Ngāti Huarere ki Whangapoua could interact with Ngāti Pu and be confident that the Rūnanga is the credible and sanctioned representative of Ngāti Pu.

[4] We issued a preliminary determination on 17 December 2015.[1] We said that we were sceptical of the need for an order simply so that Ngāti Pu could negotiate with like-minded hapū. We did go on to say however:

> The applicants before us did not challenge the right of the Hauraki Collective to negotiate settlement of the Ngāti Pu claims… what does appear to be an issue however, is the relative space left to hapū such as Ngāti Pu in a post-settlement environment to maintain and assert an independent voice.

[5] We expressed a preliminary view that there may be grounds for making a section 30 order:

> For limited and specified purposes directed primarily towards the representative capacity of the Rūnanga to represent Ngāti Pu interests at Whangamata and Hikutaia with local and public authorities on matters such as planning, consent, environmental management and regulation.

[6] We also noted that the Hauraki settlement was likely to include redress instruments that include relationships with local and public authorities.

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[1] *Shaw v Ngati Huarere ki Whangapoua – Ngati Pu* (2015) 113 Waikato-Maniapoto MB 82 (113 WMN 82).

[7] We adjourned the application with directions that various local and public bodies be served with the preliminary determination and the minutes of the hearing on 1 December 2015. Responses were received from the Crown, the Waikato Regional Council (WRC), Thames-Coromandel District Council (TCDC) and Ngāti Maru. The Crown and the WRC filed written submissions. Ngāti Maru confirmed it wished to be heard.

[8] A final hearing took place on 17 May 2016 in Thames. We heard further evidence from Ngāti Pu in response to our preliminary determination. We also heard evidence from Ngāti Maru, and legal submissions from counsel on behalf of Ngāti Pu and Ngāti Maru.[2]

[9] While the Crown and Ngāti Maru raise questions about the scope and utility of an order, they essentially abide the outcome.

[10] We begin with a review of the case made on behalf of the Rūnanga for an order that they are the most appropriate representative for Ngāti Pu. We then outline the position of the various parties after which we turn to consider the legal requirements.

Ngāti Pu

[11] The following summary of the background and the Ngāti Pu evidence recorded in our preliminary determination remains relevant and for ease of reference we repeat it here:[3]

> [8] The Rūnanga was formed as an incorporated society in 1998. It currently has approximately 600 registered members, of whom approximately 400 are over 18 years of age.
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> [9] Prior to 1998 Ngāti Pu did not have a legal structure for the purposes of representation but had operated for some time informally.
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> [10] Settlement negotiations with the Crown have been underway for some time. This would see a comprehensive settlement of the Hauraki claims including the Ngāti Pu claims. The Crown is negotiating with a collective comprised of representatives of 12 Hauraki iwi (the 12 iwi listed in the Hauraki Māori Trust Board Act of 1988). Ngāti Pu is not one of those 12 iwi.
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> [11] The constitution for the Ngāti Pu Rūnanga includes the following objectives:

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[2] 123 Waikato Maniapoto MB 54-147 (123 WMN 54-147).
[3] *Shaw v Ngati Huarere ki Whangapoua*, above n 1.

2.1 To preserve, protect and promote the cultural, spiritual, historical and environmental interest of Te Runanga O Ngati Puu Inc.

2.2 To establish Ngati Pu Marae.

2.3 To safeguard all waahi tapu, urupa and historic places upon Ngati Pu land.

2.4 To secure and preserve Ngati Pu taonga.

2.5 To resurrect the culture of Ngati Pu.

2.6 To promote the advancement educationally of Ngati Pu rangatahi.

2.7 To reclaim land that belongs to Ngati Pu.

2.8 To be compensated for assets, ie fisheries, gold and forestry taken from or on Ngati Pu coastal shores and land.

2.9 To promote and facilitate the use and administration of land and assets to the best advantage of Ngati Pu and/or other Hapu involved.

2.10 To uphold all Ngati Pu affairs with honesty and integrity.

[12] Mr Shaw said that the Rūnanga had been dealing with local bodies such as the Thames Coromandel District Council, the Hauraki District Council, the Waikato Regional Council, and the Department of Conservation ("DoC") mainly on issues relating to the environment. Mr Shaw says that the environmental management committee of the Rūnanga has worked closely with those organisations on matters such as the Whangamata Harbour plan, mangrove management, shellfish surveys in Whangamata, weed eradication, waste water and effluent disposal. They have also worked with the regional council and DoC on the Hikutaia river flood control, shingle extraction and other environmental issues.

