THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 INQUIRY STAGE 2 REPORT

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HE HUAHUATAU

Sir Pou Temara / Professor Rawinia Higgins

Whakarauika ngā iwi e,
Whakarauika, ki runga o Aotearoa.
Whakaopeti ngā wheua e, i te takutai
Toia mai ngā ika i te moana
Kia kai te iwi Māori i te hua nui
Ngā uri o Tūtara-kauika, o Te Wehenga-kauki
Te oranga o te iwi Māori
Auē e te iwi e!
I tēnei rā kua ara ake he taniwha hou
Hei ārai i te mana o Tūtara-kauika
Ko tōna ingoa ko te ture Takutai Moana
Ko tōna mana, hohonu atu i te moana o Te Wehenga-kauiki
Nui atu i te atuatanga o Tangaroa
Ko tāna mahi he aukati i te mana o te Māori
Ki ngā hua o Hinemoana
I tāmirotia ai e ngā atua o te pō
Engari koe, te ture Takutai Moana
Teitei atu i te aroha o ngā atua o te Māori
He aukati i te whakapapa o te Māori ki te moana
He whakawehewehe tangata,
Iwi ki te iwi
Hapū ki te hapū
Māori ki te Pākehā
Mō te aha te hua?
Ko iwi huhua ka whiwhi
I a hua nui
Ko iwi iti ka whiwhi
I a hua iti
Ko te Māori ka kai i ngā toenga
E te iwi e, kei hea te mana orite?
E te Tiriti e, kei hea tō manaakitanga?

Gather o' people
Gather upon Aotearoa.
Gather the bounteous flesh from the shore
Haul forth the fish from the sea
So as to feast upon the great repast
Gifts of Tūtara-kauika and Te Wehenga-kauki
That have sustained the Māori people
Alas o' people!
Today a new taniwha emerges
To subsume the power of Tūtara-kauika
It goes by the name of the Marine and Coastal Area Act
Its reach is deeper than the domain of Te Wehenga-kauiki
Greater than the deity Tangaroa
Its purpose is to restrict and diminish the rights of Māori
To access the abundance of the ocean maiden
Guaranteed by the deities
But, the Marine and Coastal Area Act
Supersedes the charity of the Māori deities
And limits the genealogical connections of Māori to the ocean
Obliterating the connections between the people
Tribe versus tribe
Hapū versus hapū
Māori versus Pākehā
For whose benefit?
Those with resources will benefit
The most
Those without
Will not
And what little remains may be for Māori
O' people where is the equity?
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Parliament Buildings
WELLINGTON

4 October 2023

Te tai rā, te tai rā e pari nei,
E pari nei ki whea?
E pari ana ki tawhiti nui, ki tawhiti roa, ki tawhiti pāmamao.
Te tai e pari ki whea?
E pari ana ki Aotearoa,
Ki te nohoanga rā o te tangata Māori – Tihei mauriora!

E ngā minita, tēnei ngā maioha ki a koutou. Kua oti i a mātou te wāhanga tuarua o te pūrongo mō te Takutai Moana. Koia tēnei ka tukuna atu hei kai mā ō koutou whatu, hei wānanga mā ō koutou hinengaro i ngā whakaaro o te Rōpū Whakamana i te Tiriti o Waitangi mō tēnei take whakahirahira ki ngā iwi huri taiāwhio i ngā motu o Aotearoa.

We enclose our report on stage 2 of the Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry. This two-stage inquiry was announced in August

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MINISTRY OF JUSTICE
Tāhū o te Ture

2017, following claims that the Act undermines Māori customary rights in the marine and coastal area, thus breaching the Treaty of Waitangi. Acknowledging the importance of the customary rights at stake and the immediacy of the Act's alleged impacts on Māori, the inquiry was accorded a high priority in the Waitangi Tribunal's kaupapa inquiry programme. In the stage 1 report, which was released in 2020, we found that many aspects of the procedural and resourcing regime fell well short of Treaty compliance.

In this stage 2 report, we analyse the Treaty compliance of the Takutai Moana Act itself. We investigate whether the Act's foundations, the Act's mechanisms for recognising claimants' rights, and the rights available under the Act themselves are Treaty compliant.

Undoubtedly, the Marine and Coastal Area (Takutai Moana) Act 2011 is an improvement on the Foreshore and Seabed Act 2004. For example, we consider that the statutory tests for protected customary rights achieve an appropriate balance between Māori interests and other public and private interests. We also acknowledge that owning abutting land may be relevant, but is no longer a mandatory requirement, to obtain a customary marine title. We welcome the Crown's recent efforts to improve the cohesion between the two application pathways (whereby Māori can seek recognition of their rights) through consultation with potential applicants. However, while we acknowledge these improvements, many elements of the Takutai Moana Act still unreasonably and unnecessarily restrict the legal recognition of Māori customary interests in te takutai moana.

We begin our analysis by considering the Crown's consultation with Māori in developing the Act. We find that the marine and coastal area is a taonga and that the Act's impact on this taonga and on the relationship Māori have with it is significant. Therefore, the principles of the Treaty require a high standard of consultation with Māori. Although the Crown consulted with focus groups – an important step – this did not relieve the Crown of its obligation to actively consult and engage with Māori generally. This broader phase of the Crown's consultation process was too short, did not focus on affected Māori as opposed to non-Māori, and did not sufficiently allow Māori to engage with the operational details of the Act. The Crown also failed to demonstrate a genuine willingness to revisit core aspects of its policy proposal on the basis of the feedback it received during the consultation process.

The statutory tests for protected customary rights and customary marine title are crucial components of the Act. As already mentioned, we consider that the test for protected customary rights strikes a reasonable balance between Māori interests and other public and private interests. However, the test for customary marine title – the element of 'without

substantial interruption' specifically – is in breach of Treaty principles. We can see no legitimate reason why existing public and private interests should lead to a substantial interruption of Māori customary rights given that those existing interests are already protected in other parts of the Act. Our finding on this matter is interim only, as the High Court's *Re Edwards* (*Te Whakatōhea No 2*) judgment, which is relevant to the interpretation of the test, is currently under appeal.

The statutory deadline for Māori to apply for recognition of their rights in te takutai moana was not and is not justified. We have formed this view after noting how the Takutai Moana Act's deadline compares with other land-related statutory deadlines, the absence of convincing evidence about why exactly the Crown chose a six-year deadline, and the Crown's flawed argument about legal certainty. We find that the Act's statutory deadline is in breach of Treaty principles. It is of paramount importance that the Crown repeal the deadline, as it is the root of many administrative problems arising from the Act. We urge the Crown to repeal it without delay.

We have identified particular problems with each of the two application pathways. In terms of the High Court pathway, we find that the Crown's failure to provide Māori with a choice between having their applications under the Act heard in the High Court or the Māori Land Court breaches the principle of options. We also see some procedural deficiencies in the referral of tikanga questions to the Māori Appellate Court, which the Act provides for. In terms of the Crown engagement pathway, we find that the unacceptably wide scope of the Crown's discretion, in conjunction with its slow pace of engagement, creates considerable uncertainty for applicants; this too amounts to a breach of Treaty principles.

Concerning the substantive rights that the Act grants to Māori applicants who can satisfy the statutory tests, we identify problems in relation to both protected customary rights and customary marine title. In respect of the first, some of the Act's exceptions from the scope of protected customary rights – spiritual activities being exempt and aquaculture activities being allowed to continue even if they adversely affect protected customary rights – undermine the legal award of protected customary rights. We consider this amounts to a breach of the principle of partnership.

With regard to customary marine title, we closely examine the permission rights (as well as the exceptions to them), the limits on alienation of customary marine title, the wāhi tapu protection right, the right to create a planning document, and the legal status of reclaimed land. Although the permission rights are the strongest statutory rights recognised under the Act, we consider that their impact is severely undermined by the exceptions of accommodated activities and deemed accommodated

activities, some of which are not justified. Concerning alienation, we find that the Act prevents customary marine title holders from granting a lease or a licence over a customary marine title area without providing an adequate substitute. Furthermore, the wāhi tapu protection right does not allow Māori to effectively protect wāhi tapū and wāhi tapu areas; a key problem is that the Act requires Māori to obtain a customary marine title before they can seek protection of their wāhi tapu. Regarding the right of customary marine title holders to create a planning document, we are concerned that the framework in place does not sufficiently support either Māori or regional councils for the concept to work. Finally, we are concerned that the Act vests reclaimed land in the Crown, extinguishing Māori customary rights and preventing the grant of a customary marine title and protected customary rights without compensation.

Overall, we find that the Act does not sufficiently support Māori in their kaitiakitanga duties and rangatiratanga rights, nor does it provide for a fair and reasonable balance between Māori rights and other public and private rights. Therefore, the Marine and Coastal Area (Takutai Moana) Act 2011 is in breach of principles of the Treaty of Waitangi. The claimants have been, and will likely continue to be, prejudiced by it.

To give effect to Treaty principles and alleviate the existing or likely prejudice to Māori we have identified, the Tribunal recommends that the Crown make targeted amendments to the Act based on the claims that have been heard and upheld. Specifically, we recommend:

- improving the statutory test for customary marine title (subject to the outcome of appeals following the High Court's *Re Edwards (Te Whakatōhea No 2)* judgment);
- repealing the statutory deadline;
- allowing concurrent jurisdiction between the High Court and the Māori Land Court to hear and grant recognition orders under the Act;
- allowing applicants the ability to transfer their applications from the High Court to the Māori Land Court (and vice versa) and improving the process for referring questions of tikanga to the Māori Appellate Court;
- improving and speeding up the Crown engagement pathway;
- repealing specific exceptions to the scope of protected customary rights;
- repealing specific exceptions to the scope of permission rights;
- increasing the scope of the Act's compensation regime;
- making procedural improvements to the practical exercise of permission rights;

- decoupling the wāhi tapu protection right from the customary marine title regime;
- improving the effectiveness of the wāhi tapu protection right;
- enabling customary marine title holders to appeal to the Environment Court on matters relating to their right to create a planning document;
- compensating affected iwi, hapū, and whānau for all reclaimed land vested in the Crown;
- granting a right of pre-emption in relation to reclaimed land for iwi and hapū in the area; and
- adding the ability to impose temporary rāhui following a death at sea to the award of protected customary rights.

We emphasise that these recommendations should be implemented as a package to restore a fair and reasonable balance between Māori interests and those of the public in te takutai moana. We warn against 'cherry-picking' individual recommendations; doing so would fail to restore the balance the Treaty requires. If the Crown elects to implement some, but not all, of our recommendations, it would have to address the resulting imbalance of interests by other means, such as by paying suitable compensation for the unreasonable restriction of Māori rights in this significant taonga.

The Takutai Moana Act is certainly a step in the right direction. But now is not the time to be idle. It is imperative that the Crown implement these targeted improvements to the Act without delay to ensure that te takutai moana is governed by Treaty compliant laws.

Nāku noa, nā

Judge Miharo Armstrong
Presiding Officer

ABBREVIATIONS

app	appendix
Auck U L Rev	*Auckland University Law Review*
CA	Court of Appeal
ch	chapter
CJ	chief justice
cl	clause
CMT	customary marine title
doc	document
ed	edition, editor
J, JJ	justice, justices
KC	King's Counsel
ltd	limited
MACA	marine and coastal area
memo	memorandum
n	note
no	number
NZAR	*New Zealand Administrative Reports*
NZHC	*New Zealand High Court*
NZLR	*New Zealand Law Reports*
NZSC	*New Zealand Supreme Court*
p, pp	page, pages
para	paragraph
PCR	protected customary rights
pt	part
ROI	record of inquiry
r, rr	rule, rules
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sch	schedule
subpt	subpart
UNCLOS	United Nations Convention on the Law of the Sea
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, statements of issues, submissions, and transcripts are to the Wai 2660 record of inquiry, a select index to which is reproduced in appendix II (not included in this edition). A full copy of the index is available on request from the Waitangi Tribunal.

CHAPTER 1

THE CONTEXT FOR THIS INQUIRY

1.1 Introduction

1.1.1 Background to this stage 2 report

This report concerns the second and final stage of our inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 (we also refer to it as 'the Act' or 'the Takutai Moana Act').

The inquiry began in 2016 when Te Kapotai – a coastal hapū from the Bay of Islands in Northland – made an application to the Waitangi Tribunal for an urgent inquiry into the Act.[1] Te Kapotai claimed that the Act undermined and eroded the hapū's customary and common law rights in te takutai moana within their rohe. They alleged that the Act perpetuated many prejudicial aspects of the Foreshore and Seabed Act 2004, which preceded it. They identified three key forms of prejudice arising from the 2011 Act:

- The legislation prevented them from owning te takutai moana in their rohe, but left the Crown free to exercise full authority over it.
- The Act had redefined and limited their legal rights and interests to an extent that was inconsistent with the Treaty and prevented them from exercising their rangatiratanga or partnering with the Crown.
- To seek recognition of their rights, they had to comply with a unilaterally imposed statutory deadline for filing applications (3 April 2017) and follow either High Court or Crown engagement processes that were cumbersome, unfair, and risky.[2]

Following Te Kapotai's application to the Tribunal, 17 other whānau, hapū, and/or iwi from around the motu filed claims and applications for urgency.[3]

In March 2017, Chief Judge Wilson Isaac – then chairperson of the Waitangi Tribunal – declined the applications for urgency on the grounds that an alternative remedy was still available to applicants, as the statutory deadline for applications to have their rights recognised under the Act had not yet passed.[4] Claimants had still been able to file applications for recognition of their customary rights in te takutai moana. However, in August, after that deadline had passed, the chairperson granted priority 'for a kaupapa inquiry into the marine and coastal

1. Claim 1.1.1; memo 3.1.1
2. Claim 1.1.1, pp 3–4
3. Claims 1.1.2–1.1.18; memoranda 3.1.2, 3.1.3, 3.1.6, 3.1.14, 3.1.18, 3.1.21, 3.1.24, 3.1.26, 3.1.27, 3.1.35, 3.1.55, 3.1.62, 3.1.64
4. Memorandum 2.5.5, p 8

area/takutai moana claims, targeted on the legislative framework and applications process established under the MACA [Marine and Coastal Area Act]'.[5] Its priority status reflected the 'immediacy and significance' of the issues raised.[6]

The inquiry is divided into two stages.[7] In stage 1 we considered whether the procedural and resourcing arrangements supporting the Act breached the Treaty and prejudicially affected Māori. Hearings were held in March and August 2019, and our ensuing report – *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* – was released at the end of June 2020.[8] The findings set out in that report are final, and stage 1 issues were not relitigated in stage 2 hearings.

The key issue addressed in this second stage of the inquiry – comprising seven weeks of hearings held between September 2020 and November 2021 in Wellington, Northland, and the Bay of Plenty – is whether the Act itself breaches the Treaty and causes prejudice to Māori.[9] These matters are the subject of this report.

1.1.2 The Tribunal panel

Then chairperson, Chief Judge Isaac appointed Judge Miharo Armstrong as presiding officer for the inquiry in October 2017, and Ron Crosby, Professor Rawinia Higgins, and Dr Hauata Palmer as panel members.[10] Later, during the hearings for stage 2 of the inquiry, Dr Palmer recused himself from the panel and Tā Pou Temara was appointed in his stead.[11]

1.1.3 The parties

The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry concerns 92 claims from various individuals, whānau, hapū, iwi, and/or other entities, including trusts, district Māori councils, and rūnanga spread across the country. In addition, 75 parties were granted interested party status. A full list of the claimants and their claims, as well as the interested parties, appears in appendix I.

The Crown Law Office appeared in response on behalf of the Crown.

1.1.4 The issues for determination

This stage 2 report addresses the following overarching question:

5. Memorandum 2.5.8, p 9
6. Ibid, p 8
7. Memorandum 2.5.16, p 6
8. Memoranda 2.5.29(a), 2.6.2(a), 2.6.6, 2.6.10; Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2020)
9. Memoranda 2.6.25, 2.6.31(a), 2.6.36(a), 2.6.39(a), 2.6.43, 2.6.44(a), 2.6.47(a), 2.6.52(a), 2.6.53(a), 2.6.63(a), 2.6.71(a), 2.6.75(a), 2.6.85(a)
10. Memoranda 2.5.9, 2.5.12
11. Memorandum 2.6.62. Dr Palmer recused himself from the panel to avoid the appearance of bias, as he had previously supported a High Court application of one of the claimants for recognition of customary interests under the Act.

> To what extent, if at all, are [the Marine and Coastal Area (Takutai Moana) Act 2011] and Crown policy and practice inconsistent with the Treaty in protecting the ability of Māori holders of customary marine and coastal area rights to assert and exercise those rights?[12]

This broad question in turn gives rise to the following specific questions, as expressed in the statement of issues:

3. What framework does the MACA Act create to recognise and provide for Māori interests in the takutai moana?
4. In developing the policy that underpins the MACA Act, what considerations did the Crown take into account? To what extent did the Crown consider the findings and recommendations of the Wai 1071 Foreshore and Seabed Tribunal and Ministerial Review Panel?
5. What is the effect of the MACA Act on Māori interests in the takutai moana?
6. To what extent, if at all, are the MACA Act and the Crown's policy and practice inconsistent with the principles of the Treaty/Te Tiriti?
7. To what extent does the MACA Act recognise and provide for tino rangatiratanga and Māori interests in the takutai moana?
8. To what extent, if at all, do the MACA Act and the Crown's policy and practice prejudicially affect Māori, including in relation to:
    a) the statutory deadline for filing an application on or before 3 April 2017; and
    b) dissension caused, if any, between Māori, between the public, and between Māori and the public?[13]

In focusing on these issues, we have avoided revisiting those already considered by the Foreshore and Seabed Tribunal in its *Report on the Crown's Foreshore and Seabed Policy* (2004), except where those earlier issues provide critical context for the matters before us now.[14] Nor do we comment on the legislation giving effect to individual Treaty settlements that provide rights in te takutai moana, such as the Ngāti Pāhauwera Treaty Claims Settlement Act 2012 or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019. Again, we discuss these only where they concern the Treaty-compliance of the Takutai Moana Act. We also reiterate comments made by the chairperson when granting priority – namely:

> this Tribunal cannot and will not intervene in the High Court proceedings now underway or pending, whether to offer 'guidance' or for any other purpose. Nor is it

12. Memorandum 2.5.8, p 9; memo 2.5.16, p 6
13. Statement of issues 1.4.1, paras 3–8. Note that this list starts at number 3, as the first two issues concern preliminary questions.
14. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004); see also memo 2.5.8, p 7; Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 3.

appropriate for the Tribunal to stand between applicants and the Crown where they are freely engaging in direct negotiations.[15]

This report will therefore 'not inquire into the substance of applications for recognition of customary marine and coastal area rights lodged with the High Court, or applications for direct engagement with the Crown.'[16]

Finally, we have elsewhere noted the 'unavoidable overlap' arising at times between the two stages of this inquiry. Some topics which were considered in stage 1 will therefore be returned to in this report, although the focus of our discussion will be different. These are the Crown's consultation with Māori, the two application pathways, and the statutory deadline for filing applications under the Act; issues that relate equally, but differently, to both stages of the inquiry.[17] In stage 1, we assessed the Treaty-compliance of the Crown's consultation with Māori on funding and operational matters, but reserved our review of the adequacy of the Crown's consultation with Māori on the Act itself for this stage 2 report.[18] Furthermore, we discussed in our stage 1 report whether the High Court process and the Crown engagement process work cohesively, and found they do not. In this report, we elaborate on the consequences of this, and take account of the Crown's most recent consultation with potential applicants about how to improve cohesion between the two pathways. Finally, the statutory deadline was discussed in stage 1 '*to the extent* that it contextualises both the Crown's funding and resourcing decisions and the claimants' experience of the Act's supporting regime' (emphasis in original). In this report, by contrast, we review the Treaty-compliance of the deadline itself.[19]

1.2 Treaty Principles

1.2.1 Our jurisdiction

The Waitangi Tribunal was established by – and derives its jurisdiction from – the Treaty of Waitangi Act 1975.[20] Section 6 provides that any Māori may make a claim to the Tribunal that they have been, or are likely to be, prejudicially affected by any legislation, policy, or practice of the Crown after 6 February 1840. For a claim to be well-founded, it must demonstrate that the Crown's acts or omissions have breached Treaty principles, and that this breach has caused, or will likely cause, prejudice to Māori. If the Tribunal determines that a claim is well-founded, it may – having regard to all the circumstances of the case – make recommendations to the Crown to compensate for or remove the prejudice, or to prevent others from being similarly affected in the future.

15. Memorandum 2.5.8, p 7
16. Ibid
17. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report*, p 14
18. Ibid
19. Ibid
20. Treaty of Waitangi Act 1975, ss 4, 6

1.2.2 What Treaty principles do the parties consider most relevant to this stage 2 inquiry?

(1) *The claimants' submissions*

In their submissions, the claimants focus on the Treaty principles of reciprocity (between kāwanatanga and rangatiratanga), partnership (especially concerning the Crown's duty of consultation), active protection, and redress.

Regarding the principle of reciprocity, which concerns the balance between the Crown's right of kāwanatanga and the Māori right of tino rangatiratanga, claimants cite the Te Raki Tribunal's conclusion in *He Whakaputanga me te Tiriti/The Declaration and the Treaty* (2014) that 'the rangatira who signed te Tiriti in February 1840 did not cede their sovereignty to the Crown'.[21] Claimants also refer to *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018–20), in which the Tribunal emphasised that the Crown's right of kāwanatanga is subject to Māori rights of rangatiratanga,[22] and that kāwanatanga was 'not the supreme and unfettered power that the Crown believed it to be'.[23] Several claimants make similar arguments on the issue of sovereignty in their own individual submissions.[24]

Under the principle of partnership, the Crown has a duty to consult, negotiate, and/or seek Māori consent. Claimants argue that the Crown is required to negotiate with Māori and obtain their agreement in order to meet its Treaty obligations. In support, they cite the Tribunal's *Report on the Crown's Foreshore and Seabed Policy*, which found 'that full compliance with the Treaty would require the Crown to negotiate with Māori and obtain their agreement to a settlement'.[25] Some claimants also make the point that the principle of partnership obliges the Crown to obtain informed consent from Māori to the ownership regime under the Act, citing *He Maunga Rongo: Report on Central North Island Claims* (2008) and *Te Mana Whatu Ahuru* among other sources.[26]

Claimants emphasise that the Crown has a duty to actively protect claimants' tino rangatiratanga over te takutai moana in their rohe,[27] which many claimants

21. Submission 3.3.137(b), pp 19–20, referring to Waitangi Tribunal, *He Whakaputanga me te Tiriti – The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o te Raki Inquiry* (Lower Hutt: Legislation Direct, 2014), p 529

22. Submission 3.3.137(b), p 21

23. Ibid

24. See, for example, submission 3.3.139, pp 2, 28–29; submission 3.3.142, pp 11–13; submission 3.3.143, pp 6–7, 9–10, 13; submission 3.3.144, pp 11–13; submission 3.3.145, p 5; submission 3.3.146, p 4; submission 3.3.147, pp 11–13; submission 3.3.150, p 4; submission 3.3.158, p 16; submission 3.3.165, p 4; submission 3.3.169, pp 6, 13; submission 3.3.175(b), p 3; submission 3.3.179, p 5; submission 3.3.182, p 6.

25. Submission 3.3.137(b), p 19, referring to Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 139; see also submission 3.3.138, p 31; submission 3.3.140(a), p 13

26. Submission 3.3.81, p 7, referring to Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 173; submission 3.3.165, pp 4–5; submission 3.3.169, p 26, referring to Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007), p 5; submission 3.3.179, p 12; submission 3.3.212, p 27

27. See, for example, submission 3.3.89, p 2; submission 3.3.103, p 2; submission 3.3.117, p 3; submission 3.3.137(b), p 59.

expressly call a taonga.[28] The Act, they argue, fails to fulfil this duty.[29] Some claimants – citing the Privy Council's findings in the *Broadcasting Assets* case (1994) – emphasise that 'if a taonga is in a vulnerable state, it may require the Crown to take especially vigorous action, particularly where the vulnerable state can be attributed to past breaches of its treaty obligations'.[30] With regard to the customary title regime under the Takutai Moana Act, some claimants also refer to the Tribunal's Central North Island report.[31] The report stated that 'any failure on the part of the Crown . . . to provide a form of title that recognised customary and Treaty rights of Maori to their taonga [must constitute a prima facie breach of the Treaty principle of active protection]'.[32]

On the principle of redress, several claimants argue that they should be compensated for the loss of rights in the marine and coastal area that would have been available immediately after the Court of Appeal's *Ngāti Apa* decision (2003), but are no longer available under the Marine and Coastal Area Act.[33] Claimants cite the Tribunal's *Te Mana Whatu Ahuru* report, where the Tribunal stated '[s]hould the Crown act in excess of its kāwanatanga powers . . ., the Crown should compensate.'[34] The claimants also reiterate the summary of Tribunal jurisprudence on redress provided in *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* report (2021), the Tribunal's report about tamariki Māori taken into state care.[35]

(2) *The Crown's submission*

The Crown argues, in summary, that Treaty principles do not prescribe a particular course of action that it must take in exercising its right to govern. Rather, the Crown says, it may choose from multiple policy options on how to give effect to its Treaty obligations, 'provided it elects between the available options reasonably and in good faith'.[36] The Crown considers 'questions of sovereignty' and consequences for the interpretation of Treaty principles from the Tribunal's Stage 1 Report of the Te Paparahi o Te Raki Inquiry 'do not properly fall within the scope of this

28. See, for example, submission 3.3.155, p 7; submission 3.3.157, p 3; submission 3.3.158, p 4; submission 3.3.168, p 1; submission 3.3.182, p 178; submission 3.3.200, p 3.
29. See, for example, submission 3.3.89, pp 2–3; submission 3.3.142, p 6; submission 3.3.148, p 9; submission 3.3.158, p 4.
30. Submission 3.3.103, p 3, referring to *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC)
31. Submission 3.3.168, p 5
32. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1243
33. *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA). See, for example, submission 3.3.98, p 5; submission 3.3.136, p 1; submission 3.3.158, p 25; submission 3.3.174, p 11; submission 3.3.182, pp 57, 98, 173; submission 3.3.201, p 21; submission 3.3.206, p 38.
34. Submission 3.3.137(b), p 26
35. Ibid, pp 25–27
36. Submission 3.3.187, p 69

inquiry'.[37] Rather, the Crown submits the principles of partnership and active protection to be most relevant, with its submissions briefly touching on equity (under the headline of active protection) as well.[38]

On the matter of sovereignty, the Crown states that sovereignty-related issues arising from the Tribunal's Stage 1 Report of the Te Paparahi o Te Raki Inquiry are outside the inquiry's scope.[39] It would therefore be 'inappropriate for the Tribunal's inquiry into the Treaty-consistency of the Act to be expanded into a broad, constitutional inquiry into sovereignty issues and the Crown-Māori relationship', the Crown says.[40] The Crown refers to the Tribunal's *Report on the Trans-Pacific Partnership Agreement* (2016) and *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (2019) as examples where the Tribunal refrained from making findings about contemporary sovereignty issues.[41] The Crown submits that the same approach ought to be applied in this inquiry.[42] Although the Crown also considers questions of kāwanatanga to be outside the scope of the inquiry, it does note that, according to the Tribunal, 'kāwanatanga clearly gave the Crown the right to legislate, provided the interests of Māori were recognised and upheld'.[43]

Concerning partnership, the Crown accepts that it has an obligation to make informed decisions on matters that affect Māori interests.[44] However, the Crown maintains that a case-by-case analysis is required to determine the form and extent of the consultation required in any given situation.[45] In any case, consultation does not mean that an agreement must be reached, the Crown adds, relying on the Court of Appeal's *Wellington Airport* case (1993).[46] On multiple occasions, the Crown emphasises that it needs to balance many interests in the marine and coastal area.[47]

In the context of active protection, too, the Crown highlights that 'the degree of protection to be accorded the Māori interest in any particular case . . . will depend on the nature and importance of the interest when balanced alongside the interests of other New Zealanders', quoting from the Tribunal's *Ko Aotearoa Tēnei* report (2011).[48] The Crown also makes the point that the degree of Crown

37. Ibid, p 61
38. Ibid, pp 59, 67
39. Ibid, p 61
40. Ibid
41. Ibid, pp 61–62
42. Ibid, p 62
43. Ibid, p 65, referring to Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: GP Publications, 1996), p 232; Waitangi Tribunal, *The Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 63–66; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 130–132
44. Submission 3.3.187, pp 65–66
45. Ibid, pp 66–67
46. Ibid, p 66
47. Ibid, pp 89, 126, 179, 257
48. Ibid, p 67

protection given to a certain taonga further depends on the taonga itself,[49] and that 'some caution is needed' in indiscriminately 'characterising the entirety of the takutai moana as a taonga for all whānau, hapū and iwi'.[50]

Finally, the Crown states that the principle of equity 'encompasses equity of outcomes and equity of access', citing *The Napier Hospital and Health Services Report* (2001): 'The Crown accepts equity is relevant to evaluating claims concerning inequity of treatment between Māori and non-Māori . . . and Māori vis-à-vis each other.'[51]

1.2.3 What Treaty principles do we consider most relevant?

In our stage 1 report, we focused on the principles of partnership and active protection; these, we said, were the Treaty principles most pertinent to the issues raised in that stage.[52] Both these principles remain important in this second stage of the inquiry. Without wishing to duplicate our earlier report, the following discussion addresses both principles, emphasising their relevance to the specific issue before us now – namely, whether the Act, and Crown policy and practice, adequately protect Māori customary rights in the marine and coastal area. We also address other Treaty principles which we have identified as relevant to stage 2: the principles of options, good government, redress, equity, equal treatment, and whanaungatanga.

(1) *The principle of partnership*

The principle of partnership was first articulated in 1985, in the *Report of the Waitangi Tribunal on the Manukau Claim*.[53] Two years later, the Court of Appeal, in the *Lands* case, defined the Treaty principle of partnership for the first time, noting that the principles of the Treaty 'require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith'.[54] The Tribunal adopted this view in its *Report of the Waitangi Tribunal on the Orakei Claim* (1987), stating that '[t]he Treaty signifies a partnership between the Crown and the Maori people' and that 'the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other'.[55] The Court of Appeal expressed its position again in *Taiaroa v Minister of*

49. Submission 3.3.187, p 68, referring to *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, para 154; Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 272

50. Submission 3.3.187, p 69

51. Ibid, p 67

52. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, pp 17–22

53. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 70

54. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 667

55. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 207

Justice (1995), determining that the test for the Crown's exercise of kāwanatanga must be one of 'reasonableness, not perfection'.[56]

The principle of partnership has since been reaffirmed and developed in many Tribunal reports.[57] Throughout, the Tribunal has continued to emphasise the duties of both Treaty partners 'to act reasonably, honourably, and in good faith' with one another,[58] and in accordance with the principles of reciprocity and mutual benefit.[59] In the *Te Whanau o Waipareira Report* (1998), the Tribunal explained the relationship between partnership and reciprocity in the following terms:

> The perception of a partnership relationship between Maori and the Crown arises from historical evidence of Maori and Pakeha expectations at the time of the Treaty, and the fact that in the Treaty the gift of kawanatanga was in exchange for protection and the guarantee of rangatiratanga in all its forms.[60]

However, the Tribunal has also held that the principle of reciprocity does not mean that Māori gave 'unfettered legislative supremacy over resources' to the Crown.[61] The Tribunal in the *Te Whanau o Waipareira Report* went on to say that the Treaty partnership is one where neither is 'subordinate to the other but where each must respect the other's status and authority in all walks of life'.[62] The Tribunal's *Report on the Crown's Foreshore and Seabed Policy* also commented on the balancing of competing interests under the principle of partnership. It held:

> The Treaty envisaged a future for both peoples, sharing resources and developing them . . . In the balancing of interests required for a successful partnership, we think that there is a place for both peoples and their interests in the foreshore and seabed.

