

## Hon Andrew Little

Minister for Treaty of Waitangi Negotiations

### Proactive release- Report Back- Takutai Moana Engagement Strategy

Date of issue: 28 June 2022

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

| No. | Document   | Comments  |
|-----|--|---|
| 1   | <b>Report Back- Takutai Moana Engagement Strategy Cabinet Paper</b><br>Cabinet paper<br>Office for Māori Crown Relations: Te Arawhiti<br>14 March 2022       | Information in this document has been withheld in accordance with: <ul style="list-style-type: none"><li>Section 9(2)(f)(iv) of the OIA- to protect the confidentiality of advice tendered by Ministers of the Crown and officials.</li></ul>   |
| 2   | <b>Cabinet Māori Crown Relations: Te Arawhiti Committee Minute of Decision</b><br>Cabinet Committee Minute MCR-22-MIN-0005<br>Cabinet Office<br>8 March 2022 | Information in this document has been withheld in accordance with: <ul style="list-style-type: none"><li>Section 9(2)(f)(iv) of the OIA- to protect the confidentiality of advice tendered by Ministers of the Crown and officials.</li><li>Section 9(2)(g)(i) of the OIA- to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty.</li></ul> |

In Confidence

Office of the Minister for Treaty of Waitangi Negotiations

Cabinet Māori Crown Relations: Te Arawhiti Committee

## **Report Back - Takutai Moana Engagement Strategy**

### **Proposal**

- 1 This paper reports back on the implementation of the Takutai Moana Engagement Strategy (the strategy) following its public launch in June 2021. The paper provides an update on the engagement with takutai moana applicants so far, how the new approach has been received by applicants, and the likely timeframes and next steps for progressing applications in each coastal area.

### **Relation to government priorities**

- 2 This paper will support the Government's manifesto commitment of continuing the partnership path with Māori and realising the promise of Te Tiriti.

### **Executive summary**

- 3 On 22 March 2021, Cabinet agreed a new strategy to achieve the fair, transparent and timely determination of applications for recognition of customary marine title and protected customary rights under the Takutai Moana Act 2011 and Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (takutai moana legislation). Cabinet invited me, as the responsible Minister, to report back on the implementation of the strategy at the beginning of 2022 [CAB-21-MIN-0076].
- 4 The strategy is centred on a 'coastline approach' where engagement with iwi, hapū and whānau applicant groups occurs across 20 coastal areas (see Appendix 1).
- 5 Since the strategy's launch in June 2021, Te Arawhiti has been implementing its first phase ('initial engagement'), which has involved contacting applicants across all 20 coastal areas to discuss the strategy and applicants' readiness to begin actively progressing their applications. Where applicants are ready to do so, this has included starting to develop some timelines for next steps for both applicants and Te Arawhiti.
- 6 Te Arawhiti has also continued to work with applicants who were already well progressed in their applications prior to the strategy being agreed, as well as supporting applicants involved in court proceedings.

- 7 As a result of the engagement work since the strategy was launched, Te Arawhiti have identified six coastlines with applications that are likely to progress considerably through the research and evidence gathering and/or determination stages of the strategy in 2022/23. This list will likely grow as discussions between applicants in other coastlines and Te Arawhiti continue.
- 8 Through this engagement, Te Arawhiti has broadly received positive feedback regarding the strategy and the approach of the Crown. Applicants have noted that, compared with the previous approach, this strategy provides:
- 8.1 a better alignment with their tikanga;
  - 8.2 an opportunity to work with the Crown based on a partnership approach;
  - 8.3 much greater flexibility in how applications are progressed and for applicants to progress on a timeframe that works for them; and
  - 8.4 support for applicants to work through their application regardless of whether they are an iwi, hapū, or whānau.
- 9 Te Arawhiti will continue to implement the strategy, [REDACTED] s9(2)(f)(iv)  
[REDACTED] engaging with and supporting the progress of takutai moana applicants within their coastlines.

