

WAITANGI TRIBUNAL

Wai 3400

CONCERNING

the Treaty of Waitangi Act 1975

AND

Marine and Coastal Area
(Takutai Moana) Act Coalition
Changes Urgent Inquiry

**REASONS FOR GRANTING AN URGENT INQUIRY INTO
THE MARINE AND COASTAL AREA (TAKUTAI MOANA) FINANCIAL
ASSISTANCE SCHEME AND PROPOSED AMENDMENTS TO THE ACT**

26 July 2024

Hei tīmatanga kōrero / Introduction

1. The Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) regulates rights and interests in the takutai moana. In 2016, an application was made seeking an urgent inquiry into the Act. The Chairperson of the Tribunal declined the application for urgency but granted a priority kaupapa inquiry into the legislative framework and applications process established under the Act (Wai 2660, #2.5.8).
2. We were appointed to conduct that inquiry. We did so in two stages, releasing two separate reports:
 - (a) Stage One determined whether the Act's procedural and resourcing (including funding) arrangements complied with Treaty principles;
 - (b) Stage Two determined whether the provisions in the Act that recognise and provide for Māori interests complied with Treaty principles.
3. The claims by Māori under the Act in the High Court pathway are now well advanced. Many applications have already been determined, awards have been made, while others are in hearing or the interlocutory process.
4. Recently, the Crown has decided to:
 - (a) Make changes to the Takutai Moana financial assistance scheme (the funding scheme) reducing the amount of funding available to assist Māori to advance their claims; and
 - (b) Amend s 58 of the Act which sets out the test for customary marine title.
5. As a result, we received seven applications seeking an urgent inquiry into those decisions.
6. On 23 July 2024, we released our decision granting an urgent inquiry into the following issues (Wai 3400, #2.5.1):
 - (a) The 2024 changes to the Crown funding scheme that funds applicants seeking customary marine title and protected customary rights in the High Court and Crown engagement pathways; and
 - (b) The Crown's proposed amendments to s 58 of the Act, which sets out the test for customary marine title.
7. We set out below our reasons for granting this urgent inquiry.

Ngā tāpaetanga a ngā kaitono / Applicant Submissions

The funding scheme issue

8. Te Arawhiti administers the funding scheme, which provides funding to iwi, hapū and whānau applicants seeking recognition orders under the Act. Te Arawhiti has recently announced a review and change to the funding scheme which reduces the amount of funding available. Those changes are set out in the affidavit of Francis Dagg filed by the Crown (Wai 3375, #A2).

9. The applicants submit that Māori claimants under the Act will suffer significant and irreversible prejudice because of the mismanagement of, and the reduction to, the funding scheme (Wai 3375, #3.1.2, Wai 2669, #3.1.1, Wai 2581, #3.1.13, Wai 2764, #3.1.1).
10. They argue that the Crown has been aware that the funding scheme was insufficient to meet the costs prior to the recent announcements. Despite possessing this knowledge, it has represented to applicants, counsel and witnesses that reimbursement costs would be met (2603, #1.1.1(b)).
11. The applicants assert that this prejudice is exacerbated given that the Crown is appearing as an interested party in applications before the High Court or is the decision maker in the Crown engagement pathway. The Crown's ability to act as both an interested party and the funder lacks impartiality (Wai 3375, #3.1.2, Wai 2669, #3.1.3, Wai 2581, #3.1.13). Furthermore, the involvement of commercial interests in hearings, who have instructed counsel and have the means to cover those costs, again demonstrates an inequality between applicant groups the Crown and commercial interests (Wai 3375, #3.1.2, Wai 2669, #3.1.3, Wai 2581, #3.1.13).
12. The applicants submit that the decision to cap funding will result in delays to the hearing programme in the High Court. Applicants have expended significant time and resource to have hearings set down, and now due to a lack of funding, those hearings may be vacated. They also allege further prejudice from these delays as some witnesses are elderly particularly those who will give important kōrero tuku iho evidence in Court. The applicants contend this will also impact groups who have received awards in the High Court pathway as it will delay finalising orders (Wai 3375, #3.1.2, Wai 2669, #3.1.13, Wai 2764, #3.1.1, Wai 745, #2.203).

