Part 1 – Open documents

Document ID	Date	Document Type	Author	Recipient	Parent Document ID	Redaction Basis
TA.001.0210	11/04/2024	Email	ARTHUR-ROCHE J (Te Arawhiti)	HYETT F; BERTAUD-GANDER R; DAGG F; MARSH T; SOUTHEE P; HOOD B; BUTLER N; (Te Arawhiti)		
TA.001.0226	17/04/2024	Email	HYETT F	(Te Arawhiti); DAGG F; MARSH T; SOUTHEE P; HOOD B; BUTLER N		
TA.001.0228	11/04/2024	Paper	ANDERSON L	GOLDSMITH P Hon (Minister for Treaty of Waitangi Negotiations)	TA.001.0226	Part Solicitor Client Privilege; Part Confidential Communication or Information; Matters of State
TA.001.0243	18/04/2024	Aide Memoire	ANDERSON L	GOLDSMITH P Hon (Minister for Treaty of Waitangi Negotiations)		Part Solicitor Client Privilege; Part Confidential Communication or Information; Matters of State
TA.001.0258	24/04/2024	Email	BUTLER N	ANDERSON L; MARSH T (Te Arawhiti)		Part Solicitor Client Privilege; Part Confidential Communication or Information; Matters of State
TA.001.0260	1/05/2024	Email	BUTLER N	MATANGI D		
TA.001.0293	20/05/2024	Email	MATANGI D	MARSH T; HOOD B; BUTLER N; ANDREWS M (Te Arawhiti); VAN DAATSELAAR S; FRASER W		Part Solicitor Client Privilege
TA.001.0367	27/05/2024	Paper	MARSH T (Te Arawhiti)	GOLDSMITH P Hon (Minister for Treaty of Waitangi Negotiations)		Part Litigation Privilege; Solicitor Client Privilege; Part Confidential Communication or Information; Matters of State
TA.001.0410	8/07/2024	Cabinet Minute				Part Solicitor Client Privilege; Part Confidential Communication or Information; Matters of State

Document ID	Date	Document Type	Author	Recipient	Parent Document ID	Redaction Basis
TA.001.0412		Cabinet Paper				Part Solicitor Client Privilege; Part Confidential Communication or Information; Matters of State

Fieldes, Tim

From: Te Arawhiti OCE
Sent: Thursday, 11 April 2024 4:06 pm
To: Fern Hyett; Rhiannon Bertaud-Gandar
Cc: Dagg, Frances; Marsh, Tui; Southee1, Patrick; Hood, Bridie; Butler, Nicole; Te Arawhiti OCE; OfficialCorrespondence@tearawhiti.govt.nz
Subject: 237 - Takutai Moana: Section 58 Options
Attachments: 237 - Takutai Moana Section 58 options.pdf; 237 - Takutai Moana Section 58 options.docx

Kia ora Rhiannon

Please see attached electronic copies of '237 - Takutai Moana: Section 58 Options' for consideration by the Minister.

Please let us know if there are any issues.

E mihi ake ana, nā
Joey

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

Joey Arthur-Roche (he/him)
SENIOR ADVISOR - OFFICE OF THE CHIEF EXECUTIVE
CEL [redacted]
WEB: tearawhiti.govt.nz

The Office for Māori Crown Relations – Te Arawhiti
Level 3, Justice Centre, 19 Aitken Street, SX10111, Wellington 6011

Fieldes, Tim

From: Fern Hyett <Fern.Hyett@parliament.govt.nz>
Sent: Wednesday, 17 April 2024 3:47 pm
To: Te Arawhiti OCE
Cc: Dagg, Frances; Marsh, Tui; Southee1, Patrick; Hood, Bridie; Butler, Nicole; OfficialCorrespondence@tearawhiti.govt.nz
Subject: RE: 237 - Takutai Moana: Section 58 Options
Attachments: 237 - Takutai Moana section 58 options.pdf

Kia ora koutou

Please find **attached** a copy of report '237 - Takutai Moana section 58 options' as considered by the minister,

Ngā manaakitanga

Fern

Fern Hyett
Private Secretary (Treaty of Waitangi Negotiations) | Office of Hon Paul Goldsmith
Minister for Arts Culture and Heritage | Minister of Justice
Minister for State Owned Enterprises | Minister for Treaty of Waitangi Negotiations

M: [redacted]
Email: fern.hyett@parliament.govt.nz | www.beehive.govt.nz
Private Bag 18041, Parliament Buildings, Wellington 6160, New Zealand

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To: Fern Hyett <Fern.Hyett@parliament.govt.nz>; Rhiannon Bertaud-Gandar <Rhiannon.Bertaud-Gandar@parliament.govt.nz>
Cc: Dagg, Frances <Frances.Dagg@tearawhiti.govt.nz>; Marsh, Tui <Tui.Marsh@justice.govt.nz>; Southee1, Patrick <Patrick.Southee1@tearawhiti.govt.nz>; Hood, Bridie <Bridie.Hood@tearawhiti.govt.nz>; Butler, Nicole <Nicole.Butler@tearawhiti.govt.nz>; Te Arawhiti OCE <TeArawhitiOCE@tearawhiti.govt.nz>; OfficialCorrespondence@tearawhiti.govt.nz
Subject: 237 - Takutai Moana: Section 58 Options

Kia ora Rhiannon

Please see attached electronic copies of '237 - Takutai Moana: Section 58 Options' for consideration by the Minister.

Please let us know if there are any issues.

E mihi ake ana, nā
Joey

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

Joey Arthur-Roche (he/him)
SENIOR ADVISOR - OFFICE OF THE CHIEF EXECUTIVE
CEL: [redacted]
WEB: tearawhiti.govt.nz

The Office for Māori Crown Relations – Te Arawhiti
Level 3, Justice Centre, 19 Aitken Street, SX10111, Wellington 6011

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

Minister for Treaty of Waitangi Negotiations

Takutai Moana: Section 58 options

Date	11 April 2024	***Priority***	*High*
Report No.	2023/2024 - 237	**File ref**	

Action sought

Minister for Treaty of Waitangi Negotiations (Hon Paul Goldsmith)	**Agree** the approach to amending the Marine and Coastal Area (Takutai Moana) Act 2011 to clarify Parliament's original intent for the test for customary marine title.	**By 15 April 2024**

Contact for phone discussion (if required)

Name	Position	Phone	1st Contact
Lil Anderson	Tumu Whakarae, Chief Executive The Office for Māori Crown Relations – Te Arawhiti	[redacted]	✓
Tui Marsh	Deputy Chief Executive, Treaty Reconciliation and Takutai Moana		

Takutai Moana: Section 58 options

Purpose

1. This paper seeks your agreement to the proposed options to restore the originally intended exacting nature of the test for customary marine title (CMT) in section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). Your decisions will inform a draft Cabinet paper, which you will receive in the week of 15 April.

2. It also provides updates on related work, confirming that these will be progressed separately to the section 58 amendments.

Executive summary

3. You have prioritised the National and New Zealand First coalition agreement commitment to amend section 58 of the Act and directed officials to provide advice on how legislative amendments can be enacted by the end of 2024.

4. This paper proposes two options, which progressed together, will address the specific legal issues concerning the interpretation of the test for customary marine title (CMT) in the *Re Edwards* decision. The amendments will also make it difficult for the Courts to continue to read down the intended meaning of the legislation.

5. Legal privilege Legal privilege The timeframe for enacting amendments by the end of 2024 allows a maximum of 2-3 weeks targeted engagement with whānau, hapū and iwi applicant groups on the proposed amendments.

6. The section 58 amendments are a part of a series of improvements to the administration of the Act:

   a. The review of the Financial Assistance Scheme (FAS) settings and the Takutai Moana Engagement Strategy (the Strategy) will progress in 2024 and not hinder section 58 legislative amendments.

   b. A review of the determination pathways in the Act is a more fundamental endeavour and will not be completed in the same timeframe as the section 58 amendments. This will be progressed separately.

7. The workstreams will be aligned to provide consistent messaging and to demonstrate a coherent work programme as changes to improve the administration of the Act are progressed.

Recommendations

8. It is recommended that you:

   a. **note** you have directed officials to provide advice on how legislative amendments to give effect to the National and New Zealand First coalition agreement commitment to amend section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 can be enacted by the end of 2024;

   b. **note** the range of options for legislative amendments officials have considered (paragraphs 23-35);

c. **agree** that the following two options together will achieve the objective of the coalition agreement to restore the exacting nature of the section 58 test as Parliament intended it: YES / NO

   A. insert a declaratory statement that specifically overturns the Court of Appeal's judgment insofar as it interprets the test for CMT; and

   B. add text to define or clarify the terms 'exclusive use and occupation' and 'substantial interruption.'

d. **agree** that section 58 amendments not be applied retrospectively; YES / NO

OR

e. **agree** that section 58 amendments be applied retrospectively; YES / NO

f. **note** that the Crown has unique arrangements around the recognition of customary marine rights with Ngā hapū o Ngāti Porou and Te Whānau a Apanui which will require the Crown to engage with them regarding amendments to section 58;

g. **agree** to undertake 2-3 weeks targeted engagement with whānau, hapū and iwi applicant groups, including with Ngā hapū o Ngāti Porou and Te Whānau a Apanui on the proposals; YES / NO

h. **agree** to seek delegated authority from Cabinet to approve changes that address minor technical issues that arise during drafting of legislative amendments; and YES / NO

i. **agree** to seek delegated authority from Cabinet to finalise and implement any changes to the Takutai Moana Engagement Strategy. YES / NO

Lil Anderson
Tumu Whakarae

NOTED / APPROVED / NOT APPROVED
Hon Paul Goldsmith Minister for Treaty of Waitangi Negotiations
Date: 15 / 4 / 2024

Background

Previous advice

9. You have received the following advice on progressing the coalition commitment:

   a. the Court of Appeal judgment in *Re Edwards* and the Attorney-General's appeal of the judgment in early December 2023 [2023/2024 – 106 refers];

   b. initial advice, options and information for Ministerial consultation on amending section 58 of the Act in December 2023, January and March 2024 [2023/2024-149, 2023/2024-165, and 2023/2024 – 209 – UPDATED refers]; and

   c. addressing FAS cost pressures in March 2004 [2023/2024 – 210 and 2023/2024 – 219 refers].[1]

Ministerial consultation meeting

10. On 19 March 2024, you met with the Deputy Prime Minister, and Ministers Potaka, Seymour and Jones to discuss the approach to the section 58 legislative amendments and other related matters.

11. Following that meeting, you directed officials to:

   a. complete the work on section 58 amendment options to enable legislative amendments to be enacted by the end of 2024;

   b. explore a single determination pathway, alongside other pathway options; and

   c. provide further advice to give confidence that Takutai Moana funding for applicants operates within the FAS appropriation.

Context

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

12. The National and New Zealand First coalition agreement commits to:

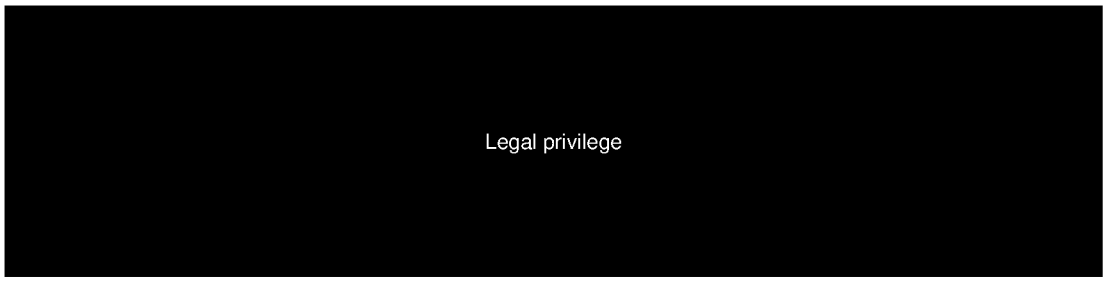
   "Amend section 58 of the Marine and Coastal Area Act to make clear Parliament's original intent, in light of the judgment of the Court of Appeal in Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kahui and Whakatōhea Māori Trust Board & Ors [2023] NZCA 504."

13. Section 58 of the Act sets out the test for customary marine title (CMT). The test has two limbs, both of which must be satisfied by an applicant group. The first limb of the test requires the applicant group to 'hold' the relevant area 'in accordance with tikanga.' The second limb of the test requires that the applicant group has 'exclusively used and occupied' the area 'from 1840 to the present day without substantial interruption.'

14. In interpreting the second limb of the test for CMT – i.e. s 58(1)(b)(i) of the Act, the Court of Appeal found that:

[1] The Cabinet paper "Vote Te Arawhiti – Takutai Moana Financial Assistance Scheme" is lodged for Cabinet Business Committee consideration on 15 April 2024.

- 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 for that use and occupation not to have ceased or have been substantially interrupted after 1840; and
- customary use can only be 'substantially interrupted' where relevant third-party activities are authorised by legislation.

15. 

Implications of the Court of Appeal's decision

16. The Court of Appeal's interpretation of the CMT test in *Re Edwards* is binding on decision makers in both the Crown engagement and High Court pathways. Because each application is considered by decision makers on its own facts, we cannot predict what the precise implications of the decision will be in particular cases or decisions. However, the Court of Appeal's less stringent interpretation of the test in *Re Edwards* is likely to result in CMT being recognised over more of the coastal and marine area than under previous precedent set by the High Court.

17. You have expressed a concern that recognition of CMT over a larger portion of the marine and coastal area than previously anticipated may challenge New Zealanders' expectation of having an equal say over the management and use of the coastline.

18. Te Arawhiti notes that many iwi, hapū and whānau groups are already actively involved in resource management processes. In some cases, Treaty settlement mechanisms or direct relationships with local authorities facilitate that involvement. The rights of CMT holders are greater than the rights ordinarily available to iwi and hapū under the resource management regime. Parliament intended for this additional set of rights to only be available to those groups with strong customary connections to the marine and coastal area, reflected by exclusive use and occupation of that area since 1840.

What was Parliament's intent?

19. The Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) repealed the Foreshore and Seabed Act 2004 (the 2004 Act). The Act restored the customary interests that were extinguished by the 2004 Act and divested the Crown and local authorities of any ownership they held in the foreshore and seabed. The Act established a special category of land – the common marine and coastal area – and assigned a 'no ownership' status to that area such that no one, including the Crown, is capable of owning it.

20. The Act sought to balance a range of interests in the marine and coastal area – including customary, commercial and recreational. To achieve this, the Act guarantees continued public access, fishing, and navigation in the marine and coastal area within a legal framework that also provides for recognition of Māori customary interests.

21. Legal privilege

Options for amending section 58

22. Te Arawhiti, Legal privilege have considered a range of options for amending section 58 to restore Parliament's original intent following the *Re Edwards* decision on appeal. Officials consider the following two amendments together will be most effective in achieving this objective:

    A. Insert a declaratory statement that specifically overturns the Court of Appeal's judgment insofar as it interprets the test for CMT; and

    B. Add text to define or clarify the terms 'exclusive use and occupation' and 'substantial interruption.'

23. This approach will expressly refer to the *Re Edwards* decision and clearly signal an intention to overrule that decision's interpretation of section 58. Legal privilege Legal privilege

24. The following section provides analysis of the effectiveness of all the options and identification of key risks.

Full options analysis

25. We identified four options to address the specific legal issues concerning the interpretation of the test for CMT in the *Re Edwards* decision:

    A. **Declaratory statement:** State that the purpose of the amendment is to overturn aspects of the *Re Edwards* decision and alter the law as expressed by the Court of Appeal.