## Background

### *Takutai moana legislation*

- 10 The takutai moana legislation enabled applicant groups – iwi, hapū and whānau – to apply to have their customary interests in the common marine and coastal area (CMCA) legally recognised. Applicants seek recognition of their customary interests in the CMCA by way of:
- 10.1 protected customary rights, which allow an activity, use or practice that has been carried out since 1840 in accordance with tikanga Māori to be carried out by the applicant group without the need for a resource consent; and
  - 10.2 customary marine title, which provides the applicant group with particular rights (specified in te takutai moana legislation) in relation to a specified area of the CMCA.
- 11 The takutai moana legislation sets out two pathways for recognition of customary interests:
- 11.1 by engagement directly with the Crown (to seek a determination by the responsible Minister); or
  - 11.2 by application to the High Court.

- 12 Applications for recognition of customary interests together cover the whole coastline of Aotearoa New Zealand and its outer islands; there is considerable overlap of interests in most areas and varying levels of complexity between applications.<sup>1</sup> The work required to get applications ready for determination is significant, for example, requiring substantial amounts of evidence to be gathered by applicants.

*The need for a new approach to engaging with applicants*

- 13 The strategy replaced the old approach of engaging one-by-one with takutai moana applicants, which was not fit for purpose. The Waitangi Tribunal (the Tribunal), in its *Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry, Stage 1 Report*, found that the failure of the Crown to provide adequate and timely information about the Crown engagement pathway, and a lack of support for applicants to address overlapping claims, constituted a breach of Te Tiriti principle of active protection.
- 14 Continuing the old approach would have led to inequalities between applicant groups being progressed and those who had to wait. Officials estimated that, if the previous approach continued, it would take approximately 95 years to reach determinations with all applicants.

*Takutai Moana Engagement Strategy*

- 15 In March 2021, Cabinet approved the new approach which is consistent with Te Tiriti principles by enabling:
- 15.1 the Crown to work together with applicants to support them to make progress on their applications in a fair, transparent and timely manner; and
  - 15.2 tikanga based processes to be used to guide and underpin partnership and engagement arrangements.
- 16 In order to achieve this, the strategy provides that:
- 16.1 the New Zealand coastline be initially divided into 20 coastal areas;
  - 16.2 Te Arawhiti will work with all applicants, who wish to do so, within each coastal area to determine the approach and timeframes for progressing applications most appropriate in each coastal area;
  - 16.3 Te Arawhiti engage with all applicants (both Crown engagement and High Court), including those in high third-party use areas and in areas covered by High Court proceedings; and

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<sup>1</sup> By the statutory deadline, the Crown received 387 applications and the High Court received 202 applications.

16.4 delivery under the strategy will occur in three phases:

16.4.1 *initial engagement*; which includes discussion and agreement to the boundaries of the coastal area and that all applicants are included, identifying the needs of applicants, and agreeing next steps, including timeframes and processes;

16.4.2 *research and evidence gathering*; which focuses on the core work of developing the evidence base for customary interests, and discussions about shared or overlapping customary interests through appropriate tikanga processes; and

16.4.3 *determination and recognition*; during which the collected evidence from applicants, the Crown, and non-applicants will be considered by myself or by the High Court.

17 Further information on the strategy can be found at Appendix 2.

### **Implementation of the Takutai Moana Engagement Strategy**

18 Following the launch of the strategy on 12 June 2021, Te Arawhiti began implementing the first phase of the strategy. The 'initial engagement' phase involved contacting applicants in each of the 20 coastal areas to better understand connections between applicant groups, explore ways to address overlapping or shared interests, agree mutually acceptable timeframes, and begin outlining possible pathways to a determination.

19 Te Arawhiti made initial contact with more than 400 applicant groups or their representatives. Te Arawhiti acknowledged in this initial contact that some applicants needed to prioritise working with their communities on their respective COVID-19 responses. From this initial contact Te Arawhiti received over 100 responses, many of which sought further information, made funding applications, or asked to meet with Te Arawhiti. From these responses Te Arawhiti have so far held over 40 hui with applicants.

20 Te Arawhiti met with two groups of applicants that are focused on developing a collective approach to progressing their applications: the Whaingaroa Moana Collective in Waikato and several applicants in Whangaroa Harbour, Northland. Te Arawhiti have offered support and encouraged the collective approach these applicant groups are working towards.

