Supplementary Analysis Report: Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011

Coversheet

Purpose of Document	
Decision sought:	This analysis is produced to support the Cabinet Legislation Committee paper seeking approval on final policy decisions and to introduce the draft Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill (**the Amendment Bill**). The Amendment Bill implements Cabinet's policy decisions made on 8 July 2024 to amend section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (**the Takutai Moana Act**) to restore Parliament's intent in light of the *Re Edwards* Court of Appeal decision.
Advising agencies:	The Office for Māori Crown Relations - Te Arawhiti
Proposing Ministers:	Hon Paul Goldsmith
Date finalised:	18 September 2024

Problem Definition

The government's coalition agreement commits to amend section 58 of the Takutai Moana Act to restore Parliament's intent in light of the Court of Appeal's decision in *Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kahui and Whakatōhea Māori Trust Board & Ors* [2023] NZCA 504 ***(Re Edwards)***. The Court of Appeal interpreted the test for customary marine title (**CMT**) in a manner that materially reduced the threshold for the recognition of CMT.

Executive Summary

Marine and Coastal Area (Takutai Moana) Act 2011

The Takutai Moana Act establishes a regime that balances the interests of all New Zealanders in the marine and coastal area. To achieve this, the Act guarantees continued public access, fishing, and navigation, and protects existing use rights in the common marine and coastal area within a legal framework that also provides for recognition of Māori customary interests.

The Takutai Moana Act provides whānau, hapū, and iwi, with the ability to seek legal recognition of their customary interests, either through the High Court or through direct engagement with the Crown. Customary interests are legally recognised through two awards: protected customary rights (**PCR**); and CMT. The statutory deadline for submitting applications was 3 April 2017.

Section 58 of the Takutai Moana Act sets out the test that must be met to determine whether a whānau, hapū or iwi applicant group can be granted CMT. The test has two 'limbs', both of which must be satisfied. It also specifies that CMT does not exist if that title is extinguished as a matter of law. The test is the same whether the application has been made to the Crown or the High Court.

Re Edwards Court of Appeal

In October 2023, the Court of Appeal issued its decision on *Re Edwards.* In interpreting the second limb of the test for CMT, the Court of Appeal found that:

a. applicants do not need to demonstrate exclusive use and occupation 'from 1840 to the present day' and only need to establish exclusive use and occupation in 1840, and that this use and occupation has not ceased or been substantially interrupted after 1840; and

b. customary use and occupation can only be 'substantially interrupted' where relevant third-party activities are authorised by legislation.

The Government considered that the Court of Appeal's interpretation of section 58 prioritised the purpose of the Takutai Moana Act, the preamble and the Treaty clause and did not place sufficient weight on the text of section 58 thereby changing the test and materially reducing the threshold. In addition, the Crown disagreed with the Court of Appeal's finding that customary interests had not been extinguished via historic legislation such as the Coal Mines Act Amendment Act 1903.

Prior to the formation of the current government, the Attorney-General sought leave to appeal the Court of Appeal's decision, including on the basis of an error of law in the Court's interpretation of s 58, and the issue of legal extinguishment. Leave was granted in April 2024 and the hearing is scheduled to commence on 4 November 2024.

Coalition agreement commitment

On 28 November 2023, Cabinet endorsed the coalition agreements between the parties as the basis on which the Coalition Government will operate. A Cabinet Office circular provided an instruction to Chief Executives and their respective offices that they were to have processes in place to implement coalition agreements.

The National - New Zealand First Coalition Agreement includes 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 Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kahui and Whakatōhea Māori Trust Board & Ors [2023] NZCA 504."*

Te Arawhiti identified a range of policy options for implementing the coalition agreement commitment. This involved identifying the options for amending section 58. The Minister also requested advice, and subsequently options, on the retrospective application of the amended test.

Section 58 options

Te Arawhiti identified the following range of options:

- Status quo – allow the Supreme Court judgement to play out;
- Option A – relatively few changes focusing on the Court of Appeal's interpretation;
- Option B – more extensive changes to ensure a strict CMT test (Minister's preferred option); and
- Option C – wider reform of the Takutai Moana Act.

Te Arawhiti's advice also highlighted the range of risks associated with these options. Any amendment to the Takutai Moana Act was likely to attract significant litigation, reputational, constitutional, Treaty of Waitangi, Māori-Crown relationship, and wider public perception risks. The more extensive the amendments and the greater the extent of retrospective application the greater

the magnitude of those risks including, in the case of litigation risk, the risk of an adverse outcome for the Crown.

Given the Minister for Treaty of Waitangi Negotiations' (the Minister's) direction that the status quo was not a feasible option, Te Arawhiti considered that out of the remaining options Option A applied prospectively would be a direct and effective way to address the problem and achieve the policy objective. Te Arawhiti considered this option posed the least legal, Tiriti and relationship risk by confining the amendment to a targeted alteration of key errors in the Court of Appeal's interpretation of section 58 of the Takutai Moana Act and that it thereby delivers the highest net benefit.

On 9 July 2024, Cabinet considered three options (A-C) to restore Parliament's original intent [CAB-24-MIN-0256 Revised refers].

Cabinet agreed to the following package of amendments to restore the test, Option B in the Cabinet paper [CAB-24-MIN-0256 Revised refers]:

- inserting a declaratory statement that overturns the Court of Appeal's and High Court's judgments in *Re Edwards* relevant to the test for CMT and High Court judgments since the High Court in *Re Edwards* insofar as they interpret 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 Takutai Moana Act (section 106) to clarify that applicant groups are required to prove exclusive use and occupation from 1840 to the present day; and
- making clearer the relationship between the framing sections of the Takutai Moana 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.

Retrospective options

The Minister advised that he wanted to consider the retrospective application of the amendment to section 58 to ensure that all applications, past and future, are decided based on the same test, and to bring unduly large awards made on the basis of the *Re Edwards* interpretation back in line with earlier awards and Parliament's intention in passing the Takutai Moana Act.

The four options presented in the 9 July Cabinet paper were:

a. prospective application;

b. retrospective application to all CMT decisions since (and including) *Re Edwards* in the High Court;

c. retrospective application to all CMT decisions since *Re Edwards* in the Court of Appeal; and

d. retrospective application from the point of announcement of the policy changes.

The core difference between those four options is how many CMT judgments will be overturned and how many cases will need to be re-heard on the basis of the restored test arising out of the proposed section 58 amendments. The options ranged from no rehearings (a) to all being reheard in (b).

Te Arawhiti advised the Minister that the section 58 amendments should not be applied retrospectively i.e. option (a) above. Specifically, Te Arawhiti considered there was not reasonable justification for retrospective application of any new CMT test and that this was based on well-established norms and conventions around retrospectivity, and the specific Treaty-related context of the Takutai Moana Act.

Cabinet agreed to option (d) above, that the amended law be applied retrospectively from the date of the Minister's announcement of the policy changes. The impact of this option was that all existing decisions would remain as they are, but live cases in the High Court without decisions at the time of announcement would have to be re-heard.

On 25 July 2024, the Minister announced Cabinet's decisions. He also commenced a three-week submission process for whānau, hapū and iwi applicant groups to provide comment on the broad policy proposals.

Consultation with Māori

All applicant groups who submitted during the consultation period opposed the changes to the Takutai Moana Act. The majority of applicant groups expressed significant concern with the lack of engagement or consultation in the development of the proposals and with the subsequent engagement process. The retrospective application of the changes including requiring re-hearings and possibly overturning awards, was raised as a consistent concern in applicant submissions, the submission of the Law Society, and by claimants in the Tribunal.

Officials provided a summary of the submissions received and subsequently proposed a number of recommendations for the Minister's consideration prior to him returning to Cabinet in mid-September. These recommendations are identified in part C of Section 2 below, but not assessed.

The Cabinet Legislation Committee paper is seeking approval on final policy decisions and to introduce the draft Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill. The key outstanding policy decision is around the approach to the Ngāti Porou bespoke takutai moana regime (Ngā Rohe Moana o Ngā Hapū o Ngāti Porou). Cabinet approval is being sought to introduce the legislation without consequential amendments to the Ngāti Porou Act, to allow time for further engagement with Ngāti Porou.

Limitations and Constraints on Analysis

Narrow scope

The Minister directed officials to prepare options for implementation of the coalition agreement commitment. The coalition agreement has meant that all options considered needed to be legislative in nature.

Timing and depth of analysis

The Minister directed that the Amendment Bill needs to be enacted by end of 2024. The speed of this legislative process reflected the Government's desire to restore the section 58 test to that intended by Parliament before more Court decisions are made on the basis of an inconsistent interpretation of the section 58 test. The development of policy, and drafting the legislation to give effect to that policy, has been constrained by the tight timeframe required to meet the government's objective of enacting the amendment legislation before the end of 2024.

This has impacted the policy advice Te Arawhiti has provided. Advice was consistently required at short timeframes (sometimes within days) for the development of options, subsequent advice, development of the Cabinet papers, drafting of the Amendment Bill and analysis of the submissions from the three-week consultation period on Cabinet's decisions.

