TAKUTAI MOANA ACT 2011
URGENT INQUIRY
STAGE 1 REPORT

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Pre-publication Version

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HE HUAHUATAU

Sir Pou Temara / Professor Rawinia Higgins

Whakarauika ngā iwi e,
Whakarauika, ki runga o Aotearoa.
Whakaopeti ngā wheua e, i te takutai
Toia mai ngā ika i te moana
Kia kai te iwi Māori i te hua nui
Ngā uri o Tūtara-kauika, o Te Wehenga-kauki
Te oranga o te iwi Māori
Auē e te iwi e!
I tēnei rā kua ara ake he taniwha hou
Hei ārai i te mana o Tūtara-kauika
Ko tōna ingoa ko te ture Takutai Moana
Ko tōna mana, hohonu atu i te moana o Te Wehenga-kauiki
Nui atu i te atuatanga o Tangaroa
Ko tāna mahi he aukati i te mana o te Māori
Ki ngā hua o Hinemoana
I tāmirotia ai e ngā atua o te pō
Engari koe, te ture Takutai Moana
Teitei atu i te aroha o ngā atua o te Māori
He aukati i te whakapapa o te Māori ki te moana
He whakawehewehe tangata,
Iwi ki te iwi
Hapū ki te hapū
Māori ki te Pākehā
Mō te aha te hua?
Ko iwi huhua ka whiwhi
I a hua nui
Ko iwi iti ka whiwhi
I a hua iti
Ko te Māori ka kai i ngā toenga
E te iwi e, kei hea te mana orite?
E te Tiriti e, kei hea tō manaakitanga?

Gather o' people
Gather upon Aotearoa.
Gather the bounteous flesh from the shore
Haul forth the fish from the sea
So as to feast upon the great repast
Gifts of Tūtara-kauika and Te Wehenga-kauki
That have sustained the Māori people
Alas o' people!
Today a new taniwha emerges
To subsume the power of Tūtara-kauika
It goes by the name of the Marine and Coastal Area Act
Its reach is deeper than the domain of Te Wehenga-kauiki
Greater than the deity Tangaroa
Its purpose is to restrict and diminish the rights of Māori
To access the abundance of the ocean maiden
Guaranteed by the deities
But, the Marine and Coastal Area Act
Supersedes the charity of the Māori deities
And limits the genealogical connections of Māori to the ocean
Obliterating the connections between the people
Tribe versus tribe
Hapū versus hapū
Māori versus Pākehā
For whose benefit?
Those with resources will benefit
The most
Those without
Will not
And what little remains may be for Māori
O' people where is the equity?
O' te Tiriti, where is your protection?

PREFACE

This is a pre-publication version of the Waitangi Tribunal's urgent report *Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report*. As such, all parties should expect that, in the published version, headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Additional illustrative material may be inserted. However, the Tribunal's findings and recommendations will not change with the publication of this urgent report.

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The Honourable Judith Collins
Attorney-General

Parliament Buildings
WELLINGTON

12 September 2024

Te tai rā, te tai rā e pari nei,
E pari nei ki whea?
E pari ana ki tawhiti nui, ki tawhiti roa, ki tawhiti pāmamao.
Te tai e pari ki whea?
E pari ana ki Aotearoa,
Ki te nohoanga rā o te tangata Māori – Tihei mauriora!

E ngā minita, tēnei ngā maioha ki a koutou. Kua oti i a mātou te wāhanga tuatahi o te pūrongo mō te Takutai Moana. Koia tēnei ka tukuna atu hei kai mā ō koutou whatu, hei wānanga mā ō koutou hinengaro i ngā whakaaro o te Rōpū Whakamana i te Tiriti o Waitangi mō tēnei take whakahirahira ki ngā iwi huri taiāwhio i ngā motu o Aotearoa.

I enclose our report on stage 1 of the Marine and Coastal Area (Takutai Moana) Act Coalition Changes Urgent Inquiry. This inquiry was held urgently in the Waitangi Tribunal's inquiry programme, due to the importance of the customary rights at stake; the immediacy and apparent irreversibility of likely prejudice to Māori; and the lack of an alternative remedy.

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MINISTRY OF JUSTICE
Tāhu o te Ture

This stage 1 report addresses claims concerning the Coalition Government's proposed amendments to the Marine and Coastal Area (Takutai Moana) Act 2011. We note that another significant theme of claims in the urgent inquiry – the alleged mismanagement of funding for Customary Marine Title (CMT) applications under the Act – will be addressed in a forthcoming stage 2 of the inquiry. In this stage 1 report, we solely consider the Treaty compliance of the policy development process the Government has followed in seeking to amend the Takutai Moana Act, and of the proposed amendments themselves.

Our analysis of the policy development process reveals the Crown has departed from orthodox and responsible policymaking in several concerning ways when proposing to amend the Act. The advice of officials was regularly dismissed, and the process was rushed, leading to important steps not being taken. Key among these omissions was a failure to follow a transparent and evidence-based approach. This approach, widely recognised as best practice in the government's own publications, including the *Cabinet Manual* and the Legislation Design and Advisory Committee guidelines, involves identifying and defining a legitimate 'problem' needing to be solved by regulation and engaging with Māori as a Treaty partner during the policy development process. On the contrary, we heard evidence of an approach characterised by ideology and blind adherence to pre-existing political commitments and which prioritised these goals at the expense of those whose rights stood to be affected – whānau, hapū, and iwi Māori. We believe this absence of a reasoned and responsible policy development process has resulted in the Crown failing to meet the high standard it should set for itself with its Treaty partner and breaching the principle of good government.

The principles of the Treaty require the Crown to observe a high standard of consultation – and, where possible, co-design with Māori – when developing policy or legislation concerning te takutai moana. However, we found that the Crown breached the principle of partnership in three ways. First, by failing to consult with Māori during the development of the proposed amendments, despite repeated advice from officials. Secondly, by only offering to consult with Māori after decisions were made. Lastly, by reducing that limited offer of consultation even further to suit its own deadline to amend the Act before the end of 2024.

We find the Crown has breached the principle of tino rangatiratanga by exercising kāwanatanga over Māori rights and interests in te takutai moana without providing any evidence for one of its key justifications, namely that the public's rights and interests require further protection beyond what is already provided by the Act. By failing to inform itself of

Māori interests, the Crown's exercise of kāwanatanga was also a breach of the principle of tino rangatiratanga. We find the Crown's consultation with commercial fishing interests, which already have statutory protection, prior to finalising the proposed amendments, while failing to consult with Māori, to be a further breach of the principle of good government.

We considered the Treaty compliance of the Crown's proposed amendments to the Takutai Moana Act. We find here that the Crown has breached the principle of active protection and the principle of good government by failing to demonstrate how it had arrived at its understanding of Parliament's original intent – which informed the decision to extensively amend Māori rights in te takutai moana, contrary to the reasoned advice of officials, and by seeking to amend the Act before the Supreme Court can hear the matter.

We also find the Crown breached the principles of active protection and good government by proposing amendments that are applied retrospectively (from 25 July 2024 onwards). As a result of this retrospectivity, applicants will be forced to have their cases reheard, burdening them emotionally and financially through no fault of their own, and placing further strain on whanaungatanga. Retrospectivity would also mean that some applicants who would have been granted CMT under the old test might find themselves unable to meet the standards of a new test.

We find that Māori will, or are likely, to suffer significant prejudice as a result of these breaches as:

- the takutai moana is a significant taonga but the proposed amendments are not subject to robust well-designed transparent policy;
- Māori have not been given the opportunity to engage as Treaty partners, and to exercise their tino rangatiratanga, on such a significant issue;
- the Crown is seeking to restrict the ability of Māori to have their rights recognised through an award of CMT, when there is no identified public right or interest that requires protection, and when there has been no balancing exercise taking into account Māori rights and interests in the takutai moana;
- the Crown seeks to amend the Act so drastically, without any evidentiary basis for doing so, while ignoring the advice of officials, and choosing to preempt the Supreme Court on the matter; and
- Māori applicants affected by the retrospective application of the amendments will suffer harm from having to go through a rehearing process when they have already participated in extensive hearings in good faith.

We therefore make the following recommendations that:

- the Crown halts its current efforts to amend the Takutai Moana Act;
- the Crown makes a genuine effort for meaningful engagement with Māori; and
- the focus of this engagement should be on the perceived issues of permissions for resource consents, rather than interrupting the process of awarding CMTs.

We emphasise that these recommendations should be implemented to restore a fair and reasonable balance between Māori interests and those of the public in te takutai moana. At present, the Crown's actions are such a gross breach of the Treaty that, if it proceeds, these amendments would be an illegitimate exercise of kāwanatanga. We caution the Crown that, on the strength of the evidence we have received, to proceed now on its current course will significantly endanger the Māori–Crown relationship.

Nāku noa nā

Judge Miharo Armstrong
Presiding Officer

ABBREVIATIONS

ACT	Association of Consumers and Taxpayers
app	appendix
CA	Court of Appeal
ch	chapter
CMT	customary marine title
doc	document
J, JJ	justice, justices
LDAC	Legislation Design and Advisory Committee
ltd	limited
MACA	marine and coastal area
memo	memorandum
no	number
NZCA	*New Zealand Court of Appeal*
NZHC	*New Zealand High Court*
NZLR	*New Zealand Law Reports*
p, pp	page, pages
PCR	protected customary rights
RIS	regulatory impact statement
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SIR	seafood industry representative
TRONA	Te Rūnanga o Ngāti Awa
v	and (in a legal case name)
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, statements of issues, submissions, and transcripts are to the Wai 3400 record of inquiry. A copy of the index to the record is available on request from the Waitangi Tribunal. All URLs were accurate at the time of going to print.

CHAPTER 1

INTRODUCTION

1.1 What Is at Issue?

This inquiry addresses claims submitted to the Waitangi Tribunal under urgency regarding the Marine and Coastal Area (Takutai Moana) Act 2011. Claimants lodged grievances concerning the Crown's proposal to amend section 58 of the Act, which sets out the statutory test applicant groups must meet for recognition of Customary Marine Title (CMT), and the alleged mismanagement of funding for applications. As discussed below in section 1.2.3, this stage of the inquiry is concerned only with the Treaty compliance of the policy development process and the proposed legislative amendments. The funding issue will be addressed in a stage 2 report.

In 2011, the then National Government introduced the Takutai Moana Act to replace the Foreshore and Seabed Act 2004. On 18 October 2023, just four days after the general election, the Court of Appeal issued a judgment in *Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* determining how the courts should interpret section 58.[1] On 24 November 2023, the National and New Zealand First parties signed their coalition agreement, which stated that the Crown 'will reverse measures . . . which have eroded the principle of equal citizenship'. This included amending section 58 'to make clear Parliament's original intent'.[2] On 25 July 2024, Minister for Treaty of Waitangi Negotiations Paul Goldsmith issued a press release detailing the measures the Crown would take to ensure tests for CMT were 'applied consistently'.[3]

The claimants and interested parties argue that 'the effect of the proposed amendments is to subordinate the interests of the many iwi, hapū and whānau affected to the interests of non-Māori New Zealanders'.[4] The Crown, however, argues that the proposed amendments 'are necessary to clarify the requirements for obtaining an award of customary marine title (CMT) following the Court of Appeal's decision in *Re Edwards*'.[5]

1. *Whakatōhea Kotahitanga Waka* (*Edwards*) *& Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2003] NZCA 504 (18 October 2023). This decision is currently under appeal.
2. New Zealand National Party and New Zealand First, Coalition Agreement, 24 November 2023, p 10
3. Submission 3.1.3(a), pp [1]–[2]
4. Submission 3.3.27, p 76
5. Submission 3.3.38, p 1

1.2 Background to our Inquiry

1.2.1 Application for urgency

On 10 June 2024, Waitangi Tribunal Deputy Chairperson Judge Sarah Reeves directed the Registrar to enter a joint application for an urgent inquiry on the register of claims.[6] The joint application alleged two Treaty breaches. The first alleged breach concerned 'Te Arawhiti's mismanagement of the Takutai Moana financial assistance scheme' and the second concerned the 'proposed amendments to the Marine and Coastal Area (Takutai Moana) Act 2011'. The four claimants in the joint application were:

- Steve Panoho and Joy Panoho for the Marine and Coastal Area (Takutai Moana) Act (Panoho) claim (Wai 2603);
- Marise Lant on behalf of Ngā Whanaū Hapū o Te Aitanga a Hauiti Takutai Moana concerning the Maine and Coastal Area (Takutai Moana) Act 2011 (Wai 2658);
- Te Upokorehe Iwi (Wai 1092, Wai 1758, Wai 1787);
- John Tamihere on behalf of Ngāti Porou ki Hauraki (Wai 3375).[7]

On 11 June 2024, Judge Reeves appointed Judge Miharo Armstrong as Presiding Officer alongside Tā Pou Temara, Professor Rawinia Higgins, and Ron Crosby as Tribunal panel members.[8]

1.2.2 Decision to grant urgency

On 13 June 2024, claimant counsel filed a joint memorandum stating that '[t]he timing of the introduction of a bill to amend the s 58 test is material to the application for urgency'.[9] On 17 June 2024, Judge Armstrong responded, stating that the claim 'does not allege that a Bill is being introduced to amend s 58' but 'only alleges that the Crown has "signalled its intent" to do so'. He directed the Crown to respond, adding, 'I consider the Crown, as a Treaty partner acting in good faith, will disclose relevant information concerning any proposed amendment, including proposed timeframes, when responsing to the claim'.[10]

On 5 July 2024, Crown counsel opposed the application for an urgent inquiry for both the matter of funding at Te Arawhiti and the proposed amendments to the Act.[11] Counsel stated that the Crown had made '[n]o decisions' in relation to the coalition agreement's amendment of the Act. Counsel noted that 'Te Arawhiti officials now hope to be in a position to provide a material update on these matters

6. Wai 3375 ROI, memo 2.1.1, p [1]. Initially, the claim was given the record of inquiry (ROI) number Wai 3375. Later, when the decision was made to stage the inquiry, the ROI number Wai 3400 was assigned to filings for this stage of the inquiry.

7. Wai 3375 ROI, memo 3.1.1, p 1

8. Wai 3375 ROI, memo 2.5.1, pp [1]–[2]. Unfortunately, Professor Higgins was unable to sit on stage 1 of this urgent inquiry due to a tangi. Judge Armstrong, Tā Pou Temara, and Ron Crosby have determined stage 1 by majority.

9. Wai 3375 ROI, memo 3.1.3, p 1

10. Wai 3375 ROI, memo 2.5.3, p 2

11. Wai 3375 ROI, memo 3.1.6, p 3

by 12 July 2024'. In light of these points, counsel argued that an urgent inquiry would be premature and have 'limited utility'.[12]

However, on 10 July 2024, the Crown filed a memorandum confirming Cabinet had made decisions about the Government's intention to amend section 58, which would have 'material impacts' on current Takutai Moana Act proceedings. Counsel argued that the decisions were subject to confidentiality. At this point, the Crown changed its position, noting that it no longer considered an urgent inquiry to be premature, but maintained its position that an urgent inquiry would have limited utility.[13]

On 17 July 2024, Judge Armstrong held a judicial conference where he heard submissions from parties about holding an urgent inquiry.[14] Following this, on 23 July 2024, the Tribunal granted an urgent inquiry into the following issues:

a) The 2024 changes to the Crown funding scheme that funds applicants seeking customary marine title and protected customary rights in the High Court and Crown engagement pathways; and
b) The Crown's proposed amendments to s58 of the MACA Act, which sets out the test for customary marine title.[15]

In the full decision (released three days later), the Tribunal stated that 'the Crown has provided very little information on what amendments are proposed, or the steps or timeframe it intends to adopt'.[16] The Tribunal considered that, based on the limited information available, the proposed amendments were likely to be made 'without consulting Māori' and were unlikely to be 'based on treaty principles, tikanga, Māori customary law, or even common law principles of aboriginal title'. The Tribunal considered that 'Māori will, or are likely to, suffer significant and irreversible prejudice from such an approach', and that it appeared the Crown aimed 'to intentionally make it harder for Māori claimant groups to successfully obtain customary marine title'.[17] The Tribunal said the proposed amendment to the test for customary marine title would alter 'the cornerstone provision in the Act that recognises and provides for Māori interests in the takutai moana'.[18]

1.2.3 The rationale for staging the inquiry

On 19 July 2024, counsel for the Panoho claim filed a memorandum proposing a pathway forward for the inquiry based on the possibility the Crown might introduce a Bill to amend section 58 in the near future. The proposal included an initial hearing and report on the proposed amendments, and a later hearing and report

12. Ibid, pp7–8
13. Wai 745 ROI, memo 2.208, p2; see also Wai 3375 ROI, memo 3.1.15, p2
14. Wai 3383 ROI, memo 3.3.1, p2; also see memo 2.5.4, p5
15. Memorandum 2.5.1, p[2]
16. Memorandum 2.5.4, p12
17. Ibid, p13
18. Ibid, p14

on the changes to the Crown funding scheme concerning Te Arawhiti.[19] On 25 July 2024, the Crown then confirmed its intention to introduce the Bill by mid-September. At the second judicial conference on 31 July 2024, all counsel agreed that the urgent inquiry should be conducted in two stages:

(a) Stage one: The hearing set down for 26 to 28 August will inquire into the proposed amendments to the Act. This will allow us to report on those amendments prior to the Bill being introduced to the House.
(b) Stage two: We will hold a separate hearing, and will issue a separate report, on the changes to the Crown funding scheme. The current focus is to prepare, hear and report on stage one. Hearing planning for stage two will proceed in due course. In the meantime, Tribunal staff will make preliminary inquiries as to available hearing dates for stage two.[20]

On 5 August 2024, Crown and claimant counsel filed a draft Joint Statement of Issues for stage one.[21] The following day, Judge Armstrong adopted this draft as the Tribunal Statement of Issues for this stage of the inquiry.[22]

1.2.4 Hearings in this inquiry

The hearings for this inquiry took place at the Tribunal's offices in Wellington from 26 to 28 August 2024.[23]

1.3 Parties to this Inquiry

On 23 July 2024, Judge Armstrong finalised the list of claimants and interested parties.[24] The full list of claimants and interested parties can be found on the record of inquiry.[25]

1.4 Issues for Inquiry

The Tribunal Statement of Issues reads as follows:

1. Which principles of the Treaty of Waitangi / Te Tiriti o Waitangi (Te Tiriti) are engaged?
2. What are the Crown's proposed amendments to the MACA Act and what is their effect?
3. What process has the Crown followed in the development and implementation of the proposed amendments?

19. Memorandum 2.5.3, p 1
20. Memorandum 2.5.6, p 2
21. Draft statement of issues 1.4.1
22. Statement of issues 1.4.2; also see memo 2.5.8, p 2
23. Memorandum 2.5.7, p 2
24. Memorandum 2.5.3, p 2
25. Memorandum 2.5.13(a), pp [1]–[5]; memo 2.5.13(b), pp 1–2

4. Are the proposed amendments inconsistent with the principles of Te Tiriti?
5. Is the process the Crown followed in the development and implementation of the proposed amendments inconsistent with the principles of Te Tiriti?
6. If the answer to Issue 4 or 5 is yes, what recommendations are required to remove any prejudice caused by these breaches?[26]

We have used these questions to guide the structure to this report as set out in section 1.5 below.

1.5 The Structure of the Report

In chapter 2, we set out the Treaty principles that apply in this inquiry taking into account relevant Tribunal jurisprudence. In chapter 3, we provide a background to the Marine Coastal Area (Takutai Moana) Act 2011; summarise our previous reports on the Act; and examine from a contextual standpoint the process the Crown has followed to amend it. In chapter 4, we analyse the Treaty compliance of the policy development process and the amendments themselves, discussing the implications the amendments may have for Māori as well as any relevant prejudice. Finally, in chapter 5, we provide a summary of our findings and make our recommendations.

26. Statement of issues 1.4.2

CHAPTER 2

THE TREATY CONTEXT

2.1 Introduction

In this chapter, we set out the Treaty principles most relevant to this stage of the inquiry: partnership, tino rangatiratanga, active protection, and good government. Where possible, we adopt the prior discussion of these principles in our stage 1 and 2 reports, as well as the analysis in other recent reports, particularly *Ngā Mātāpono – The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – The Constitutional Kaupapa Inquiry Panel on The Crown's Treaty Principles Bill and Treaty Clause Review Policies* (2024) and *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report*.

2.2 Treaty Principles

2.2.1 Partnership

In *Ngā Mātāpono*, the Tribunal described partnership as 'central' among the Treaty principles the courts and the Tribunal have developed since the 1980s.[1] Partnership has previously been characterised as an 'overarching tenet from which other principles have been derived'.[2] We cite that report's summary of the Treaty partnership:

> The Court of Appeal in the *Lands* case . . . found the Treaty created a relationship akin to a partnership with mutual obligations to act reasonably and with the utmost good faith. The Tribunal has described the principle of partnership as arising 'from one of the Treaty's basic objectives – to create the framework for two peoples to live together in one country'.
>
> The Te Rohe Pōtae Tribunal in this respect observed:
>
> > In any negotiations over laws and institutions to give effect to kāwanatanga and tino rangatiratanga, neither party could impose its will. These matters could only be worked out through ongoing dialogue and partnership, in which the

1. Waitangi Tribunal, *Ngā Mātāpono – The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p74

2. Te Puni Kokiri, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Wellington: Te Puni Kokiri, 2000), p77

parties acted with the utmost good faith. From this are derived the principles of partnership and good governance.

