

# Departmental Disclosure Statement

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| Marine and Coastal (Takutai Moana) (Customary Marine Title) Amendment Bill |
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by Te Arawhiti – the Office for Māori Crown Relations.

Te Arawhiti – the Office for Māori Crown Relations certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

19 September 2024

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## Part One: General Policy Statement

### Purposes of amendments

This Bill amends the Marine and Coastal Area (Takutai Moana) Act 2011. The purposes of the amendments are –

- To define some of the applicable requirements for recognition of CMT (namely, requirements for, and for proof of, exclusive use and occupation of a specified area from the start to the end of the applicable period (from 1840 to the present day or, if applicable, from 1840 to the time of a customary transfer, or from the time of a customary transfer to the present day) without substantial interruption); and
- in particular, to alter aspects of the law that are expressed, for example, in parts of *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 and in other judgments.

### Altered aspects of law

The altered aspects of the law include those altered by provisions that—

- define an applicant group's exclusive use and occupation of a specified area of the common marine and coastal area from the start to the end of the applicable period:
- require the group's use and occupation of that area to be exclusive in that the group has had both the intention and the ability to control that area, to the exclusion of others, from the start to the end of the applicable period:
- require that no substantial interruption has occurred to the group's exclusive use and occupation of that area from the start to the end of the applicable period:
- define substantial interruption to the group's exclusive use and occupation of that area as meaning any 1 or more substantial interruptions to 1 or both of the following:
  - the group's use and occupation of that area:
  - the exclusivity of the group's use and occupation of that area:
- clarify how substantial interruption to the group's exclusive use and occupation of that area can be caused, and when it has not occurred:
- clarify what inferences are permitted, and require particular regard to be had to specified matters, in determining whether the group has had exclusive use and occupation of that area from the start to the end of the applicable period:
- clarify when customary marine title is extinguished as a matter of law by a vesting of a title as owner to any part of the common marine and coastal area (for example, to the bed of a navigable river, to the extent that the bed of the river is any part of that area):
- clarify what the group must prove in an application for the recognition of customary marine title in that area.

### Application of amendments and transitional, savings, and related provisions

The transitional, savings, and related provisions ensure that—

- the amendments do not apply to or affect a CMT decision made before or at midnight on 25 July 2024 (the announcement time):
- the amendments apply to a CMT decision made after the announcement time:
- certain CMT decisions made in the interim period (starting at the announcement time, and ending on the commencement of this Bill), and related agreement and orders made, have no legal effect, and never have had legal effect:
- the High Court is enabled to continue to hear, or rehear, all, or any part of, affected applications, in order to consider and determine how the amendments affect those applications: and
- a person is not entitled to compensation of any kind on account of the operation of the amendments.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

| 2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?   | YES |
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| <p>Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report, Wai 3400, Waitangi Tribunal, 12 September 2024.</p> <p><a href="#">Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report – Pre-publication Version (justice.govt.nz)</a></p> <p>Decision of the High Court – <i>Te Rūnanga o Ngāti Whātua v Attorney General</i> [2024 NZHC 71]. This decision considered an application by Te Rūnanga o Ngāti Whātua for a declaratory statement by the High Court that the government's consultation process in respect of this amendment breached the principles of natural justice. This application was dismissed by the High Court.</p> |     |

### Relevant international treaties

| 2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty? | NO |
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### Regulatory impact analysis

| 2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?  | NO |
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| <p>A regulatory impact statement was not provided for Cabinet's policy consideration, but a Supplementary Analysis Report was provided to Cabinet ahead of its decision to introduce the Bill (see below).</p> |    |

### Extent of impact analysis available

| 2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?   | YES |
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| <p>Supplementary Analysis Report: Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011, Te Arawhiti – the Office for Māori Crown Relations, 18 September 2024.</p> <p><a href="#">Te Arawhiti - Cabinet papers and related material</a></p> <p><a href="#">Regulatory impact statements   The Treasury New Zealand</a></p> |     |