The tight timeframes to complete the policy work and drafting have limited the depth of analysis. Specifically the timing constraints precluded:

- the development of a regulatory impact analysis before Cabinet's decisions on the broad policy intent. This supplementary analysis report will accompany the paper seeking Cabinet's approval and introduction of the amendment legislation;
- financial forecasting was not undertaken before Cabinet policy decisions on the cost of re-hearings for the six live High Court cases that are impacted, or costs associated with anticipated litigation (that forecasting has now been conducted);
- analysis of compliance with international obligations. Potential inconsistency with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) was raised by claimants in the urgent Waitangi Tribunal inquiry; and
- wide stakeholder or public consultation to understand the scale or significance of the issue and the extent to which the Court of Appeal decision might cause problems in practice.

The targeted engagement period did not extend to other stakeholders. Te Arawhiti is aware that there are groups that actively oppose the Act itself; most notably Hobson's Pledge. In addition, the Minister regularly receives correspondence from people expressing concerns with the Takutai Moana Act based on their perceptions of the Act (and often misinformation). Five non-applicants made submissions during the engagement period on their own initiative. It was not the purpose of the targeted consultation to seek the views of non-applicant groups, and there are likely more views from non-applicants than are represented here. The New Zealand Law Society and the Māori Law Society both responded with concerns about the proposed changes, along similar lines to the legal and Treaty objections raised by applicants.

Scope of advice

The early advice and engagement with the Minister focused on outlining the context, including the Court of Appeal decision and the documentary record of Parliament's original intent, identifying issues for further consideration in the policy development process, and developing options.

Te Arawhiti has investigated the body of evidence and found that the intent behind the test for CMT (section 58) was to:

- establish a principled approach to testing customary property interests – not based on predetermined outcomes;
- address some criticisms of the 2004 Act's test (e.g. removing 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
- provide for recognition of unrecognised (extant) property rights – rather than address historical grievances.

The Minister's understanding of Parliament's original intent was that the section 58 test was intended to set a very high threshold to the recognition of CMT, resulting in relatively few and small areas under CMT.

The Minister's focus on his particular interpretation of Parliament's intent, accompanied by a desire to have amending legislation passed in 2024, has limited the scope of policy options and the depth of analysis possible. Te Arawhiti has needed to focus its resource on directly responding to the Minister's direction regarding the coalition agreement and providing free and frank advice on the associated risks.

Engagement with Māori

The constrained timeframes precluded engagement with Māori (and other stakeholders) with an interest in the marine and coastal area prior to Cabinet's decision on the broad approach to amending the Takutai Moana Act. Wider public engagement to understand public views, including on the impact of the Court of Appeal's decision, was also not possible.

Following announcement of Cabinet's decisions in July 2024, the Minister wrote to applicant groups inviting feedback on the decisions, and received responses from 47 applicant groups and five interested parties. Analysis of the feedback has been included in this supplementary analysis report where possible.

Te Arawhiti advised the Minister that this process was not consistent with the principles of the Treaty of Waitangi or Te Arawhiti's 'Guidelines for engagement with Māori' – especially given the impacts are on core Māori rights and interests, and the importance of foreshore and seabed issues in the Māori Crown relationship.

On Friday 13 September the Waitangi Tribunal released its urgent report on the policy for the proposed amendments. The Tribunal found the Crown had breached the principles of good government, partnership, tino rangatiratanga and active protection. It found Māori were likely to suffer prejudice because of the amendments as the amendments were the result of a process that was neither robust nor transparent, with no balancing exercise, and which pre-empted judicial appeal processes. The Tribunal found applicants subject to rehearing are likely to suffer harm.

Responsible Manager(s) (completed by relevant manager)

Tui Marsh

Deputy Chief Executive, Treaty Reconciliation and Takutai Moana

Te Arawhiti – The Office for Māori Crown Relations

s 9(2)(a)

19 September 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Justice
Panel Assessment & Comment:	The Ministry of Justice's Regulatory Impact Assessment quality assurance panel has reviewed the Supplementary Analysis Report (SAR) *Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011* prepared by Te Arawhiti, and considers that the information and analysis summarised in the supplementary analysis partially meets the quality assurance criteria. The SAR clearly sets out the problem definition, a range of options, and evaluation criteria. As stated in the SAR, the analysis is constrained by its narrow scope, limited timeframes, and lack of public consultation. While targeted consultation did occur, this was after Cabinet's policy decisions had been made. The SAR identifies where the costs and benefits fall, and the significance of their impact, but time constraints mean these can't be quantified and evidence is not available to support the judgements made.

	The SAR makes good use of an analytical framework to support conclusions, although the criteria are not applied consistently throughout. More time would enable engagement to understand the scale and significance of the problem and a more informed analysis of the options and their impacts. The Panel considers that the analysis is otherwise robust and can be relied upon.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The Marine and Coastal Area (Takutai Moana) Act 2011

1. There is a significant legislative, historical and cultural context to the Takutai Moana Act. In 2003, the Court of Appeal in *Ngāti Apa* found that the Māori Land Court had jurisdiction to consider extant Māori customary rights claims, including claims for indigenous title, in respect of the foreshore and seabed. The Foreshore and Seabed Act 2004 (**Foreshore and Seabed Act**) was passed in response to the Court of Appeal's judgment, and it vested the foreshore and seabed in the Crown, extinguishing Māori customary rights in these areas, and providing instead for limited recognition and protection of customary interests.

2. The reaction from Māori, and sections of the public generally, to the Foreshore and Seabed Act resulted in a large hikoi to Parliament in 2004 opposing it. The Foreshore and Seabed Act was viewed as a further confiscation of Māori customary rights and interests. The Waitangi Tribunal also conducted an inquiry (Wai 1070) into claims concerning the policy underpinning the Foreshore and Seabed Act. Following the 2008 general election the new National-led government entered a confidence and supply agreement with the Māori Party agreeing to review and replace the Foreshore and Seabed Act. A Ministerial review panel conducted that review and engaged with Māori on the Foreshore and Seabed Act. Further engagement with the Iwi Leaders Forum was also held while the government conducted policy work on a replacement regime.

3. The resulting legislation, the Marine and Coastal Area (Takutai Moana) Act 2011 was passed in 2011. It repealed the Foreshore and Seabed Act and restored the customary rights that had been extinguished by that Act. The Takutai Moana Act sets out a framework to protect the interests of all New Zealanders in the marine and coastal area, while enabling the legal recognition of Māori customary rights.

4. Section 4 of the Takutai Moana Act states that the purpose of the 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;

    b. recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua;

    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).

5. The Takutai Moana Act established a 'no ownership' status for the common marine and coastal area. This area extends from the line of mean high-water springs to twelve nautical miles out to

sea, subject to some exceptions.[1] This means that neither the Crown nor any person or group owns, or can own, the common marine and coastal area. The Takutai Moana Act protects ongoing public access to the marine and coastal area, including for fishing, and navigation.[2]

6. The Takutai Moana Act provides for iwi, hapū, and whānau Māori to seek recognition of their customary rights in the common marine and coastal area. These rights are legally recognised through two awards: CMT; and PCRs. Section 58 of the Act sets out the test for CMT. The test has two 'limbs' and requires applicant groups to prove that they:
   a. 'hold' the relevant area 'in accordance with tikanga' ('limb one'); and
   b. have 'exclusively used and occupied' that area 'from 1840 to the present day without substantial interruption' ('limb two').

7. Two 'pathways' were available to applicant groups seeking recognition of their customary interests in the marine and coastal area. Applicants could either apply to the High Court or the Minister for Treaty of Waitangi Negotiations for direct engagement, or both. The test for CMT is the same whether an application has been made to the Crown or the High Court. Applications for legal recognition of customary rights through CMT and PCRs were required to be filed by the deadline of 3 April 2017 under the Takutai Moana Act.

Key features of CMT

8. CMT provides an interest in land but does not include the right to alienate or dispose of the CMT. CMT holders are able to derive commercial benefit from these rights but are not exempt from obtaining any relevant permit or consent. Iwi, hapū, and whānau Māori who have had CMT recognised may exercise specified rights in relation to their CMT, including:
   a. a resource management permission right – where permission from the CMT holder must be obtained before councils may approve some resource consents;
   b. a conservation activity permission right – where permission from the CMT holder must be obtained before the Minister of Conservation may grant concessions for some conservation activities;
   c. the ability to apply for additional protections for wāhi tapu areas;[3]
   d. involvement in coastal policy planning;
   e. the prima facie ownership of newly found taonga tūturu;[4]

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1 The common marine and coastal area is the area between the line of mean high water springs and 12 nautical miles out to sea (the outer limits of the territorial sea) except for any freehold land, conservation areas under the Conservation Act 1987, national parks under the National Parks Act 1908, reserves under the Reserves Act 1977, and the bed of the Te Whaanga Lagoon in the Chatham Islands. It includes the air and water space above (but not the water) and the subsoil, bedrock and other matter below, as well as the beds of rivers that are part of the coastal marine area (under the Resource Management Act 1991).