    B. **Defining key terms:** Insert text to define the key concepts of exclusive use and occupation and substantial interruption, consistent with the legislative intent (could be used in combination with option A).

C. **Clarify relationship between the purpose provision and section 58:** Address the Court of Appeal's approach to the test by clarifying that the actual words of section 58 apply 'notwithstanding' the Act's preamble/purpose provisions.

D. **Clarify relationship between Treaty provision and section 58:** Address the Court of Appeal's approach to the test by clarifying that the actual words of section 58 apply 'notwithstanding' the Act's Treaty provision.

Declaratory statement and definition of key terms (options A and B)

26. Te Arawhiti consider that implementing these two options together has the best prospect of achieving the policy intent.

27. Legal privilege

28.

29. The inclusion of text to define key terms in the test for CMT will assist to address the multiple aspects of the Court of Appeal's decision regarding section 58 that we have identified are inconsistent with Parliament's intent, 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 s 106.

Amending the relationship between section 58 and the purpose and/or the Treaty provisions (options C and D)

30. Legal privilege

31. Officials consider these options would need to be carefully drafted to ensure they did not affect the relationship between other provisions and the Act's purpose or Treaty clause. Whānau, hapū and iwi applicant groups and some Māori generally are likely to consider a proposal to amend the Act's purpose or Treaty clause as the Crown intending to erode the Treaty interests underpinning the Act Legal privilege Legal .

Risks Legal privilege

32. Legal privilege

33. [redacted]

34. [redacted] Legal privilege

35. Te Arawhiti consider that [redacted] Legal privilege, amendments to the purpose and Treaty options are more likely to attract criticism from applicant groups and some Māori generally. These amendments would likely be perceived as undermining the core principles of the takutai moana regime when there is no need to.

36. Māori have already expressed significant dissatisfaction with the statutory regime as it stands and its provision for customary interests (including through the Wai 2660 inquiry, in which the Tribunal found many concerns Māori had about the Act were well-founded). Amendments to the legislation are likely to attract criticism, possibly of a magnitude akin to the controversy associated with the enactment of the Foreshore and Seabed Act in 2004. Those protests alleged the Crown was removing Māori rights and some Māori are likely to see amending section 58 as a similarly limiting of Māori rights.

37. We consider that options A and B pose the least [redacted] Legal 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. As discussed above, these two options together are also the most likely to be effective in achieving the policy intent.

Other issues

38. We have identified two key additional policy issues for your consideration as part of the section 58 amendment proposal. These are:

    a. whether an amendment to section 58 should be applied retrospectively to applications already determined under the *Re Edwards* Court of Appeal decision, [redacted] Legal privilege [redacted] Legal privilege; and

    b. the impact of these amendments on the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 and the Deed of Agreement between the Crown and Ngāti Porou relating to takutai moana matters.

[redacted] Legal privilege

40. [redacted]

41. [redacted]

42. [redacted]

43. [redacted]

Legal privilege

44. [redacted]

45. [redacted]

46. [redacted]

47. [redacted]

Impact on Deed of Agreement with Ngāti Porou and Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act

48. Ngāti Porou began negotiations with the Crown in relation to their interests in the marine and coastal area under the 2004 Act. In 2008, they signed a Deed of Agreement with the Crown regarding marine and coastal area matters. However, implementation of this deed of agreement was interrupted by the review and repeal of the 2004 Act and the introduction of the Act. As a result of the new regime, in 2017 Ngāti Porou and the Crown signed a Deed to Amend the 2008 Deed of Agreement (the amended Deed).

49. The amended Deed was designed to reflect what had been negotiated and agreed to in 2008, in the new context of the new Act. The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act was passed in 2019 (the 2019 Act) to give effect to the amended Deed. The 2019 Act creates an alternative scheme for the recognition of customary interests in the rohe moana of Ngāti Porou. Applications for CMT by ngā hapū o Ngāti Porou are made under the 2019 Act rather than under the Act.

50. [redacted]

51. Legal privilege

52. Given the above factors, we recommend that you undertake targeted consultation with ngā hapū o Ngāti Porou on the proposed amendments. Legal privilege

Legal privilege

Te Whānau a Apanui

53. Te Whānau a Apanui have a similar arrangement with the Crown in their initialled Deed of Settlement which reflects negotiations conducted under the 2004 Act. This arrangement means they should also be engaged with directly on the proposed amendment, over and above general consultation with applicants and Māori (see discussion below).

[2] Sections 111 and 113 of Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

Timeframes

54. You have indicated your intention for the coalition commitment to be afforded priority and for legislative amendments to be enacted by the end of 2024. The process and timeframes are outlined in the following table.

What	Date
Draft Cabinet paper with proposals for amending the Act provided to you	18 April
Ministerial consultation	22 April-13 May
Cabinet Social Outcomes Committee consider paper	22 May
Cabinet	27 May

Confidential

55. Confidential

56. Confidential

Confidential we recommend you seek delegated authority to approve changes that address minor technical issues, consistent with the policy, that arise during the drafting of bill. The final draft of the bill will still be subject to Ministerial consultation prior to submission to Cabinet.

Engagement with Māori

57. Amendment of the Act to ensure the section 58 test is correctly interpreted (in line with Parliament's original intent) directly affects significant Māori interests. Previous advice has conveyed that good faith engagement with Māori on the government's proposals is necessary to meet Treaty of Waitangi obligations; a fulsome and meaningful engagement process is important; Legal privilege

Legal privilege

58. Over and above general consultation with Māori, and as discussed above, there is a strong case for direct engagement with Ngāti Porou (and Te Whānau a Apanui), given their unique arrangements with the Crown. Legal privilege

Legal privilege

59. At a maximum, the above timeframe could allow for 2-3 weeks targeted engagement with whānau, hapū and iwi applicant groups (comparable to that allowed for the Fast Track Consenting Bill). It would allow time to inform applicant groups of the proposed amendments and invite them to provide their views, but it would allow very little time for those views to be taken into account. Should you agree to this targeted engagement we will provide you with an engagement plan.

60. We recommend directed engagement with Ngāti Porou and Te Whānau a Apanui and targeted engagement with other applicants be undertaken as a matter of priority after Cabinet consideration of the proposed amendment on 27 May 2024. The engagement period will need to occur before the Parliamentary Counsel Office drafting period. Te Arawhiti can lead this work, though Ministerial involvement may be advantageous to help reach an agreement with Nga Hapū o Ngāti Porou and Te Whanau Apanui around the amendments. General consultation with Māori would be via the Select Committee process.

Related work

61. The section 58 amendments are a part of a series of improvements to the administration of the Act. These improvements target three specific areas:

    a. Restoring the original intent of the section 58 test;

    b. Affordability – addressing cost pressures and review of the FAS settings;

    c. Improvements to the determination pathways in the Act:

        i. Crown engagement pathway improvements, and specifically the review of the Takutai Moana Engagement Strategy;

        ii. Addressing dual pathways issue; and

        iii. Investigating alternative recognition pathway options for the Act.

62. The workstreams will be aligned to provide consistent messaging and to demonstrate coherency as changes to improve the administration of the Act are progressed. A communications and engagement plan will be developed for this and any subsequent engagement process.

Determination pathways in the Act

63. You have asked for advice on the option of moving to a single recognition pathway under the Act. We understand the reasons for this include: the cost of operating two pathways; addressing the dual pathways issue; and if an option to remove the High Court pathway was progressed, it would remove the risk of Courts interpreting section 58 in novel ways.

64. The resolution of the dual pathways issue is a longstanding technical problem with operating the two separate pathways under the Act. The lack of cohesion between the High Court and Crown engagement pathways for recognition of customary interests has meant that the Act does not provide the flexibility for customary marine title applications in the same area to be heard by the same decision maker at the same time. As a result, groups who only applied in one pathway are unable to have their interests determined by the decision-maker in the other pathway. This is likely to result in significant unfairness to some applicants. In the Wai 2660 inquiry, the Crown stated that it was committed to exploring options (including legislative options) to resolve the dual pathways issue, and it has made similar statements in the High Court.

65. We have identified five options to streamline the pathways in the Act:

a. Crown engagement only: Amend the Act to remove the High Court pathway, including a clause to oust its jurisdiction, and implement significant improvements to the Crown engagement pathway;

b. High Court only: Amend the Act to remove the Crown engagement pathway;

c. Dual pathway without fixing the dual pathway issue: no amendment to the Act, so current pathways remain unchanged, but with the Crown engagement strategy improved;

d. Dual pathway with the dual pathway issue fixed: refresh the Crown engagement strategy and amend the Act to allow applicant groups to choose which pathway to seek determination in for a particular area; and

e. Triple pathway: Amend the Act to add the Māori Land Court pathway to the existing two pathways (Waitangi Tribunal Wai 2660 Stage 2 recommendation).

66. We have undertaken an initial analysis of these options, considering relative timeframes and costs and risks. Legal privilege

Legal privilege

67. Any decision to make a fundamental change to the Act, such as removing or adding a pathway, will require more thorough policy development, consultation and sufficient drafting time for Parliamentary Counsel Office. It is unlikely that any resulting amendments could be introduced before the end of 2024 alongside the section 58 work, so will be progressed separately.

68. We will report back to you by end of April with a full analysis of these options for your consideration.

Review of the Takutai Moana Engagement Strategy (Strategy)

69. If the Crown engagement pathway is retained, improvements are required to enhance its workability and cost effectiveness. A review of the current Takutai Moana Engagement Strategy [CAB-21-MIN-0076 refers] is underway to identify options for improvement. We will provide initial advice on proposed changes by the end of June 2024.

70. Foreshadowing this we recommend you seek delegation from Cabinet, at the same time you are seeking decisions on section 58 amendments, to allow you to consult, finalise and implement any changes to the strategy. This is consistent with the delegation you are seeking to progress the changes from the FAS review.

Changes to the FAS

71. The FAS review will be completed by the end of May. The review will identify changes that will ensure a more efficient, durable and sustainable model of funding.

72. The Vote Te Arawhiti - Takutai Moana Financial Assistance Scheme Cabinet paper seeks delegated authority to finalise and implement any changes to the FAS. Any material changes to the FAS following consultation with applicant groups will require Cabinet approval.

73. We will provide advice to you by the end of June 2024 seeking your approval to the proposals and to commence engagement with applicant groups. As the FAS and Strategy are interlinked, our advice is to combine the consultation for both reviews.

74. The preliminary changes we have identified will strengthen our approach to collective engagement with all applicants within an area;

a. require budgeted workplans agreed with Te Arawhiti in advance of any funding approval;

b. reduce funding levels for pre-hearing and hearing costs to Legal Aid rates;

c. impose time limits on claims for financial support; and

d. remove the current reimbursement model and implement a grants model.

75. We will also explore whether changes in the way the appropriation is managed will achieve better outcomes. For example, a multi-year appropriation model might better allow for management of costs year-on-year compared to an annual appropriation. This could address fluctuations in the number of hearings scheduled or the number of groups participating in hearings each year, which are outside our control, and which make forecasting costs on an annual basis more difficult.

76. Legal privilege

Consultation

Legal privilege

Next steps

Cabinet paper

81. We will provide you a draft paper in the week of 15 April to reflect your decisions and recommend the preferred approach to implementing amendments to section 58. The paper will outline the next stages including engagement with Māori and issuing drafting instructions to Parliamentary Counsel Office. It will seek delegated authority for you to approve changes that address minor technical issues, consistent with the policy, that arise during drafting. The paper will also seek delegated authority for you to make changes to the Strategy to improve the Crown engagement pathway.

82. Subject to your agreement to targeted engagement on the amendments to section 58 we will provide an engagement plan for your approval in early May.

83. We will meet with the Legislation Design and Advisory Committee while the Cabinet paper is going through Ministerial consultation.

Other related work

84. We will report back on options for the determination pathways under the Act, including the option of moving to a single pathway, by the end of April.

85. We will provide advice by the end of June 2024 on FAS and Strategy review proposals and seek your approval to consult with applicant groups.

to Action Monday

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

Aide Memoire

To	Hon Paul Goldsmith Minister for Treaty of Waitangi Negotiations	**File no.**
From	Lil Anderson Tumu Whakarae 021 387 047	**Report no.** 2023/24 - 256
Date	18 April 2024	
Title	**Takutai Moana Draft Cabinet paper on clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011**	

Purpose

1. This paper provides you with a draft Cabinet paper *Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011* (attached as Appendix 1) for your consideration and consultation with your Ministerial colleagues.

Background

2. The Cabinet paper seeks approval to amendments that will restore the exacting nature of the section 58 test for customary marine title to that originally intended by Parliament when the Marine and Coastal Area (Takutai Moana) Act 2011 was passed.

3. We have previously briefed you on options relating to scope and timing for this work [2023/2024 – 237 refers] and have incorporated your feedback into the draft paper.

Comment

4. Following your review of the attached draft Cabinet paper, we recommend a copy be forwarded to the Prime Minister, Deputy Prime Minister, the Attorney-General, Minister for Māori Crown Relations: Te Arawhiti, Minister for Regulation, and the Minister for Regional Development, Oceans and Fisheries, and Resources by 22 April 2024, seeking any comments by 13 May 2024.

5. [redacted] Legal privilege

6. Subject to your agreement, the paper will be lodged with the Cabinet office on 16 May 2024 for Cabinet Social Outcomes Committee (SOU) on 22 May 2024, and Cabinet on 27 May 2024. We understand you may wish to expedite this time frame. If you do, we could reduce ministerial consultation to one week, seeking comment until 29 April 2024. This would provide for the paper to be lodged with the Cabinet Office on 2 May 2024, for consideration by SOU on 8 May 2024, and confirmation by Cabinet on 13 May 2024.

7. You may also wish to consider seeking Power to Act from Cabinet for SOU in order to expedite the drafting and pre-introduction consultation processes.

Recommendations

8. It is recommended you:

a. **approve** the draft Cabinet paper *Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011* (Appendix 1) for Ministerial consultation; **YES / NO**

EITHER

Option 1

b. **forward** a copy of the draft Cabinet paper to your Ministerial colleagues for consultation by 22 April and seeking comments by 13 May; **YES / NO**

c. **note** a final Cabinet paper addressing any comments received will be provided to you on 14 May so that it may be lodged with the Cabinet office on 16 May, for consideration at the Cabinet Social Outcomes Committee on 22 May; **YES / NO**

OR

Option 2

d. **forward** a copy of the draft Cabinet paper to your Ministerial colleagues for consultation by 22 April and seeking comments by 29 April; and **YES / NO**

e. **note** a final Cabinet paper addressing any comments received will be provided to you on 30 April so that it may be lodged with the Cabinet office on 2 May, for consideration at the Cabinet Social Outcomes Committee on 8 May. **YES / NO**

Nāku noa, nā

Lil Anderson
Tumu Whakarae

NOTED / APPROVED / NOT APPROVED
Hon Paul Goldsmith Minister for Treaty of Waitangi Negotiations
Date: / / 2024

Appendix 1: draft Cabinet Paper: *Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011*

In Confidence

Office of the Minister for Treaty of Waitangi Negotiations

Cabinet Social Outcomes Committee

Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011

Proposal

1 This paper seeks agreement to amendments to restore the exacting nature of the test for customary marine title (**CMT**) to that originally intended by Parliament when the Marine and Coastal Area (Takutai Moana) Act 2011 (**the Act**) was passed.