Further, the Central North Island Tribunal stated:

> In the words of the president of the Court of Appeal, 'the Treaty signified a partnership between races', and each partner had to act towards the other 'with the utmost good faith which is the characteristic obligation of partnership'. . . .
>
> The Treaty partners were required to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlapped or affected each other.[3]

Addressing the constitutional significance of the Treaty partnership, the Tribunal observed in *Ngā Mātāpono*:

> As a founding relationship for a nation, the partnership does not have an expiry date and creates enduring obligations. As the *Ngai Tahu Report* (1991) stated: 'It was not intended merely to regulate relations at the time of its signing by the Crown and the Maori, but rather to operate in the indefinite future when, as the parties contemplated, the new nation would grow and develop'.
>
> In its discussion of the principle of partnership, the Te Raki stage 2 Tribunal began from the position of equal spheres of authority that were agreed in the Treaty/te Tiriti. It found that partnership is the framework for governance of New Zealand and the Crown's duty is to engage actively with Māori on 'how it should recognise Te Raki tino rangatiratanga and, where agreed, give it effect in New Zealand law'. In doing so, partnership requires both parties to act reasonably and with the utmost good faith

In *Ngā Mātāpono*, the Tribunal cited the High Court's *Wellington International Airport v Waka Kotahi* decision and also commented on the connection between the partnership principle and the Crown's duty to consult with Māori when developing policy on matters of importance to them:

> The obligation of the decision-maker is to consult properly and with an open mind before making any final decision. A proper opportunity must be given to the person consulted to put any matters forward that they wished to, and the decision-maker must take due notice of what is said. The proposal must not have been finally decided upon prior to consulting. Rather, the decision-maker must listen to what others have to say, considering their responses, and only then saying what will be done.

As the Napier Hospital Tribunal (2000) stated, 'it would not suffice, in other words, simply to call a hui and explain the proposals.' That Tribunal also observed that the

3. Waitangi Tribunal, *Ngā Mātāpono*, p 74

'mode of consultation should take appropriate account of Maori expectations and preferences' and articulated a set of criteria for consulting with Māori.

The obligation to consult, in turn, is connected to the Crown's partnership obligations to act reasonably and with the utmost good faith. As the Offender Assessment Policies Tribunal (2005) noted, 'one element of the Crown's obligations is that it must make informed decisions. Where Crown policies affect Māori, a vital element of the partnership relationship is the Crown's duty to consult with Māori'. In *The Preliminary Report on the Haane Manahi Victoria Cross Claim* (2005), the Tribunal stated: 'In other words, the Crown could not act unilaterally on matters of importance to its Māori Treaty partner'. In *Napier Hospital*, the Tribunal found that the significance of the decision to Māori may mean consultation is required even if the Crown believes it already holds sufficient information.[4]

Referring back to the *Lands* case, the Tribunal noted that consultation is not an absolute duty, but one that is guided heavily by circumstances:

. . . Justice Richardson did not find an absolute duty to consult, and suggested the better view was that

> the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.[5]

The Tribunal in *Ngā Mātāpono* also discussed an emerging emphasis in policy-focused Treaty jurisprudence on the concepts of consent and co-design, which may, at times, be more appropriate than consultation alone:

> In some cases, particularly where the issue is significant to Māori or goes to the heart of the Treaty/te Tiriti relationship, the Tribunal has found the Crown may be obliged to go further than consultation and obtain the consent of Māori. The Indigenous Flora and Fauna Tribunal in its *Ko Aotearoa Tēnei* report (2011), for example, noted that there is no 'one size fits all' approach to consultation, and indicated there could be 'occasions in which the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at

4. Ibid, pp 75–76
5. Ibid, p 62

> achieving consensus, acquiescence or consent'. The Te Raki stage 2 Tribunal similarly found that the Treaty/te Tiriti obliges the Crown to go beyond consultation and negotiate through 'discussion and agreement'.
>
> The Wai 262 Tribunal noted that 'partnership mechanisms', 'partnership structures', 'partnership forums', or 'partnership entities' are required to bring about 'responsible power-sharing' across multiple policy sectors and statutory regimes, and Tribunal reports have pointed to a number of such mechanisms designed to achieve these ends. Those include co-governance bodies and collaboration between the Crown and Māori in the co-design of policy.
>
> The principles of partnership and reciprocity require the Crown to develop its Treaty/te Tiriti policies in partnership with Māori.[6]

In *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report*, the Tribunal found the Crown had breached the principle of tino rangatiratanga by failing to have a good faith dialogue with Māori regarding proposed policy changes:

> If the Crown wishes to make a fundamental change of this nature it should start by having direct good faith dialogue with the parties to these agreements. To simply tell those parties what is going to happen and invite them to make submissions to a select committee, is to dishonour the very basis of the agreement itself.[7]

With respect to an unparalleled resource and taonga interest, such as te takutai moana, we stated in *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (2023) that, 'on the sliding scale that determines the appropriate standard of consultation, the Crown's obligation to consult with Māori in developing the Takutai Moana Act is at the highest end'.[8] Furthermore, when noting the Court of Appeal's decision in the 1989 *Forests* case, the Tribunal noted in *Ngā Mātāpono* that 'presenting Māori with a predetermined decision, described as a "fait accompli", was inconsistent with the "spirit of the partnership which is at the heart of the principles of the Treaty of Waitangi"'.[9] Again, the importance of a taonga as considerable as te takutai moana elevates any measure of consultation in this inquiry to the highest possible standard and raises questions of policy co-design as a likely Treaty consistent outcome.

2.2.2 Active protection

The principle of active protection is strongly linked with partnership. We quote from *Ngā Mātāpono* the following explication of active protection:

6. Waitangi Tribunal, *Ngā Mātāpono*, p 76
7. Waitangi Tribunal, *The Oranga Tamariki* (*Section 7AA*) *Urgent Inquiry 10 May 2024 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), pp 29–30
8. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report* (Wellington: Waitangi Tribunal, 2023), p 52
9. Waitangi Tribunal, *Ngā Mātāpono*, p 64

The principle of active protection, which is sometimes referred to as a duty, has been described in many court decisions and Tribunal reports. The Te Tau Ihu Tribunal (2008) stated that the Crown's 'duty to protect Maori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity'. The Te Raki stage 2 Tribunal also noted the references to royal protection in the Treaty and in Lord Normanby's 1839 instructions to Captain Hobson, stating that protection of Māori interests was a 'duty the British imposed on themselves, as they embarked on the annexation and colonisation of New Zealand'. In the *Lands* case, the Court of Appeal found the Crown's obligations were 'analogous to fiduciary duties' and were 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.

Active (rather than passive) protection 'requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected'. Otherwise, active protection can have 'paternalistic implications', reflecting the power imbalance between the Treaty/te Tiriti partners. Further, active protection applies to 'all interests guaranteed to Māori under the treaty and extends to intangible properties'. It applies across all statutory regimes and fields of Crown policy today, whether it be monitoring local government policies and practices, or active protection of tino rangatiratanga over kāinga in child protection services.[10]

In our stage 2 report, we noted the findings of the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993), that, 'of all the taonga whose protection is guaranteed under article 2 of the Treaty, "natural and cultural resources are of primary importance"'.[11] This means Māori must not be 'unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences'.[12] Our stage 2 report also noted the findings of the Foreshore and Seabed Tribunal:

> The foreshore and seabed were and are taonga for many hapū and iwi . . . The Crown's duty under the Treaty, therefore, was actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants' relationship with their taonga; in other words, te tino rangatiratanga.[13]

In *The Report on the Management of the Petroleum Resource* (2011), the Tribunal addressed the principle of active protection in situations where natural resources

10. Ibid, p 77
11. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report*, p 13
12. Ibid, p 13; Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: GP Publications, 1993) p 31
13. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report*, p 14

were subject to complex bodies of law and involved a range of interests. We cited their comments in our stage 2 report, and repeat them here:

> How is the protection of Māori interests to the fullest extent practicable to be achieved? Our answer is that, in an area of law as complex as petroleum resource management – where a number of important interests are involved, including Māori interests – the only way that the Crown can guarantee Treaty-compliant outcomes is by ensuring that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made.[14]

The principle of active protection is particularly relevant to this stage of the inquiry, in which the Crown is seeking to tighten the test to recognise Māori property rights in te takutai moana, as article 2 of the Treaty places a duty on the Crown to protect these rights.

2.2.3 Tino rangatiratanga

The principle of rangatiratanga, which stems from the guarantee in the text of article 2 of Te Tiriti, is significant to this urgent inquiry. As the Tribunal noted in *Ngā Mātāpono*, summarising earlier jurisprudence:

> Tino rangatiratanga is the mana or full chiefly authority over properties and people within a particular kinship group, all that is treasured, and access to resources. It involves pre-existing sovereign authority, expressed as self-government and autonomy and 'extends to matters both tangible and intangible that [Māori] value'. Rangatiratanga limits the Crown's right to govern and is itself limited by obligations to manage rights between hapū and with neighbouring iwi, obligations of kaitiakitanga, and obligations as partners to the Treaty/te Tiriti. The Te Raki stage 2 Tribunal (2023) observed:
>
> > The Tribunal has long emphasised that the treaty guaranteed the rights of Māori to exercise their tino rangatiratanga (full authority) over their lands, their villages, and all their taonga, and in each inquiry has assessed Crown actions and omissions in light of this principle of tino rangatiratanga.
>
> The Te Rohe Pōtae Tribunal (2023) explained further:
>
> > Our conclusion is that the Treaty guaranteed to Māori their tino rangatiratanga. This was a guarantee that Māori would be able to continue to exercise full authority over lands, homes, and all matters of importance to them. This, at a minimum, was the right to self-determination and autonomy or self-government in respect of their lands, forests, fisheries, and other taonga for so long as they wished to retain them. That authority or self-government included the right to

14. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p150

> work through their own institutions of governance, and apply their own tikanga or system of custom and laws.[15]

Balancing the interests of Māori and non-Māori is an important aspect of the principle of tino rangatiratanga that the Crown must consider to meet its Treaty obligations. In *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (2023), we found:

> Balancing the interests of Māori and non-Māori in a fair and reasonable manner is particularly relevant to this inquiry. Importantly, in addition to being fair and reasonable, any such balancing exercise must also be principled. It cannot be arbitrary, particularly where the balancing exercise has the effect of restricting or impacting Māori rights.[16]

In *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (2017), the Tribunal found that 'the Crown's right of kāwanatanga is not an unfettered authority'. The Tribunal found that '[t]he guarantee of rangatiratanga requires the Crown to acknowledge Māori control over their tikanga, and to manage their own affairs in a way that aligns with their customs and values'.[17] Similarly, the Te Rohe Pōtae Tribunal found in 2018 that kāwanatanga did not give the Crown 'supreme and unfettered power', but 'a power that was conditioned or qualified by the rights reserved to Māori'.[18]

The principle of tino rangatiratanga is self-evidently relevant to this inquiry, concerning as it does customary property rights guaranteed by article 2 of the Treaty and which applicants for CMT attest have never been extinguished.

2.2.4 Good government

A key focus of this inquiry is whether the Crown's proposed reforms are a legitimate and transparent exercise of its kāwanatanga powers afforded under article 1 of the Treaty. We quote and adopt the *Ngā Mātāpono* Tribunal's analysis of the principle of good government here:

> The Treaty/te Tiriti principle of good government or 'good governance' applies to the Crown's exercise of kāwanatanga when proposing legislation that affects Māori interests. Deriving from article 3 of the Treaty/te Tiriti, this principle 'requires the Crown to keep its own laws' and 'holds the Crown wholly responsible for complying with its own laws, rules and standards'. The Whanganui Land Tribunal (2015) has observed that the Crown's actions cannot be truly consistent with good government

15. Waitangi Tribunal, *Ngā Mātāpono*, p 70
16. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report*, p 10
17. Waitangi Tribunal, *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wellington: Legislation Direct, 2017), p 21
18. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, 6 vols (Wellington: Legislation Direct, 2023), vol 1, p 196

unless they are also just and fair. The Tribunal stated that the 'language and spirit of the Treaty were imbued with the ideas of justice and fairness', as seen in the words of the Treaty's preamble:

> Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, . . . Her Majesty Victoria . . . regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order . . .

The Tribunal in its *Ko Aotearoa Tēnei* or Wai 262 report (2011) commented on the Crown's obligations in respect of its te reo Māori policies in this way:

> The Crown was granted kāwanatanga in article 1 of the Treaty. This is generally translated in the case law as the right to govern. It is unarguable that the right to govern should be exercised wisely so as to produce well-designed policy which is implemented efficiently to minimise the cost to the taxpayer. That is an obligation owed by every government in the world, whatever the source of its right to govern. But here there is a greater dimension: a taonga of the utmost importance is at issue. In this Treaty context, the State owes Māori two kāwanatanga duties: transparent policies forged in the partnership to which we have referred; and implementation programmes that are focused and highly functional. Te reo Māori deserves the best policies and programmes the Crown can devise.[19]

In the context of the Treaty Principles Bill and the Treaty clause review, we consider the principle of good government applies relying in particular on the statements quoted above from the Wai 262 Tribunal. That is because if the Crown's policies impact on the constitutional status of the Treaty/te Tiriti, as these two policies do, it must produce robust well-designed transparent policy forged in partnership. The constitutional status of the Treaty/te Tiriti should not be undermined by poorly designed, unjustifiable policies as that would be inconsistent with the principle of good government.[20]

19. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 163

20. Waitangi Tribunal, *Ngā Mātāpono*, p 74

CHAPTER 3

WHAT PROCESS HAS THE COALITION GOVERNMENT FOLLOWED IN SEEKING TO AMEND THE TAKUTAI MOANA ACT?

3.1 Introduction

This chapter details the policy process the coalition government followed seeking to amend the Takutai Moana Act. We also provide important contextual background by reproducing relevant sections of the Act and a summary of our stage 1 and 2 reports in the Wai 2660 inquiry. We then discuss the origins of the coalition government's decision to amend the Act, including an overview of the precipitating *Re Edwards* decisions in the High Court and the Court of Appeal. We next set out key developments: from when Te Arawhiti first advised Minister Goldsmith regarding the amendments promised in the National-New Zealand First coalition agreement, to the drafting of the Cabinet paper submitted to Cabinet on 8 July 2024. Lastly, we discuss the Minister's announcement of the policy and the commencement of engagement with Māori on 25 July 2024.

3.2 Background

At the outset of this contextual section, we reproduce the key parts of the Act the coalition government is proposing to amend and discuss our relevant stage 1 and 2 findings from the Wai 2660 inquiry.

3.2.1 The Marine and Coastal Area (Takutai Moana) Act 2011

The political circumstances surrounding the repeal of the Foreshore and Seabed Act 2004 and its replacement with the Takutai Moana Act are set out in *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (2020).[1] Due to the urgent nature of this inquiry, we do not repeat them here. However, we note as relevant to this stage of the present inquiry that section 58 of the Act sets out a statutory test for the determination of CMT applications. We reproduce that section of the Act in full:

1. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report*, p 5

58 Customary marine title

(1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—
  (a) holds the specified area in accordance with tikanga; and
  (b) has, in relation to the specified area,—
    (i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
    (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

(2) For the purpose of subsection (1)?(b), there is no substantial interruption to the exclusive use and occupation of a specified area of the common marine and coastal area if, in relation to that area, a resource consent for an activity to be carried out wholly or partly in that area is granted at any time between—
  (a) the commencement of this Act; and
  (b) the effective date.

(3) For the purposes of subsection (1)?(b)?(ii), a transfer is a customary transfer if—
  (a) a customary interest in a specified area of the common marine and coastal area was transferred—
    (i) between or among members of the applicant group; or
    (ii) to the applicant group or some of its members from a group or some members of a group who were not part of the applicant group; and
  (b) the transfer was in accordance with tikanga; and
  (c) the group or members of the group making the transfer—
    (i) held the specified area in accordance with tikanga; and
    (ii) had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and
  (d) the group or some members of the group to whom the transfer was made have—
    (i) held the specified area in accordance with tikanga; and
    (ii) exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.

(4) Without limiting subsection (2), customary marine title does not exist if that title is extinguished as a matter of law.

Also relevant to this inquiry is section 106 of the Act, which establishes the burden of proof in the section 58 test. We reproduce that section in full here:

106 Burden of proof

(1) In the case of an application for recognition of protected customary rights in a specified area of the common marine and coastal area, the applicant group must prove that the protected customary right—
  (a) has been exercised in the specified area; and
  (b) continues to be exercised by that group in the same area in accordance with tikanga.

(2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the specified area—
  (a) is held in accordance with tikanga; and
  (b) has been used and occupied by the applicant group, either—
    (i) from 1840 to the present day; or
    (ii) from the time of a customary transfer to the present day.

(3) In the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

In order to achieve its coalition agreement commitment, the Government also seeks to amend the Act's Preamble, Purpose (section 4), and Treaty of Waitangi provision (section 7). We reproduce these sections of the Act in full here. The Preamble states:

(1) In June 2003, the Court of Appeal held in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 that the Māori Land Court had jurisdiction to determine claims of customary ownership to areas of the foreshore and seabed. The Foreshore and Seabed Act 2004 (the 2004 Act) was enacted partly in response to the Court of Appeal's decision:

(2) In its *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071), the Waitangi Tribunal found the policy underpinning the 2004 Act in breach of the Treaty of Waitangi. The Tribunal raised questions as to whether the policy complied with the rule of law and the principles of fairness and non-discrimination against a particular group of people. Criticism was voiced against the discriminatory effect of the 2004 Act on whānau, hapū, and iwi by the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Special Rapporteur:

(3) In 2009, a Ministerial Review Panel was set up to provide independent advice on the 2004 Act. It, too, viewed the Act as severely discriminatory against whānau, hapū, and iwi. The Panel proposed the repeal of the 2004 Act and engagement with Māori and the public about their interests in the foreshore and seabed, recommending that new legislation be enacted to reflect the Treaty of Waitangi and to recognise and provide for the interests of whānau, hapū, and iwi and for public interests in the foreshore and seabed:

(4) This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations:

Section 4 provides:

> **4 Purpose**
> (1) The purpose of this Act is to—
> (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).
> (2) To that end, this Act—
> (a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and
> (b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and
> (c) gives legal expression to customary interests; and
> (d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and
> (e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—
> (i) for its intrinsic worth; and
> (ii) for the benefit, use, and enjoyment of the public of New Zealand.

Section 7 provides:

> **7 Treaty of Waitangi (te Tiriti o Waitangi)**
> In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—
> (a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and
> (b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and
> (c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

3.2.2 The Marine and Coastal Area (Takutai Moana) Act 2011 inquiry stage 1 and 2 reports

In August 2017, a Waitangi Tribunal inquiry into marine and coastal area claims commenced. We chose to stage our inquiry, with stage 1 considering claims related to the Act's procedural and resourcing arrangements. We found in our stage 1 report, released in June 2020, that the Crown breached the Treaty and caused prejudice to Māori in a variety of ways. These included failing to provide adequate and timely information or funding, failing to establish coherent or fair policies,

processes, and procedures, and declining to engage with applications involving overlapping claims.[2]

In *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report*, released in October 2023, we assessed whether the Act and its accompanying regime adequately recognised and protected Māori customary rights in te takutai moana in accordance with the Treaty.[3] We found that 'the requirement to hold a specified area of the common marine and coastal area "without substantial interruption", as a part of the test for customary marine title under section 58 of the Takutai Moana Act, is in breach of the Treaty principles of partnership and active protection'.[4] However, we did not find the test breached the principles of equal treatment or whanaungatanga.[5] An interim recommendation was made for the Crown to amend the Act 'by removing the words "without substantial interruption" from section 58(1)(b)(i)'. Such an amendment 'would need to be accompanied by transitional provisions to ensure that any applicants whose applications for customary marine title have been denied on the grounds of a substantial interruption can re-submit their applications'.[6] We explained our reasoning for making only an interim recommendation:

> As we have mentioned above, the *Re Edwards (Te Whakatōhea No 2)* judgement is currently under appeal. The test for customary marine title is an issue of primary importance in this inquiry. Although the test has been interpreted and applied by the High Court, the test itself was formulated by the Crown. Our role is to determine whether the test, as formulated by the Crown, is consistent with Treaty principles. We do not take issue with the High Court's decision, nor would we take issue with the Court of Appeal's decision (nor the Supreme Court's) on appeal. The Courts are simply fulfilling their judicial function. However, the outcome of the appeal could mean that our findings and recommendations on the test are no longer relevant. Therefore, we make only interim findings and recommendations in relation to the customary marine title test at this point. We grant leave for the parties to seek a final finding and recommendation (if necessary) once all appeal rights (including possible appeals to the Supreme Court) have been exhausted.[7]

We discuss the *Re Edwards* case further in section 3.3.1.