56. *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA), 418

57. See, for example, Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims concerning the Allocation of Radio Frequencies* (Wellington: Brooker and Friend Ltd, 1990), pp 40–44; Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), pp 288–290; Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: Legislation Direct, 1998), pp 28–30; Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 173–174; Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p 151; Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Lower Hutt: Legislation Direct, 2015), vol 1, p 156.

58. 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

59. See, for example, Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), p 22; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 19–20; Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 156.

60. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 27; see also Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), pp 20–21; Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 174; Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt: Legislation Direct, 2019), pp 27–28; Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), p 16

61. Waitangi Tribunal, *Report on Claims concerning the Allocation of Radio Frequencies*, p 42

62. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 28

> . . . [We] accept that the Crown has the authority to develop a policy in respect of the foreshore and seabed. However, the principles of reciprocity and partnership require it to do so in a way that gives meaningful effect to te tino rangatiratanga, and balances the interests of both peoples in a fair and reasonable manner.[63]

The Crown has repeatedly stated that the Takutai Moana Act is the result of balancing competing interests.[64] Balancing the interests of Māori and non-Māori in a fair and reasonable manner is particularly relevant to this inquiry. Importantly, in addition to being fair and reasonable, any such balancing exercise must also be principled. It cannot be arbitrary, particularly where the balancing exercise has the effect of restricting or impacting Māori rights.

How partnership mechanisms between Māori and the Crown can best be designed depends on the subject matter at issue and the parameters of the other partner's role, the Tribunal has found.[65] Each Treaty partner needs to 'respect the other's status and authority in their respective spheres'.[66] This is also true for how Treaty partners acknowledge each other's interests in, and authority over, natural resources.[67] Citing the *Te Whanau o Waipareira Report*, the *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake* report (2015) stated that 'Māori must recognise those things that reasonably go with good governance just as the Crown must recognise those things that reasonably go with being Māori'.[68] The Tribunal went on to say that overlaps between the two Treaty partners 'should be resolved by negotiation and agreement'.[69] In the *Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, the Tribunal considered that 'where matters of core interest to the Māori Treaty partner overlap with the Crown's authority to legislate, the principle of partnership can require a collaborative agreement in the making of law and policy'.[70] However, as the Tribunal held in its *Hauora* report (2019), 'because the power imbalance in the Māori-Crown relationship favours the Crown, it is the Crown's Treaty responsibility to ensure that Māori are not disadvantaged in that relationship'.[71]

63. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 131
64. Submission 3.3.187, pp 54, 126, 179, 257
65. Waitangi Tribunal, *Matua Rautia: The Report on the Kōhanga Reo Claim* (Lower Hutt: Legislation Direct, 2013), p 64, referencing Waitangi Tribunal, *Te Whanau o Waipareira Report*, pp 19–20, 28–31; see also Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Lower Hutt: Legislation Direct, 2015), p 42.
66. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 28, referencing Waitangi Tribunal, *Te Whanau o Waipareira Report*, pp 27–28; see also Waitangi Tribunal, *Motiti: Report on the Te Moutere o Motiti Inquiry* (Lower Hutt: Legislation Direct, 2023), p 17.
67. Waitangi Tribunal, *Mohaka River Report 1992*, p 65
68. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 29
69. Ibid
70. Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, p 17, referencing Waitangi Tribunal, *Whaia te Mana Motuhake*, p 42
71. Waitangi Tribunal, *Hauora*, p 28, referencing Waitangi Tribunal, *Te Whanau o Waipareira Report*, pp xxvi, 16, 30.

The Crown's duty to make informed decisions arises from the principle of partnership. In the *Lands* case, the Court of Appeal held that the duty is not absolute, and its extent will vary depending on circumstances. In some instances, the Crown may have 'sufficient information' without conducting any specific consultation. In others, 'the responsibility to make informed decisions will require some consultation', while sometimes 'extensive consultation and co-operation' may be necessary.[72] At a minimum, the Crown needs to consult with Māori on 'major issues'.[73] The Tribunal has also repeatedly held that it becomes imperative for the Crown to consult with Māori on matters of importance to them, and where important resources are at stake.[74] The Tribunal, in its *Ngawha Geothermal Resource Report* (1993), stated:

> Before any decisions are made by the Crown, or those exercising statutory authority on matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Maori. The Crown obligation actively to protect Maori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.[75]

The duty to make informed decisions in respect of natural resources was also considered in the *Final Report on the MV* Rena *and Motiti Island Claims*. There, the Tribunal held that 'the Crown is obliged to make informed decisions about the impact of proposed legislation, policies, actions, or omissions on Māori interests in the environment and natural resources'.[76] Elsewhere, the Tribunal emphasised that, when it comes to the natural environment, Māori are not just another interest group but the Crown's Treaty partner.[77]

In recent years, the Tribunal has increasingly characterised the Crown's duty to make informed decisions as a duty to seek Māori consent on certain matters. For example, regarding the governance of Māori land, the principle of partnership imposes a duty 'not only to consult with Māori' but requires 'Māori agreement in respect to changing the law as to how they are to own, manage and control their lands under the law'.[78] In its *Mohaka ki Ahuriri Report* (2004), the Tribunal said

72. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 683
73. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA), 152
74. See, for example, Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 272; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 68; Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), p 11; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1237.
75. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, 2nd ed (Wellington: Legislation Direct, 2006), pp 101–102
76. Waitangi Tribunal, *The Final Report on the MV* Rena *and Motiti Island Claims*, p 12
77. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 78
78. Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Lower Hutt: Legislation Direct, 2016), p 202

that, in addition to consulting on such crucial matters, the parties also need to reach agreement – 'except on questions of national interest'.[79] Four years later, in its Central North Island report, the Tribunal stated that the Crown needs to obtain 'full, free, prior, and informed consent [from Māori] to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2 [of the Treaty]'.[80]

(2) *The principle of active protection*

The principle of active protection was considered in early Tribunal reports[81] and affirmed in the *Lands* case.[82] The court held that 'the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties,'[83] and that the Crown's duty to protect Māori rights and interests 'is not merely passive but extends to active protection of Maori people in the use of their lands and waters.'[84] The Tribunal found in its Manukau report that 'the omission to provide [active] protection is as much a breach of the Treaty as a positive act that removes those rights.'[85] In many later reports, the Tribunal has located the principle of active protection, like the principle of partnership, in the exchange of kāwanatanga for tino rangatiratanga – that is, in the principle of reciprocity.[86]

While the Court of Appeal specified that the Crown needs to actively protect Māori rights and interests 'to the fullest extent practicable,'[87] four years later the Privy Council noted in its *Broadcasting Assets* decision that the Crown is 'not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances.'[88] Tribunal reports have found that the extent of the Crown's active protection duty further depends on the context, specifically – if natural resources are concerned – on 'the nature and value' of the resource and who controls it.[89] The Privy Council observed that '[w]here a taonga is in a parlous state, especially as a result of previous Treaty breaches, . . . the Crown may need to

79. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 23

80. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 173; see also Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 70.

81. Waitangi Tribunal, *Report on the Manukau Claim*, p 70; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 2nd ed (Wellington: Brooker's Ltd, 1993), p 1

82. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)

83. Ibid, p 664

84. Ibid

85. Waitangi Tribunal, *Report on the Manukau Claim*, p 70

86. Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: Brooker's Ltd, 1993), p 33; Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p xxv; Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (Lower Hutt: Legislation Direct, 2016), p 6; Waitangi Tribunal, *Motiti*, p 18; see also Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4

87. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664

88. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517

89. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, p 100; Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 265; Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, pp 149–150

take "especially vigorous action for its protection"' – a conclusion that the Tribunal also reached in several reports.[90] The Tribunal subsequently stated that, where Crown and Māori authority overlaps, the extent of the duty of active protection 'may need to be the subject of negotiation and compromise'.[91]

The Tribunal has applied and developed the duty of active protection in many contexts, including 'language, culture, and other taonga of an intangible nature'.[92] Among them is the protection of natural resources, in particular 'the lands, estates, and taonga of Māori', and Māori tino rangatiratanga over these resources.[93] The Tribunal found in its *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993) that of all the taonga whose protection is guaranteed to Māori under article 2 of the Treaty, 'natural and cultural resources are of primary importance'.[94] The active protection of resources is especially relevant where Māori clearly have 'a traditional interest in the resource'; it is required 'for so long as Māori wish that protection'.[95]

That also means that Māori must not be 'unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences'.[96] In fact, any Crown failure to provide a form of title that recognises customary and Treaty rights of Māori to their resources is 'a prima facie breach of the Treaty principle of active protection guaranteed in article 2 [of the Treaty]', as the Tribunal found in its Central North Island report.[97] The Tribunal emphasised elsewhere that as part of its active protection duties, 'the Crown also needs to ensure that Maori retain a sufficient endowment of land and other resources, and receive effective Government aid to fully develop them' so that they have a 'share in the economic benefits that have flowed from colonisation'.[98]

90. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517 (Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 149); see also Waitangi Tribunal, *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wellington: Legislation Direct, 2013), pp 61–62; Waitangi Tribunal, *The Priority Report concerning Māui's Dolphin – Pre-publication Version* (Wellington: Waitangi Tribunal, 2016), p 23

91. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 31

92. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2015), p 23, referring to Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 20; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, p 270; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, pp 100–101.

93. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 149; Waitangi Tribunal, *The Final Report on the MV* Rena *and Motiti Island Claims*, p 12; see also Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 225; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, pp 269–272; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, pp 100–101; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 2, p 638; Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1241–1245.

94. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 31

95. Waitangi Tribunal, *Ahu Moana*, p 67

96. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, p 31; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, p 100

97. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1243

98. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 23

In the *Report on the Crown's Foreshore and Seabed Policy*, the Tribunal stated that the principle of active protection unquestionably encompasses the foreshore and seabed in its fullest sense:

> The foreshore and sea were and are taonga for many hapū and iwi. . . . The Crown's duty under the Treaty, therefore, was actively to protect and give effect to property rights, management rights, Māori self-regulation, tikanga Māori, and the claimants' relationship with their taonga; in other words, te tino rangatiratanga.[99]

The Tribunal considered that in situations where a natural resource was subject to a complex body of laws and many interests were at stake – as is the case with the foreshore and seabed – active protection could be practically achieved through Māori participation in the decision-making process.[100] The Tribunal elaborated in its *Report on the Management of the Petroleum Resource* (2011):

> How is the protection of Māori interests to the fullest extent practicable to be achieved? Our answer is that, in an area of law as complex as petroleum resource management – where a number of important interests are involved, including Māori interests – the only way that the Crown can guarantee Treaty-compliant outcomes is by ensuring that all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made.[101]

(3) *The principle of options*

The principle of options arises from the combination of two different guarantees given to Māori under the Treaty: protection of tino rangatiratanga (under article 2 of the Treaty) and equity with other British subjects (under article 3).[102] The Tribunal has held that the Treaty thereby provides for options for Māori to 'develop along customary lines and from a traditional base' or to 'assimilate into a new way'.[103] It also offers a third option, 'to walk in two worlds', as the Tribunal first put it in the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (1988).[104]

The Tribunal has since applied the principle in many contexts, including fisheries, public health, and land ownership.[105] Applied to this inquiry, the principle of options is relevant in assessing the Treaty compliance of the Takutai Moana Act.

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99. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 28
100. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 150
101. Ibid
102. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 195; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, p 274
103. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 195
104. Ibid
105. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, p 274; Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 65; Waitangi Tribunal, *He Whiritaunoka*, vol 3, p 1472; Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2017), pp 17, 177; Waitangi Tribunal, *Hauora*, pp 35–36

One of the key questions this report therefore seeks to determine is: does the Act provide Māori with adequate options as to how they may choose to seek recognition of their customary rights?

(4) *The principle of good government*

Like the principles of equity, equal treatment, and options, the principle of good government (sometimes referred to as 'good governance') derives from article 3 of the Treaty.[106] The Tribunal held in its Central North Island report in 2008 that 'Put simply, the Treaty principle of good government requires the Crown to keep its own laws and not to act outside the law.'[107] Later, in 2015, it also stressed the importance of the 'rule of law', as the principle of good government is usually referred to outside Treaty jurisprudence, in its Whanganui land report.[108] Furthermore, the Tribunal's *He Whiritaunoka* report observed the Crown's actions cannot be truly consistent with good government unless they are also just and fair – a fundamental idea, the Tribunal noted, 'that was imported to New Zealand in the language of the Treaty'.[109]

More specifically, in its report *He Kura Whenua ka Rokohanga* (2016), which considered decision-making mechanisms under Te Ture Whenua Maori Act 1993, the Tribunal held that the Crown has a duty 'to ensure good government for a national system of individualised Māori title which the Crown's own earlier statutes had imposed on Māori'.[110] Most recently, the Tribunal applied the principle of good government to the area of Māori homelessness. It found that the Crown had breached the principle of good government by failing to obtain adequate data on rangatahi homelessness.[111]

In the context of the Takutai Moana Act, we consider the principle of good government is relevant to procedural aspects of granting customary marine title under the Takutai Moana Act, in particular to the question of whether the current distribution of the burden of proof is 'just and fair'.

(5) *The principle of redress*

The Tribunal's Manukau report concludes by observing: 'Past wrongs can be put right, in a practical way, and it is not too late to begin again.'[112] This is the essence of the principle of redress. Where the Tribunal finds that the Crown breached the Treaty and that prejudice for Māori arose from that breach, the Crown needs to adequately remedy the breach.[113] In the *Lands* case, Justice Somers held that redress

106. Waitangi Tribunal, *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness – Pre-publication Version* (Wellington: Waitangi Tribunal, 2023), p 94
107. See Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 429.
108. Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 157
109. Ibid, vol 3, p 1473
110. Waitangi Tribunal, *He Kura Whenua ka Rokohanga*, p 202
111. Waitangi Tribunal, *Kāinga Kore*, pp 176, 195
112. Waitangi Tribunal, *Report on the Manukau Claim*, p 99
113. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664–665

means 'fair and reasonable recognition of, and recompense for, the wrong that has occurred'.[114] The Tribunal held that the omission of redress can itself constitute a breach of the Treaty.[115]

Which type of remedy is appropriate varies from case to case, according to the form of loss Māori suffered. According to various Tribunal reports, remedy can be by way of monetary compensation but may also involve the return of lands and fisheries, changes to Crown legislation and policy, or a coordinated effort of environmental restoration.[116] The redress should be proportional to 'the nature of the breaches and the prejudice identified', the Tribunal said in 1998.[117] In 2021, the Tribunal said in *The Mangatū Remedies Report* that a restorative approach to remedies requires a focus on 'political, cultural and economic restoration' rather than a civil damages-based approach.[118] However, it added that addressing the loss of mana whenua would, in most cases, also require the return of some part of the claimants' lands so that their cultural and spiritual connection with them may be restored.[119]

The Tribunal has repeatedly asserted that, when seeking to make amends for its actions, the Crown must not create further grievances. In the *Report of the Waitangi Tribunal on the Waiheke Island Claim* (1987), the Tribunal said that '[i]t is out of keeping with the spirit of the Treaty that it should be seen to resolve an unfair situation for one party while creating another for another.'[120] Similarly, in the *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (1988) the Tribunal noted that, when considering an appropriate remedy, it is necessary to balance concerns from various Māori groups so as not to 'over-redress' a Treaty breach.[121]

To realise certain forms of redress, both Treaty partners may need to be willing to compromise and to cooperate. The Tribunal has emphasised in the past that the principle of redress commands not an 'eye for an eye' approach but 'one in which

114. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 693

115. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 243–244

116. Waitangi Tribunal, *Report on the Manukau Claim*, pp 95–99; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 15; Waitangi Tribunal, *The Ngāti Kahu Remedies Report* (Wellington: Legislation Direct, 2013), p 115; Waitangi Tribunal, *The Stage 2 Report on National Freshwater and Geothermal Resources Claims*, p 563; Waitangi Tribunal, *The Mangatū Remedies Report 2021 – Pre-publication Version* (Wellington: Waitangi Tribunal, 2021), pp 295, 326–327

117. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: Brooker's Ltd, 1998), p 77

118. Waitangi Tribunal, *The Mangatū Remedies Report 2021*, p 157

119. Waitangi Tribunal, *The Mangatū Remedies Report 2021*, p 160

120. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 47; see also Waitangi Tribunal, *The Tarawera Forest Report*, p 29; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 134–135; Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 695

121. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wellington: Waitangi Tribunal, 1988), p 60

the Crown needs to restore a tribal base and tribal mana, and provide sufficient remedy to resolve the grievance'.[122] It will involve 'compromise on both sides'.[123] In its Central North Island report, the Tribunal held that some remedies 'may require the joint efforts of a number of agencies working with Maori if that is what the parties agree to'.[124]

Whether and how the principle of redress applies to Treaty breaches affecting the marine and coastal area was discussed in depth in the Tribunal's *Report on the Crown's Foreshore and Seabed Policy*. It held that the Crown's proposed policy was 'effectively an expropriation' of Māori rights in the foreshore and seabed.[125] When it came to remedying the situation, the Tribunal expressed a strong preference for redress in the form of compensation.[126] The Tribunal did not believe that the Treaty breaches 'arising from the effective expropriation of property rights' under the Government's policy at the time could be 'put right' through redress that did not include monetary payment.[127]

When it comes to our own inquiry, the principle of redress applies if we were to determine that the Act or aspects of it are not Treaty compliant and cause prejudice to Māori.

(6) *The principles of equity, equal treatment, and whanaungatanga*

The principles of equity and equal treatment concern freedom from discrimination.[128] The Crown must treat 'like cases alike' and refrain from 'arbitrary distinctions' between groups that unjustly favour some over others.[129] Both principles derive from article 3 of the Treaty.[130] Although the Tribunal has, at times, used equity and equal treatment interchangeably,[131] its more recent reports distinguish between the principle of equity, which concerns the treatment of Māori in relation to non-Māori,[132] and the principle of equal treatment, which concerns the treatment of Māori in relation to other Māori.[133] The principle of equal treatment is crucial to the protection of whanaungatanga, the value of 'kinship that binds Māori people together through whakapapa'.[134] This principle requires the Crown to

122. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 134, referring to Waitangi Tribunal, *Tarawera Forest Report*, p 29
123. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 134
124. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1248
125. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 121
126. Ibid, pp 114 n, 136
127. Ibid, p 135
128. Waitangi Tribunal, *Hauora*, p 34
129. See Waitangi Tribunal, *Tauranga Moana, 1886–2006*, p 25; Waitangi Tribunal, *Te Urewera*, 8 vols (Lower Hutt: Legislation Direct, 2015), vol 1, p 241, which derive these principles from the Crown's duty of good government.
130. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 133
131. See, for example, Waitangi Tribunal, *Whaia te Mana Motuhake*, pp 31–32.
132. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, 6 vols (Lower Hutt: Legislation Direct, 2018), vol 1, p 216
133. Waitangi Tribunal, *Motiti*, pp 21–22
134. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 2

treat all Māori groups 'in a manner that is not intended to create division between them', and is therefore inextricably intertwined with the principle of equity.[135] Given the inter-related nature of these three principles, we discuss them here together.

The principle of equity is particularly relevant to this inquiry, as the Act treats property rights of Māori differently from those of non-Māori. As we have noted already, the Tribunal's *Report on the Crown's Foreshore and Seabed Policy* found that '[a] policy that effectively expropriates one class of property (Māori rights under common law and Te Ture Whenua Māori Act), but leaves all other classes of private property intact, breaches the principle of equity.'[136] Consequently, the Tribunal held that the Crown's decision to remove Māori access to the High Court or Māori Land Court in matters of customary rights relating to the foreshore and seabed breached the principle of equity.[137] In *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (2008), the Tribunal held that where inequitable treatment causes prejudice to Māori compared with non-Māori, the principle of equity – in conjunction with the principles of active protection and redress – requires the Crown to take active measures to restore that balance.[138]

In the Central North Island report, the Tribunal stated that, under the principle of equal treatment, the Crown must not 'favour one Maori community over another'[139] – or, as the Tribunal put it in its *Te Tau Ihu* report, 'unfairly advantage one group over another if their circumstances, rights, and interests were broadly the same'.[140] Again in the *Report on the Foreshore and Seabed Policy*, the Tribunal held:

> a government that denies coastal tribes the ability to own fee simple of the foreshore and seabed, but at the same time enters into arrangements that recognise equivalent rights in other tribes (such as the right to own a lakebed in fee simple) is in breach of the principle of equal treatment.[141]

In terms of this inquiry, we must consider whether all Māori receive equal treatment when applying for recognition of their customary rights in relation to te takutai moana, be it under the Takutai Moana Act or settlement legislation.

Recognising that damage to whanaungatanga affects Māori society 'at its very core', the Tribunal has found that the principle of whanaungatanga requires the Crown to actively work 'to maintain amicable relationships' between different iwi,

135. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 216
136. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 134
137. Ibid. On access to courts in general, see also Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 94.
138. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 5
139. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1247
140. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 5
141. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 134

hapū, and whānau that have filed overlapping claims.[142] Even where the Crown has multiple and possibly conflicting duties, it must 'avoid creating new grievances' between groups, as the Tribunal found in its *Hauraki Settlement Overlapping Claims Inquiry Report* (2020).[143] To do so, the Crown needs to engage with the Māori involved to understand their tikanga and be aware of possible conflicts, as the Tribunal has stated in multiple reports.[144] We see the principle of whanaungatanga as important to our assessment of both the Act's Treaty-compliance and the adequacy of the policy and practice developed to support the Act.

1.3 The Structure of this Report

Having set out the background to this inquiry, and the relevant Treaty principles, we move on in chapter 2 to provide a brief overview of the Takutai Moana Act's genesis and content. Chapters 3 to 6 set out the Tribunal's analysis of whether the Act, and the Crown's actions under it, comply with Treaty principles. Our analysis focuses on three different aspects of the Act:

- In chapter 3, we analyse whether the Act's foundations are Treaty compliant. This includes looking at the Crown's consultation process when designing the Act, the Act's Treaty clause, the Act's definition of te takutai moana, the special no-ownership status that the Act accords to part of te takutai moana, and the Act's use of tikanga and te reo Māori.
- In chapter 4, we analyse whether the Act's mechanisms for recognising claimants' rights are Treaty compliant. Here, we scrutinise the statutory tests for recognition of customary interests under the Act, the burden of proof for meeting these tests, and the statutory deadline and its effects on Māori. The chapter also examines the application options the Act provides for (the High Court pathway and the Crown engagement pathway) and considers the effects on Māori of having two application pathways.
- In chapter 5, we analyse particular aspects of the scope and effect of protected customary rights and customary marine title. Regarding customary marine title, the chapter focuses on the resource management and conservation permission rights, limitations on the alienation of these permission rights, the wāhi tapu protection right, and the right to create a planning document. The chapter also covers fishing-related matters and the legal status of reclaimed land.

142. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2018), p 22; Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report*, p 2

143. Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report* (Lower Hutt: Legislation Direct, 2020), p 32

144. Waitangi Tribunal, *The Maniapoto Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2020), p 17, referring to Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report*, p 26; Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, pp 36–37; Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, pp 23–24; see also Waitangi Tribunal, *Motiti*, p 214.

- In chapter 6, we assess the adequacy of the combined legal effect of all rights whose individual legal effects we analysed in chapter 5.

In each chapter, we first summarise the parties' positions before presenting our analysis and findings. Where appropriate, we make recommendations on how the Crown can address any prejudice to Māori resulting from Treaty breaches in the Takutai Moana Act.

Chapter 7 summarises – but does not add to – all the findings, suggestions, and recommendations made in the four preceding chapters.

CHAPTER 2

OVERVIEW OF THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 AND ITS DEVELOPMENT

2.1 Introduction

This overview chapter begins with an account of the judicial and legislative history leading up to the introduction of the Act, before summarising the key provisions of the Act itself. Our stage 1 report covered similar ground to provide context for the specific aspects of funding and procedure it discussed. However, this stage 2 report assesses the Treaty compliance of the Act itself, which requires a more detailed explanation of the Takutai Moana Act.

This chapter provides the legal context required for the analytical discussion that follows. It is purely contextual and makes no assessment of the adequacy of the Act, nor of the Crown policy underpinning and supporting it. These questions will be addressed in chapters 3 to 6.

2.2 Key Events affecting Customary Title, 2003–11

2.2.1 The *Ngāti Apa* decision

The Takutai Moana Act is the last link in a chain of recent legal developments relating to Māori customary title in the marine and coastal area. The first is the Court of Appeal's 2003 *Ngāti Apa* decision (also known as the *Marlborough Sounds* case).

In that decision, the Court of Appeal held that the Crown's ownership of the foreshore and seabed was not absolute, but subject to the customary rights of Māori which were pre-existing in 1840.[1] The Court said that if the Crown sought to extinguish Māori customary rights, it needed to do so by statute in 'clear and plain' terms.[2] With *Ngāti Apa*, the Court overturned the then 40-year old *Re The Ninety-Mile Beach* decision, which held that the Crown owned the foreshore and seabed absolutely.[3]

The practical effect of the *Ngāti Apa* decision was that Māori applicants could apply to the High Court to seek a declaration that their common law rights in the foreshore and seabed still existed, and to the Māori Land Court to have their land

1. *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA), 656 per Elias CJ (doc B3(a), pp [369]–[416])
2. *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA), 684, 686–688 per Keith and Anderson JJ
3. *In Re The Ninety-Mile Beach* [1963] NZLR 461 (CA)

declared Māori customary land under Te Ture Whenua Maori Act 1993.[4] Māori customary land could then be changed into Māori freehold land through a vesting order issued by the Māori Land Court.[5] Such an order would vest the Māori freehold land in the applicant 'for a legal estate in fee simple, in the same manner as if the land had been granted to those persons by the Crown'.[6] To what extent Māori would be able to prove customary ownership of parts of the foreshore and seabed was, at that time, a matter of speculation.[7]

2.2.2 The Foreshore and Seabed Act 2004

In mid-2003, the Labour–Progressive Party coalition Government reacted to the *Ngāti Apa* decision by developing a specialised foreshore and seabed policy. About two months after the *Ngāti Apa* decision had been released, the Government published a first version of the policy for public consultation, asking for public submissions to be made during a two-month window.[8] The Government released its full foreshore and seabed policy framework in December 2003.[9] It set out the Crown's intention to vest the foreshore and seabed in the Crown, or in 'the people of New Zealand',[10] and to remove the ability of the High Court and Māori Land Court to hear customary land claims from Māori which related to the foreshore and seabed.[11] Māori whānau, hapū, and iwi would instead be able to apply to the Māori Land Court for recognition of a new statutory customary title after having proven their customary interest in a specific area of the foreshore and seabed to the High Court or the Māori Land Court.[12] In contrast to a Māori customary land title under Te Ture Whenua Maori Act 1993, a new customary title under the Crown's foreshore and seabed policy proposal would not allow Māori to obtain a fee simple title.[13]

The Foreshore and Seabed Bill became law in November 2004. The Act remained in force for seven years. It vested the public foreshore and seabed in the Crown and extinguished all customary rights of Māori in it.[14] In exchange, the

4. Te Ture Whenua Maori Act 1993, s 131
5. Ibid, ss 132, 141
6. Ibid, s 141(1)(b)
7. *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) 650, 660 per Elias CJ, 673 per Gault P; see also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 45, 70–71, referring to Richard Boast, submission in the matter of the Foreshore and Seabed Urgent Inquiry, 9 January 2004 (Wai 1071 ROI, doc A55), p 43.
8. 'The Foreshore and Seabed of New Zealand. Protecting Public Access and Customary Rights: Government Proposals for Consultation' (Wai 1071 ROI, doc A125), p 36; see also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 147
9. 'Foreshore and Seabed: A Framework' (Wai 1071 ROI, doc A21)
10. Ibid, p 15; see also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 85.
11. 'Foreshore and Seabed: A Framework', pp 4, 18–19, 58–60; see also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 85.
12. 'Foreshore and Seabed: A Framework', pp 4, 18–19, 58, 60
13. Ibid, p 16; see also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 85.
14. Foreshore and Seabed Act 2004, s 13(1); see also Richard Boast, *Foreshore and Seabed* (Wellington: LexisNexis, 2005), pp 132–133

Act gave Māori the options to apply to the High Court for 'territorial customary rights orders,'[15] and to the High Court or Māori Land Court for 'customary rights orders'.[16] Alternatively, applicant groups could directly engage in negotiations with the Crown.[17] Few chose to pursue these options.[18] Between 2004 and 2009, only one application for a territorial customary rights order was filed with the High Court, and nine applications for customary rights orders with the Māori Land Court.[19] Five Māori groups engaged in negotiations with the Crown directly.[20] Until 2009, only one of those five groups, Ngā Hapū o Ngāti Porou, reached a deed of agreement with the Crown, to which the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 gave effect.[21]

2.2.3 Responses to the Crown's Foreshore and Seabed Policy and the resulting Foreshore and Seabed Act 2004

(1) *The Report on the Crown's Foreshore and Seabed Policy*

In early 2004, ahead of the introduction of the Foreshore and Seabed Bill to Parliament, the Waitangi Tribunal conducted an urgent inquiry into the Crown's foreshore and seabed policy. It published the *Report on the Crown's Foreshore and Seabed Policy* in March 2004.[22] The Tribunal found that the policy had an expropriatory effect; it was 'not strictly required' to achieve the purposes for which the policy was intended; it lacked detail, clarity, safeguards, and certainty; it violated the rule of law; and it was unfair to Māori for various reasons.[23] The Tribunal also concluded that the Crown's policy was in breach of the plain terms of articles 2 and 3 of the Treaty, and of the Treaty principles of partnership, active protection, equity, and options.[24] The Tribunal said the policy prejudicially affected Māori because it devalued Māori citizenship, and placed them in a position of uncertainty. It was also prejudicial in removing the possibility for Māori to obtain property rights. As a consequence, Māori were deprived of opportunities to exercise mana over their rohe which required property rights.[25] To remedy the prejudice, and to prevent others from being similarly prejudiced, the Tribunal recommended different courses of action for the Crown. One option was to 'do nothing' — to refrain from interfering with the jurisdiction of the High Court and Māori Land Court, which the *Ngāti Apa* decision had confirmed.[26] Other options were to revisit specific