[13] Dr Chalmers also gave evidence of the work the Rūnanga had been involved in with local authorities including its recognition as an iwi stakeholder in the draft Hauraki District Council plan.

[14] Both Mr Shaw and Dr Chalmers describe how this work was, in their view, being compromised and made more difficult over the last several years due to what they saw as increasing uncertainty on the part of public authorities about whom they should be dealing with. This, they see as one of the consequences of the ongoing Treaty settlement negotiations.

…

Ngāti Pu Treaty Claims

[16] Two claims were lodged with the Waitangi Tribunal on behalf of Ngāti Pu. Wai 355 was lodged by Ropata Rare and Ani Wells in April 1993. That claim concerned the alienation of Hikutaia and Whangamata lands. The core grievance related to the McCaskill transactions and the old land claim which had been the subject of protest and petition by Ngāti Pu since the 1850's. Further claims related to alienation of lands by other means and rating gold, foreshore and rivers, environmental impact, wāhi tapu and taonga and social economic factors. Their counsel told the Tribunal that "today the land held by Ngāti Pu amounts to approximately 35 Ha and that Ngāti Pu have suffered social, economic and cultural dislocation and a loss of status."[4]

[17] Wai 704 was lodged by Dianne Chalmers in Feburary 1998 on behalf of her whānau, the descendants of Haki Pene Hura, and his daughter Poihaere Hakipene Hura. The claimants are a whānau of Ngāti Pu and the Wai 704 related to interests in Ngāti Pu land particularly at Hikutaia and Whangamata.

[18] In its overall review of the Ngāti Pu claims the Waitangi Tribunal noted that Ngāti Pu were amongst the hapū who suffered significant prejudicial consequences from the inadequate investigations at Hikutaia and that the subsequent award of land to Ngāti Pu was inadequate redress. The Tribunal concludes as follows:[5]

> We note especially that Ngāti Pu lacks the land area, the local community, and the local income flow necessary to sustain a marae. In general terms, we consider the Wai 355 and Wai 704 claims to be well founded, and recommend that these claims be included in a comprehensive settlement for the Hauraki inquiry district.

[12] In advance of the 17 May 2016 hearing, further evidence was filed on behalf of Ngāti Pu. This evidence was in response to our preliminary determination and also in response to evidence filed on behalf of Ngāti Maru.

[13] In a jointly sworn affidavit Dr Chalmers and Mr Shaw updated the Court on developments within the Rūnanga since the application was first lodged, including an account of various hui at which the application was discussed by Rūnanga members. More detail was provided as to the operation of the Rūnanga and the way it communicates to its membership. Further examples were also provided of practical engagement by the Rūnanga and whānau with the communities of Whangamata and Hikutaia. One example was the

[4] Waitangi Tribunal, *The Hauraki Report Volume 1* (Wai 686, 2006) Vol 1 at15.
[5] Waitangi Tribunal, *The Hauraki Report Volume 3* (Wai 686, 2006) Vol 3 at 1243.

blessing of a kohatu at Whangamata in February 2015, a ceremony attended by representatives of Ngāti Pu, Thames-Coromandel District Council, Whangamata Community Board, the Whangamata Ocean Sports Club and the general public.

[14] Further examples include relationships established and recorded by way of memorandum of understanding with the New Zealand Historic Places Trust (regarding property developments in Whangamata). The Rūnanga also refers to a memorandum of understanding it has established with TransPower and the Waihi Gold Company.

[15] The key points to emerge out of that evidence and from questioning during the hearing were:

(a) The s 30 application arises in part as a reaction to Ngāti Maru having secured a mandate to negotiate settlement of the Ngāti Pu Treaty claims. Ngāti Pu have tried unsuccessfully to challenge the Ngāti Maru mandate. They now accept that Ngāti Maru have a mandate to settle the Ngāti Pu Treaty claims and do not seek to challenge that right through this application.

(b) Ngāti Pu nonetheless fear loss of autonomy and recognition as a result of that mandate and in a post-settlement environment and seek a s 30 order to secure their representative capacity with local and public agencies, Māori organisations and amongst other hapū and iwi. Ngāti Pu representatives sought an expansive s 30 order that might also include central government agencies (aside from the Department of Conservation) such as Te Puni Kokiri (TPK), the Ministry of Primary Industries, the Ministry of Business and Innovation, the Office of Treaty Settlements.

(c) The felling of kauri trees in the Wharekawa forest, the need to lodge a takutai moana customary rights application within the next 11 months, omission from the TPK iwi register and a memorandum of understanding with the Thames-Coromandel District Council, were cited as examples of pressing issues in relation to which a s 30 order was sought.