We agreed with the claimants that section 106 was 'confusing' because the provision 'gives the impression that applicant groups do not have to prove that their use and occupation is "exclusive" or "without substantial interruption"'. However, the

2. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report*, pp 129–134
3. Ibid, pp 12–13; Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2023), pp 1–2
4. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report*, p 100
5. Ibid, p 102
6. Ibid
7. Ibid, pp 102–103

High Court found that 'exclusively' and 'without substantial interruption' are positive elements of section 58 that must be proven by the applicants.[8] Accordingly, the Tribunal commented:

> If the Crown follows our recommendation, the element of 'without substantial interruption' will no longer be a positive element of the test, and no burden would lie on the applicants in that regard. This will also bring the positive elements of the test in section 58 in line with the burden of proof set out in section 106, a level of consistency that all legislation should strive to achieve, particularly when dealing with customary Māori interests.[9]

Regarding the issue of proving *exclusive* use and occupation, we found that the burden of proof provision did not breach the Treaty principle of good government. This was because applicant groups must demonstrate that they hold an area in accordance with tikanga, and as the High Court found in 2021 (see section 3.3.1), tikanga allows for 'shared exclusivity'.[10] As such, we found that '[w]here use and occupation of the area has been shared with other applicant groups, this will naturally form part of the evidence and the relevant tikanga that applies'.[11]

We also commented on other relevant aspects of the Act, noting, for example, its 'puzzling use of te reo Māori terms and concepts', such as the Preamble's mention of the principle of manaakitanga. 'While manaakitanga is no doubt an important part of tikanga', we observed, 'so are tino rangatiratanga, mana whenua, mana moana, and kaitiakitanga . . . There is no obvious reason the Crown chose to refer to one tikanga principle here and not to others'.[12] Elsewhere in the report, despite finding the wording of the Act's Treaty clause (section 7) is not as clear as it could be, we did not find it to breach any Treaty principles.[13]

3.3 The Origins of the Decision to Amend the Takutai Moana Act

In this section, we discuss the origins of the decision to amend the Takutai Moana Act, including providing an overview of the *Re Edwards* decisions in the High Court and Court of Appeal, and the formation of the policy after the November 2023 general election.

8. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report*, p 107
9. Ibid
10. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025 (7 May 2021) at 168; Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report*, p 108
11. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report*, p 108
12. Ibid, p 79
13. Ibid, p 64

3.3.1 High Court and Court of Appeal decisions *Re Edwards* and the Attorney-General's Supreme Court appeal

On 7 May 2021, Justice Churchman of the High Court issued his judgment in *Re Edwards (Te Whakatōhea No 2)*, awarding CMT and protected customary rights (PCR) to a range of applicant groups in the Bay of Plenty. It was the first case to address the issue of competing applications for CMT over the same area, and the decision had implications for some 200 other applications already before the High Court.[14] Justice Churchman relied on two pūkenga experts to help identify which hapū held the area in accordance with tikanga and he rejected the idea that hapū needed to demonstrate that they controlled an area in order to meet the test for exclusive use and occupation. He accepted that the tikanga element of the test (section 58(1)(a)) allowed for 'shared exclusivity' in the second part of the test (section 58(1)(b)(i)). Two groups within Te Whakatōhea appealed the decision, disagreeing over who should hold CMT of the area.[15] As mentioned in section 1.1, on 18 October 2023, the Court of Appeal released its decision in *Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors*, effectively removing what the court saw as an unfairly onerous barrier to claimant groups receiving CMT. The case divided the bench, with Justice Miller dissenting from the majority decision of Justices Cooper and Goddard as to the interpretation of section 58.[16]

In their judgment on that issue, Justices Cooper and Goddard said they found it 'exceptionally difficult' to reconcile section 58 (the test for CMT) with section 4 (the purpose) of the Act. They wrote that under a literal reading of section 58, an applicant group 'must have exclusively used and occupied the area from 1840 to the present day'. In their view, if such a literal reading applied, 'it seems likely there would be few areas of the foreshore or seabed where CMT could be made out'. The Act 'would in many cases extinguish [customary] interests by a side wind, by setting a threshold for recognition of CMT that could not be met'. Significantly, they stated that such an outcome 'would be inconsistent with the Treaty/te Tiriti'.[17]

Ultimately, Justices Cooper and Goddard found that the test for CMT under section 58 should be interpreted in light of three considerations:

- whether an applicant group holds the specified area 'in accordance with tikanga'.[18]

14. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025 (7 May 2021); see also Fiona Wu, 'First Substantive Appeal of Marine and Coastal Area Act Decisions Clarifies Legal Principles', 3 November 2023, The Law Association, https://thelawassociation.nz/first-substantive-appeal-of-marine-and-coastal-area-act-decision-clarifies-legal-principles, accessed 14 August 2024

15. Wu, 'First Substantive Appeal'

16. *Whakatōhea Kotahitanga Waka* (*Edwards*) *& Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2003] NZCA 504 (18 October 2023); see also Wu, 'First Substantive Appeal'

17. *Whakatōhea Kotahitanga Waka* (*Edwards*) *& Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2003] NZCA 504 (18 October 2023), Cooper and Goddard JJ at 416

18. Ibid at 406–407

- whether an applicant group (or its tikanga predecessors) used and occupied the area in 1840, prior to the proclamation of British sovereignty, and had sufficient authority to exclude other groups.[19]
- whether use and occupation post-1840 was interrupted as a matter of tikanga, or because of lawful activities.[20]

The justices stated that if an area was used by two groups, 'the appropriate conclusion may well be that the two groups together meet the test, or that some broader group that includes the two applicant groups meets that test'.[21] They added:

> The requirement that a group must have exclusively used and occupied the area from the proclamation of British sovereignty to the present day, without substantial interruption, needs to be approached having regard to the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga, and having regard to the scheme and purpose of MACA.[22]

By reading the Act 'in a manner that is sensitive to the materially different legal frameworks that applied before proclamation of sovereignty in 1840, and from proclamation of British sovereignty onwards', they stated that 'it is possible to interpret the text of s 58 in a manner that is consistent with the purpose of MACA'.[23]

In his dissent, Justice Miller wrote that '[t]he majority approach makes the s 58 test very much easier to meet'. This was despite the fact 'no applicant group contended for it', nor was it 'an available reading of the legislation'. In his opinion, 'the statutory language and the legislative history make clear that exclusive use and occupation must subsist in fact from 1840 to the present day'.[24] He added that, when read alongside the Preamble and section 7, 'the purpose statement [section 4] tells us that Parliament has taken account of the Treaty by establishing a durable scheme which recognises and promotes the exercise of customary interests while reconciling them with other lawful rights and uses'. It was the court's 'carefully circumscribed task . . . to implement that scheme'.[25]

3.3.2 The Attorney-General appeals *Re Edwards*

The Attorney-General did not appeal the High Court's 2021 *Re Edwards* decision. However, on 16 November 2023, before National and New Zealand First finalised their coalition agreement, the Attorney-General initiated the legal process for appealing the *Re Edwards* decision. On 14 December 2023, the Attorney-General made submissions seeking leave to appeal *Re Edwards* to the Supreme Court. The Attorney-General stated that Cooper and Goddard 'erred in law' in their

19. *Whakatōhea Kotahitanga Waka* (*Edwards*) *& Ors v Te Kāhui and Whakatōhea Māori Trust Board & Ors* [2003] NZCA 504 (18 October 2023), Cooper and Goddard JJ at 419–421
20. Ibid, Cooper and Goddard JJ at 428
21. Ibid, Cooper and Goddard JJ at 425
22. Ibid, Cooper and Goddard JJ at 426
23. Ibid, Cooper and Goddard JJ at 418
24. Ibid, Miller J at 188
25. Ibid, Miller J at 190

conclusion that section 58(1) 'does not require an applicant group to demonstrate exclusivity from 1840 to the present'. The Attorney-General added that the Act 'clearly and unambiguously' states this requirement. In their opinion, the Court of Appeal's interpretation 'ignores that requirement' and 'is not an available reading' of the Act.[26] Such a reading leaves the 'requirement of *exclusive* use and occupation *from 1840 to the present day* with no work to do'.[27] The Attorney-General stated that Miller 'correctly concluded that the concept of exclusive use and occupation requires both an externally-manifested intention to control the area as against others and the capacity to do so'.[28]

The Attorney-General's appeal, and further appeals from applicant groups, are scheduled to be heard by the Supreme Court in November 2024.[29]

3.3.3 The National–New Zealand First coalition agreement

Following the general election and the Court of Appeal decision in October, neither National nor New Zealand First members appear to have made any substantial public statements about the section 58 test in the Act prior to the release of the coalition agreement on 24 November 2023. As noted in section 1.1, however, the coalition agreement between National and New Zealand First confirmed the latter's position towards the Act by including a commitment to:

> Amend section 58 of the Marine and Coastal Area Act to make clear Parliament's original intent, in light of the judgment of the Court of Appeal in *Whakatohea Kotahitanga Waka (Edwards) & Ors v Te Kahui and Whakatohea Maori Trust Board & Ors* [2023] NZCA 504.[30]

This commitment was part of a range of policies listed under the theme of 'Equal Citizenship'. The agreement stated that the coalition government 'will not advance policies that seek to ascribe different rights and responsibilities to New Zealanders on the basis of their race or ancestry'.[31]

3.4 Policy Development Process

This section details the policy development process the coalition government followed in seeking to amend the Takutai Moana Act. We begin by canvassing

26. 'Te Arawhiti – Marine and Coastal Area (Takutai Moana) Act 2011: Initial Advice on the Review of Section 58', 21 December 2023 (TA 003.0006), p 10 (doc A52, p 10)
27. Ibid p 12 (p 12)
28. Ibid, p 11 (p 11)
29. Audrey Young, 'Foreshore and Seabed: What the Planned Changes to the Law Mean and Why', *New Zealand Herald*, 23 August 2024, https://www.nzherald.co.nz/nz/politics/foreshore-and-seabed-what-the-planned-changes-to-the-law-mean-and-why-audrey-young/I3S2AOTD2ZBBXIE7D5ICYRVWHY, accessed 23 August 2024
30. New Zealand National Party and New Zealand First, Coalition Agreement, 24 November 2023, p 10
31. Ibid

the initial advice Te Arawhiti officials provided Minister Goldsmith following the formation of the coalition government and then detail the development of the Cabinet paper that was ultimately approved by Cabinet on 8 July 2024. We also address the Minister's announcement of the policy and his invitation to CMT applicants to take part in a 2–3 week engagement process on 25 July 2024.

3.4.1 Initial advice

(1) *Te Arawhiti's first advice to Minister Goldsmith*

On 21 December 2023, Te Arawhiti sent a briefing paper to Minister Goldsmith with initial advice on the Government's commitment to amend section 58 to 'make clear Parliament's original intent'. The briefing paper provided a short history of the Act's development and confirmed that Te Arawhiti would review official records to identify 'the appropriate options that will achieve that original intent'.[32] However, the briefing paper also included a 6 September 2010 press release from then Attorney-General Christopher Finlayson to demonstrate his view of the original intent. Finlayson wrote:

> One of the key objectives of the legislation is to give Māori the opportunity to argue their case for customary marine title before the courts or in negotiation with the government. For that reason, it is inappropriate to second-guess what a court or negotiations process might decide.[33]

However, Minister Goldsmith underlined parts of Finlayson's press release, such as 'the tests for customary marine title are strong ones' and the requirement that 'the group seeking title has had exclusive use and occupation of the area . . . from 1840 until the present without substantial interruption', and wrote a marginal comment saying 'the intent is clear'.[34]

The briefing paper stated that the majority Court of Appeal decision by Justices Cooper and Goddard had ignored the section 58 requirement for applicant groups to have exclusively used and occupied an area from 1840 because they considered 'a literal interpretation of "exclusive use, 'would be inconsistent with the Treaty of Waitangi and the Act's purposes'.[35] The briefing paper also acknowledged that timing of a possible Supreme Court appeal would 'be a factor in assessing options for the legislative amendment to section 58'. However, while the Supreme Court had not yet decided whether it would hear the case, Te Arawhiti advised that the Attorney-General's appeal (see section 3.3.2) did not limit the Minister from making decisions to amend the Act, but noted that 'it does add complexity'. Te Arawhiti acknowledged the Minister's preference was 'to progress the amendment and not to wait for a potential Supreme Court judgement'.[36]

32. 'Te Arawhiti – Marine and Coastal Area (Takutai Moana) Act 2011: Initial Advice on the Review of Section 58', 21 December 2023 (TA.003.0005), p 2 (doc A52, p 2)
33. Ibid, p 3 (p 3)
34. Ibid
35. Ibid
36. Ibid

The briefing paper informed the Minister of Te Arawhiti's intention to identify options to amend section 58, but that they all came with challenges '[g]iven the nature and complexity of the Act'.[37] This complexity meant any amendments carried 'risks and implications' the Minister would need to consider, including 'causing a futher tension in the Māori Crown relationship'.[38] Engagement with Māori, especially applicant groups, was 'crucial to mitigating damage to the Māori Crown relationship'. Engagement would be needed 'on the policy and legislative process, as well as communicating the impacts on groups with current applications'.[39] The briefing paper stated that more detailed advice and options to amend the Act would be provided by late January 2024, which among other things would include a 'fuller understanding' of Parliament's original intent, an analysis and risk assessment of options to amend section 58, and a Treaty analysis on the progression of legislation with a proposed engagement plan for consultation.[40] Minister Goldsmith acknowledged receipt of this advice on 9 January 2024.[41]

(2) *Minister Goldsmith's meeting with Te Arawhiti*

On 30 January 2024, Minister Goldsmith met with Te Arawhiti to discuss the proposed amendments.[42] To guide the meeting, officials presented the Minister with a summary document that summarised Parliament's original intent, based on their review of the historical record.[43] The summary document stated that the Takutai Moana Act 'restored any customary interests' extinguished by the Foreshore and Seabed Act 2004 'and enables legal expression to be given to those interests'. The Act also 'sought to balance the range of interests in the marine and coastal area – including customary, commerical and recreational' by providing 'guarantees of continued public access, fishing, and navigation'.[44] The summary document stated that records showed there were five key objectives behind section 58's original intent:

- establish a principled approach to testing customary interests – not based on predetermined outcomes;
- address some criticisms of the 2004 Act's test (e.g. the requirement for ownership of abutting land, incorporating tikanga etc);
- draw from international common law and New Zealand's legal heritage;
- create an exacting standard ('exclusive use and occupation') that aligns with the proprietary nature of customary title; and

37. Ibid, p 4 (p 4)
38. Ibid
39. Ibid, p 5 (p 5)
40. Ibid, p 6 (p 6)
41. Ibid, p 7 (p 7)
42. Lil Anderson to Paul Goldsmith, 29 February 2024 (TA.003.0032), p 1 (doc A52, p 15)
43. Tui Marsh explained at hearing that a review of the historical record, *Hansard* and so forth, formed the basis of Te Arawhiti's understanding of Parliament's 'original intent'.
44. 'Section 58 – Preliminary Options and Process', 30 January 2024 (TA.003.0323) (doc A52, p 530)

- provide recognition of unrecognised (extant) property rights – rather than address historical grievances.[45]

Under the heading 'What is the problem we are trying to solve?', the summary document stated that the Court of Appeal 'did not interpret s 58 consistent with Parliament's original intent'. It noted that the Court of Appeal 'reached this interpretation by focusing on the Act's purpose and Treaty provision, rather than the literal text of s 58'. Under the heading 'What is the objective of any amendment?', the summary document read: 'To restore the exacting nature of the s 58 test as Parliament intended it'. It listed three key points to achieve this:

- overturn the CoA's interpretation of s 58;
- clarify that exclusivity must be demonstrated at 1840 and *from 1840 to the present day*;
- clarify that activities need not be authorised by legislation to amount to a substantial interruption. [Emphasis in original.][46]

The summary document provided two options to achieve this objective. The first was to include a declaratory statement 'that the purpose of the amendment is to overturn the majority's interpretation of s 58 in *Re Edwards*'. The second was to insert definitions of key terms 'to explain the concepts of exclusive use and occupation and substantial interruption consistent with Parliament's original intent'.[47] Other key considerations were identified, although the advice concerning the impact on the Māori–Crown relationship and consultation with Māori was redacted as being subject to legal privilege.

However, the advice concerning retrospectively applying the proposed amendments was not redacted. It stated that 'there is a general presumption against legislation with retrospective effect'.[48] When considering the implications for active applications, the summary document simply stated that there were 'four High Court hearings scheduled this year and several judgments from previous cases expected to be issued'.[49] When considering engagement with Māori, much of the advice was also redacted as being subject to legal privilege, but the unredacted advice read: 'A full discussion with Māori is appropriate given the significance of the rights under discussion. During any engagement process the government must demonstrate an openness to changing its proposals in light of the feedback'.[50] The summary document provided three options for consultation, depending on how quickly the Minister sought to move on the proposed amendments: 4 weeks

45. 'Section 58 – Preliminary Options and Process', 30 January 2024 (TA.003.0323) (doc A52, p 530)
46. Ibid
47. Ibid
48. Ibid
49. Ibid
50. Ibid (p 529)

of targeted consultation, 6–8 weeks of broader consultation, or 3 months of full consultation.[51]

At the meeting, Minister Goldsmith directed officials to draft letters on his behalf to relevant Cabinet members seeking their feedback on his approach to progressing the Government's coalition commitment. He also sought further advice by late April on the proposed amendment options and a consultation strategy.[52]

(3) ***Further advice from Te Arawhiti***

On 29 February 2024, Te Arawhiti provided Minister Goldsmith with an aide memoire that included draft letters for Prime Minister Christopher Luxon, Deputy Prime Minister Winston Peters, Associate Justice Minister David Seymour, and Minister for Māori Crown Relations: Te Arawhiti Tama Potaka. The draft letters, which were not ultimately sent, noted that '[b]ased on the policy intent at the time the Act was passed, the Court of Appeal's reading departed from Parliament's original intent'. Accordingly, 'I have tasked Te Arawhiti officials to work with the Crown Law Office, Ministry of Justice, and Parliamentary Counsel Office to develop options for amending section 58 of the Act to clarify Parliament's original intent'. The draft letters stated that Minister Goldsmith sought 'decisions from Cabinet in late May/early June on the proposed amendments, the engagement strategy, and timeframes for progressing a bill to Parliament'. The draft letters also noted the Minister's intention to introduce the amendment Bill by the end of 2024.[53]

Attached in the aide memoire was another summary document produced by Te Arawhiti. Under the title 'What is the problem we are trying to solve?', the summary document read that the Court of Appeal reached its decision 'by focusing on the Act's purpose and Treaty provision, rather than the literal text of s 58'. Here, Minister Goldsmith wrote a marginal comment: 'This has led to real possibility that most of coastline [illegible] fall into customary ownership + hugely expensive process to determine overlapping claims + real conseq[uences] for expectation of NZers to have equal say in what happens on coast'.[54]

On 14 March 2024, Te Arawhiti sent Minister Goldsmith another briefing paper. The paper provided a further overview of Parliament's 'original intent' regarding section 58. It stated the legislation sought 'to establish a regime that balanced the interests of all New Zealanders in the marine and coastal area, noting that these interests were interconnected and overlapping'. These interests included recreation, conservation, customary, business and development, and those of local government. As such, they were 'specifically referred to in the Act's Preamble and

51. Ibid

52. Tui Marsh, brief of evidence (doc A48), pp 15–16

53. 'Te Arawhiti to Hon Paul Goldsmith re *"Letters to the Prime Minister and Ministerial Colleagues Seeking Feedback on the Proposed Approach to Amend Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011"*, 29 February 2024 (TA.003.0036) (doc A52, p 19)

54. Ibid (p 27)

Purpose provision as being recognised and protected'.[55] The briefing paper stated that the balancing of interests 'was intentional on part of the legislature' and that the Act aimed to create 'a practical regime for the management of the marine and coastal area, taking into account public and Māori interests'. The test for CMT 'is inherently linked to this balancing of rights', the briefing paper said, adding that 'Parliament was aware of the stringency of the test and this informed which rights would be part of CMT, and which would not'.[56] The briefing paper quoted the then Minister and Māori Party co-leader Tariana Turia who said at the initial Bill's First Reading:

> The Marine and Coastal Area (Takutai Moana) Bill creates a new regime that recognises and provides for the legitimate association of w[h]ānau, hapū, and iwi with the common marine coastal area while ensuring that the interest and rights of all other New Zealanders in this area are also recognised and protected. The preamble acknowledges the intrinsic inherited rights of w[h]ānau, hapū, and iwi derived in accordance with tikanga and based on their connection with the foreshore and seabed . . . In most respects it will formalise existing practise.[57]

The briefing paper then discussed the impact of the Court of Appeal's *Re Edwards* decision. Te Arawhiti wrote that 'our expectation is that the less stringent interpretation of the test arising from *Edwards* may result in CMT being recognised over more of the coastal and marine area than under the previous interpretation'.[58] The briefing paper then noted:

> There is concern that the potential implications of recognition of CMT over a larger amount of the marine and coastal area than previously anticipated, will have an impact on New Zealanders' expectation of having equal say over the management and use of the coastline as originally intended by the Act.[59]

Te Arawhiti noted that, while 'the rights conferred by CMT are generally constrained and provide for the public interest', CMT does afford Māori 'greater involvement in planning and management' and 'involvement in the consenting process'.[60]

The briefing paper then provided Minister Goldsmith with three options to amend the Act:

- One targeted option is to include a declaratory statement in section 58 of the Act. This has been done previously in the Parliamentary Privilege Act 2014 to alter a

55. 'Te Arawhiti – Amending Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 14 March 2024 (TA.003.0046), p 2 (doc A52, p 29)
56. Ibid, p 4 (p 31)
57. Ibid
58. Ibid
59. Ibid, p 5 (p 32)
60. Ibid

significant judgment of the Supreme Court, relating to the definition of 'proceedings in Parliament' for the purposes of Article 9 of the Bill of Rights Act.