2 There is one exception to this which is where a wāhi tapu, an area with cultural and historical significance to applicant groups, is recognised as part of a CMT area and additional protections are needed to protect that area.

3 Defined by section 6 of the Heritage New Zealand Pouhere Taonga Act 2014 as places sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense (as per s 9 of the Takutai Moana Act).

4 Defined by section 2 of the Protected Objects Act 1975 as objects that: relate to Māori culture, history, or society; were manufactured in or brought to New Zealand, or used by Māori; and are more than 50 years old (as per s 9 of the Takutai Moana Act).

f. the ownership of minerals (excluding Crown-owned minerals - gold, silver, uranium, and petroleum); and

g. the right to create a planning document for the management of the CMT area that must be taken into account by local authorities.

9. Public access, fishing and other recreational activities in a CMT area are not affected (except for a limited exception for the protection of wāhi tapu areas within a CMT area). Significant third-party rights, including in relation to existing infrastructure, are also maintained, and the resource permission right has a number of other carve-outs, e.g. for emergency activities, and scientific research. New public-interest infrastructure is able to be deemed exempt from the resource management permission right following a process set out in Schedule 2 of the Takutai Moana Act, which includes engagement with the CMT holder and culminates in a final decision being made by the Minister for Land Information.

Parliament's intent in respect of the test for CMT

10. The repeal of the Foreshore and Seabed Act and introduction of alternative legislation was part of a confidence and supply agreement between the National Party and the Māori Party as explained above. In developing the new legislation, the government's objective was 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. They included: recreational, conservation, customary, business and development, and local government interests.

11. In developing the test for CMT, officials and the then Attorney-General and Minister for Treaty of Waitangi Negotiations Christopher Finlayson KC, drew on overseas common law, tikanga and New Zealand common law. Advice to Cabinet in the development of the Takutai Moana Act recommended an approach that would "strike the right balance by recognising the continuum of customary interests and testing these in a manner that is consistent with New Zealand's legal heritage, and which resonates with the treatment of customary interests in comparable jurisdictions".

12. In evidence on behalf of the Crown in the Waitangi Tribunal's Wai 2660 inquiry into the Takutai Moana Act, Hon Christopher Finlayson KC stated: [5]

> "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."

13. The Crown's position in that inquiry was that the test in s 58 was not designed to produce specific outcomes but to reflect common law principles for the recognition of rights of a proprietary nature.[6] The extent of CMT was a matter for decision-makers – the High Court or the Minister responsible for the administration of the Takutai Moana 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.

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[5] Wai 2660, B117 at 6.

[6] While officials are aware that some speculative remarks were made about the scope of CMT, including by Mr Finlayson suggesting in the media that "iwi will get 2000km of coastline", we are not aware of Cabinet papers that reference or guarantee specific outcomes.

14. Ms Benesia Smith – a lead official in the policy process leading to the Takutai Moana Act – explained in her evidence to the Waitangi Tribunal that:[7]

> … 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.

15. A 6 September 2010 press release from the responsible minister – Hon Christopher Finlayson KC - indicates the then Minister's view of the policy intent:

> "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. But those seeking title will have to prove their case, and the tests for customary marine title are strong ones. They will have to prove: that the area for which they are seeking title is held in accordance with tikanga, and that the group seeking title has had exclusive use and occupation of the area, and that the exclusive use and occupation has been held from 1840 until the present without substantial interruption. These tests are based on overseas common law from similar countries (Canada) but reflect New Zealand's experience better than overseas case law by incorporating tikanga. Customary marine title is not an exclusionary right and includes the public rights of access, fishing, navigation and existing uses."

16. 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 test that would be applied by the High Court and Ministerial decision-makers. This was a marked difference from the Foreshore and Seabed Act test for territorial customary rights which required applicants to have ownership of abutting coastal – a very high threshold.

17. A small number of statements were made speculating on the percentage of coastline that might be subject to CMT, see for example, Mr Finlayson's comment in a New Zealand Herald article: [8]

> "I wouldn't want to fetter any government's negotiating position, or position in court, that would be held against the Government or a future government, if I started to say 'well that bay's in'," he said. New Zealand's coastline is about 20,000km so Mr Finlayson's "guesstimate", as he put it, would be about 10 per cent. "Iwi will get 2000km of coastline"

18. In later evidence to the Waitangi Tribunal Wai 2660 Stage 2 inquiry Hon Christopher Finlayson KC strongly disagreed with the suggestion "that [the Crown had] drafted a test so that the net result would be …minimal." In the departmental report on the Bill, officials explained:

> "The government has taken a principled approach in developing the test which is not based on predetermining the outcome in terms of quantifying the amount of CMT which could be recognised. It is appropriate to provide a level of flexibility in the test to

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[7] Wai 2660, B114(g) at 1.

[8] NZ Herald https://www.nzherald.co.nz/kahu/iwi-will-get-2000km-of-coastline/QK2T5UQBZXF6V2LVN3KGHDSPAI/

allow for the facts of each situation to be assessed within the context of evidence spanning 170 years."

CMT determinations to date

19. There are currently 380 active applications under the Takutai Moana Act. 178 of those applications are dual applications and can access either the High Court or Crown Engagement pathway. Nineteen determinations for CMT have been fully completed, one through the High Court and 18 through the Crown engagement pathways under the Ngāti Porou Act.

20. There have been seven High Court decisions on customary marine title to date (*Re Tipene* (complete), *Re Edwards* and *Ngāti Pāhauwera* (subject to appeals), *Ngā Pōtiki* stage 1 (subject to finalisation), *Re Clarkson* (which declined to grant CMT) and post the *Re Edwards* COA decision, the *Wairarapa* stage 1(a) and *Tokomaru Bay (Ngā Hapū o Tokomaru Ākau v Te Whānau a Ruataupere ki Tokomaru)* and a rehearing of Ngai Tai Ririwhenua CMT award (*Re Edwards*)).

The Court of Appeal's interpretation of section 58 in Re Edwards

21. The *Re Edwards* Stage 1 High Court hearing took place in late 2020, and was the first substantive High Court hearing under the Takutai Moana Act. There were a number of overlapping applications from different whānau, hapū and iwi applicant groups over the same area. The hearing covered a section of the eastern Bay of Plenty coastline, including Ōpōtiki and Ōhiwa harbour. The High Court awarded CMT over three different areas for the six hapū of Whakatōhea, Ngāi Tai, and Ngāti Awa, respectively. PCRs were also awarded to multiple applicant groups.

22. The Landowners' Coalition appealed the High Court judgment on a range of legal issues, including the proper interpretation of the test for CMT. A number of applicant groups cross-appealed or made limited appeals on matters of fact.

23. The Court of Appeal hearing was held in February and March 2023. The Attorney-General did not appeal the High Court judgment and appeared in the Court of Appeal as an interested party. The Court of Appeal's most significant findings in its October 2023 judgment related to its interpretation of the second limb of the section 58 test.

24. In interpreting the second limb of the test for CMT, the Court of Appeal found that:

    a. applicants primarily need to demonstrate 'exclusive use and occupation' in the context of tikanga at 1840 with no substantial interruption since then (rather than demonstrating exclusive use and occupation over the entirety of that period); and

    b. only activities authorised by legislation or loss of connection and control as a matter of tikanga can be considered 'substantial interruption' – a narrow interpretation.

25. The Court concluded that it would be "exceptionally difficult" to reconcile the text of 'exclusive use and occupation' with the purposes of the Takutai Moana Act which include providing for the exercise of customary interests in the marine area and acknowledging the Treaty of Waitangi. It considered that a literal reading of limb two would make it likely that CMT would only be recognised in very few areas of the marine and coastal area.

26. The High Court found that CMT in the Waiōweka and Ōtara riverbeds had been extinguished because these rivers were 'navigable' in 1903 and were therefore vested in the Crown under legislation, extinguishing customary interests in those areas and precluding recognition of CMT. The Court of Appeal reversed this finding and found that vesting in Crown ownership, where that was subsequently reversed, did not extinguish CMT, and therefore CMT could be recognised over these riverbeds.

27. The Attorney-General sought and obtained leave to appeal to the Supreme Court on matters she considered constituted errors of law in the Court of Appeal's judgment including, among other matters, the proper interpretation of s 58. The Supreme Court is scheduled to hear the appeal in November 2024. The ongoing effect of the Court of Appeal's judgment (absent any legislative intervention) will, therefore, be dependent on the outcome of the Supreme Court's consideration of the Attorney's appeal.

What is the policy problem or opportunity?

28. The Act as originally enacted struck a balance between a range of interests. The balance struck was the product of a prolonged national conversation, the work of an expert panel, and significant consultation with Māori and the public generally. The Act represented a political compact that was intended to be durable and to provide a basis for moving forward following the Foreshore and Seabed Act 2004, which the Act repealed.