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| <b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>   |            |
| <b>(a) the size of the potential costs and benefits?</b>  | <b>YES</b> |
| <b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>   | <b>YES</b> |
| Retrospective application will apply to six hearings which have already been heard or are in progress. If those hearings would otherwise have resulted in CMT findings in the applicants' favour it is possible the retrospective application of the amended test could be considered an expropriation of applicants' property rights. In addition, the Bill provides that there is no compensation arising out of the operation of the Bill so the net result may be that CMT findings are retrospectively removed in a manner that constitutes expropriation of property rights without compensation. |            |

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| <b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b> |           |
| <b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>                  | <b>NO</b> |
| <b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>                          | <b>NO</b> |
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## Part Three: Testing of Legislative Content

### Consistency with New Zealand’s international obligations

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| <b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand’s international obligations?</b>  |
| A detailed analysis of compliance with international obligations has not been undertaken. Potential inconsistency with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was raised by claimants in the urgent Waitangi Tribunal inquiry. This is likely referring to Article 26 of the UNDRIP which affirms that indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. There is also the potential for inconsistency with Article 27 of the International Covenant on Civil and Political Rights, which protects cultural rights of minorities. |

### Consistency with the government’s Treaty of Waitangi obligations

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| <b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>   |
| <p>In August 2024, the Waitangi Tribunal conducted an urgent inquiry (WAI 3400) involving a total of 86 participants: 53 claimants and 33 interested parties who contest the proposed amendments. The urgent inquiry was split into two parts with stage one addressing policy decisions implemented through this Bill.</p> <p>The Waitangi Tribunal released its report on 13 September 2024. The Tribunal found that, in pursuing these amendments, the Crown breached Treaty principles by: failing to appropriately consult Māori on changes that significantly affect their interests; not having sufficient policy justification to support the amendments being necessary as proposed, given the significant interference with Māori; and pursuing retrospective application, to the detriment of applicants who have already engaged in High Court hearings.</p> <p>The Tribunal recommended the Crown give further consideration to the underlying issue it is seeking to resolve through the amendments, including whether adjustments to the resource management permission right might be a better way to address the Crown’s concerns. It recommended that the proposed amendments be halted until meaningful engagement with Māori on that policy problem can be undertaken.</p> <p>Te Arawhiti had previously advised the Minister that the proposed consultation process was not consistent with the principles of the Treaty of Waitangi or Te Arawhiti’s ‘Guidelines for engagement with Māori’ – especially given the impacts are on core Māori rights and interests, and the importance of foreshore and seabed issues in the Māori Crown relationship.</p> |

### Consistency with the New Zealand Bill of Rights Act 1990

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| <b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b> | <b>YES</b> |
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## Offences, penalties and court jurisdictions

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| <b>3.4. Does this Bill create, amend, or remove:</b>   |           |
| <b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>   | <b>NO</b> |
| <b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>  | <b>NO</b> |
| The Bill does not create, amend or remove a court's jurisdiction but as stated in 2.5 and 4.3 it has retrospective effect so it is possible that some judicial awards of CMT will be legislatively reversed. |           |

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| <b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>  | <b>YES</b> |
| The Ministry of Justice were consulted on both the original Cabinet paper seeking policy decisions and the subsequent Cabinet paper seeking approval to introduce the legislation. |            |

## Privacy issues

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| <b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b> | <b>NO</b> |
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## External consultation