Relation to government priorities

2 The coalition agreement between the National Party and the New Zealand First Party includes an agreement to amend section 58 of the 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 (***Re Edwards***).

Executive Summary

3 The Act provides iwi, hapū and whānau Māori with the ability to seek legal expression of their customary interests in the common marine and coastal area, either through the High Court or the Crown.

4 Section 58 of the Act sets out the test for CMT. The Court of Appeal's interpretation of the CMT test in its judgment in *Re Edwards* is inconsistent with the literal words in the legislation and does not reflect Parliament's original intent for the CMT test.

5 I propose that section 58 of the Act be amended, with retrospective application, as soon as possible in 2024 by:

5.1 inserting a declaratory statement that specifically overturns the Court of Appeal's judgment insofar as it interprets the test for CMT; and

5.2 adding text to define or clarify the terms 'exclusive use and occupation' and 'substantial interruption.'

6 This amendment will give effect to the agreement in the coalition agreement between the National Party and the New Zealand First Party to amend section 58 of the Act to make clear Parliament's original intent.

7 Enacting legislative amendments as soon as possible in 2024 has risks. They include limited time available to consult with applicant groups on the amendments and draft a bill. To mitigate these risks, I seek authority from Cabinet to undertake 2-3 weeks targeted engagement with applicant groups on the section 58 amendments and progress the drafting of an amendment bill.

8 The section 58 amendments are a part of a series of improvements to the administration of the Act. I am currently reviewing the financial assistance scheme [CAB-24-MIN-0128 refers]. I have also asked Te Arawhiti - The Office for Māori Crown Relations (**Te Arawhiti**) to explore the pathway options in the Act and review the current Takutai Moana engagement strategy **(the engagement strategy)**, an essential part of the Crown determination pathway, with a view to a more streamlined and cost-effective process.

9 I seek authorisation to finalise and implement refreshed settings to the engagement strategy, following engagement with applicant groups. This will enable the strategy and financial assistance reviews to progress at the same time as they are connected. I intend to report to Cabinet early in the second half of 2024 on these workstreams.

Background

Marine and Coastal Area (Takutai Moana) Act 2011

10 The Foreshore and Seabed Act 2004 (the **2004 Act**) vested the foreshore and seabed in the Crown, extinguishing Māori customary rights in these areas.

11 The Act repealed and replaced the 2004 Act, and restored the customary interests that were extinguished by the 2004 Act. The Act also divested the Crown and local authorities of any ownership they held in the foreshore and seabed. The Act established a special category of land – the common marine and coastal area – and assigned a 'no ownership' status to that area such that no one, including the Crown, is capable of owning it.

12 The repeal of the 2004 Act and introduction of the Act was part of a confidence and supply agreement between the National Party and the Māori Party.

13 The Government's objective in developing the legislation 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. To achieve this, the Act guarantees continued public access, fishing, and navigation in the marine and coastal area within a legal framework that also provides for recognition of Māori customary interests.

14 The Act provides iwi, hapū and whānau Māori applicant groups[1] with the ability to seek a determination of their application either through the High Court or the Crown for recognition of their customary interests in the marine and coastal area. These interests are legally recognised through two awards: CMT; and protected customary rights (**PCRs**) which protect cultural activities in the marine area.

15 A CMT award recognises Māori customary interests by providing for regulatory rights in relation to the common marine and coastal area, i.e., providing an ability to: decline certain resource consents in the CMT area; publish a planning document that local authorities and the relevant government agencies must take into account in decision making and apply for the protection of wāhi tapu within that area. CMT cannot be sold.

[1] The statutory deadline for submitting applications was 3 April 2017.

16 Public access, fishing and other recreational activities in a CMT area are unaffected (except for some lawful restrictions, including for the protection of wāhi tapu areas). Significant third part rights such as existing infrastructure are also maintained.

17 Section 58 of the Act sets out the test for CMT. The test has two 'limbs' and requires applicant groups to prove that they:

17.1 'hold' the relevant area 'in accordance with tikanga' (limb one); and

17.2 have 'exclusively used and occupied' an area 'from 1840 to the present day without substantial interruption' (limb two).

18 The test is the same whether the application has been made to the Crown or the High Court. The full text of section 58 is set out at **Appendix One**.

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

19 The *Re Edwards* Stage 1 High Court hearing took place in late 2020 and was the first substantive High Court hearing of applications for CMT and PCRs under the Act. The hearing covered a section of the eastern Bay of Plenty coastline, including Ōpōtiki and Ōhiwa harbour.

20 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. A number of applicant groups appealed to the Court of Appeal on aspects of the judgment, and that hearing was held in February and March 2023.

21 The Court of Appeal considered a wide range of issues, including the proper interpretation of key provisions of the Act. The Court's most significant findings related to its interpretation of the section 58 test.

22 The Court of Appeal judgment agreed with the High Court on the interpretation of limb one (as referenced in paragraph 17.1). Both Courts found that the focus of this part of the test should be on evidence of the applicant group's tikanga in relation to the application area. It was accepted that evidence of activities showing control or authority over the area will be useful for applicant groups to prove that they "hold" an area in accordance with a system of tikanga, as opposed to merely using or being present in that area.

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

23.1 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 for that use and occupation not to have ceased or have been substantially interrupted after 1840; and

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

24 [redacted] Legal privilege

25 The Attorney-General has sought leave to appeal the Court of Appeal's judgment.

Implications of the Court of Appeal's decision

26 The Court of Appeal's interpretation of the CMT test in *Re Edwards* is binding on decision makers in both the Crown engagement and High Court pathways. Because each application is considered by decision makers on its own facts, the implications of the decision for particular cases or decisions cannot be predicted. However, the Court of Appeal's less stringent interpretation of the test in *Re Edwards* will likely result in CMT being recognised over more of the coastal and marine area than under the previous precedent set by the High Court.

27 In March 2024, the High Court released a judgment awarding five CMT orders and 12 PCR orders over the area hearing, stretching from Tūrakirae Head, at the western end of Palliser Bay, to the southern bank of the Whareama River, which meets the coast 40 kilometres east of Masterton. I am concerned that recognition of CMT over a larger amount of the marine and coastal area than previously anticipated will challenge New Zealanders' expectation that the Act establishes and maintains a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand.

Original intent of section 58

28 [redacted] Legal privilege

Amending section 58 of the Act to restore Parliament's original intent

29 In March 2024, I met with the Deputy Prime Minister, Hon David Seymour, Hon Tama Potaka, and Hon Shane Jones to discuss the approach to implementing the National Party and New Zealand First Party coalition agreement to amend section 58 of the Act.

Options for amending section 58

30 I directed Te Arawhiti Legal privilege to consider options for amending section 58 to restore Parliament's original intent following the *Re Edwards* decision on appeal. The following options were investigated:

30.1 *Declaratory statement:* state that the purpose of the amendment is to overturn aspects of the *Re Edwards* decision and correct the law as expressed by the Court of Appeal;

30.2 *Defining key terms:* insert text to define the key concepts of exclusive use and occupation and substantial interruption, consistent with the legislative intent;

30.3 *Clarify the relationship between the purpose provision and section 58:* address the Court of Appeal's approach to the test by clarifying that the actual words of section 58 apply 'notwithstanding' the Act's preamble/purpose provisions'; and

30.4 *Clarify the relationship between the Treaty provision and section 58:* address the Court of Appeal's approach to the test by clarifying that the actual words of section 58 apply 'notwithstanding' the Act's Treaty provision.

31 I consider that amending the relationship between section 58 and the purpose provision (as in paragraph 30.3) or amending the relationship between section 58 and the Treaty provision (as in paragraph 30.4) would not fully address the issues with the Court of Appeal's decision in *Re Edwards* and would leave room for further judicial misinterpretation of section 58. Amendments affecting the Act's purpose or Treaty clause are also more likely to be seen as the Crown materially eroding the Treaty interests underpinning the Act.

Preferred options: declaratory statement and additional definitions

32 I consider that the following two amendments together will be most effective in achieving the objective of the coalition agreement. They pose the least Legal privilege relationship risk by confining the amendment to a targeted correction of key errors in the Court of Appeal's decision:

32.1 inserting a declaratory statement that specifically overturns the Court of Appeal's judgment insofar as it interprets the test for CMT; and

32.2 adding text to define or clarify the terms 'exclusive use and occupation' and 'substantial interruption.'

33 [redacted] Legal privilege

34 This approach will expressly refer to the *Re Edwards* decision to clearly signal an intention to overrule that decision. It will also provide further explanation of the key terms in section 58 [redacted] Legal privilege and ensure greater clarity for decision makers going forward.

35 The insertion of a declaratory statement into a statute to reverse the effect of a court judgment (option in paragraph 32.1) is not common. However, there is precedent for it. A recent example is in the Parliamentary Privilege Act 2014, where section 3(2)(c) states that it is a purpose of that Act to overturn the Supreme Court's decision in *Attorney-General v Leigh*.

36 The inclusion of text to define key terms in the test for CMT (option in paragraph 32.2) will assist to address the multiple aspects of the Court of Appeal's decision regarding section 58 that are inconsistent with Parliament's intent, 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 of the Act.

Prospective versus retrospective amendment

37 It is one of the strongest underlying presumptions in the common law that legislation should be prospective. This principle is based on the rule of law. [redacted] Legal privilege [redacted] Legal privilege

38 [redacted] Legal privilege

39 Maintaining the standard prospective approach would mean that all applicant groups who have had CMT awarded until the date that the section 58 test is tightened would keep the benefit of the more liberal Court interpretation in their favour; but applicant groups after that legislative date would be subject to the more restricted test. This would create differential treatment based, in effect, on when applicant groups' cases were scheduled for hearing and determined by the Courts. That timing is not something within their control and would be seen by applicant groups whose cases have not been heard as significantly unfair. Equality of process and rules is also an important component of the rule of law.

40 Applying the amendment retrospectively would, [redacted] Legal privilege [redacted] Legal privilege pose a significant reputational and relationship risk to the Crown. However, there are also risks to the Māori Crown relationship through differential

treatment based on case scheduling. I therefore consider that the policy rationale for the section 58 amendments (i.e. restoration of Parliament's intent) and the equality of process and rules are sufficiently strong factors to justify retrospective application. In saying that, I am also conscious that retrospective provisions would significantly increase the complexity of drafting the amendments, putting at risk my intention to have the Act amended by the end of 2024.

41 Further analysis will also be needed to assess whether retrospective application is inconsistent with the New Zealand Bill of Rights Act 1990. I will address any Bill of Rights Act implications when I report to the Cabinet Legislation Committee with the amendment bill.

Risks

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

43 [redacted] Legal privilege

44 Some 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). Amendments to the legislation are likely to attract criticism, possibly akin to the controversy associated with the enactment of the 2004 Act. Those protests alleged the Crown was removing Māori rights and some Māori may see amending section 58 as a similarly limiting of Māori rights. [redacted] Legal privilege

[redacted] Legal privilege

45 I have separately addressed the risks of retrospective legislation in paragraphs 37-41.

Timeframes and process

46 [redacted] Confidential

Confidential I propose that the amendments to the Act be enacted as soon as practicable, and at the latest by the end of 2024.

47 It is important to progress the amendments with urgency as two judgments have been issued since the Court of Appeal decision and further High Court proceedings are underway. A key implication of amending the Act by the end of 2024 is there is a

very limited period of time available to undertake both engagement on the proposed amendments and draft the amendment bill.

48 To mitigate the risks related to the short timeframe, I seek authorisation to:

48.1 undertake 2-3 weeks targeted engagement with applicant groups under the Act (including direct engagement with Ngāti Porou and Te Whānau a Apanui[2]) after Cabinet decisions; and

48.2 issue drafting instructions to Parliamentary Counsel Office and approve changes that address minor technical issues, consistent with the policy, which arise during the drafting of bill. The final draft of the bill will still be subject to Ministerial consultation prior to submission to Cabinet.

49 [redacted] Confidential

Related Takutai Moana work

50 The restoration of section 58 is part of a series of improvements to the administration of the Act that I am undertaking. I am addressing cost pressures on and reviewing the Takutai Moana funding assistance scheme. On 15 April 2024, Cabinet took decisions on additional funding for the assistance scheme [CAB-24-MIN-0128 refers].

51 Improvements are required to enhance the workability and cost effectiveness of the Crown engagement pathway. In March 2021, Cabinet agreed to a strategy for engagement with applicant groups who have applied for recognition of customary interests under the Act [CAB-21-MIN-0076 refers]. I have asked Te Arawhiti to review the Takutai Moana engagement strategy to identify options that streamline and improve efficiency and cost.

52 I would like to progress both the funding assistance scheme and engagement strategy reviews at the same time because they are interlinked. For this reason, I seek authorisation to finalise and implement refreshed settings to the engagement strategy following engagement with applicant groups.

53 I have also asked Te Arawhiti to explore the pathway options in the Act to streamline processes and improve the system. I intend to report to Cabinet early in the second half of 2024 on these workstreams.

Cost-of-living Implications

54 There are no cost-of-living implications arising from these proposals.

[2] Ngā Hapū o Ngāti Porou and Te Whānau a Apanui have arrangements with the Crown in their respective Deed of Settlement's which reflect negotiations conducted under the 2004 Act. These arrangements require the Crown to engage specifically with these two groups when proposing changes to the Act

Financial Implications

55 There are no financial implications from this paper.

Legislative Implications

56 The amendment to section 58 of the Act will be given effect through a Marine and Coastal Area (Takutai Moana) Act 2011 (Section 58) Amendment Bill (**the Bill**).

57 [redacted] Confidential

Impact Analysis

Regulatory Impact Statement

58 A Regulatory Impact Statement is attached. The Treasury confirms that the Statement meets the impact assessment requirements.

Climate Implications of Policy Assessment

59 There are no climate implications arising from this paper.

Population Implications

60 The proposals in this paper will ensure that whānau, hapū and iwi applicant groups have greater certainty when making applications for CMT under the Act.

Human Rights

61 [redacted] Legal privilege

Use of External Resources

62 No contractors or external consultants have contributed to the development of this paper.

Consultation

63 The following agencies have been consulted in the development of this paper: the Crown Law Office, Parliamentary Counsel Office, Legislation Design and Advisory Committee and the Treasury (Regulatory Impact Analysis Team). The Department of the Prime Minister and Cabinet was informed.

Communications

64 I intend to undertake 2-3 weeks targeted engagement with applicant groups after Cabinet's decisions on 27 May 2024 and before the Parliamentary Counsel Office

drafting period. [redacted] My office will develop a communications plan with Te Arawhiti.

Proactive Release

65 I will consider proactive release as a part of the communications plan above.

Recommendations

66 The Minister for Treaty of Waitangi Negotiations recommends that the Committee:

Restoring the intent of section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011

1 **note** that section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 sets out the test for customary marine title;

2 **note** that the Court of Appeal's interpretation is inconsistent with the wording of the Marine and Coastal Area (Takutai Moana) Act 2011 and does not reflect Parliament's original intent for the customary marine title test;

3 **note** that the coalition agreement between the National Party and the New Zealand First Party includes an agreement to amend section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 to make clear Parliament's original intent, in light of the judgment of the Court of Appeal in *Re Edwards*;

4 **agree** to amend the Marine and Coastal Area (Takutai Moana) Act 2011 to clarify Parliament's original intent by:

4.1 inserting a declaratory statement that specifically overturns the Court of Appeal's judgment insofar as it interprets the test for customary marine title; and

4.2 adding text to define or clarify the terms 'exclusive use and occupation' and 'substantial interruption.'