29. An important premise of the balance struck in the Act was the test for CMT in s 58. That test includes two limbs, one focused on tikanga, and one focused on exclusive use and occupation absent substantial interruption. CMT is the highest form of statutory right recognised by the scheme. It confers on holders of CMT strong protections including a power to decline permission, on any grounds, to a wide range of activities otherwise permitted by resource consents, in the territory covered by CMT (the resource management permission right).

30. Legally Privileged [redacted] The government's view is that this unanticipated change de-stabilises the balance struck by the Act. Specifically, on the Court of Appeal's interpretation, it is likely that a significantly greater proportion of the coastal and marine area would be designated CMT than if the second limb of the test in s 58 test were effective.

31. The government's view is that by restoring the Act's original balance, these amendments secure important public interests, which would be unduly compromised if a larger proportion of the coastal and marine area were subject to the resource management permission right that runs with CMT, and the attendant uncertainties that right may create for otherwise permitted activities. These public interests include local and national economic development, which are particularly significant today given challenging economic conditions. An appropriately delineated test for recognition of CMT, as originally intended by Parliament, also serves to uphold the public interest in all New Zealanders having a say over the coastal and marine area.

32. The government's view is that it will remain the case, as was always contemplated by the plain terms of s 58, that iwi, hapū and whānau will be able to establish CMT if they meet the legal requirements - including the test of exclusive use and occupation – and, if so, benefit from the protections that run with CMT, which will remain as originally crafted. There are also a range of further protections for Māori cultural connection to the coastal and marine area within the Act, including protections for customary activities, and within other relevant statutory schemes, such as the Resource Management Act 1991.

33. It is important to note that given the time constraints in this policy process it was not possible to undertake extensive or in-depth engagement with the public and wider stakeholders, including applicants, to fully understand the extent to which the issues the government has identified are likely to materialise, and what the impact of these will be in practice.

34. Te Arawhiti was not considering the option of legislative reform to s 58 prior to the government's coalition commitment.

What objectives are sought in relation to the policy problem?

35. The objective sought in relation to the policy problem is a clarified test for customary marine title which provides greater legislative guidance to decision makers under the Act and restores a strict test for applicant groups to meet.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

36. The criteria Te Arawhiti has used to assess the options in this SAR simplifies the range of criteria used during the policy development. The criteria are:

Effectiveness	Does the option achieve the policy objectives including restoring the strength of the test and providing clarity to decision makers?
Efficiency (Retrospectivity related options only)	Is the impact of the option an efficient use of time and resources?
Compliance	Is the proposal coherent with the overall regulatory and constitutional frameworks, the rule of law, BORA and property rights, and does it minimise litigation risk?
Sustainability (Amending section 58 options only)	What is the likelihood of the option being legally effective and enduring over time?
Alignment with te Tiriti	Does the option uphold Treaty obligations and how does it impact on the Crown Māori relationship?

What scope will options be considered within?

37. Policy options needed to be developed with a view to implementing the coalition agreement commitment.[9] Te Arawhiti identified a range of options:

    a. not making any amendments until after the Supreme Court's consideration of issues raised by the Court of Appeal – status quo;

    b. directly legislating for "small and discrete" awards of CMT, or for a limited amount of coastline to be under CMT;

    c. inserting a declaratory statement to specifically overturn the Court of Appeal's interpretation;

    d. providing more definition and clarity on what the concepts of continuous exclusive use and occupation and substantial interruption entail;

[9] See above at [X] for reference to the Cabinet circular which provided direction in relation to coalition agreement commitments.

e. adjusting the relationship between section 58 and the Takutai Moana Act's preamble, purpose and/or Treaty provisions; and/or

f. more fundamentally reforming the Takutai Moana Act's legislative regime.

38. Options b was ruled out early in the policy process. Officials identified it was not possible to use legislation to directly legislate for 'small and discrete' awards of CMT, or for a limited percentage of coastline to be covered by CMT. It would be difficult or impossible to sensibly specify this in legislation, and/or for decision makers to assess applications in light of this kind of benchmark. Te Arawhiti also advised this approach would not be consistent with the legislative history which indicated the intention was to establish a legal test for CMT that it would be up to the Courts and Ministers to implement in practice.

39. The status quo option was also ruled out early, but is still covered further in the section below.

What options are being considered?

40. The analysis of options is set out in three parts:

- PART A: Options to amend section 58;
- PART B: Prospective or retrospective application of the amended section 58 test; and
- PART C: Options arising out of drafting and consultation.

PART A: Options to amend section 58

41. Options a, c, d, e and f above were consolidated into four options which became the focus of further policy development. Three of these options (the last three) were included in the Cabinet paper.

- Status quo – wait for the Supreme Court appeal to be heard and a judgment issued;
- Option A – relatively few changes focusing on the Court of Appeal's interpretation of s 58;
- Option B – more extensive changes to ensure a strict CMT test (Minister's preferred option); and
- Option C – wider reform of the Takutai Moana Act.

Status Quo – wait for the Supreme Court judgment with no immediate amendment

42. Te Arawhiti's initial preference was retaining the status quo, noting that the Attorney-General had sought leave to appeal the *Re Edwards* Court of Appeal decision. One of the grounds on which the Attorney had sought to appeal was that the Court of Appeal's approach to section 58(b)(ii) amounted to an error of law because the Court's interpretation was inconsistent with the literal requirements of the test set out in section 58. Te Arawhiti's view was that consideration of the appeals by the Supreme Court could have resolved the issue.

43. However, the Minister's view was legislative amendment was needed urgently to clarify the issue, and his preference was to progress the amendment rather than wait for a potential Supreme Court judgment. This was also informed by the release of a further judgment from the High Court in February 2024 in relation to a large section of coastline on the Wairarapa. The High Court in that case relied on the Court of Appeal judgment in *Re Edwards* in its interpretation of the legal test.

44. If the Supreme Court ruled in favour of the Crown, it could mean the additional time and resource on progressing amendments would not be required. If not, it was likely amendments would still be required.

Effectiveness

45. The Court of Appeal's less stringent interpretation of the test in *Re Edwards* has the potential to result in CMT being recognised over more of the marine and coastal area than under the precedent set by earlier High Court judgments.

46. The Minister was concerned that it will likely be some time before a Supreme Court decision is issued on these matters. This option did not meet the effectiveness criterion as it was considered likely it would be a matter of years before a Supreme Court decision on the *Re Edwards* appeal would be made. In the meantime, as noted above, High Court determinations would continue to be made on the basis of the Court of Appeal's interpretation.

47. [*Legally privileged*] [redacted]

48. If a Supreme Court appeal ruled in favour of the Crown this could mean the additional time and resource on progressing amendments would become obsolete. However, as noted above, it was considered possible amendments might still be required following a Supreme Court decision.

Compliance

49. Officials identified this option would be most consistent with conventions relating to the rule of law and non-interference with judicial processes as the standard route for the Crown to challenge judicial decisions is through an appeal to a higher court. [*Legally privileged*] [redacted]

Sustainability

50. Each application is considered by decision makers on its own facts, so officials identified the implications of the Court of Appeal decision for particular cases would be hard to predict. The Court of Appeal's less stringent interpretation of the test in *Re Edwards* was overall likely to result in CMT being recognised over more of the marine and coastal area than under the precedent set by earlier High Court judgments.

Alignment with te Tiriti

51. Te Arawhiti noted that Māori had already expressed significant dissatisfaction with the statutory regime as it stands and its provision for customary interests through the Waitangi Tribunal Wai 2660 inquiry. That inquiry was conducted between 2016 and 2023. These two reports provided significant commentary on the Takutai Moana Act, its compliance with Treaty obligations and subsequent recommendations.

Overall assessment

52. Te Arawhiti advised the Minister on the option to wait for a Supreme Court judgment which may resolve the section 58 issue. The Minister's view was that a legislative amendment was needed more urgently to clarify the issue, and his preference was to progress the amendment rather than wait for the Supreme Court judgment.

53. However, officials considered that the status quo of continuing to the Supreme Court posed the least risk of Treaty breach as it would not involve introducing additional amendments to the Takutai Moana Act that were likely to be considered a breach of the principles of the Treaty of Waitangi by applicants and the Waitangi Tribunal.

Option A – relatively few changes focusing on the Court of Appeal's interpretation

54. Option A proposed amendments to the Takutai Moana Act to:

    a. Insert a declaratory statement in section 58 stating that the purpose of the amendment is to overturn the Court of Appeal's *Re Edwards* reasoning relating to the test for CMT, and overturn the law as expressed by the Court of Appeal; and

    b. Insert text in section 58 to define the key concepts of 'exclusive use and occupation' and 'substantial interruption', consistent with the original legislative intent, including that:

        i. 'exclusive use and occupation' relates to exclusivity over the whole period from 1840 to the present, and includes exclusivity as against third parties; and

        ii. 'substantial interruption' includes any sufficiently significant interruption, regardless of its nature;

    c. Amend section 106, which provides for the burden of proof, to clarify that applicant groups need to demonstrate exclusive use and occupation from 1840 to the present in order for CMT to be recognised.