The section 58 issue

13. Section 58 of the Act sets out the test for customary marine title:

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.

14. The applicants submit that significant and irreversible prejudice will arise from the Crown's decision to amend section 58 of the Act to make it more difficult to meet the test, as this will limit the availability of customary marine title under the Act (Wai 2603, #1.1.1(b)).
15. The applicants argue that publicly available documents, such as the briefing paper prepared by Lil Anderson to the Ministers of the Crown dated 17 February 2024, show that the Crown is committed to making these changes, regardless of the impact on Māori (Wai 2669, #3.1.3, Wai 2669, #A2(a)).
16. The application for urgency filed by Bennion Law, emphasises the prejudice likely to occur as a result of the amendments to s 58. Counsel submits that amending s 58 of the Act to 'make clear Parliament's original intent' is in serious breach of te Tiriti as Parliament is legislating to affect the jurisdiction of the courts while they are actively dealing with customary interests, in the absence of a compelling public interest to do so. Furthermore, Māori are being treated unequally as they are actively pursuing property rights before the Courts and their entitlement to rely on current legal tests is being interfered with (Wai 3383, #3.1.1).
17. The applicants are ready to proceed urgently to hearing and submit that no research is required as the Tribunal can rely on the previous MACA Inquiry research for assistance (Wai 3375, #3.1.2, Wai 2669, #3.1.3, Wai 2581, #3.1.13, Wai 3380, #3380, #3.1.1, Wai 2764, #3.1.1, Wai 745, #2.203).

Ngā tāpaetanga a te Karauna / Crown submissions

18. The Crown opposes the applications for urgency (Wai 3375, #3.1.6, Wai 745, #2.208 & Wai 3383, 3.1.2).

The funding scheme issue

19. The Crown argues that there is no significant or irreversible prejudice to the applicants as a result of Te Arawhiti's administration of the funding scheme to date (Wai 3375, #3.1.6).

Te Arawhiti acknowledges that delays have occurred processing and paying funding requests, but say they have taken steps to address those delays (Wai 3375, #A2).

20. The Crown submits it is too early to determine whether prejudice will arise and while the maximum amount of funding available per applicant has been lowered, funding will still be available to applicants participating in substantive hearings scheduled for the 2024/25 financial year (Wai 3375, #3.1.6). The Crown also submits that the Tribunal has already inquired into claims concerning the funding scheme in Stage One and has recommended that the Crown cover all reasonable costs that claimants incur pursuing applications under the Act regardless of pathway. The Crown contends that it would not be an efficient use of Tribunal resource to conduct a further urgent inquiry into the same issues and claimed relief (Wai 3375, #3.1.6).
21. The Crown acknowledges that until 1 July 2024, applicants had not received information on how the available appropriation for the 2024/25 financial year would be applied, as there was insufficient time to engage with the applicants before decisions were made. The Crown submits that Te Arawhiti informed the applicants of those decisions as soon as it was able to.

The section 58 issue

22. In a memorandum dated 5 July 2024, Crown counsel advised that no decisions had been made concerning amending s 58 of the Act. Counsel argued that as such, an urgent inquiry into this was premature.
23. In its 10 July 2024 memorandum, Crown counsel advised that Cabinet had now made initial decisions regarding its intention to clarify s 58 of the Act, and that this will have material impacts on live MACA proceedings. Counsel submits that these decisions are confidential. Counsel advised that they are urgently seeking instructions on when these decisions will be announced. They are unable to provide further information at this time (Wai 745, #2.208).
24. As initial decisions have been made, Crown counsel no longer submit that an urgent inquiry into s 58 of the Act would be premature. However, the Crown maintains its position that an urgent inquiry into these claims would have limited utility (Wai 745, #2.208).