5 **agree** that the amendments to section 58 should be applied retrospectively to decisions made by the courts in the period between *Re Edwards* and the proposed amendment coming into force;

6 **authorise** the Minister for Treaty of Waitangi Negotiations, through Te Arawhiti, to undertake 2-3 weeks targeted engagement with affected applicant groups, including Ngā Hapū o Ngāti Porou and Te Whānau a Apanui;

7 **invite** the Minister for Treaty of Waitangi Negotiations to issue drafting instructions to the Parliamentary Counsel Office to give effect to the decisions to amend the Marine and Coastal Area (Takutai Moana) Act 2011;

8 **authorise** the Minister for Treaty of Waitangi Negotiations to take decisions on technical issues during the drafting process, consistent with Cabinet's decisions;

9 [redacted] Confidential

10 **note** that amendments to section 58 will be given effect through the Marine and Coastal Area (Takutai Moana) Act 2011 (Section 58) Amendment Bill (the Bill);

11 [redacted] Confidential

Related Takutai Moana work

12 **note** that the Minister for Treaty of Waitangi Negotiations is undertaking a series of improvements to the Marine and Coastal Area (Takutai Moana) Act 2011 relating to the funding assistance scheme and determination pathways; and

13 **authorise** the Minister for Treaty of Waitangi Negotiations to take decisions on a review of the Takutai Moana engagement strategy and report back to Cabinet by the end of 2024.

Authorised for lodgement

Hon Paul Goldsmith

Minister for Treaty of Waitangi Negotiations

Appendix One: Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011

Subpart 3—Customary marine title

Determination of whether customary marine title exists

58 Customary marine title

1. Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—

   a. holds the specified area in accordance with tikanga; and

   b. has, in relation to the specified area,—

      i. exclusively used and occupied it from 1840 to the present day without substantial interruption; or

      ii. received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

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

   a. the commencement of this Act; and

   b. the effective date.

3. For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—

   a. a customary interest in a specified area of the common marine and coastal area was transferred—

      i. between or among members of the applicant group; or

      ii. to the applicant group or some of its members from a group or some members of a group who were not part of the applicant group; and

   b. the transfer was in accordance with tikanga; and

   c. the group or members of the group making the transfer—

      i. held the specified area in accordance with tikanga; and

      ii. had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and

   d. the group or some members of the group to whom the transfer was made have—

      i. held the specified area in accordance with tikanga; and

      ii. exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.

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

Fieldes, Tim

From: Butler, Nicole
Sent: Tuesday, 23 April 2024 12:15 pm
To: Anderson, Lillian
Cc: DL-TE ARAWHITI OCE; Marsh, Tui
Subject: Section 58 - Follow up from Ministers meeting on 22/04/24 and proposed timeframes

Kia ora Lil
As a follow up to yesterday's meeting with the Minister I have noted the key questions and actions. This includes a revised timeframe to allow for this additional piece of work.

The Minister indicated his concern that if we address the Court of appeal judgement, we only go part of the way on delivering on the Coalition Agreement commitments intent. Once the CoA judgement was overturned, the interpretation of test reverts back to the High Court's interpretation. The High Court's interpretation was too liberal and went beyond Parliament's intent. He reiterated his recall of Parliament's intent – high threshold, small areas.

The Minister wanted:

- a clearer understanding of how the High Court (re Edwards) arrived at granting CMT; and
- options and advice on overturning the High Court decision also.

He noted that there were high stakes, and we need to take the time necessary to ensure it is robust and defensible (not a rush job that falls over).

In the subsequent debrief the following initial actions were identified:

- Legal privilege
- TA to review the intent work and early advice on interpretation of the test;
- Legal privilege
- TA to provide OCE timeframes around providing this further advice.

Proposed timeframes
We've developed the following timeframe, it adds:

- a month to undertake additional work at front end;
- includes 2 weeks Ministerial consultation before SOU;
- allows month of July for engagement – still sitting at 2-3 weeks and will include analysis of submissions;
- allows full 2 months for PCO; and
- includes 2 weeks Ministerial consultation before LEG.

The level of complexity of the options the Minister wishes to pursue will also have a bearing on some of the subsequent timeframes. Including this additional piece of advice will impact on his recently expressed preference for enactment by the end of this year. Legal privilege

What	Timeframe	
	Current AM/draft Cabinet paper	Inclusion of advice and options re High Court (Edwards) judgment
Draft briefing paper Legal privilege Legal privilege		Now-10 May
Peer review		13-16 May
Briefing to Minster		16 May

What	Timeframe	
	Current AM/draft Cabinet paper	Inclusion of advice and options re High Court (Edwards) judgment
Update Draft Cabinet paper(subject to Ministers decisions)		14-24 May*
Peer review		27-30 May
Draft Cabinet paper to Min		30 May
Ministerial consultation	22 April-13 May or 19-29 April	3 -14 June (2 weeks)*
Upload Cabinet		20 June
Cabinet Social Outcomes Committee consider paper	22 May or 8 May	26 June (CBC if earlier date in June)
Cabinet	27 May or 20 May	1 July

[redacted]
Confidential

*Dependant on complexity

Happy to discuss further.

Ngā mihi
Nicole

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

Nicole Butler
PRINCIPAL ADVISOR
CEL: DDI: [redacted]
WEB: tearawhiti.govt.nz

The Office for Māori Crown Relations – Te Arawhiti
Level 3, Justice Centre, 19 Aitken Street, SX10111, Wellington 6011

Fieldes, Tim

From: Butler, Nicole
Sent: Wednesday, 1 May 2024 10:23 am
To: Matangi, Duncan
Subject: FW: 237 - Takutai Moana: Section 58 Options
Attachments: 237 - Takutai Moana section 58 options.pdf

From: Fern Hyett <Fern.Hyett@parliament.govt.nz>
Sent: Wednesday, 17 April 2024 3:47 pm
To: Te Arawhiti OCE <TeArawhitiOCE@tearawhiti.govt.nz>
Cc: Dagg, Frances <Frances.Dagg@tearawhiti.govt.nz>; Marsh, Tui <Tui.Marsh@justice.govt.nz>; Southee1, Patrick <Patrick.Southee1@tearawhiti.govt.nz>; Hood, Bridie <Bridie.Hood@tearawhiti.govt.nz>; Butler, Nicole <Nicole.Butler@tearawhiti.govt.nz>; OfficialCorrespondence@tearawhiti.govt.nz
Subject: RE: 237 - Takutai Moana: Section 58 Options

Kia ora koutou

Please find **attached** a copy of report '237 - Takutai Moana section 58 options' as considered by the minister,

Ngā manaakitanga

Fern

Fern Hyett
Private Secretary (Treaty of Waitangi Negotiations) | Office of Hon Paul Goldsmith
Minister for Arts Culture and Heritage | Minister of Justice
Minister for State Owned Enterprises | Minister for Treaty of Waitangi Negotiations

M: [redacted]
Email: fern.hyett@parliament.govt.nz | www.beehive.govt.nz
Private Bag 18041, Parliament Buildings, Wellington 6160, New Zealand

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From: Te Arawhiti OCE <TeArawhitiOCE@tearawhiti.govt.nz>
Sent: Thursday, April 11, 2024 4:06 PM
To: Fern Hyett <Fern.Hyett@parliament.govt.nz>; Rhiannon Bertaud-Gandar <Rhiannon.Bertaud-Gandar@parliament.govt.nz>
Cc: Dagg, Frances <Frances.Dagg@tearawhiti.govt.nz>; Marsh, Tui <Tui.Marsh@justice.govt.nz>; Southee1, Patrick

<Patrick.Southee1@tearawhiti.govt.nz>; Hood, Bridie <Bridie.Hood@tearawhiti.govt.nz>; Butler, Nicole <Nicole.Butler@tearawhiti.govt.nz>; Te Arawhiti OCE <TeArawhitiOCE@tearawhiti.govt.nz>; OfficialCorrespondence@tearawhiti.govt.nz

Subject: 237 - Takutai Moana: Section 58 Options

Kia ora Rhiannon

Please see attached electronic copies of '237 - Takutai Moana: Section 58 Options' for consideration by the Minister.

Please let us know if there are any issues.

E mihi ake ana, nā
Joey

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

Joey Arthur-Roche (he/him)
SENIOR ADVISOR - OFFICE OF THE CHIEF EXECUTIVE
CEL: [redacted]
WEB: tearawhiti.govt.nz

The Office for Māori Crown Relations – Te Arawhiti
Level 3, Justice Centre, 19 Aitken Street, SX10111, Wellington 6011

Fieldes, Tim

From: Matangi, Duncan
Sent: Monday, 20 May 2024 5:02 pm
To: Marsh, Tui; Hood, Bridie
Cc: Butler, Nicole; Andrews, Matthew; Van Daatselaar, Sue; Fraser, Warren
Subject: FOR REVIEW: Further advice on options for s 58
Attachments: v2 264 - MACA - Further advice on options for s.58.docx; Legal privilege

Legal privilege

Importance: High

Kia ora Tui,

Please see attached for review the revised briefing with our advice on options for progressing the Coalition Agreement commitment around s 58. Legal privilege

Legal privilege

Review time is in for 11-12 tomorrow. Next step is OCE's review – I have undertaken to get the paper to them following your review by mid afternoon if possible. Due with Lil on Wednesday.

Happy to discuss,

D.

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

Duncan Matangi
Principal Advisor - Strategy

WEB: tearawhiti.govt.nz

The Office for Māori Crown Relations – Te Arawhiti
Level 3, Justice Centre, 19 Aitken Street, SX10111, Wellington 6011
Rāhina Rātū Rāapa Rāpare Rāmere

28/05: returned unsigned. discussed at officials on 27/05.

Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

LEGALLY-PRIVILEGED-IN-PART

Minister for Treaty of Waitangi Negotiations

Further advice on options for section 58 of the Marine and Coastal Area (Takutai Moana) Act

Date	27 May 2024	**Priority**	Medium
Report No.	2023/2024 - 264		

Action sought

Minister for Treaty of Waitangi Negotiations (Hon Paul Goldsmith)	**Indicate** which policy options to pursue in amending the Marine and Coastal Area (Takutai Moana) Act 2011 in response to the NZ First/National Coalition Agreement commitment.	By 05/06/2024

Contact for phone discussion (if required)

Name	Position	Phone	1st Contact
Lil Anderson	Tumu Whakarae, Chief Executive The Office for Māori Crown Relations – Te Arawhiti	[redacted]	
Tui Marsh	Deputy Chief Executive, Treaty Reconciliation and Takutai Moana		✓

Further advice on options for section 58 of the Marine and Coastal Area (Takutai Moana) Act

Purpose

1. We are seeking your decisions on which policy options (summarised in **Appendix Two**) to pursue in the upcoming Cabinet paper on changes to the Act, responding to your request for advice on:

    a. how the Marine and Coastal Area (Takutai Moana) Act 2011 (**the Act**) section 58 (**s 58**) test was applied in the *Re Edwards* High Court judgment (***Re Edwards HC***) and whether responding to this and other High Court judgments should be part of the s 58 proposals; and

    b. the risk and appropriateness of applying any changes to s 58 retrospectively.

2. The Crown Law Office's (**Crown Law**) (**Appendix Three**) and the Legislation Design and Advisory Committee's (**LDAC**) (**Appendix Four**) advice on these and related issues are attached and considered in this paper.

Executive Summary

3. Officials have been developing policy proposals to fulfil the NZ First/National Coalition Agreement commitment on amending s 58 of the Act. We understand the underlying policy objective of the Coalition commitment is to implement a test for Customary Marine Title (**CMT**) that is consistent with Parliament's intention in passing the Act.

4. On 18 April, we provided you with a draft Cabinet paper with proposals that focus on responding to the Court of Appeal's decision in *Re Edwards* (***Re Edwards CA***) – as indicated in the Coalition commitment.

5. You subsequently asked officials for advice on whether earlier High Court decisions also needed to be responded to in the context of restoring Parliament's intended test (list provided in **Appendix One).** You also indicated an intention to apply whatever changes are made to the s 58 test retrospectively – i.e., that *Edwards* and potentially other applicants would need to have their applications decided again under the 'restored' new test.

6. In Te Arawhiti's view, while the High Court's decisions prior to *Re Edwards CA* focused less on the literal wording of s 58 (and more on s 58 in the context of the wider Act) than the Crown might have expected, these interpretations and decisions are broadly consistent with the regime set out by Parliament. Accordingly, we do not consider legislatively setting-aside any of the High Court decisions on CMT is necessary to achieve the Coalition Agreement commitment.

7. Nonetheless, it is open to you to pursue further changes to the Act beyond the Coalition commitment - e.g., if you wanted to significantly raise the threshold for the award of CMT or make more fundamental changes to the marine and coastal area regime.

8. **Appendix Two** sets out broad policy options that could be taken forward in the upcoming Cabinet paper.

9. [redacted]

10. [redacted]

11. Retrospectivity in this case would ensure that all applications past and future in either pathway are decided based on the same test, [redacted] Te Arawhiti does not consider there is sufficient justification for retrospective application of any new test, [redacted].

12. Ultimately, Te Arawhiti recommends progressing with the existing Court of Appeal-focused proposals in the draft Cabinet paper, as the timeliest [redacted] approach to fulfilling the Coalition commitment.

Recommendations

13. It is recommended that you:

a. **note** you received a draft Cabinet paper *Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011* on 18 April;

b. [redacted]

c. [redacted] Legal privilege

d. **note** Te Arawhiti's view is that the High Court in *Re Edwards*, and subsequent High Court decisions before *Re Edwards Court CA*, did not interpret the Marine and Coastal Area (Takutai Moana) Act 2011 in a way that is inconsistent with Parliament's original intent, and that these judgments do not need to be set aside;

e. **note** Te Arawhiti's view is that the existing proposals in the draft Cabinet paper are the most appropriate and timely way to fulfil the Coalition Agreement commitment around section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011;

f. [redacted]

g. [redacted] Legal privilege

h. **agree** which of the policy options below you want officials to pursue in the upcoming paper to Cabinet on Marine and Coastal Area Act issues;

EITHER (Te Arawhiti's recommended option)

i. **agree** to pursue a combination of a declaratory statement and the definition of key terms in section 58, as per the current draft Cabinet paper (focused on changing the law established in the Court of Appeal's judgment in *Re Edwards*); **YES/NO**

OR

ii. **agree** to pursue the above alongside wider changes to the preamble, purpose, and/or Treaty of Waitangi sections to definitively limit the size and number of Customary Marine Title awards through a higher-threshold test ; **YES/NO**

OR

iii. **agree** to pursue a wider reform of the Marine and Coastal Area (Takutai Moana) Act 2011;` **YES/NO**

AND

EITHER (Te Arawhiti's recommended option)

iv. **agree** that any changes should be prospective only, with transitional arrangements for applications currently mid-process; **YES/NO**

OR

v. **agree** to pursue the retrospective application of any changes above to:

A. only the *Edwards* application; or **YES/NO**

B. *Edwards* and all previous High Court awards of Customary Marine Title; and **YES/NO**

i. **indicate** whether you want to discuss the contents of this paper with Te Arawhiti and Crown Law officials. **YES/NO**

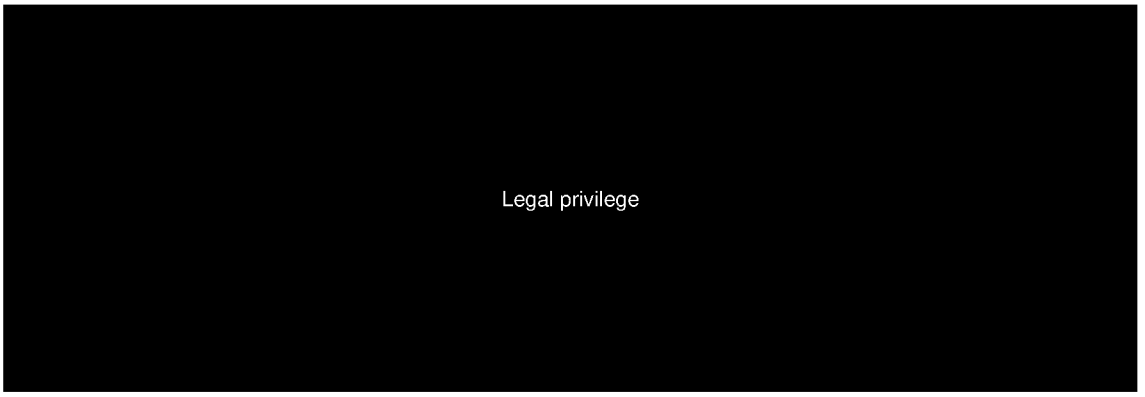
Tui Marsh
Deputy Chief Executive - Treaty Reconciliation and Takutai Moana

NOTED / APPROVED / NOT APPROVED
Hon Paul Goldsmith Minister for Treaty of Waitangi Negotiations
Date: / / 2024

Background

Previous advice on fulfilling the Coalition Agreement commitment

14. On 18 April 2024, you received a draft Cabinet paper *Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011* for your consideration and consultation with your Ministerial colleagues [2023/24 – 256 refers]. This paper reflected your decisions on the Section 58 Options Report [2023/2024 - 237 refers].