Effectiveness

55. Te Arawhiti's advice was that the inclusion of text to define key terms in the test for CMT would address the multiple aspects of the Court of Appeal's decision regarding section 58 that the government was concerned about, e.g. the finding that applicant groups need not demonstrate continuous exclusive use and occupation of an area from 1840 to the present day, the Court's findings on substantial interruption, and the Court's findings in relation to the burden of proof in section 106.

56. [*Legally privileged*] [redacted]

Compliance

57. The doctrine of parliamentary sovereignty means Parliament has the constitutional authority to alter or reverse the effect of a court judgment if it chooses. Officials identified the insertion of a declaratory statement into a statute to reverse the effect of a court judgment, although uncommon, is not unknown. For example, section 3(2)(c) of the Parliamentary Privilege Act 2014 states that it is a purpose of that Act to alter the Supreme Court's decision in *Attorney-General v Leigh* [2011] NZSC 106.

58. [*Legally privileged*] [redacted]

59. The Minister considered that the Court of Appeal sufficiently disrupted the effective operation of the Takutai Moana Act such that overturning relevant elements of the Court's judgment was necessary. This option was considered by officials to pose the lower legal and relationship risk

compared to Option B by confining the amendment to a targeted alteration of key aspects of the Court of Appeal's interpretation of section 58 of the Act.

Sustainability

60. [*Legally privileged*] [redacted]

61. The Legislation Design and Advisory Committee's (**LDAC**) view was that the approach outlined in Option A to define key terms in section 58 would still require changes to the Takutai Moana Act's purpose section and Treaty of Waitangi clause. This reflects their concern that strengthening section 58 only will exacerbate the existing tension (central to the Court of Appeal's interpretations discussed earlier) between section 58 and the preamble, purpose section, and Treaty clause of the Takutai Moana Act. LDAC's view was that failing to directly address the issue of inconsistency with the purpose would raise the risk of ongoing Crown disagreement with judicial interpretation, despite the efforts to clarify section 58.

Alignment with te Tiriti

62. Any legislative override of the Court of Appeal's interpretation of section 58, was strongly criticised by applicant groups and the wider Māori community. This was reflected in the submissions received from applicant and other Māori groups (summarised later in this paper) through the recent consultation and reflected in the application for and submissions in an urgent inquiry in the Waitangi Tribunal.

63. Te Arawhiti advised the risk of breaching Treaty principles could be mitigated to some extent by confining the amendment to a targeted alteration of key aspects of the Court of Appeal's interpretation of section 58 of the Act, rather than broader amendments to the Act's purpose and Treaty provisions.

Overall assessment

64. Te Arawhiti's view is that Option A is the most appropriate way to fulfil the Coalition Agreement commitment objectives. [*Legally privileged*] [redacted]

Option B– more extensive changes to ensure a strict CMT test

65. Option B included all the changes proposed in Option A, but also proposed:

    a. clarifying the relationship between the preamble, purpose, and Treaty of Waitangi provisions and section 58 to address the courts' general interpretative approach, by either:

        i. clarifying in section 58 that the wording of the CMT test applies 'notwithstanding the Takutai Moana Act's preamble, purpose, and Treaty of Waitangi provisions'; or

        ii. amending the preamble, purpose and/or Treaty of Waitangi clauses themselves; and

    b. an expanded declaratory statement that also overturns the interpretation of the High Court in *Re Edwards* and all the subsequent cases, insofar as they relate to the CMT test.

66. This option responded to the Minister's direction to widen the scope of judgments of concern to include the *Re Edwards* High Court judgment and subsequent High Court judgments as well.

67. [*Legally privileged*] [redacted]

68. We note the Bill was drafted reflecting (a)(i) above, that the Bill should direct decision makers to place greater weight on the specific words in the CMT test section compared to the framing sections in the Takutai Moana Act in order to strengthen the CMT test, rather than changing the words in those framing sections themselves.

Effectiveness

69. [*Legally privileged*] [redacted]

Compliance

70. [*Legally privileged*] [redacted]

71. [*Legally privileged*] [redacted]

72. [*Legally privileged*] [redacted]

73. The policy proposals (now reflected in the Amendment Bill) also raised concerns around the following guidelines from LDAC's 2021 Legislation Guidelines:

    a. Guideline 4.1 – that legislation should be consistent with fundamental constitutional principles including the rule of law;

    b. Guideline 4.2 – that legislation should be consistent with the principles of the Treaty of Waitangi;

    c. Guideline 5.7 that where there is a risk that a court may find a government outcome or policy inconsistent with the Treaty care must be taken to express the policy intention as clearly as possible, both in the legislation itself and in the policy documentation;

    d. Guideline 12.1 – that legislation should not have retrospective effect; and

e. Guideline 12.2 – that legislation should not deprive individuals of their right to benefit from judgments obtained in proceedings brought under earlier law or to continue proceedings asserting rights and duties under that law.

Sustainability

74. [*Legally privileged*] [redacted]

Alignment with te Tiriti

75. Te Arawhiti advised there were likely to be severe impacts on the Māori Crown relationship if wider amendments are pursued. These kinds of changes to fundamental aspects of the Takutai Moana Act were likely to be seen by Māori as an erosion of the political compromise at its heart – which was intended to be an improvement on the Foreshore and Seabed Act in terms of recognition of Māori customary rights. This was demonstrated in the submissions made in the consultation period as many submitters viewed the changes as a mechanism to confiscate customary title rights rather than just a clarification of Parliament's original intent with the Takutai Moana Act. On the basis of the applicant groups' responses, none of them anticipate satisfactory outcomes for their Takutai Moana Act applications with the changes.

76. The expansion of the scope of judgments of concern, beyond the *Re Edwards* Court of Appeal judgment to include the *Re Edwards* High Court judgment and subsequent High Court judgments also increases the risk of breaching Treaty obligations. Legislative override of the Court of Appeal's interpretation of section 58 was strongly criticised by applicant groups through consultation. An expansion of the policy proposal to include the High Court judgments (which had not been the subject of a Crown appeal) was likely to increase the risk of Treaty breaches.

Overall assessment

77. [*Legally privileged*] [redacted]

Option C – Broader reform of the Act

78. A wider reform of the Act and its regime would provide an opportunity to clarify the nature of the test more fundamentally for CMT and so respond to the coalition commitment. It could also have presented an opportunity to address a broader range of issues facing the Takutai Moana Act regime, rather than taking a piecemeal approach. The process for recognising customary interests under the Takutai Moana Act was not operating efficiently in terms of cost or timeliness. In addition, the Waitangi Tribunal report had found the Takutai Moana Act breached the Treaty in a number of respects, and it had made a suite of recommendations to resolve these breaches.

Effectiveness

79. Officials advised there could be merit in a first principles look at how the Takutai Moana Act operates in practice and considering what changes could be made to improve the efficiency of

the process. However, the Tribunal had recommended changes to the test to make it easier for applicants to satisfy it, such as removing the requirement for 'substantial interruption'. The government's policy intention was the opposite of trying to make the test for CMT easier, so the two objectives were not well aligned. Te Arawhiti advised it was likely that changes making the test for CMT stricter would be considered a further breach of Treaty principles by the Tribunal.

80. It was identified this larger programme of work would be significantly broader than the coalition commitment scope and would not be achievable in the desired timeframe. There were significant resourcing implications to conducting a full review of the Takutai Moana Act.

Compliance

81. Officials advised the more extensive the amendments and the greater the degree of complexity, the greater the magnitude of the risks including challenges in the Waitangi Tribunal, further litigation, and reputational and Māori Crown relationship risks.

Sustainability

82. Potentially sustainable in the long term.

Alignment with te Tiriti

83. Te Arawhiti acknowledged that Māori have already expressed significant dissatisfaction with the statutory regime as it stands and its provision for customary interests, including through the Waitangi Tribunal Wai 2660 inquiry. That inquiry was conducted between 2016 and 2023. These two reports provided significant commentary on the Takutai Moana Act, its compliance with Treaty obligations and subsequent recommendations. It was identified there could be significant benefits in undertaking a response to the Tribunal's report at the same time as the work on the coalition commitment. However, this would have had an impact on timeframes.

84. In addition, as mentioned above, the Tribunal's recommendations were not well aligned with the government's policy intention for the s 58 amendment. The Tribunal had found that the rights (including CMT) available under the Takutai Moana Act do not sufficiently support Māori in their kaitiakitanga duties and exercise of rangatiratanga and fail to provide a fair and reasonable balance between Māori rights and other public and private rights. They recommended legislative changes to make the CMT test easier to meet.

Overall assessment

85. Te Arawhiti considered reform was unlikely to address the primary concerns Māori have with the Takutai Moana Act as identified through the Waitangi Tribunal Wai 2660 inquiry. Any amendments proposed to address the coalition commitment that make it harder than under current law to prove CMT, were likely to be perceived as further eroding the ability of Māori to have customary rights, guaranteed through Article Two of te Tiriti, recognised. There was a risk that wider reform proposals would further impact the provisions under the Takutai Moana Act that currently provide for those rights and interests.

How do the section 58 amendment options compare to the status quo/counterfactual?