Ngā tāpaetanga whakahoki a ngā kaitono / Applicant Submissions in Reply

25. During the 17 July 2024 judicial conference, Mr Lyall submitted that the Crown's failure to disclose the potential amendments to s 58 of the Act highlights the risk of the Crown introducing a Bill urgently. Mr Lyall does not accept that there would be no utility in an urgent inquiry even if the amendments are introduced to the House. Mr Lyall argues that the Crown's lack of candour should lean in favour of granting an urgent inquiry.
26. At the judicial conference, Mr Bennion argued the suggestion that the Crown is aware of the Tribunal's view on s 58 of the Act overlooks that the Stage Two report made interim findings because the decision in *Re Edwards (Whakatōhea)* was under appeal. He says as a good Treaty partner, the Crown should be interested in hearing further comment from the Tribunal, rather than mischaracterising its earlier work.
27. The applicants further submit it is a reasonable inference that the proposed amendment will make tests under section 58 more onerous to meet than they already are and suggest that the wording "Parliament's original intent" is used to add a pretence of constitutional

legitimacy to the intention to advance the views of industry and non-Māori groups at the expense of Māori customary rights (Wai 3383, #3.3.1).

28. The applicants also submit that engagement with applicants on funding matters has not been clear or understood. Furthermore, applicants face challenges communicating and meeting with Te Arawhiti. The applicants dispute deductions made by Te Arawhiti and also dispute the claims that Te Arawhiti do not have any outstanding reimbursement requests from certain applicants (Wai 2764, #A5).

He aha ngā mātāpono o te ture / What legal principles apply?

29. We have jurisdiction to inquire into these issues per s 6(1) of the Treaty of Waitangi Act 1975. We can inquire into any policy, practice, act or omission adopted by or on behalf of the Crown or proposed to be adopted by or on behalf of the Crown which is likely to prejudicially affect any Māori.

30. The Tribunal's *Guide to Practice and Procedure* states that:

In deciding an urgency application, the Tribunal has regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Kōrerorero / Discussion

Should we grant an urgent inquiry into the funding issues?

31. The applicants make three broad allegations concerning the funding scheme:

- (a) There are unreasonable delays by Te Arawhiti processing and paying funding requests;
- (b) The Crown has unilaterally decided to limit further funding without consulting Māori; and

- (c) The funding now available is not sufficient to properly advance the applicants' claims in the High Court pathway.

Should we grant an urgent inquiry into the delays processing and administering the funding?

- 32. The Crown accepts that there have been significant delays processing and paying funding requests. It says that in most cases, Te Arawhiti has been unable to meet its own 20 working day timeframe (Wai 3375, #A2). Ms Dagg says this has resulted from a number of factors (Wai 3375, #A2):
 - (a) In late 2023 and into the first half of 2024, Te Arawhiti dealt with an unprecedented volume of funding requests. These were more complex on average than Te Arawhiti's previous experience.
 - (b) The Te Arawhiti team that worked on funding requests was small (three people and one manager). The team found it difficult to keep up with the large volume of funding requests.
 - (c) The team regularly received funding requests from applicants and counsel that did not comply with the funding guidelines or lacked necessary information. This added to the timing and complexity issue.
- 33. Te Arawhiti has taken steps to address this backlog. It has increased the size of the team to process the requests. It has also increased its expected processing timeframe from 20 working days to 45 working days (Wai 3375, #A2).
- 34. It is disappointing to see that Te Arawhiti continues to struggle with delays processing and paying funding requests. This was an issue before us during Stage One of our inquiry. We are concerned that four years after we issued our Stage One report, these delays continue.
- 35. We are also sceptical over the Crown's response to these delays. While we welcome Te Arawhiti engaging more staff to improve processing times, increasing the standard processing timeframe from 20 working days to 45 working days does not contribute in any way to faster processing and payment of funding requests. It is a self-serving attempt to artificially inflate Te Arawhiti's performance by bringing what were significantly delayed payments within Te Arawhiti's new, and very extended, processing window.
- 36. Despite these concerns, we do not consider that these issues meet the high threshold justifying an urgent inquiry. We accept that increasing the staff available from three to eight will improve processing timeframes. Te Arawhiti is also committed to processing and paying all eligible funding requests, and reimbursement of eligible costs, incurred by applicants up to 30 June 2024 (Wai 3375, #A2).
- 37. We consider these ongoing delays processing and paying funding requests will cause prejudice to the applicants. However, with the projected decrease in processing time, and the commitment to honour outstanding eligible payments, we are not satisfied that this prejudice will be significant or irreversible.
- 38. We also consider that the Tribunal's limited resources will not be best spent inquiring into individual processing times, or disputes over whether a particular payment complies with the funding guidelines. Our time and resources will be best served focussing on the new changes that have been made to the funding scheme.