15. 

16. The draft Cabinet paper's proposals seek to:

    a. clarify the intended meaning of s 58 through adding definitions of 'exclusive use and occupation' and 'substantial interruption'; and

    b. insert a declaratory statement into the Act clearly overturning the Court of Appeal's reasoning in *Re Edwards CA*.

17. These changes are intended to directly address the interpretation in *Re Edwards CA*, as indicated in the Coalition commitment, and would be the most timely option.

Discussions with officials

18. At a hui with Te Arawhiti officials on 22 April 2024, you expressed concern that the earlier interpretation by the High Court in *Re Edwards HC* (and subsequent High Court decisions) also went beyond Parliament's intent and queried whether they should be set-aside as well as *Re Edwards CA*. You also indicated an intention to apply the proposed changes to s 58 retrospectively – i.e., that already-granted CMT awards should be reconsidered under the amended legislation.

19. This paper provides advice on these two matters, Legal privilege and seeks your final decision on which policy approach to pursue in the planned Cabinet paper.

High Court interpretations of s 58

High Court's interpretation of s 58 in Re Edwards

20. The High Court's 2021 decision in *Re Edwards HC* was an early substantive Court decision on the award of CMT, and the first with significant overlapping applications. Although not binding on other High Courts when considering other CMT applications, it was an early and influential interpretation of the s 58 test.

21. The interpretation of the second limb of the s 58 test regarding 'exclusive use and occupation' without 'substantial interruption' is most relevant in terms of the policy objective being considered here.

22. The High Court did not explicitly explain its interpretation of the second limb, although it introduced reasoning that was later strengthened by the Court of Appeal. The High Court's interpretation was that 'exclusive use and occupation' (in order to be consistent with the tikanga focus of the first limb and the wider context of the Act) is directed at exclusivity from other hapū and iwi rather than third parties – with the 'substantial interruption' element of the limb where third party interaction would be considered.

23. The High Court also indicated that (as an example) third-party use of the takutai moana for commercial fishing did not itself constitute 'substantial interruption' of use and occupation without evidence of other third party activities that had interrupted the continuation of applicants' customary activities. This reasoning around substantial interruption was expanded on by the Court of Appeal, which went further and found that substantial interruption because of third party activities will only occur where that use is *authorised by legislation*, such as in the case of ports or other infrastructure.

24. This interpretational approach, focusing on control and occupation in the context of tikanga, was central to the High Court's award of CMT out to 12 nautical miles, despite there being limited evidence (in the Crown's view) of exclusive use and occupation out that far. While the Crown had some concerns about the evidential basis for these awards and did not agree with the wide CMT award, the Attorney-General submitted to the Court at the time that it was open to it to draw inferences from available evidence when considering CMT - including how activities in specific places may justify inferences about use and occupation in other parts of the application area. Ultimately, the Crown did not appeal the decision.

Subsequent Court decisions

25. Subsequent High Court judgments prior to the Court of Appeal's judgment in *Re Edwards CA*, such as *Re Reeder (Ngā Pōtiki)* and *Re Ngāti Pahauwera,* borrowed key interpretational elements from *Re Edwards HC* and these have been largely consistent across all Court CMT decisions since:

    a. Considering both limbs of s 58 through a tikanga lens e.g., requiring demonstration of exclusive use and occupation *with regards to tikanga practices* and the control of the area *in the context of other Māori groups rather than third parties*;

    b. Not placing much emphasis on western property concepts or traditional common law principles around property; and

    c. Generally, interpreting the s 58 tests in the context of the wider Act, particularly the preamble, purpose section, and Treaty of Waitangi clause which position the Act as a regime to recognise (as opposed to being a barrier to the recognition of) customary interests.

26. Similarly, the general reasoning in *Re Edwards HC* was developed by the High Court in *Re Reeder (Ngā Pōtiki)* and reinforced in *Re Ngāti Pahauwera* – that s 58 does not require an applicant to have excluded others from the takutai moana because for most of the period since 1840 there has been no legal mechanism available to Māori to do so, as well as exclusion generally not being consistent with tikanga. Rather, s 58 requires only the demonstration of 'exclusive use and occupation' within the context of tikanga e.g., by demonstrating the authority to control access by other Māori groups to resources in the area, whether or not this control manifested as exclusivity in practice.

27. The Court of Appeal in *Re Edwards CA* took a different but related approach to limb two focusing on exclusivity and control at 1840 and whether an applicant's occupation and use since then was interrupted or lost as a matter of tikanga (or by legislatively authorised third-party activities). Again, this was informed by the Court of Appeal's view of the preamble, purpose and Treaty of Waitangi sections in the Act, which they are required to consider under section 10 of the Legislation Act 2019. This further reduced the evidentiary barrier to the recognition of CMT when compared to the High Court judgments discussed above, and further illustrated the influence of the wider Act on the section 58 test wording.

28. To summarise, successive High Court decisions interpreting limb two of s 58 have been generally on the same basis since *Re Edwards HC*, but with a significant interpretational step taken in *Re Edwards CA*. It is this significant step that was the focus of the recent draft Cabinet paper proposals and indicated in the Coalition commitment.

Does the High Court's judgment in *Re Edwards* also need to be set-aside?

29. [redacted] Legal privilege

30. Based on our understanding of the Coalition Agreement commitment, and from discussions with you, the policy objective in this case is to ensure that the threshold for the award of CMT is consistent with what was intended by Parliament at the time – on the presumption that the Court of Appeal in *Re Edwards CA* made an error when it interpreted Parliament's intent in deciding that case.

What was Parliament's intent around the strictness and nature of the s 58 test?

31. We understand your view of Parliament's intent is that the s 58 test was intended to set a very high threshold to the recognition of CMT, resulting in relatively few and small areas under CMT.

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

33. [redacted]

Legal privilege

34. [redacted]

[redacted]

Legal privilege

Has the High Court's interpretation been inconsistent with Parliament's intent?

35. As set out above, while the approach to interpreting the second limb changed quite substantially in *Re Edwards CA*, there has been a consistent idea developing in Court judgments since *Re Edwards HC* that the New Zealand interpretations of 'exclusive use and occupation' should not rely on the literal wording (as used in the Canadian jurisprudence) because the threshold would be too high, very little CMT would be awarded, and it would not be commensurate with the relatively small bundle of rights. In the Courts' view, this outcome would be inconsistent with the preamble, purpose of the Act, and its Treaty of Waitangi clause.

36. As the High Court said in *Re Reeder (Ngā Pōtiki)*, "[the second limb,] when properly reconciled with the rest of the Act clearly sets a much lower threshold than the wording of the section would otherwise suggest. What is required is evidence of authority giving rise to an ability or intention to exclude others"[4].

37. In Te Arawhiti's view, while aspects of the High Court's interpretation of s 58's second limb in *Re Edwards HC* raised questions for the Crown (e.g., around whether it asked for enough evidence to prove customary interests), the approach of the Court was broadly consistent with Parliament's intent described earlier.

38. Legal privilege

39. In our view, the interpretations and decisions were consistent with the application of s 58 when read within the wider setting of the Act – which has a clear focus on the recognition of existing customary interests on their own terms:

    a. The Act's preamble links the legal rights established through the Act's regime to the 'intrinsic, inherited rights of iwi, hapū and whānau' derived from tikanga; and

    b. One stated purpose of the Act is to 'provide for the exercise of customary interests in the common marine and coastal area', and this is reinforced in the Treaty clause.

40. Accordingly, Te Arawhiti does not think it is necessary to set aside *Re Edwards HC* or other High Court decisions in order to achieve the threshold for awards of CMT intended by Parliament, as implied by the Coalition Agreement commitment.

41. However, the interpretation of limb two by the Court of Appeal in *Re Edwards* in our view weakened the limb to the point that the evidentiary threshold for the recognition of CMT was well below that anticipated by Parliament. By only requiring exclusive use and occupation at 1840 and the absence of 'substantial interruption' post-1840 (narrowly limited to matters of tikanga and legislatively authorised third-party activities), the Court removed a clear legislated requirement for applicants to demonstrate continuous and exclusive use and occupation since 1840 and for there to be an absence of any substantial interruption to that continuous and exclusive use and occupation.

[4] *Re Reeder (Stage 1)* [2021] NZHC 2726 at [41].

Options analysis, including strengthening the s 58 test to reduce the size and number of CMT awards

42. Notwithstanding the above discussion on Parliamentary intent and the Coalition commitment, it is open to Ministers to advance policy changes to the Act to bring a more demanding test that will reduce the number and size of CMT awards, or else otherwise adjust the marine and coastal area regime to change the balance of interests between Māori customary interests and the wider interests identified in the preamble and purpose provisions – though this carries additional risk.

43. Theoretically, within the existing draft Cabinet paper proposals, there is broad scope to define key terms in a way that makes the s 58 test more exacting to align with Ministers' policy intentions. For example, by including definitions of exclusive use and occupation similar to those established in Canadian jurisprudence.

44. However, those proposals were designed to address the particular interpretational errors made by the Court of Appeal. Legal privilege

45. Legal privilege

46. An analysis including more significant change options compared with the current proposals is below and summarised as **Appendix Two**.

47. The broad policy options are:

    a. **Option A** - the existing proposal for a declaratory statement disregarding *Re Edwards CA* and the definition of key terms in s 58 to ensure future judgments are more consistent with Parliament's original intent for the nature of the CMT test;

    b. **Option B** - the above, but with the addition of a range of significant changes to the preamble, purpose, and/or Treaty of Waitangi clauses to definitively limit the size and number of Customary Marine Title awards through a higher-threshold test; and

    c. **Option C** - a broader reform of the Act to make the test and its relationship with the wider Act objective more coherent, as well as considering how to improve existing logistical issues around the cost and process of determining CMT.

48. For each broad option, there is a question about whether the respective changes to the s 58 test should be applied *retrospectively* – i.e., to awards of CMT that have already been made – and what the scope of that retrospectivity should be. The risks and considerations around retrospectivity are discussed in the next section.

49. It should be noted that even prospective legislation will need to contend with transitional arrangements for applications that are mid-process or still have appeal opportunities.

Discussion of alternative options

50. [redacted]
Legal privilege

51. **Option B (Amendments to the Act beyond s 58):** Additional amendments outside s 58 (e.g., removing or refining the effect of terms like tikanga and mana tuku iho in the Act's purpose and preamble, or limiting or removing the Treaty of Waitangi clause) would improve the efficacy of s 58 changes that aim for a higher threshold test. However, removing those references from the Act, or disapplying them from s 58, are not technical drafting measures to secure clarity. They would likely involve a substantial redrafting of a number of provisions of the Act - requiring careful and time-consuming drafting in order to provide sufficient and enduring direction to the judiciary.

52. These kinds of changes to fundamental aspects of the Act are likely to be seen by Māori as an erosion of the objective and political compromise of the Act – that distinguished this Act from the original Foreshore and Seabed Act 2004.

53. [redacted]

54.
Legal privilege

55. **Option C (Wider reform of the Act):** As you are aware, there is a full range of work underway on the Takutai Moana regime:

    a. managing the impact of constrained financial assistance funding;

    b. the review of the Takutai Moana Engagement Strategy and the Financial Assistance Scheme; and

    c. addressing the 'dual pathways issue' and early thinking on the future of the dual determination pathways.

56. The Waitangi Tribunal has also made a number or recommendations in Stage Two of its Wai 2660 Stage 2 Marine and Coastal Area (Takutai Moana) Act inquiry.

57. With this full range of issues in mind, Ministers could consider a broader reform of the Act. This would provide an opportunity to design a test from the ground-up that provides clarity around CMT tests and their intended outcome, alongside addressing the dual pathways issues and streamlining the determination process. The role of the Courts and the nature of rights provided as part of CMT could also be considered.

58. However, this level of change to the regime presents the same or greater risks as making substantial changes to the existing Act. Reform would be a time-consuming process involving significant engagement with Māori and other impacted parties. It is likely that reform would be viewed as a continuation of government efforts to erode Māori customary interests (as with the Foreshore and Seabed Act) – particularly if there is a clear intention to make the test for the recognition of customary interests more demanding.

Te Arawhiti's view

59. On the basis of the options analysis above and attached, Te Arawhiti's view is that the existing suite of proposals in the draft Cabinet paper (declaratory statement and defining key terms in s 58) applied prospectively is the most appropriate way to fulfil the Coalition Agreement commitment (Option A). Legal privilege

Legal privilege

60. Ultimately, in conjunction with Cabinet's recent decision not to increase the Financial Assistance Scheme funding for 2024/25, wider changes to the regime are likely to be seen as undermining the political compromise central to the Act (as an alternative to the Foreshore and Seabed Act 2004). While Options B and C might result in a more coherent Act, and one consistent with Ministers' aspirations for the regime, the disruption to the Takutai Moana process from litigation and dissatisfied applicants could ultimately result in a costlier and more lengthy outcome.

Retrospectivity: the implications of applying new changes to existing CMT awards

61. By default, any changes to s 58 will apply to all future judicial decisions on CMT. That would be a prospective law - it would apply to any decisions made after the date the amendment takes effect.

62. We understand you are considering the application of any new test to CMT awards that have already been made. This would be a retrospective application of the law. Retrospectivity is contentious as it changes the legal character and consequence of past events and denies applicants the 'fruits of their litigation'. Legal privilege

Legal privilege

Te Arawhiti's view

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

64. 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.