- Other options (which would be used in conjunction with the above) would amend the text of section 58 and surrounding sections, focusing on the addition of more explicit definitions and a clearer structuring of the sections.
- An alternative option would be to amend the preamble and purpose of the Act in order to resolve the tension perceived by the Court of Appeal between these and the section 58 test. This kind of change could impact a number of sections in the Act if not appropriately constrained to section 58.[61]

Te Arawhiti again outlined possible implications of amending the Act, once more stating the strain it could put on Māori–Crown relations. Two of the four points listed were redacted as being subject to legal privilege, but Te Arawhiti's unredacted advice stated that 'Māori are likely to see any amendment as reopening issues resolved in the 2011 Act given their concerns about the approach taken in the Foreshore and Seabed Act 2004' and that Māori may take issue with the Government seemingly ignoring the Tribunal's recommendations in its Stage 2 report that there be a less stringent test for CMT.[62] The briefing paper again highlighted the importance of engagement with Māori, 'particularly applicants', describing this as 'crucial to minimising damage to the Māori Crown relationship'.[63] Other potential implications of amending the Act that Te Arawhiti noted centred on the applications presently before the High Court, and the appeal of the *Re Edwards* decision to the Supreme Court.[64]

On 19 March 2024, Minister Goldsmith met with Ministers Peters, Potaka, Seymour, and Minister for Oceans and Fisheries Shane Jones 'to discuss the approach to the section 58 legislative amendments and other related matters'. Following this meeting, Minister Goldsmith directed Te Arawhiti to, among other things, 'complete the work on section 58 amendment options to enable legislative amendments to be enacted by the end of 2024'.[65]

On 11 April 2024, Te Arawhiti sent Minister Goldsmith a briefing paper with two options that 'together will achieve the objective of the coalition agreement to restore the exacting nature of the section 58 test as Parliament intended it'. These included inserting 'a declaratory statement that specifically overturns the Court of Appeal's judgment insofar as it interprets the test for CMT' and to 'add text to define or clarify the terms "exclusive use and occupation" and "substantial interruption"'. The briefing paper raised with the Minister whether the section 58 amendments would be applied retrospectively. The Minister returned the briefing paper on 15 April 2024, having approved the two options for amending the Act and

61. Ibid, p 6 (p 33)
62. Ibid
63. Ibid, p 7 (p 34)
64. Ibid
65. 'Te Arawhiti – Takutai Moana: Section 58 options', 11 April 2024 (TA.001.0231), p 4 (doc A52, p 59); Tui Marsh, brief of evidence (doc A48), p 20

specifying that he wanted them to be applied retrospectively.[66] In her evidence, Te Arawhiti Deputy Chief Executive Tui Marsh stated that the Minister's decisions on this briefing paper informed the first draft Cabinet paper.[67]

3.4.2 Preparation of the Cabinet paper

(1) *The first draft Cabinet paper*

On 18 April 2024, Te Arawhiti supplied the first draft Cabinet paper to Minister Goldsmith.[68] Written in the Minister's voice, the draft stated:

> I propose that section 58 of the Act be amended, with retrospective application, as soon as possible in 2024 by:
>
> 5.1 inserting a declaratory statement that specifically overturns the Court of Appeal's judgment insofar as it interprets the test for CMT; and
>
> 5.2 adding text to define or clarify the terms 'exclusive use and occupation' and 'substantial interruption.'[69]

Under 'Implications of the Court of Appeal's decision', the draft noted that the Court's 'less stringent interpretation of the test' for CMT 'will likely result in CMT being recognised over more of the coastal and marine area than under the previous precendent set by the High Court'. The Minister underlined 'precedent set by the High Court' and left a marginal comment: 'than envisaged by act'. Responding to the part that read 'more of the coastal and marine area', the Minister left a notation reading: 'in fact not hard to see NZ entire coastline.'[70]

The draft noted Minister Goldsmith's preferred options for amending the Act (as set out above). It stated that the 'insertion of a declaratory statement into a statute to reverse the effect of a court judgment . . . is not common', but cited section 3(2)(c) of the Parliamentary Privilege Act 2014 overturning a Supreme Court decision as precedent.[71]

The draft also provided the Minister's rationale for seeking to apply the amendments retrospectively:

> Maintaining the standard prospective approach would mean that all applicant groups who have had CMT awarded until the date that the section 58 test is tightened would keep the benefit of the more liberal Court interpretation in their favour; but applicant groups after that legislative date would be subject to the more restricted test.

66. 'Te Arawhiti – Takutai Moana: Section 58 options', 11 April 2024 (TA.001.0230), p 3 (doc A52, p 58)
67. Tui Marsh, brief of evidence (doc A48), p 20
68. 'Te Arawhiti to Hon Paul Goldsmith re "*Takutai Moana Draft Cabinet Paper on Clarifying Section 58 of the Marine and Coastal Area* (*Takutai Moana*) *Act* 2011"', 18 April 2024 (TA.001.0243), p 1 (doc A52, p 73)
69. 'Takutai Moana Draft Cabinet Paper on Clarifying s58 of the Marine and Coastal Area (Takutai Moana) Act 2011, 18 April 2024 (TA.001.0246), p 1 (doc A52, p 76)
70. Ibid, p 4 (p 79)
71. Ibid, p 6 (p 81)

> This would create differential treatment based, in effect, on when applicant groups' cases were scheduled for hearing and determined by the Courts. That timing is not something within their control and would be seen by applicant groups whose cases have not been heard as significantly unfair.[72]

The draft acknowledged that applying retrospectivity to the amendments would 'pose a significant reputational and relationship risk to the Crown'.[73] However, having 'differential treatment based on case scheduling' also risked damaging the Māori–Crown relationship, which was considered a 'sufficiently strong' factor 'to justify retrospective application'.[74] The draft stated:

> The doctrine of parliamentary sovereignty means Parliament has the constitutional authority to alter or reverse the effect of a court judgment. However, as the courts' role is to interpret and apply legislation and in light of the constitutional principles of the separation of powers and comity, Parliament should be asked to do this only in cases that manifestly warrant such intervention. Any legislative override of the Court of Appeal's interpretation of section 58, even if it restores what was understood to be Parliament's original intent, is likely to be strongly criticised by applicant groups as unfair and an erosion of their rights and entitlements.[75]

Furthermore, the draft noted that '[a]mendments to the legislation are likely to attract criticism, possibly akin to the controversy associated with the enactment of the 2004 Act'. In seeking to enact the amendments 'as soon as possible in 2024', the draft noted as a risk the 'limited time available to consult with applicant groups'. Authority was sought from Cabinet 'to undertake 2–3 weeks targeted engagement with applicant groups'.[76]

(2) *Expanding scope of amendments*

On 22 April 2024, Te Arawhiti officials met with Minister Goldsmith to discuss the first draft Cabinet paper.[77] At this meeting, Minister Goldsmith expressed his desire to expand the aim of the proposed amendments to respond not just to the Court of Appeal's 2023 decision, but also the High Court's 2021 decision. On 23 April 2024, the Principal Advisor at Te Arawhiti, Nicole Butler, wrote to Te Arawhiti Chief Executive Lil Anderson and Deputy Chief Executive Tui Marsh:

> The Minister indicated his concern that if we address the Court of appeal judgement, we only go part of the way on delivering on the Coalition Agreement commitments' intent. Once the CoA judgement was overturned, the interpretation of test reverts back to the High Court's interpretation. The High Court's interpretation was

72. Ibid, p 4 (p 79)
73. Ibid
74. Ibid, pp 6–7 (pp 81–82)
75. Ibid, p 7 (p 82)
76. Ibid, p 9 (p 84)
77. Nicole Butler to Lil Anderson, 23 April 2024 (TA.001.0258), p 1 (doc A52, p 88)

too liberal and went beyond Parliament's intent. He reiterated his recall of Parliament's intent — high threshold, small areas.[78]

Butler explained that the Minister sought 'a clearer understanding of how the High Court (*Re Edwards*) arrived at granting CMT' and 'options and advice on overturning the High Court decision also'.[79]

(3) *Advice from the Legislation Design and Advisory Committee*

On 30 April 2024, Te Arawhiti Chief Legal Advisor Matthew Andrews and Senior Analyst Tessa Buchanan met with the Legislation Design and Advisory Committee (LDAC) and the Parliamentary Counsel Office to discuss the Minister's proposed amendments. On 10 May 2024, LDAC provided its advice to Andrews and Buchanan, writing that the 'current legislative proposal raises significant issues of legislative design'. It provided advice on three 'inter-related' matters: policy objective, retrospectivity, and coherency of the legislative regime.[80] Regarding the first matter, LDAC wrote:

> For current purposes, the intent of parliament when enacting the Marine and Coastal Area (Takutai Moana) Act 2011 (Act) generally, and section 58 more specifically, is relevant only so far as it provides the policy rationale for the Bill. It is not a helpful articulation of the policy objective.
>
> The recent decision of the Court of Appeal sets out the law as it currently stands. The correct avenue to challenge what the law is, and what parliament's intent was, is on appeal to the Supreme Court. An appeal has been sought and granted. The Government does not wish to wait for the Supreme Court decision.[81]

Regarding the issue of retrospectivity, LDAC wrote that any legislation 'that overrides judgments given or proceedings already begun, runs against two key arguments of principle'. First, the legislation 'should generally only have prospective effect and should not interfere with accrued rights and duties, nor should it create offences retrospectively'. Secondly, the legislation 'should neither deprive individuals of their right to benefit from the judgments they obtain in proceedings brought under an earlier law, nor to continue proceedings asserting rights and duties under that law'. However, LDAC added that these principles are not absolute 'and the overarching principle is one of fairness'.[82] LDAC noted that 'some degree of retrospectivity is likely to be required to give effect to the policy objective as we

78. Nicole Butler to Lil Anderson, 23 April 2024 (TA.001.0258), p 1 (doc A52, p 88)
79. Ibid
80. 'Legislation Design and Advisory Committee advice on the Takutai Moana Bill', 10 May 2024, (TA.001.0294), p [1] (doc A52), p 49)
81. Ibid, p [2] (p 50)
82. Ibid

understand it'.[83] The remainder of LDAC's advice was redacted as being subject to legal privilege.[84]

(4) *Minister Goldsmith's meeting with Seafood Industry Representatives*

On 26 March 2024, leading Seafood Industry Representatives (SIRs) wrote to Ministers Goldsmith and Jones to express their concern about

> the absence of any defined pathway or process for non-applicant interested parties such as the Seafood industry, to participate in applications by hapu or iwi for customary marine title (CMT) under Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) using the direct negotiation pathway, in a similar manner to that which we can and have been doing with applications made using the High Court process.[85]

The SIRs added that they

> have been involved in numerous applications made under the Act since 2017. Our involvement recognises the potentially significant effects on commercial fishing rights, including restrictions on fishing and support activities, of the granting of CMT orders, or more particularly the subsequent rights provided under Subpart 3 of the Act. Our reluctant participation has sought to inform the court on the nature and extent of commercial fishing in the application area and thereby the implementation of various tests in the Act.[86]

They sought an urgent meeting with the Ministers 'to find a resolution that will enable parties with a legitimate interest in these applications to participate at appropriate stages'.[87]

On 16 May 2024, Te Arawhiti sent an aide memoire to Ministers Goldsmith and Jones in preparation for their upcoming meeting with the SIRs 'to discuss third party involvement in takutai moana applications'.[88] The meeting took place on 21 May 2024, with Te Arawhiti in attendance. The SIRs stated that the Takutai Moana Act had not prevented fishing, but said that engagement with applicants was 'resource-intensive' and also asserted 'our involvement recognises the potentially significant effects on commercial fishing rights, including restrictions on fishing

83. Ibid, p [3] (p 51)
84. Ibid, pp [3]–[6] (pp 51–54)
85. 'Te Arawhiti to Hon Paul Goldsmith re *"Meeting with Seafood Industry Representatives on Third Party Engagement on Takutai Moana Applications"*', 16 May 2024 (TA.002.0117), p 1 (doc A52, p 98)
86. Ibid, pp 1–2 (pp 98–99)
87. Ibid, p 1 (p 98)
88. Kelly Dunn to Paul Goldsmith, 16 May 2024 (TA.002.0111), p 1 (doc A52, p 92). Te Arawhiti's record of this meeting stated that 'this was the express purpose of the meeting but was barely discussed'; see 'Ministerial hui (Hon Goldsmith and Hon Jones) with Seafood industry representatives on 21 May 2024. Officials from MPI and Te Arawhiti in attendance', 22 May 2024 (TA.003.0324), p 1 (doc A52, p 105)

and support activities, of the granting of CMT orders, or more particularly the subsequent rights provided under Subpart 3 of the Act'. Furthermore, 'the Court process with multiple hearings is expensive and uncertain'. When they commented that wāhi tapu decisions were yet to be made, Minister Jones stated that 'we need to change the law re wāhi tapu areas'.[89]

The SIRs expressed concern to the Ministers about 'closures and restrictions on beach access for beach launches such as in the Wairarapa'. They noted that 'this isn't happening yet but the High Court has indicated significant CMT awards'. The SIRs added that CMT applicants 'are raising fisheries management issues in MACA hearings which isn't appropriate'.[90]

Minister Goldsmith told the SIRs that the proposed section 58 changes would 'reassert Parliamentary intention'. He recalled being told in the National caucus by Minister Finlayson in 2012 that 'the bar was very high'. He stated that a 'solution is imminent' that will 'reduce the territory'. According to Minister Goldsmith, '[u]nder the current test 100% of the coastline will be subject to CMT'.[91]

Minister Jones stated that he was not aware of the Crown engagement pathway, and described it as a form of settlement, adding 'we're under no duty to settle these claims'. He added that he 'was trying to have the RMA removed from fisheries'.[92] Minister Goldsmith told the SIRs that 'economies grow through investment' but that the Takutai Moana Act 'creates too much legal uncertainty'. He described the notion of CMT extending to 12 nautical miles as 'ridiculous' and that applicants would need 'a navy to enforce that'.[93] Minister Jones asked the SIRs if they wanted the section 58 amendments to address wāhi tapu (which he described as 'de facto marine reserves'), to which they said yes. The SIRs also expressed concern about CMT holders' right to veto resource consent. Minister Jones said he was not aware of this, but told Minister Goldsmith that this would have to change. Minister Goldsmith said the right to veto 'made sense if only 1% of the coastline was going to be subject to CMT'. He added that the amendments 'should reduce the 100% of coastline subject to CMT to 5%'.[94]

(5) *Minister Goldsmith's meeting with the Ngāti Koata Trust Board*

The day after meeting with the SIRs, Minister Goldsmith met with delegates of the Ngāti Koata Trust Board to discuss their current application for CMT for Rangitoto ki te Tonga (D'Urville Island) Area 1.[95] The discussions focused on the Ngāti Koata Trust Board application. There was a passing reference to the proposed amendments to section 58 but they were not discussed in detail.[96]

89. 'Ministerial Hui (Hon Goldsmith and Hon Jones) with Seafood Industry Representatives on 21 May 2024', 22 May 2024 (TA.003.0324), p 1 (doc A52, p 105)
90. Ibid
91. Ibid
92. Ibid, pp 1–2 (pp 105–106)
93. Ibid, p 2 (p 106)
94. Ibid, p 2 (p 106)
95. 'Ngāti Koata Hui with Minister Goldsmith', 22 May 2024 (TA.003.0621), p 1 (doc A52, p 107)
96. Ibid, pp 1–3 (pp 107–109)

(6) *The second draft Cabinet paper*

On 27 May 2024, Te Arawhiti sent further advice to Minister Goldsmith. In response to the Minister's desire to expand the scope of the amendments to address the High Court's 2021 decision (see section 3.4.2(2)), Te Arawhiti wrote:

> while the High Court's decisions prior to *Re Edwards* CA focused less on the literal wording of s58 (and more on s58 in the context of the wider Act) than the Crown might have expected, these interpretations and decisions are broadly consistent with the regime set out by Parliament. Accordingly, we do not consider legislatively setting-aside any of the High Court decisions on CMT is necessary to achieve the Coalition Agreement commitment.[97]

Nonetheless, the briefing paper added, 'it is open to you to pursue further changes to the Act beyond the Coalition commitment – eg, if you wanted to significantly raise the threshold for the award of CMT or make more fundamental changes to the marine and coastal area regime'.[98] However, it noted that 'Te Arawhiti does not consider there is sufficient justification for retrospective application of any new test'. Te Arawhiti recommended that the second draft Cabinet paper focus on 'the exisiting Court of Appeal-focused proposals'.[99]

The briefing paper sought recognition from the Minister that the High Court in *Re Edwards* 'did not interpret the Marine and Coastal Area (Takutai Moana) Act 2011 in a way that is inconsistent with Parliament's original intent' and that 'Te Arawhiti's view is that the existing proposals in the [18 April 2024] draft Cabinet paper are the most appropriate and timely way to fulfil the Coalition Agreement commitment around section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011'.[100]

Te Arawhiti noted that LDAC's advice (see section 3.4.2(3)) highlighted that legislative proposals need a 'clearly defined and discernable policy objective' distinct from 'restoring Parliament's intent'. Te Arawhiti added that, based on their understanding of the coalition agreement's commitment and from discussions with the Minister, 'the policy objective in this case is to ensure that the threshold for the award of CMT is consistent with what was intended by Parliament at the time – on the presumption that the Court of Appeal in *Re Edwards* CA made an error when it interpreted Parliament's intent in deciding that case'.[101] Significantly, the briefing paper went on:

> We understand your view of Parliament's intent is that the s58 test was intended to set a very high threshold to the recognition of CMT, resulting in relatively few and small areas under CMT.