15. Foreshore and Seabed Act 2004, s 33
16. Ibid, ss 48, 68
17. Ibid, s 96
18. Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel Volume 1', 30 June 2009 (CLO.004.0441), p 27 (doc B3(a), p [25590])
19. Ibid
20. Ibid, pp 27, 32 (pp [25590], [25595])
21. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 3(2)
22. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p ix
23. Ibid, pp 124–125
24. Ibid, pp 127–134
25. Ibid, pp 136–138
26. Ibid, pp 140–141

parts of the policy, such as by developing less interventionist policies that would still ensure public access to the foreshore and seabed.[27] Ultimately, the Tribunal strongly recommended the Crown commit to a 'longer conversation' with Māori to determine the path forward.[28] The Tribunal stressed that should the Crown decide to proceed with its policy unchanged, it would need to compensate Māori for the removal of their property rights.[29]

Despite the Tribunal's findings and near-universal Māori opposition to the proposed legislation,[30] the Government introduced the Foreshore and Seabed Bill to Parliament without major changes one month after the Tribunal released its report.[31]

(2) *United Nations Committee on the Elimination of Racial Discrimination: 'Decision on Foreshore and Seabed Act 2004'*

In 2005, the United Nations Committee on the Elimination of Racial Discrimination issued its own report on this now highly contested issue. Its report, titled *Decision on Foreshore and Seabed Act 2004*, was extremely critical, stating: 'the legislation appears . . . to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress'.[32]

The United Nations Special Rapporteur, Rodolfo Stavenhagen, echoed these concerns in 2006, and recommended that the Foreshore and Seabed Act 2004 be repealed or amended.[33]

(3) *Report of the Ministerial Review Panel*

In 2008, the National–Māori Party coalition Government appointed a Ministerial Review Panel to provide independent advice on the Foreshore and Seabed Act 2004.[34] The ensuing report, 'Pākia ki uta pākia ki tai: Report of the Ministerial

27. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 141–143
28. Ibid, pp 139–140
29. Ibid, p 143
30. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 4; Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel Volume 1', p 21 (doc B3(a), p [25584])
31. Foreshore and Seabed Bill 2004 (129–1), http://www.nzlii.org/nz/legis/hist_bill/fasb20041291177, accessed 24 May 2023
32. 'UN Committee on the Elimination of Racial Discrimination "Decision on Foreshore and Seabed Act 2004": Decision 1 (66): New Zealand CERD/C/DEC/NZL/1', 11 March 2005, para 6, http://www.converge.org.nz/pma/fs110305.htm, accessed 24 May 2023
33. 'Briefing Paper: Meeting with United Nations Special Rapporteur on Monday 19 July 9.30–10AM' (CLO.009.0539), p 21 (doc B3(a), pp [20818], [20849])
34. 'Cabinet Paper: TOW (09) 1 Foreshore and Seabed Act Review: Terms of Reference, Appointment of Ministerial Panel, and Honouring Agreements' (CLO.004.0013), p 3 (doc B3(a), pp [2275]–[2276])

Review Panel, Volume 1', was released in 2009.[35] It characterised the Foreshore and Seabed Act 2004 as discriminatory against Māori, noting that it imported 'foreign' legal tests, the thresholds for meeting the tests were too high, and the outcomes of a successful application were inadequate.[36] The Panel recommended the Act be repealed.[37] Echoing the Tribunal's Foreshore and Seabed report, the Panel also stated that the Crown should engage in a longer conversation with stakeholders about the foreshore and seabed.[38]

2.2.4 The Marine and Coastal Area Bill

(1) *The Crown's initial response to the Ministerial Review Panel's report*

In response to the Panel's report, Cabinet began deliberating on replacement legislation, and agreed in late 2009 to a set of principles and non-negotiable positions that would guide a replacement Bill.[39] The principles were:

- good faith – to achieve a good outcome for all following fair, reasonable and honourable processes;
- Treaty of Waitangi – the development of a new regime must reflect the Treaty of Waitangi, its principles and related jurisprudence;
- recognition and protection of interests – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
- equity – provide fair and consistent treatment for all;
- certainty – transparent and precise processes that provide clarity; and
- efficiency – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies[.][40]

The non-negotiable positions, also referred to as 'bottom lines' were:

- reasonable public access for all;
- recognition of customary interests;
- the protection of fishing and navigation rights; [and]
- the protection of existing use rights to the end of their term[.][41]

35. Document B3, p 7
36. Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel Volume 1', 30 June 2009 (CLO.004.0441), pp 139–142 (doc B3(a), pp [25702]–[25705])
37. Ibid, p 151 (p [25714])
38. Ibid, pp 154, 159 (pp [25717], [25722]); Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 139–140
39. Document B3, pp 7–8; 'TOW (09) 27 Review of Foreshore and Seabed Act 2004: Options for Government Response to 'Pakia Ki Uta, Pakia Ki Tai' and Next Steps' 17 July 2009 (CLO.001.0001) (doc B3(a), pp [9183]–[9197])
40. 'Cabinet Paper: TOW (09) 37 Review of Foreshore and Seabed Act 2004: Principles, Bottom Lines, and Next Steps' (CLO.001.0047), p 4 (doc B3(a), p [9985])
41. Ibid

In December 2009, the Attorney-General recommended making the foreshore and seabed a 'shared marine space' not vested in anyone as absolute property.[42] The Attorney-General also proposed that the High Court should have jurisdiction to determine applications under the new regime.[43]

(2) *Report of the special rapporteur on the situation of human rights and fundamental freedoms of indigenous people*

The United Nations Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, visited New Zealand in July 2010 and commented on these policy developments. He released a report in August 2010, urging the Government to ensure that the ongoing reform process 'includes an adequate dialogue with Maori people, and that the new legislative arrangement avoids any discriminatory effects and establishes measures to recognize and protect rights of iwi over the foreshore and seabed'.[44]

(3) *The Crown's continued policy and Bill development*

At the start of April 2010, the Government consulted the public about an outline of what legislation replacing the Foreshore and Seabed Act 2004 could look like, seeking submissions until the end of that month.[45] In June 2010, Cabinet agreed that Parliament would repeal the Foreshore and Seabed Act 2004 and replace it with new legislation.[46]

The Marine and Coastal Area (Takutai Moana) Bill – which had been in development since 2009 – was introduced to Parliament in September 2010 and was referred to the Māori Affairs Committee. The Committee received 4,455 written submissions and an additional 1,520 form submissions (based on a template).[47] It heard 287 submissions orally, most of which opposed the Bill.[48] The Bill was adopted in the third reading with a majority of 63 to 56 votes.[49] The Marine and Coastal Area (Takutai Moana) Bill became law on 31 March 2011.

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42. 'Cabinet Paper: TOW (09) 51 Review of the Foreshore and Seabed Act 2004: A Shared Marine Space' (CLO.001.0088), p 2 (doc B3(a), p [10410])
43. 'Cabinet Paper: TOW Min (10) 6/1 Review of the Foreshore and Seabed Act 2004: Report on Public Consultation Process and Proposals for a New Regime' (CLO.001.0132), p 1 (doc A131(a), p 4)
44. James Anaya, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of indigenous People' (CLO.009.0587), p 3 (doc B3(a), p [21508])
45. 'Reviewing the Foreshore and Seabed Act 2004: Consultation document' (CLO.009.0294) (doc B3(a), p [15394])
46. Document B3, pp 9–10
47. Ibid, p 11; 'Marine and Coastal Area (Takutai Moana) Bill Report of the Māori Affairs Committee' (CLO.005.0243), app A (doc B3(a), p [25842])
48. 'Marine and Coastal Area (Takutai Moana) Bill: Report of the Māori Affairs Committee, no date (CLO.005.0243), p 10 (doc B3(a), p [25842]); 'Summary of submissions: oral submitters to the Marine and Coastal Area (Takutai Moana) Bill', 1 December 2010 (CLO.010.4809) (doc B3(a), pp [22694]–[22885])
49. 'Marine and Coastal Area (Takutai Moana) Bill', 24 March 2011, *New Zealand Parliamentary Debates*, vol 671, p 17651

2.3 Key Features of The Marine and Coastal Area (Takutai Moana) Act 2011

2.3.1 The preamble, purpose, and Treaty clause

The preamble of the Takutai Moana Act briefly sets out that the Foreshore and Seabed Act 2004 was adopted 'partly in response to' the *Ngāti Apa* decision, and that the Tribunal, the Ministerial Review Panel, and the United Nations Special Rapporteur all found it to be flawed. Against this background, the Takutai Moana Act states that it

> takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations[.]

Section 4(1) states that the Act's purpose is to:

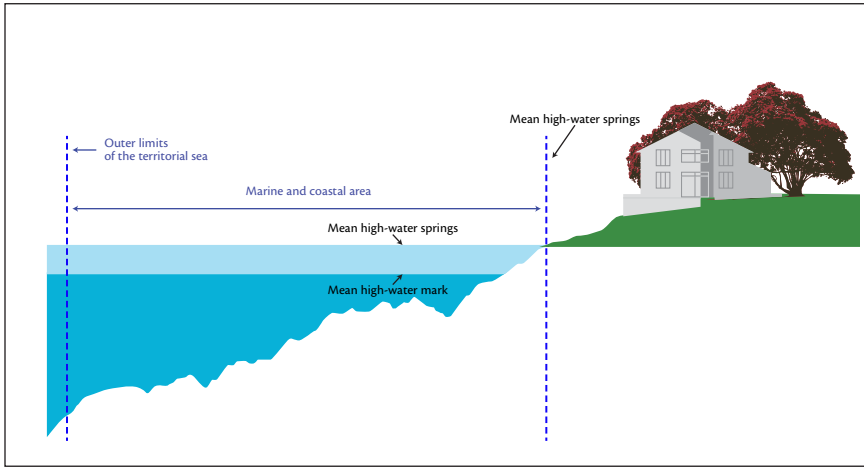
(a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
(b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
(c) provide for the exercise of customary interests in the common marine and coastal area; and
(d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

Section 4(2) specifies how these objectives will be achieved, stating that the Act:

(a) repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and
(b) contributes to the continuing exercise of mana tuku iho in the marine and coastal area; and
(c) gives legal expression to customary interests; and
(d) recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area; and
(e) recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area—
    (i) for its intrinsic worth; and
    (ii) for the benefit, use, and enjoyment of the public of New Zealand.[50]

Complementing the preamble and the purpose section, the Act also contains a 'Treaty clause', which states:

50. Marine and Coastal Area (Takutai Moana) Act 2011, s 4(2)



Beach profile showing the extent of the marine and coastal area

Redrawn from Toitū Te Whenua Land Information New Zealand, 'Tidal Boundaries', www.linz.govt.nz/guidance/survey/cadastral-survey-guidelines/tidal-boundaries, accessed 29 August 2023. The pohutakawa image is from https://freesvg.org and is a vectorised version of the photo by Ed323.

7 **Treaty of Waitangi (te Tiriti o Waitangi)**

In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—

(a) . . . for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and

(b) . . . for customary rights to be recognised and protected; and

(c) . . . for customary marine title to be recognised and exercised.[51]

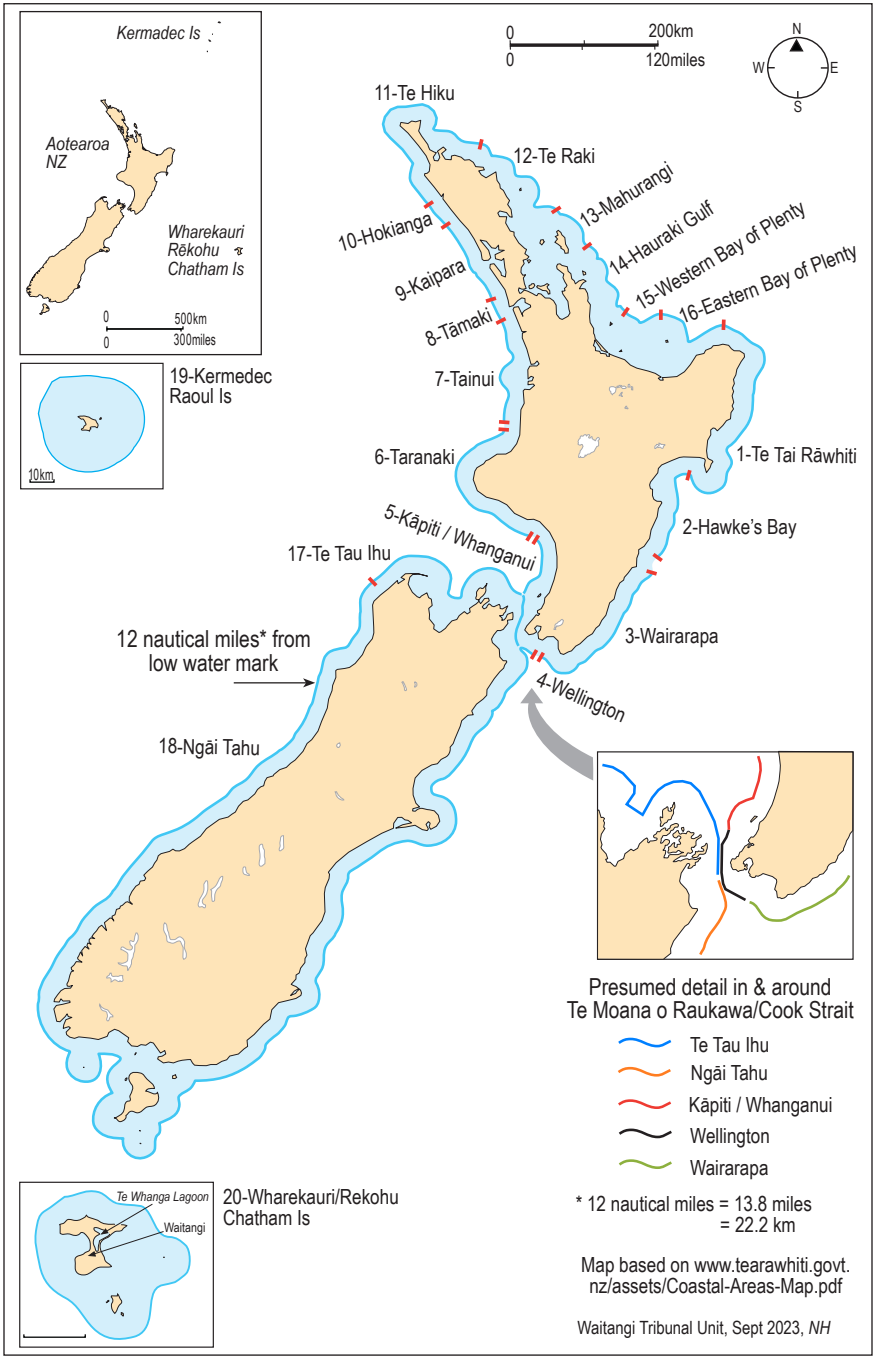
2.3.2 Status of the common marine and coastal area

Under the Act, the 'marine and coastal area' is defined as the area bounded by the line of mean high-water springs (in lay language: the high-tide mark[52]) on the landward side; and by the outer limits of the territorial sea (considered to lie 12 nautical miles from the low-water mark along the coast) on the seaward side.[53]

51. Marine and Coastal Area (Takutai Moana) Act 2011, s 7

52. The Ministry for Land Information defines mean high-water springs as 'The average of the levels of each pair of successive high waters . . . during that period of about 24 hours in each semi-lunation (approximately every 14 days), when the range of the tide is greatest (spring range)': see Toitū Te Whenua Land Information New Zealand, 'Tides Glossary', www.linz.govt.nz/guidance/survey/cadastral-survey-guidelines/tidal-boundaries, accessed 29 August 2023; see also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 95.

53. Marine and Coastal Area (Takutai Moana) Act 2011, s 9; Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, ss 3, 5



The marine and coastal area of Aotearoa New Zealand

Source: Te Arawhiti, 'Maps of Indicative Coastal Areas', www.tearawhiti.govt.nz/assets/Coastal-Areas-Map.pdf.

It runs along the whole coastline of Aotearoa New Zealand (and of offshore islands), and includes the air space above, the water space (but not the water itself), and the subsoil and bedrock in this area.[54] It also includes riverbeds that are part of the 'coastal marine area', as defined under the Resource Management Act 1991.[55]

The 'common marine and coastal area' is a subset of the marine and coastal area. It comprises the marine and coastal area but excludes:

- any specified freehold land in that area;
- conservation areas, national parks, and reserves owned by the Crown in that area;
- the bed of Te Whaanga Lagoon in the Chatham Islands;
- most roads in that area; and
- most structures (any type of built artefacts) fixed to, under, or over that area.[56]

As for the legal status of the marine and coastal area, the 2011 Act repeals the Foreshore and Seabed Act 2004 (under which the public foreshore and seabed was vested in the Crown).[57] At the same time, the Takutai Moana Act restores extinguished interests in the common marine and coastal area with the following qualification: 'Any customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004 are restored and given legal expression in accordance with this Act.'[58]

Importantly, the 2011 Act also accords the common marine and coastal area a new legal 'no ownership' status. Section 11(2) states: 'Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act.'

There are exceptions to this – the Crown retains ownership of all petroleum, gold, silver, and uranium that exists in its natural condition in the common marine and coastal area.[59] The Crown also owns most reclaimed land and any abandoned structures in the common marine and coastal area.[60]

Finally, the Act clarifies that the special status of the common marine and coastal area does not preclude the Crown from introducing legislative changes or other enactments in relation to the common marine and coastal area.[61]

54. Marine and Coastal Area (Takutai Moana) Act 2011, s 9
55. Ibid, in connection with section 2 of the Resource Management Act 1991.
56. Marine and Coastal Area (Takutai Moana) Act 2011, ss 9, 14, 18
57. Ibid, s 5
58. Ibid, s 6(1). This section does not apply to Te Whaanga Lagoon in the Chatham Islands, because the lagoon is excluded from the common marine and coastal area: Legislation Act 2019, s 32 (which replaced the now repealed Interpretation Act 1999, s 17).
59. Marine and Coastal Area (Takutai Moana) Act 2011, s 16; but see s 83.
60. Ibid, ss 19, 30–31. The developer of the reclaimed land or a network utility operator can apply to the Crown to be granted an interest in it: see sections 34 to 44. A freehold interest in the land can be alienated per sections 44 and 45 of the Act.
61. Ibid, s 11(5)(c)–(f)

2.3.3 Statutory recognition of customary interests

The Act recognises customary interests in te takutai moana through three different bundles of rights (we use the term 'bundle of rights' to refer to rights that are grouped together and available to Māori if they satisfy certain legal requirements):

- participation in conservation processes;
- protected customary rights; and
- customary marine title.

'Participation in conservation processes' requires decision makers in those processes – and in situations where marine mammals have been stranded – to have 'particular regard' to the views of iwi, hapū, or whānau that exercise kaitiakitanga in the rohe encompassing that part of te takutai moana.[62] There is no application process that Māori must go through to participate in conservation processes.[63] These participation rights are the most limited bundles of rights available under the Act.

As the Act is largely geared towards the latter two bundles of rights, which confer more significant rights, we elaborate on these in greater detail in the following sections.

(1) *Protected customary rights*

Protected customary rights recognise customary activities such as collecting certain stones, wood, or plants; non-commercial whitebait fishing; or launching waka.[64]

There are several types of activities that cannot be recognised as protected customary rights. These include commercial and most recreational fishing, commercial aquaculture activities, activities relating to wildlife and sea mammals, and activities based on spiritual or cultural associations that do not manifest in a physical activity or use related to natural or physical resources.[65]

(1) Test

To obtain legal recognition of a protected customary right, the Act requires the applicant group to show that they have exercised the right since 1840, and that they continue to exercise it in accordance with tikanga. It is not necessary for the right to still be exercised in the same way it was in 1840 – the activity may have evolved over time.[66] To qualify for a protected customary right, an applicant group does not need to have an interest in land in or abutting the specified part of the common marine and coastal area to meet the test.[67] However, the right can only

62. Ibid, ss 46–50
63. Where there is a dispute as to whether, or which iwi, hapū, or whānau are affected, a final decision is made by the Director-General of Conservation: see section 48(4)–(5).
64. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 366–386
65. Marine and Coastal Area (Takutai Moana) Act 2011, s 51(2)
66. Ibid, s 51(1)(a)–(b)
67. Ibid, s 51(3)

be recognised if it has not been extinguished as a matter of law, such as the Crown passing legislation that intentionally terminates the customary right.[68]

(b) Scope and effect of rights created

Section 52(4) sets out what groups can do with a protected customary right. They may delegate or transfer the right in accordance with tikanga, limit or suspend the right, and decide who is allowed to carry out the protected activity. Furthermore, the group may, with some exceptions, derive a commercial benefit from exercising the right.

A group holding a protected customary right may exercise it without obtaining a resource consent, even if it would normally be required under the Resource Management Act 1991.[69] Furthermore, the group, unlike other people carrying out relevant resource management activities in the area, does not need to pay coastal occupation charges or royalties for sand and shingle extraction in exercising their protected customary right.[70]

A protected customary right affects third parties' resource consent applications. A resource consent must not be granted to a third party in an area covered by a protected customary right if the activity in question will, or is likely to, have adverse effects that are more than minor on the exercise of the protected customary right, unless the group holding the right gives its written approval.[71] However, this rule does not apply to resource consents for emergency activities or deemed accommodated activities (such as the operation or construction of essential infrastructure). Nor does it apply to resource consents for existing accommodated infrastructure and coastal permits for existing aquaculture activities within certain parameters.[72]

The exercise of a protected customary right can be limited. The right is subject to the terms, conditions, or limitations imposed by the order or agreement effecting it.[73] If the Minister of Conservation determines that the exercise of a protected customary right has, or is likely to have, a significant adverse effect on the environment, the Minister may impose additional conditions or restrictions.[74]

(2) *Customary marine title*

Customary marine title is the most substantial bundle of rights available under the Act to recognise customary interests.

(1) Test

To obtain customary marine title, the applicant group must show that they:

68. Marine and Coastal Area (Takutai Moana) Act 2011, s 51(1)(c)
69. Ibid, s 52(1)
70. Ibid, s 52(2)
71. Ibid, s 55, sch 1, pt 1
72. Ibid, ss 55(3), 63–65
73. Ibid, ss 52(3)(c), 54(2)(a)
74. Ibid, ss 52(3)(c), 56–57

- hold the specified area 'in accordance with tikanga'; and
- have either 'exclusively used and occupied it from 1840 to the present day without substantial interruption' or received it after 1840 through a 'customary transfer'.[75]

Customary marine title can only be recognised if it has not been extinguished as a matter of law.[76] In determining whether a group qualifies for a customary marine title, relevant factors are whether the group in question has:

- owned land abutting the specified area from 1840 until the present day without substantial interruption, and/or
- been exercising non-commercial customary fishing rights in the specified area from 1840 until the present day without substantial interruption.[77]

The use of the area for fishing or navigation by third parties does not, of itself, preclude the granting of a customary marine title. Nor does the grant of a resource consent to a third party between the time of the Act's commencement and the grant of the customary marine title.[78]

(b) Scope and effect of rights created

Once customary marine title is granted, it 'provides an interest in land, but does not include a right to alienate or otherwise dispose of any part of a customary marine title area'.[79] Section 62 provides that customary marine title includes the following rights in that area:

- an RMA permission right, which allows the group to permit or veto an activity authorised under a resource consent (except for accommodated activities);[80] and
- a conservation permission right, which allows the group to prevent the Minister or Director-General of Conservation from considering or approving certain conservation activities (except for accommodated activities).[81]

In addition to these/the above permission rights, customary marine title also comprises the following rights:

- a right to protect wāhi tapu and wāhi tapu areas, including through prohibitions and restrictions, where this is recognised in the order or agreement. Compliance can be supervised by a warden or a fishery officer;[82]
- rights in relation to marine mammal watching permits and coastal policy statements;[83]

75. Ibid, s 58(1), (3)
76. Ibid, s 58(4)
77. Ibid, s 59(1)
78. Ibid, ss 58(2), 59(3)
79. Ibid, s 60(1)
80. Ibid, ss 62(1)(a), 66–70
81. Ibid, ss 62(1)(b), 71–75
82. Ibid, ss 62(1)(c), 78–81. Wardens under the Takutai Moana Act are not the same as Māori wardens under the Maori Community Development Act 1962.
83. Marine and Coastal Area (Takutai Moana) Act 2011, ss 62(1)(d), 76–77

- the prima facie ownership (meaning presumed ownership until proven otherwise) of newly found taonga tūturu;[84]
- the ownership of certain minerals;[85] and
- the right to create a planning document and have it taken into account, or had regard to, by certain decision makers.[86]

A group holding customary marine title 'may use, benefit from, or develop a customary marine title area (including derive commercial benefit)' by exercising the rights under the title.[87] The group may also delegate or transfer them in accordance with tikanga.[88] However, the group is not exempt from obtaining any resource consents or other approvals required for the use and development of the customary marine title area. The group is not liable for coastal occupation charges or royalties for sand and shingle extraction.[89]

2.3.4 The application process for recognition of customary interests

(1) *The two application pathways*

The Act provides applicants with two pathways to seek protected customary rights or customary marine title under the Act.[90] Applicants can pursue either or both pathways.

(1) The High Court pathway

The High Court (but no other Court) may make an order recognising a protected customary right or customary marine title.[91] The High Court's statutory jurisdiction to hear applications under the Act replaces all its previous powers to hear aboriginal rights claims concerning the common marine and coastal area.[92]

Any interested person may appear and be heard on an application for a recognition order.[93] If any questions relating to tikanga arise from an application, the High Court may obtain the advice of a pūkenga (an expert on tikanga Māori) or refer the question to the Māori Appellate Court.[94] The Māori Appellate Court's opinion is binding on the High Court, the pūkenga's advice is not.[95]

84. Marine and Coastal Area (Takutai Moana) Act 2011, ss 62(1)(e), 82
85. Ibid, ss 62(1)(f), 83
86. Ibid, ss 62(1)(g), 85–93
87. Ibid, s 60(2)
88. Ibid, ss 60(3), 61
89. Ibid, s 60(2)
90. Ibid, s 94
91. Ibid, s 98
92. Ibid, s 98(4)–(5)
93. Ibid, s 104
94. Ibid, s 99(1); see also *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 308–331 and app A, where Churchman J made use of this provision.
95. Marine and Coastal Area (Takutai Moana) Act 2011, s 99(2)

(b) The Crown engagement pathway

An applicant group and the Minister for Treaty of Waitangi Negotiations (who is responsible for the administration of the Takutai Moana Act) on behalf of the Crown may enter into an agreement recognising a protected customary right and/or customary marine title.[96] It is at the Crown's discretion whether to engage in negotiations for a recognition agreement and whether to enter into a recognition agreement.[97] However, a recognition agreement can only be entered into if the applicant group in question fulfils the requirements for either protected customary rights or customary marine title.[98] To give effect to a recognition agreement on protected customary rights, an Order in Council from the Governor-General is required.[99] To give effect to a recognition agreement on customary marine title, an Act of Parliament is required.[100]

(2) *The statutory deadline*

The Act provides that all applications must be initiated 'not later than 6 years after the commencement of this Act'.[101] Thus, all applications in either pathway must have been initiated by 3 April 2017. The only exception to this is the ability of whānau, hapū, and iwi to participate in conservation processes per sections 47 to 50 of the Act. This requires neither an application to be filed, nor a recognition agreement or order to be given effect. They are entitled to participate, provided they are affected by the conservation process in question or exercise kaitiakitanga in the area.

There were 387 applications filed by the statutory deadline seeking engagement with the Crown.[102] Furthermore, 205 applications seeking High Court orders were filed.[103] Of those, 175 applications were filed in both the High Court pathway and the Crown engagement pathway.[104]

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96. Submission 3.3.187, p 30
97. Marine and Coastal Area (Takutai Moana) Act 2011, s 95(3)
98. Ibid, s 95(4)
99. Ibid, s 96(1)(a)
100. Ibid, s 96(1)(b)
101. Ibid, ss 95(2), 100(2)
102. Minister for Treaty of Waitangi Negotiations, 'Proactive Release – Takutai Moana Crown Engagement Strategy', 9 July 2021, www.tearawhiti.govt.nz/assets/Cabinet-material-Takutai-Moana-Crown-Engagement-Strategy.pdf, accessed 16 May 2023; 'Applications', no date, https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications, accessed 16 May 2023. Note that, during stage 1 of this inquiry, the evidence was that only 385 applications were filed with the Crown: see doc A131, p 12.
103. 'Marine and Coastal Area (Takutai Moana) Act 2011 applications for recognition orders', no date, https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/marine-and-coastal-area-takutai-moana-act-2011-applications-for-recognition-orders, accessed 16 May 2023. Note that, during stage 1 of this inquiry, the evidence was that only 202 applications were filed with the High Court: see doc A131, p 12.
104. 'Draft Takutai Moana Engagement Strategy', 13 December 2019 (CLO.048.0804), p 6 (doc B113(a), p 159). Note that, during stage 1 of this inquiry, the evidence was that 176 applications were filed in both pathways: see doc A131, p 12.

(3) *Determinations of applications to date*

This section provides a brief overview of the applications that (at the time this report was written) had been determined – first, by the High Court and, secondly, by the Minister for Treaty of Waitangi Negotiations.

The High Court had determined a total of 28 of the 205 applications seeking protected customary rights and/or customary marine title. The court set out its decisions in five main judgments.[105]

The first judgment, *Re Tipene*, dealt with an application lodged by Denis Tipene on behalf of his family, seeking a customary marine title order over a small marine and coastal area to the south-west of Rakiura (Stewart Island).[106] The application was originally lodged with the Māori Land Court under the Foreshore and Seabed Act 2004, and, after the Takutai Moana Act was enacted in 2011, was transferred to the jurisdiction of the High Court.[107] The High Court granted recognition of customary marine title in December 2016,[108] and, in a later 2017 judgment, determined who should hold the title.[109]

The second judgment, *Re Edwards (Te Whakatōhea No 2)*, dealt with 15 applications for recognition of protected customary rights and customary marine title. These were brought on behalf of multiple groups from the eastern Bay of Plenty.[110] In May 2021, the High Court granted recognition of over 20 protected customary rights to six different applicants, and three customary marine titles (two of which would be held jointly by multiple applicants).[111] The *Re Edwards (Te Whakatōhea No 2)* judgment contains a detailed analysis of how the tests for protected customary rights and customary marine title are applied. The Court made the following findings concerning customary marine title:

- In assessing whether the test for customary marine title is met, '[t]he critical focus must be on tikanga and . . . whether or not the specified area was held in accordance with the tikanga that has been established.'[112]
- The Act allowed customary marine title to be held jointly by multiple applicant groups through the concept of 'shared exclusivity'.[113]

105. For an overview see 'Marine and Coastal Area (Takutai Moana) Act 2011 applications for recognition orders', no date, https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/marine-and-coastal-area-takutai-moana-act-2011-applications-for-recognition-orders, accessed 16 May 2023.