Should we conduct an urgent inquiry into the Crown failing to consult with Māori over the changes to the funding scheme?

39. The Crown accepts that it did not consult with Māori over the review of the funding scheme in 2024 (Wai 3375, #A2). It also appears that the Crown did not consult prior to Cabinet's decision which declined to approve additional funding for the 2024/25 financial year and future years.
40. The Crown's failure to consult will likely form a significant issue in this urgent inquiry. However, when deciding whether to grant an urgent inquiry, the key issue is whether the 2024 changes to the funding scheme provide adequate funding to allow applicant groups to properly prosecute, and defend, their applications in the High Court pathway. For example, if the Crown implemented changes without consulting Māori, but the new scheme still provided adequate funding, it is unlikely that there would be significant and irreversible prejudice justifying an urgent inquiry. For this reason, we proceed to consider whether we should conduct an urgent inquiry into the 2024 changes to the funding scheme.

Should we conduct an urgent inquiry into the funding scheme for the 2024/25 financial year?

41. The Crown has committed to providing a contribution to the costs for all scheduled substantive hearings for the 2024 / 25 financial year. The amount of funding available per applicant has been capped. Funding for pre-hearing and hearing costs has also been aligned with legal aid rates (Wai 3375, #A2).
42. The funding cap per applicant is (Wai 3375, #A2(a) at FMD-4):
- (a) \$140,000.00 for substantive hearings;
 - (b) \$25,000.00 for follow up hearings; and
 - (c) \$30,000.00 for appeals.
43. All applicants are required to have a budgeted workplan approved by Te Arawhiti before funding is provided (Wai 3375, #A2(a) at FMD-4).
44. The new rates for counsel are (Wai 3375, #A2(a) at FMD-4):
- (a) Senior Associate / Senior Solicitor / Barrister
 - i. High Court - \$167.00 per hour excluding GST
 - ii. Court of Appeal and Supreme Court \$178.00 per hour excluding GST
 - (b) Solicitor / Associate
 - i. High Court - \$150.00 per hour excluding GST
 - ii. Court of Appeal and Supreme Court \$161.00 per hour excluding GST
 - (c) Junior
 - i. High Court - \$134.00 per hour excluding GST
 - ii. Court of Appeal and Supreme Court \$146.00 per hour excluding GST
45. This can be contrasted with the rates available under the prior scheme (Wai 1092, #B1(a) at KFB-1 #9):

