

# TE HUNGA ROIA MĀORI O AOTEAROA

## National Māori Issues Moot Competitions 2020

You are appearing before the Court of Appeal, appealing on points of law arising from a High Court decision from May 2020.

The local university rounds may involve four or six participants, with two or three people appearing for each of the Appellant and Respondent as the case may be. Directions on the division of issues is provided below.

In the National Final, the winners of the six local university rounds will moot, with three people appearing for each of the Appellant and Respondent.

### A. The Facts

Erina Kingi passed away at the age of 96, from matters unrelated to Covid-19, on 18 May 2020. At that time, New Zealand was at Covid-19 Alert Level 2. Restrictions in place at that alert level prohibited funerals and tangihanga with more than 50 people.

Erina was the eldest of eight siblings, all of whom survived her. Erina herself had eight children and, at the time of her death, 35 grandchildren, and six great-grandchildren. The Kingi whānau were concerned that a limit of 50 people would mean that even this group, who are so closely related to Erina, would not all be able to gather together, let alone members of the wider whānau.

One of Erina's nieces, Rongomai, is a lawyer who specialises in public and administrative law and she thought it might be possible to challenge the limitation on numbers. She helped Erina's son, Rawiri, to quickly engage legal representation and to bring an application for judicial review to challenge the order made by the Minister of Health which prohibited tangihanga with more than 50 people. The application was filed on 18 May with arguments being heard by Her Honour Justice Goldsmith in the High Court at Wellington on 19 May. Justice Goldsmith issued her decision on 20 May.

The application was successful and Erina's tangihanga took place in Wairoa over 21-22 May with more than 200 members of her whānau attending. The marae had put in place a range of practical public health measures consistent with tikanga and kawa and followed up with attendees over the weeks that followed to check for and track any symptoms of Covid-19. There have been no reported confirmed or probable cases of Covid-19 amongst any of the people who attended Erina's tangi.

The Minister of Health, however, is worried that Justice Goldsmith's decision incorrectly limits his powers under the Covid-19 Public Health Response Act 2020. He appeals the decision of Justice Goldsmith and seeks declarations reflecting the grounds of appeal set out below.

### B. Summary of the Application for Judicial Review

1. The decision that was challenged by Rawiri Kingi was the decision of the Minister of Health ('the Minister') to issue the COVID-19 Public Health Response (Alert

Level 2) Order 2020 ('the Alert Level 2 Order'). This order was made in accordance with sections 9 and 11 of the COVID-19 Public Health Response Act 2020 ('the COVID-19 Act') and came into force on 14 May 2020.

2. Sections 9 and 11 of the COVID-19 Act provide as follows:

**9 Minister may make section 11 orders**

- (1) The Minister may make a section 11 order in accordance with the following provisions:
  - (a) the Minister must have had regard to advice from the Director-General about—
    - (i) the risks of the outbreak or spread of COVID-19; and
    - (ii) the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks; and
  - (b) the Minister may have had regard to any decision by the Government on the level of public health measures appropriate to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (which decision may have taken into account any social, economic, or other factors); and
  - (c) the Minister must have consulted the Prime Minister and the Minister of Justice, and may have consulted any other Minister that the Minister of Health thinks fit; and
  - (d) before making the order, the Minister must be satisfied that the order is appropriate to achieve the purpose of this Act.
- (2) Nothing in this section requires the Minister to receive specific advice from the Director-General about the content of a proposed order or proposal to amend, extend, or revoke an order.

[...]

**11 Orders that can be made under this Act**

- (1) An order made by the Minister or the Director-General (as the case may be) under this section may be made for 1 or more of the following purposes:
  - (a) to require persons to refrain from taking any specified actions that contribute or are likely to contribute to the risk of the outbreak or spread of COVID-19, or require persons to take any specified actions, or comply with any specified measures, that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19, including (without limitation) requiring persons to do any of the following:
    - (i) stay in any specified place or refrain from going to any specified place:
    - (ii) refrain from associating with specified persons:
    - (iii) stay physically distant from any persons in any specified way:
    - (iv) refrain from travelling to or from any specified area:
    - (v) refrain from carrying out specified activities (for example, business activities involving close personal contact) or require specified activities to be carried out only in any specified way or in compliance with specified measures:
    - (vi) be isolated or quarantined in any specified place or in any specified way:
    - (vii) refrain from participating in gatherings of any specified kind, in any specified place, or in specified circumstances:
    - (viii) report for medical examination or testing in any specified way or in any specified circumstances:

- (ix) provide, in specified circumstances or in any specified way, any information necessary for the purpose of contact tracing:
  - (b) in relation to any places, premises, crafts, vehicles, animals, or other things, to require specified actions to be taken, require compliance with any specified measures, or impose specified prohibitions that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19, including (without limitation) any of the following:
    - (i) require things to be closed or only open if specified measures are complied with:
    - (ii) prohibit things from entering any port or place, or permit the entry of things into any port or place only if specified measures are complied with:
    - (iii) prohibit gatherings of any specified kind in any specified places or premises, or in any specified circumstances:
    - (iv) require things to be isolated, quarantined, or disinfected in any specified way or specified circumstances:
    - (v) require the testing of things in any specified way or specified circumstances.
  - (2) An order made by the Minister may specify which breaches of an order made by the Minister or the Director-General are infringement offences for the purposes of section 26(3).
  - (3) For the purpose of this section and section 12, things means any things mentioned in subsection (1)(b), including places, premises, ports, crafts, vehicles, and animals.
3. The relevant limits in relation to tangihanga are set out at clause 19 of the Alert Level 2 Order:

**19 Authorised funeral or tangihanga gathering**

- (1) An **authorised funeral or tangihanga gathering** is a gathering—
  - (a) that is held for the purposes of a funeral service or tangihanga; and
  - (b) of no more than 50 people (not including workers); and
  - (c) is authorised under clause 23; and
  - (d) for which the funeral director or any other person who arranges or organises the funeral service or tangihanga—
    - (i) registers the funeral service or tangihanga with the Ministry of Health (before it takes place); and
    - (ii) declares that it is authorised under clause 23; and
    - (iii) keeps records to enable contact tracing of all people who attend the funeral service or tangihanga.
- (2) An authorised funeral or tangihanga gathering is permitted.

4. Clause 23 of the Alert Level 2 Order provides:

**23 Authorisations from this order**

- (1) The Director-General of Health may, after having had regard to the purposes of the COVID-19 Public Health Response Act 2020, authorise, on conditions that the Director-General thinks fit, any class of funerals or tangihanga for the purposes of clause 19(1)(c).
- (2) The exemption must—
  - (a) be published on a publicly accessible Internet site maintained by or on behalf of the New Zealand Government; and

(b) be notified in the *Gazette*.

5. The Director-General has issued an authorisation in accordance with clause 23 for funerals and tangihanga of no more than 50 people.
6. The purpose of the COVID-19 Act is set out in section 4:

#### **4 Purpose**

The purpose of this Act is to support a public health response to COVID-19 that—

- (a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and
  - (b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
  - (c) is co-ordinated, orderly, and proportionate; and
  - (d) has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.
7. Mr Kingi challenged the decision of the Minister to issue the Alert Level 2 Order on two grounds:
    - a. First, the restrictions placed on tangihanga by the Alert Level 2 Order constituted a disproportionate constraint on Māori rights and were therefore outside the purpose of the empowering statute to support a response that “is co-ordinated, orderly, and proportionate”;
    - b. Second, in making the decision to issue the Alert Level 2 Order, the Minister failed to take into account relevant considerations, specifically, the impact on rights under Te Tiriti o Waitangi and the impact on tikanga Māori.
  8. The Minister did not dispute the fact that he had not considered Te Tiriti o Waitangi or the impact on tikanga Māori in making the decision to issue the Alert Level 2 Order. However, Crown counsel submitted that the COVID-19 Act did not require him to do so.
  9. Justice Goldsmith found that both grounds were made out and determined that the Alert Level 2 Order, so far as it purported to restrict the number of people attending tangihanga, was not valid.

### **C. Grounds of Appeal**

The Minister of Health is appealing the decision of Justice Goldsmith on the following points of law:

1. Her Honour erred in concluding that the purported limit on the number of people who may attend a tangihanga, made in the Alert Level 2 Order, is outside the powers conferred by the COVID-19 Act because it does not meet the purpose of supporting a response that is proportionate. The Alert Level 2 Order does limit the rights of New Zealand citizens but these limitations are a proportionate response to the COVID-19

pandemic and Māori rights are not limited to any greater degree than the rights of other citizens. The Alert Level 2 Order is, therefore, not outside the purpose of the empowering statute.

2. Her Honour erred in finding that the Minister was required to consider Te Tiriti o Waitangi in making the impugned decision. There is no such requirement imposed by the COVID-19 Act and, in any case, neither the COVID-19 Act nor the Alert Level 2 Order impinge on Te Tiriti rights (as indicated by the disclosure statement for the COVID-19 Public Health Response Bill).
3. Her Honour erred in finding that the Minister was required to consider tikanga in making the impugned decision. There is no such requirement imposed by the COVID-19 Act.
4. Even if the Minister had been required to consider tikanga Māori in making his decision, limiting the number of people who may attend a tangihanga at any one time is not irreconcilable with tikanga Māori.

*Note on division of issues*

In the National Final (and if there are six participants in the local university round), for each party, one person will address Issue 1, one person will address Issue 2, and one person will address Issues 3 and 4.

If there are four participants in the local university round, one person from each party will address Issues 1 and 2 and the other person appearing for that party will address Issues 3 and 4.