106. *Re Tipene* [2016] NZHC 3199, paras 2, 46. Leading up to the hearing, the High Court dealt with three related procedural issues in three separate judgments: *Re Tipene* [2014] NZHC 2046; *Re Tipene* [2015] NZHC 169; *Re Tipene* [2015] NZHC 2923.

107. *Re Tipene* [2016] NZHC 3199, para 45

108. Ibid, para 179

109. *Re Tipene* [2017] NZHC 2990

110. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025; see also Hannah Z Yang, 'Exclusivity, Substantial Interruption and the Burden of Proof in Re Edwards (Te Whakatōhea No 2)' (2021) 27 Auckland U L Rev 415.

111. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 660, 669

112. Ibid, para 144

113. Ibid, para 168

Whether there is a 'substantial interruption' to the applicants' exclusive use and occupation of a specified area is largely a question of fact.[114] The 1866 confiscations in the eastern Bay of Plenty did not amount to a substantial interruption.[115] Activities carried out and structures erected under the Resource Management Act 1991 may amount to a substantial interruption, but these are questions of fact to be decided in each case.[116] The mere existence of a resource consent that pre-dates the commencement of the Act does not create a presumption of substantial interruption.[117] Where a title has been or will be issued, reclamation of land has the effect of a substantial interruption, as the reclaimed land ceases to be part of te takutai moana.[118]

Re Edwards (Te Whakatōhea No 2) is currently under appeal. The High Court has since issued several other judgments addressing procedural and follow-up questions concerning the recognised protected customary rights and customary marine titles in *Re Edwards (Te Whakatōhea No 2)*.[119] In *Re Edwards (Te Whakatōhea No 7)*, the Court focused on the requirements of section 109 of the Act. This provision specifies the details that need to be set out in a recognition order once the Court has decided to grant one.[120]

The third judgment, *Re Clarkson*, related to a marine and coastal area on the North Island's east coast.[121] The application for a customary marine title was brought by a whānau affiliated with Ngāti Kere hapū and Ngāti Kahungunu and Rangitāne iwi.[122] The High Court dismissed the application in July 2021, holding that the applicants lacked 'a proper mandate' for the application area.[123]

The fourth judgment, *Re Reeder*, dealt with the application of seven groups concerning Te Tāhuna o Rangataua, the eastern-most arm of Tauranga Harbour. The applicants included 'groups representing all of the marae located around the harbour and in the wider vicinity'.[124] They applied for recognition of a joint customary

114. Ibid, paras 188–270

115. Ibid, para 270. Justice Churchman uses the term '1866 raupatu'. However, we refer to these events as 'the 1866 confiscations' to distinguish them from the landing of troops ('1865 raupatu') one year prior.

116. Ibid, paras 229–230, 271

117. Ibid, paras 230, 271

118. Ibid, para 271

119. *Re Edwards* (*Te Whakatōhea No 3*) [2021] NZHC 1772; *Re Edwards* (*Te Whakatōhea No 4*) [2021] NZHC 3180; *Re Edwards* (*Te Whakatōhea No 5*) [2022] NZHC 608; *Re Edwards* (*Te Whakatōhea No 6*) [2022] NZHC 1160; *Re Edwards* (*Te Whakatōhea No 7*) [2022] NZHC 2644; *Re Edwards* (*Te Whakatōhea No 8*) [2023] NZHC 1618

120. *Re Edwards* (*Te Whakatōhea No 7*) [2022] NZHC 2644, para 2

121. *Re Clarkson* [2021] NZHC 1968, para 1. The application area is described as 'from Finlay's Reef (which is to the north of Whangaehu) to the south side of Cape Turnagain (whereas Poroporo is on the north side of the Cape). Whangaehu is 8.5 km south and toward the coast from the settlement of Porangahau and is in Central Hawke's Bay, and Cape Turnagain is in the Tararua District.'; see para 6.

122. *Re Clarkson* [2021] NZHC 1968, para 2

123. Ibid, paras 237–240

124. *Re Reeder* [2021] NZHC 2726, para 4

marine title.[125] The High Court granted recognition to five of the seven applicant groups, but dismissed the remaining two applications, in October 2021.[126]

The fifth and most recent judgment, *Re Ngāti Pāhauwera*, dealt with applications for protected customary rights and customary marine title of four groups in Hawke's Bay.[127] In December 2021, the High Court granted recognition of 11 protected customary rights to three of the four applicants. The Court also granted recognition of five customary marine titles (some to be held exclusively, some to be held jointly with other applicants) to the four applicants.[128] The judgment is currently under appeal. Following the *Re Ngāti Pāhauwera* judgment, the High Court has issued a stage 2 judgment addressing the formal requirements for issuing recognition orders.[129]

Two further High Court judgments, *Re Dargaville* and *Re Paul*, are distinct from the five summarised above as they concern nationwide applications.[130] Rihari Dargaville said he brought his application 'on behalf of "New Zealand Māori Council Members"' and in respect of 'the entire coastline of New Zealand'.[131] Similarly, the late Cletus Maanu Paul said he brought his application 'on behalf of all Māori in Aotearoa New Zealand' and, again, it concerned the entire coastline of Aotearoa New Zealand.[132] The New Zealand Māori Council did not authorise either of the two applications.[133] The High Court struck out both applications in August 2020 on the grounds that they were 'filed for an improper purpose' and were an 'abuse of process'.[134]

Having set out the High Court judgments to date, we now turn to the Crown's decisions (in the form of recognition agreements) on applications for protected customary rights and/or customary marine title via the Crown engagement pathway. As at 9 July 2021, 387 applications relating to 20 different coastlines (a category the responsible Crown authority, Te Arawhiti, uses to organise Crown engagement by region) had been filed in the Crown engagement pathway.[135] The Minister for Treaty of Waitangi Negotiations, exercising his discretion under the

125. *Re Reeder* [2021] NZHC 2726, para 4
126. Ibid, paras 72, 149, 157
127. *Re Ngāti Pāhauwera* [2021] NZHC 3599, paras 1–3
128. Ibid, paras 598–599
129. *Re Ngāti Pāhauwera* (*Stage 2*) [2023] NZHC 15
130. *Re Dargaville* [2020] NZHC 2028; *Re Paul* [2020] NZHC 2039; see also doc B138, p 3
131. *Re Dargaville* [2020] NZHC 2028, para 1
132. *Re Paul* [2020] NZHC 2039, para 10
133. *Re Dargaville* [2020] NZHC 2028, para 3; *Re Paul* [2020] NZHC 2039, para 15
134. *Re Dargaville* [2020] NZHC 2028, paras 47–50; *Re Paul* [2020] NZHC 2039, paras 64–70
135. Minister for Treaty of Waitangi Negotiations, 'Proactive Release – Takutai Moana Crown Engagement Strategy', 9 July 2021, www.tearawhiti.govt.nz/assets/Cabinet-material-Takutai-Moana-Crown-Engagement-Strategy.pdf; Te Arawhiti/The Office for Māori Crown Relations, 'Applications', no date, https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications, accessed 16 May 2023. Note that, during stage 1 of this inquiry, the evidence was that only 385 applications were filed with the Crown: see doc A131, p 12.

Act, declined to engage with 13 applications.[136] In 2016, the Minister offered to enter into negotiations for a recognition agreement with Ngāti Pāhauwera concerning the area from Poututu Stream to Pōnui Stream in Hawke's Bay. However, the Minister was not satisfied that the tests for protected customary rights or wāhi tapu protection were met by Ngāti Pāhauwera. Furthermore, the Minister considered that the statutory test for customary marine title was met only with regard to the small stretch of land between the mean high-water springs and the mean low-water springs (as opposed to the outer limit of the territorial sea). The Minister also stated Ngāti Pāhauwera were free to pursue their claims in the High Court to the extent they should be unsuccessful in the Crown engagement pathway.[137] Although the Crown offered Ngāti Pāhauwera an agreement, it was never given legal effect.[138] To date, the marine and coastal area register does not indicate that any recognition agreements are in effect.[139] In other words, not a single application in the Crown engagement pathway has resulted in a recognition agreement since 2011. Having established the relevant legal history and the cornerstones of the Takutai Moana Act, we now turn to assess its Treaty compliance in the subsequent analytical chapters 3 to 6.

136. Te Arawhiti/The Office for Māori Crown Relations, 'Decisions to Engage with Applications', https://tearawhiti.govt.nz/assets/MACA-docs/Latest-information/Applications_Minister_declined_to_engage.pdf. See Marine and Coastal Area (Takutai Moana) Act 2011, s 95(3).

137. Minister for Treaty of Waitangi Negotiations, 'Ngāti Pāhauwera Determination of Customary Interests under the Marine and Coastal Area (Takutai Moana) Act 2011', 23 August 2016, www.tearawhiti.govt.nz/assets/Ngati-Pahauwera-Letter-of-Determination-23-August-2016-PDF866KB.pdf

138. 'Deed of Agreement in relation to the Marine and Coastal Area', 2017, https://ngatipahauwera.co.nz/wp-content/uploads/2017/07/Ng%C4%81ti-P%C4%81hauwera-Deed-of-Agreement-in-Relation-to-the-Marine-and-Coastal-Area-initialled.pdf; *Re Ngāti Pāhauwera* [2021] NZHC 3599, para 527

139. Toitū Te Whenua/Land Information New Zealand, 'Marine and Coastal Area Register', https://www.linz.govt.nz/our-work/maori-and-iwi-development/marine-and-coastal-area-register, accessed 16 May 2023

CHAPTER 3

ARE THE FOUNDATIONS OF THE ACT TREATY COMPLIANT?

3.1 The Crown's Consultation with Māori about the Act

3.1.1 Overview

Having outlined the Act's legal history and its key provisions, we now turn to the Treaty compliance of the Act itself. We start by analysing whether consultation with Māori about the Act was Treaty compliant.

In stage 1 of this inquiry, we considered the Treaty-compliance of the Crown's consultation with Māori over the funding and procedural arrangements supporting the Marine and Coastal Area (Takutai Moana) Act. This consultation mainly occurred after the Act was enacted. In this stage 2 report, we turn our attention to the adequacy of the Crown's earlier consultation with Māori when developing the Act itself.

Before outlining the parties' positions, we briefly summarise the three forms of consultation the Crown undertook when the Act was being developed: the Ministerial Review Panel process, a period of public consultation, and the Select Committee process. We also outline complementary consultation the Crown undertook with focus groups.

(1) *The Ministerial Review Panel's public consultation*

As we set out in chapter 2, in 2008, Ministers from the National Party and the Māori Party agreed to initiate an independent review of the Foreshore and Seabed Act 2004 (see section 2.2.3). The resulting Ministerial Review Panel formed the following year. The Panel outlined key issues on which they wished to receive submissions and then undertook a public consultation process.[1] The focus of the Panel's consultation process was to establish whether submitters considered the main elements of the Foreshore and Seabed Act 2004 adequate or not.[2] The window for submissions was open for seven weeks, from 30 March until 19 May

1. Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel – Ministerial Review of the Foreshore and Seabed Act 2004 Volume 1', 30 June 2009 (CLO.004.0441), pp 29–30 (doc B3(a), pp [25592]–[25593]); Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel – Ministerial Review of the Foreshore and Seabed Act 2004 Volume 3: Summary of Submissions' (CLO.004.0618) (doc B3(a), pp [25725]–[25819])

2. 'Ministerial Review Panel – Paper 3: External Engagement', 11 March 2009 (CLO.004.201), attachment F (doc B3(a), pp [2775]–[2779])

2009.[3] During this time, the Panel received 580 submissions. Of these, 236 were oral presentations which the Panel heard as it travelled around the motu holding 21 consultation hui, including in Auckland, Whāngārei, Wanganui, Hamilton, Invercargill, Christchurch, and Wellington, among other places.[4] The Panel also met with various specific interest groups, some of them dedicated Māori interest groups.[5]

(2) *The Government's public consultation*

After the Government decided to repeal the Foreshore and Seabed Act 2004, which the Ministerial Review Panel had recommended, it invited the public to make submissions on a proposed replacement Act on 1 April 2010.[6] The proposal outlined, in abstract terms, what replacement legislation could look like and gave options for the main elements of a new Act (for example, options for the ownership of the foreshore and seabed, possible tests and awards, and proposed rules on public access).[7] Submissions closed after one month on 30 April 2010.[8] The Government received 1593 written submissions.[9] A summary of the submissions was published on the Ministry of Justice's website six months later.[10] As part of the public consultation process, 20 hui took place across the country in April 2010, including in Auckland, Gisborne, Wellington, and Christchurch, among other places. At these hui, the Attorney-General presented the Government's policy proposal for replacing the Foreshore and Seabed Act 2004.[11]

In addition, the Attorney-General (the Honourable Christopher Finlayson KC) met with 'representatives of "stakeholder and negotiating" groups' during that time, including Fish & Game New Zealand, the Royal Forest and Bird Protection Society of New Zealand, the New Zealand Council of Trade Unions, Aquaculture New Zealand, the New Zealand Recreational Fishing Council, Federated Farmers, the Federation of Māori authorities, the Petroleum Exploration Association, the City of Wellington, Local Government New Zealand, Saunders Unsworth representing port companies, the Ngāti Porou ki Hauraki Trust, the Ngāti Pahauwera Development Trust, Te Rūnanga o Te Whānau a Apanui, Te Rūnanga o Ngāti Porou, Te Rūnanga o Te Rarawa, the New Zealand Law Society, Trans-Tasman

3. Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel – Ministerial Review of the Foreshore and Seabed Act 2004 Volume 1', 30 June 2009 (CLO.004.0441), p 30 (doc B3(a), p [25593])
4. Ibid, pp 30–31 (pp [25593]–[25594])
5. Document B3, p 20
6. 'Reviewing the Foreshore and Seabed Act 2004: Consultation Document', no date (CLO.009.0294) (doc B3(a), pp [15394]–[15458])
7. Ibid, pp 23–47 (pp [15417]–[15441])
8. Ibid, p 5 (p [15399])
9. 'Reviewing the Foreshore and Seabed Act 2004: Summary of Submissions', 22 October 2010 (CLO.046.0003), p 63 (doc B3(a), p [22402])
10. Document B3, p 92, referring to 'Reviewing the Foreshore and Seabed Act 2004: Summary of Submissions', 22 October 2010 (CLO.046.0003), pp (doc B3(a), pp [22340]–[22402])
11. Document B3, pp 86–87

Resources, and five power companies.[12] These 'targeted meetings' included meetings with 'groups in foreshore and seabed negotiations' and meetings with 'key stakeholder groups'. The Crown did not specify which criteria it used to select the stakeholder groups.[13]

(3) *Submissions to the Māori Affairs Select Committee*

Following its introduction to Parliament in September 2010, the Marine and Coastal Area (Takutai Moana) Bill was referred to the Māori Affairs Committee. Over the next three months, the Committee received nearly 6,000 submissions on the Bill. It heard 287 of the submissions orally in Whāngārei, Auckland, Hamilton, Tauranga, Wellington, and Christchurch.[14]

(4) *Periodic consultation with focus groups*

In addition to the three main consultation activities described above, the Attorney-General periodically conferred with two groups set up to provide policy input into the development of the new legislation:

- The Iwi Leaders Group (also referred to as the 'Iwi Leaders' Forum', 'Iwi Leaders', and 'Iwi Leaders' Working Party'[15]), which was established by the Iwi Chairs Forum in late 2009.[16] The group comprised iwi leaders from across the country. Sir Mark Solomon (Kaiwhakahaere, Te Rūnanga o Ngāi Tahu) convened it and became its chair.[17] The Attorney-General formally consulted with the Iwi Leaders Group from August 2009 until June 2010.[18] Specific matters raised by the group included whether the Bill should describe customary marine title as an interest in land and whether the undefined term 'applicant group' (as opposed to 'hapū and iwi') ought to be used in the Bill.[19]
- The Technical Advisory Group, which met weekly from October 2009 onwards 'to discuss issues of shared importance and advise the Attorney-General on a monthly basis'.[20] The Technical Advisory Group consisted of four advisers to the Iwi Leaders Group (who appear to be 'iwi policy advisor

12. Ibid, p 89; 'Stakeholder and Negotiating Group Meetings with the Attorney-General', 1 April 2010 (CLO.009.0361) (doc B3(a), p [11359])
13. 'CAB (10) 106 Review of the Foreshore and Seabed Act 2004: Proposed Consultation Process' 19 March 2010 (CLO.026.0001), para 17, app 1 (doc B3(a), pp [11207], [11211])
14. 'Marine and Coastal Area (Takutai Moana) Bill: Report of the Māori Affairs Committee', no date (CLO.005.0243), p 10 (doc B3(a), p [25842])
15. Document B3, p 5
16. 'The Iwi Chairs Forum at times establishes iwi leaders groups on particular kaupapa to engage directly with government, host regional hui with iwi and hapū representatives, engage with other groups and stakeholders, and then report back to the Iwi Chairs Forum': doc B114, p 9.
17. Ibid
18. There is evidence of occasional meetings held until August 2010. For an overview of the meetings, see document B3, pp 97–98.
19. Document B113, p 6
20. Document B3, p 99 referring to 'TOW (09) 37 Review of Foreshore and Seabed Act 2004: Principles, Bottom Lines, and Next Steps', 23 October 2009 (CLO.001.0047), p 18 (doc B3(a), p [10006])

representatives' and distinct from the members of the Iwi Leaders Group[21]) and four government advisers (the Senior Advisor to the Minister of Māori Affairs, the Senior Advisor to the Attorney-General, and both the Director and Manager of the Ministry of Justice's Foreshore and Seabed Unit).[22] Among other matters, the Technical Advisory Group proposed possible awards for groups that met the test for protected customary rights and/or customary marine title.[23] In March 2010, the Technical Advisory Group was reconstituted as the Technical Design Group,[24] which, 'to ensure the group's ongoing independence', no longer included government officials.[25] The Crown also referred to and relied on internal advice it received from Te Puni Kōkiri and members of Te Pāti Māori.[26]

3.1.2 The claimants' position

Claimants contend that the Crown's consultation process with Māori during the development, enactment, and implementation of the Act was inadequate and 'lacked comprehensiveness and representation of . . . affected right-holders'. As a consequence, they argue that the consultation process breached the principles of partnership and active protection.[27]

Claimant counsel submit five main arguments to support their contention. First, they stress that matters as significant as the customary interests in te takutai moana require a heightened standard of consultation.[28] Counsel state that the principles of partnership and active protection 'require more of the Crown than taking "reasonable steps to make informed decisions"'.[29] Counsel also submit that when 'implementing legislation that seeks to continue to deprive Māori of their land, of their whenua, of their rohe moana', the Crown has 'a heightened obligation to consult'.[30] Counsel emphasise that, in addition to consultation, either 'consent or compensation'[31] is required to deprive Māori of their land, and that a 'robust

21. 'Weekly Status Report 2009/10: 66', 14 October 2009 (CLO.010.1985), p 2 (doc B3(a), p [9971]). The details on the four advisors to the Iwi Leaders Group were redacted from 'TOW (09) 37 Review of Foreshore and Seabed Act 2004: Principles, Bottom Lines, and Next Steps', 23 October 2009 (CLO.001.0047), p 18 (doc B3(a), p [10006]).

22. Document B3, p 99 referring to 'TOW (09) 37 Review of Foreshore and Seabed Act 2004: Principles, Bottom Lines, and Next Steps', 23 October 2009 (CLO.001.0047), p 18 (doc B3(a), p [10006])

23. 'Review of the Foreshore and Seabed Act 2004: List of Awards proposed by the Technical Advisory Group', 22 December 2009 (CLO.013.0198), paras 1–17, app A (doc B3(a), pp [10482]–[10487])

24. See doc B3, pp 99–100

25. Document B114, p 10 referring to 'Weekly Status Report (Week ending Wednesday 24 March 2010)', 25 March 2010 (CLO.010.1940), p 3 (doc B3(a), p [11261])

26. See, for example, submission 3.3.187, p 78; doc B113, pp 10–11, 14.

27. Submission 3.3.154, p 11; see also submission 3.3.81, p 10; submission 3.3.137(b), p 47; submission 3.3.150, p 5; submission 3.3.160, p 17; submission 3.3.167, p 35.

28. Submission 3.3.158, p 7

29. Submission 3.3.137(b), p 42

30. Submission 3.3.173, p 15

31. Submission 3.3.138, p 30; see also submission 3.3.179, p 3, which emphasises the need for 'dialogue and consent'.

policy process' for co-designing any new legislation with Māori should have been undertaken.[32] Overall, claimants criticise the Crown for failing to obtain consent from, or engage in, negotiations with Māori when developing and enacting the Act, thus breaching principles of the Treaty.[33] Several claimant witnesses say that their consent was not sought.[34]

Secondly, some claimant counsel argue that the Crown's consultation process was too short,[35] and did not reflect the recommendations of both the Tribunal and the Ministerial Review Panel for a 'longer conversation' between the Crown and Māori.[36] Instead, claimants assert that the consultation process, and the policy development process more broadly, were 'rushed'.[37] They draw attention to the evidence of Crown witness Benesia Smith, Director of the Ministry of Justice's Foreshore and Seabed Unit from 2007 until 2010, who described during hearing how officials were required to move 'at pace' to develop replacement legislation within the current political cycle.[38] Claimant counsel argue that this pace did not allow for a 'full exploration' into the issues the Tribunal and the Ministerial Review Panel had highlighted.[39] Claimants conclude that a robust and Treaty-compliant consultation process was compromised so that the Crown could achieve its political objectives, and that its failure to engage in the recommended 'longer conversation' has resulted in ongoing prejudice to Māori.[40]

Thirdly, claimants state that the Iwi Leaders Group is not representative of all Māori, and that the Crown was aware of this.[41] According to one claimant counsel, while the Crown certainly wished to involve Māori, 'it was not *all* or *any* Māori, it was the Māori of their choosing—the Iwi Leaders' Group who was identified as acceptable to the National Party'.[42] Another counsel states that 'It is for Māori to decide what their own representative institutions are and not the Crown.'[43]

Fourthly, claimants argue that the Crown did not approach the consultation process 'with an open mind'.[44] Rather, they allege, the Crown – by defining non-negotiable bottom lines early on – determined from the outset that the consultation process would reflect its own preferences: '[T]he control and management of the policy development process was always unilaterally in the hands of the

32. Submission 3.3.183, p 12
33. Submission 3.3.88, p 4
34. See, for example, doc B44, pp 16–17; doc B45, p 13; doc B99, pp 12–13.
35. Submission 3.3.99, p 4; submission 3.3.137(b), p 50; submission 3.3.158, p 9; submission 3.3.183, p 13
36. Submission 3.3.182, p 79; see also submission 3.3.137(b), pp 43–44
37. Submission 3.3.141, p 3; submission 3.3.174, p 230; see also submission 3.3.164, p 3; submission 3.3.173, p 13.
38. Submission 3.3.167, p 2; submission 3.3.169, p 12; both referring to transcript 4.1.9, p 194.
39. Submission 3.3.158, p 9
40. Submission 3.3.182, p 187; see also submission 3.3.81, pp 8–9; submission 3.3.197, p 10.
41. Submission 3.3.150, pp 10–11; submission 3.3.174, pp 247–248
42. Submission 3.3.167, p 35. Emphasis in original.
43. Submission 3.3.154, p 5
44. Submission 3.3.169, p 12

Crown'.[45] Counsel say 'the Crown's views on the manner and form of the new legislation were entrenched by the time it ran its public consultation programme, thus making consultation pointless'.[46] Significantly, counsel submit that no substantial changes were made to the Marine and Coastal Area (Takutai Moana) Bill following the Select Committee consultation process, despite the large number of submissions received.[47] In their submissions, claimants' summarise the Crown's consultation strategy as follows:

> [D]uring the policy development for the 2011 Act, Maori were included alongside other stakeholders and the general public at certain times throughout the process; however, their role is limited to providing feedback once the models and 'preferred options' are already developed and chosen. The extent of Maori influence over decision making from this point is at the will of the Crown and, from what the documents show, little weight or consideration is given to their concerns and preferences as the final outcomes remain the same as those chosen by the Minister.[48]

For example, before public consultation on the Takutai Moana Act began, the Attorney-General had already made clear to Cabinet that he preferred both a no-ownership regime and a statutory test for recognition of customary interests that combined common law and tikanga elements.[49]

Finally, claimants argue that while the Crown had unduly pre-determined some aspects of the Act before consultation, it omitted other important details from the consultation process entirely. Claimants argue that they did not have 'a genuine opportunity to be consulted on the details' of the Takutai Moana Act.[50] It would have been 'vital' to consult on issues such as the statutory deadline, which the Crown developed only after its public consultation process in April 2010.[51] Claimants also point to the Crown's decision to omit from the Act the ability of protected customary rights holders to declare temporary rāhui – which was mentioned in the consultation document – after the consultation process had concluded.[52]

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45. Submission 3.3.167, p 35; see also 'Cabinet Paper: TOW (09) 37 Review of Foreshore and Seabed Act 2004: Principles, Bottom Lines, and Next Steps', 23 October 2009 (CLO.001.0047), pp 6–9 (doc B3(a), pp [9994]–[9997])
46. Submission 3.3.174, p 230
47. Submission 3.3.196, pp 2–3
48. Submission 3.3.102, pp 18–19
49. Document B114, pp 59–60; 'Review of the Foreshore and Seabed Act 2004: Possible Test for Customary Title', 4 September 2009 (CLO.010.1326), p 7 (doc B3(a), p [9746]); 'Cabinet Paper: TOW (09) 51 Review of the Foreshore and Seabed Act 2004: A Shared Marine Space', 15 December 2009 (CLO.001.0088), p 2 (doc B3(a), p [10410]); 'Cabinet Paper TOW(10) 5: Review of the Foreshore and Seabed Act 2004: Proposals for Public Discussion Document', 12 March 2010 (CLO.003.0018), p 13 (doc B3(a), p [11029])
50. Submission 3.3.173, referring to transcript 4.1.9, p 407
51. Submission 3.3.149, pp 27–28
52. Submission 3.3.168, pp 30–31, referring to transcript 4.1.9, p 562; see also 'Reviewing the Foreshore and Seabed Act 2004: Consultation Document', no date (CLO.009.0294), p 38 (doc B3(a), p [15432])

3.1.3 The Crown's position

The Crown considers that it discharged its Treaty consultation obligations through the three main consultation events outlined above (the Ministerial Review Panel's consideration of submissions in 2009, the round of public consultation in April 2010, and the Select Committee process in late 2010), in combination with the involvement of the Iwi Leaders Group and the Technical Advisory Group.[53]

Crown counsel stress that 'the political realities of the Government's review of the 2004 Act must be given due weight' when assessing the duration of its consultation with Māori. In the Crown's view, the three-year political term did not allow for more extensive consultation,[54] a reality which counsel notes was also acknowledged by the Iwi Leaders Group.[55] The Crown therefore contends that the consultation process was 'as long as reasonably possible', given the political circumstances.[56] The Crown also suggests that it was reasonable to move on with the policy development process, given that submitters views were not likely going to change from another round of consultation:

> Given the entrenched views expressed by submitters during the public consultation process, it was not unreasonable for the Government to have continued to develop and refine its policy proposals and to rely on the select committee process to gather submitters' feedback on some of the details of the new regime, rather than carrying out a further round of public consultation on those matters.[57]

In response to the claimants' argument that the Crown did not consider Māori input with an open mind, the Crown cites examples of where it made changes to 'matters of both process and substance' in response to input from the Iwi Leaders Group and the Technical Advisory Group/Technical Design Group. For example, the Crown notes that the Attorney-General delayed considering certain matters, including possible statutory tests and the Act's possible contribution to the expression, recognition, and protection of mana, to allow for deliberation by the Iwi Leaders Group.[58] The Crown also highlights revisions it made to the public consultation document in response to feedback from the Technical Design Group. Further, Crown counsel point out that the Crown revised the definition of the term 'applicant group' before introducing the Bill to Parliament. Originally, the meaning of the term was not further specified to allow for flexibility.[59] In the Bill (and

53. Submission 3.3.134, p 22; submission 3.3.187, pp 73–74
54. Submission 3.3.187, pp 73–74
55. Ibid, p 76 referring to 'TOW (09) 41 Review of the Foreshore and Seabed Act: Timetable Options', 20 November 2009 (CLO.001.0347), paras 18–19 (doc B3(a), p [10167])
56. Submission 3.3.187, p 74
57. Ibid, p 82
58. Ibid, p 76, referring to 'Weekly Status Report (Week ending Wednesday 20 January 2010)', 20 January 2010 (CLO.010.2028), p 2 (doc B3(a), p [10524]); 'Weekly Status Report (Week ending Wednesday 27 January 2010)', 28 January 2010 (CLO.010.1897), p 2 (doc B3(a), p [10534]).
59. 'CAB Min (10) 21/4 – Review of the Foreshore and Seabed Act 2004: Report on Public Consultation Process and Proposals for a new regime', 14 June 2010 (CLO.009.0398), para 57 (doc B3(a), p [20480])

subsequently in the Act), it was later defined as '1 or more iwi, hapū, or whānau groups that seek recognition . . . of their protected customary rights or customary marine title' to reflect feedback from Te Pāti Māori and the Iwi Leaders Group.[60] The Crown also points to multiple instances where it found itself in agreement with the Iwi Leaders Group. For example, the Crown and the Iwi Leaders Group agreed that the Foreshore and Seabed 2004 needed to be replaced, the foreshore and seabed made inalienable, and public access protected.[61] In respect of the 2010 public consultation process, the Crown therefore urges caution in correlating an absence of 'significant changes to the Government's policy proposals' with 'evidence of a closed mind'.[62]

3.1.4 The Tribunal's analysis and findings

In this section, we determine whether the Crown's consultation process with Māori when developing the Takutai Moana Act met the standard required by the principles of partnership and active protection. If not, did the Crown's Treaty breach create prejudice for the claimants?

(1) *What Treaty compliant consultation should look like*

As we discuss in chapter 1, the principle of partnership requires that the Crown consults with Māori on matters of importance to them, and where important resources are at stake (see section 1.2.3). It must do so 'with an open mind' and provide Māori with 'sufficient information' so they can engage meaningfully.[63] The Tribunal has developed a 'sliding scale' for the appropriate standard of consultation.[64] It is determined by 'the nature of the resource or taonga, and the likely effects of the [Crown's] policy, action, or legislation'.[65] Consultation does not necessarily imply 'eventual agreement, or even negotiation'.[66] However, where Crown legislation may impinge on Māori rangatiratanga over a taonga, 'it is essential that full discussion take place with Maori', as the Tribunal found in its *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993).[67] In

60. Submission 3.3.187, pp 76–79, referring to 'CAB (10) 455 Marine and Coastal Area (Takutai Moana) Bill 2010: Approval for Introduction', 27 August 2010 (CLO.011.0151), paras 23–27 (doc B3(a), pp [21516]–[21517]); see also Marine and Coastal Area (Takutai Moana) Bill (as reported from the committee of the whole House), cl 7.