- (a) Senior Associate / Solicitor / Barrister - \$250.00 to \$350.00 per hour excluding GST;
 - (b) Solicitor / Associate - \$150.00 to 250.00 per hour excluding GST;
 - (c) Junior – up to \$150.00 per hour excluding GST.
46. These changes demonstrate a significant reduction between the rates now available compared to the higher rates for senior and mid-level counsel that were previously available.
47. While it could be said that aligning these rates with legal aid rates is reasonable, we are concerned that legal aid rates may be far below market rates and do not reflect the nature or complexity of the work required in the High Court pathway. For example, the High Court has fixtured nine weeks of hearing from 19 August 2024 to hear the Whangarei 1(b) applications (Whangarei Coast). This proceeding is large, complex and involves multiple overlapping applications from numerous applicant groups. A proceeding of this size and nature requires senior counsel. We are sceptical whether a plaintiff could retain senior counsel for a nine-week hearing before the High Court, of this size and complexity, in any other proceeding, at a rate of \$167.00 per hour.
48. Of greater concern is the maximum cap that has been imposed on applicant groups. We have no information from the Crown to determine how this maximum cap has been assessed or whether it is sufficient to properly prosecute these applications. It appears this cap covers all costs including travel, accommodation and food, as well as costs to prepare for and appear at the hearing. We have no assessment of costs for travel, accommodation and food to attend a nine-week hearing and how much funding will remain to cover pre-hearing and hearing costs (even at a low rate of \$167 per hour).
49. To put this funding cap into context, scale costs per the High Court Rules in category 3 proceedings, for sole or principal counsel, to appear at a nine-week hearing is \$158,850.00.¹ These scale costs exceed the total funding cap available under the revised funding scheme for a substantive proceeding in the High Court yet:
- (a) These scale costs only cover attendance at the hearing, and do not include preparation time;
 - (b) These scale costs do not cover other associated costs such as expert witnesses; and
 - (c) The scale costs are based on a contribution of two-thirds of a reasonable daily rate.²
50. In the absence of any analysis or information from the Crown as to how these funding caps have been determined, this comparison increases our concern that the new funding

¹ High Court Rules 2016, rr 14.2 – 14.3, schedules 2 – 3.

² High Court Rules 2016, r 14.2(1)(d).

caps may be severely inadequate to allow applicants to properly prosecute their applications.

51. The new funding scheme also has to be considered within the wider context of this legislation. This legislative scheme arose because Māori claimants sought a declaration in the Māori Land Court that a portion of the foreshore and seabed was Māori customary land. Following the decision of the Court of Appeal in *Ngati Apa*,³ the Crown chose to legislate to limit the recognition of Māori rights in the takutai moana firstly through the Foreshore and Seabed Act and then through the MACA Act.
52. Under the MACA regime, the Crown imposed a statutory deadline which meant that any applicant group that wanted to seek recognition of their rights had to apply in either the High Court or the Crown engagement pathway by 3 April 2017. This resulted in a flood of applications shortly before that deadline. Since then, the High Court has undertaken intensive case management of those applications to bring them on for hearing in an orderly and timely manner (Wai 1092, #B1(a) at KFB-1 #131).
53. The Crown has responsibly recognised that many applicant groups do not have the financial capacity to engage in such litigation and so it initiated this funding scheme to assist those groups to advance those applications. The Crown has now chosen to make significant reductions to that funding, without consulting those applicant groups, and without providing any analysis to demonstrate that the funding now available is sufficient to allow those groups to prosecute their claims.
54. In short, the Crown created this situation. We now have real concerns over whether the funding available for the 2024/25 financial year is sufficient to allow those applicant groups to properly prosecute their applications under the Act. If that funding is not sufficient, the Crown is setting up Māori to fail under a scheme it has imposed which already limits the recognition of their rights.⁴ If that is the case, these applicant groups will suffer, or are likely to suffer, significant and irreversible prejudice.
55. We consider an urgent inquiry into these issues is necessary.

Is there any utility inquiring into this issue?

56. The Crown refers to our recommendation in the Stage One report that the Crown should fund all reasonable costs that claimants incur pursuing applications under the Act, regardless of pathway. The Crown argues that it already has the benefit of that recommendation and so it would not be an efficient use of the Tribunal's resources to conduct a further inquiry into the same issues.
57. We accept that in Stage One we made an overarching recommendation that the Crown fund all reasonable claimant costs. However, we do not agree that there is no utility inquiring into the changes to the funding scheme for the 2024/25 financial year.
58. Our recommendation that the Crown fund all reasonable costs was an overarching recommendation arising from the Stage One inquiry. We also went on to make specific

³ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

⁴ *Re Edwards (Whakatōhea No 2)* [2021] NZHC 1025 at [33].

findings and recommendations on the funding policy in place at that time.⁵ The Crown took those findings and recommendations into account when it undertook its first review of the funding scheme following the Stage One hearings (Wai 3375, #A2).