21 Te Arawhiti have also continued to support several applicant groups who are advanced with their research and evidence gathering and with whom the Crown had made commitments to engage under the old approach. These groups include Ngā Hapū o Ngāti Porou, Te Whānau ā Apanui, Ngāti Koata, Te Uri o Hau and Ngāti Rongomaiwahine. Further, Te Arawhiti has been able to provide support to those applicants with High Court proceedings underway.

## Insights from engagement

- 22 Applicants have responded positively to the strategy of engaging with applicants when they are ready and working with Māori at iwi, hapū, and whānau levels, rather than larger groupings exclusively. Applicants have liked the flexibility in how applications can be progressed under the strategy, and the opportunity it provides for applicants to incorporate their own tikanga into this process. Applicants have also appreciated the offer of support regardless of whether they have chosen to proceed through the High Court or Crown engagement pathway.

### *Determining readiness to progress applications*

- 23 The initial engagement carried out by Te Arawhiti has highlighted that the coastline approach can assist applicants to work collectively, where they wish to, and has helped us to gain a better understanding of the readiness of applicants to progress in this way. Initial engagement has also shown that applicants within their respective coastlines are at different stages of readiness, and confirmed that the strategy's flexible approach enables us to respond to the unique features and complexities of each coastline.
- 24 Through discussions with applicants, Te Arawhiti have identified six coastlines where considerable progress, within the phases as outlined above, can be made in 2022. These coastlines are:
- 24.1 Te Tai Rāwhiti;
  - 24.2 Wairarapa;
  - 24.3 Taranaki;
  - 24.4 Tainui;
  - 24.5 Western Bay of Plenty; and
  - 24.6 Eastern Bay of Plenty.
- 25 These coastlines were identified due to a combination of having already carried out considerable research in their regions, a broad willingness and readiness to engage from relevant applicants, and discussions with applicants' legal counsel.
- 26 Te Arawhiti will now work alongside applicants within these coastlines to develop a detailed plan on how their applications will progress. Further work will include; facilitating conversations between applicants to resolve any overlapping application boundary concerns and identify any areas of shared interest; supporting applicants research and evidence gathering and assessing what research has already been provided; and engaging with non-applicants on their interests in the takutai moana. While applicants decide what pace they would like to progress their applications, Te Arawhiti anticipates that some application areas within these coastlines will progress through to a Ministerial decision over the next 12 months.

- 27 The five coastlines that together make up the greater Northland region (Kaipara, Hokianga, Te Hiku, Te Raki and Mahurangi) are the most complex. Of the 150 applications that are covered in these coastlines, Te Arawhiti has so far had 34 responses from applicant groups. These responses have provided useful initial information on how applications within the coastlines may be progressed. Te Arawhiti is also working to consider opportunities for alignment with discussions about historical Treaty of Waitangi claims in the region, where appropriate.
- 28 Te Arawhiti will undertake further conversations with applicants in the remaining coastlines and be able to establish clearer timelines for progression of all other coastlines over 2022 and beyond.
- 29 Prior to Cabinet approval of the new strategy the Crown had actively engaged with seven applicant groups and the six management arrangement trusts who represent ngā hapū o Ngāti Porou. Since I launched the new strategy in June 2021, there has been a significant shift in the level of engagement and support provided to applicants. Within the six coastlines mentioned above, there will be approximately 130 applicant groups now in active engagement with the Crown who may be able to significantly progress their applications over the next 12 months.

#### *Other insights*

- 30 Throughout the initial engagement phase, applicants and their legal counsel have also provided Te Arawhiti with feedback on other aspects of the takutai moana legislation and policies.
- 31 Many 'dual pathway' applicants (those who have applications in both High Court and Crown engagement pathways) have said they are encouraged by the fact that Te Arawhiti will support and progress their applications, where possible, regardless of the end decision maker.
- 32 Some applicants noted challenges with the dual pathway itself, particularly those that are only in one engagement pathway. Applicants are concerned that the Act is unclear on how the pathways work together if they share or have overlapping interests with applicants seeking a decision in the other pathway. Applicants who have raised this are generally pleased that we have acknowledged the issue, and that there is work underway to address it [CAB-21-MIN-0441].

