

7 December 2022

To

Richard Clarke and Tiwana Tibble
Te Rimu Trust

From

David Randal

By Email

s 9(2)(a)

Tēnā kōrua e ngā Rangatira

COVID-19 Recovery (Fast-track Consenting) Act 2020 – standing of Pōtikirua ki Whangaōkena Takutai Kaitiaki Trust

1. Thank you for seeking our advice in respect of the application by Te Rimu Trust for its project to be referred to an expert consenting panel under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**Fast-track Act**) process.
2. For context, we understand that:
 - (a) Te Rimu Trust wishes to develop a marine access facility on its Māori freehold land near Te Araroa, which will help achieve the purpose of the Fast-track Act on the East Coast and elsewhere in Aotearoa by supporting local industries and communities, offering employment opportunities, reducing carbon emissions associated with transporting timber and other resources, and supporting aquaculture and customary Māori activities in the takutai moana.
 - (b) Crown Infrastructure Partners have provided government funding for the project from the COVID-19 Response and Recovery Fund. The funding agreement requires Te Rimu Trust to apply for the necessary resource consents under the Fast-track Act rather than the Resource Management Act 1991 (**RMA**).
 - (c) Te Rimu Trust has therefore applied under the Fast-track Act for the project first to be referred to an expert consenting panel for consideration.
 - (d) In that context, the Ministers for the Environment and Conservation have invited Pōtikirua ki Whangaōkena Takutai Kaitiaki Trust (**Takutai Trust**) to comment on Te Rimu Trust's referral application (under section 21(3) of the Fast-track Act).
 - (e) At least one trustee of the Takutai Trust does not favour the Fast-track Act being used, and so may ask the Ministers not to refer the project to an expert consenting panel.
3. Against that background, you have asked us to advise on the legal standing that the Takutai Trust has in respect of your referral application under the Fast-track Act.
4. Below we explain briefly why:

- (a) the Takutai Trust does not have recognised customary interests in the project area and so does not have any right to veto activities associated with the project;
 - (b) based on the information you have provided, there is a question as to whether the Takutai Trust is able, under the terms of its trust deed, to make decisions affecting the interests of ngā hapū o Ngāti Porou in areas where ngā hapū exercise customary authority; and
 - (c) ongoing consultation by Te Rimu Trust and the consenting process under the Fast-track Act will appropriately allow for the views and interests of the Takutai Trust to be considered and provided for.
5. Because of the critical importance of the project and its progression through the Fast-track Act (given that government funding for the project is premised on that process being used), we understand that this advice will be provided to the Ministers to inform their decision on referring the project to an expert consenting panel.

No recognised interests in respect of the project area

6. We presume that the Ministers have sought comment from the Takutai Trust because it is the holder of customary marine title (**CMT**) over several areas between Pōtikirua and Whangaōkeno, as described in Schedule 1 to the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020. Those rights have been recognised following direct discussions between ngā hapū o Ngāti Porou and the Crown under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (**Ngā Rohe Moana Act**).
7. It is important for the Ministers (and their officials) to be aware, however, that the areas over which CMT has been recognised **do not include** the takutai moana on and adjacent to the Māori freehold land owned by Te Rimu Trust, where the project is proposed to be built and operated. We **enclose** a plan that shows this clearly.
8. The Takutai Trust has since applied to the High Court under the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA**) to have CMT recognised over the project area (among other areas). It can therefore be inferred, in our view, that the project area was **deliberately excluded** from the CMT order made (with the Crown's agreement) under Ngā Rohe Moana Act.
9. As you will be aware, holders of CMT recognised under MACA effectively have a right to veto projects in the relevant CMT areas, as reflected in section 18(3)(c) of the Fast-track Act. We note, however, that section 18(3)(c) does not extend that power of veto to holders of CMT recognised under the Ngā Rohe Moana Act.
10. In any event, as noted above, CMT has not been recognised over the project area **under any legislation**, so no veto right is held by the Takutai Trust (or any other entity) in respect of this project or the Trust's application to refer it to an expert consenting panel.
11. While the Takutai Trust has applied to the High Court for CMT to be recognised over the project area, we understand that Te Rimu Trust has given notice of its intention to participate in that process and will be asserting its own rights to use and develop its whenua and takutai moana. That

High Court process is not likely to be concluded for a number of years. In the meantime, it should not be assumed that CMT will be recognised.

12. Further, in our view the fact that the Takutai Trust has applied to the High Court under MACA is irrelevant to the Ministers' referral decision; almost the entirety of the takutai moana around Aotearoa is the subject of processes under MACA or Ngā Rohe Moana Act, and veto rights do not accrue unless and until CMT is recognised.

Further limitation on the rights and powers of the Takutai Trust

13. While the Takutai Trust is not recognised as holding any customary interests in the project area, it is identified as a "*management entity*" over the wider stretch of coastline (in Schedule 7 to the amended Deed of Agreement between ngā hapū o Ngāti Porou and the Crown, amended on 9 August 2017). However, that status does not give it any particular authority under the Fast-track Act process either, in our view.
14. Moreover, as you have explained, the deed establishing the Takutai Trust is clear that each of ngā hapū o Ngāti Porou, rather than the Takutai Trust, must be the effective decision-makers in relation to their respective interests within ngā rohe moana o ngā hapū o Ngāti Porou.
15. We understand that Te Whānau a Kahu is the hapū with customary authority over the project area. As such, without having reviewed the trust deed, it appears to us that under the management arrangements it is Te Whānau a Kahu, rather than the Takutai Trust, with the authority to make decisions in respect of the project area.
16. We also understand that the representative of Te Whānau a Kahu on the Takutai Trust supports the project being referred to an expert consenting panel under the Fast-track Act.

Ongoing consultation and Fast-track Act will ensure that the views of the Takutai Trust are considered and provided for

17. Notwithstanding that the Takutai Trust does not have any right of veto in respect of the project, there are numerous ways for the views of the Takutai Trust to be considered and provided for through the Fast-track Act process. Some examples are:
 - (a) the consultation that Te Rimu Trust has undertaken (and continues to undertake) with the communities on the East Coast about the projects and its effects on the environment;
 - (b) the fact that Te Rimu Trust itself shares many beneficiaries in common with the Takutai Trust, and the project's Working Group includes one trustee of the Takutai Trust; and
 - (c) the open offer by Te Rimu Trust to provide the Takutai Trust with all technical information regarding the project and make its consultants available to discuss any matters of interest (which we understand has not yet been taken up by the Takutai Trust).
18. Further, if the project is referred to an expert consenting panel for consideration, the Fast-track Act provides for the Takutai Trust to participate in the process. Because the Takutai Trust has applied to the High Court for CMT over the area where the project is situated, the expert consenting panel would be required to invite comments from it (clause 17(6)(f) of Schedule 6 to the Fast-track Act).

19. The Takutai Trust would also likely be given the opportunity to comment on any resource consent conditions being considered by the expert consenting panel, which has been a common feature of the process.

Conclusion

20. While the Takutai Trust does not have the right to veto the project, we endorse the approach taken by Te Rimu Trust of continuing to engage with that entity, to ensure that its views on the project can be considered.
21. We trust this advice assists, and would be happy to discuss it with you.

Nāku noa, nā



Dave Randal
Partner

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