Criteria / *Options*	Status Quo Wait for Supreme Court judgement	Option A Relatively few changes focusing on the Court of Appeal's interpretation	Option B More extensive changes to ensure a strict CMT test	Option C Broader reform of the Takutai Moana Act
Effectiveness Option achieves the policy objectives including restoring the strength of the test for CMT and providing clarity to decision makers	0	+ Somewhat higher threshold for awards of CMT	+ + Significantly higher threshold for awards of CMT	+ Dependent on new test design
Compliance Proposal is coherent with the overall regulatory and constitutional frameworks, the rule of law, BORA and property rights and minimises litigation risk.	0	- [redacted] *[Legally privileged]* [redacted]	- - [redacted] *[Legally privileged]* [redacted]	- Dependent on nature of reform
Sustainability Likelihood of the option being legally effective and enduring over time	0	0 *[Legally privileged]* [redacted]	- *[Legally privileged]* [redacted]	0 Takutai Moana Act can be reformed with clarity for the decision-makers and likely will be sustainable in the long term
Alignment with te Tiriti Upholds Treaty obligations and Crown Māori relationship.	0	- Amendments will be perceived as further eroding the ability of Māori to have customary rights, guaranteed through Article Two of te Tiriti, recognised.	- - Amendments will be perceived as further eroding the ability of Māori to have customary rights, guaranteed through Article Two of te Tiriti, recognised.	- - Reform is unlikely to address the primary concerns Māori have with the Takutai Moana Act as identified through the Waitangi Tribunal Wai 2660 inquiry
Overall assessment	0	-	- -	- -

Example key for qualitative judgements:
++ much better than status quo
+ better than the status quo
0 about the same as the status quo
- worse than the status quo
- - much worse than status quo

PART B: Prospective or retrospective application options

86. Ordinarily any changes to the s 58 test (regardless of the option chosen) would apply only to future judicial decisions and have prospective application. There are strong constitutional conventions that limit the use of retrospectivity. Retrospectivity is applied 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 an award of CMT. The Court of Appeal described retrospectivity in similar circumstances as "draconian."

87. Te Arawhiti advised the Minister that the section 58 amendments should not be applied retrospectively. Specifically, it advised that there was not sufficient justification for retrospective application of any new CMT test and that this was based on well-established norms and conventions around retrospectivity, and the specific Treaty-related context of the Takutai Moana Act.

88. The Minister advised that he wanted to consider the retrospective application of the amendment to section 58 to ensure that all applications, past and future, are decided based on the same test, and to bring unduly large awards made on the basis of the *Re Edwards* interpretation back in line with earlier awards and Parliament's intention in passing the Takutai Moana Act.

89. Ultimately, four options regarding retrospectivity were presented in the 9 July Cabinet paper:

    a. Prospective application;

    b. Retrospective application to all CMT decisions since (and including) *Re Edwards* in the High Court;

    c. Retrospective application to all CMT decisions since *Re Edwards* in the Court of Appeal; and

    d. Retrospective application from the point of announcement of the policy changes.

90. Te Arawhiti and LDAC advised that there are significant consequences and risks with the use of retrospectivity.

91. [*Legally privileged*] [redacted]

Prospective application

92. The restored test would apply only to determinations of CMT applications in either pathway from the date that the amendments to the Takutai Moana Act come into force. The impact of this is:

    - all existing CMT decisions would continue to be recognised;
    - all cases that have progressed to substantive hearings would continue to progress under the existing Court of Appeal interpretation of the CMT test; and
    - all unheard applications will be decided under the clarified test.

Effectiveness

93. By default, any changes to the section 58 test would apply only to future judicial decisions and have prospective application. Some potential inconsistency would exist between earlier and later CMT awards.

Efficiency

94. This option does not disrupt current processes, nor create a need for rehearing of existing cases. It may cause some impact to those applicant groups who are currently undertaking research or

evidence collation, to ensure their evidence is robust and in line with the requirements of the amended legislation.

Compliance

95. [*Legally privileged*] [redacted]

Alignment with te Tiriti

96. This option has the least impact on te Tiriti and the Crown Māori relationship.

Overall assessment

97. This was Te Arawhiti's preferred option. Te Arawhiti's view was that the benefits of achieving consistency in the assessment of Customary Marine Title applications by applying any changes to the section 58 test retrospectively are considerably outweighed by the significant constitutional, legal, and Māori Crown relationship risks of applying legislation retrospectively against established convention.

Retrospective application to all CMT decisions since (and including) *Re Edwards* in the High Court

98. The impact of this option is that:

- Only the 19 finalised CMT would continue to be recognised (Titi Islands (1) and Ngā Hapū o Ngāti Porou (18))
- all CMT decisions since (and including) Re Edwards in the High Court would need to be reheard;
- all undetermined applications will be decided under the clarified test; and
- undetermined applications include six High Court cases that at the date of the policy announcement have had, or are having, a hearing but where there are no judgments. These cases would need to be re-heard.

Effectiveness

99. This option will ensure that the majority of applications, past and future, are decided based on the same test, and would bring unduly large awards made on the basis of the *Re Edwards* interpretation back in line with earlier awards and Parliamentary intent.

Efficiency

100. Application of retrospectivity to existing CMT awards will require those successful applicant groups to have their cases re-heard potentially years after their original hearings, imposing a significant burden on those applicant groups. This will also have a significant impact on time and resources, impacting government, applicant groups, interested partes and the judiciary.

101. In addition, the Parliamentary Counsel Office advised that retrospective application would significantly increase the complexity of legislative drafting and potentially increase the time required to draft the amendment legislation.

Compliance

102. LDAC's advice noted that "removing the fruits of successful litigation is rarely justifiable and only then when the maintenance of the judgment itself would undermine or nullify the policy objective of the legislation".

103. [*Legally privileged*] [redacted]

Alignment with te Tiriti

104. Te Arawhiti advised there were significant consequences and risks to the Māori Crown relationship with the proposed use of retrospectivity.

Overall assessment

105. Te Arawhiti does not consider that there is any reasonable justification for overturning and re-testing awarded CMT. This assessment is based on well-established norms and conventions around retrospectivity, and the specific Treaty-related context of the Act. 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.

106. There are comparably only a small number of CMT awards to date, and these (while larger than the Crown may have anticipated), are not so far beyond what could be expected going forward as to cause issues. It is not uncommon for old regimes to be replaced, leaving some parties with grandfathered-in arrangements.

107. [*Legally privileged*] [redacted]

Retrospective application to all CMT decisions since *Re Edwards* in the Court of Appeal

108. Retrospective application to all CMT decisions since *Re Edwards* in the Court of Appeal. The impact of this is:

- All existing decisions before the *Re Edwards* Court of Appeal judgment will continue to be recognised;
- all CMT judgments post the Re Edwards Court of Appeal judgment would need to be reheard;
- all undetermined applications from the date of the policy announcement will be decided under the clarified test; and
- undetermined applications include five High Court cases that, at the date of the policy announcement, have had, or are having, a hearing but where there are no judgments. These cases would, if Parliament enacts these amendments, need to be reheard under the clarified test.

Effectiveness

109. This option reduces the number of applications considered on the basis of the Court of Appeal's interpretation of the test for CMT. This reduces inconsistency between earlier and later CMT awards.

Efficiency

110. Application of retrospectivity to the CMT judgments post the *Re Edwards* Court of Appeal judgment will require those applicant groups to have their cases re-heard potentially years after their original hearings, imposing a significant burden on those applicant groups. This will create a significant impact on time and resources, impacting government, applicant groups, interested partes and the judiciary.

111. In addition, the Parliamentary Counsel Office advised that retrospective application would significantly increase the complexity of legislative drafting and potentially increase the time required to draft the amendment legislation.

Compliance

112. LDAC's advice noted that "removing the fruits of successful litigation is rarely justifiable and only then when the maintenance of the judgment itself would undermine or nullify the policy objective of the legislation".

113. [*Legally privileged*] [redacted]

Alignment with te Tiriti

114. Te Arawhiti advised there were significant consequences and risks to the Māori Crown relationship with the proposed use of retrospectivity.

Retrospective application from the point of announcement of the policy changes

115. This option is a variation of the prospective option and has both prospective and retrospective application. It introduces a date of announcement. The amended legislation will apply retrospectively from the point of announcement of the policy changes. The impact of this option is that:

- all existing CMT decisions will continue to be recognised;
- all undetermined applications from the date of the policy announcement will be decided under the clarified test.
- undetermined applications including five High Court cases that, at the date of the policy announcement, have had, or are having, a hearing but where there are no judgments would need to be reheard under the clarified test.
- Any CMT awards made between the date of the policy announcement and the date of enactment would be overturned and those cases would need to be reheard.

116. This option was added by the Minister subsequent to initial consideration of a paper by the Cabinet Economic Policy Committee (ECO) on 26 June 2024 [ECO-24-MIN-0125 refers].

Effectiveness

117. It will require six live cases in the High Court to have their cases reheard under the under the clarified test. This reduces the number of applications considered under the existing law as per Court of Appeal interpretation of the test for CMT. This reduces inconsistency between earlier and later CMT awards.