59. The changes to the funding scheme for the 2024/25 financial year are entirely new. While our overarching recommendation may still be useful, we consider that the Crown, and applicants, would benefit from:

- (a) A finding on whether the funding scheme for the 2024/25 financial year is treaty compliant; and
- (b) If not, any specific recommendations we may have on how the Crown can address any prejudice that may arise.

Should we inquire into the funding scheme for the 2025 / 26 financial year and beyond?

60. The Crown has not yet made any decisions on funding for the 2025/26 financial year and beyond. It also intends to engage with applicant groups on those proposed changes (Wai 3375, #A2).

61. We agree with the Crown that it is premature to conduct an inquiry into future funding.

Summary on funding

62. For these reasons, we are going to conduct an urgent inquiry into the 2024 changes to the funding scheme. The focus of this part of the inquiry is whether the Crown has acted consistently with Treaty principles, on both process and outcomes, when determining the funding available for the 2024/25 financial year.

Should we conduct an urgent inquiry into the proposed amendments to s 58 of the Act?

63. Section 58 of the Act sets out the test for customary marine title. As we said in our Stage Two report, the test for customary marine title is an issue of primary importance in the wider MACA inquiry.⁶ Customary marine title is the strongest form of recognition of Māori rights under the Act. Any amendment to that test could have a significant impact on the ability of claimant groups to obtain customary marine title.

64. The Coalition Agreement between the New Zealand National Party and New Zealand First states (Wai 1092, #B1(a) at KFB-1 #159):

The Coalition Government will reverse measures taken in recent years which have eroded the principle of equal citizenship, specifically we will:

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

⁵ Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 inquiry Stage 1 Report* (Wai 2660, 2020, at 129.

⁶ Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 inquiry Stage 2 Report* (Wai 2660, 2020), at 102.

65. Unfortunately, the Crown has provided very little information on what amendments are proposed, or the steps or timeframe it intends to adopt. All we have to date are two Crown memoranda. In the first memorandum of 5 July, the Crown advised that no decisions had been made and so an inquiry was premature. Five days later, the Crown filed a second memorandum which recorded a change in position (Wai 3379, #3.1.3):

6. ...counsel are instructed that Cabinet has made initial decisions regarding the Government's intention to clarify s 58 of the Act that will have material impacts on live MACA proceedings. Those decisions are subject to confidentiality. Counsel are seeking instructions on when those decisions (and further supporting Cabinet decisions yet to be made) will be announced and are unable to provide further information at present. Counsel will advise once instructions are received.

7. ...the Crown no longer submits that an urgent inquiry would be premature in light of the discussion in paragraph 6 (of this memorandum) directly above.

66. Mr Lyall has filed a copy of a briefing paper from Te Arawhiti to Ministers dated 17 February 2024 concerning the Fast Track Consenting bill (Wai 3375, #3.1.2(a)). That paper contains a background section titled: *How do Treaty Settlements, Takutai Moana and other arrangements intersect with consenting and other approvals?* In that section, Lil Anderson, the Tumu Whakarae for Te Arawhiti, states:

The Coalition Government has also committed to amend the test for CMT to better align with Parliament's original intent – that there is a very high bar to meet the test (so that consequently, it is expected there would be relatively few areas of coastline subject to CMT).

67. We have no further information on the proposed amendments. Mr Lyall argues that the Crown has a duty of candour to the Tribunal that is analogous to that in judicial review proceedings. He relies on the decision in *Henderson v Privacy Commissioner*,⁷ where the High Court found:

...as a general principle, decision-makers have a duty to disclose to the Court material relevant to a decision being judicially reviewed... The Court normally expects public bodies to disclose relevant material, which is one reason why discovery is not required as a matter of course under the Judicature Amendment Act, and an adverse inference may be drawn where a decision maker has failed to do so.

68. We agree that those principles apply to proceedings before the Tribunal. If anything, that duty is heightened in this jurisdiction because of the Treaty principles that apply to the

⁷ *Henderson v Privacy Commissioner* [2010] NZHC 554 at [108].