- 33 Applicants also noted difficulties with the takutai moana financial assistance scheme (the scheme), including that it creates uncertainty about which activities are funded under the scheme and that the funding for High Court proceedings is insufficient. Applicants have welcomed the review of the scheme and the interim changes that have been made to improve its operation, however, they have been clear that the issues with the scheme are becoming a barrier to progressing their applications under the strategy. Proposed changes to the scheme were agreed by Cabinet in February, with the additional funding needed to enable the changes being sought through Budget 22 [CAB-22-MIN-0037 refers].
- 34 I also anticipate that the Tribunal's final report in the Wai 2660 inquiry will have findings and recommendations relating to the strategy. I will carefully consider those, including whether I need to seek Cabinet decisions on any adjustments in our approach to supporting applicants progress their applications.

#### *Progress in the High Court pathway*

- 35 The High Court has issued three judgments determining applications under the Takutai Moana Act since May 2021. In *Re Edwards (Te Whakatōhea No. 2)*, *Ngā Pōtiki stage one*, and *Re Ngāti Pāhauwera*, the Court recognised a number of customary marine titles for the applicant groups involved. The *Re Edwards* judgment and the *Re Ngāti Pāhauwera* judgment have been appealed to the Court of Appeal. Both appeal proceedings are seeking clarification of the High Court's interpretation of the statutory tests as well as contesting some factual findings. Te Arawhiti are continuing to support the applicants involved in these proceedings.
- 36 A judgment was also released in *Re Clarkson*, where the applicant whānau group was unsuccessful in having customary marine title recognised but was given the opportunity to amend its application to an application for protected customary rights in respect of karengo activities. Overlapping applicant groups who participated in that hearing advised the Court that they would progress their applications through Crown engagement.
- 37 These High Court decisions have helped create momentum amongst applicants, and following the launch of the strategy many applicants have sought a meeting with the Crown to discuss the alternative pathways to reach a determination.
- 38 Under the strategy, all applicants in a coastal area are supported irrespective of their chosen pathway. While Te Arawhiti cannot be directly involved in High Court proceedings they have provided support through the financial assistance scheme, Kōrero Takutai (an online geospatial system which can map application areas, use and activity), and in assisting applicants to work through overlapping interests before a case is heard.

## Next Steps

s9(2)(f)(iv)

- 39 [REDACTED],  
Te Arawhiti will:
- 39.1 continue engaging with all applicants; establishing their readiness to progress and supporting those who are ready to do so; and
  - 39.2 develop delivery plans for each coastline, outlining potential challenges, complexities and how Te Arawhiti will support applicants who may be at different phases of the strategy.
- 40 Te Arawhiti will review and report back to Cabinet on the progress of the implementation of the strategy every three years.

## Risks

- 41 The pace of this work has increased dramatically since the strategy was launched, [REDACTED]. s9(2)(f)(iv)
- 42 This increased pace could create tensions between applicants. Te Arawhiti will need to maintain good relations through open communication and supporting groups to work together to progress their applications where appropriate.
- 43 Applicants have demonstrated a lot of good will, despite limited communications from the Crown for several years. A failure to deliver would be detrimental to good Māori Crown relations.
- 44 In certain coastal areas there are ongoing Treaty settlement negotiations to progress or post-settlement relationships to maintain. Engaging with applicants in such areas regarding their takutai moana applications may create undue stress, potentially undermining existing Māori Crown relations. I believe, however, that the flexibility and applicant-driven approach outlined in the strategy offers the best opportunity to mitigate such risks.

## Consultation

- 45 Te Arawhiti consulted with the Treasury, the Crown Law Office, and Te Puni Kōkiri in the preparation of this paper. The Department of the Prime Minister and Cabinet has been informed.

## Financial implications

- 46 This paper does not seek funding decisions. [REDACTED] s9(2)(f)(iv)
- [REDACTED]

47 I am encouraged by the progress made under the strategy since it was launched in June last year, and the positive way in which it has been received by applicants. Continuing the momentum will ensure the timely progression of applications and strengthen good Māori Crown relations. [REDACTED]

s9(2)(f)(iv)

[REDACTED] I have not recommended a return to the almost snail-like progress of the old approach.