97. 'Te Arawhiti – Further Advice on Options for Section 58 of the Marine and Coastal Area (Takutai Moana) Act', 27 May 2024 (TA.001.0368), p 2 (doc A52, p 111)
98. Ibid
99. Ibid, p 3 (p 112)
100. Ibid, p 4 (p 113)
101. Ibid, p 8 (p 117)

> While internal political discussion may have suggested a very stringent test was intended, the body of evidence from the Parliamentary record, public statements from legislators at the time, and officials and Ministers' statements to the Waitangi Tribunal during the recent Takutai Moana inquiry, indicate Parliament had a less restrictive intent.[102]

Te Arawhiti cited the advice they had received from Crown Law, which included the statements made to the Tribunal by the then Attorney-General Chris Finlayson and Benesia Smith, a lead official in the policy process leading to the Act, in the Wai 2660 inquiry. In that evidence, Finlayson said:

> The incorporation of tikanga into the tests for customary marine title and protected customary rights recognises the unique circumstances of New Zealand. We carefully considered overseas jurisdictions, particularly the Commonwealth jurisdictions of Canada and Australia, as well as New Zealand's own sources of law, before settling on a combination of tikanga and the common law for shaping the tests for customary rights and title.[103]

Crown Law's advice added to this:

> The extent of CMT was a matter for decision-makers – the High Court or the Minister responsible for the administration of the Act – to determine in light of the evidence put before them. The degree and extent of evidence required to show exclusivity in a marine area was a matter left for development in the case law.[104]

In her evidence to the Tribunal in the Wai 2660 inquiry, which was quoted to Minister Goldsmith in this advice from Te Arawhiti, Benesia Smith said:

> To my knowledge, no policy decision was made in the design of the test for customary title under the Marine and Coastal Area (Takutai Moana) Act 2011 to ensure that it would result in only 'small' and 'discrete' areas being recognised. This contrasted with the Foreshore and Seabed Act 2004 framework, where the recognition of only small and discrete areas was a policy consideration that underpinned that Act.[105]

In light of these statements from the key officials behind the Takutai Moana Act, Te Arawhiti wrote:

> The above evidence indicates that legislators' intent was not to set up a particular high barrier to the recognition of CMT, instead providing a common law-influenced

102. 'Te Arawhiti – Further Advice on Options for Section 58 of the Marine and Coastal Area (Takutai Moana) Act', 27 May 2024 (TA.001.0374), p 8 (doc A52, p 117)
103. Ibid, p 9 (p 118)
104. Ibid
105. Ibid

> test that would be applied by the High Court and Ministerial decision-makers. We note this was a marked step from the Foreshore and Seabed Act 2004 test which required applicants to have ownership of abutting coastal land to be awarded territorial customary rights — a very high threshold.[106]

Te Arawhiti stressed it did not think setting aside the High Court's decision was necessary 'in order to achieve the threshold for awards of CMT intended by Parliament, as implied by the Coalition Agreement commitment'.[107] However, Te Arawhiti reiterated that 'the interpretation of limb two by the Court of Appeal in *Re Edwards* in our view weakened the limb to the point that the evidentiary threshold for the recognition of CMT was well below that anticipated by Parliament'.[108]

On the question of retrospectivity, Te Arawhiti stated:

> Based on well-established norms and conventions around retrospectivity, and the specific Treaty-related context of the Act, Te Arawhiti does not consider that there is any reasonable justification for overturning and re-testing awarded CMT. The primary objective of this retrospective application would be to improve the consistency of CMT awards over time — assuming the test for CMT becomes stricter following the proposed changes. However, this benefit needs to be weighed against the consequences of depriving litigants of the fruits of their litigation – contrary to well-established convention.[109]

With their position clear, Te Arawhiti sought the Minister's direction. They asked him whether he wanted to focus the section 58 amendments on the Court of Appeal's judgment, if he wanted 'wider changes to the preamble, purpose, and/or Treaty of Waitangi sections to definitively limit the size and number of Customary Marine Title awards through a higher-threshold test', or if he wanted 'to pursue wider reform' of the Act. Te Arawhiti also sought direction on the extent of proposed retrospectivity of the above options.[110] Te Arawhiti again noted that 'changes to fundamental aspects of the Act are likely to be seen by Māori as an erosion of the objective and political compromise of the Act – that distinguished this Act from the original Foreshore and Seabed Act 2004'.[111] The Minister returned the briefing paper unsigned the following day.[112]

On 5 June 2024, Te Arawhiti provided Minister Goldsmith with the second draft Cabinet paper. The attached aide memoire noted that the Minister had met with officials on 27 May 2024 (hence why the briefing paper was returned unsigned the following day), and had directed them to pursue the option of including amendments to the Preamble, section 4 (purpose), and section 7 (Treaty provision) of the

106. Ibid
107. Ibid, p10 (p119)
108. Ibid
109. Ibid, p13 (p122)
110. Ibid, p5 (p114)
111. Ibid, p12 (p121)
112. Ibid, p1 (p110)

Act, as well as applying retrospectivity to the High Court decision and subsequent High Court cases that had not been appealed.[113] The draft had been revised to reflect the Minister's comments at the 27 May 2024 meeting.[114] It read:

> I propose that the Act be amended by:
>
> 8.1 inserting a declaratory statement into section 58 that specifically overturns the Court of Appeal and High Court's judgments in *Re Edwards*, and subsequent High Court judgments, insofar as they interpret the test for CMT; and
>
> 8.2 adding text to section 58 to define and clarify the terms 'exclusive use and occupation' and 'substantial interruption';
>
> 8.3 make necessary changes to the effect of the preamble, purpose, and/or Treaty of Waitangi sections of the Act to allow section 58 to operate more in line with its literal wording.
>
> I believe these amendments would give effect to the coalition commitment agreement between the National Party and the New Zealand First Party to amend section 58 of the Act to make clear Parliament's original intent.[115]

The Minister sought Cabinet's advice on the matter on retrospectivity, noting his preference for it to be applied in order to ensure 'a degree of consistency across CMT decision and reflect that the Crown considers the courts in *Re Edwards* (High Court and Court of Appeal) incorrectly interpreted the test'.[116] The draft added that the amendments were proposed 'so that CMT awards are small and discrete, as I believe was intended by Parliament — evidenced by the strict requirements of the section 58 test wording'.[117] The Minister outlined the options provided by Te Arawhiti for amending the Act, and noted his preference (as outlined above). He added that 'I recognise that these changes are likely to be controversial', causing strain to the Māori–Crown relationship and reputational risks to the Crown.[118]

With respect to resource management applications and the veto right of CMT holders, the initial final paper noted the restrictions on that right. It acknowledged that 'existing consents (including existing aquaculture activities) and a range of public-interest activities (including existing infrastructure)' are not subject to veto by CMT holders. New public-interest infrastructure could also be exempt. The Cabinet paper also noted that 'public access, navigation, and fishing are expressly preserved by the Act and are generally unaffected by CMT'.[119]

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113. 'Te Arawhiti to Hon Paul Goldsmith re *"Revised Draft Cabinet Paper on Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011"*, 5 June 2024 (TA.003.0138), p 1 (doc A52, p 172)
114. Ibid, p 2 (p 173)
115. 'Draft Cabinet Paper: *Takutai Moana: Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011*', 5 June 2024 (TA.003.0143), p 2 (doc A52, p 177)
116. Ibid, p 3 (p 178)
117. Ibid, p 6 (p 181)
118. Ibid, p 10 (p 185)
119. Ibid, p 1 (p 176)

Regarding the limited window for engagement, the Minister noted that '[o]fficials further advise that a non-standard process in the present circumstances, dealing with such important property rights as customary title to the foreshore and seabed, is likely to be inconsistent with the principles of the Treaty of Waitangi'.[120] Nonetheless, he advocated for 'the expedited timeframe' to limit 'the inconsistency of CMT awards'.[121]

Te Arawhiti did not receive any comments from other Ministers regarding the draft.[122]

3.4.3 The Cabinet paper

(1) *The initial final Cabinet paper*

On 19 June 2024, Te Arawhiti provided Minister Goldsmith with a final Cabinet paper. No comments from Ministers on the second draft Cabinet paper had been received, but Te Arawhiti had received comments from various Government departments.[123] The Ministry of Justice, for example, stated that there was a 'need to strengthen the policy rationale for the changes' and significantly that there was a 'likely impact of the proposals on social cohesion, considering the full range of current policy proposals impacting Māori rights and interests'.[124] The Department of Prime Minister and Cabinet sought clarification on the timing and number of current CMT applications, and the Parliamentary Counsel Office suggested an amendment of section 106 of the Act (burden of proof) be considered alongside the proposed section 58 amendments.[125] The comments from Crown Law and an independent review by legal scholar and constitutional expert Dr Mark Hickford were redacted as being subject to legal privilege.[126]

On 26 June 2024, the Cabinet Economic Policy Committee considered the final Cabinet paper, with a decision for Cabinet to review it further on 1 July 2024.[127] At the 1 July 2024 sitting, Cabinet directed the Minister to submit a revised version on 8 July 2024.[128] An aide memoire from Te Arawhiti on 2 July 2024 indicated that the reason for this was the production of 'an additional retrospectivity option for consideration'.[129]

(2) *The revised final Cabinet paper*

On 8 July 2024, the revised final Cabinet paper went to Cabinet. This version differed from the 1 July 2024 version in that it included an option for Cabinet

120. Ibid, p 12 (p 187)
121. Ibid, pp 12–13 (pp 187–188)
122. Tui Marsh to Paul Goldsmith, 19 June 2024 (TA.003.0188), p 1 (doc A52, p 230)
123. Ibid
124. Ibid
125. Ibid
126. Ibid
127. Cabinet Economic Policy Committee, minute of decision, 26 June 2024 (TA.003.0246), p 1 (doc A52, p 242)
128. Cabinet, minute of decision, 1 July 2024 (TA.001.0174), p 1 (doc A52, p 247)
129. Lil Anderson to Paul Goldsmith, 2 July 2024 (TA.003.0250), p 1 (doc A52, p 248)

to apply the amended section 58 test prospectively from the point of announcement, requiring rehearings only for any live cases.[130] Selecting this option, Cabinet approved the revised version.[131]

Cabinet noted that CMT 'comes with a bundle of rights, which are balanced with the interests of wider New Zealand' and that the Court of Appeal 'materially reduced the threshold' for applicants to gain CMT. Cabinet agreed to amend the Act by 'inserting a declaratory statement that specifically overturns the reasoning of the Court of Appeal and High Court in *Re Edwards*, as well as all High Court decisions since the High Court in *Re Edwards*, where they relate to the test for customary marine title'. Cabinet also agreed to add text to section 58 'to define and clarify the terms "exclusive use and occupation" and "substantial interruption"'. The Government also agreed to amend section 106 (the burden of proof) 'to clarify that applicant groups are required to prove exclusivity of use and occupation from 1840 to the present day'. Cabinet further agreed to make changes to the Preamble, section 4 (purpose), and section 7 (Treaty of Waitangi provision) 'to make clearer the relationship between these sections and section 58, in a way that allows section 58 to operate more in line with its literal wording'. Cabinet also agreed to the amendments being applied from the date of the policy's announcement, 'noting that this will leave exisiting customary marine title decisions as at the date of announcement as they are, but require re-hearing of any live cases that do not have decisions at the time of announcement'.[132]

3.4.4 Policy announcement

(1) *Minister Goldsmith's press release*

On 25 July 2024, Minister Goldsmith issued a press release stating that 'Parliament deliberately set a high test in 2011 before Customary Marine Title could be granted' and that the Court's of Appeal's ruling in *Re Edwards* had departed from this standard. In response, the Crown would take four measures 'to ensure the wider public has confidence these tests are interpreted and applied consistently', including:

- Inserting a declaratory statement that overturns the reasoning of the Court of Appeal and High Court in *Re Edwards*, and the reasoning of all High Court decisions since the High Court in *Re Edwards*, where they relate to the test for CMT;
- Adding text to section 58 to define and clarify the terms 'exclusive use and occupation' and 'substantial interruption';
- Amending the 'burden of proof' section of the Act (section 106) to clarify that applicant groups are required to prove exclusive use and occupation from 1840 to the present day;

130. Cabinet, paper, 8 July 2024 (TA.003.0276), p 20 (doc A52, p 516)

131. 'Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 8 July 2024 (TA.001.0411), p 2 (doc A52, p 256)

132. Ibid, pp 1–2 (pp 255–256)

- Making clearer the relationship between the framing sections of the Act (the preamble, purpose, and Treaty of Waitangi sections) and section 58 in a way that allows section 58 to operate more in line with its literal wording.[133]

The Minister added that the amendment would be retrospective, stating that 'the amended section 58 test should be applied from today's date, if enacted'. This meant that existing CMT decisions would continue to be recognised, but all undetermined applications as of 25 July 2024 would 'if Parliament enacts these amendments, be decided under the clarified test'. This included applicants who were going through, or had been through the hearing process but not yet had their applications determined. The Minister stated that drafting of the Bill was underway and that the Government was seeking Cabinet's approval for the introduction of the amendment Bill by mid-September. He concluded that '[t]he Act enables the legal recognition of Māori customary rights while protecting the legitimate interests of all New Zealanders in the marine and coastal area.'[134]

In the lead up to the announcement, Te Arawhiti provided the Minister with various talking points to consider. A point that did not appear in his announcement was a rationale for the Government not waiting for the Supreme Court to hear the *Re Edwards* appeal. Te Arawhiti had written:

> The Government's concerns about the Court of Appeal's decision on CMT form the basis of the Crown's ongoing appeal to the Supreme Court. However, applicant groups and the public need to have confidence that the Takutai Moana legislation and its tests are interpreted and applied consistently, and as Parliament intended. This government is committed to delivering on that, as reflected in the coalition agreement commitment between the National Party and NZ First.[135]

(2) *Minister Goldsmith's letter to Takutai Moana Act applicants*

On the same day as the policy announcement, 25 July 2024, Minister Goldsmith sent a letter to all Takutai Moana Act applicants to advise them of Cabinet's decision. The letter relayed the four key points listed above, but also stated that the Court of Appeal's *Re Edwards* decision meant that 'applicant groups essentially need to only satisfy the first limb of the section 58 test ("holds in accordance with tikanga") and prove they have used and occupied the area from 1840 to the present day in order to prove CMT'. In his view, this was 'inconsistent with the clear two-limbed requirement set out in section 58'. In response, 'the Government considers it appropriate to propose legislation to Parliament which would amend the Act and alter the law established' by *Re Edwards*. While the amendments to sections

133. Submission 3.1.3(a), pp [1]–[2]
134. Ibid, p [2]
135. 'Te Arawhiti to Hon Paul Goldsmith re *"Communications Collateral to Support Section 58 Amendment Communications Plan"*', 17 July 2024 (TA.003.0336), p 11 (doc A52, p 267)

58 and 106 were detailed, the amendments to the preamble, the purpose (section 4), and the Treaty of Waitangi provision (section 7) were 'being worked through'.[136]

The Minister's letter stated that 'the above changes have already been approved by Cabinet' but he noted that there were two additional matters still being considered:

- the exact clarified definitions of 'exclusive use and occupation' and 'substantial interruption'; and
- what changes should be made to the framing sections of the Act (purpose, preamble, Treaty of Waitangi clause) or their effect within section 58, to allow section 58 to be interpreted consistent with its wording.[137]

'I am seeking your views on these issues', Minister Goldsmith wrote, 'as well as any general views or concerns'. The deadline for feedback was 15 August 2024.[138]

136. Paul Goldsmith to Takutai Moana Act applicants, 25 July 2024 (submission 3.1.3(c)), p [2]
137. Ibid, p [3]
138. Ibid, p [3]

CHAPTER 4

TREATY ANALYSIS AND FINDINGS

4.1 Introduction

In this chapter, we address the issues for inquiry concerning Treaty compliance. First, we assess whether the process to amend the Takutai Moana Act is Treaty compliant. As we noted in chapter 2, the scope of the Crown's proposed changes to the regime governing Māori rights and interests in a taonga as significant as the takutai moana require us to measure the Treaty compliance of the Crown's actions against the highest possible standards. Secondly, we assess whether the proposed amendments to the Act are consistent with the principles of the Treaty. At the outset, we briefly summarise the submissions of the claimants and the Crown on these issues.

4.2 Parties' Positions

4.2.1 The claimants' and interested parties' submissions

The claimants and interested parties in this inquiry all argued that the policy process underpinning the proposed amendments breached Treaty principles.

Broadly, the claimants and interested parties raised two issues with the policy development process. First, they argued the Crown did not adequately engage with Māori when making decisions around the proposed amendments. Claimant counsel emphasised that a high standard of consultation was required of the Crown in this instance, given that the Tribunal had previously found high standards of consultation were required in the development of the Act.[1] Claimant counsel argued 'in this matter, open dialogue and engagement with Māori to obtain their full, free and informed consent was and is needed'.[2]

Claimants criticised the Crown for failing to engage with Māori at all before Cabinet decided on 8 July 2024 to amend the Act.[3] Further, they argued the engagement the Crown sought with Māori about the details of their proposed amendments (discussed in section 3.4.4(2)), was also inadequate. The proposed definitions were not circulated, despite the planned introduction of the Bill in September.[4] Claimants also noted that the Crown appeared willing to share more details about the proposed amendments with seafood industry representatives

1. Submission 3.3.12, p 15; submission 3.3.27, p 57
2. Submission 3.3.27, p 9
3. Submission 3.3.12, p 16; submission 3.3.4, p [6]
4. Submission 3.3.27, p 43

than with affected Māori groups.[5] Further, the claimants were only provided 'a mere three weeks' to respond, in the words of counsel – an unreasonably limited time.[6] The claimants argued the restricted timeframe was a deliberate choice of the Crown, and there was '[n]o defensible reason' for the haste.[7] Claimant counsel called this policy process 'rushed' and 'ill-considered', and noted the Minister 'ignored advice on process and substance from all official channels' throughout.[8] Counsel described this fast-paced policy process as 'over-speedy recklessness in pursuit of the purely political agenda set out in the coalition agreements'.[9]

Secondly, the claimants and interested parties criticised the policy problem underpinning the proposed amendments. Counsel argued '[t]here is no legitimate policy rationale for the amendments'.[10] Te Arawhiti framed their advice around restoring the original Parliamentary intent of the Act, which the claimants argued was not the true purpose of the amendments – meaning Te Arawhiti's policy advice 'proceeded on a fundamental error'.[11] Instead, the Coalition Agreement stated the amendments were necessary to 'restore the principle of equal citizenship' – a notion which the claimants say was flawed, and not sufficiently explored by those providing policy advice.[12] The claimants emphasised that Crown policy documents reveal a concern that large CMT awards may challenge 'New Zealanders' expectation of having an equal say over the management and use of the coastline' – another rationale without evidence-based policy process behind it.[13] Counsel argued that the Crown's concerns with an 'equal say' and 'equal citizenship' were essentially about resource consents – the Crown was worried Māori would have the ability to 'exercise a permission right over resource consents beyond "small and discrete" areas'.[14] The true intent of the amendments, the claimants argue, is to 'reduce the number and extent of CMTs being awarded to Māori' through a more restrictive statutory test.[15] Such a rebalancing of rights in the Act, which the claimants argue 'is already tipped against Māori customary rights towards existing private and public interests', would be inconsistent with Treaty principles.[16] Some counsel also argued that such a rebalancing would mean 'the regulatory rights will not operate as a form of compensation for the loss of their customary rights'.[17] That form of compensation had been argued by the Crown in the stage 2 proceedings to justify the statutory restriction of the customary rights.[18]

5. Submission 3.3.12, p 16
6. Submission 3.3.40, p 71
7. Submission 3.3.19, p 3; submission 3.3.1, p 3; submission 3.3.20, p 1
8. Submission 3.3.27, p 43; submission 3.3.19, p 2
9. Submission 3.3.39, p 5
10. Submission 3.3.27, p 2
11. Ibid, p 24
12. Ibid, pp 24–25; submission 3.3.40, pp 8–9; submission 3.3.12, p 9
13. Submission 3.3.12, pp 8–10; submission 3.3.40, pp 66–67
14. Submission 3.3.34, p 5
15. Submission 3.3.19, p 2
16. Submission 3.3.27, pp 2, 38
17. Submission 3.3.35, p 71
18. Wai 2660 ROI, transcript 4.1.11, p 382

The claimants also criticised the advice given around Parliament's original intent. It is unclear, according to them, what information the Crown considered in determining that intent.[19] Claimant counsel argued that officials did not challenge the Minister's view that Parliament's intent was to award 'discrete' and 'small' CMTs – a belief they say is not borne out in fact.[20] In the words of counsel, 'Parliamentary intent was being reconstructed to achieve the desired outcome'.[21] Counsel also noted that the Court of Appeal in *Re Edwards* carefully examined Parliament's rationale for the Act, through available official documents and Hansard debates before reaching their decision.[22]

Claimant counsel noted the Takutai Moana Act, while flawed, included a 'carefully designed' test for the award of customary title.[23] Claimant counsel highlighted advice from the Legislation Design and Advisory Committee that said amendments would not restore Parliament's intent, but rather change the law as it currently exists.[24] They argued the Crown's proposed amendments would 'make it practically impossible' to obtain CMT, taking an already Treaty-inconsistent legal test and making it even more rigorous, and thus even less Treaty compliant.[25]

For the claimants, one of the most significant problems with the proposed amendments is its retrospective elements. According to claimant counsel, the proposed amendments will affect all applications undecided as of 25 July 2024, including applications heard but not decided, as well as the many applications that have been lodged but are yet to be heard.[26] Counsel also argue that only CMTs that have been issued with 'sealed orders' are beyond the reach of the amendments.[27] The claimants submitted that such retrospectivity is unnecessary, and contrary to the presumption against retrospectivity in Aotearoa New Zealand's legal system.[28] The Crown was unjustified in going against this important principle of the rule of law.[29] The claimants also emphasised that Cabinet ignored advice from officials on this point.[30] Counsel argued this retrospective effect would breach several Treaty principles, including good faith, active protection, and redress.[31] The claimants and interested parties in this inquiry told us this retrospectivity would have devastating effect, writing in generic closing submissions that '[f]or those that have invested financially and emotionally in progressing applications, retrospectivity comes as a cruel and humiliating twist'.[32] Counsel for parties around the motu told

19. Submission 3.3.10, pp 8–9
20. Submission 3.3.27, pp 48–50
21. Ibid, p 50
22. Submission 3.3.40, p 65
23. Submission 3.3.14, p 2
24. Submission 3.3.34, p 4; submission 3.3.27, pp 26–27
25. Submission 3.3.39, pp 2; submission 3.3.27, p 20
26. Submission 3.3.27, pp 22–23
27. Submission 3.3.19, p 3
28. Ibid; submission 3.3.27, pp 53–54; submission 3.3.22, p 13
29. Submission 3.3.27, pp 53–54
30. Submission 3.3.40, pp 58–59
31. Submission 3.3.27, p 7; submission 3.3.40, pp 56–59
32. Submission 3.3.19, p 3

us how their time preparing and presenting applications would be wasted, and they would be 'forced back to the start'.[33]

4.2.2 Crown submissions

The Crown did not accept that its policy process in developing the proposed amendments had breached Treaty principles. The Crown argued there was 'robust and comprehensive policy advice' from Te Arawhiti regarding the amendments.[34] It stated officials 'outlined the risks and impacts of proposed options' and advised the Minister of the Crown's Treaty obligations, including impacts on Māori.[35] However, the Crown did accept applicants under the Act 'were not consulted' about the proposals before they were decided by Cabinet and announced in July 2024.[36] Crown counsel noted that after the announcement was made, applicants under the Act were given three weeks to provide written feedback.[37] Regarding the condensed timeframe for implementation of the amendments, Crown counsel stated the Minister deemed it necessary to enact the amendments in 2024 to limit the number of further decisions being made based on *Re Edwards*, and because of the inconsistency of CMT awards over time.[38]

Crown counsel articulated the policy rationale behind the amendments in their closing submissions. The Crown stated 'the purpose of the proposed amendments to the Act is to clarify the requirements for obtaining CMT' following the *Re Edwards* decision.[39] Crown counsel argued Parliament intended to establish an 'exacting and rigorous test for CMT, reflecting the rights available to CMT-holders under the Act'.[40] Crown counsel listed these 'significant' rights in their submissions, including to give or decline permission for an activity to which an RMA permission right applies.[41] The Minister's rationale included that the reduced threshold created by *Re Edwards* 'was inconsistent with the balance of interests under the Act intended by Parliament'.[42] Large awards of CMT may challenge 'New Zealanders' expectation that the Act protects the legitimate interests of all New Zealanders in the common marine and coastal area'.[43] The Crown rejected the idea that it had put up a 'smokescreen' – saying the purpose of the amendments are clear in the Cabinet paper and minute, which record these rationales and the Minister's view that the amendments are necessary so '"CMT awards are small and discrete"', which he believed was originally intended by Parliament.[44] Crown counsel said the Tribunal should bear in mind that in typical policy-making process, Ministers

33. Submission 3.3.9, p 1; submission 3.3.4, pp [9]–[10]; submission 3.3.34, p 11
34. Submission 3.3.38, p 1
35. Ibid, pp 15, 24
36. Ibid, p 26
37. Ibid
38. Ibid, pp 11–12
39. Ibid, p 10
40. Ibid, pp 2–3
41. Ibid, p 4
42. Ibid, p 11
43. Ibid
44. Ibid, p 20

will express political assessments and record their policy rationales 'in succinct terms' – something shown in the documentary evidence here.[45]

Crown counsel addressed the Minister's choice to apply the amendments from the date of the announcement on 25 July 2024. Counsel noted that officials did warn against retrospective application in their advice.[46] However, as Crown counsel articulated, the Minister said the approach would allow litigants who had received judgments to retain the fruit of their litigation, while removing incentive for pending cases to rush to make their decision while the *Re Edwards* test still applied.[47] The Minister was also concerned about the inconsistent awards of CMT under the existing legislation, and those under the proposed amendments.[48] The Crown submitted that under the proposed changes, existing CMT decisions will be recognised – but that all undetermined applications as of the announcement date would be decided under the amended test.[49] This included applications that had been heard, but for which a judgment had not yet been issued.[50] Crown counsel clarified that the sealing of orders had no bearing on the application of the proposed amendments – the relevant factor was whether or not a judgment had been issued or an application determined under the Crown engagement pathway before the 25 July date.[51] The Crown acknowledged the claimants' evidence about the personal cost of preparing for hearing, stating this and other evidence was 'helpful' for the Crown and would be summarised for the Minister before Cabinet makes further decisions.[52]

4.3 Treaty Analysis and Findings

Having set out the policy development process in chapter 3, we assess in this section whether that process and the amendments themselves are consistent with the Treaty. Again, we note that in developing legislation concerning such a significant taonga as the takutai moana, the Crown must be held to the highest standards of Treaty compliance.