(d) A s 30 order was also necessary to make clear that Ngāti Pu are not the same as Ngāti Maru, that they are tangata whenua and mana whenua at Whangamata and Hikutaia. There is a concern about a lack of such recognition, particularly in a post-Treaty settlement environment.

The Crown

[16] The Crown notes that the impending Treaty settlement is likely to include statutory acknowledgements, advisory committee appointments and relationship agreements and protocols. In light of this the Crown submits that grounds remain for the Court in exercise of discretion to confine the scope of any possible order under section 30 *"*to those matters presently arising for Ngāti Pu in respect of which they have provided persuasive evidence of ongoing difficulties*."*

[17] The Crown also notes that Ngāti Pu Treaty claims are being negotiated and settled through Ngāti Maru as part of the Hauraki Collective, and Ngāti Pu will be able to benefit from the resulting settlement. Ngāti Pu are not challenging the right of the Hauraki Collective or Ngāti Maru to negotiate settlement and the Court should not lightly cut across the approach taken to the wider group that may ultimately be reflected in a Treaty settlement.

[18] The Crown also notes that the applicants for the first time have raised representation in relation to TPK as a relevant authority. The Crown notes that there has been no evidence at all of any issues regarding funding or representation issues with TPK. The applicants have not made a case for a s 30 order in relation to TPK.

[19] The Crown say the Marine and Coastal Area Act 2011 reflects the desirability of a group appointing its own representatives. That Act includes within the definition of "applicant group" representatives appointed by one or more iwi, hapū or whānau groups to apply for and hold an order to enter into an agreement on behalf of an applicant group. The Crown therefore submits that the Court should not lightly make a determination order under section 30 concerning representation under the Marine and Coastal Area Act 2011 and "should carefully consider whether such a determination is required or whether the matter is better left for the group to determine."

Waikato Regional Council

[20] The WRC filed submissions but did not wish to appear. The WRC points out that under s 35A of the Resource Management Act 1991 (RMA) it is required to keep and maintain a record of the contact details of each Iwi Authority and hapū within the region. An Iwi Authority is defined as "an authority which represents an iwi and which is recognised by that iwi as having authority to do so." The WRC go on to say that the Crown is responsible for providing the local authority with information of Iwi Authorities and hapū in the Waikato region and it does so through the Kāhui Māngai directory of iwi and Māori organisations

held by TPK. Neither Ngāti Pu nor the Ngāti Pu Rūnanga are identified in that directory. The WRC is required to consult with the Iwi Authorities when it prepares changes and reviews, policy statements and plans. WRC has not consulted with Ngāti Pu Rūnanga on planning matters as the Rūnanga is not recorded in the directory as an Iwi Authority.

[21] As a consent authority, the RMA does not require WRC to undertake consultation with iwi or hapū when it processes and assesses applications for consents. Nonetheless the WRC maintains a database of iwi and hapū groups and marae representatives and provides contact details to potentially affected parties to consent applications. The Rūnanga is included in the WRC's database and its details are provided to consent applicants for consultation purposes.

[22] The WRC has an integrated catchment management directorate responsible for river and catchment functions. That directorate has consulted with representatives of Ngāti Pu (Mr Ted Shaw and Sue King) on a range of operational matters in the past and will continue to do so until Ngāti Pu advises otherwise.

[23] WRC recognises Ngāti Pu Rūnanga as a representative of Ngāti Pu for the purposes of consultation for resource consents in the Whangamata and surrounding area, and also consults with Ngāti Pu through Mr Shaw and Ms King on operational matters in that part of the catchment. As the Rūnanga is not identified as an Iwi Authority in Te Kāhui Māngai directory, it is not an Iwi Authority that WRC consults with when it prepares changes and reviews, policy statements and plans under Schedule 1 of the RMA.

Thames-Coromandel District Council

[24] TCDC advised the Court that it did not wish to be heard.

Peter Barrett

[25] Since the preliminary determination Mr Barrett has taken no further steps other than to try and challenge (unsuccessfully) the preliminary determination itself. He has been notified of procedural steps such as teleconferences and the resumed hearing, but has not taken part.

Ngāti Maru

[26] Ngāti Maru did not oppose the s 30 application but did raise questions as to the need for a s 30 order and sought clarification as to its intended scope. If the Court was minded to

grant a s 30 order, counsel for Ngāti Maru sought an opportunity to have input into the terms of the order, either by way of discussion with counsel for Ngāti Pu, or in response to proposed draft orders from the Court. Ngāti Maru would oppose any s 30 order, the terms of which might compromise or interfere with redress currently being negotiated with the Crown as part of a comprehensive settlement of the Hauraki claims.