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| <b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>   | <b>YES</b> |
| <p>A brief targeted consultation period was undertaken in respect of the policy to be given effect to by this Bill. Letters were sent to applicant groups (whānau, hapū and iwi) seeking their views. The consultation period was three weeks long beginning on 25 July 2024 and finishing on 15 August 2024.</p> <p>The consultation document outlined the policy decisions Cabinet had made and specifically sought decisions on:</p> <ul style="list-style-type: none"> <li>• clarifying the definitions of 'exclusive use' and 'substantial interruption' in section 58;</li> <li>• changes to the framing sections of the Act (comprising the purpose, preamble and Treaty of Waitangi sections); and</li> <li>• any general views or concerns about the proposed changes.</li> </ul> <p>A total of 52 submissions were received, of which 47 were from groups with applications under the Takutai Moana Act. Five overarching themes were derived from the submissions:</p> <ul style="list-style-type: none"> <li>• opposition to the proposed changes to the Act;</li> <li>• concerns about lack of sufficient consultation, engagement and communication;</li> <li>• concerns with legal process and Treaty of Waitangi obligations;</li> <li>• specific concerns about the proposed amendments to the Act; and</li> <li>• impact on applicant groups, including those who have already had hearings.</li> </ul> <p>The Minister for Treaty of Waitangi Negotiations also met directly with four applicant groups – Ngāti Porou, Te Whānau a Apanui, Ngāti Koata and Rongomaiwāhine as well as seafood industry representatives.</p> |            |

Other testing of proposals

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| 3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete? | NO |
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## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

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| <b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b> | <b>NO</b> |
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### Charges in the nature of a tax

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| <b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b> | <b>NO</b> |
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### Retrospective effect

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| <b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>  | <b>YES</b> |
| <p>The Bill will apply with retrospective effect dating back to 25 July 2024. This means that any decisions of the Court granting CMT during the interim period between the date of the policy announcement and the date the legislation is enacted will have no legal effect. All decisions made after 25 July 2024 will need to be reheard under the Bill.</p> <p>This provision was necessary because the government wanted to ensure to that all applications, past and future, are decided based on the same test, in line with earlier awards and Parliament's intention in passing the Takutai Moana Act. This option was considered to mitigate the constitutional risks involved in removing the 'fruits of litigation' for applicants in cases where judicial decisions awarding CMT had already been made (such as in <i>Re Edwards</i>, itself).</p> |            |

### Strict liability or reversal of the usual burden of proof for offences

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| <b>4.4. Does this Bill:</b>  |           |
| <b>(a) create or amend a strict or absolute liability offence?</b>   | <b>NO</b> |
| <b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b> | <b>NO</b> |
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### Civil or criminal immunity

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| <b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b> | <b>NO</b> |
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## Significant decision-making powers

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| <b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>  | <b>YES</b> |
| <p>The Bill amends section 58 of the Takutai Moana Act 2011 which sets out the legal test that Courts and the responsible Minister must abide by when determining whether to recognise CMT for an applicant group. The amendments are intended to provide greater clarity for decision makers interpreting the test and are intended to ensure the test is interpreted consistently with Parliament's original intent. The provisions in the Bill provide that the Amendment Bill will prevail over any other law, including the purpose and Treaty provisions in the Act. The Bill is likely to have a significant impact on the rights of iwi, hapū and whānau who have made applications under the Takutai Moana Act for recognition of their customary interests. It removes what otherwise might be considered safeguards for governing the proper interpretation of statutory provisions by disapplying the purpose and Treaty of Waitangi provisions. The Bill therefore provides a very clear directive from Parliament that the amended CMT test provisions are to be interpreted literally.</p> |            |

## Powers to make delegated legislation

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| <b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b> | <b>NO</b> |
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| <b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b> | <b>NO</b> |
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## Any other unusual provisions or features

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| <b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>  | <b>YES</b> |
| <p>This Bill contains some provisions which are unusual because they overturn the decision of the Court of Appeal in <i>Re Edwards</i> in respect of the test for customary marine title as well as several decisions of the High Court, also in respect of the test for CMT. This is unusual practice in legislation but is not unprecedented (see for example the Parliamentary Privileges Act 2014, which at s 3 specified that one of the purposes of the Act was to overturn the Supreme Court's decision in <i>Attorney-General v Leigh</i>. The Bill includes at Schedule 1AB a list of the law that Parliament intends to alter through the Act. This also includes a non-exhaustive list of paragraph references to particular judgments where those legal findings are expressed.</p> |            |