61. Submission 3.3.187, pp 77–78

62. Ibid, p 81

63. Waitangi Tribunal, *Tauranga Moana 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 20

64. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 237; Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, pp 682–690

65. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1237

66. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, p 20

67. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 173

such cases, the Crown cannot discharge its consultation obligation by merely informing Māori and hearing Māori views on the matter; it must strive to reach agreement with Māori, with the exception of matters of 'national interest'.[68]

On this basis, consulting Māori where taonga or other significant issues are at stake is not just an information-gathering exercise. Although it is important that the Crown makes informed decisions, that is not the sole purpose or focus of such consultation. The Crown must engage with Māori and allow them to exercise their tino rangatiratanga as part of the decision-making process.

In submissions, the Crown warns against classifying the whole takutai moana as a taonga:

> some caution is needed in characterising the entirety of the takutai moana as a taonga for all whānau, hapū and iwi, without accounting for the varying levels of interest that whānau, hapū and iwi have in different locations within the takutai moana, or in different resources within it.[69]

We accept that there are different layers and levels of interest in te takutai moana. For example, coastal iwi such as Ngātiwai have a different relationship to the moana than iwi like Ngāti Hine, whose rohe whenua is inland.[70] However, we accept the claimant submission that 'it is for Māori to define Māori interests in te takutai moana as a taonga in accordance with tikanga'.[71] Hori Parata, of Ngātiwai, tells us that, to them, the moana is not just a resource or a taonga – it is part of their identity:

> Ngātiwai are, quite literally, the people of the sea. The moana surrounding our mainland rohe (Te Moana nui o Toi te Huatahi), the islands, islets and rocks that dot that moana (Ngā Pōito o te Kupenga o Toi te Huatahi) are an integral part of our identity as a people.[72]

At the same time, Waihoroi Shortland of Ngāti Hine says that even though the rohe whenua of Ngāti Hine is inland, their rohe tangata extends further, maintaining their connection to the sea: 'Understandings of mana i te whenua and mana i te moana were inherent in our relationship with each other.'[73] In this context, we note that, unlike the Takutai Moana Act, the claimants draw no distinction between te takutai moana and whenua: '[W]henua is a taonga, whether above or below water', they submit.[74] Claimant counsel state that 'for coastal Māori, their

68. Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim*, pp 30–31; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 23
69. Submission 3.3.187, p 69
70. Document B4, p 3
71. Submission 3.3.189, p 6
72. Document B85, p 2
73. Document B4, pp 2–3, 6
74. Submission 3.3.157, p 3; see also submission 3.3.182, p 178; doc B75, p 3.

relationship with the takutai moana is just as culturally and practically significant to them as the relationship to whenua is to all Māori'.[75]

We accept that some parts of te takutai moana – for example, fishing grounds or areas containing wāhi tapu – are more significant to Māori than others. However, the evidence given during this inquiry demonstrates that, for the claimants, the entire takutai moana in their rohe is a taonga. That some areas within it are more significant than others does not undermine the status of te takutai moana as a whole. Richard Witana, a claimant on behalf of Te Rūnanga Nui o Te Aupōuri Trust, states in his brief of evidence that te takutai moana 'provides sustenance to the people of Te Aupōuri. It is a taonga and as such Te Aupōuri have obligations as kaitiaki to protect it and to preserve resources and the environment for future generations.'[76] Claimant Pereri Mahanga, of Te Waiariki, Ngāti Korora, and Ngāti Takapari, adds that the 'spiritual and physical well-being' of his people cannot be achieved without their wai, including 'taniwha, kaimoana, the act of kaitiakitanga and all that is encompassed in that tikanga'.[77] And Hilda Halkyard-Harawira, of Ngāti Haua, paints a strong picture of her hapū's customary interests, particularly in the Whangape Harbour:

> The Awaroa River, Whangape Moana and the coast are a life source for our people. They were once and still are full of life and purpose. The ebb and flow of the Whangape Moana is timeless. Our takutai moana is a focal point of Whangape and of the people.[78]

Finally, claimant Glenn Tootill, of Ngā Tai o Kāwhia, points out the significance of the moana to those living by the Kāwhia Harbour in the Waikato Region:

> The saying 'Kāwhia Moana, Kāwhia Kai, Kāwhia Tangata' denotes the long association of the Tainui people to Kāwhia, as well as the significance of the moana and its sustenance. The Kāwhia Harbour – or Kāwhia moana as we refer to it – is a place of great traditional significance and an important food-gathering ground.[79]

Numerous other witnesses give similar evidence as to the depth and closeness of their relationships with te takutai moana.[80] In contrast, we heard no evidence to suggest that some parts of te takutai moana are not considered a taonga. On the strength of the evidence we heard, we conclude that the marine and coastal area as a whole is a taonga that has significant importance to Māori. This is consistent with the Tribunal's finding in its Foreshore and Seabed report:

75. Submission 3.3.167, p 7
76. Document B33, p 5
77. Document B45, p 12
78. Document B27, para 9
79. Document B120, p 2; see also transcript 4.1.7, p 473
80. See, for example, doc B35, p 7; doc B46, para 33; doc B86(b), para 12; doc B86(c), p 3; doc B119, pp 1–3; see also submission 3.3.78, p 2; submission 3.3.89, p 2; submission 3.3.157, p 3; submission 3.3.168, p 1; submission 3.3.182, p 178; submission 3.3.200, p 3.

> The foreshore and sea were and are taonga for many hapū and iwi. Those taonga were the source of physical and spiritual sustenance. Māori communities had rights of use, management and control that equated to the full and exclusive possession promised in the English version of the Treaty. This promise applied just as much to the foreshore and seabed as, in 1848, it was found to apply to all dry land. There is in our view no logical, factual, or historical distinction to be drawn. In addition to rights and authority over whenua, Māori had a relationship with their taonga which involved guardianship, protection, and mutual nurturing.[81]

Where a taonga is in a vulnerable state, especially as a result of previous Treaty breaches, this may increase the Crown's duty to actively protect that taonga.[82] We consider the same applies where Māori reliance on a taonga has increased, especially as a result of previous Treaty breaches (as is the case with te takutai moana).

We hesitate to generalise the impact of colonisation on iwi, as each had their own experience. However, the evidence presented to the Tribunal over many inquiries demonstrates that most iwi suffered significant land loss. There were some iwi, such as Ngāti Porou and Te Whānau-ā-Apanui, who retained much of their tribal lands. Sadly, that experience was the exception rather than the norm. Only 1.47 million hectares of land has been retained as Māori freehold land.[83] This represents approximately 6 per cent of New Zealand's land mass or the traditional tribal estate. In *Re Edwards (Te Whakatōhea No 2)*, Justice Churchman relied on evidence that the 1866 confiscations of Whakatōhea dry land increased their dependence on te takutai moana, particularly as a source of food.[84] This would have been the case for many iwi who lost access to traditional land-based mahinga kai (cultivations and food gathering areas). We heard extensive evidence from claimants in this inquiry on their dependence on te takutai moana for physical and spiritual sustenance.[85] In summary, te takutai moana is a significant taonga to Māori, and for many iwi the reliance on it has even increased over time.

Having determined that te takutai moana is a significant taonga, we now turn to the impact of the Act on this taonga. This is the second of the two steps we must undertake to establish what Treaty compliant consultation should look like. The Act directly affects the relationship between Māori and te takutai moana. It takes the 'inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed' and translates those

81. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 28
82. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517 (Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 149); see also Waitangi Tribunal, *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wellington: Legislation Direct, 2013), pp 61–62; Waitangi Tribunal, *The Priority Report concerning Maui's Dolphin – Pre-publication Version* (Wellington: Waitangi Tribunal, 2016), 23.
83. Māori Land Court, 'Legal Terms', www.māorilandcourt.govt.nz/en/maori-land/legal-terms, accessed 31 July 2023
84. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, para 202
85. See, for example, doc B18, paras 33, 57; doc B30, paras 5–8, doc B45, pp 10–12.

rights 'into legal rights and interests' under the Act.[86] The customary interests in te takutai moana that were extinguished by the Foreshore and Seabed Act 2004 are restored and 'given legal expression in accordance with this Act'.[87] Furthermore, the Act deals with the question of ownership of the common marine and coastal area and (as the Crown accepts in its closing submissions[88]) limits Māori customary rights in relation to te takutai moana. It also imposes a deadline for the recognition of these rights; if applicants missed that deadline, they entirely lost the opportunity to obtain legal recognition of their customary rights.[89] In short, the Act's impact on te takutai moana and on the relationship Māori have with this taonga is significant.

Therefore, on the sliding scale that determines the appropriate standard of consultation, the Crown's obligation to consult with Māori in developing the Takutai Moana Act is at the highest end.[90] Merely 'reaching out' to Māori is not sufficient, nor is gathering information to make an informed decision. The Crown needed to engage in negotiations with Māori and allow them to exercise their tino rangatiratanga. In those negotiations, the Crown had to seek agreement with Māori, except if national interests outweighed reaching consensus.[91] That is the applicable standard for Treaty compliant consultation. We now assess the Crown's actions against it.

(2) *Periodic consultation with focus groups*

We acknowledge that the Crown consulted important focus groups, including the Iwi Leaders Group, the Technical Advisory Group/Technical Design Group, and iwi that had previously been engaged in negotiations with the Crown over the foreshore and seabed in their rohe. The Crown also drew on internal expertise from Te Puni Kōkiri and members of Te Pāti Māori. We agree that these groups have important knowledge and expertise, which are important sources for the Crown to draw on.

We also acknowledge that the Crown implemented some of the suggestions made by these groups. The Attorney-General received feedback from Iwi Leaders Group and Te Pāti Māori on the draft Bill, who wanted to replace the term 'applicant group' with 'hapū and iwi' or 'whānau, hapū and iwi', respectively.[92] He responded to this feedback by defining the previously undefined term 'applicant

86. Marine and Coastal Area (Takutai Moana) Act 2011, preamble
87. Ibid, s 6(1)
88. Submission 3.3.187, p 112
89. Marine and Coastal Area (Takutai Moana) Act 2011, ss 11, 46–93, 95(2), 100(2)
90. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuatahi*, vol 1, p 237; Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 2, pp 682–690
91. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, p 23; Waitangi Tribunal, *He Kura Whenua ka Rokohanga* (Lower Hutt: Legislation Direct, 2016), p 202, which states that the principle of partnership 'imposed on the Crown a duty not only to consult with Māori as to the governance of their lands, but required Māori agreement in respect to changing the law as to how they are to own, manage and control their lands under the law'.
92. Document B113, pp 10–11

group' as 'any iwi, hapū or whānau that seeks recognition under Part 4 of the customary rights or customary title of the group' in the final version of the Bill that was introduced to Parliament.[93] The Crown also submits that changes were made to the public consultation document to incorporate feedback from the Technical Design Group. However, we observe that the evidence Crown counsel cite in support does not indicate to what extent feedback was incorporated.[94]

In stage 1 of this inquiry, we found it was sufficient for the Crown to focus on key Māori groups with relevant knowledge and experience when consulting specifically on funding issues.[95] However, as the Crown acknowledges, the Iwi Leaders Group and the Technical Advisory Group were not representative of all Māori.[96] Targeted consultation with these groups is not the same as allowing all iwi, hapū, and whānau to engage, express their views, and exercise their tino rangatiratanga on an issue as significant as the legal fate of the entire takutai moana. Although consultation with focus groups was an important step, it does not relieve the Crown of its obligation to actively consult and engage with Māori generally.

(3) *Consultation with Māori generally*

We now turn to consider whether the Crown consultation process with Māori generally was Treaty compliant.

We accept that Māori, through the Ministerial Review Panel's consultation activities, had an opportunity to submit on a replacement regime in this process. However, there is a major difference between hearing Māori opinions on the shortcomings of a pre-existing statute in isolation and without accompanying policy proposals, on the one hand, and seeking Māori engagement on an elaborate and mature proposal including operational details for a new statute, on the other. Given that a concrete policy proposal had not yet been released at the time of the Panel's engagement activities, their value was necessarily limited. Although we support the Ministerial Review Panel's work, their review alone does not discharge the Crown's obligation to meaningfully engage with Māori on the proposed replacement regime that was to follow.

When the Ministerial Review Panel conducted its consultation process in 2009, the Foreshore and Seabed Act 2004 was still in force. The 2004 Act was a highly contentious piece of legislation; Māori widely opposed it. Given these circumstances, it is not surprising that the Māori submitters focused on what was wrong with the Foreshore and Seabed Act rather than promoting ideas for a replacement regime. Māori wanted the Foreshore and Seabed Act repealed and

93. Ibid, p 12

94. Submission 3.3.187, p 77, referring to 'Review of the Foreshore and Seabed Act 2004: Draft Speaking Notes for Cabinet Meeting Monday 29 March 2010', 29 March 2010 (CL10.013.0517), pp 4–5 (doc B3(a), pp [11274]–[11275])

95. See Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Waitangi Tribunal, 2020), p 53.

96. Submission 3.3.187, p 79; transcript 4.1.9, p 404

their submissions were tailored accordingly. The Ministerial Review Panel itself came to the same conclusion.[97]

In response to public submissions, including those of Māori, the Crown generally appears to rely on the narrative that the country was divided on all main questions concerning the policy proposal, and that, faced with this outcome, the Government's only appropriate path forward was to stick with its original proposal. For example, Crown counsel referred to 'divided', 'differing', or 'widely ranged' views among submitters on numerous occasions in their submissions.[98] Another passage that illustrates the Crown's strategy is the following:

> the fact that the 2010 public consultation process did not result in significant changes to the Government's policy proposals is not evidence of a closed mind. Officials carefully scrutinised the submissions received during that process and the Attorney-General provided a detailed report back to Cabinet on the submissions that were received. What is clear from the submissions received during that process is that there was little consensus among submitters on how issues associated with the foreshore and seabed should be addressed – apart from general agreement that there should be change.[99]

Public servants used similar language in the Ministry of Justice's departmental report, stressing there was 'little consensus' among submitters.[100] Where submitters largely agreed, the Crown highlighted that it was, in fact, for diametrically opposing reasons that led to the same outcome, for example that all submitters thought the statutory tests were inadequate, some because they thought the threshold was too high, some because they thought it was too low.[101]

We consider this consultation strategy neglects that the principle of partnership creates special duties for the Crown toward Māori that it does not have in relation to other New Zealanders. The Crown had to strive to reach agreement with Māori unless reasonable steps had been taken, agreement could still not be reached, and the Crown was required to make a unilateral decision on a matter of national interest (for example, certain individual provisions of the Takutai Moana Act that are in the national interest rather than the Act as a whole). Instead, the Crown seems to suggest that because there was no consensus between Māori and the public, it could proceed with its original policy proposal, subject to minor technical amendments.

97. Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel Volume 1', 30 June 2009 (CL0.004.0441), p 137 (doc B3(a), p [25700])
98. Submission 3.3.187, pp 46, 51, 55, 56
99. Ibid, pp 81–82
100. Ministry of Justice, 'Marine and Coastal Area (Takutai Moana) Bill – Departmental Report', 4 February 2011 (CL0.005.0302), para 3 (doc B3(a), p [23219])
101. Ibid, para 3 (p 23220)

We are also concerned that the Crown chose to cement non-negotiable 'bottom lines' as the Act's foundation, excluding them from consultation.[102] In principle, it may be legitimate for political actors engaged in negotiations to adopt fixed positions on certain matters. However, meaningful consultation on proposed policy is severely undermined when core aspects of that policy are declared non-negotiable. As mentioned in chapter 2 (see section 2.2.4), the bottom lines set by the Crown were:

- reasonable public access for all;
- recognition of customary interests;
- the protection of fishing and navigation rights; [and]
- the protection of existing use rights to the end of their term[.][103]

We agree that some of these aspects relate to national interests, on which the Crown does not necessarily have to 'strive to reach agreement with Māori'.[104] However, that does not give the Crown the right to define broad areas that are exempt from negotiations altogether. Rather, it means that disagreement about specific, detailed policies is acceptable if consensus cannot be achieved despite reasonable efforts having been made. Here, the Crown unilaterally shaped crucial aspects of how Māori could exercise rangatiratanga in relation to te takutai moana before it even began its consultation processes with Māori. We therefore consider that the Crown, in setting their non-negotiable bottom lines, was not acting in good faith toward Māori.

The April 2010 public consultation document set out high level policies and options that could be included in the replacement legislation. We agree that the public consultation that occurred in 2010 was a step in the right direction. It allowed Māori to engage on key policy issues before a replacement Bill was prepared (albeit excluding the bottom lines as above). However, once again, there were multiple shortcomings. Māori only had one calendar month to make submissions in response to the public consultation document. We consider this was too short a time to allow for meaningful consultation, which is inherently time-consuming.[105] Meaningful consultation allows for in-person discussions, sufficient time to prepare submissions, and multiple rounds of seeking feedback. Furthermore, the Crown's public consultation has consulted Māori and the general public to a similar extent, even though the principles of partnership and active protection required the Crown to consult with Māori to a greater degree than the general

102. 'Cabinet Paper: TOW (09) 37 Review of Foreshore and Seabed Act 2004: Principles, Bottom Lines, and Next Steps', 23 October 2009 (CLO.001.0047), paras 34–57 (doc B3(a), pp [9994]–[9997])

103. Ibid, para 9 (p [9985])

104. Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim*, pp 30–31; Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 23

105. 'Reviewing the Foreshore and Seabed Act 2004: Consultation Document', 31 March 2010 (CLO.009.0294), p 5 (doc B3(a), p [15399])

public, given the particular interest that Māori have in the taonga that is te takutai moana. There was little evidence to suggest that the Crown made meaningful efforts to engage with Māori specifically. The only general consultation activities that were arguably Māori-specific were the 10 consultation hui in April 2010 held at marae or Māori trust offices and the stakeholder meetings with Māori who had engaged in negotiations under the Foreshore and Seabed Act 2004.[106] The remaining 10 consultation hui were held in hotel conference rooms and similar venues.[107] We accept that the Crown needed to consult with the public as well. However, te takutai moana is an issue of national significance, which requires the Crown to meaningfully engage with and consult Māori to an extent that goes beyond the consultation with the general public. There was little evidence to demonstrate this took place.

Furthermore, some significant developments and changes to the proposed regime were not included in the public consultation document. Ms Smith told us in her evidence that 'there was quite significant policy development after the consultation process in March/April 2010 had been completed. And it was still evolving, it was very, very iterative.'[108] For example, the statutory deadline – a significant provision that imposed a limitation period on Māori to apply for recognition of their customary rights – was not included in the consultation document. Furthermore, the ability of Māori to have rāhui recognised changed considerably later in the policy development. The public consultation document proposed an award under the Act that would allow Māori to place rāhui over wāhi tapu, thus restricting or prohibiting access to wāhi tapu where necessary.[109] This included permanent wāhi tapu such as burial grounds and temporary wāhi tapu areas such as an area of sea after drowning. These awards were initially promoted as part of a non-territorial interest, which later become known as protected customary rights. However, in the Bill, wāhi tapu protection was instead included in the customary marine title regime (to which a statutory test with a higher threshold applies), thus making it more difficult for Māori to obtain it.[110] Finally, on reclaimed land (permanent land formed from land that formerly was below the line of mean high-water springs), the consultation document proposed that port companies would be able to obtain a permit that would provide for an interest akin to a leasehold interest in reclaimed land.[111] In the Bill this ability was expanded to include, in addition to port companies, other developers and network utility operators, who

106. Document B3, pp 86–89; 'Stakeholder and Negotiating Group Meetings with the Attorney-General', 1 April 2010 (CLO.009.0361) (doc B3(a), p [11359])

107. The consultation hui on the Marae were also open to the public but these would have drawn a higher level of Māori participation.

108. Transcript 4.1.9, p 405

109. 'Reviewing the Foreshore and Seabed Act 2004: Consultation Document', no date (CLO.009.0294), p 38 (doc B3(a), p [15432])

110. Marine and Coastal Area (Takutai Moana) Bill 201–1, cl 77

111. 'Reviewing the Foreshore and Seabed Act 2004: Consultation Document', no date (CLO.009.0294), p 45 (doc B3(a), p [15439])

would be able to receive a 'freehold interest or lesser interest'.[112] Māori were unaware of these significant changes until the Bill was introduced to the House. We consider the Crown should have undertaken a second round of consultation about the changes prior to introducing the Bill to the House.

The Takutai Moana Act is a complex piece of legislation. It promotes new concepts such as the no-ownership regime and translates inherited customary rights into 'legal rights' recognised under the Act. When dealing with such complex issues, the 'devil is in the detail'. Māori would have had to see the full draft Bill in order to properly understand how the proposed legislation would affect their interests. At this key stage in the lawmaking process, the Crown needed to fully and meaninfully engage with Māori, so that Māori could express their views and exercise their tino rangatiratanga. As Ms Smith acknowledged during the hearing, the introduction of the Bill to Parliament in September 2010 was the first opportunity for Māori to see the details of the legislation.[113] The only opportunity to engage on the Bill following that was through the Select Committee. Although the Select Committee process for receiving submissions on proposed legislation is important, it is a standard process available to all members of the public for every piece of proposed legislation. This was not a sufficient opportunity for Māori to engage in a meaningful way and to exercise their tino rangatiratanga in relation to te takutai moana – a significant issue that directly affected their taonga and their interests in it.

In summary, while the Ministerial Review Panel's consultation, the 2010 public consultation, and the Select Committee process were positive steps along the consultation pathway, they were, on their own, not sufficient for the Crown to discharge its obligation to consult with Māori on the Takuai Moana Act. The Crown should have known better: both the Foreshore and Seabed Tribunal and the Ministerial Review Panel had advised that proper engagement with Māori on this issue required 'a longer conversation'.

Instead of following this advice, the Crown chose to push the Act through 'at pace', so that it could be passed during the first term of the Government at the time. During cross-examination, Ms Smith stated that the political target of adopting the new Act before the end of the legislative cycle effectively meant that the review of the 2004 Act, the public consultation process, the policy development, and the Bill drafting all needed to be undertaken in just 18 months.[114] The Crown says the time constraints were dictated by prevailing 'political realities'.[115] We understand the sentiment behind this. Repealing the Foreshore and Seabed Act 2004 was the genesis and cornerstone policy of Te Pāti Māori. We appreciate that they wanted to achieve this before the next election. However, we accept claimant counsel's argument that this does not excuse the Crown's failure to ensure that the broader Māori community had every opportunity to meaningfully participate in

112. Marine and Coastal Area (Takutai Moana) Bill 201–1, cls 38–39
113. Transcript 4.1.9, p 407
114. Ibid, pp 229–230
115. Submission 3.3.187, p 73; doc B117, p 3

developing the Act.[116] It is for the Crown to navigate the 'political realities' of the day and reconcile them with its obligations to adequately consult with its Treaty partner. The everyday challenges that come with party politics must bow to the principles of the Treaty, not the other way around.

There were other options available to the Crown. They included repealing the Foreshore and Seabed Act 2004 and establising an interim regime to allow for a longer conversation to take place. The Crown says any interim regime would have risked creating confusion, increased and unnecessary legal complexity, and complex transitional provisions.[117] We accept that an interim regime would have presented some challenges, given that it would have required a transition across three regimes (the 2004 Act, an interim regime, and a replacement regime) as opposed to two (the 2004 Act and a replacement regime). However, we do not consider this challenge would have been insurmountable. It could have been overcome with time and care. Importantly, an interim regime would have allowed the time to do so. This would have also allowed for meaningful engagement with Māori while addressing the shortcomings of the Foreshore and Seabed Act immediately by repealing it. Alas, the Crown ultimately chose to prioritise a private compact between two political parties over the Treaty obligations it owed to Māori.

Finally, we are not convinced that the Crown was sufficiently open to revising key aspects of the Bill in light of the feedback it received through its consultation processes. The submissions to the Select Committee in response to the Bill were 'similar in diversity, content and tone' to those the Government received in its April 2010 consultation process, according to Ministry of Justice officials.[118] Yet, despite the tenor of these submissions, the Ministry of Justice's Departmental Report on the Bill did not recommend any substantial amendments that improved the position of Māori applicants under the Act.[119] For example, although submitters asked the Select Committee for more time to consider the Bill, the Crown chose to move ahead with its legislative timetable.[120] Many submitters were critical of the list of activities exempt from permission rights, some considering it as too extensive, some as insufficient. The report did not recommend 'the list be either reduced or increased'.[121] Submitters were critical of the no-ownership regime, but the Crown maintained it.[122] A significant number of submitters thought the types of customary rights recognised under the Bill did not adequately reflect the relationship of Māori with te takutai moana. Nevertheless, the report did not recommend

116. See submission 3.3.198, p 9; submission 3.3.208, p 2
117. Submission 3.3.187, pp 95–96
118. Ministry of Justice, 'Marine and Coastal Area (Takutai Moana) Bill – Departmental Report', 4 February 2011 (CLO.005.0302), para 8 (doc B3(a), p [23272]); see also 'Summary of submissions: oral submitters to the Marine and Coastal Area (Takutai Moana) Bill', 1 December 2011 (CLO.010.4809) (doc B3(a), pp [22694]–[22884])
119. Ministry of Justice, 'Marine and Coastal Area (Takutai Moana) Bill – Departmental Report', 4 February 2011 (CLO.005.0302), paras 1–4 (doc B3(a), pp [23219]–[23221])
120. Ibid, paras 3, 33 (pp 23219, 23276)
121. Ibid, para 3 (p 23219)
122. Ibid, paras 50–51 (p 23281)

changing the types of customary rights recognised in the Bill.[123] Many submitters did not agree that the High Court, rather than the Māori Land Court, should have jurisdiction for determining protected customary rights and customary marine title. However, the report did not recommend a change to the Bill.[124] In its own report, the Māori Affairs Committee recommended by majority that Parliament pass the Bill with no amendments, although the members of the Labour Party, the Green Party, and the ACT Party did voice their respective minority views, which all opposed the Bill.[125] The Bill subsequently adopted by the Committee of the whole House included numerous technical changes but stayed true to the Crown's positions on the key aspects of the legislation as at March 2010.[126]

In summary, the Crown's consultation with Māori on the Takutai Moana Act was conducted over too short a time and lacked a focus on affected Māori as opposed to non-Māori. It did not allow Māori to engage with the operational details of the Act, apart from making submissions to the Select Committee on the Bill. We have significant concerns about the Crown's practice of undertaking very general, high-level initial consultation on proposed legislation with only limited ability to engage on the crucial details of that legislation. In our view, this practice does not meet the Treaty standard for consultation in this case. The Crown also failed to demonstrate a genuine willingness to revisit core aspects of its policy proposal on the basis of the feedback it received during the consultation process.

(4) *Result*

For the reasons we have given above, we find that the Crown's failure to adequately consult with Māori during the development of the Takutai Moana Act is a breach of the Treaty principles of partnership and active protection.

(5) *Prejudice*

Claimant counsel made few substantial submissions dealing with prejudice resulting from the alleged sub-standard consultation. Nevertheless, the submissions and evidence the Tribunal received about the Crown's consultation process demonstrate sufficiently clearly that Māori had only limited opportunities to engage with the details of the Takutai Moana Act. Because Māori were unable to discuss and comment on the details of the Bill until the Select Committee's public consultation process, there was essentially no meaningful, Māori-specific consultation conducted on the details of the Bill. Hastily timed and broad consultation on insufficiently detailed policy is not sufficient to allow 'properly informed and meaningful participation' for Māori, thus preventing them from exercising tino rangatiratanga. Therefore, we consider the Crown's consultation omissions have prejudiced claimants.

123. Ibid, para 3 (p 23219)
124. Ibid, para 3 (p 23221)
125. Māori Affairs Committee, 'Marine and Coastal Area (Takutai Moana) Bill 201–1 Report of the Māori Affairs Committee', undated (CL10.005.0243), pp 2–9 (doc B3(a), pp [25835]–[25841])
126. Marine and Coastal Area (Takutai Moana) Bill 201–2 (as reported from the Committee of the Whole House on 22 March 2011)

(6) *Recommendation*

Ordinarily, we would recommend that the Crown start its consultation process with Māori anew. However, a proper consultation process could take years. Proper consultation would involve the longer conversation that was previously recommended to the Crown and which we agree should have occurred. However, as we will explain in further detail in chapter 5, further consultation at this late stage would likely create further prejudice for Māori applicants who have been awarded rights under the Act, and for those still waiting to be heard (see section 5.3.1(4)(d)). Instead, we recommend that the Crown use its response to this Tribunal inquiry process as an opportunity to amend the Act based on the claims that have been heard and upheld.

3.2 The Treaty Clause

3.2.1 Overview

Section 7 of the Act sets out the 'Treaty clause', which provides:

> 7 **Treaty of Waitangi (te Tiriti o Waitangi)**
>
> In order to take account of the Treaty of Waitangi (te Tiriti o Waitangi), this Act recognises, and promotes the exercise of, customary interests of Māori in the common marine and coastal area by providing,—
>
> (a) in subpart 1 of Part 3, for the participation of affected iwi, hapū, and whānau in the specified conservation processes relating to the common marine and coastal area; and
>
> (b) in subpart 2 of Part 3, for customary rights to be recognised and protected; and
>
> (c) in subpart 3 of Part 3, for customary marine title to be recognised and exercised.