4.3.1 Policy development process

The Crown's only witness in this inquiry, Te Arawhiti Deputy Chief Executive Tui Marsh, gave a detailed account of how the policy development process is supposed to unfold. She noted that the process, 'especially on complex subjects, is typically iterative with officials' advice to Ministers for decisions informing further advice and decisions'.[53] However, in this instance, it appears the Minister turned the

45. Ibid
46. Ibid, p 17
47. Ibid, p 12
48. Ibid, p 22
49. Ibid, pp 12–13
50. Ibid, p 13
51. Ibid, p 14
52. Ibid, p 23
53. Tui Marsh, brief of evidence (doc A48), pp 3–4

policy development process into a foregone conclusion. When Te Arawhiti told the Minister on 21 December 2023 that they would research Parliament's original intent (see section 3.4.1(1)), he wrote on the briefing paper: 'The intent is clear'.[54] From this point on, the Minister used the policy development process not to inform himself but to inform officials.

This is evidenced in the materials Te Arawhiti produced for the Minister. On the 29 February 2024 summary document (see section 3.4.1(3)), under the title 'What is the problem we are trying to solve?', the Minister left a marginal comment: 'real possibility that most of coastline [will?] fall into customary ownership . . . + real conseq[uences] for expectation of NZers to have equal say in what happens on coast'.[55] The Minister's influence can be seen in Te Arawhiti's briefing paper on 14 March 2024, which adopted the phrasing and read 'the potential implications of recognition of CMT over a larger amount of the marine and coastal area than previously anticipated, will have an impact on New Zealanders' expectation of having equal say over the management and use of the coastline as originally intended by the Act'.[56]

When the Minister sought to expand the scope of the amendments to overturn the High Court's 2021 decision (see section 3.4.2(2)), officials advised against this. Te Arawhiti stated 'we do not consider legislatively setting-aside any of the High Court decisions on CMT is necessary to achieve the Coalition Agreement commitment'.[57] The Minister is pressing ahead with this amendment anyway. The only time the Minister appears to have listened to any advice against his position is when he agreed to revise the Cabinet paper to reflect Cabinet's concerns that the application of retrospectivity was too severe (see section 3.4.3(1)). At hearing, the Crown noted this as an example of the Minister listening to advice.[58] However, taking *direction* from more senior Cabinet members can hardly be used as an example of the Minister's willingness to change his mind, especially when he disregarded the concerns of all the officials working under him until this point. Repeatedly, officials from Te Arawhiti and the Ministry of Justice warned the Minister about the dangers of his proposals and moving through the development process too quickly (see section 3.4), and repeatedly he chose to ignore these warnings.

It is worth noting that, to date, no Regulatory Impact Statement (RIS) has been provided by the Crown. Ms Marsh stated in her evidence that if a proposal included a regulatory option then 'officials must prepare a Regulatory Impact

54. 'Te Arawhiti – Marine and Coastal Area (Takutai Moana) Act 2011: Initial Advice on the Review of Section 58', 21 December 2023 (TA 003.0006), p 3 (doc A52, p 3)

55. 'Te Arawhiti to Hon Paul Goldsmith re "*Letters to the Prime Minister and Ministerial Colleagues Seeking Feedback on the Proposed Approach to Amend Section 58 of the Marine and Coastal Area* (*Takutai Moana*) *Act* 2011"', 29 February 2024 (TA.003.0044) (doc A52, p 27)

56. 'Te Arawhiti – Amending Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 14 March 2024 (TA.003.0049), p 5 (doc A52, p 32)

57. 'Te Arawhiti – Further Advice on Options for Section 58 of the Marine and Coastal Area (Takutai Moana) Act', 27 May 2024 (TA.001.0368), p 2 (doc A52, p 111)

58. Transcript 4.1.1, p 325

Analysis, which provides Cabinet with officials' assessment of the policy options'.[59] In *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report*, the Tribunal further described the importance of a RIS in the policy development process:

> A Regulatory Impact Statement (RIS) on the proposed repeal of section 7AA prepared by Oranga Tamariki staff accompanied the 19 March Cabinet paper. Unlike the Cabinet paper, which reflects the Minister's policy, intention, and voice, the RIS is an opportunity for officials to provide independent analysis and free and frank advice to Cabinet.[60]

The first draft Cabinet paper on 18 April 2024 stated that a RIS 'is attached'. The paper added that 'Treasury confirms that the Statement meets the impact assessment requirements'.[61] However, this was clearly placeholder text, as an aide memoire from Ms Marsh to the Minister on 20 June 2024 stated:

> It has not been possible to undertake a full regulatory quality assurance process in the time available. We have discussed this with the Regulatory Impact Assessment Team at the Ministry for Regulation. We have agreed that a regulatory impact assessment will be provided when amendment legislation is submitted to the Cabinet Legislation Committee.[62]

The final Cabinet paper on 8 July 2024 stated: 'A Regulatory Impact Statement is being prepared and will be provided alongside the Cabinet Legislation Committee paper'.[63] As we discuss below in section 4.3.3, Cabinet therefore approved the Minister's proposed amendments on the basis of his personal views without seeing 'free and frank' advice from officials, at least in the form of a regulatory impact statement. As Ms Marsh's aide memoire indicated, the Minister's own haste to amend the Act resulted in the normal policy development process not being followed. This is all the more serious in an instance where officials have expressed clearly divergent views to the policy under consideration.

It is possible that, as the Minister considers his amendments to be 'restoring' his view of Parliamentary intent, he considered it less important to follow the standard policy development process. However, we disagree that this is an acceptable exercise of kāwanatanga for two reasons. First, as we will discuss in chapter 4, the amendments go further than Parliament's original intent in 2011. Secondly, the

59. Tui Marsh, brief of evidence (doc A48), p 4
60. Waitangi Tribunal, *The Oranga Tamariki* (*Section 7AA*) *Urgent Inquiry 10 May 2024 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 14
61. 'Takutai Moana Draft Cabinet Paper on Clarifying s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 18 April 2024 (TA.001.0246), p 9 (doc A52, p 84)
62. 'Te Arawhiti – Aide Memoire from Tui Marsh to Hon Paul Goldsmith', 20 June 2024 (TA.003.0193), p 2 (doc A52, p 235)
63. 'Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011' (TA.003.0273), p 17 (doc A52, p 513)

Government should still follow due process, especially when legislating in matters of Māori property rights in significant taonga.

The Tribunal stated in *Ngā Mātāpono* that the principle of good government required the Crown to 'produce robust well-designed transparent policy forged in partnership'. The Tribunal added that 'the Treaty/te Tiriti should not be undermined by poorly designed, unjustifiable policies as that would be inconsistent with the principle of good government'.[64] We agree. As such, we find the Crown's rushed policy development process on a matter of singular importance to Māori to be in breach of the principle of good government. We also consider that, in these circumstances, Māori will, or are likely, to suffer prejudice as this significant taonga is not subject to robust well-designed transparent policy. We proceed next to discuss engagement with Māori as a specific facet of that process.

4.3.2 Engagement with Māori during the policy development process

Officials advised Minister Goldsmith of the importance of meaningful engagement and consultation with Māori at every step of the policy development process. This began on 21 December 2023, with Tui Marsh stating that 'officials advised that as the issue directly impacted on the rights of whānau, hapū and Māori under the Act, engagement with Māori, particularly applicants, would be crucial to mitigating damage to the Māori Crown relationship'.[65] At a meeting with the Minister on 30 January 2024, Te Arawhiti restated the critical importance of consulation given the significance of the rights in question.[66] Officials noted that during any engagement process the Government 'must demonstrate an openness to changing its proposals' in light of kōrero received.[67] Te Arawhiti gave the Minister three timeframes for consultation, depending on how quickly he wanted to introduce the amendments: four weeks of targeted consultation, six to eight weeks of broader consultation, or three months of full consultation.[68]

On 29 February 2024, Te Arawhiti drafted letters on Minister Goldsmith's behalf to update key Cabinet members on the progress of the amendments. As Ms Marsh told us, the draft letters 'noted the Minister's proposed process and timeframes for progressing a legislative amendment, including his intention to seek Cabinet decisions in May, followed by a six-to-eight-week period for consultation and a Bill introduced by November 2024'.[69] The Minister did not ultimately send these letters. Te Arawhiti reiterated the importance of engagement in a further briefing

64. Waitangi Tribunal, *Ngā Mātāpono – The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 74
65. Tui Marsh, brief of evidence (doc A48), p 14
66. Ibid
67. 'Section 58 – Preliminary Options and Process', 30 January 2024 (TA.003.0323) (doc A52, p 529)
68. Ibid
69. Tui Marsh, brief of evidence (doc A48), p 16

paper to the Minister on 14 March 2024.[70] Ms Marsh told us officials advised the Minister that 'given the tenor of claims already lodged with the Waitangi Tribunal challenging the anticipated amendment, Māori were likely to see any amendments as reopening issues resolved in the 2011 Act'. Engagement, Ms Marsh repeated, 'would be crucial to minimising damage to the Māori–Crown relationship'.[71]

After meeting with Ministers Peters, Seymour, and Potaka on 19 March 2024, Minister Goldsmith directed Te Arawhiti to produce options to enable the amendments to be enacted by the end of the year. Ms Marsh noted that 'this direction reflected a change in the Government's proposed timing for the amending legislation from *introduction* by the end of this year to *enactment* by the end of this year' (emphasis added).[72] On 11 April 2024, Te Arawhiti provided the Minister with a briefing paper that informed the first draft Cabinet paper. Ms Marsh told us that officials noted the Minister's revised deadline would only allow a 'maximum' of two to three weeks consultation.[73] The first draft Cabinet paper on 18 April 2024 incorporated the two to three week consultation period, but described it as 'a very limited period of time'.[74]

In the second draft Cabinet paper on 5 June 2024, the Minister justified opting for the 'expedited' timeframe in order to lessen the 'inconsistency' of CMT awards. As we noted in chapter 3, the draft also stated (as did all later versions of the Cabinet paper) that employing a 'non-standard' engagement process when 'dealing with such important property rights as customary title to the foreshore and seabed' would likely 'be inconsistent with the principles of the Treaty of Waitangi'.[75] Nonetheless, the Minister pursued this engagement plan when he announced the policy on 25 July 2024. In his letter to applicants that same day, the Minister noted that the amendments had already been approved by Cabinet, but he still wanted to hear the applicants' views on the definitions of 'exclusive use and occupation' and 'substantial use' and on what changes should be made to the framing sections of the Act (Preamble, section 4, and section 7). He also invited 'any general views or concerns', with a deadline of 15 August 2024.[76]

In this policy development process, the Minister opted for an engagement plan even more constricted than the most limited option advised by officials on numerous occasions. He did so, despite their repeated warnings, because the Government set itself a deadline to enact the legislation before the end of 2024, knowingly hindering any possibility of meaningful consultation with Māori. The Cabinet paper acknowledged the consultation period would likely breach the Crown's Treaty

70. 'Te Arawhiti – Amending Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 14 March 2024 (TA.003.0051), p 7 (doc A52, p 34)
71. Tui Marsh, brief of evidence (doc A48), p 19
72. Ibid, p 20
73. Ibid, p 22
74. 'Takutai Moana Draft Cabinet Paper on Clarifying s58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 18 April 2024 (TA.001.0253), p 8 (doc A52, p 83
75. 'Draft Cabinet Paper: *Takutai Moana: Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011*', 5 June 2024 (TA.003.0153), p 12 (doc A52, p 187)
76. Paul Goldsmith to Takutai Moana Act applicants, 25 July 2024 (submission 3.1.3(c)), p [3]

responsibilities, but instead of seeking a Treaty compliant approach, the Minister justified his actions by saying he sought to avoid 'inconsistent' awarding of CMT. In this way, the Minister prioritised the Crown's desire to avoid the administrative difficulties – of its own making – caused by CMTs awarded under different tests over the rights and interests of Māori in te takutai moana. The Crown's concern for the impact and prejudice to Māori should far outweigh its concern over the difficulties of having two tests.

Moreover, the three week window of engagement (from 25 July 2024 to 15 August 2024) that the Crown offered was limited in scope, with Cabinet having already approved the substantive elements of the proposal. In her evidence, claimant Dr Joy Panoho, who is a Senior Kaupapa Māori Researcher, argued that the Government's opportunity to give 'feedback' was misleading as the Crown admitted that Cabinet decisions had already been made.[77] The Crown also provided applicants with very little detail about what the proposed amendments actually entailed. The Minister would have been aware that the time and energy of many applicants were already taken up by their exhaustive CMT litigation involvements in the High Court, and their preparation for this urgent inquiry. These overlapped with this compressed timeframe, compounding their inability to meaningfully engage in such a truncated process. It also became evident to us over the course of this inquiry that there was no indication the Minister planned to incorporate any feedback received from Māori even if it was received. Māori were presented with a 'fait accompli' on the most significant aspects of the proposed amendments that had already been approved by Cabinet.

The use of the word 'mitigate' in Te Arawhiti's initial briefing to the Minister in December 2023, as noted above, assumed that major issues would arise between Māori and the Crown that needed addressing. But, as the claimants noted, the Crown 'cannot however lawfully move to breach its fundamental promises and then look to mitigate'.[78] Claimant Aperahama Kerepeti-Edwards from the Ngātiwai Trust Board told us that the lack of consultation was 'one of the most contentious points about this MACA process'.[79] Kara Paerata George also expressed concern: 'The Crown says it is going to engage with Māori on these amendments, but when will this happen and how? What difference will it make? Will the Crown even listen to what we have to say or will it just press on and do what it wants despite our views?'[80]

Claimants acknowledged the power imbalance the process had highlighted. As, Dr Panoho stated, 'The unilateral decision to revisit MACA legislation and overturn judicial rulings is a humiliation not just for those of us here today but our tūpuna and again evidences the power imbalance between Māori and the Crown.'[81]

77. Joy Panoho, brief of evidence (doc A41), p 4
78. Submission 3.3.41, p 3
79. Aperahama Kerepepti-Edwards, brief of evidence (doc A13), p 2
80. Kara Paerata George, brief of evidence (doc A6), p 3
81. Joy Panoho, brief of evidence (doc A41), p 2

Mr Kerepeti-Edwards also said that the Government 'purport to set the test for how our customary rights are determined, without any consultation with us.'[82] He then outlined the process of consultation in customary rights, as he saw it, which 'should not sit with any pan iwi collective but with respective iwi, hapū, and kainga'. Proper consultation, he observed, 'must start at the kainga level'.[83] During the hearing, Mr Kerepeti-Edwards was asked by Crown counsel how long that would take and he responded by saying 'it'll take as long as it needs to take for an honourable decision and process to be established and determined'.[84]

In chapter 2, we noted our stage 2 finding that 'on the sliding scale that determines the appropriate standard of consultation, the Crown's obligation to consult with Māori in developing the Takutai Moana Act is at the highest end'.[85] The level of engagement offered to Māori in the development of these amendments would likely fail to meet the Crown's Treaty obligations even if the bar was at the lowest end, but it certainly falls blantantly short of the standard required in these circumstances. Dr Panoho said during the hearing that 'the lack of consultation was first and foremost egregious'.[86] We agree. As noted in chapter 2, previous jurisprudence of the Tribunal has established that meaningful consultation means the Crown cannot simply present Māori with a predetermined decision.[87] With Cabinet approving the substantive amendments on 8 July 2024 and the Minister only inviting feedback on related matters on 25 July 2024, it is clear that even this unsatisfactory opportunity to engage would have had limited utility for Māori. In failing to offer any meaningful engagement with Māori, therefore, we find the Crown to be in breach of the principle of partnership. We also find that Māori will, or are likely to, suffer prejudice as a result of this breach as they have not been given the opportunity to engage as Treaty partners, and to exercise their tino rangatiratanga, on such a significant issue.

4.3.3 Expectations of New Zealanders

As we noted in section 3.3.3, the coalition agreement to amend section 58 of the Takutai Moana Act was one of several pledges under the heading of 'Equal Citizenship'. The agreement stated that the Government 'will defend the principle that New Zealanders are equal before the law, with the same rights and obligations'. Furthermore, the agreement stated the Government 'will work to improve outcomes for all New Zealanders, and will not advance policies that seek to ascribe

82. Aperahama Kerepepti-Edwards, brief of evidence (doc A13), p 2
83. Ibid, p 3
84. Transcript 4.1.1, p 79
85. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report* (Wellington: Legislation Direct, 2020), p 52
86. Transcript 4.1.1, p 73
87. Waitangi Tribunal, *Ngā Mātāpono – The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 64

different rights and responsibilities to New Zealanders on the basis of their race or ancestry'.[88]

The initial advice Te Arawhiti sent to Minister Goldsmith on 21 December 2023 noted that Parliament in 2011 sought 'to establish a regime that balanced the interests of all New Zealanders'. This included interests such as recreation, conservation, customary, business and development, and those of local government.[89] On 30 January 2024, Te Arawhiti met with the Minister and presented him with a summary document that said the Act 'sought to balance the range of interests in the marine and coastal area – including customary, commercial and recreational' by providing 'guarantees of continued public access, fishing, and navigation'.[90] On 29 February 2024, Te Arawhiti provided the Minister with another summary document, on which the Minister provided directions, wanting to add 'more', he wrote: 'This has led to real possibility that most of coastline [will?] fall into customary ownership + hugely expensive process to determine overlapping claims + real conseq[uences] for expectation of NZers to have equal say in what happens on coast'.[91]

Following this marginal comment from the Minister, Te Arawhiti's next briefing paper on 14 March 2024 adopted his phrasing and seemed to accept his concerns, stating that the Government was concerned 'that the potential implications of recognition of CMT over a larger amount of the marine and coastal area than previously anticipated, will have an impact on New Zealanders' expectation of having equal say over the management and use of the coastline as originally intended by the Act'.[92] Te Arawhiti continued to adopt the Minister's language, and in their 11 April 2024 briefing paper, officials noted that the Minister had 'expressed a concern that recognition of CMT over a larger portion of the marine and coastal area than previously anticipated may challenge New Zealanders' expectation of having an equal say over the management and use of the coastline'.[93]

As noted above, Ministers Goldsmith and Jones met with the Seafood Industry Representatives on 21 May 2024. At this meeting, the representatives were asked about their concerns and feedback on the Act and the proposed amendments.[94] During questioning, Tribunal panel member Ron Crosby asked Ms Marsh why the seafood industry was involved in the decision-making process regarding the proposed amendments. He stated that he was perplexed that Ministers would

88. New Zealand National Party and New Zealand First, Coalition Agreement, 24 November 2023, p 10

89. 'Te Arawhiti – Marine and Coastal Area (Takutai Moana) Act 2011: Initial Advice on the Review of Section 58', 21 December 2023 (TA.003.0005), p 2 (doc A52, p 2)

90. 'Section 58 – Preliminary Options and Process', 30 January 2024 (TA.003.0323) (doc A52, p 530)

91. 'Te Arawhiti to Hon Paul Goldsmith re "*Letters to the Prime Minister and Ministerial Colleagues Seeking Feedback on the Proposed Approach to Amend Section 58 of the Marine and Coastal Area* (*Takutai Moana*) *Act* 2011"', 29 February 2024 (TA.003.0044) (doc A52, p 27)

92. 'Te Arawhiti – Amending Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 14 March 2024 (TA.003.0049), p 5 (doc A52, p 32)

93. 'Takutai Moana: Section 58 Options,' 11 April 2024 (TA.001.0232), p 5 (doc A52, p 60)

94. 'Ministerial Hui (Hon Goldsmith and Hon Jones) with Seafood Industry Representatives on 21 May 2024', 22 May 2024 (TA.003.0324), pp 1–2 (doc A52, pp 105–106)

need to involve this third-party or give them any priority or further Ministerial assurances when section 28 of the Act already expressly protects fishing rights and wāhi tapu provisions do not impact quota rights. He referred to the statutory protection of fishing rights in the Act and asked, 'did they express a concern . . . that their interests were under threat in any particular way?' Ms Marsh responded by saying that Te Arawhiti had briefed the seafood industry about public consultation and that they were invited as a third party to provide submissions.[95] Given express statutory protections, and the protection of rights of navigation and acess, we are perplexed as to why the SIRs are engaging in the CMT process at all, as their members cannot be affected by the grant of CMTs.