65. It is not uncommon for old regimes to be replaced, leaving some parties with grandfathered-in arrangements. We consider this preferable Legal privilege

Legal privilege

66. Given this, it is Te Arawhiti's recommendation is that any changes to s 58 or the wider Act be prospective only – i.e., that awarded CMT be left as per the original decisions. Within a prospective approach, consideration would still need to be given to the transitional arrangements for live cases. Because of the constitutional and Legislation Act presumption of a prospective approach applying to all cases which have started, these arrangements would need to set out clearly in legislation whether the original or new test and interpretation would apply for:

    a. upcoming appeals (e.g., *Re Edwards* in the Supreme Court);

    b. cases that have begun but not progressed to substantive hearings; and

    c. cases who have had hearings but are waiting on decisions.

Consultation

67. LDAC and Crown Law provided the attached advice on the general proposals and issues discussed, and were informed of the content of this briefing.

68. Appendices Three and Four set out Crown Law and LDAC's full advice, respectively.

Next steps

Timing

69. You have indicated your preference for enactment of s 58 amendments by the end of 2024. While complex, the existing proposals in the draft Cabinet paper (Option A) could be implemented on this timeframe.

70. Confidential

71.

72.

73. We note the Attorney-General's recent letter to all Ministers dated 25 March 2024 which emphasises the importance and value of standard legislative development processes, and strongly cautions against leaving out Select Committee processes.

74. Confidential

75. Following your decisions on this paper we will provide you advice on the timing for finalising the draft Cabinet paper and seek decisions on the detailed approach to any engagement with Māori and the legislative process (including drafting work with the Parliamentary Council Office).

Appendix One: Summary of existing High Court judgments

Case	CMT(s) awarded	Status	Hearing Area	Notes Live cases -
Re Tipene	1	Determination made February 2015 No appeals	CMT over part of the Tītī Islands, on Rakiura/Stewart Island	The case did not raise any significant legal issues under the Act as Mr Tipene had the authority to represent his wider whānau on Rakiura and the isolated nature of the area meant there were no other applicants, or third parties, with strong interests in the application area.
Re Edwards Te Whakatōhea	3	High Court determination made May 2021 Court of Appeal, determination made October 2023 (CoA) Leave granted for appeal to Supreme Court April 2023 (hearing date TBC)	Coastline from Ōhope east to Ōhiwa harbour and out to the limit of the territorial sea, including the area around Whakaari/White Island	The High Court awarded CMT to six Whakatōhea hapū over the application area from Maraetōtara stream at Ōhope to Tarakeha and out to twelve nautical miles, including most of Ōhiwa Harbour. CMT was awarded for the remaining western part of Ōhiwa harbour jointly between the Whakatōhea hapū and Ngāti Awa, and a joint CMT between Whakatōhea and Ngāi Tai was awarded between Tarakeha and Te Rangi, near Tōrere. The Judge declined to award CMT over Whakaari/White Island as there was no agreement between the parties on shared exclusivity.
Re Clarkson	0	High Court determination made July 2021 No appeals	Coastline from Whangaehu to Cape Turnagain	The Court declined a whānau application for CMT over fifteen kilometres of coastline. Four other groups with applications covering the same area appeared as interested parties in the proceeding to dispute the exclusive award of CMT to the Clarkson applicants. The Court found there was insufficient evidence that the applicants held the application area in accordance with tikanga. They had not demonstrated that they had the authority to represent their wider whānau nor demonstrated that they held the area exclusively given the wider hapū interests in the application area.
Re Ngāti Pāhauwera	5	High Court determination made January 2023 Appeal by Landowners Coalition and other cross-appellants has been paused ahead of the	Hawkes Bay coastline between Wairoa and Napier	The Court found that four of the five applicants had met the test for CMT in a portion of their application areas. One of the applicants had met the test out to the 12 nautical mile limit, the other groups were awarded CMT out to 5 kilometres offshore and 1.5 kilometres, respectively.

		outcome of the *Re Edwards* Supreme Court appeal.		The applications for CMT around Napier Port and parts of Marine Parade, as well as near a Pan Pac waste pipeline were declined on the basis that applicant use of these areas had been 'substantially interrupted' by significant third party activity including development, marine structures, shipping operations and boating use.
Re Reeder (Ngā Pōtiki)	1	High Court determination for Stage One made October 2021 No appeals to Stage One determination Stage Two pending decision	Rangataua Bay an estuary on the south-eastern side of Tauranga Harbour	*Ngā Pōtiki* was split into two stages. A decision was issued in the stage one proceedings in October 2021 granting a joint CMT over Te Tāhuna o Rangataua/Rangataua Bay an estuary within Tauranga harbour to four applicant groups. The Judge commented in his decision that despite the proximity to Tauranga the ongoing Māori presence around Rangataua was 'striking' with six marae adjacent to the estuary and the majority of the adjourning land in Māori ownership.
Re *Ngāi Tūmapūhia-a-Rangi Hapū Inc*	5	High Court determination on Stage 1(a) made in February 2024 Attorney-General sought leave to appeal the judgment and numerous cross appeals were also filed. Stage 1(b) hearing on wāhi tapu areas is pending	Wairarapa coastline	A range of CMT areas were granted over a remote section of the Wairarapa coastline from Turakirae Head to Whareama River (including Lake Ferry and Cape Palliser) with four out of five CMT awards shared between applicant groups. The Attorney-General has appealed the judgment to oppose the inclusion of some groups in the CMT order who did not have applications under the Act, and to dispute the recognition of CMT in relation to one section of the application area (near Lake Onoke) where in the Attorney's view there was insufficient evidence to demonstrate the applicants had met the statutory test.
Re Ngā Hapū o Tokomaru Ākau and Te Whānau a Ruataupare Ki Tokomaru	1	High Court determination April 2024 Time for appeal still open. We will update you regarding the Solicitor-General's decision on whether to appeal.	Tokomaru Bay, out to 3-4 nautical miles, issued subject to hapū agreement on representation.	Joint CMT granted from Waimahuru south to Te Māwhai at Tokomaru Bay on the East Cape. CMT was granted to two hapū; Te Whānau Te Aotāwarirangi and Te Whānau a Ruataupare out to three or four nautical miles offshore (and declined beyond this). Tokomaru Bay is a relatively isolated location on the East Coast, and the land abutting the foreshore is largely Māori freehold land with three pā sites of significance to the local hapū.

Appendix Two: Options for responding to Court interpretations of s 58 and fulfilling the Coalition Agreement commitment

Amendment options

Criteria \ *Options*	Option A Declaratory statement (COA) + define key terms of s 58	Option B Option A + Amendments to preamble, purpose, and/or TOW clause	Option C Broader reform of the Act	Option D No changes
Likely impact on CMT test	Somewhat higher threshold for awards of CMT	Significantly higher threshold for awards of CMT	Dependent on new test design	Inconsistent with Parliament's intent
Consistency of CMT awards over time (assuming prospective application)	Broadly consistency, with only moderate changes to test threshold and small number of awarded CMT to date. Awards soon after amendment likely to be more conservative	Poor consistency, but relatively few CMT have been made to date. Applicants after amendment will have to meet a much higher threshold than those before	Poor consistency, but relatively few CMT have been made to date. Applicants after amendment will have to meet a much higher threshold than those before	High consistency
Are changes likely to be legally effective and enduring?	Jurisprudence will likely continue to develop with an eye to the Act's purpose and TOW clause	Yes, wider amendments to the Act (if clear and directive) will drive more literal interpretations of the revised test	Yes, Act can be reformed with clarity for the judiciary and Ministerial decision-makers in mind	-
Legal privilege				
Māori Crown relationship risk	High	Very High	Very High	Low

Retrospectivity

Criteria \ *Options*	Prospective only – subject to transitional arrangements	Retrospective on *Edwards* application only	Retrospective on all High Court CMT decisions to date
Consistency of CMT awards over time	As per table above	Improves consistency through specific reconsideration of the judgment with most liberal interpretation	All decisions based on the same test
Impact on Takutai Moana regime costs and timeframe	None	Would involve rehearing a complex case in *Re Edwards*	Would involve rehearing 5+ existing decisions
Legal privilege			

CAB-24-MIN-0256
Revised

Cabinet

Minute of Decision

Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011

Portfolio **Treaty of Waitangi Negotiations**

On 8 July 2024, Cabinet:

1 **noted** that section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) sets out the test for customary marine title;

2 **noted** that customary marine title comes with a bundle of rights, which are balanced with the interests of wider New Zealand;

3 **noted** that the Court of Appeal's interpretation of the section 58 test in *Re Edwards* changed the nature of the test and materially reduced the threshold for the recognition of customary marine title;

4 **noted** that the coalition agreement between the National Party and the New Zealand First Party includes an agreement to amend section 58 of the Act to make clear Parliament's original intent, in light of the judgment of the Court of Appeal in *Re Edwards*;

5 [redacted] Legal privilege

6 **agreed** to amend the Act by:

6.1 inserting a declaratory statement that specifically overturns the reasoning of the Court of Appeal and High Court in *Re Edwards*, as well as all High Court decisions since the High Court in *Re Edwards*, where they relate to the test for customary marine title;

6.2 adding text to section 58 to define and clarify the terms 'exclusive use and occupation' and 'substantial interruption';

6.3 amending 'the burden of proof' section of the Act (section 106) to clarify that applicant groups are required to prove exclusivity of use and occupation from 1840 to the present day;

6.4 making changes to the effect of the preamble, purpose, and/or Treaty of Waitangi sections of the Act to make clearer the relationship between these sections and section 58, in a way that allows section 58 to operate more in line with its literal wording;

7 **agreed**, for the avoidance of doubt, that the amendments agreed above will make it clear that any undetermined applications as of a certain date will need to satisfy the amended tests;

8 **noted** that the amendments agreed above have retrospective elements, and that the further retrospective application of the amended test for customary marine title is possible Legal privilege

Legal privilege

9 **agreed** that the amended section 58 test should be applied from the point of announcement of the policy change, noting that this will leave existing customary marine title decisions as at the date of announcement as they are, but require re-hearing of any live cases that do not have decisions at the time of announcement, subject to detailed work on transitional arrangements during drafting;

10 **authorised** the Minister for Treaty of Waitangi Negotiations, through Te Arawhiti, to undertake 2 to 3 weeks' targeted engagement with applicant groups, including Ngā Hapū o Ngāti Porou and Te Whānau a Apanui;

11 **invited** the Minister for Treaty of Waitangi Negotiations to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above decisions;

12 **authorised** the Minister for Treaty of Waitangi Negotiations to take decisions on technical issues during the drafting process, consistent with Cabinet's decisions, including on the detailed approach to the amendments referred to in paragraph 6.4 above, and on the appropriate transitional arrangements for cases currently in process;

13 **noted** that amendments to section 58 will be given effect through the Marine and Coastal Area (Takutai Moana) Act 2011 (Section 58) Amendment Bill (the Amendment Bill);

14

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15

16 **noted** that Te Arawhiti is undertaking wider work on the Act's regime relating to the funding assistance scheme, determination pathways and the efficiency of the Crown engagement pathway.

Rachel Hayward
Secretary of the Cabinet

***Secretary's note**: Subsequent to the discussions at Cabinet, the wording of paragraph 9 has been amended to clarify Cabinet's intent.*

In Confidence

Office of the Minister for Treaty of Waitangi Negotiations

Cabinet Social Outcomes Committee

Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011

Proposal

1 This paper seeks agreement to policy proposals that amend the Marine and Coastal Area (Takutai Moana) Act 2011 (**the Act**) in order to bring the interpretation and application of the test for customary marine title (**CMT**) back in line with Parliament's original intent.

Relation to government priorities

2 The coalition agreement between the National Party and the New Zealand First Party includes an agreement to amend section 58 of the 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 (***Re Edwards***).

Executive Summary

3 The Act provides iwi, hapū and whānau Māori with the ability to seek legal expression of their customary interests in the common marine and coastal area, either through the High Court or through direct engagement with the Crown.

4 The Act looks to provide a balance between these interests and the interests of wider New Zealand, including by ensuring that:

4.1 existing consents (including existing aquaculture activities) and a range of public-interest activities (including existing infrastructure) are not subject to the **resource management permission right**, which entitles CMT holders to withhold permission for activities in the CMT area for which resource consents are required;

4.2 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 Act; and

4.3 public access, navigation, and fishing are expressly preserved by the Act and are generally unaffected by CMT.

5 CMT is the strongest level of customary interest recognised through the Act. A CMT award recognises Māori customary interests by providing an interest in land and regulatory rights in relation to the common marine and coastal area. It provides:

5.1 the right to exercise the resource management permission right;

5.2 the right to publish a planning document that local authorities and the relevant government agencies must take into account in decision making;

5.3 ownership of minerals in the CMT area (excluding Crown minerals - gold, silver, uranium and petroleum); and

5.4 the right to apply for the protection of wāhi tapu in the CMT area.

6 Section 58 of the Act sets out the test for CMT. The Court of Appeal's interpretation of the section 58 test in *Re Edwards* changed the nature of the test and materially reduced the threshold for the recognition of CMT. This is likely to increase the size and amount of CMT awarded in subsequent cases, and in my view is inconsistent with the balance of interests intended by Parliament. This interpretation draws from, but goes significantly beyond, the earlier *Re Edwards* High Court judgment and has been carried forward into subsequent High Court decisions.

7 I propose a series of changes to the Act to ensure that the nature and strictness of the section 58 test remain consistent with what I believe was Parliament's intent.

8 I propose that the Act be amended by:

8.1 inserting a declaratory statement into section 58 that specifically overturns the reasoning in Court of Appeal and High Court's judgments in *Re Edwards*, and High Court judgments since the High Court in *Re Edwards*, insofar as they interpret the test for CMT;

8.2 adding text to section 58 to define and clarify the terms 'exclusive use and occupation' and 'substantial interruption';

8.3 amending the burden of proof section (section 106) to clarify applicants' need to demonstrate exclusive use and occupation from 1840 to the present day in order for CMT to be recognised; and

8.4 making changes to the effect of the preamble, purpose, and/or Treaty of Waitangi sections of the Act (the framing sections) to make clearer the relationship between these sections and section 58, in a way that allows section 58 to operate more in line with its literal wording.

9 I believe these amendments would give effect to the coalition commitment agreement between the National Party and the New Zealand First Party to amend section 58 of the Act to make clear Parliament's original intent.

10 A more moderate set of changes could be pursued that do not make changes to the framing sections of the Act or overturn reasoning beyond the Court of Appeal judgment. However, I consider these changes are unlikely to enduringly alter the interpretation of section 58.

11 Legal privilege Legal privilege This reflects the controversial history of foreshore and seabed legislation, the relationship of this Act with customary Māori rights and interests, Legal privilege Legal privilege. The more extensive the amendments and the greater the degree of

complexity. Legal privilege Legal privilege .

12 Crown Law and the Legislation Design and Advisory Committee (**LDAC**) have provided advice on the issues discussed in this paper, attached as **Appendices Two** and **Three,** respectively. Legal privilege Legal privilege .

13 We need to decide how these amendments will apply to existing CMT decisions, as well as cases that are in hearings or pending judgments. While legislatively reversing the reasoning in *Re Edwards (High Court and Court of Appeal)* is sufficient to restore the policy objective of the Act going forward, I believe we should consider retrospectively applying the amended test to CMT awards made on the basis of the Court of Appeal's *Re Edwards* interpretation (at least to some extent) – because these awards are likely to have been larger and not consistent with the policy objective of the Act.

14 However, there are a range of options around whether and how existing decisions might be revisited under a new test. I set out options in this paper and seek your views.

15 I intend to enact the amendments in 2024 to limit the number of further High Court decisions being made on the basis of the Court of Appeal's interpretation of the test (which they are required to do based on precedent), though this comes with risks. A 2024 timeframe would necessitate:

15.1 limited time for consulting with applicant groups on the amendments;

15.2 condensed time for drafting amending legislation; and

15.3 significantly expediting the select committee process.