3.2.2 The claimants' position

Claimants characterise this clause as 'self-fulfilling' and comparatively weak when set against Treaty clauses included in other Acts.[127] Claimant counsel compare it with the Resource Management Act's Treaty clause, which likewise 'carries the same low weighting' by merely taking into account the Treaty, rather than giving effect to it.[128] They cite examples of Treaty clauses with stronger wording, including section 9 of the State-Owned Enterprises Act 1986 (which provides that 'nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi') and section 4 of the Conservation Act 1987 (which provides that 'this Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi').[129] Elsewhere, claimants submit

127. Submission 3.3.137(b), p 97; submission 3.3.160, p 41; submission 3.3.172, p 19; see also doc B4, p 7.
128. Submission 3.3.201, p 39. See Resource Management Act 1991, s 8.
129. Submission 3.3.137(b), p 97

that more recent Treaty clauses have become 'statements about treaty principles, rather than directives to apply treaty principles.'[130]

The Treaty clause under the Takutai Moana Act is one such 'statement' about Treaty principles, claimants submit, rather than a directive to apply them. In other words, the clause requires no action beyond the implementation of the statute itself.[131] Indeed, one counsel suggests that the wording of the Treaty clause might have been intentionally framed in such a way as to prevent the courts from interpreting the Act in accordance with the principles of the Treaty.[132]

3.2.3 The Crown's position

The Crown submits that the Act's Treaty clause is consistent with the Legislation and Design Advisory Committee's 'Legislation Guidelines'.[133] Crown counsel explain that there are two types of Treaty clauses. The first ('general clauses'), usually found in older statutes, require decision makers to apply the statute in a Treaty-compliant fashion.[134] The second ('specific clauses') are usually found in statutes adopted more recently and 'enumerate how particular parts or provisions of an Act take account of or give effect to the Crown's Treaty obligations.'[135] The move towards specific Treaty clauses is also consistent with submissions and recommendations from the Law Commission, the Crown says. It also notes that this 'has "been the usual approach" since 2000.'[136]

The Crown suggests that a specific Treaty clause is chiefly intended to demonstrate that the legislator has fully considered Treaty consistency before the Act is passed.[137] Specific Treaty clauses like the one used in the Takutai Moana Act demonstrate that 'the Government has actively worked through what is required in order to recognise and safeguard what the principles of the Treaty mean in the particular context. In doing this, the provisions provide greater certainty than general measures, the Crown says.'[138] The Crown also submits that, '[c]ontrary to some claimants' submissions, it is not correct that the effect of s 7 is that the Treaty has no "interpretive force" in respect of the provisions of the Act.'[139] Rather, 'The Treaty of Waitangi and its principles will be a relevant interpretive aid if ambiguity

130. Ibid, p 100
131. Ibid
132. Submission 3.3.160, p 40
133. Submission 3.3.187, p 266
134. The Crown names as examples section 4 of the Conservation Act 1987 and section 8 of the Resource Management Act 1991: submission 3.3.187, p 266.
135. The Crown names as examples section 4 of the Environmental Protection Authority Act 2011 and section 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012: submission 3.3.187, p 266.
136. Submission 3.3.187, p 267, with reference to Law Commission, *Study Paper 9: Māori Custom and Values in New Zealand Law* (Wellington: New Zealand Law Commission, 2001), para 352
137. Submission 3.3.187, pp 266–268
138. Legislation Design and Advisory Committee, 'Legislation Guidelines', March 2018, www.ldac.org.nz/assets/documents/LDAC-Legislation-Guidelines-2021-edition.pdf, pp 31–32 (submission 3.3.187, p 267)
139. Submission 3.3.187, p 268

or a lack of clarity in the statute exists.'[140] To support their argument, Crown counsel refer to the High Court's approach in its *Re Paul* decision and the Supreme Court's *Trans-Tasman* decision, where the Supreme Court held that 'An intention to constrain the ability of statutory decision makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.'[141]

3.2.4 The Tribunal's analysis and findings

Is the Treaty clause in section 7 of the Act consistent with the principles of the Treaty; if not, has it created prejudice for claimants?

As Crown counsel have pointed out, statutes may contain either 'general' or 'specific' Treaty clauses. The Tribunal has previously made findings on both types. Concerning general clauses, the Tribunal held on multiple occasions that the Treaty clause in the Resource Management Act 1991 is in breach of Treaty principles, because it does not require those with responsibilities under the Act to give effect to Treaty principles, only to take them into account.[142] In the *Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, the Tribunal said the clause was 'entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty'.[143] This puts the Treaty 'at the bottom of the hierarchy of matters' to be considered, the Tribunal found in that same report.[144] On the other hand, in *Ko Aotearoa Tēnei*, the Tribunal characterised the general clause in section 4 of the Conservation Act 1987 as 'one of the strongest legislative requirements for the Crown to give effect to its Treaty obligations.'[145]

As for specific Treaty clauses, the Tribunal's *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (2019) discussed the Treaty-compliance of section 4 of the now-repealed New Zealand Public Health and Disability Act 2000.[146] This specific Treaty clause read:

> **4 Treaty of Waitangi**
>
> In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Maori, Part 3 provides for mechanisms to enable Maori to contribute to decision-making on, and to participate in the delivery of, health and disability services.

140. Submission 3.3.187, p 268
141. Ibid, pp 268–269, referring to *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC), para 151
142. For an overview of the reports that made such findings, see Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pp 49–50
143. Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, pp 49–50, 66
144. Ibid, p 45
145. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 315
146. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt: Legislation Direct, 2019), p 97

The Tribunal held that the Treaty clause in that Act did not 'go far enough in ensuring that the whole health sector complies with Treaty principles', and that these omissions by the Crown constituted 'breaches of the Treaty principles of partnership, active protection, and equity and the duty of good governance.'[147]

The Treaty clause in the Takutai Moana Act is very similar to the Treaty clause in the now-repealed New Zealand Public Health and Disability Act 2000. We accept claimant counsel's argument that, compared to other legislation, the Takutai Moana Act's Treaty clause is at the bottom end of Treaty recognition standards. It is a weak and self-serving provision. It states only that the Treaty has been taken into account when the Act was drafted but goes no further. As a consequence, it fails to expressly require the decision makers who administer the Takutai Moana Act to comply with Treaty principles.

However, to determine whether the Takutai Moana Act's Treaty clause is in breach of Treaty principles, we must take into account recent developments in case law on the application of Treaty clauses. The Supreme Court, in its *Trans-Tasman Resources Ltd v Taranaki–Whanganui Conservation Board* judgment, acknowledged that there is a 'trend in more recent statutes to give a greater degree of definition as to the way in which the Treaty principles are to be given effect and a departure from the more general, free standing Treaty clauses like that in s 4 of the Conservation Act'.[148] Importantly, the Court clarified that this trend does not necessarily restrict the Treaty's relevance to the interpretation of statutes – in fact, quite the opposite:

> the move to more finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.[149]

In light of this decision, Treaty principles still apply when the courts or the Government interpret and apply the Takutai Moana Act – despite the phrasing of the Act's Treaty clause. For example, the High Court considers the acknowledgement of the principles of the Treaty as one of the Takutai Moana Act's purposes relevant to the interpretation of the Act:

147. Ibid, p 97
148. *Trans-Tasman Resources Ltd v Taranaki–Whanganui Conservation Board* [2021] 1 NZLR 801 (SC), para 150
149. Ibid, para 151

> The last three of the stated purposes (recognition of the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau as tangata whenua, provision for the exercise of customary interests, and acknowledgement of the Treaty of Waitangi), favour an interpretation which focuses on tikanga and the exercise of that tikanga by the claimant groups rather than any reference back to common law or statutory property rights.[150]

In conclusion, although it would have been preferable for the Crown to make this express in the legislation, we find that the Takutai Moana Act's Treaty clause does not breach Treaty principles. Despite its phrasing, Treaty principles of partnership and active protection still apply to the administration of the Takutai Moana Act. How exactly these Treaty principles materialise in the statutory interpretation of the Act is an issue to be argued before, and determined by, the courts.

3.3 The Statutory Definition of the Marine and Coastal Area

3.3.1 Overview

The Act defines the marine and coastal area in section 9. Under the Act, marine and coastal area means:

(a) . . . the area that is bounded,—
  (i) on the landward side, by the line of mean high-water springs; and
  (ii) on the seaward side, by the outer limits of the territorial sea; and
(b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
(c) includes the airspace above, and the water space (but not the water) above, the areas described in paragraphs (a) and (b); and
(d) includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b)

3.3.2 The claimants' position

The claimants contend that the Act's definition of the marine and coastal area creates 'artificial boundaries' on continuous land that, under tikanga Māori, should not be compartmentalised.[151] Their evidence refers to 'dry land and sea land'[152] and to 'ground flooded by the sea'[153] to illustrate their argument. In this context, claimant witness Te Atarangi Sayers quotes Moana Jackson, who gave evidence on this issue in the Waitangi Tribunal's *Te Moutere o Motiti Inquiry*:

150. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, para 120
151. Document B82, p 3; see also doc B12, p 2; doc B21, pp 4–5; doc B62, para 14; doc B71, pp 15–16; doc B73, p 5; doc B102, p 13.
152. Document B122, p 2; doc B123, para 11; doc B124, p 3; doc B125, para 14; doc B133, p 2
153. Document B12, p 2

> Unlike the common law compartmentalisation of land and water into separate components like the foreshore and seabed; or the river, the riverbed, and the riverbank; the Māori legal and intellectual tradition has always seen fresh and sea waters as part of the land. Every body of water has its own unique characteristics and life cycles but they are all part of the life blood and the sustaining, purifying body fluids of Papatuanuku.[154]

Furthermore, some claimant counsel argue that the Act's definition of the marine and coastal area is 'restrictive'.[155] In their view, the seaward boundary restricts 'customary rights recognition to customary rights that exist within the outer limits of the Territorial Sea when, in fact, the Claimants' customary rights in the sea extend into the contiguous zone, the exclusive economic zone and the continental shelf'.[156]

They submit that the limit of the territorial sea at 12 nautical miles out has no relevance under tikanga whatsoever.[157] Rather, claimant Robert Gabel, of Ngāti Tara, says in his brief of evidence that his tūpuna went out 'further than that to fish . . . They used small boats and were able to read the tides well and used favourable winds to return to shore.'[158] Other claimants also give evidence that their customary interests extend 'to the furthest traditional fishing grounds', which are well beyond the 12 nautical mile limit.[159] Bryce Peda-Smith, on behalf of Te-Whānau-ō-Rataroa, describes the method for finding the right seaward boundary under tikanga: 'if you go out 10 miles and you catch a fish with a Māori name, keep going. If you go out 50 miles and you catch a fish with a Māori name, keep going. Keep going and when you catch a fish that doesn't have a Māori name, you have reached the boundary.'[160]

The Crown's failure to legislate for the recognition of customary rights beyond the 12 nautical mile limit 'has culminated in breaches of the Treaty principles of partnership, active protection and good faith', one claimant counsel submits.[161]

Regarding the landward boundary, some claimants state that the mean high-water springs tide mark is an 'arbitrary' Pākehā parameter that is 'not consistent with tikanga'.[162] Rather, the area should extend from another point, which claimants variously suggested could be the 'mean High Water Spring tide mark',[163]

154. Moana Jackson, evidence in the matter of Te Moutere o Motiti Inquiry, 24 April 2018 (Wai 2521 ROI, doc A18), p 27 (doc B20, para 22)
155. Submission 3.3.128, pp 3–4
156. Submission 3.3.174, p 83; see also submission 3.3.182, pp 162–165; submission 3.3.206, pp 20–25.
157. Submission 3.3.212, p 28; see also doc B85, p 3; doc B109, p 5.
158. Document B38, p 5
159. Document B74, p 7
160. Document B102, p 14
161. Submission 3.3.206, p 25
162. Document B37, p 3; doc B38, p 4
163. Document B9, para 5

'where the beach stops and the land begins',[164] or about '50–100 metres further in' than the high-tide mark.[165]

3.3.3 The Crown's position

Crown counsel submit that the seaward boundary of the marine and coastal area is prescribed by Aotearoa New Zealand's obligations under international law. They explain that since New Zealand does not exercise full sovereignty in the area beyond the territorial sea, there was a 'sound basis' on which to define the seaward boundary of the marine and coastal area as the outer limit of the territorial sea.[166] Counsel say that, when the Crown was developing the Act, it considered extending the seaward boundary beyond the outer limit of the territorial sea and into the exclusive economic zone. But it ultimately found that the United Nations Convention on the Law of the Sea (UNCLOS) prevents the New Zealand Government from conferring any territorial rights to groups in recognition of their customary interests beyond the outer limit of the territorial sea.[167] Crown counsel add that other legislation – such as the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 – can protect certain Māori interests beyond the territorial sea.[168]

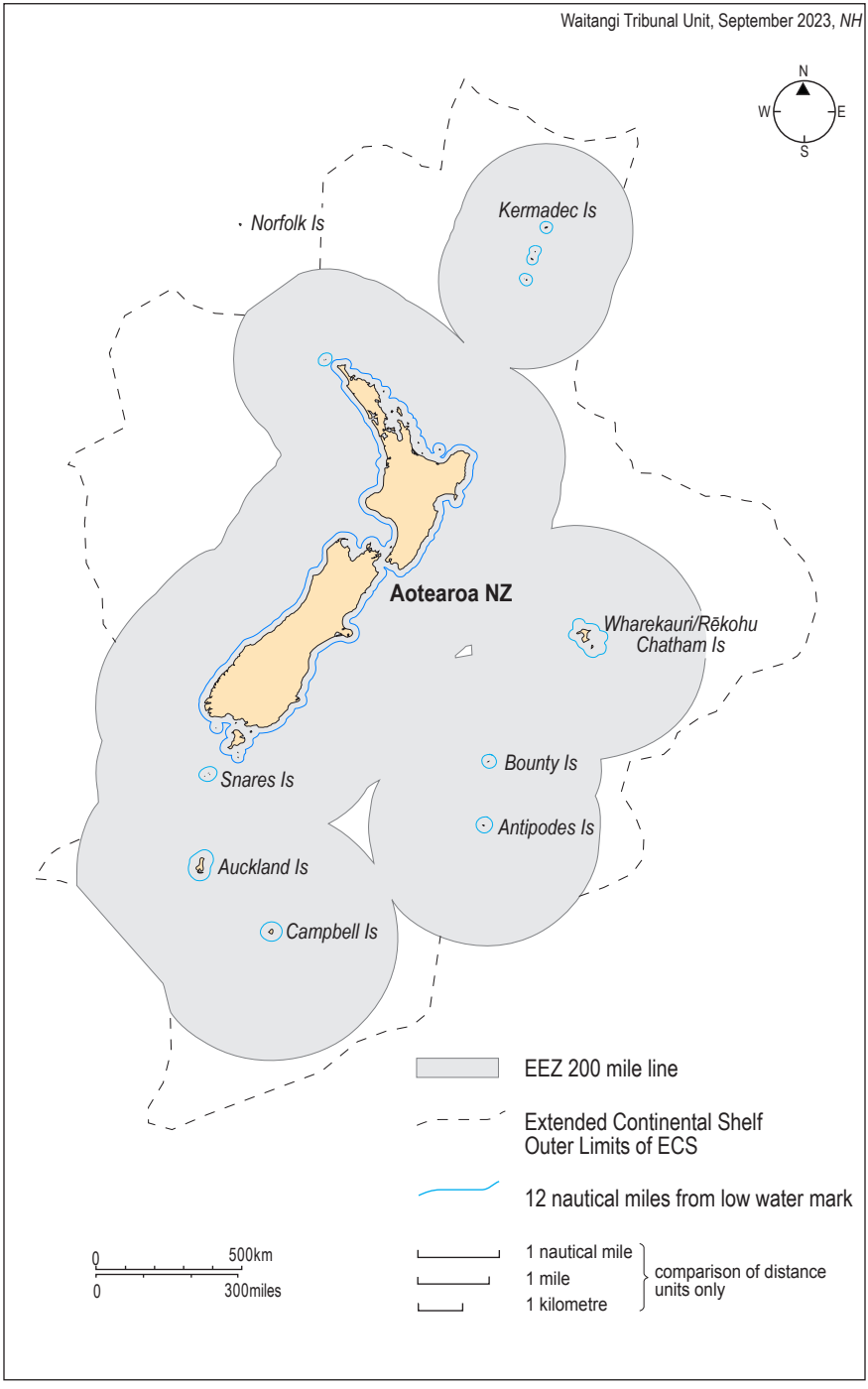
3.3.4 The Tribunal's analysis and findings

In this section, we determine whether the Act's definition of the marine and coastal area is consistent with the principles of the Treaty, and if not, whether it has prejudiced claimants.

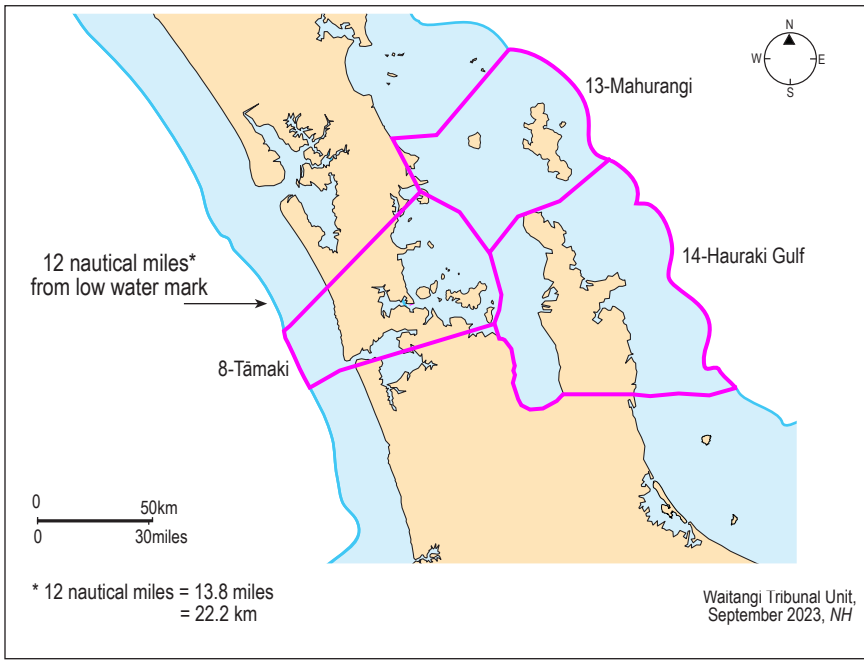
The definition of the marine and coastal area affects which parts of te takutai moana are subject to the Act and which are not. Therefore, it plays a role in all other aspects of the Act, be it the tests for protected customary rights and customary marine title, the statutory deadline, or the bundles of rights that the Act grants. However, in this chapter, our focus is solely on whether the definition in itself complies with the principles of the Treaty. Specifically, we consider whether the Act creates artificial boundaries that make it more difficult for Māori to live alongside te takutai moana in accordance with tikanga and, if so, whether this can be justified by objective policy reasons.

This is a matter that involves, first, fair balancing between Māori interests and other public and private interests represented by the Crown and, secondly, the protection of a taonga. We therefore consider the principles of partnership and active protection most relevant to determining whether the definition of the marine and coastal area is Treaty compliant. As the Tribunal first defined it in its *Report of the Waitangi Tribunal on the Orakei Claim* (1987), the principle of partnership provides that the compact between Māori and the Crown 'rests on

164. Document B36, p 4
165. Document B38, p 4
166. Submission 3.3.187, p 103
167. Ibid, p 107
168. Ibid, pp 107–108



The exclusive economic zone, continental shelf, and marine and coastal area



The Tāmaki, Mahurangi, and Hauraki Gulf marine and coastal areas

Source: Te Arawhiti, 'Maps of Indicative Coastal Areas', www.tearawhiti.govt.nz/assets/Coastal-Areas-Map.pdf.

the premise that each partner will act reasonably and in the utmost good faith towards the other'.[169] If the Crown acts in good faith, it is within the Crown's kāwanatanga powers to choose from multiple policy options.[170] And, as the Tribunal found regarding the principle of active protection in its *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993), of all taonga whose protection is guaranteed to Māori under article 2 of the Treaty, natural and cultural resources are of 'primary importance'.[171] The active protection of resources is especially relevant where Māori have 'a traditional interest in the resource'.[172] In the context of the Crown's 'fiduciary duty' to protect Māori interests, the Tribunal later

169. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 207, referencing *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353, 369–370

170. *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) 135, per Cooke P; Waitangi Tribunal, *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Lower Hutt: Legislation Direct, 2017), p 60; see also Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 131.

171. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: GP Publications, 1993), p 31

172. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct: 2002), p 67, referring to Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report*, p 52.

added in its *Radio Spectrum Management and Development Final Report* (1999), that '[w]here there was doubt over what was included as taonga . . ., the Crown had an obligation to ascertain Maori views to see what they regarded as "their taonga" and . . . to ensure that they were protected'.[173]

We begin by observing that the Act's definition of the marine and coastal area, which legally separates it from other land, is at odds with a Māori understanding of the natural world. The evidence presented in this inquiry demonstrates that tikanga Māori does not distinguish between whenua that is covered by water and whenua that is not – an interconnectedness that is reflected in the phrase 'ki uta ki tai' ('from the mountains to the sea'). By insisting on a division between the marine and coastal area and other land, the Act's definition certainly makes it more difficult for Māori to properly exercise tino rangatiratanga.

However, we also acknowledge the Crown's argument that the governance of the marine and coastal area is a complex matter. At multiple locations and in various ways, most New Zealand communities enjoy, utilise, and access differing aspects of the marine and coastal area. Consequently, its legal regulation involves numerous statutory regimes, each regulating a different aspect of te takutai moana and seeking to balance the interests of all New Zealanders.[174] For this complex legal and administrative framework to function properly and be understood without unreasonable effort required, the law may need to treat certain aspects of a natural phenomenon (in this case, the sea) in isolation, even if it and the land it washes are understood as an indivisible whole. It is common practice for legislation to do so. For example, the Resource Management Act 1991 defines what 'coastal water' is, the Continental Shelf Act 1964 defines what the 'continental shelf' is, and Te Ture Whenua Maori Act 1993 defines what 'land' is.[175] Within its kāwanatanga powers, the Crown regularly needs to define physical phenomena distinctly in order to balance various interests in and around them. There are always many different possible definitions available, and none of them will ever satisfy all those concerned. Therefore, on balance, we consider that the legal separation of the marine and coastal area from other land under the Takutai Moana Act is a pragmatic necessity that does not seek to negate the Māori view of what te takutai moana is.

The Act's definitions of both the seaward and the landward boundaries of the marine and coastal area are identical with those of the 'foreshore and seabed' under the Foreshore and Seabed Act 2004. As outlined in section 3.3.2, claimants have suggested a range of alternative definitions of the marine and coastal area boundaries (locating the landward boundary at the 'mean high water spring tide mark', 'where the beach stops and the land begins', or about '50–100 metres further in' than the high tide mark, and locating the seaward boundary where the 'furthest

173. Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wellington: GP Publications, 1999), p 40

174. See submission 3.3.187, p 88, referring to Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel – Ministerial Review of the Foreshore and Seabed Act 2004 Volume 2: Appendices', 30 June 2009 (CL10.004.0357), p 29 (doc B3(a), p [25513])

175. Resource Management Act 1991, s 2; Continental Shelf Act 1964, s 2; Te Ture Whenua Maori Act 1993, s 4

traditional fishing grounds' end). While these suggestions have merit, they also raise further complex issues. The claimant suggestions for the landward boundary generally move it further inland than the current landward boundary in the Act. Doing so would bring the landward boundary into collision with privately-owned parcels of land and other regulatory regimes to a greater degree than at present. As 'specified freehold land' is excluded from the definition of the common marine and coastal area, this would have little practical benefit for Māori. (We consider the exclusion of 'specified freehold land' from the common marine and coastal area in chapter 6: see section 6.5.2.) Moreover, the definition the Crown chose for the seaward boundary (see section 3.3.1) is consistent with the United Nations Convention on the Law of the Sea. Extending the seaward boundary beyond the limits of the territorial sea may breach international law. We also note that the Act only applies to the marine and coastal area bounded by the mean high-water springs and the outer limits of the territorial sea. As such, any Māori customary interests that lie beyond the outer limits of the territorial sea remain undisturbed.[176] As most claimants oppose the regime established under the Act, one would assume they would welcome the Act not applying to customary interests beyond the outer limits of the territorial sea.

For these reasons, we find that the Takutai Moana Act's definition of the marine and coastal area does not breach the Treaty principles of partnership or active protection.

3.4 The No-Ownership Status of Te Takutai Moana

3.4.1 Overview

One of the fundamental tenets of the Takutai Moana Act is that it creates a 'no-ownership' regime for the common marine and coastal area. The common marine and coastal area is defined in section 9 of the Act as

> the marine and coastal area other than—
> (a) specified freehold land located in that area; and
> (b) any area that is owned by the Crown and has the status of any of the following kinds:
> (i) a conservation area within the meaning of section 2(1) of the Conservation Act 1987:
> (ii) a national park within the meaning of section 2 of the National Parks Act 1980:
> (iii) a reserve within the meaning of section 2(1) of the Reserves Act 1977; and
> (c) the bed of Te Whaanga Lagoon in the Chatham Islands

Section 11 of the Act establishes a special status for the common marine and coastal area:

176. Unless affected or extinguished by means other than this Act.

11 Special status of common marine and coastal area

(1) The common marine and coastal area is accorded a special status by this section.

(2) Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act.

. . . . .

(5) The special status accorded by this section to the common marine and coastal area does not affect—

(a) the recognition of customary interests in accordance with this Act; or

(b) any lawful use of any part of the common marine and coastal area or the undertaking of any lawful activity in any part of the common marine and coastal area; or

(c) any power to impose, by or under an enactment, a prohibition, limitation, or restriction in respect of a part of the common marine and coastal area; or

(d) any power or duty, by or under an enactment, to grant resource consents or permits (including the power to impose charges) within any part of the common marine and coastal area; or

(e) any power, by or under an enactment, to accord a status of any kind to a part of the common marine and coastal area, or to set aside a part of the common marine and coastal area for a specific purpose; or

(f) any status that is, by or under an enactment, accorded to a part of the common marine and coastal area or a specific purpose for which a part of the common marine and coastal area is, by or under an enactment, set aside, or any rights or powers that may, by or under an enactment, be exercised in relation to that status or purpose.

3.4.2 The claimants' position

The claimants state that the Act's no-ownership regime, and the exceptions to it, effectively deprive Māori of their customary interests and instead place greater authority and land rights in the Crown's control.[177] Claimants make several arguments to support this claim.

First, some claimants submit that ownership is a wholly inappropriate term to denote the relationship between Māori and te takutai moana in their respective rohe.[178] Tama Hata, of Ngāti Ira o Waiōweka hapū, tells us:

> Seas do not belong to a people, they are entirely their own entity. People cannot claim an ocean's mana, it is the ocean's in its entirety. Who am I to make myself godlike and to cause the flow and ebb of the oceans? Who am I, a mere mortal, to espouse that my mana is greater than the mana of the guardian of the oceans? To the Crown, your audacity to designate yourself god of the oceans is astounding. Cease forthwith![179]

177. Submission 3.3.82, p 10; submission 3.3.102, pp 51–52; submission 3.3.158, p 15
178. Document B79, para 27; doc B80, para 16; doc B102, p 8; doc B112, p 4
179. Document B71, p 15

However, some claimant witnesses consider that tino rangatiratanga is linked to the exercise of ownership rights.[180] Despite the tension between the common law concept of ownership and a tikanga Māori understanding of te takutai moana, many witnesses say that Māori 'own' te takutai moana in their respective rohe.[181] In essence, the claimants argue that, as far as the term 'ownership' is at all useful in the context of te takutai moana, Māori are the rightful owners of te takutai moana in their own rohe. The Act's no-ownership regime takes that ownership away, the claimants argue.[182] They consider that it therefore 'operates as an instrument of expropriation.'[183] Witness James Kyrke Watkins, of Patutoka hapū, argues that 'the Crown cannot transfer a property right of property that they do not own.'[184] Claimants also highlight that the no-ownership regime was not recommended by either the Tribunal or the Ministerial Review Panel.[185]

Secondly, claimants submit that the significant number of exceptions to the no-ownership regime undermines the concept. For example, Mr Sayers says that exemptions 'like fishing and mining, are the kinds of activities that matter most to Pākehā, and which can damage the mauri of the rohe moana the most.'[186] Claimants are also particularly concerned about the provisions around the ownership of minerals and the reclamation of land. Claimant counsel on behalf of Ngāti Mutunga o Wharekauri criticises the exclusion of Te Whaanga Lagoon in the Chatham Islands from the no-ownership regime, which has allowed the Crown's ownership of the lagoon to continue, albeit for the purpose of settling historical Treaty claims with with Ngāti Mutunga o Wharekauri and Moriori.[187]

Thirdly, claimants assert that the Act's misleading language hides the expropriatory effect of the no-ownership regime. The Act may give the appearance of improving the legal situation of Māori because section 11(2) states that '[n]either the Crown nor any other person owns, or is capable of owning, the common marine and coastal area'. But ultimately, claimants allege, the concept of no-ownership has turned out to be not 'materially different' from the Crown's plans to vest the foreshore and seabed in 'the people of New Zealand' under its 2004 policy – which the Tribunal thought was indistinguishable from Crown ownership.[188] Therefore, claimant submissions characterise the no-ownership model as 'disingenuous' and 'duplicitous'.[189] They emphasise that the status of no-ownership 'does

180. Document B146, p 5, with reference to Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claims* (Lower Hutt: Legislation Direct, 2012), pp 1, 14–16.

181. Document B6, para 16; doc B7, para 13; doc B37, p 3; doc B38, p 7; doc B45, p 14; doc B46, para 42; doc B53, para 7; doc B82, p 3; doc B104, p 6; doc B111, p 9; but see doc B80, para 16.

182. Document B17, para 18; submission 3.3.102, p 49; submission 3.3.173, p 23; Moana Jackson, 'A Further Primer on the Foreshore and Seabed', 7 April 2010 (doc B87(a)), p 3; doc B99, p 22

183. Submission 3.3.137(b), p 58; see also submission 3.3.212, pp 9–10.

184. Document B8, para 58

185. Submission 3.3.102, p 49

186. Document B20, para 56

187. Submission 3.3.133, p 4; submission 3.3.138, p 16; see also transcript 4.1.9, pp 145–147.

188. Submission 3.3.137(b), pp 55–58, referring to Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 99; see also submission 3.3.206, p 32.