From the evidence available, this meeting appears to be the only instance where Ministers sought to directly consult with any New Zealanders, including Māori (as noted in section 3.4.2(5), the Minister met with Ngāti Koata but did not discuss the proposed amendments other than a passing mention), on the specific subject matter of the policy prior to announcing it on 25 July 2024.[96]

In 2021, the Crown did not appeal the High Court's *Re Edwards* decision. However, the Minister ultimately pursued amendments to the Act that sought to overturn its decision as well as that of the Court of Appeal, despite the clear advice from Te Arawhiti against doing so. Prior to this policy development process, the Crown clearly did not consider that the High Court's decision created an imbalance. The Crown confirmed this during its closing statement when it told us that, prior to the Court of Appeal decision, the Crown considered the Act provided an appropriate balance between the Māori and public interests.[97] Yet, in the Cabinet paper, which provides the best evidence for the policy rationale behind the amendments, the Minister stated that the effect of both decisions 'unsettles the balance of rights intended by the Act'.[98] As a result, in his view, this would lead to 'increased difficulty of getting resource consents across a large portion of the coastline'.[99] As the expectations of all New Zealanders to have an equal say in the management of the foreshore and seabed formed a key basis for the amendments, it is not unreasonable to expect some evidence from the Crown as to how these expectations were measured or assessed. But the Crown produced no evidence at all to explain how Minister Goldsmith arrived at his sense of the expectations of all New Zealanders. It appears to be a political position that claimants stated came 'purely from the minds of Ministers'.[100] The only inference that can be drawn from the Cabinet paper is that the Minister's concerns about an 'increased difficulty of getting resource consents across a large portion of the coastline' relates to the permission rights that come with a CMT.

In our stage 2 report, we wrote:

95. Transcript 4.1.1, p 289
96. Ibid
97. Submission 3.3.38, p 3
98. 'Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011' (TA.003.0273), p 17 (doc A52, p 503)
99. Cabinet, paper, 8 July 2024 (TA.003.0276), p 11 (doc A52, p 507)
100. Submission 3.3.12, p 8

> The Act preserves public rights of access, navigation, and fishing over the common marine and coastal area. The Act also preserves the rights of owners of existing structures in te takutai moana. The two strongest rights granted under a customary marine title (the RMA permission right and conservation permission right) do not apply to accommodated activities . . . [which] includes activities authorised under a resource consent, whenever granted, if the application for the consent is first accepted by the consent authority before the effective date (the date from which a customary marine title becomes effective). It also includes existing aquaculture activities if there is no increase in area or change of location and certain activities and infrastructure associated with national or regional social or economic wellbeing . . . The Crown has already taken significant steps to preserve and protect existing interests (and some new interests) in te takutai moana even where a customary marine title has been granted.[101]

In Tribunal questioning, Judge Armstrong asked Ms Marsh, 'Just to confirm, there's nothing in your affidavit or in the Crown bundle which can point to a further public right or interest that is currently not protected that needs to be further protected through these amendments?' To which Ms Marsh replied, 'not to my understanding'. Judge Armstrong further asked Ms Marsh if she could identify any evidence that the Minister made an assessment to provide for tino rangatiratanga as part of the balancing exercise of the rights of all New Zealanders. 'I cannot', she replied.[102]

The Crown's closing submissions contained an entire section about Te Arawhiti's advice to Minister Goldsmith on how to give effect to the coalition agreement commitment. Yet none of this had any evidential basis or was based on consultation of any kind. After the Crown's closing statement, Judge Armstrong asked Crown counsel about the absence of evidence: 'In the context of this urgent inquiry before us, how are we to treat such significant decisions being made in relation to a significant taonga with no real evidence supporting the key policy rationale behind that approach?'[103] As claimant counsel noted in their closing submissions, this question encapsulated 'how we are void of knowledge' that gives rise to any certainty about the Minister's decision making process; how he assessed the expectations of all New Zealanders; what 'exacting' nature of the test has even been lost as a result of *Re Edwards*; or what the public rights are that the Minister believes need to be protected by the proposed amendments – that are not already protected under the current Act.[104]

In our stage 2 report, we noted that any balancing exercise must be principled. 'It cannot be arbitrary', we found, 'particularly where the balancing exercise has the effect of restricting or impacting Māori rights.'[105] By not providing any evidence

101. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report* (Wellington: Legislation Direct, 2023), pp 98–99, see also pp 223–224

102. Transcript 4.1.1, p 284

103. Ibid, p 328

104. Submission 3.3.22, p 6

105. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 2 Report* (Wellington: Legislation Direct, 2023), p 10

supporting one of the key justifications for seeking to amend the Act, we find the Minister's decision to be so fixed as to be arbitrary in nature. Furthermore, the Crown chose not to inform itself of the interests of Māori in the development of these amendments, although it did seek the opinions of certain commercial entities. In these ways, we find that the Crown has breached the principle of tino rangatiratanga, the principle of partnership, and the principle of good government. We also find that Māori will, or are likely to, suffer prejudice as a result, as the Crown is seeking to restrict the ability to have their rights recognised through the award of a CMT, when there is no identified public right or interest that requires protection, and when there has been no balancing exercise taking into account Māori rights and interests in the takutai moana.

4.3.4 Parliamentary intent

The coalition agreement stated that the Government's aim in amending the Takutai Moana Act was 'to make clear Parliament's original intent.'[106] Te Arawhiti addressed the matter in its initial advice to Minister Goldsmith on 21 December 2023, stating that it would review historical records to ascertain Parliament's original intent. It added that '[t]his exercise is important to identify the appropriate options that will achieve that original intent.'[107] However, as mentioned in chapter 3, before Te Arawhiti began this work, the Minister left a marginal comment on their advice that read: 'The intent is clear.'[108] Clearly, the Minister already held a firm opinion in advance of receiving any official advice.

When the Minister met with Te Arawhiti on 30 January 2024, officials seemed to support his view, stating that the historical record showed the Court of Appeal 'did not interpret s 58 consistent with Parliament's original intent.'[109] But the matter of intent remained somewhat unclear, with officials adding that Parliament intended to '[c]reate an exacting standard ("exclusive use and occupation") that aligns with the proprietary nature of customary title.'[110] However, officials did not address the role tikanga might play in determining the 'nature of customary title', a key factor in the High Court and Court of Appeal *Re Edwards* decisions. On 27 May 2024, Te Arawhiti presented a firm view when the Minister sought to extend the scope of the amendments to respond to the High Court's decision. They wrote, 'while the High Court's decisions prior to *Re Edwards* CA focused less on the literal wording of s 58 (and more on s 58 in the context of the wider Act) than the Crown might have expected, these interpretations and decisions are broadly consistent with the

106. New Zealand National Party and New Zealand First, Coalition Agreement, 24 November 2023, p 10

107. Te Arawhiti – Marine and Coastal Area (Takutai Moana) Act 2011: Initial Advice on the Review of Section 58', 21 December 2023 (TA 003.0005), p 2 (doc A52, p 2)

108. Ibid, p 3 (p 3)

109. 'Section 58 – Preliminary Options and Process', 30 January 2024 (TA.003.0323) (doc A52, p 530)

110. Ibid

regime set out by Parliament'.[111] Despite this clear advice, the Minister progressed work extending the scope of the proposed amendments to overturn the High Court's decision as well.[112]

Exactly how the Minister came to hold such certainty about Parliament's original intent in 2011 is unclear. The Crown provided no evidence on this matter beyond stating at the hearing that the Minister relied on his recollections of discussions with political colleagues from the time the law was enacted. However, claimant counsel noted that the Act was passed in March 2011 and the Minister did not become a Member of Parliament until after the general election in November 2011. The Crown clarified that the Minister, while not an elected Member of Parliament at the time the Act was passed, was a member of the National Party. His conversations, therefore, were had in his capacity as a member of the public. The only actual evidence the Crown provided of this was in the minutes of the Minister's meeting with the seafood industry on 21 May 2024. The record of the meeting states that the Minister said the amendments would 'reassert Parliamentary intention', which he recalled being told about in the National caucus by the then Attorney-General Christopher Finlayson in 2012. In producing the minutes, Te Arawhiti assumed the Minister misspoke and meant 2011 – the year the Act was passed. Regardless of the year, the Minister told the seafood industry that Finlayson had deliberately set the bar 'very high'.[113]

As we noted in section 3.4.2(4), at the meeting with the seafood industry, the Minister commented that 'economies grow through investment' but that the Takutai Moana Act 'creates too much legal uncertainty'. He stated that '[u]nder the current test 100% of the coastline will be subject to CMT', and that the right to veto 'made sense if only 1% of the coastline was going to be subject to CMT'. His amendments 'should reduce the 100% of coastline subject to CMT to 5%'.[114] These concerns expressed here by the Minister represent one of the coalition government's main underlying concerns about the Act, that is, a perceived notion that CMT holders will arbitrarily block the resource management consenting process. As discussed above in section 4.3.3, the right of CMT holders to grant or withhold permission for resource consent to undertake activities is already severely limited by statute. Although the Crown presented no evidence that CMT holders have arbitrarily exercised this right, or that they would, the Minister is proposing wide-ranging amendments to limit CMT specifically to address an anxiety that they may do so.

It was not apparent to us that Te Arawhiti officials tried to inform the Minister that his concerns were not supported by evidence and were contradicted by the many protections for other interests in the Takutai Moana Act itself; or that there

111. 'Te Arawhiti – Further Advice on Options for Section 58 of the Marine and Coastal Area (Takutai Moana) Act', 27 May 2024 (TA.001.0368), p 2 (doc A52, p 111)

112. 'Te Arawhiti to Hon Paul Goldsmith re *"Revised Draft Cabinet Paper on Clarifying Section 58 of the Marine and Coastal Area* (*Takutai Moana*) *Act 2011"*', 5 June 2024 (TA.003.0138), p 1 (doc A52, p 172)

113. 'Ministerial Hui (Hon Goldsmith and Hon Jones) with Seafood Industry Representatives on 21 May 2024', 22 May 2024 (TA.003.0324), p 1 (doc A52, p 105)

114. Ibid, pp 1–2 (pp 105–106)

might be other ways of addressing this specific concern, such as engagement with Māori; or a more targeted amending of the Act as to the manner of exercise of the permission right. As noted above, officials told the Minister at the meeting on 30 January 2024 that Parliament had originally intended for the CMT test to be 'exacting'.

The 'exacting' nature of the test was addressed in our Wai 2660 hearings by Mr Finlayson himself, who provided further clarity of Parliament's original intent. Mr Finlayson was the Minister responsible for enacting the current version of the Act. Claimant counsel asked Mr Finlayson if 'the view of the Government of the day was that it would be a very difficult test to meet'. Finlayson replied, 'it would be an exacting test, yes'. Significantly, however, he added 'if you were suggesting that we drafted a test so that the net result would be . . . minimal, you're wrong.'[115] The Tribunal also questioned Mr Finlayson about the percentage of foreshore he said 'might ultimately be returned under CMT orders'. He admitted he had given a percentage, but, significantly, he qualified that by saying 'it was probably me as a politician trying to sort of quieten down people' and that he was 'trying to soothe the waters.'[116] Crown documents revealed in a notice to supporters of the Foreshore and Seabed Act 2004 that 'the Attorney General indicated it would be around 4% of the coastline.'[117] A letter from Mr Finlayson to Conor English, the Chief Executive of Federated Farmers of New Zealand Incorporated stated:

> You are concerned the test for customary title would be set too low resulting in customary title being found across New Zealand's coastline. I disagree. The proposed test for customary title would require a group to demonstrate, in addition to holding the area in accordance with tikanga Maori, that they have occupied the land to the exclusion of non-members of that group since 1840 without substantial interruption. In practice, it is unlikely that this part of the test could be met in areas where there has been substantial use or development by non-members of the group (such as a marine farm or jetty) or in heavily visited or populated areas.[118]

Mr Finlayson told the Tribunal that 'there was some discussion about how much customary title there was out there and so our figures sort of ranged a little bit, but there was not obviously any ultimate determination'. Importantly, he added that the amount of CMT awarded 'depends on the Court.'[119] That response accords with his contemporary press release to that effect issued on 6 September 2010, which stated:

115. Wai 2660 ROI, transcript 4.1.9, pp 84–85
116. Ibid, p 124
117. 'Landowners Coalition Inc, Foreshore and Seabed Legislation,' 31 May 2021, p 1 (Wai 2660 ROI, doc 3.2.578(a), p 29)
118. 'Letter from the Office of Hon Christopher Finlayson to the Chief Executive of Federated Farmers of New Zealand Incorporated, Conor English,' p [10] (CLO.013.0617) (Wai 2660 ROI, doc 3.2.578(a), p 9)
119. Wai 2660 ROI, transcript 4.1.9, p 84

> One of the key objectives of the legislation is to give Māori the opportunity to argue their case for customary marine title before the courts or in negotiation with the government. For that reason, it is inappropriate to second-guess what a court or negotiations process might decide.[120]

As noted in section 3.4.2(6), Benesia Smith told the Tribunal in the Wai 2660 inquiry:

> To my knowledge, no policy decision was made in the design of the test for customary title under the Marine and Coastal Area (Takutai Moana) Act 2011 to ensure that it would result in only 'small' and 'discrete' areas being recognised. This contrasted with the Foreshore and Seabed Act 2004 framework, where the recognition of only small and discrete areas was a policy consideration that underpinned that Act.[121]

In contrast to Minister Goldsmith, the views of Mr Finlayson and Ms Smith were not based on a predetermined notion of the extent of the grants of CMT. In light of the complete lack of evidence supporting this key policy rationale, and the fact that the Minister's position contradicts the body of evidence available on Parliament's intent at the time, the only inference we can draw is that the Minister is relying on his own personal view, even though he was not involved in enacting the legislation. Based on the evidence we have about Parliament's original intent we determine that the intent was for the test to indeed be thorough, but also to be interpreted by the judiciary.

As claimant counsel submitted, 'It is constitutionally self-evident that the role of the Court is to find and assess Parliament's intent'.[122] At present, that process is unfolding, with the *Re Edwards* case and the test for CMT having passed through the High Court in 2021 to the Court of Appeal in 2023, and heading to the Supreme Court in November 2024. As the Legislation Design and Advisory Committee (LDAC) stated, '[t]he correct avenue to challenge what the law is, and what parliament's intent was, is on appeal to the Supreme Court'.[123] The Crown, having appealed the Court of Appeal's decision, still has its opportunity to plead its case before the Supreme Court. However, the Crown has chosen an expedited push to amend the Act to overturn the High Court and Court of Appeal decisions, circumventing the process of final judical interpretation of legislative intent. In doing so, the Minister is asserting his personal view of Parliament's original intent, a view not supported by evidence or officials, before the matter can go to the Supreme Court.

If the Minister is confident that his understanding of Parliament's original intent is correct, then he should proceed with the appeal to the Supreme Court. If

120. 'Te Arawhiti – Marine and Coastal Area (Takutai Moana) Act 2011: Initial Advice on the Review of Section 58', 21 December 2023 (TA 003.0006), p 3 (doc A52, p 3)

121. 'Te Arawhiti – Further Advice on Options for Section 58 of the Marine and Coastal Area (Takutai Moana) Act', 27 May 2024 (TA.001.0375), p 9 (doc A52, p 118)

122. Submission 3.3.20, p 5

123. Tui Marsh, brief of evidence (doc A52), p 50

the Minister believes the Supreme Court will not support his view (as Te Arawhiti has already stated), necessitating a preemptive amending of the Act to achieve his aims, then it is important the Crown provide some evidence to support his position in the face of such a contrary judical interpretation. Again, and as with the basis for his views on the expectations of all New Zealanders (see section 4.3.3), nothing of substance to support his view has been provided. Tellingly, the evidence of Tui Marsh used the phrase 'the Minister's view of Parliament's intent' when referring to actions Te Arawhiti took in drafting cabinet papers based on his views.[124]

Changing the test in these circumstances with such haste is highly prejudicial to Māori. Claimants and interested parties told us about the impact a newer, harder, test was already having on Māori. Ronald Apiti, an interested party to this inquiry, told us that Ngāti Te Wehi were waiting to receive a judgement in the first stage of the High Court hearing in respect of Aotea harbour.[125] He said the Crown's intention to enact a new test, and make it harder, would mean the Attorney General's submissions relating to Ngāti Te Wehi would no longer be applicable and 'our whole case which was based on recognition of shared exclusivity in accordance with our tikanga, would be thrown out'. He said, '[t]he thought of this happening is incomprehensible'.[126] Claimant Kahukore Baker, Te Upokorehe Iwi, said the Crown was gaslighting applicants by making the 'narrowest possible test'. She said the Crown was not acting in a neutral or impartial manner but instead is aligning itself with commercial interests and those opposed to 'all that is Māori'.[127] Other claimants denounced the proposed new test, regardless of whether they would still meet the test or not. Claimant Alexander Nathan said the Government had agreed to the changes and this 'belittles the relationship that Te Roroa and the Crown have only recently began to address', which was 'extremely disappointing'.[128] Te Iwi ō Te Rarawa ki Ahipara claimant Reuben Porter said, 'we should not have to prove that we are there on our own takutai moana . . . The Crown should have to prove that we are not there'.[129] Those are but some examples of evidence from numerous claimants to similar effect.

The Minister originally sought to amend the Act 'to make clear Parliament's original intent' as stated in the coalition agreement. However, his proposals have since gone beyond what the agreement requires by proposing, in addition, amendments to the Preamble, purpose and Treaty provisions, as well as the burden of proof provision, and he has provided no evidence to counter the opinions of officials in doing so.

In *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (2008), the Tribunal stated that the principle of '[a]ctive protection requires honourable conduct by, and fair processes from, the Crown, and full consultation

124. Tui Marsh, brief of evidence (doc A48), p 28
125. Ronald Apiti, brief of evidence (doc A5), p 1
126. Ibid, p 4
127. Kahukore Baker, brief of evidence (doc A10), p 2
128. Alexander Nathan, brief of evidence (doc A1), p 3
129. Reuben Porter, brief of evidence (doc A18), p 2

with – and, where appropriate, decision-making by – those whose interests are to be protected'.[130] The Crown's proposed amendments seek to radically alter the ability for Māori to have their customary rights recognised in the takutai moana. By providing no evidentiary basis for amending the Act so drastically, by ignoring the advice of officials, and by choosing to preempt the Supreme Court on the matter, we find the Crown's proposed amendments are in breach of the principle of acting in good faith, in breach of the principle of active protection and the principle of good government. We also consider that Māori will, or are likely, to suffer prejudice as a result of such radical amendments when there is no proper foundation for doing so.

4.3.5 Retrospectivity

Another highly contentious feature of the Crown's proposed amendments is the decision to have them apply retrospectively from the date of the Minister's announcement on 25 July 2024. Te Arawhiti began cautioning the Minister against incorporating retrospecivity in the amendments as early as 30 January 2024.[131] The Minister's stated rationale for applying retrospectivity was to avoid 'differential treatment' for CMT applicants based on the timing the High Court heard their cases.[132] As we found in section 4.3.2, this placed the Crown's desire to avoid administrative difficulties – of its own making – before the property rights of Māori, in breach of the principle of tino rangatiratanga.