A representation order – what are the legal requirements?

[27] Section 30 provides:

> **30 Maori Land Court's jurisdiction to advise on or determine representation of Maori groups**
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> (1) The Maori Land Court may do either of the following things:
>
> (a) advise other courts, commissions, or tribunals as to who are the most appropriate representatives of a class or group of Maori.
>
> (b) determine, by order, who are the most appropriate representatives of a class or group of Maori.
>
> (2) The jurisdiction of the Maori Land Court in subsection (1) applies to representation of a class or group of Maori in or for the purpose of (current or intended) proceedings, negotiations, consultations, allocations of property, or other matters.
>
> (3) A request for advice or an application for an order under subsection (1) is an application within the ordinary jurisdiction of the Maori Land Court, and the Maori Land Court has the power and authority to give advice and make determinations as the court thinks proper.

[28] In *Manuirirangi v Nga Hapu o Nga Ruahine Inc*, Judge Clark cited with approval the following description of the intention of s 30 in its original form by then Chief Judge Durie.[6]

> The section may be defined by reference to the malady that the Legislature has sought to cure. The malady in this case would appear to be that persons seeking to effect negotiations, consultations, funding allocations or the like, in respect of Māori groups, are uncertain as to who may have an appropriate mandate to effect such negotiations or consultations or as to who may give a valid receipt. The section is designed to give that certainty so that outside parties may treat or be treated with.

[6] *Manuirirangi v Ngā Hapu o Nga Ruahine Iwi Inc* [2010] Chief Judge's MB 355 (2010 J 355) at [33].

> Conversely, the section does not appear to be designed to enable the Court to determine the appropriate representatives of a group for all or a wide number of purposes. The purpose must relate to some matter of business that is pressing at the time. It must also be established that the question of representation for the particular purpose described has not and cannot be settled outside of the Court.
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> …
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> The section may be read in the context of past Legislative history. The legislature empowered the Māori Land Court to determine appropriate tribal representatives for a range of purposes in the [Runanga Iwi Act 1990], but then repealed that Act [Runanga Iwi Act Repeal Act 1991]. This supports the view that the current section limits the Court to determining representation in the light of specific representation problems that arise, and is not a mandate to determine the representation of a group for all or for a wide ranging number of purposes of no immediate concern. The words "or other matter" should be read in the context of the words preceding them. The common denominator for the preceding words is that some outside person wishes to treat with a Māori group, or vice versa.

[29] Judge Clark concluded that s 30 was not designed to determine or advise upon appropriate representatives for wide number of purposes for all time. We agree. There must be a matter of business that is pressing and which requires determination by way of a representation order.

[30] In our preliminary determination, we relied upon the *Ngāti Paoa* case.[7] We said:[8]

> [27] In Ngāti Paoa Whānau Trust v Hauraki Māori Trust Board, the Court noted the discretionary nature of the jurisdiction under s 30 and commented that in an "ideal world" representation would depend upon the following factors:
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> (a) Broad based consent of people or mandate;
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> (b) Due process of consultation according to tikanga;
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> (c) Credibility in terms of leadership;
>
> (d) Approval of rangatira and kaumātua;
>
> (e) Provision for accountability to the tribe.
>
> [28] The Court noted that if those principles were followed then one would expect the decision by consensus which would be unlikely to require the Court to be involved. The Court went on to find:

[7] Ngāti Paoa Whānau Trust v Hauraki Māori Trust Board (1995) 96A Hauraki MB 155 (96A H 155) at 159.
[8] *Shaw v Ngati Huarere ki Whangapoua*, above n 1.

> In our view the Court should not lightly make an order under this section. While appointment by the Court is a means of settling disputes it transgresses the right of the tribe to appoint its representatives. It will invariably place the appointee in a position of strength. We believe that a court imposed solution will not be as acceptable as one reached by the tribe and that the tribe should be encouraged to resolve any disputes over representation through traditional means.

Does Ngāti Pu need a s 30 order? What are the pressing issues?