Efficiency

118. Application of retrospectivity to the six live cases in the High Court will require those applicant groups to have their cases re-heard potentially years after their original hearings, imposing a significant burden on those applicant groups. This will have a significant impact on time and resources, impacting government, applicant groups, interested partes and the judiciary.

119. In addition, the Parliamentary Counsel Office advised that retrospective application would significantly increase the complexity of legislative drafting and potentially increase the time required to draft the amendment legislation.

Compliance

120. [*Legally privileged*] [redacted]

Alignment with te Tiriti

121. Te Arawhiti considered there were still Treaty issues raised by the proposal to require rehearings for some applications. This was reflected in the submissions made during the consultation process and the submissions of claimants to the Wai 3400 urgent Waitangi Tribunal inquiry, who considered the proposal for the amendments to be applied retrospectively from the date of announcement would cause significant prejudice to applicants who will need to have their claims reheard under a stricter test. They were concerned about evidence, such as historical and tikanga evidence, being lost with the passing of kaumātua and rangatira over time.

122. Claimants had also noted that re-hearings were likely to cause increased expense and human resources that claimants asserted they may not be able to sustain. Further, for those who will have applications in similar or overlapping geographical and iwi/hapū affiliated areas decided under two different tests (of the current Takutai Moana Act and the amended Act), complexities were said to be likely to arise with the potential to cause tension within whānau, hapū and iwi relationships.

Overall assessment

123. Te Arawhiti considered this option was less damaging from a Treaty perspective than the option of retrospectively overturning all High Court decisions, including *Re Edwards*, though there were still significant implications for those applicant groups who would need to participate in a rehearing.

124. This was the option that Cabinet approved.

How do the retrospectivity options compare to the status quo/counterfactual?

Criteria / *Options*	Status Quo Prospective only	Retrospective on post *Edwards COA* applications only	Retrospective on all High Court CMT decisions to date	Retrospective from date of announcement
Effectiveness Option achieves the policy objectives including restoring the strength of the test and providing clarity to decision makers	0 Potential inconsistency between earlier and later CMT awards.	+ Reduces number of applications considered under the Court of Appeal law. Reduce inconsistency between earlier and later CMT awards.	+ Will ensure that majority of applications, past and future, are decided based on the same test. Less inconsistency.	+ Reduce number of applications considered under the under the Court of Appeal law. Reduce inconsistency.
Efficiency Option is an efficient use of time and resources.	0 Doesn't disrupt current processes, no need for rehearing of existing cases	- Re-hearings impose a significant financial and resource and time burden on those applicant groups. Also impacts government, interested partes and the judiciary	- - Re-hearings impose a significant financial and resource and time burden on those applicant groups. Also impacts government, interested partes and the judiciary	- - Re-hearings impose a significant financial and resource and time burden on those applicant groups. Also impacts government, interested partes and the judiciary
Compliance Proposal is coherent with the overall regulatory and constitutional frameworks, the rule of law, BORA and property rights and minimises the likelihood of litigation risk.	0 [*Legally privileged*] [redacted]	- - [*Legally privileged*] [redacted]	- - [*Legally privileged*] [redacted]	- [*Legally privileged*] [redacted]
Alignment with te Tiriti Upholds Treaty obligations and Crown Māori relationship.	0 Least impact on te Tiriti and Crown Māori relationship	- - Significant impact on te Tiriti and Crown Māori relationship	- - Significant impact on te Tiriti and Crown Māori relationship	- - Significant impact on te Tiriti and Crown Māori relationship
Overall assessment	0	- -	- -	- -

Example key for qualitative judgements:
++ much better than status quo
+ better than the status quo
0 about the same as the status quo
- worse than the status quo
- - much worse than status quo

PART C: Options arising out of drafting and consultation.

Amendment Bill drafting

125. Drafting commenced immediately given the government's intention to finalise the drafting of the amendment bill by mid-September so that it can be introduced into Parliament and passed by the end of 2024.

126. Two additional matters arose during drafting that the Minister has sought Cabinet's agreement. One related to the Court of Appeal's finding on extinguishment. The second was the effect of the amendments on the Ngā Hapū o Ngāti Porou Act 2019.

127. The current Cabinet paper seeks agreement to clarify, as part of these amendments, the situations under which customary marine title is extinguished as anticipated by s 58(4) of the primary Takutai Moana Act. An options analysis was not completed. It one of the grounds that formed the basis of the Attorney General's appeal to the Supreme Court.

128. Ngāti Porou are subject to a different Act, the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, for the recognition of customary interests in their marine area.

129. [*Legally privileged*] [redacted]

130. The Minister has agreed to seek Cabinet's approval to introduce the Bill without consequential amendment to the Ngāti Porou Act to allow time for further engagement with Ngāti Porou with a view to agreeing any appropriate amendments to the Ngāti Porou Act.

Engagement with Māori

131. On 25 July 2024, the Minister sent a letter to whānau, hapū and iwi applicant groups outlining Cabinet's decisions above. The letter signalled the commencement of a three-week consultation period. The deadline for responses was 15 August 2024.

132. The Minister specifically sought the views on clarifying the definitions of 'exclusive use' and 'substantial interruption'; changes to the framing sections of the Act (comprising the purpose, preamble and Treaty of Waitangi sections); and any general views or concerns about proposed changes.

133. The Minister also met with Ngā Hapū o Ngāti Porou, Te Whānau a Apanui, Rongomaiwahine and Ngāti Koata as a part of this process. These groups are well-progressed in their applications in the Crown engagement pathway, and some have distinct agreements with the Crown around takutai moana issues.

134. A total of 52 submissions were received. 47 of these were from whanau, hapū and iwi applicant groups. Five submissions were received from non-applicant individuals or groups. The 47 submissions from applicant groups represent a response rate of around 10%. Factors contributing to the low response rate may be the proposed changes involving complex legal issues, the very limited timeframe to reply, and participation in parallel Waitangi Tribunal processes.

135. The responses from the applicant groups are grouped in five overarching key themes, that were derived from the fuller set of themes identified in the submissions, (as outlined in Appendix 1):

    a. opposition to changes to the Act;

    b. lack of consultation, engagement and communication;

c. concerns with legal process and Treaty of Waitangi obligations;

d. specific concerns about the proposed amendments to the Act; and

e. impact on applicant groups, specifically related to retrospectivity and rehearings.

Te Arawhiti assessment of submissions

136. All applicant groups who submitted opposed the changes to Act. The majority of applicant groups expressed significant concern with the lack of engagement or consultation in the development of the proposals and the subsequent engagement process.

137. The retrospective application of the changes approved by Cabinet, requiring re-hearings and overturning awards for any applications that do not currently have decisions, was raised as a consistent concern in applicant submissions, the submission of the Law Society, and by claimants in the Tribunal. Submitters were also concerned with what they consider to be the loss of their investment in the Takutai Moana process to date in tandem with what they anticipate will be their diminished capacity to participate in future processes. This may be seen as compounding relative disadvantage of applicant vis a vis the Crown, when taken alongside the other areas of concern – including limitations on financial assistance.

How feedback impacted proposals

138. This feedback will be reported to Cabinet when the Minister seeks approval for the introduction of the Amendment Bill.

139. Te Arawhiti advised that in order for the Crown's consultation with applicants to be in good faith, it needs to demonstrate that it has seriously considered how it could respond to the concerns raised. As a result of the submissions Te Arawhiti provided the Minister the following options for his consideration that would respond in part to these issues and concerns – and which wouldn't undermine the fundamental policy intent:

a. reconsideration of the retrospective application of the clarified test;

b. specific consideration of Ngā Hapū o Ngāti Porou, Te Whanau a Apanui and Rangitoto ki Tonga (Ngāti Koata) to sit outside the clarified test; and

c. options to extend policy and/or Parliamentary timeframes.

140. Options a) and c) were not progressed. The Minister has advised there is further opportunity for participation in the Select Committee process. The Minister will engage with Ngāti Porou, Te Whānau a Apanui and Ngāti Koata on the implications for them over the next month in order to make any necessary further changes at select committee stage.

Waitangi Tribunal Wai 3400

141. The Waitangi Tribunal granted an urgent inquiry (WAI 3400) involving a total of 86 parties – 53 claimants and 33 interested parties - who contest the proposed amendments. The process for the urgent inquiry commenced before the consultation period, and Stage 1 relating to the section 58 amendments was heard on 26-30 August 2024. The themes identified in the submissions to the Waitangi Tribunal are consistent with those received by applicant groups in this process.

142. On 13 September the Waitangi Tribunal publicly issued its Wai 3400 Stage 1 report. In summary, the Tribunal has found that the Crown breached the following Treaty principles

in a range of ways: good government, partnership, tino rangatiratanga, active protection/good government.