Crown and Māori as Treaty partners. That includes the duty to act reasonably, honourably and in good faith.⁸

69. We accept that those obligations can be qualified where there are genuine grounds of confidentiality that justify non-disclosure. Mr Lyall disputes the claim of confidentiality here. Ultimately, it is not necessary to decide that now. Crown counsel, Mr Stephens KC, told us that we have before us the Crown's response to the applications seeking an urgent inquiry, and we should make our decision on whether to grant urgency based on that material.⁹

70. Although the information before us is limited, we do know as follows:

- (a) The Coalition Agreement provides that the Government will amend s 58 of the Act to make clear 'Parliament's original intent';
- (b) Initially, we were told no decisions had been made and so an inquiry was premature.
- (c) Five days later, Cabinet has made initial decisions on the proposed amendments to s 58 of the Act;
- (d) Those amendments will have a material impact on live MACA proceedings;
- (e) According to Ms Anderson, the amendments will result in a very high bar to meet the test, so that consequently there would be relatively few areas of coastline subject to customary marine title;
- (f) There has been no consultation with Māori over the proposed amendments; and
- (g) The Crown no longer argues that an urgent inquiry is premature.

71. The only inference that we can draw from the limited information available, is that the Crown is going to amend s 58 of the Act, without consulting Māori, to intentionally make it harder for Māori claimant groups to successfully obtain customary marine title. There is no information to demonstrate that those proposed amendments are based on treaty principles, tikanga, Māori customary law, or even common law principles of aboriginal title. The only justification provided to us is to ensure that the test better aligns with 'Parliament's original intent' and to reverse measures taken in recent years that have eroded the principle of equal citizenship. It is not clear what is meant by either of those explanations. The Crown now submits that an urgent inquiry is no longer premature. From that, we infer that the proposed amendments are imminent. We consider that Māori will, or are likely to, suffer significant and irreversible prejudice from such an approach.

⁸ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 667; Waitangi Tribunal, *The Tarawera Forest Report* (Wellington : Legislation Direct, 2003), p 26 ; Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims* (Lower Hutt : Legislation Direct, 2015), p 12.

⁹ Mr Stephens also told us that he is seeking instructions on whether the Crown is going to maintain its claim of confidentiality. We have not heard further from Mr Stephens on this.

72. The Crown also argues that there would be limited utility inquiring into these proposed amendments. It says:

- (a) These claims are analogous to the claims we inquired into and reported on in Stage Two;
- (b) We made interim findings and a recommendation on s 58 of the Act in the Stage Two report; and
- (c) That is available to the Crown in any process to amend the Act.

73. We do not agree. The award of customary marine title is the cornerstone provision in the Act that recognises and provides for Māori interests in the takutai moana. In our Stage Two report we reported on the test in s 58 of the Act as it had been interpreted and applied in *Re Edwards*. We also commented that:¹⁰

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

74. Given the significance of the test for customary marine title, we granted leave for the parties to seek a further finding and recommendation should the approach to the test change on appeal. The Crown is now proposing to change the test in a far more radical manner. Clearly, our earlier findings and recommendation will have even less relevance in those circumstances. We consider the Crown, and claimants, will benefit from any finding and recommendation we may make on the proposed amendments.

¹⁰ Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 inquiry Stage 2 Report* (Wai 2660, 2020), at 102- 103.

75. For these reasons, we have granted an urgent inquiry into the Crown's proposed amendments to s 58 of the Act.

The Registrar is to send a copy of these reasons to counsel for the applicant, Crown counsel and those on the notification list for the Wai 3400 Marine and Coastal Area (Takutai Moana) Act Coalition Changes Urgent Inquiry.

DATED this 26 day of July 2024



Judge M P Armstrong
Presiding Officer
WAITANGI TRIBUNAL



Tā Pou Temara
Tribunal Member
WAITANGI TRIBUNAL



Ron Crosby
Tribunal Member
WAITANGI TRIBUNAL



Professor Rawinia Higgins
Tribunal Member
WAITANGI TRIBUNAL