[31] We have already expressed scepticism about whether Ngāti Pu needed a s 30 order in order to enter into negotiations with like-minded hapū. It seemed to us that the application was more concerned with relationships with local and public authorities on land, marine and environmental issues that concern Ngāti Pu at Whangamata and Hikutaia. In our preliminary determination we said:[9]

> [36] The need to sustain a robust mandate for Treaty settlement purposes is often a significant drain on the resources and good will of the iwi involved. Those pressures tend to be magnified in the context of a collective negotiation as is the case in Hauraki. The applicants before us did not challenge the right of the Hauraki Collective to negotiate settlement of the Ngāti Pu claims (Wai 355 and Wai 704). What does appear to be an issue, however, is the relative space left to hapū such as Ngāti Pu in a post-settlement environment to maintain and assert an independent voice. In one sense, this in an intensely practical question depending in large part upon the human and other resources available to the hapū and the extent to which it is unified. There are also important points of principle potentially at issue. Chief amongst these are the way in which whānau, hapū and iwi relate to each other and to outside agencies in a post-settlement context.
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> [37] We are conscious that the Hauraki Collective negotiations are likely to include a number of redress instruments that address relationships with local and public authorities. We have not heard from the Hauraki Collective or any of its constituent members and neither have we heard from any of the local or public agencies involved. Neither have we heard from the Crown on these wider questions.

[32] This application has some unusual features. It does not arise out of a contest as to who would be the most appropriate representative for Ngāti Pu with respect to a particular negotiation or consultation. The context is the Hauraki Collective negotiations and Crown

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[9] *Shaw v Ngati Huarere ki Whangapoua*, above n 1.

recognition of the Ngāti Maru mandate to settle the Ngāti Pu Treaty claims. The issue is the impact the settlement process can have on the established relationships of non-mandated groups and the relative space left for such groups in a post settlement environment. That seems to us to be the pressing issue.

[33] Despite tension over the mandate, the Ngāti Maru response to this application has been moderate and constructive. One of their mandated negotiators confirmed that Ngāti Maru were supportive of the exercise of kaitiakitanga by Ngāti Pu at Whangamata and Hikutaia. Mr Ngamene said that Ngāti Maru did not oppose the preliminary indication given by the Court as to a possible order, providing it did not undermine or cut across the Hauraki settlement outcomes.

[34] The evidence of the representative capacity of the Ngāti Pu Rūnanga and the various functions it has performed on behalf of Ngāti Pu since its establishment is uncontested. At the final hearing in May there were a large number in attendance in support of the application.

[35] We have regard to the fact that a s 30 order should not be made lightly. However, on balance we think Ngāti Pu have made out a case for a s 30 order along the lines foreshadowed in our preliminary determination:[10]

> [41] It is the Court's preliminary view that there may be grounds for the making of a s 30(1)(b) order in favour of the applicants for limited and specified purposes directed primarily towards the representative capacity of the Rūnanga to represent Ngāti Pu interests at Whangamata and Hikutaia with local and public authorities on matters such as planning, consent, environmental management and regulation.

[36] We are not persuaded that it would be appropriate to enlarge the terms of the order to specifically refer to TPK or other central government agencies. Neither do we think it appropriate to refer in the order to negotiations under the Marine and Coastal Area Act 2011. In terms of s 30(2), we see the order as applicable to consultations and relationships with local and public bodies in relation to planning, consent, environmental management and regulation at Whangamata and Hikutaia.

[37] We see utility in an order so that the day to day exercise of kaitiakitanga by Ngāti Pu at Whangamata and Hikutaia is maintained during, and, after the Hauraki Treaty settlement

[10] *Shaw v Ngati Huarere ki Whangapoua*, above n 1.

negotiations. A s 30 order of the kind proposed should reduce uncertainty on the part of local and public authorities as to the status of the Rūnanga relative to mandated groups such as Ngāti Maru or other iwi of the Hauraki Collective. We do not think it necessary or appropriate to go beyond that.

[38] We accept the submission made on behalf of Ngāti Maru and the Crown that any s 30 order ought not to intrude upon or interfere with redress instruments that may be negotiated as part of the Hauraki settlement.

[39] We therefore propose that counsel discuss the terms of a s 30 order to see if agreement can be reached. Counsel are to file a joint memorandum, or memoranda on or before 4pm Wednesday 31 August 2016. If agreement is not reached the Court will settle the final terms of the order.

[40] Any order will be conditional upon a review once the final terms of the Hauraki settlement are known.

This determination of Judge M J Doogan, Mr Robert Koroheke and Mr Waihoroi Shortland was pronounced at 10 am in Wellington on this 14th day of July 2016

M J Doogan **JUDGE**	R Koroheke **ADDITIONAL MEMBER**	W Shortland **ADDITIONAL MEMBER**