143. The Tribunal has found that the claimants will suffer, or are likely to suffer, significant prejudice as a result.

144. The Tribunal makes three recommendations:

- 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 resource consent permission rights, rather than interrupting the process of awarding CMTs.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

145. Given Minister's direction that the status quo is not a feasible option, Te Arawhiti advised that out of the remaining options Option A applied prospectively would be a direct and effective way to address the problem and achieve the policy objective. It posed the least legal, Tiriti and relationship risk by confining the amendment to a targeted alteration of key errors in the Court of Appeal's interpretation of section 58 of the Act and thereby delivers the highest net benefit.

146. Te Arawhiti advised that prospective application (i.e. preserving the current test for all existing cases) would be the option with the least complexity, legal and Māori-Crown relationship risks. Te Arawhiti also noted that retrospective application back to the date of the policy announcement would be preferrable to retrospective application of the amendment in relation to all cases including where Court decisions have already been made (such as for *Re Edwards* itself).

147. The Cabinet decisions were as follows [CAB-24-MIN-0256 Revised refers]:

- inserting a declaratory statement that overturns the Court of Appeal and High Court's judgment in Re Edwards relevant to the test for CMT and High Court judgments since the High Court in Re Edwards insofar as they interpret 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 Takutai Moana Act (section 106) to clarify that applicant groups are required to prove exclusive use and occupation from 1840 to the present day; and
- making clearer the relationship between the framing sections of the Takutai Moana 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; and
- that when enacted the amended law would be applied retrospectively from the point of the Minister's announcement of the policy changes.

Analysis of Costs

Affected groups *(identify)*	**Comment** *nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.*	**Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	**Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.*
Additional costs of the Option B applied retrospectively from date of announcement compared to taking no action			
Regulated groups			
Iwi, hapū, and whanau Māori applicant groups	Cost of rehearing CMT awards made between date of announcement and date of enactment will be overturned and need to be reheard	High	High
	Reduced number of applicants willing to seek awards under the new test; reduced number of CMT awards	Low	Low
Regulators			
The Office of Māori Crown Relations – Te Arawhiti	Litigation in the Waitangi Tribunal and courts will incur additional resource (time and cost) and opportunity cost of progressing other workstreams	Medium	High
Crown Law Office	Litigation in the Waitangi Tribunal and courts will incur additional resource (time and cost) [redacted] Legally Privileged		
Others (e.g., wider govt, consumers, etc.)			
Courts	Cost to the courts in rehearing applications currently underway or where an award is made between the date of announcement and enactment	Medium	Medium
Waitangi Tribunal	Urgent inquiry costs	Medium	Medium
Non-applicant third parties	Additional cost of participation in rehearings	Medium	Low
Total monetised costs	-		-
Non-monetised costs		High	

Additional benefits of the preferred option compared to taking no action			
Others (e.g., wider govt, consumers, etc.)			
The courts	Benefit: Increased pace of determinations due to reduction in applications	Low	Low
General public	Benefit: Confidence that the Takutai Moana Act and its tests are robustly applied and as Parliament intended	Medium	Low
Total monetised benefits	-		
Non-monetised benefits		*Medium*	

Section 3: Delivering an option

How will the new arrangements be implemented?

148. The proposals will be given effect through the Amendment Bill as set out above.

149. A communications and engagement plan will be developed to advise applicant groups, the public and the courts of the implications of the Amendment Bill.

150. Te Arawhiti is also developing options for providing funding for applicants and other affected groups for the cost of rehearings. These options explore what the Crown's contribution is to the rehearings, whether the existing Financial Assistance Scheme can accommodate rehearings or whether new money is required. Once the Minister and the Minister of Finance have indicated their preferred options, Te Arawhiti will determine the next steps. This may require Cabinet decisions. The implementation of any decisions will be communicated to those applicant groups impacted and other affected groups involved in the hearings.

151. Te Arawhiti will work with the Ministry of Justice to identify any implementation requirements for the Courts.

152. Te Arawhiti is progressing a programme of work that supports both the affordability of the Financial Assistance Scheme and improvements to the High Court and Crown determination pathways. This work is progressing in parallel to the changes in the Amendment Bill. Included in that programme of work is an update to the 'Blue Book' that provides comprehensive guidance to applicant groups on progressing their applications under the Act.

Transitional arrangements

153. The Amendment Bill will provide for the transitional arrangements as they apply to all applications. The transitional arrangements include:

    a. Completed CMT decisions will continue to be recognised (no impact).

    b. All undetermined applications from the date of the policy announcement will be decided under the clarified test for customary marine title.

    c. Undetermined applications include five High Court cases that at the date of the policy announcement have had, or are having, a hearing but where there are no judgments. These cases would, if Parliament enacts the amendments, need to be reheard under the clarified test.

    d. Any CMT awards made between the date of the policy announcement and the date of enactment would be overturned and those cases would need to be reheard.

154. The amendments will have no impact on existing and completed awards of customary marine title, such as the CMT awarded around the Tītī Islands or the 18 CMTs awarded to hapū of Ngāti Porou.

155. The following table sets out the impacts of the amended section 58 test on applications in both pathways.

	Applications/ High court Case	Location	**Impact of amendment** (if Parliament enacts the proposed amendments)
Undetermined	**All undetermined applications**	Various	These applicant groups are impacted. Applications will be determined under the provisions of amended test in the new Amendment Act.
	Rongomaiwahine	Hawkes Bay	
	Ngāti Koata	Top of the South Island	
	Te Whanau a Apanui	Bay of Plenty	
	Ngā hapū o Ngāti Porou	Tai Rāwhiti	
Live in the High Court	**Whangārei Coast**	Whangārei	These "live" cases will be impacted if Courts award CMT. 1. **If the judgment is released on or after the date of announcement,** the Act will require these cases to be re-heard under the amended test (in the new Amendment Act). Any decision to award CMT will be overturned. 2. **If they are still in hearings or pending a decision when the Act is deemed to have come into force (because the commencement date will be before the date of enactment),** the case will need to begin again, or provision made for the applicants to develop evidence meeting the amended test.
	Whangārei Harbour	Tai Tokerau	
	Wairarapa (1b)	Wairarapa	
	Re Ngā Pōtiki (2)	Tauranga	
	Inner Aotea Harbour	Aotea Harbour	
	Kāpiti-Manawatu (1a)	Kāpiti-Manawatu	
Decided and under appeal	**Re Edwards**	Eastern Bay of Plenty	No impact Appeals will continue under the pre-amendment law (which may change following the Supreme Court's November 2024 hearing).
	Re Ngāti Pāhauwera	Hawkes Bay	
	Tokomaru Bay 1 & 2	Tokomaru Bay	
	Wairarapa (1a)	Wairarapa	
Decided	**Re Tipene**	Titi Island	No impact
	Ngā hapū o Ngāti Porou Tranche 1 & 2	Tai Rāwhiti	
	Re Clarkson	Wairarapa	
	Re Ngā Pōtiki (1)	Tauranga	

How will the new arrangements be monitored, evaluated, and reviewed?

156. Te Arawhiti will monitor the courts' upcoming decisions on CMT applications under the amended test and will advise the Minister of significant developments in the jurisprudence. These developments and the Court's interpretation of the law will also be relevant to the Minister's decision making in the Crown engagement pathway.

157. Te Arawhiti will also advise Ministers on the wider response to the amendments and implications for the Māori Crown relationship including the Minister's relationships with applicant groups. Te Arawhiti will also continue to support Crown Law in their role representing the Attorney-General in Court proceedings.

APPENDIX 1

Table 1 Breakdown of main themes in responses from applicants		
Key themes	**Themes**	**No. of submissions**
Oppose changes to the Act	No applicants supported the changes already agreed by Cabinet and/or additional proposed changes to be enacted through the amendment Bill	47
Lack of consultation, engagement and communication	Lack of genuine consultation	32
	Rushed process	15
Concerns with legal process and Treaty of Waitangi obligations	Inconsistency with the principles of the Treaty	29
	Not acting in accordance with the rule of law	14
	Lack of context, background and information on proposed change	11
	Unfairness of changing test for groups	4
	Retrospectivity in applying proposed new provisions	11
	Criticism of 'return to original intention'	14
	Ignoring recommendations and findings of Tribunal WAI 2660 inquiry	8
	Inconsistency with MACA Act	4
	Breach of New Zealand Bill of Rights Act 1990 and other Acts / Breach of natural justice	9
	Allegation the Crown is aligned with commercial interests	10
	Waitangi Tribunal report on WAI 2660 Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry	14
	Feedback on 'exclusive use and occupation' and 'substantial interruption' wording	27
Specific concerns about the proposed amendments to the Act	Feedback on making changes to the effect of the preamble, purpose and/or Treaty of Waitangi framing sections	13
	Feedback on amending burden of proof	8
	Feedback on declaratory statement	13
	Limiting rights through amendments	5
	Impact of the changes on work to date (including time, money and people)	88
Impact on applicant groups	Further impacts on limited funding	14
	Retrospectivity may lead to inconsistent outcomes	7

	Gone through hearing, but awaiting judgment	5
	Impact of re-hearings	9
	In breach of settlement Acts and/or agreements. Applicant's particular circumstances not being considered	6