Although much of LDAC's advice on retrospectivity was subject to legal privilege, they did acknowledge that 'some degree of retrospectivity is likely to be required to give effect to the policy objective as we understand it'.[133] However, LDAC provided this advice on 10 May 2024 before the second draft Cabinet paper on 5 June 2024 expanded the scope of the amendments to address the High Court's 2021 decision. In response to the Minister's indication that he wanted retrospectivity to apply to all awarded CMT, Te Arawhiti advised on 27 May 2024 that there was not sufficient justification for doing so.[134] As earlier mentioned, Te Arawhiti stated:

> Based on well-established norms and conventions around retrospectivity, and the specific Treaty-related context of the Act, Te Arawhiti does not consider that there is any reasonable justification for overturning and re-testing awarded CMT. The primary objective of this retrospective application would be to improve the consistency of CMT awards over time — assuming the test for CMT becomes stricter following

130. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4

131. 'Section 58 – Preliminary Options and Process', 30 January 2024 (TA.003.0323) (doc A52, p 530)

132. 'Takutai Moana Draft Cabinet Paper on Clarifying s58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 18 April 2024 (TA.001.0246), p 6 (doc A52, p 81)

133. 'Legislation Design and Advisory Committee Advice on the Takutai Moana Bill', 10 May 2024, p [61] (TA.001.0296) (doc A52, p 51)

134. 'Te Arawhiti – Further Advice on Options for Section 58 of the Marine and Coastal Area (Takutai Moana) Act', 27 May 2024 (TA.001.0369), p 3 (doc A52, p 112)

> the proposed changes. However, this benefit needs to be weighed against the consequences of depriving litigants of the fruits of their litigation – contrary to well-established convention.[135]

Nonetheless, the second draft Cabinet paper saw the Minister push for this level of retrospectivity, although he did seek feedback on this from Cabinet.[136] When the intial final Cabinet paper went to Cabinet on 1 July 2024, a revision to the retrospectivity of the amendments was requested. The final Cabinet paper on 8 July 2024 saw Cabinet agreeing to only apply retrospectivity from the date of the policy announcement.[137] As discussed above in section 4.3.1, the Crown cited this as an example of the Minister demonstrating an open attitude during the policy development process – we hold a different view.[138]

Retrospectivity will cause significant prejudice to applicants who have already been through the CMT application process, in some cases for as many as 18 weeks of hearing, but who did not have their decisions finalised before the Minister's announcement. The length of these hearings, and the extensive testing of evidence that has occurred, even in the wake of the Court of Appeal's 2023 decision, demonstrates that the test for CMT remains 'exacting'. Te Roroa claimant Alexander Nathan said the test was being 'changed at the Crown's whim, and to the Crown's benefit'.[139] Ngāti Kauwhata ki te Tonga claimant Donald Tai called the Crown's actions to change the test 'deceitful and unfair'.[140] Heta Kaukau said the Te Rauhina Marae Trustees were now in 'limbo'.[141] Ngāti Te Wehi claimant Ronald Apiti said being forced to relitigate their case is 'extremely prejudicial' and 'absolutely abhorrent'.[142] Ngāti Tamarangi claimant William Taueki stated that '[w]e are continually put into these positions where one minute the Crown has agreed to something and you get some hope and the next minute it's all changed'. He said '[t]his constant battle has hurt our health . . . and has a negative impact on all of us, but especially the rangatahi'.[143] Once again, these are just some examples of the prejudice expressed by numerous claimant witnesses.

Many Māori did not want to participate in this regime in the first place, but, given the statutory deadline, had to apply in order to have their customary rights recognised. Te Kapotai claimant Kara George stated that 'we believe the MACA Act is prejudicial already', but '[w]e have no choice but to proceed down this track in order to get some form of acknowledgement of our rights'. On the prospect

135. Ibid, p 13 (p 122)
136. 'Draft Cabinet Paper: *Takutai Moana: Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011*', 5 June 2024 (TA.003.0144), p 3 (doc A52, p 178)
137. 'Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011', 8 July 2024 (TA.001.0410-TA.001.0411), pp 1–2 (doc A52, pp 255–256)
138. Transcript 4.1.1, p 325
139. Alexander Nathan, brief of evidence (doc A1), p 3
140. Donald Tait, brief of evidence (doc A2), p 5
141. Heta Kaukau, brief of evidence (doc A3), p 2
142. Ronald Apiti, brief of evidence (doc A5), p 3
143. William Taueki, brief of evidence (doc A7), p 2

of rehearings, George stated, 'The light at the end of the tunnel gets smaller and smaller'.[144] Having now gone through this exhaustive process, these applicants will be forced to repeat it. Rehearing these cases will likely place a significant personal and financial burden on applicants and strain whanaungatanga. Many witnesses have also passed away since they provided the evidence necessary to meet the exacting standard of the CMT test. Moreoever, some applicants who would have been granted CMT under the old test will likely find themselves unable to meet the standards of the proposed new test. Reuben Araroa, Chief Executive of Te Rūnanga o Ngāti Awa, told us about the impact of having to undertake a rehearing. He said

> Although we have participated in several proceedings already, TRONA [Te Rūnanga o Ngāti Awa] is yet to have the majority of its substantive application heard. The bulk, and remainder, of its application area falls within the Central Bay of Plenty grouping for hearing which is currently set down to start in May 2025.
>
> Overlapping interests at the boundaries of the Ngāti Awa rohe have necessitated TRONA's participation in other priority hearings. TRONA has obligations to its hapū and a role to maintain the integrity of Ngāti Awa's boundaries and interests. It is for these reasons we had to participate in the *Re Edwards* and *Re Reeder* proceedings. Because they had priority, we understood why those hearings had to be among the first to be heard. What we could not have predicted is that we would spend years of effort trying to meet one test for those hearings and our boundary interests, only for the test to be changed before we could have the rest of our area heard.[145]

He told us that proceedings had required 'substantial effort from TRONA staff, iwi members and kaumātua'. Furthermore, he said, 'I think about the pakeke elders within the iwi that have passed since those times'.[146]

Many claimants told us about the impact of the retrospective nature of the amendments on their whānau, hapū, and iwi. Mr Kerepeti-Edwards said:

> To now propose amendments that retrospectively and unilaterally make customary title more unattainable for Māori is completely unacceptable. There is no observance of our tino rangatiratanga and no respect for our place as tangata whenua, mana whenua and mana moana.[147]

Claimant Dr Panoho similarly observed:

> The Court might still issue a judgment before the Bill is introduced. If it does, the judgment will be overturned, and the application reheard once the Crown passes the legislation. To require us to repeat this application process is egregious and places

144. Kara George, brief of evidence (doc A6), pp 2–3
145. Reuben Araroa, brief of evidence (doc A4), p 9
146. Ibid; transcript 4.1.1, p 122
147. Aperahama Kerepeti-Edwards, brief of evidence (doc A13), pp 2–3

those of our whanau in poor health at risk . . . This has and will cause significant prejudice to us.[148]

Claimant George Matthews, on behalf of Te Hika O Pāpāuma of Eastern Wairarapa, said that retrospectivity would have a 'jarring and devastating effect on Pāpāuma'. Their judgement, he said, was still pending from Justice Gwyn in the High Court. Mr Matthews said '[o]verturning our Pāpāuma judgement by Justice Gwyn (when it is delivered) is plain wrong and, frankly, racist'.[149] Counsel for the Rump claim argued that the Crown had accepted that the retrospective nature of the proposed amendments was in principle 'draconion'.[150] Not only this, they said, '[h]is primary concern is not unevenness that might result between hapu and iwi, but large awards affecting the erroneous "equal citizenship" policy'.[151] Claimants drew on the Cabinet paper, which stated:

> Nonetheless, Parliamentary sovereignty means that Parliament can pass retrospective laws (ie, applying to past judicial decisions). However, there are strong constitutional conventions that influence the use of retrospectivity.
>
> Retrospectivity is used only where necessary and with good policy reason. This expectation is heightened when *retrospectivity* is used to deprive litigants of 'the fruits of their litigation,' in this case; awards of CMT. The Court of Appeal has described; retrospectivity in similar circumstances as "draconian."[152]

As discussed in section 1.2.3, we are going to consider the changes to the funding available to applicants in stage 2 of this urgent inquiry. Despite that, we cannot ignore the overlap the proposed reduction in funding could have on those applicant groups who would have to go through a rehearing because of the retrospective application of these proposed amendments. After participating in the Crown's Takutai Moana Act regime in good faith, applicants could find themselves having to go through a rehearing process, against a more difficult test, with less funding available.

At the hearing, the Crown repeatedly asked claimant witnesses how it might mitigate the prejudice of rehearings. Many claimants understandably met this question with a mix of exasperation, saying that the Crown could simply mitigate the harm by deciding not to inflict it. If the Crown continues its work to amend the Act, claimant Steven Chrisp listed three things it could do to reduce harm towards the applicants, including providing funding for rehearings, offering support to lessen intra- and inter-tribal tension, and developing a streamlined system for cases that have already spent weeks and months in litigation.[153] However, as we stated in section 4.3.2 above, the Crown should not decide to act in breach of te

148. Joy Panoho, brief of evidence (doc A41), p 3
149. George Matthews, brief of evidence (doc A14), p 9
150. Submission 3.3.34, p 7
151. Ibid, p 8
152. Cabinet, paper, 8 July 2024 (TA.003.0276), p 12 (doc A52, p 508)
153. Transcript 4.1.1, pp 113–114

tiriti and then look to mitigate prejudice afterwards. It should first and foremost comply with its te tiriti obligations.

As the claimant evidence and our analysis shows, to include retrospectivity in these amendments is a breach of the principle of active protection, which requires the Crown to develop fair processes to protect the rights and interests of Māori. There is nothing fair about expecting applicants to subject themselves to a second round of arduous litigation simply because the Crown has chosen to intervene and change the metrics of the system it created. Even if retrospectivity were needed to achieve the Government's stated aims, it is such an unfair unilateral decision that it would still constitute a breach of the Treaty. That the Crown knows its policies will cause harm to applicants and their wider communities, but resolves to continue nonetheless, finding itself having to ask how it can mitigate that harm, is also a breach of the principle of good government. We find that affected Māori applicants will, or are likely, to suffer prejudice as a result of this harm from having to go through a rehearing process in these circumstances.

CHAPTER 5

SUMMARY OF FINDINGS AND RECOMMENDATIONS

5.1 Introduction

In this chapter, we summarise our findings and present our recommendations.

5.2 Summary of Findings

We made findings on the Treaty compliance of the policy development process that the Crown followed in seeking to amend the Takutai Moana Act. We found that the Crown's dismissal of official advice led to important steps not being taken, resulting in the Crown breaching the principle of good government.

We found that the Crown breached the principle of partnership in various ways. First, by failing to consult with Māori during the development of the proposed amendments. Secondly, by only offering to consult with Māori after decisions were made. Lastly, by reducing that limited offer of consultation even further to suit its own deadline to amend the Act before the end of the year. Te takutai moana is a significant taonga and changes to its legislative regime requires the Crown to demonstrate the highest standard of consultation, which it failed to meet at every step of the policy development process, despite the advice from officials.

We found the Crown breached the principle of tino rangatiratanga by exercising kāwanatanga over Māori rights and interests in te takutai moana without providing any evidence for one of its key justifications, namely that the public's rights and interests require further protection beyond what is already provided by the Act. By failing to inform itself of Māori interests, the Crown's exercise of kāwanatanga was also a breach of the principle of tino rangatiratanga. We also found the Crown's consultation with commercial fishing interests, which already have statutory protection, prior to finalising the proposed amendments, while failing to consult with Māori at all, to breach the principle of good government.

We also made findings regarding the Treaty compliance of the Crown's proposed amendments to the Takutai Moana Act. We found the Crown breached the principle of active protection and the principle of good government by failing to demonstrate how it had arrived at its understanding of Parliament's original intent – which informed the decision to extensively amend Māori rights in te takutai moana – in contrast to that of the objective evidence and official advice, and by seeking to amend the Act before the Supreme Court can hear the matter.

We also found the Crown breached the principles of active protection and good government by proposing amendments that are applied retrospectively (from 25 July 2024 onwards). As a result of retrospectivity, applicants will be forced to have

their cases reheard, burdening them emotionally and financially through no fault of their own, and placing further strain on whanaungatanga.

We also found that Māori will, or are likely, to suffer prejudice as a result of these breaches as:

- the takutai moana is a significant taonga but the proposed amendments are not subject to robust well-designed transparent policy;
- Māori have not been given the opportunity to engage as Treaty partners, and to exercise their tino rangatiratanga, on such a significant issue;
- the Crown is seeking to restrict the ability of Māori to have their rights recognised through an award of CMT, when there is no identified public right or interest that requires protection, and when there has been no balancing exercise taking into account Māori rights and interests in the takutai moana;
- the Crown seeks to amend the Act so drastically, without any evidentiary basis for doing so, while ignoring the advice of officials, and choosing to preempt the Supreme Court on the matter; and
- Māori applicants affected by the retrospective application of the amendments will suffer harm from having to go through a rehearing process when they have already participated in extensive hearings in good faith.

5.3 Recommendations

5.3.1 Claimant submissions

The claimants submitted common recommendations that they sought from the Tribunal, including that the Crown:

- halt its efforts to amend the Takutai Moana Act;[1]
- apologise to CMT applicants and to all Māori;[2]
- implement instead all recommendations from the Wai 2660 reports;[3]
- allow the Supreme Court to hear *Re Edwards* before making any legislative changes;[4]
- let the High Court hearings into CMT applications, and hearings that are awaiting judgments, be decided under the present Act;[5]
- publish material correcting misleading articles published by Hobson's Pledge; and[6]

1. Submission 3.3.20, p 20; submission 3.3.21, p 15; submission 3.3.22, p 23; submission 3.3.24, p 11; submission 3.3.26, p 28; submission 3.3.27, p 76; submission 3.3.28, p 20; submission 3.3.29, p 23; submission 3.3.30, p 24; submission 3.3.31, p [14]; submission 3.3.32, p 30; submission 3.3.33, p 14; submission 3.3.34, p 13; submission 3.3.35, p 88; submission 3.3.36, p 51; submission 3.3.40, p 74
2. Submission 3.3.20, p 20; submission 3.3.24, p 11; submission 3.3.27, p 76; submission 3.3.28, p 20; submission 3.3.32, p 30; submission 3.3.34, p 13; submission 3.3.36, p 51
3. Submission 3.3.20, p 20; submission 3.3.21, p 14; submission 3.3.27, p 76; submission 3.3.29, p 23; submission 3.3.32, p 30; submission 3.3.36, p 52
4. Submission 3.3.20, p 20; submission 3.3.22, p 23; submission 3.3.30, p 24; submission 3.3.40, p 74
5. Submission 3.3.20, p 20
6. Submission 3.3.22, p 23

- adopt any other recommendations made by the Tribunal.[7]

If the proposed amendments do go ahead, the claimants sought the following recommendations that the Crown:

- allow for meaningful engagement with Māori;[8]
- should not apply the amendments retrospectively; and[9]
- compensate Māori who lose customary rights and interests in te takutai moana.[10]

5.3.2 Crown submissions

The Crown advanced a general position that it is too soon to determine what, if any, prejudice may arise from the proposed amendments. In its closing submissions, the Crown stated that 'there remain important steps to come for the proposed amendments and that these steps should be weighed in the Tribunal's assessment of the claims and extent of prejudice arising to claimants'. Counsel noted that Cabinet 'are yet to take final decisions on the content of the Bill and whether to seek the Bill's introduction into Parliament'. They stated that the Bill 'would then be considered by the House of Representatives for enactment (a matter for Parliament, not the Crown), following which the interpretation and application of the legislation would be considered by the Courts'.[11] Furthermore, as to prejudice caused by having differential treatment of applicants if the amendments are enacted, 'the Crown suggests that the nature and extent of that differential treatment cannot be accurately gauged before the proposed amendments are legislated and before the Supreme Court issues its judgment on the interpretation and application of s 58 in the *Re Edwards* proceeding'.[12]

5.3.3 Tribunal recommendations

In this inquiry, the Crown has not provided us with any substantive Treaty compliant arguments to consider, but focused instead on a narrative of Minister Goldsmith's concerns. As we discussed in chapters 3 and 4, the Minister has ignored warnings from officials as to non-compliance with the Treaty and with law-making conventions, being singularly focused on Māori exercising permission rights as a result of recognition of CMT (which, as we noted in chapter 4, are already severely limited by statute). The Minister's only response has been to ignore advice and seek to reduce the recognition of those rights – almost down to nothing.

We strongly recommend that Cabinet pause and step back before advancing to the next stage of considering presenting to Parliament a Bill based on such a

7. Submission 3.3.20, p 20; submission 3.3.21, p 15; submission 3.3.23, p 9; submission 3.3.24, p 12; submission 3.3.28, p 20; submission 3.3.35, p 88; submission 3.3.36, p 51
8. Submission 3.3.20, p 20; submission 3.3.22, p 23; submission 3.3.27, pp 76–77; submission 3.3.30, p 24; submission 3.3.35, p 88
9. Submission 3.3.27, p 76; submission 3.3.28, p 20
10. Submission 3.3.22, p 23; submission 3.3.35, p 88
11. Submission 3.3.38, p 2
12. Ibid, p 23

flawed approach. Cabinet needs to ask itself – why or how has this situation of such clear Treaty breach arisen? What has caused such anxiety about the recognition of statutorily limited customary rights and their exercise to such an extent as to reduce Māori CMT recognition down almost to nothing? That anxiety has even led to proposed changes to the Act's underlying Preamble, purpose, and Treaty provisions presumably to enable the proposed changes to section 58 to overcome any potential later court scrutiny of those changes.

As discussed in section 4.3.3, the only policy rationale advanced by the Minister's Cabinet paper is a concern that more CMT equates to 'increased difficulty of getting resource consents' which 'unsettles the balance of rights intended by the Act'.[13] But the fundamental concern has to be the absolute failure of the Minister to be able to enunciate, or even consider, exactly what type of resource consents he is worried about. It cannot be for:

- existing infrastructure – it has exemption from the permission regime as accommodated activities;
- new infrastructure – because a waiver with compensation system under Ministerial control already exists there;
- existing resource consents – they too are defined as accommodated activities which cover a very broad range of activities and structures;
- existing aquaculture consents – they are exempt; or
- new aquaculture or other activities which regional coastal plans might class as permitted activities – they will not need resource consents.

Once all these major structures and activities are taken into account, there is very little left that can cause concern. The permission right will only apply to a range of limited consents for such structures as new jetties, moorings or boatsheds, and renewals of some existing consents. If the Minister is seriously concerned about those (and there is no evidence before us from the Crown of Māori acting arbitrarily), and only if evidence of arbitrary withholding of permission rights arises in the future, then surely the answer is to raise that issue squarely in a Treaty compliant conversation with Māori and to address how best to resolve that concern.

A range of methods could be considered and discussed in that conversation. Options for discussion might include: some tikanga or environmental based criteria for refusal of permission being required with rights of appeal to the Māori Land Court or the Environment Court with the latter having a member with tikanga experience; or an annual compensation regime similar to the rates of fees charged by the Crown for foreshore licences on land for structures; or other compensation measures similar to the current schedule arrangements on the Takutai Moana Act for mining; or for renewals some new tikanga or environmental related issue which affects renewal with rights of appeal again as described above.

Any, or a mix of those, or other options must be preferable to the current option of just doggedly continuing with a path which is in clear Treaty breach and which repeats the approach of the Foreshore and Seabed Act 2004.

13. Cabinet, paper, 8 July 2024 (TA.003.0276), p 11 (doc A52, p 507)

The enactment of the 2004 Act led to a powerful resistance from Māori, in the form of the hīkoi and the subsequent rise of the Māori Party. Recently, the tangi for the passing of the Māori King has demonstrated once again the power of kotahitanga for Māori when bound by a just cause. In the spirit of Kingi Tuheitia's call for the principle of kotahitanga to be broader and for all New Zealanders, we urge Cabinet to stand back and seriously reconsider before seeking to introduce a Bill which is the antithesis of a kotahitanga approach for the whole community of New Zealand because of its clear non-compliance with Treaty principles.

Instead Cabinet should opt for a course which respects the rule of law and allows an appeal decision to clarify the intent of section 58. After that outcome, if any residual concern is still felt by the Crown based on actual evidence, then and only then, to commence a conversation with Māori about the real issue concerning the Crown – which is the potential for arbitrary negative exercise of the permission right, not the spatial extent of the statutorily severely limited customary rights.

We therefore make the following recommendations that:

- the Crown halts its current efforts to amend the Takutai Moana Act;
- the Crown makes a genuine effort for meaningful engagement with Māori; and
- the focus of this engagement should be on the perceived issues of permissions for resource consents, rather than interrupting the process of awarding CMTs.

At present, the Crown's actions are such a gross breach of the Treaty that, if it proceeds, these amendments would be an illegitimate exercise of kāwanatanga. We caution the Crown that on the strength of the evidence we have received to proceed now on its current course will significantly endanger the Māori–Crown relationship.

Dated at Wellington this 12th day of September 2024

Judge Miharo Armstrong, presiding officer

Ron Crosby, member

Tā Pou Temara, member

THE SEAL OF THE WAITANGI TRIBUNAL