16 I propose to undertake 2-3 weeks targeted engagement with applicant groups on the section 58 amendments. I will update Cabinet through the Cabinet Legislation Committee (**LEG**) on the extent of select committee expediting required Legal privilege

17 The section 58 amendments are a part of wider changes to the takutai moana regime currently underway. I am currently reviewing the financial assistance scheme [CAB-24-MIN-0128 refers] and the Takutai Moana Engagement strategy. I have also asked Te Arawhiti to explore whether the dual High Court and Crown pathways in the Act remain appropriate and effective, alongside consideration of how the Crown engagement pathway can be made more streamlined and cost-effective.

Background

Marine and Coastal Area (Takutai Moana) Act 2011

18 The Foreshore and Seabed Act 2004 (the **2004 Act**) vested the foreshore and seabed in the Crown, extinguishing Māori customary rights in these areas, and prescribing a process by which limited customary rights could be recognised.

19 The Marine and Coastal Area (Takutai Moana) Act 2011 repealed and replaced the 2004 Act, and restored any customary rights that were extinguished. The 2011 Act also divested the Crown and local authorities of any ownership they held in the foreshore and seabed. The 2011 Act established a special category of land – the common marine and coastal area – and assigned a 'no ownership' status to that area.

20 The repeal of the 2004 Act and introduction of the new Act in 2011 was prompted by a commitment in a confidence and supply agreement between the National Party and the Māori Party to review the 2004 Act.

21 The Government's objective in developing the legislation 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. 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. It also sought to integrate that recognition within the broader statutory framework.

22 The Act provides iwi, hapū and whānau Māori applicant groups[1] with the ability to seek a determination of their application for recognition of their customary interests in the common marine and coastal area either through the High Court, or engagement with the Crown. These interests are legally recognised through two awards: protected customary rights (**PCRs**); and CMT.

23 PCRs protect specific cultural activities in a specified part of the common marine and coastal area. PCRs allow these activities to be undertaken without requiring resource consent and the PCR holder may derive commercial benefit from exercising its PCRs. PCRs are non-exclusive and public access, fishing and other recreational activities in a PCR area are unaffected. They do not provide a form of title of the PCR area.

24 A consent authority cannot grant a resource consent for an activity to be carried out in a PCR area if the activity will have adverse effects that are more than minor on the exercise of the PCR. The exception is where the PCR group agrees or for some limited purposes specified in the Act. These purposes include existing aquaculture activities, emergency works, existing accommodated infrastructure and deemed accommodated activities. Section 51 sets out the test for PCRs.

25 A CMT award recognises Māori customary interests in a specified area and provides a range of rights, including:

25.1 a resource management permission right – where permission from the CMT-holder must be obtained before progressing resource consents (with some exceptions);

25.2 a conservation activity permission right;

25.3 the ability to apply for additional protections for wāhi tapu areas;

25.4 involvement in coastal policy planning;

[1] The statutory deadline for submitting applications was 3 April 2017.

25.5 the prima facie ownership of newly found taonga tūturu;

25.6 the ownership of non-Crown minerals (excluding gold, silver, uranium and petroleum); and

25.7 the right to create a planning document for the management of the CMT area that must be taken into account by a range of public bodies.

26 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.

27 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 can be deemed exempt from the resource management permission right following a process set out in Schedule 2 of the Act, which includes engagement with the CMT holder, culminating in a final decision made by the Minister for Land Information.

28 Section 58 of the Act sets out the test for CMT. The test has two 'limbs' and provides that CMT exists where an applicant group:

28.1 'holds' the relevant area 'in accordance with tikanga' (limb one); and

28.2 has 'exclusively used and occupied' an area 'from 1840 to the present day without substantial interruption' (limb two).

29 The test is the same whether the application has been made to the Crown or the High Court. The full text of section 58 is set out at **Appendix One**.

30 There are currently 380 live applications under the Act. 178 of those applications are dual applications and can access either the High Court or Crown Engagement pathway.

31 196 applicant groups have access to the High Court pathway. Approximately sixty-three percent (113) of those applicant groups are already either engaged in preparation for a scheduled hearing, are participating in a High Court hearing or have participated in one.

32 362 applicant groups can access the Crown engagement pathway and five percent (16) of those applicant groups have progressed past initial engagement in the Crown engagement pathway.

33 There are approximately 200 applications for recognition under the Act still to engage in either pathway.

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

34 The *Re Edwards* Stage 1 High Court hearing took place in late 2020 and was one of the first substantive High Court hearings of applications for CMT and PCRs under the Act, and the first with significant overlapping applications. The hearing covered a section of the eastern Bay of Plenty coastline, including Ōpōtiki and Ōhiwa harbour.

35 The High Court awarded CMT over three different areas for the six hapū of Whakatōhea, Ngāi Tai and Ngāti Awa. PCRs were also awarded to multiple applicant groups.

36 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. The Court of Appeal hearing was held in February and March 2023. The Attorney-General appeared as an interested party. The Court's most significant findings in its October 2023 judgment related to its interpretation of the second limb of the section 58 test.

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

37.1 applicant groups do not need to have exclusively used and occupied an area "from 1840 to the present day" (instead finding that "exclusivity" is required only as at 1840, prior to the proclamation of British sovereignty);

37.2 applicant groups only need to establish that their use and occupation has been continuous from 1840 to the present day in order to satisfy the second limb of s 58; and

37.3 a third-party activity can only amount to a substantial interruption where it is authorised by legislation and the activity would present an impediment to applicant groups' physical use and occupation of an area.

38 Legal privilege

39 Legal privilege

40 The Attorney-General has applied for, and been granted, leave to appeal the Court of Appeal's judgment to the Supreme Court, alongside other parties. The hearing will occur in the weeks of 4 and 11 November 2024.

Implications of the Court of Appeal's decision

41 The Court of Appeal's interpretation of the CMT test in *Re Edwards* is binding on decision makers in both the Crown engagement and High Court pathways. Because each application is considered by decision makers on its own facts, the implications of the decision for particular cases is hard to predict. However, the Court of Appeal's less stringent interpretation of the test in *Re Edwards* will likely result in CMT being

recognised over more of the common marine and coastal area than under the previous precedent set by earlier High Court judgments.

42 In March 2024, in the Wairarapa hearing, the High Court released a judgment making five CMT orders and 12 PCR orders over a large area of the common marine and coastal area, stretching from Tūrakirae Head, at the western end of Palliser Bay, to the southern bank of the Whareama River, which meets the coast 40 kilometres east of Masterton. It is not clear to what extent the Court of Appeal's interpretation affected this outcome.

43 I am concerned that the recognition of CMT over a larger amount of the common marine and coastal area unsettles the balance of rights intended by the Act. The bundle of rights included with CMT is premised on CMT being awarded where applications meet the full criteria set out in section 58.

44 Large awards of CMT on the basis of the lower-threshold test established by the Court of Appeal in *Re Edwards* may challenge New Zealanders' expectation that the Act protects the legitimate interests of all New Zealanders in the common marine and coastal area of New Zealand.

45 I propose we make changes to the Act so that CMT awards are small and discrete, as I believe was intended by Parliament – evidenced by the strict requirements of the section 58 test wording.

Proposals for amending section 58

46 I directed Te Arawhiti, with the support of Crown Law, to consider options for amending section 58 to restore Parliament's original intent following the *Re Edwards* decision. I have considered the following bundles of options:

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

47 Option A includes amending section 58 by:

47.1 **inserting a declaratory statement** 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 correct the law as expressed by the Court of Appeal;

47.2 **inserting text to define the key concepts** of 'exclusive use and occupation' and 'substantial interruption', consistent with the original legislative intent:

47.2.1 that 'exclusive use and occupation' relates to exclusivity over the whole period from 1840-today, and includes exclusivity as against third parties;

47.2.2 that 'substantial interruption' includes any sufficiently significant interruption, regardless of its nature; and

47.3 **amendment to section 106** (which sets out the burden of proof on applicants) to clarify applicants need to demonstrate exclusive use and occupation from 1840 to the present day in order for CMT to be recognised.

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

48 Option B includes all the changes proposed in Option A, as well as:

48.1 **clarifying the relationship between the preamble, purpose, and Treaty of Waitangi provisions (the framing elements) and section 58** to address the courts' general interpretative approach, by either:

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

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

48.2 **an expanded declaratory statement** that also overturns the reasoning of the High Court in *Re Edwards* and all the subsequent cases, insofar as they relate to the CMT test.[2]

Option C – wider reform of the Act

49 There are a number of issues developing around the practical operation of the Act:

49.1 high and increasing financial assistance for applicants and Crown legal costs;

49.2 the lengthy timeframes for considering the large number of applications; and

49.3 the difficulties of navigating the Act's dual pathways (High Court and direct Crown engagement) in progressing applications for CMT.

50 I have considered whether a wider review and reform of the Act is required to make progress on these operational issues alongside the section 58 issue.

Options analysis

General risks

51 Legal privilege Legal privilege. This reflects the controversial history of foreshore and seabed legislation, and the relationship of this Act with customary Māori rights and interests, Legal privilege Legal privilege

[2] And so would not impact on findings or decisions around PCRs or other elements unrelated to the CMT test.

52 The more extensive the amendments and the greater the degree of complexity, Legal privilege

53 On declaratory statements overturning court decisions, the doctrine of parliamentary sovereignty means Parliament has the constitutional authority to alter or reverse the effect of a court judgment. However, as the courts' role is to interpret and apply legislation, and in light of the constitutional principles of the separation of powers and comity, Parliament should be asked to do this only in cases that manifestly warrant such intervention. I consider that the errors of law made by the Court of Appeal sufficiently disrupt the effective operation of the Act that overturning relevant elements of the Court's judgment is necessary.

54 Any legislative override of the Court of Appeal's interpretation of section 58, even if it restores what was understood to be Parliament's original intent, is likely to be strongly criticised by applicant groups and the wider Māori community.

55 The insertion of a declaratory statement into a statute to reverse the effect of a court judgment is not common. However, there is precedent for it. A recent example is in the Parliamentary Privilege Act 2014, where section 3(2)(c) states that it is a purpose of that Act to overturn the Supreme Court's decision in *Attorney-General v Leigh*.

56 Legal privilege

57 Legal privilege a large number of claimants have filed applications for an urgent Waitangi Tribunal inquiry into the section 58 amendments proposed in the coalition commitment, as well as into the financial assistance scheme. The Tribunal is considering whether urgency will be granted.

58 Some 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). Amendments to the legislation are likely to attract criticism, possibly akin to the controversy associated with the enactment of the Foreshore and Seabed Act 2004. Those protests alleged the Crown was removing Māori rights and some Māori may see amending section 58 as similarly limiting of Māori rights.

Option A

59 A combination of a declaratory statement and defining key terms in section 58 is the most direct and timely way to fulfil the coalition agreement commitment. It would directly overturn the problematic interpretation of section 58 by the Court of Appeal in *Re Edwards* and the definition of key terms would provide clear interpretational guidance to the judiciary.

60 This option also amends section 106, which sets out the elements of the section 58 test that applicants themselves have to prove. Including exclusivity of use and occupation within the applicants' burden of proof ensures that exclusivity is a positive element of the CMT test – consistent with the wording of section 58 itself.

61 Because the changes in Option A are specific to the CMT test and clearly directed at a particular court case in *Re Edwards* (Court of Appeal), the Legal reputational risks of this option (while high) are lower than if wider changes to the Act were pursued.

62 Legal privilege Legal privilege. For example, the High Court in *Re Reeder (Ngā Pōtiki)* stated, "[the second limb,] when properly reconciled with the rest of the Act clearly sets a much lower threshold than the wording of the section would otherwise suggest."[3]

63 This raises the possibility that the changes to section 58 proposed as part of Option A will not have an enduring impact on the interpretation of the CMT test, with the wider framing elements of the Act leading to the same sorts of interpretations seen in *Re Edwards*.

Option B

64 Noting the above, Option B's changes seek to clearly focus interpretation on the wording of section 58, by clarifying that the framing elements of the Act do not undermine the literal wording and clear requirements of the CMT test.

65 Option B also involves an expanded declaratory statement that additionally overturns the High Court's reasoning in *Re Edwards* and subsequent High Court judgments that relate to the interpretation of the CMT test. The High Court in *Re Edwards*, while not going as far as the Court of Appeal, shares many elements with the Court of Appeal judgment. Subsequent High Court cases have followed the Court of Appeal's approach in *Re Edwards* to the interpretation of section 58, as they are required to do.

66 Overturning the reasoning in these cases will limit their ability to serve as precedents in the future.

67 Option B's additional changes, because they go further in their overturning of court judgments and impact on the Act's foundational elements, are likely to raise questions Legal privilege Legal privilege. The wider changes to the Act's foundational sections proposed as part of Option B are likely to be seen by Māori and others as:

67.1 an erosion of the objective and political compromise of the Act – that distinguished this Act from the original Foreshore and Seabed Act 2004; and

[3] *Re Reeder (Stage 1)* [2021] NZHC 2726 at [41].

67.2 a change to the most significant section of the Act relating to the recognition of Māori customary interests.

68 While Option B will likely result in a more appropriate and consistent CMT test from the Crown's perspective, Legal privilege Legal privilege and dissatisfied applicants could ultimately result in a costlier and more lengthy process of recognising customary interests under the Act.

Option C

69 It is clear that the process for recognising customary interests under the Act is not operating efficiently from a cost or timeliness perspective. Accordingly, there could be value in taking a first principles look at how the Act operates in practice, and considering what changes could be made to improve the efficiency of the process.

70 This would be a time-consuming exercise and would introduce further uncertainty for applicants and the courts – Legal privilege Legal privilege.

71 There is a range of work underway on a number of issues with the Act's operation, set out at the end of this paper. I consider this work is sufficient for the time being for us to make steady progress towards improving the operation of the Act, and I will report back to Cabinet on this work as it progresses.

Conclusion

72 The risks associated with the proposals are noted above. But these have to be considered alongside the consequences of doing nothing. I am concerned that the recognition of CMT over a larger amount of the common marine and coastal area unsettles the balance of rights intended by the Act. The bundle of rights included with CMT is premised on CMT being awarded only where applications meet the full criteria set out in section 58.

73 Large and more awards of CMT on the basis of the lower-threshold test established by the Court of Appeal in *Re Edwards,* may result in significant portions of the coastline falling under CMT.

74 The increased difficulty of getting resource consents across a large portion of the coastline would challenge New Zealanders' expectation that the Act protects the legitimate interests of all New Zealanders in the common marine and coastal area of New Zealand.

75 I consider that a robust approach to amending the Act is necessary in order for the Act to operate as originally intended when it comes to recognising and providing for customary interests. I recommend we pursue Option B. I recognise that these changes are likely to be controversial, and raise additional Legal Māori Crown relationship and other reputational risks to the Crown compared with Option A.

76 While Option A would be a direct way to fulfil the coalition agreement commitment, the advice from officials Legal privilege. Amendments to

how section 58 relates to the wider framing sections of the Act seems necessary to provide certainty around the nature of the CMT test.

Prospective versus retrospective application of an amended test

77 Both Options A and B have retrospective elements because they include declaratory statements that overturn the reasoning of the Courts and would apply to applications that haven't been heard yet but were filed before the 2017 cut-off on the basis of the original test wording.