189. Submission 3.3.203, p 4; doc B11, p 4

not mean that nobody controls and manages the takutai moana – that authority still sits with the Crown' despite the different phrasing.[190] Another counsel calls the 2011 Act 'more pernicious' than the Foreshore and Seabed Act 2004 because of its 'remarkable sophistry' in creating the impression that no property rights are held in the marine and coastal area, when in fact, many rights remain with private owners or the Crown.[191] Ms Halkyard-Harawira summarises her view thus:

> The 2011 Act says that no one owns the takutai moana, but in my opinion, when you control and make decisions about who can use it, who can access it, who can have rights to it, how it is used, how it is not to be used, then you are the owner. The Crown is the owner.[192]

3.4.3 The Crown's position

The Crown submits that the no-ownership regime is consistent with the principles of the Treaty. It says the exceptions to it are the inevitable result of needing to balance multiple competing interests in te takutai moana.[193]

On the no-ownership regime in general, the Crown points to claimant evidence stating that 'te takutai moana is not something that can be "owned"'.[194] The Crown further submits that there are significant differences between the 2004 and 2011 Act in this regard. For example, whereas the 2004 Act extinguished customary interests by vesting the public foreshore and seabed in the Crown, the 2011 Act 'restores those customary interests', and the Crown 'no longer owns the [public] foreshore and seabed'.[195] Furthermore, the Crown maintains that it is inaccurate to describe the Takutai Moana Act as 'confiscatory' or as having the effect of 'extinguishing rights'.[196]

On the exceptions to the no-ownership regime, the Crown submits that there are good reasons for them. First, Crown counsel state that there are 'sound public policy reasons' to retain the Crown ownership of gold, silver, uranium, and petroleum by exempting it from the no-ownership regime, thus 'preferring the national interest over that of landowners (whether Māori or non-Māori)'.[197] Secondly, the Crown states that the purpose of placing reclaimed land outside the scope of the no-ownership regime is 'to provide certainty to business and development interests'.[198] It notes that 'port companies and airport operators will have made considerable investment commitments based on a presumption of Crown ownership of the reclaimed land, and the belief that they could obtain an interest

190. Submission 3.3.102, p 52; see also submission 3.3.137(b), pp 59–61; submission 3.3.158, p 15; doc B4, p 6.
191. Submission 3.3.140, para 6
192. Document B27, para 45
193. Submission 3.3.134, p 24; submission 3.3.187, pp 102–108, 111–128
194. Submission 3.3.134, p 24
195. Submission 3.3.187, pp 108–111
196. Ibid, p 112
197. Ibid, pp 126, 150–152
198. Ibid, p 126

in the land.'[199] Thirdly, regarding the exemption of Te Whaanga Lagoon from the no-ownership regime, the Crown clarifies that the reason for excluding it was to ensure that 'the lagoon would be available for use in future Treaty settlements with Ngāti Mutunga o Wharekauri and Moriori'.[200] The Crown also explains that, despite claims to the contrary,[201] the repeal of the Foreshore and Seabed Act 2004 did not reverse the vesting of Te Whaanga Lagoon in the Crown.[202] Neither did section 6 of the 2011 Act, because, as Crown counsel explain, section 6 of the 2011 Act only restores customary interests in the 'common marine and coastal area', from which Te Whaanga Lagoon is excluded.[203]

3.4.4 The Tribunal's analysis and findings

In this section, we consider whether the no-ownership status of the common marine and coastal area under the Act is consistent with the principles of the Treaty. If not, has the statutory regime prejudiced claimants or could it do so in the future?

We agree with the Crown that Māori do not generally view their customary interests in land or te takutai moana as a western form of ownership – their interests, and the rights and obligations linked to them, are grounded in tikanga. However, this does not mean that ownership is not important to Māori. On the contrary, in a common law system, ownership is a critical legal instrument in order to exercise tino rangatiratanga.[204] A fee simple title is also the form of western property rights that most closely resembles the property rights inherent in mana whenua, mana moana, or tino rangatiratanga over tribal lands.[205] The language used in the no-ownership provision suggests that it was designed to remove the heat from what has proven to be a highly controversial issue. We acknowledge that language is an important factor. However, ultimately the label of 'ownership' is not the most important matter for us to consider. Instead, the key issue is whether the Act adequately recognises and protects Māori customary rights in te takutai moana.

If the bundles of rights provided to Māori under the Act adequately recognise and protect Māori customary interests, then the no-ownership regime has little practical effect. But whether this is the case or not cannot be answered without considering in detail what rights are granted under the Act, and according to what procedures. We do so in chapters 4 to 6, and therefore defer making comprehensive findings on the no-ownership regime until then. We also defer until chapters 5 and 6 our examination of the significant exceptions to the no-ownership regime,

199. Submission 3.3.187, p 126
200. Ibid, p 218
201. Document B92, p 4
202. Submission 3.3.134, pp 31–32
203. Ibid
204. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claims*, p 16
205. Mana whenua, mana moana, and tino rangatiratanga provide a greater bundle of rights than a fee simple title, as it also includes rights of self-determination, regulation, and absolute authority.

including the regime concerning reclaimed land, the retention of private titles, and the ownership of Crown minerals.

However, we can, at this point, consider the distinct matter of Te Whaanga Lagoon. The bed of Te Whaanga Lagoon is expressly excluded from the definition of the common marine and coastal area in the Act.[206] Here, we agree with the Crown that, in accordance with section 32 of the Legislation Act 2019, the repeal of the Foreshore and Seabed Act 2004 did not of itself reverse the vesting of the lagoon in the Crown. Nor did section 6 of the Takutai Moana Act restore customary interests in Te Whaanga Lagoon, given that the lagoon is excluded from the definition of the common marine and coastal area. In addition, we accept the Crown's evidence that it is retaining ownership in good faith to ensure that the lagoon is available for a future Treaty settlement with Ngāti Mutunga o Wharekauri and Moriori.[207] We therefore find no breach of the Treaty principles of partnership, active protection, equity, or equal treatment concerning the treatment of Te Whaanga lagoon.

3.5 The Use of Tikanga Concepts and Te Reo Māori Terms in the Act

3.5.1 Overview

References to different tikanga concepts and te reo Māori terms are found throughout the Act, including the following:

- The Act refers to the Resource Management Act's definition of kaitiakitanga as 'the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship'.[208] The Takutai Moana Act mentions kaitiakitanga, among other provisions, in the context of iwi, hapū, and whānau participation in conservation processes.[209]
- The Act defines mana tuku iho as 'inherited right or authority derived in accordance with tikanga'.[210] One of the Act's purposes is to 'recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua'.[211]
- For the definition of taonga tūturu, the Takutai Moana Act refers to section 2(1) of the Protected Objects Act 1975:

> **taonga tūturu** means an object that—
> (a) relates to Māori culture, history, or society; and
> (b) was, or appears to have been,—
> (i) manufactured or modified in New Zealand by Māori; or

206. Marine and Coastal Area (Takutai Moana) Act 2011, s 9
207. Document B114, pp 51–52; transcript 4.1.9, pp 146–147
208. Marine and Coastal Area (Takutai Moana) Act 2011, s 9, in connection with Resource Management Act 1991, s 2
209. Marine and Coastal Area (Takutai Moana) Act 2011, s 47
210. Ibid, s 9
211. Ibid, s 4

(ii) brought into New Zealand by Māori; or
(iii) used by Māori; and
(c) is more than 50 years old

The Act provides that any taonga tūturu found in a customary marine title area is prima facie the property of the relevant customary marine title group.[212]

- The Act defines tikanga as 'Māori customary values and practices'[213] and refers to it in the preamble and in various sections of the Act.[214] Importantly, exercising a right or holding an area 'in accordance with tikanga' are elements of the statutory tests for protected customary rights and customary marine title, which we will assess in depth in chapter 4.[215]
- For the definition of wāhi tapu and wāhi tapu areas, the Takutai Moana Act refers to section 6 of the Heritage New Zealand Pouhere Taonga Act 2014:

> **wāhi tapu** means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense[.]
> **wāhi tapu** area means land that contains 1 or more wāhi tapu[.]

The Act grants, under certain conditions, a wāhi tapu protection right to customary marine title groups.[216]

3.5.2 The claimants' position

According to claimants, the Act concerns matters that are crucial to te ao Māori, but its use of tikanga concepts and te reo Māori is 'selective', 'out of context', and for the Crown's 'own purpose'.[217] Some submit that tikanga and te reo Māori could have been used more extensively in the Act.[218] For example, Robert Willoughby and Bella Thompson told us in evidence:

> The language of the Act should have deferred to te reo . . . and should have relied on our words of expression, te mauri, manaakitanga, kaitiakitanga, ahikā roa, mana whenua, mana moana, mana motuhake, tikanga, maramataka. We see one reference to manaakitanga in the Act in the preamble. We can't see those other concepts expressed anywhere in the Act.[219]

212. Marine and Coastal Area (Takutai Moana) Act 2011, s 82
213. Ibid, s 9
214. Ibid, ss 51–52, 58, 60, 78, 85, 99, 106, 111
215. Ibid, ss 51, 58
216. Ibid, ss 78–81
217. Submission 3.3.137(b), pp 126–127
218. Submission 3.3.162, p 1; submission 3.3.203, p 6
219. Transcript 4.1.6, p 297

They later acknowledged that the Act also refers to kaitiakitanga and tikanga, but expressed dissatisfaction with the way they were referred to.[220] Other claimants similarly state that, even though the Act includes Māori words and phrases, the drafters of the Act do not appear to have understood 'what those phrases mean or how they work in practice'.[221] They argue that 'it is up to Māori, not the Crown, to define what concepts such as tikanga, tino rangatiratanga, kaitiakitanga and manaakitanga mean'.[222] The claimants assert that the Crown considers the use of tikanga in legislation a mere box-ticking exercise.[223] As Waihoroi Shortland puts it in his evidence in support of claims by Te Rūnanga o Ngāti Hine: 'The whole Act is conceptualised in English. The driver of the Act is the English language. The te reo Maori used does not do justice to the way in which we Maori want to express our rights.'[224]

Some claimants take particular issue with the Act's use of the phrase 'mana tuku iho' (which section 9 translates as 'inherited right or authority derived in accordance with tikanga'), saying it gives the misleading impression that the Act respects and provides for mana tuku iho. According to claimants, it does the exact opposite.[225] Meanwhile, claimant witness Kara Paerata George, of Te Kapotai hapū, notes that the concept of rangatiratanga is not mentioned in the Act at all, an absence he considers 'telling'.[226] Another witness, Mariao Hohaia, of Ngāti Rēhia hapū, tells us that constructs such as kaitiakitanga, manaakitanga, and tikanga are 'inter-dependent [on] other cultural constructs such as wairuatanga, rangatiratanga, etc and should not be used in isolation of one another' as they are in the Act.[227]

For some claimants, the real concern is not the use and definition of those terms, but whether those terms and concepts have been properly recognised and provided for in the Act. They state that although the Act 'incorporates Māori concepts such as taonga, kaitiakitanga, and manākitanga, its provisions fail to attribute their true and tika meaning'.[228]

3.5.3 The Crown's position

The Crown maintains that the Act's use of tikanga and te reo Māori is 'appropriate' and 'consistent with New Zealand's legislative history'.[229] It acknowledges that the use of Māori concepts in statutes has been criticised because of a 'risk of

220. Ibid, pp 311–312
221. Submission 3.3.141, p 4
222. Submission 3.3.173, p 8
223. Submission 3.3.175(a), p 4
224. Document B4, p 9
225. Submission 3.3.137(b), p 127; see also doc B4, p 11; doc B24, para 10.
226. Document B24, para 13
227. Document B79, para 49
228. See, for example, submission 3.3.101, para 23.
229. Submission 3.3.187, p 270

misinterpretation and redefinition.'[230] 'However', Crown counsel say, 'the inclusion of tikanga concepts and te reo Māori in the Takutai Moana Act neither restricts nor seeks to redefine how those concepts are interpreted and applied.'[231]

The Crown supports its argument by reference to the broad definitions of tikanga and mana tuku iho given in the Act.[232] Furthermore, the Crown notes that kaitiakitanga and wāhi tapu are defined consistently with other legislation that uses these terms.[233] When considering submissions that had been made to the Select Committee, Crown officials noted that:

> A number of the terms used in the Bill have been used in other legislation for a number of years (for example tikanga is used in the Fisheries Act 1996 and in Te Ture Whenua Māori Act 1993) and have an established body of case law as to their application. It is expected that this body of law, and the experience acquired by decision-makers over the years (for example, local government in applying the Resource Management Act 1991) would apply to the application of the te reo terms included in the Bill.[234]

3.5.4 The Tribunal's analysis and findings

Is the Act's use of tikanga concepts and te reo Māori terms consistent with the Treaty principles of partnership and active protection? If not, have the claimants been prejudiced by it, and how?

To answer these questions, we first consider the Treaty principles the Tribunal set out in its *Report on the Te Reo Maori Claim*. The Tribunal stated that those 'who want to use [te reo Māori] on any public occasion or when dealing with any public authority ought to be able to do so'.[235] It elaborated on this finding in its later report, *Ko Aotearoa Tēnei* (2011), which held that the Crown must lead by example when it comes to the use of te reo Māori:

> On the Crown's part, there needs to be a mind-shift away from the pervasive assumption that the Crown is Pākehā, English-speaking and distinct from Māori. More than ever the Crown now presents a Māori face to the nation and the world – in international relations, trade facilitation, diplomacy, peacekeeping. . . . The Crown must lead by example: we cannot build our national identity on a superficial co-option of Māori culture.[236]

230. Submission 3.3.187, p 271
231. Ibid
232. Ibid, pp 271–272
233. Ibid, p 272
234. Ministry of Justice, 'Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill', 4 February 2011 (CL10.005.0302), paras 108–112 (doc B3(a), p [23291]) (submission 3.3.187, p 272)
235. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 2nd ed (Wellington: Brooker's, 1993), p 47
236. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuatahi*, vol 1, p 167

In the same report, the Tribunal also noted that one of the Crown's four primary duties towards te reo Māori is to provide for a Māori-speaking government.[237] A government that abides by the rule of law speaks through its statutes. We consider that, if statutes are not bilingual, then – at the very least – they need to recognise and appropriately provide for the key Māori concepts they address. In other words, if legislation concerns core Māori concepts, as the Takutai Moana Act certainly does, those concepts need to be meaningfully recognised and provided for in the Act.

There is some puzzling use of te reo Māori terms and concepts in the Takutai Moana Act. The preamble states, for example:

> (4) This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. . . .

We are unclear why the Crown chose to refer to the principle of manaakitanga here. While manaakitanga is no doubt an important tikanga principle, so are tino rangatiratanga, mana whenua, mana moana, and kaitiakitanga. Individual iwi and hapū will likely have further tikanga that they apply to te takutai moana. There is no obvious reason the Crown chose to refer to one tikanga principle here and not to others. An uncharitable eye may view this use of manaakitanga (which invokes notions of hospitality, kindness, and generosity) as an attempt by the Crown to justify the guaranteed rights of access, navigation, and fishing provided for under the Act. Although we do not know why the Crown has used this term here, it is an example of cherry-picking terms and concepts with no obvious reason or explanation – a practice that risks undermining the very tikanga referred to. If the Crown was attempting to refer to an overarching principle that applies here, the obvious choice would be tino rangatiratanga.

In relation to kaitiakitanga, Mr Shortland told us about the important connection between kaitiakitanga and tino rangatiratanga:

> I'm here to talk about Kawiti and his understanding of mana, of Rangatiratanga, because it's the same words that the Crown still refuses to recognise as we go through this act. It's easy for them to pick all the soft words, if you have a look at any of the words that are in there, they are the words that when you translate them into English, they lose all authority, because when translated into English kaitiakitanga . . . becomes guardianship, and it's the English notion of the guardianship that carries weight, not the one I grew up with . . . but that's not the word we were looking for. The word we were looking for, and they knew what the word was, was Rangatiratanga.

237. Ibid, p 161

In this context, we note that claimants take issue with the way the definition of kaitiakitanga has been applied by the Environment Court under the Resource Management Act 1991.[238]

Furthermore, the definition refers to natural and physical resources but omits the important role that kaitiakitanga has in the spiritual realm for maintaining the mauri of physical resources and its guardians (taniwha). The Act perpetuates this omission by exempting spiritual activities from the scope of protected customary rights under certain conditions, which we will discuss in chapter 5 (see section 5.2.4).

As for the Act's definition of taonga tūturu, we acknowledge that it may not accord with the Māori view of it. However, the Protected Objects Act 1975 relates to the discovery of ancient Māori artifacts, and sets out a process to determine who is the rightful owner and/or guardian of those artifacts. The Takutai Moana Act adds special rules to that regime in relation to taonga tūturu discovered in customary marine title areas.[239] For this purpose, the Takutai Moana Act's reference to the existing definition in the Protected Objects Act 1975 is appropriate.

We do not take issue with the broad definitions used in the Act for tikanga Māori and mana tuku iho. These definitions are intentionally broad; we support this approach, because it allows decision makers to take tikanga Māori and mana tuku iho into account within the context of the particular issue before them. Applying tikanga Māori in specific circumstances will inevitably require evidence from tikanga experts. Any attempt to avoid this by providing more comprehensive definitions of tikanga concepts in the Act would likely result in prescriptive, exclusive, and inaccurate definitions.

On balance, our concern with the use of tikanga concepts and te reo Māori terms in the Takutai Moana Act is primarily about how and to what extent those concepts are recognised and provided for in the Act. Therefore, at this point, we make no finding of a Treaty breach concerning the use of tikanga concepts and te reo Māori in the Act.

However, we will return to the significance of several te ao Māori concepts in the Act later on. Importantly, in chapter 4, we will discuss whether using tikanga as an element of the statutory tests for protected customary rights and customary marine title is consistent with the principles of the Treaty (see section 4.1.4).

238. Transcript 4.1.6, p 455
239. Marine and Coastal Area (Takutai Moana) Act 2011, s 82

CHAPTER 4

ARE THE MECHANISMS FOR RECOGNISING CLAIMANTS' RIGHTS UNDER THE ACT TREATY COMPLIANT?

4.1 The Statutory Tests

4.1.1 Overview

We have outlined the statutory tests under the Act in chapter 2 (see section 2.3.3). In summary, they are:

- To obtain recognition of a protected customary right, applicants need to demonstrate that they have exercised the right since 1840 and continue to do so in accordance with tikanga.[1] The protected customary right must not be extinguished as a matter of law.[2]
- To obtain recognition of a customary marine title, applicants need to demonstrate that they hold the specified area in accordance with tikanga. They must also show they have either exclusively used and occupied it from 1840 to the present day without substantial interruption, or received it through a customary transfer from another group that fulfilled these criteria.[3] Customary marine title does not exist if it is extinguished as a matter of law.[4] Factors that may be taken into account when determining an application for customary marine title include whether the applicants own abutting land and/or have been exercising non-commercial customary fishing rights in the application area from 1840 to the present day.[5]

4.1.2 The claimants' position

(1) *Arguments applying to both tests*

The claimants submit that both statutory tests are in breach of the Treaty.[6] They state that the standards used in the tests are 'unfair', 'unrealistically high', and 'intentionally narrow'.[7]

Several claimants are concerned that the Act lacks a clear definition of who can be an 'applicant group'. They argue this could lead 'individuals and groups with no

1. Marine and Coastal Area (Takutai Moana) Act 2011, s 51(1). It does not matter whether the protected customary right has been exercised in exactly the same way or a similar way or evolved over time.
2. Ibid, s 51(1)(c)
3. Ibid, s 58(1), 58(3)
4. Ibid, s 58(4)
5. Ibid, s 59(1)
6. Submission 3.3.182, pp 114–115, 121–122
7. Submission 3.3.137(b), p 62; submission 3.3.141, p 5; submission 3.3.182, pp 114, 121

apparent standing or proven claim interest to lodge an application.'[8] This possibility, counsel submit, has 'caused undue distress' to the claimants and is a breach of good faith and partnership.[9] Claimant counsel note that while the High Court requires applicants to demonstrate their mandate, it 'is always open for larger groupings . . . to dispute the mandate of a smaller group' but the same opportunity does not exist for smaller groups.[10]

Claimants also allege that the tests make inappropriate use of international jurisprudence.[11] Counsel discuss the Crown's decision to use Canadian and Australian jurisprudence when designing the tests rather than New Zealand jurisprudence (including Treaty jurisprudence). Some claimants point out that Canada and Australia have 'an entirely different history of colonial involvement in aboriginal land holdings' than Aotearoa New Zealand.[12] Claimants say that for the Crown to have imported a high threshold for establishing customary rights from another jurisdiction, but then award rights which are lesser than those available in that jurisdiction, amounts to 'irresponsible and unequal treatment'.[13] Claimants also note that this is not the first time the Crown's reliance on international models has been problematic: the Ministerial Review Panel had previously critiqued the Crown's use of international jurisprudence when designing the Foreshore and Seabed Act 2004.[14]

Claimants submit that neither statutory test aligns with tikanga, but are also concerned 'that codifying tikanga into the statutory test reduces its meaning and effect'.[15] With regard to protected customary rights, they submit that including tikanga in the test could create a precedent for what constitutes tikanga, when 'practically it is fluid' and different among Māori groups.[16] As for the statutory test for customary marine title, claimant counsel argue that the simultaneous use of non-Māori and tikanga Māori concepts in the test provides no assured protection of tikanga and shows the Crown's 'failure to centralise Te Tiriti throughout the Act'.[17]

Finally, some claimants compare the statutory tests under the Takutai Moana Act to the test under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019. The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 resulted from a Treaty settlement between the Crown and ngā hapū o Ngāti Porou. Many aspects of the Ngāti Porou Act are very similar to the Takutai Moana Act. Claimants argue that

8. Submission 3.3.54, p 4
9. Ibid; submission 3.3.148, p 11
10. Submission 3.3.181, pp 2–3, referring to *Re Clarkson* [2021] NZHC 1968, para 228.
11. Submission 3.3.154, p 8; submission 3.3.182, pp 120, 124; see also pp 130–133.
12. Submission 3.3.198, p 10
13. Submission 3.3.159, p 10; submission 3.3.212, p 31
14. Submission 3.3.102, pp 61–62; submission 3.3.137(b), pp 61–62; submission 3.3.159, p 10; submission 3.3.182, pp 39–40, 123–133
15. Submission 3.3.102, p 62
16. Ibid
17. Submission 3.3.159, pp 8–9

the Ngāti Porou Act pre-determines the outcome of the statutory tests in favour of Ngāti Porou.[18]

(2) *Arguments applying to the customary marine title test only*

Claimants argue that the Act's requirement of exclusivity affects the relationship between iwi, hapū, and whānau with overlapping customary interests. As claimant Robert Willoughby, of Ngāti Kuta, explains in his evidence: 'The concept of exclusive use is problematic because we are expected to assert our rights not through the exercise of dominion, but essentially by denying the interests of others.'[19] He continues: 'we are in effect forced to say "we were here and another group was not", which pits hapu against hapu.'[20] Numerous claimants endorse this view, calling the process of applying for interest recognition 'adversarial', shaped by western rather than Māori culture.[21] Claimant Pita Tipene, on behalf of Ngāti Hine, warns that it is easy 'to get caught up in inter-tribal discussions about who has rights to specific areas of the takutai moana' while overlooking that 'the real overlap is with the Crown'.[22] As well as being adversarial, requiring applicants to exclusively use and occupy the area in question is inconsistent with tikanga and damaging to whanaungatanga, claimants say.[23] According to some, 'an exclusivity requirement is very difficult to gel with the nature of rights and interests in tikanga Māori and hard to apply in practice'.[24] As expert witness Dr Fiona McCormack (a marine and economic anthropologist) explains:

> That Māori have a cognatic kinship system means that hapū and iwi territories (whether rohe moana or inland terrestrial) do not have fixed boundaries, nor are rights to resources understood as exclusively owned by any one kinship group to the exclusion of other descent lines. While this flexibility is tempered by claims of ahi ka, the idea of 'exclusive use and occupation' simply does not make sense in this kinship system.[25]

Witness Taipari Munro, of Ngāti Takapari, explains that how Māori exert influence over their rohe is more nuanced and fluid than is recognised in the Act, with its emphasis on exclusive use and occupation: 'Our standing within our landscape is strongest in our rohe whenua and as it extends out into the neighbouring and outer areas it becomes more shared and the mana of another hapū and people within their rohe becomes more prominent.'[26]

18. Submission 3.3.138, p 50
19. Document B59, p 14
20. Ibid, p 22; see also doc B69, p 10.
21. Submission 3.3.158, pp 29–31
22. Document B31, p 4
23. Submission 3.3.137(b), pp 70–71, referring to doc A124, p 18.
24. Submission 3.3.149, pp 21–22
25. Document B62, para 20
26. Document B69, p 6

Furthermore, many claimants submit that past Crown confiscations and other historical Treaty breaches have made it extraordinarily difficult for applicants to prove that they have exclusively used and occupied an area without 'substantial interruption'.[27] They state that assimilationist laws and policies clearly impacted the claimants' ability to carry out activities in accordance with tikanga.[28] Beyond intentionally assimilationist laws and policies, difficulties in establishing exclusive use could also be the result of any other 'potential interruption that has a causal link to a Crown breach of its Treaty obligations to Māori'.[29] The same problem arises with the ownership of abutting land, which the Act identifies as a factor that the High Court or the Minister may take into account when determining applications.[30] Counsel say that the possibility of taking into account the ownership of abutting land puts 'claimants who have struggled to maintain ownership of abutting land' at a disadvantage.[31]

Finally, claimants argue that while they must meet 'a highly prescriptive test in order to prove their existing rights in the rohe moana', others such as recreational fishers, port operators, or energy companies 'with existing interests in the marine and coastal area' have their rights 'automatically recognised'.[32] The claimants call this a 'double standard' and consider it to be a Treaty breach.[33]

4.1.3 The Crown's position

(1) *Arguments applying to both tests*

The Crown submits that both statutory tests reflect sound policy rationale, and that 'it is premature to conclude the tests are prejudicial to Māori'.[34]

On the question of mandating requirements, the Crown acknowledges that the Act does not expressly require an applicant group to have authority to represent the group(s) that it claims to.[35] This, the Crown explains, was a decision made during policy development. It says that the definition of 'applicant group' was intentionally flexible to avoid limiting which groups could have their rights recognised and to allow each group to determine who has a mandate to represent them.[36] The Crown further submits that, although the Act itself does not expressly define what constitutes a properly mandated applicant group, the High Court has done so. The Crown argues that the High Court has 'made it clear that an applicant must have authority to bring the application on behalf of the applicant group' and that the process of lodging an application 'is by itself insufficient to demonstrate that an applicant group has a mandate'. The cases *Re Tipene* and *Re*

27. Submission 3.3.154, pp 9–10
28. Submission 3.3.171, p 19
29. Submission 3.3.157, p 16
30. Marine and Coastal Area (Takutai Moana) Act 2011, s 59(1)(a)(i)
31. Submission 3.3.168, pp 19–20
32. Submission 3.3.174, p 257; see also submission 3.3.173, pp 9, 32; submission 3.3.174(c), pp 13–15.
33. Submission 3.3.160, p 29; submission 3.3.175(b), p 16
34. Submission 3.3.187, p 225
35. Ibid, pp 247–248
36. Ibid, pp 250–251

Clarkson are cited as examples of such High Court rulings.[37] Crown counsel adds that, for applicants in the Crown engagement pathway, the new Takutai Moana Engagement Strategy 'will similarly require applicants to provide evidence that they have the support of the applicant group they purport to represent'.[38] Elizabeth Masterton, Director of Te Kāhui Takutai Moana at Te Arawhiti, acknowledged in her evidence that the previous Crown engagement strategy, which was in place until 2021, required applicant groups to take responsibility for resolving overlapping claims themselves.[39] Under the new strategy, the Crown says it is committed to helping applicants deal with overlapping interests, which could be the result of unresolved mandating conflicts, and that this support applies to applicants in both pathways.[40]

The Crown maintains that its use of international jurisprudence in developing the tests was appropriate. Crown counsel submit that it was also reasonable for the Government to develop the statutory tests with reference to existing common law approaches given the 'paucity of New Zealand jurisprudence on aboriginal title', while also paying attention to incorporating tikanga.[41] Crown witness Benesia Smith, Director of the Ministry of Justice's Foreshore and Seabed Unit from 2007 until 2010, says that officials presented the Attorney-General with various options for the statutory tests, including a test utilising international jurisprudence, a test based on a tikanga approach only (which derived from the test in Te Ture Whenua Māori Act 1993), and a test that combines both elements. Ms Smith said that a combined approach was the Attorney-General's preference.[42]

(2) *Arguments applying to the customary marine title test only*

The Crown submits that the requirement for proof of exclusive use and occupation without substantial interruption is not as strict as described by claimants.[43] Crown counsel advance several specific arguments supporting this position, drawing on the High Court's approach to relevant cases thus far:

- Crown counsel draw attention to the possibility of 'shared exclusivity', which they say is implicit in the Act's definition of the term 'applicant group' and which the High Court has already granted in multiple instances.[44] Therefore, the Crown sees no need for the Act to include more explicit wording about shared exclusivity.[45] The Crown also points to a briefing paper produced by Crown officials for the Attorney-General from 2009 and to the 'Blue Book' (an administrative guide to recognising customary rights under the Act,

37. Ibid, pp 247–252
38. Ibid, p 250
39. Transcript 4.1.9, pp 525–526
40. Submission 3.3.187, p 306
41. Ibid, p 232; submission 3.3.187(a), p 15
42. Document B114, pp 59–60
43. Submission 3.3.187, pp 237–243
44. Ibid, pp 236–237, referring to *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 168; see also *Re Reeder* [2021] NZHC 2726, paras 76, 149; *Re Ngāti Pāhauwera* [2021] NZHC 3599, para 598.
45. Submission 3.3.187, p 239

written by Ministry of Justice officials). Both documents indicate the Crown had always considered that applications relying on the concept of shared exclusivity could meet the test, not just after the High Court confirmed it.[46]

- The Crown disputes that the Act 'requires the establishment of an "unbroken chain of continuity" between present and pre-sovereignty occupation', as implied by claimants.[47] The Crown points to a decision where the High Court has recognised that 'in accordance with tikanga not every interruption would have severed the connection' between groups and te takutai moana.[48] This shows that the loss of coastal land, whether by raupatu or other means, 'does not necessarily prevent a finding of customary marine title', the Crown says, describing this as 'a significant change' from the Foreshore and Seabed Act 2004.[49]
- As to the possibility that owning abutting land may be a relevant factor for recognition of customary marine title, the Crown draws on the High Court's *Re Clarkson* and *Re Edwards (Te Whakatōhea No 2)* decisions. These rulings demonstrated that the ownership of land abutting the application area can, but does not have to be, a relevant factor for deciding whether a customary marine title should be granted. For example, in the second of these decisions, 'the Court concluded the loss of ownership of abutting land in that case (resulting from raupatu) was of minimal significance and did not, on the facts of that case, amount to a "substantial interruption"'.[50]
- Finally, the Crown disputes the claimants' submission that the Act's requirement for applicants to identify the boundaries of their rohe is inappropriate and against tikanga. The Crown notes that 'any court process for the determination of customary interests in the takutai moana immediately following *Ngāti Apa*' would also have required groups to delineate their rohe.[51] It further states that there is no clear consensus that this is against tikanga, citing the differing views put forward in claimant evidence.[52]

On the issue of equity between Māori customary interests in the common marine and coastal area and holders of private title, the Crown asserts that 'it was a reasonable policy approach to preserve the existing rights of holders of private title and those with existing proprietary interests in the takutai moana'.[53] Furthermore, the Crown argues that it is 'inapt' to compare applicants under the Act with those who have existing interests in te takutai moana.[54] The reasons given

46. Submission 3.3.187, pp 238–239, referring to 'Review of the Foreshore and Seabed Act 2004: Tests and Awards A3 (for discussion purposes only)', 14 August 2009 (CLO.010.1137), p 5 (doc B3(a), p [9554]); doc B113, p 59, referring to 'Recognising customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011', 2014 (CLO.055.0110), p 10 (doc B113(a), p 477).
47. Submission 3.3.187, p 235
48. Ibid, p 240, referring to *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 297.
49. Ibid, p 241
50. Ibid, pp 241–242, referring to *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 204.
51. Submission 3.3.187, p 240
52. Ibid
53. Ibid, p 127
54. Ibid, p 122

by the Crown are that first, 'it cannot be assumed that holders of existing interests are exclusively, or even predominantly, non-Māori'; secondly, the Act does not create 'windfall benefits' for those with pre-existing interests; and thirdly, the rights available under protected customary rights and customary marine title are 'significant'. Finally, like land falling under the no-ownership regime, freehold land is not exempt from the public rights of fishing and navigation either.[55]

4.1.4 The Tribunal's analysis and findings

(1) *How the statutory tests were developed*

Before we determine whether the statutory tests for recognition of protected customary rights and customary marine titles comply with the principles of the Treaty, we need to assess how Crown officials developed those tests. In particular, we examine which jurisdictions they considered when seeking comparable legal models, which alternatives they looked at, and to what extent they considered their proposal to be an improvement compared to the tests in the Foreshore and Seabed Act 2004.