### **Legislative implications**

48 This paper has no legislative implications.

### **Impact analysis**

49 An impact analysis is not required as this paper does not contain regulatory proposals.

### **Human rights**

50 The proposals outlined in this paper do not raise any issues of inconsistency with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

### **Gender implications**

51 There are no gender implications that arise directly from this paper.

### **Disability perspective**

52 A disability perspective is not required.

### **Publicity**

53 No publicity is required for this report back.

### **Proactive release**

54 I intend to proactively release this paper, making any necessary redactions, within 30 business days of final decisions taken by Cabinet.

## Recommendations

52 The Minister for Treaty of Waitangi Negotiations, as the responsible Minister for the Takutai Moana Act 2011 and Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, recommends that the Committee:

1 **note** this paper is a report back to Cabinet on the implementation of the Takutai Moana Engagement Strategy;

3 **note** that Te Arawhiti has begun the implementation of the initial engagement phase of the strategy by contacting, where possible, all takutai moana applicants;

4 **note** that from this initial engagement, Te Arawhiti have identified that applications within at least six of the coastal areas are likely to progress significantly in 2022 with research and evidence gathering already underway;

6 **note** [REDACTED] s9(2)(f)(iv)  
[REDACTED]

8 **note** that Te Arawhiti plans to report back on the implementation of the engagement strategy every three years, alongside its review.

Authorised for lodgement

Hon Andrew Little  
**Minister for Treaty of Waitangi Negotiations**



# Cabinet Māori Crown Relations: Te Arawhiti Committee

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Takutai Moana Engagement Strategy - Report Back

Portfolio Treaty of Waitangi Negotiations

On 8 March 2022, the Cabinet Māori Crown Relations: Te Arawhiti Committee (MCR):

1 **noted** that on 16 March 2022, MCR:

1.1 noted that the current approach to progressing applications under te Takutai Moana Act 2011 and te Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 is slow, creates uncertainty for applicants, is detrimental to good Māori Crown relations, breaches the principles of Te Tiriti o Waitangi, and does not provide a realistic alternative to expensive High Court hearings;

1.2 agreed to the strategy for engagement with Takutai Moana applicants including that:

1.2.1 the New Zealand coastline be initially divided into 20 coastal areas;

1.2.2 the strategy adopts a coastline approach, whereby Te Arawhiti will work with all applicants within each coastal area to determine the approach and timeframes for progressing applications most appropriate in each coastal area;

1.2.3 the strategy requires Te Arawhiti to engage with all applicants, including those in high third-party use areas and in areas covered by High Court proceedings; and

1.2.4 delivery under the strategy will occur in three phases:

1.2.4.1 an establishment phase, [REDACTED] s9(2)(g)(i)  
[REDACTED]; s9(2)(f)(iv)

1.2.4.2 a research and evidence gathering phase, [REDACTED] s9(2)(g)(i)  
[REDACTED]; and s9(2)(f)(iv)

1.2.4.3 a determination and recognition phase, [REDACTED] s9(2)(g)(i)  
[REDACTED] s9(2)(f)(iv)

1.2.5 invited the Minister for Treaty of Waitangi Negotiations to report back on the emerging approach, progress, timeframes and sequencing for progressing applications in each coastal area;

[MCR-21-MIN-0005]

- 2 **noted** that Te Arawhiti has begun the implementation of the initial engagement phase of the strategy by contacting, where possible, all takutai moana applicants;
- 3 **noted** that from this initial engagement, Te Arawhiti has identified that applications within at least six of the coastal areas are likely to progress significantly in 2022 with research and evidence gathering already under way;
- 4 **noted** that, [REDACTED] s9(2)(f)(iv)  
[REDACTED]
- 5 **noted** that Te Arawhiti plans to report back to MCR on the implementation of the engagement strategy every three years, alongside its review.

Gerrard Carter  
Committee Secretary

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**Present:**

Hon Kelvin Davis (Chair)  
Hon Andrew Little (Deputy Chair)  
Hon David Parker  
Hon Nanaia Mahuta  
Hon Stuart Nash  
Hon Willie Jackson  
Hon Kiri Allan

**Officials present from:**

Office of the Prime Minister  
Officials Committee for CMR