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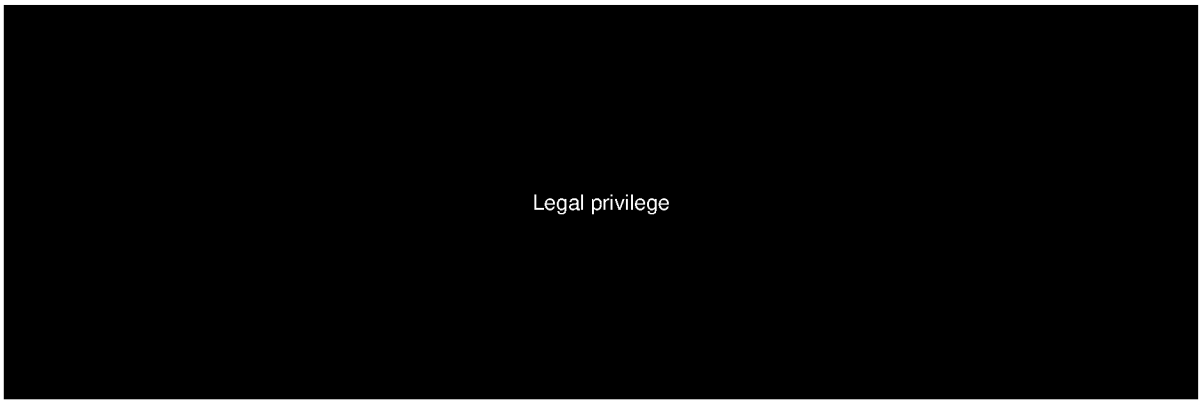

80 There are four predominant options around retrospective application of the restored test:

80.1 No retrospective application to CMT decisions before the date that the amendment Act comes into force i.e., leaving all existing decisions as they are and leaving live cases that have progressed to substantive hearings to progress under the existing Court of Appeal interpretation of the CMT test, subject to detailed work on transitional arrangements during drafting. The restored test would only apply to CMT applications in either pathway from the date that the amendment Act comes into force (**rec 9.1**);

80.2 Retrospective application to all CMT decisions since (and including) *Re Edwards* in the High Court, as well as the re-hearing of all live cases that have progressed to substantive hearings (**rec 9.2**);

80.3 Retrospective application to all CMT decisions since *Re Edwards* in the Court of Appeal, as well as the re-hearing of all live cases that have progressed to substantive hearings (**rec 9.3**);

80.4 Prospective application from the point of announcement of the policy changes – leaving all existing decisions as they are, but requiring re-hearing of any live cases that don't have decisions at the time of announcement, subject to detailed work on transitional arrangements during drafting (**rec 9.4**).

81 As discussed above, I consider the Court of Appeal in *Re Edwards*, along with subsequent High Court cases that were informed by this interpretation, are undermining the policy objective of the legislation. While legislatively reversing the

reasoning in *Re Edwards (High Court and Court of Appeal)* is sufficient to restore the policy objective of the Act going forward, I believe that there is merit in retrospectively applying the amended test to the CMT awards made on the basis of the Court of Appeal's *Re Edwards* interpretation – because these awards are likely to have been larger and not consistent with the policy objective of the Act.

82 The option to only revisit decisions since the Court of Appeal's judgment in *Re Edwards* would allow the High Court's decision in *Re Edwards* to stand. This would provide additional certainty for *Edwards* applicants, and focus on addressing what the Crown sees as the most significant interpretational error – being that which arose out of the Court of Appeal[5].

83 Retrospective application of the section 58 amendments could be made to all applications, past and future, so that all cases are decided based on the same test. This avoids differential treatment for applications based on when cases were heard and determined by the courts (with only one area of CMT being recognised prior to *Re Edwards*). The timing of Court hearing is not something within applicants' control and it could be seen as unfair if their applications are determined based on a new, more stringent test purely because their case was heard later. As set out in paragraphs 30 to 33 above, a large proportion of applicants are yet to progress substantively in either recognition pathway.

84 Nonetheless, the fairness of applying the same test to all applications needs to be considered in light of the unfairness of depriving litigants of their already-awarded CMT. Legal privilege

Legal privilege

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Legal privilege

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[5] There have been seven High Court decisions on customary marine title to date (*Re Tipene (enacted)*, *Re: Edwards*, Ngāti Pāhauwera, Ngā Pōtiki stage 1, *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*).

[redacted] Legal privilege

87 I am also conscious that provisions around the retrospective application of an amended test to existing decisions would significantly increase the complexity of drafting the amendments, putting at risk my timeline to have the Act amended by the end of 2024.

88 A prospective approach allows litigants to retain the fruits of their litigation, at the cost of potential inconsistency between earlier and later CMT awards. Within a prospective approach, there is a decision between applying the restored test to cases that are currently in progress. Paragraphs 80.1 and 80.4 outline options for having live cases (at the time of announcement) continue under the Court of Appeal interpretation or re-heard under the restored test respectively. This latter option causes more disruption and costly hearings for those live cases, but removes any incentive for cases pending judgments to rush to decisions so they can me made on the basis of the Court of Appeal's test interpretation.

89 I am seeking Cabinet's decision on whether to pursue retrospective application of the amendments to section 58 set out in this paper to existing CMT decisions.

Timeframes and process

90 As noted above, my ambition is to have amendments to the Act enacted in 2024. This is ambitious and allows only:

90.1 limited engagement with whānau, hapū and iwi applicant groups and applicant counsel – who will be directly affected and have views;

90.2 an expedited drafting process; and

[redacted] Confidential

91 I believe this timeframe is possible, though opting to pursue Option B will put on additional pressure due to the increased policy and drafting complexity. Any amendments with retrospective effect will be more complex and time-consuming.

92 I am mindful of the advice of the Attorney-General to Ministers that good law-making processes must be adhered to as much as practicable, such as allowing sufficient time for select committee consideration. [redacted] Legal privilege

[redacted] Legal privilege

[redacted]
Confidential

94 I consider it important to progress the amendments promptly as three judgments have been issued since the Court of Appeal decision, further High Court proceedings are underway, and the Supreme Court may hear the *Re Edwards* appeals this year. Any further decisions applying the Court of Appeal's interpretation will either increase the inconsistency of CMT awards over time when the test is later amended, or require additional re-hearings under the new test – depending on the approach taken to retrospectivity.

95 I propose we pursue the expedited timeframe in the table above.

96 I intend to establish a drafting committee of officials that will support the drafting process given the complexity of the proposed amendments. Depending on the timing of any urgent Waitangi Tribunal claim, it may also be able to provide advice on any recommendations of the Tribunal.

[redacted]
Confidential

98 To progress this work on tight timeframes, I seek authorisation to:

98.1 undertake 2-3 weeks targeted engagement with applicant groups under the Act (including direct engagement with Ngāti Porou and Te Whānau a Apanui)[6] after Cabinet decisions; and

[6] Ngā Hapū o Ngāti Porou has separate takutai moana legislation based on a Deed of Agreement with the Crown which was agreed in 2008 to reflect negotiations conducted under the 2004 Act, and amended in 2017 to reflect the 2011 Act. Te Whānau a Apanui entered into a Heads of Agreement with the Crown in 2008 under the 2004 Act, and this agreement is reflected in their initialled Deed of Settlement. These arrangements mean that the Crown needs to engage specifically with these two groups when proposing changes to the Act.

98.2 issue drafting instructions to Parliamentary Counsel Office and approve changes that address minor technical issues, consistent with the policy - including on the detailed approach to the amendments relating to the framing sections of the Act, and on the appropriate transitional arrangements for cases currently mid-process. The final draft of the bill will still be subject to Ministerial consultation prior to submission to Cabinet.

[redacted] Confidential

Related Takutai Moana work

100 The section 58 amendments are one part of wider work underway on the Takutai Moana regime. I am currently reviewing the financial assistance scheme [CAB-24-MIN-0128 refers]. In March 2021, Cabinet agreed to a strategy for engagement with applicant groups who have applied for recognition of customary interests under the Act [CAB-21-MIN-0076 refers]. I have asked Te Arawhiti to review the Takutai Moana engagement strategy to identify options that streamline and improve efficiency and cost.

101 I have also asked Te Arawhiti to explore pathways options for the Act to streamline processes and improve the system. Improvements are also required to enhance the workability of the Crown engagement pathway.

Cost-of-living Implications

102 There are no cost-of-living implications arising from these proposals.

Financial Implications

103 There are no direct financial implications from this paper. If the proposed changes are applied retrospectively, this will add the necessary re-hearings to an already oversubscribed High Court pathway – with associated legal and financial assistance costs.

[redacted] Legal privilege

Legislative Implications

105 The amendment to section 58 of the Act will be given effect through a Marine and Coastal Area (Takutai Moana) Act 2011 (Section 58) Amendment Bill (**the Bill**).

[redacted] Confidential

Impact Analysis

Regulatory Impact Statement

107 A Regulatory Impact Statement is being prepared and will be provided alongside the Cabinet Legislation Committee paper.

Climate Implications of Policy Assessment

108 There are no climate implications arising from this paper.

Human Rights

109 The proposals in this paper will impact on iwi, hapū, and whānau applications to recognise customary interests in the common marine and coastal area under the Marine and Coastal Area (Takutai Moana) Act 2011. Particularly, it will change the current law as to the interpretation of the section 58 test for the recognition of CMT.

Legal privilege

Use of External Resources

112 Legal privilege provided an independent review of a draft version of this Cabinet paper.

Consultation

113 The following agencies have been consulted in the development of this paper: the Crown Law Office, Parliamentary Counsel Office, and the Ministry of Justice. The Department of the Prime Minister and Cabinet was informed. The Legislation Design Advisory Committee provided advice on the broad proposals in the paper but not on the paper itself.

[redacted] Legal privilege

Communications

115 I intend to undertake 2-3 weeks targeted engagement with applicant groups after Cabinet's decisions and before the Parliamentary Counsel Office drafting period. The limited engagement period increases risks. My office will develop a communications plan with Te Arawhiti.

Proactive Release

116 I will consider proactive release as a part of the communications plan above.

Recommendations

117 The Minister for Treaty of Waitangi Negotiations recommends that the Committee:

1 **note** that section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 sets out the test for customary marine title;

2 **note** customary marine title comes with a bundle of rights which are balanced with the interests of wider New Zealand;

3 **note** the Court of Appeal's interpretation of the section 58 test in *Re Edwards* changed the nature of the test and materially reduced the threshold for the recognition of CMT;

4 **note** that the coalition agreement between the National Party and the New Zealand First Party includes an agreement to amend section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 to make clear Parliament's original intent, in light of the judgment of the Court of Appeal in *Re Edwards*;

5 [redacted] Legal privilege

6 **agree** to amend the Marine and Coastal Area (Takutai Moana) Act 2011 by:

Either Option A

6.1 inserting a declaratory statement that specifically overturns the reasoning of the Court of Appeal in *Re Edwards* where it relates to the test for customary marine title,

6.2 adding text to section 58 to define and clarify the terms 'exclusive use and occupation' and 'substantial interruption';

6.3 amending the 'burden of proof' section of the Act (section 106) to clarify that applicant groups are required to prove exclusivity of use and occupation from 1840 to the present day;

Or Option B (recommended)

6.4 inserting a declaratory statement that specifically overturns the reasoning of the Court of Appeal and High Court in *Re Edwards*, as well as all High Court decisions since the High Court in *Re Edwards*, where they relate to the test for customary marine title;

6.5 adding text to section 58 to define and clarify the terms 'exclusive use and occupation' and 'substantial interruption';

6.6 amending 'the burden of proof' section of the Act (section 106) to clarify that applicant groups are required to prove exclusivity of use and occupation from 1840 to the present day;

6.7 making changes to the effect of the preamble, purpose, and/or Treaty of Waitangi sections of the Act to make clearer the relationship between these sections and section 58, in a way that allows section 58 to operate more in line with its literal wording;

7 **agree**, for the avoidance of doubt, that both options will make it clear that that any undetermined applications as of a certain date would need to satisfy the amended tests;

8 **note** both Options A and B above have retrospective elements, and that the further retrospective application of the amended test for Customary Marine Title is possible Legal privilege

Legal privilege

9 **agree** that:

Either

9.1 the amended section 58 test should be applied prospectively from the date that the amendment Act comes into force, with appropriate transitional arrangements for applications currently in process;

Or

9.2 the amended section 58 test should be applied retrospectively to decisions relating to Customary Marine Title made by the courts in the period between (and including) *Re Edwards* in the High Court and the proposed amendment coming into force, requiring these decisions to be re-heard with the amended test (with the exception of those existing decisions that have not been appealed) as well as cases which are currently in hearings or awaiting decisions;

Or

9.3 the amended section 58 test should be applied retrospectively to decisions relating to Customary Marine Title made by the courts since *Re Edwards* in the Court of Appeal, requiring these decisions to be re-heard with the amended test (with the exception of those existing decisions that have not been appealed) as well as cases which are currently in hearings or awaiting decisions;

Or

9.4 the amended section 58 test should be applied prospectively, but from the point of announcement of the policy change – requiring re-hearing of any live cases that don't have decisions at the time of announcement, subject to detailed work on transitional arrangements during drafting;

10 **authorise** the Minister for Treaty of Waitangi Negotiations, through Te Arawhiti, to undertake 2-3 weeks targeted engagement with applicant groups, including Ngā Hapū o Ngāti Porou and Te Whānau a Apanui;

11 **invite** the Minister for Treaty of Waitangi Negotiations to issue drafting instructions to the Parliamentary Counsel Office to give effect to the decisions to amend the Marine and Coastal Area (Takutai Moana) Act 2011;

12 **authorise** the Minister for Treaty of Waitangi Negotiations to take decisions on technical issues during the drafting process, consistent with Cabinet's decisions – including on the detailed approach to the amendments at recommendation 6.7 above, and on the appropriate transitional arrangements for cases currently in process;

13 Confidential

14 **note** that amendments to section 58 will be given effect through the Marine and Coastal Area (Takutai Moana) Act 2011 (Section 58) Amendment Bill (the Bill);

15 Confidential

16 **note** that Te Arawhiti is undertaking wider work on the Marine and Coastal Area (Takutai Moana) Act 2011 regime relating to the funding assistance scheme, determination pathways and the efficiency of the Crown engagement pathway.

Authorised for lodgement

Hon Paul Goldsmith

Minister for Treaty of Waitangi Negotiations

Appendix One: Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011

Subpart 3—Customary marine title

Determination of whether customary marine title exists

58 Customary marine title

1. Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—

a. holds the specified area in accordance with tikanga; and

b. has, in relation to the specified area,—

i. exclusively used and occupied it from 1840 to the present day without substantial interruption; or

ii. received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

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

a. the commencement of this Act; and

b. the effective date.

3. For the purposes of subsection (1)(b)(ii), a transfer is a customary transfer if—

a. a customary interest in a specified area of the common marine and coastal area was transferred—

i. between or among members of the applicant group; or

ii. to the applicant group or some of its members from a group or some members of a group who were not part of the applicant group; and

b. the transfer was in accordance with tikanga; and

c. the group or members of the group making the transfer—

i. held the specified area in accordance with tikanga; and

ii. had exclusively used and occupied the specified area from 1840 to the time of the transfer without substantial interruption; and

d. the group or some members of the group to whom the transfer was made have—

i. held the specified area in accordance with tikanga; and

ii. exclusively used and occupied the specified area from the time of the transfer to the present day without substantial interruption.

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