Judging from the evidence presented to us, officials were developing the statutory tests mainly in the second half of 2009. In August of that year, officials asked the Attorney-General to decide how the tests should be designed and 'whether New Zealand sources, including tikanga Māori, and/or other sources should be used to design the tests'.[56] The Attorney-General indicated throughout the policy development process that he thought both common law sources and tikanga should be used.[57] The following month, officials presented the Attorney-General with two draft tests for what would later become protected customary rights and customary marine title.[58] In March 2010, the Attorney-General presented Cabinet with slightly amended versions of these drafts for approval before public consultation.[59]

To find appropriate legal models from other jurisdictions, the officials stated in a 2009 briefing paper for the Attorney-General that they 'analysed a substantial amount of information on the current law' in Australia, Canada, Fiji, Malaysia, Nigeria, Pakistan, Papua New Guinea, Samoa, Solomon Islands, South Africa, and Vanuatu.[60] This analysis informed various elements of what would later become

55. Ibid, pp 122–123

56. 'Paper 4 of 7: Review of the Foreshore and Seabed Act 2004: Further Advice on Legislating for a Court Process: Test(s) And Award(s)', 5 August 2009 (CLO.010.0990), p 3 (doc B3(a), p [9336])

57. 'Foreshore and Seabed Review: Possible Test for Customary Rights', 4 September 2009 (CLO.010.1326), p 7 (doc B3(a), p [9746]); 'Cabinet Paper TOW(10) 5: Review of the Foreshore and Seabed Act 2004: Proposals for Public Discussion Document', 12 March 2010 (CLO.003.0018), p 13 (doc B3(a), p [11040])

58. 'Foreshore and Seabed Review: Possible Test for Customary Rights', 4 September 2009 (CLO.010.1326), p 4 (doc B3(a), p [9743]); 'Foreshore and Seabed Review: Possible Test for Customary Rights', 18 September 2009 (CLO.010.1390), p 13 (doc B3(a), p [9799])

59. 'Cabinet Paper TOW(10) 5: Review of the Foreshore and Seabed Act 2004: Proposals for Public Discussion Document', 12 March 2010 (CLO.003.0018), p 17 (doc B3(a), p [11044)

60. 'Further Advice on Legislating for a Court Process: Test(s) and Award(s): Attachment A', 5 August 2009 (CLO.010.0996), p 2 (doc B3(a), p [9341])

protected customary rights and customary marine title. For example, the separation of protected customary rights and customary marine title was based on a similar Canadian distinction. In the paper, officials explained that under Canadian law, while customary rights were 'associated with use, activities and practices that do not require underlying title to be held', customary title 'can confer rights akin to traditional incidents of fee simple title (such as exclusive use and control)'.[61] Most of the jurisdictions that officials considered recognise non-exclusive customary rights in the foreshore and seabed. However, officials noted that, apart from the 2004 Act in Aotearoa New Zealand, only Fiji and South Africa grant a marine customary title that entails exclusive use.[62]

In that same 2009 briefing paper, officials also stated that – despite the Ministerial Review Panel's conclusion that the 2004 tests were inappropriately based on overseas laws – they considered that other countries could provide a useful and informative source when developing the tests for the 2011 Act.[63] At the same time, officials considered that further work on New Zealand sources, including tikanga Māori, would be 'beneficial'.[64] They advised the Attorney-General that their draft statutory tests thus drew on the common law, especially Canadian and Australian jurisprudence, as well as on tikanga Māori.[65] The Attorney-General later made short, hand-written comments on the briefing paper that indicated he agreed with the importance of drawing from the other common law jurisdictions.[66] In his March 2010 paper seeking Cabinet's approval for the cornerstones of the Marine and Coastal Area Bill draft, he stated:

> I agree with the Panel's criticism that the tests in the 2004 Act rely too much on the common law of other jurisdictions. However, given the lack of common law on customary title in the foreshore and seabed in New Zealand, I think Australian and Canadian common law offers valuable precedents. Common law tests should be used to the extent they resonate with New Zealand's law and society.[67]

Regarding possible alternatives to the tests that were ultimately chosen, officials gave the Attorney-General information about a spectrum of possible test designs in August 2009. For example, they provided information on different thresholds for establishing exclusive interests, ranging from 'unrestrictive' to 'moderate' to

61. 'Foreshore and Seabed Review: Possible Test for Customary Rights', 4 September 2009 (CLO.010.1326), p 6 (doc B3(a), p [9745])
62. 'Further Advice on Legislating for a Court Process: Test(s) and Award(s): Attachment A', 5 August 2009 (CLO.010.0996), pp 9, 12 (doc B3(a), pp [9348], [9351])
63. Ibid, pp 2–3 (pp 9341–9342)
64. Ibid, p 3 (p 9342)
65. 'Foreshore and Seabed Review: Possible Test for Customary Rights', 4 September 2009 (CLO.010.1326), p 2 (doc B3(a), p [9741]); 'Foreshore and Seabed Review: Possible Test for Customary Rights', 18 September 2009 (CLO.010.1390), p 2 (doc B3(a), 9788)
66. 'Foreshore and Seabed Review: Possible Test for Customary Rights', 4 September 2009 (CLO.010.1326), p 7 (doc B3(a), p [9746])
67. 'Cabinet Paper TOW(10) 5: Review of the Foreshore and Seabed Act 2004: Proposals for Public Discussion Document', 12 March 2010 (doc B3(a), CLO.003.0018), p 13

'restrictive' tests, and on the degree of detail given in the tests, ranging from 'low prescription' to 'some prescription' to 'high prescription'.[68] Ministry of Justice officials also noted that Te Puni Kōkiri disagreed 'with some of the assumptions' that they had made in considering possible tests. Te Puni Kōkiri's position was 'that the foreshore and seabed *is* held by relevant whanau, hapu or iwi in a customary title (unless an extinguishment could be proved)', officials told the Attorney-General.[69]

Officials also considered how the proposed tests for the new Act would compare to the tests under the Foreshore and Seabed Act 2004. As is now the case under the Takutai Moana Act, there were two separate tests under the 2004 Act – one non-territorial and one territorial. In developing the 2011 Act, officials noted that, for the 2004 Act, 'a clear policy decision was made in the design of the threshold test for exclusive interests that the threshold would result in only small and discrete sites being awarded to successful groups'.[70] In a Cabinet paper from March 2010, the Attorney-General pointed out what he considered to be the key differences between the tests of the 2004 Act and the new tests. The new regime, he said:

- uses tikanga Māori as a starting point for the tests, which would inform how the other elements of the test, for example 'exclusive use and occupation', would be applied;
- removes 'continuous title to contiguous land' as a requirement to be considered, but this can be taken into account;
- provides that customary fishing practices can be taken into account in assessing exclusive use and occupation;
- clarifies that fishing by third parties should not prevent a finding of 'exclusive use and occupation';
- ensures that customary transfers of territorial interests between hapū and iwi post-1840 will be recognised; and
- allows for 'shared' exclusivity between coastal hapū/iwi as against other third party interruptions.[71]

We have been able to discern broadly how the Act's statutory tests were developed, as outlined above. But we were not helped by the Crown's decision to redact parts of the briefing papers they filed in evidence documenting the tests'

68. 'Paper 4 of 7: Review of the Foreshore and Seabed Act 2004: Further Advice on Legislating for a Court Process: Test(s) And Award(s)', 5 August 2009 (CLO.010.0990), p 3 (doc B3(a), p [9336]); 'Further Advice on Legislating for a Court Process: Test(s) and Award(s): Attachment A', 5 August 2009 (CLO.010.0996), p 8 (doc B3(a), p [9347]); see also 'Review of the Foreshore and Seabed Act 2004: Tests and Awards A3 (for Discussion Purposes only)', 14 August 2009 (CLO.010.1137), p 5 (doc B3(a), p [9554]).

69. 'Paper 4 of 7: Review of the Foreshore and Seabed Act 2004: Further Advice on Legislating for a Court Process: Test(s) and Award(s)', 5 August 2009 (CLO.010.0990), p 5 (doc B3(a), p [9338]) (emphasis in the original)

70. 'Further Advice on Legislating for a Court Process: Test(s) and Award(s): Attachment A', 5 August 2009 (CLO.010.0996), pp 2–3 (doc B3(a), pp [9341]–[9342])

71. 'Cabinet Paper TOW(10) 5: Review of the Foreshore and Seabed Act 2004: Proposals for Public Discussion Document', 12 March 2010 (CLO.003.0018), p 17 (doc B3(a), p [11044])

development. As the Tribunal found in its *Ko Aotearoa Tēnei* report (2011), the State owes Māori transparent policies where a taonga of importance is concerned.[72] This should include the Crown working with the Tribunal in a transparent manner, so that the Tribunal may analyse the reasoning that underlies the Crown's decisions, policies, and practices. In light of this, we were disappointed to find that the Crown has redacted parts of the briefing papers put before us in evidence that document the history of the statutory tests.[73] We do not dispute the well-established principles of legal privilege on which the Crown relied when redacting this information. However, we question whether the Crown should rely on such legal principles to prevent the disclosure of considerations by the Crown concerning key issues which relate to the claims before us. Just because one can claim privilege does not always mean one should, particularly when the Crown has an active duty to protect Māori interests. Transparency is the best way to ensure good faith in the Crown's dealings with Māori.

We now turn to whether the tests themselves, and how they were developed, comply with the principles of the Treaty.

(2) *Applicable Treaty principles*

We consider the Treaty principles of partnership, equal treatment, active protection, and whanaungatanga are relevant to the statutory tests under the Act.

(a) Principle of partnership

The Tribunal stated in its Orakei report that '[t]he Treaty signifies a partnership between the Crown and the Maori people' and that 'the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other'.[74] Since then, the Tribunal has repeatedly stated that, under the principle of partnership, both Treaty partners have a duty 'to act reasonably, honourably, and in good faith' with one another.[75] The Crown has also stated that the Takutai Moana Act is the result of balancing competing interests.[76]

We consider the requirement to balance the interests of Māori and non-Māori in a fair and reasonable manner particularly relevant to the design of the

72. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 163

73. See, for example, 'Foreshore and Seabed Review: Possible Test for Customary Rights', 4 September 2009 (CLO.010.1326), pp 2, 8 (doc B3(a), pp [9741], [9747]); 'Paper 4 of 7: Review of the Foreshore and Seabed Act 2004: Further Advice on Legislating for a Court Process: Test(s) and Award(s)', 5 August 2009 (CLO.010.0990), p 5 (doc B3(a), p [9338]); 'Further Advice on Legislating for a Court Process: Test(s) and Award(s): Attachment A', 5 August 2009 (CLO.010.0996), pp 9–10 (doc B3(a), pp [9348]–[9349]).

74. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker and Friend Ltd, 1987), p 210

75. 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

76. Submission 3.3.187, pp 54, 126, 179, 257

statutory tests under the Takutai Moana Act. As the Tribunal held in its report on the Foreshore and Seabed Act 2004, 'In the balancing of interests required for a successful partnership, we think that there is a place for both peoples and their interests in the foreshore and seabed.'[77] The selected threshold that Māori applicants must meet in order to obtain legal recognition of their customary interests corresponds to a particular balance that has been set between Crown and Māori interests. The Crown needs to find a balance that 'gives meaningful effect to te tino rangatiratanga, and balances the interests of both peoples in a fair and reasonable manner'.[78]

At this point, we wish to briefly comment on the nature of the Crown's interests in te takutai moana. On the one hand, there are the core public interests that the Crown represents and pursues, such as conservation and environmental protection. On the other hand, the Crown also represents the interests of private third parties, for example recreational interests of citizens or commercial interests of port operators, as its own interests, as is appropriate for the state to do in an inquiry such as this one. Therefore, when we consider competing interests of Māori and the Crown, we will occasionally refer to private interests of third parties as being represented by the Crown.

(b) Principle of equal treatment

The principle of equal treatment requires the Crown to treat all Māori groups 'in a manner that is not intended to create division between them'.[79] To assess the tests' consistency with the principle of equal treatment, we compare them to the corresponding tests under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

As previously mentioned, the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 resulted from a Treaty settlement between the Crown and ngā hapū o Ngāti Porou. They had entered into negotiations on the basis of a Ngāti Porou application under the Foreshore and Seabed Act 2004. The result was a 2019 Act that mirrors many aspects of the Takutai Moana Act but tailors them to the terms agreed with ngā hapū o Ngāti Porou specifically. It is the only other example of a statute currently in force that contains similar statutory tests to the tests for protected customary rights and customary marine title under the Takutai Moana Act.[80]

(c) Principle of active protection

When it comes to the principle of active protection, the relevant question is – as we said in our stage 1 report – whether the tests are expressed in clear and

77. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 131
78. Ibid
79. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, 6 vols (Lower Hutt: Legislation Direct, 2018), vol 1, p 216
80. We note that similar provisions may arise from the agreement in principle between the Crown and Te Whānau a Apanui. However, this agreement has not yet been enacted; see 'Te Whānau a Apanui Agreement in Principle', 28 June 2019, www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/find-a-treaty-settlement/te-whanau-a-apanui, accessed 31 July 2023 (submission 3.3.187, pp 220–221).

unambiguous language to guide the decision makers and applicants.[81] The evidence and submissions in this inquiry suggest that there is considerable uncertainty with regard to the test for customary marine title, whereas the requirements of the test for protected customary rights seem to cause no significant confusion. Therefore, we undertake this analysis only in relation to the customary marine title test.

(d) Principle of whanaungatanga

Finally, the principle of whanaungatanga requires the Crown to actively work 'to maintain amicable relationships' between different iwi, hapū, and whānau, for whanaungatanga affects Māori society 'at its very core'.[82] We consider the principle of whanaungatanga particularly relevant to claims that inter-tribal tensions were exacerbated by the requirement of exclusivity in the customary marine title test.[83]

(3) *The test for protected customary rights*

(a) Principle of partnership

As mentioned above, the selected threshold that Māori applicants need to meet in order to obtain legal recognition of their protected customary rights corresponds to a particular balance between Māori interests and other public and private interests.

As outlined above, the 2004 Act contained a test for granting 'customary rights'. In summary, the test required an activity, use, or practice integral to tikanga Māori or another distinctive cultural practice to be exercised in a substantially uninterrupted manner since 1840.[84] While customary rights orders issued by the Māori Land Court were restricted to Māori applicants, customary rights orders issued by the High Court could be granted to 'a group of natural persons whose members share a distinctive community interest'.[85] The Ministerial Review Panel argued that both statutory tests under the Foreshore and Seabed Act 2004 imported 'foreign' legal tests, and that the thresholds for meeting the tests were too high.[86] It stated:

> our conclusion is that the Act is far too prescriptive and makes territorial customary rights orders and customary rights orders extremely difficult to obtain. Territorial customary rights orders are significantly more difficult to obtain than customary rights orders, but the latter are not easy to obtain either.[87]

81. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 67

82. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2018), p 22; Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 2

83. See, for example, Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2018), p 22.

84. Foreshore and Seabed Act 2004, ss 50, 74

85. Compare sections 50 and 74 of the Foreshore and Seabed Act 2004.

86. Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel Volume 1', 30 June 2009 (CL10.004.0441), pp 139–140 (doc B3(a), pp [25702]–[25703])

87. Ibid, p 140 (p 25703)

In comparison, the 2011 Act's test for protected customary rights also requires the activity in question to have been exercised since 1840, but expressly allows that the activity may have evolved over time.[88] Unlike the 2004 Act's test, the 2011 Act restricts protected customary rights to Māori applicants.[89] The 2011 Act's threshold for protected customary rights is undoubtedly lower than that of the 2004 Act for customary rights, and we therefore consider it to be an improvement. However, whether it is low enough to be Treaty compliant is another matter.

The key requirements that applicants must satisfy are that they have exercised the right since 1840 and continue to do so in accordance with tikanga, even where the way in which they do so might have changed. We consider that this test strikes a reasonable balance between Māori interests and other public and private interests: it secures Māori interests, as it allows Māori to demonstrate their protected customary rights without any unnecessary burden. At the same time, it secures other public and private interests by maintaining legal certainty for all New Zealanders who have interests in te takutai moana, as Māori must demonstrate that they have continued to exercise the right in accordance with tikanga. This prevents indiscriminate or unjustified claims.

This view is further confirmed by the High Court's record of granting protected customary rights so far. In *Re Edwards (Te Whakatōhea No 2)*, the High Court granted recognition of over 20 protected customary rights to six different applicants.[90] The High Court applied a broad reading of the test and declined applications only if the applicants lacked a mandate, if applicants failed to produce appropriate evidence, or if the Act expressly excluded the activity in question from the scope of protected customary rights.[91] In *Re Ngāti Pāhauwera*, the High Court granted recognition of eleven protected customary rights to three applicant groups.[92] The High Court applied a similar standard as in the *Re Edwards (Te Whakatōhea No 2)* judgment and referred back to that earlier judgment repeatedly.[93]

As a result, we find that the statutory test for legal recognition of protected customary rights under the Takutai Moana Act does not breach the Treaty principle of partnership. However, we note our concerns about some of the activities excluded from the scope of protected customary rights that can be recognised under the Act. We address this matter in chapter 5 (see section 5.2.4).

(b) Principle of equal treatment

The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 includes a statutory test for the recognition of protected customary activities. Section 95(3)(e) provides that applicants need to provide evidence that:

88. Marine and Coastal Area (Takutai Moana) Act 2011, s 51(1)(b)
89. Ibid, s 51(1), in combination with the definition of 'applicant group' in section 9.
90. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 669
91. Ibid, paras 483–659
92. *Re Ngāti Pāhauwera* [2021] NZHC 3599, para 599
93. Ibid, paras 515–597

each activity—

(i) has been performed since 1840; and

(ii) continues to be performed in a particular part of ngā rohe moana, in accordance with tikanga, by the named hapū that perform the activity, whether it continues to be performed in exactly the same or a similar way, or has evolved over time; and

(iii) is not performed under a right that has been extinguished as a matter of law.[94]

This is effectively the same test as under section 51(1) of the Takutai Moana Act. The Takutai Moana Act is worded slightly differently, as it relates to a protected customary *right* rather than *activity* and uses the verb *exercise* (the rights) instead of *perform* (the activity). We consider that the thresholds of these two statutory tests are the same and therefore find no breach of the Treaty principle of equal treatment.

(c) Result

In conclusion, we find that the statutory test for protected customary rights under section 51(1) of the Takutai Moana Act does not breach the principles of the Treaty. We consider the exceptions from the scope of protected customary rights under section 51(2) separately in chapter 5 (see section 5.2.4).

(4) *The test for customary marine title*

(a) Principles of partnership and active protection

As is the case with protected customary rights, the selected threshold that Māori applicants need to meet in order to obtain legal recognition of customary marine title corresponds to a particular balance that has been set between Māori interests and other public and private interests.

As outlined above, the Foreshore and Seabed Act 2004 contained a test for territorial customary rights. Briefly, that test required exclusive use and occupation since 1840 without substantial interruption, including continuous title to contiguous land.[95] It did not require that the relevant area be held in accordance with tikanga. The applicant group had to demonstrate use and occupation to the exclusion of all others, unless those others were expressly or impliedly permitted to use the area and recognised the applicant group's authority to exclude others. It provided that 'no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource'.[96] It did not provide for the possibility of a customary transfer. Again, the Ministerial Review Panel considered that this threshold was too high. It stated:

Obtaining a territorial customary rights order under the Act requires more than is necessary at Common Law; this is obvious from section 32. As a starting point – but

94. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 95(3)(e)
95. Foreshore and Seabed Act 2004, s 32
96. Ibid, s 32(3)

> only as a starting point – the applicant must prove that the group would have had a customary title at Common Law. However, in addition, other requirements must be met: 'exclusive use and occupation'; no 'substantial interruption' since 1840; and 'continuous title to contiguous land'. There are other restrictions in section 32, including that 'spiritual or cultural association' is not sufficient (s 32(3)). These requirements would probably disbar Tauranga Māori (for instance) from obtaining a territorial customary rights order over parts of Tauranga Harbour.[97]

We agree with the Ministerial Review Panel that the threshold for this test was far too high. As Crown officials noted, the 2004 Act's test was designed to intentionally prevent Māori from obtaining territorial customary rights for areas other than 'small and discrete sites'.[98]

The test for customary marine title under the 2011 Act is undoubtedly better. It retains the requirement for exclusive use and occupation since 1840 without substantial interruption. However, it lowers the threshold for meeting these requirements. Importantly, it does not require applicants to own land abutting the area in question, though it may be a relevant factor.[99] Furthermore, the 2011 Act adds to the test that the relevant area is held in accordance with tikanga.[100] The test also provides for the possibility that the area was received through a customary transfer.[101]

We understand the concerns expressed by claimants that parts of the test are incompatible with tikanga. In particular, the claimants are significantly concerned about the requirement to demonstrate exclusive use and occupation. They argue this does not reflect the complex, interrelated, and layered interests held by iwi, hapū, and whānau in accordance with tikanga. Many of those concerns have now been addressed by the way in which the High Court has applied the test. In *Re Edwards (Te Whakatōhea No 2)*, the Court held:

> [139] As explained at [33] above, CMT under the Act is not the equivalent of customary title to the takutai moana. It is not property that can be owned, it is subject to the exercise of substantial rights by others including access, navigation and fishing rights, and whether the statutory test is met is to be decided not in accordance with common law or other principles addressing customary title to land, but in accordance with the tikanga that is applicable to the specified area of the takutai moana.
>
> [140] In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, Cooke P (as he then was) said: 'The nature and incidents of Aboriginal title are matters of fact dependent on the evidence in any particular case.'

97. Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel Volume 1', 30 June 2009 (CLO.004.0441), p 140 (doc B3(a), p [25703])
98. 'Further Advice on Legislating for a Court Process: Test(s) and Award(s): Attachment A', 5 August 2009 (CLO.010.0996), pp 2–3 (doc B3(a), pp [9341]–[9342])
99. Marine and Coastal Area (Takutai Moana) Act 2011, ss 58, 59
100. Ibid, s 58(1)(a)
101. Ibid, s 58(1)(b)(ii), 58(3)

> [141] Equally, the question of whether the requirements of s 58(1)(a) of the Act have been met is a question of fact, and the focus of the factual inquiry is on tikanga.
>
> [142] As is discussed below, the concept of control of land by exclusion from it of others not of the applicant group, is not a concept that sits comfortably with core tikanga values such as manaakitanga and whanaungatanga.
>
> . . . . .
>
> [144] The task for the Court in considering whether the requirements of s 58(1)(a) of the Act have been met is therefore not to attempt to measure the factual situation against western property concepts or even the tests at common law for the establishment of customary land rights. It is also not particularly helpful to attempt to apply the Canadian and Australian jurisprudence on Aboriginal title. The critical focus must be on tikanga and the question of whether or not the specified area was held in accordance with the tikanga that has been established.[102]

The Court also held that a number of applicant groups may be able to demonstrate shared exclusivity in accordance with tikanga. This can be recognised through a jointly held customary marine title.[103] This approach has been followed in subsequent decisions on the application of the test. Accordingly, many of the initial concerns that claimants legitimately expressed about the test for a customary marine title have not materialised because of the way in which the Court has applied the test. Therefore, the core component of the test for customary marine title, as it is now applied by the High Court, is essentially that the relevant area is held by Māori in accordance with tikanga – the same test as that for Māori customary land under section 129(2)(a) of Te Ture Whenua Maori Act 1993. A number of claimants argued before us that this should be the test for customary marine title.

Certainly, the Crown could have provided for this in a far clearer and more express manner in the Act. The wording in the legislation left many claimants anxious and apprehensive as to how the requirement for exclusive use and occupation would be applied. We acknowledge that the definition of 'applicant group' has enabled the High Court to make a finding of shared exclusivity. We also accept that this was raised in some early policy papers filed in evidence.[104] However, the Crown could have avoided many of the concerns raised before us if this was expressed in a clear and unambiguous manner in the legislation itself.

Furthermore, the High Court's confirmation of shared exclusivity does not mean that all the challenges Māori face in obtaining a customary marine title are resolved. The practical exercise of those rights by different iwi, hapū, and/or whānau who hold the joint customary marine title still needs to be addressed. Ms Coates raised this point during hearing:

102. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 139–144
103. Ibid, paras 168–170
104. Ibid, para 169

> What I would be interested in is how that practically works out in relation to specific decisions. That is, is it a veto right for any one of the holders in there or do they need unanimous consent [?] . . . And what body does that? As in, are they going to set up a limited partnership agreement to hold these things or some form of legal structure or can they just have those as hapū? I think that's the sort of detail that we don't know yet and that may need to be negotiated and worked out between the individual parties.[105]

We agree with the High Court's decision to give the successful applicants the opportunity to resolve this among themselves, according to tikanga.[106] That is the appropriate course. However, it further imposes on Māori the requirement to mould their tikanga processes to fit a legislative framework of rights that is less than, and does not naturally flow from, Māori customary rights. The difficulty of doing so should not be underestimated.

We have also taken into account Mr Bennion's argument that the starting point should be a presumption that the whole of te takutai moana is in Māori customary title.[107] This would mean that Māori would only have to demonstrate who holds the specified rohe in accordance with tikanga. It would then be for the Crown or interested parties to argue whether those rights have been extinguished. According to Crown evidence, this approach was also adopted by Te Puni Kōkiri during the development of the test for customary marine title.[108] In this inquiry, a number of claimants supported Mr Bennion's argument. For example, Charlie Tawhiao, on behalf of the Ngāi Te Rangi Settlement Trust, states in his brief of evidence:

> I sometimes think why do I even have to explain who I am and why I am? Why cannot everybody see and know our relationship with our moana? I am being asked and we are being constantly asked to do that. MACA asks us to redefine ourselves and to actually justify ourselves. I know I am, yet I feel like I am being doubted. That is why it makes it an emotional issue, that is why it makes it difficult to respond to intellectually.[109]

We agree that a presumption in favour of the applicants would have provided a much stronger regime to recognise Māori customary rights in te takutai moana. However, given the number of applications filed, this would likely have had little practical benefit in terms of what Māori would have to demonstrate in evidence. Applications for a customary marine title have been filed for the whole of the New Zealand coastline. Under the current test, applicants must demonstrate that they hold the specified area in accordance with tikanga. Even if there was

105. Transcript 4.1.8, pp 343–344
106. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 170, 667
107. Submission 3.3.178, p 16
108. 'Paper 4 of 7: Review of the Foreshore and Seabed Act 2004: Further Advice on Legislating for a Court Process: Test(s) and Award(s)', 5 August 2009 (CL0.010.0990), p 5 (doc B3(a), p [9338]) (emphasis in the original)
109. Document B17, para 15

a presumption in favour of a customary marine title, Māori would still need to demonstrate in evidence that their iwi, hapū, or whānau holds the specified area in accordance with tikanga (either solely or jointly with another group). This would require the same scope and level of evidence under either approach.

We also note that with respect to dry land, there is no express corresponding presumption under Te Ture Whenua Maori Act 1993. On the face of it, Māori still have to demonstrate that the land is held by Māori in accordance with tikanga. The two regimes are consistent in that regard.

Finally, we note that the decision in *Re Edwards (Te Whakatōhea No 2)* is under appeal. Should that part of the decision be overturned, we may need to reconsider the issue of exclusivity and decide whether legislative amendment is required to ensure that this important element of the test for customary marine title is Treaty compliant. Therefore, our findings in respect of the customary marine title test are only interim findings at this stage.

As for the other key element of the customary marine title test, we do have concerns with the part of the test that requires Māori to demonstrate that they exclusively used and occupied the relevant area 'without substantial interruption'. In *Re Edwards (Te Whakatōhea No 2)*, the High Court held that whether there is a 'substantial interruption' to the applicants' exclusive use and occupation of a specified area is largely a question of fact.[110] In that specific case, the Court held that the 1866 confiscations did not amount to a substantial interruption, and that neither the granting of resource consents before the Act came into effect nor the regulation of te takutai moana by local authorities create a presumption of substantial interuption. Activities carried out and structures erected in accordance with the Resource Management Act 1991 may amount to substantial interruptions. However, whether this is the case is a question of fact to be decided in each case individually, the High Court stated.[111]

We anticipate that the inclusion of 'substantial interruptions' by the Crown as part of the test for a customary marine title is to protect existing interests in te takutai moana. If there are existing interests in the takutai moana, such as activities carried out or structures erected under a resource consent, it could be argued that this is part of the balancing exercise between Māori interests and other public and private interests. However, the Crown is already protecting these latter interests throughout the Act. The Act preserves public rights of access, navigation, and fishing over the common marine and coastal area.[112] The Act also preserves the rights of owners of existing structures in te takutai moana.[113] The two strongest rights granted under a customary marine title (the RMA permission right and conservation permission right) do not apply to accommodated activities. As we will explain in detail in chapter 5, the term 'accommodated activities' has a very broad

110. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 188–270

111. Ibid, para 270

112. Marine and Coastal Area (Takutai Moana) Act 2011, ss 26–28. The High Court also found that fishing is not sufficient of itself to exclude customary marine title; see *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, para 257.

113. Marine and Coastal Area (Takutai Moana) Act 2011, s 18

definition. It includes activities authorised under a resource consent, whenever granted, if the application for the consent is first accepted by the consent authority before the effective date (the date from which a customary marine title becomes effective). It also includes existing acquaculture activities if there is no increase in area or change of location and certain activities and infrastructure associated with national or regional social or economic wellbeing (see section 5.3.1(4)(a)). The Crown has already taken significant steps to preserve and protect existing interests (and some new interests) in te takutai moana even where a customary marine title has been granted. We cannot see any proper reason as to why the Crown should require that, in certain circumstances, those same interests may be a substantial interruption preventing the grant of a customary marine title.

We accept that in some cases certain infrastructure and activities may be relevant to whether the applicant group continues to hold that area in accordance with tikanga. However, even if that is the case, there is no need to include substantial interruptions as an express element of the test. Because the Act provides for existing interests in various ways already, we see no need for the requirement of 'without substantial interruption', as this element adds unnecessary complexity to the test. The matter of substantial interruption should instead be left for the courts to consider implicitly when deciding whether an applicant group holds te takutai moana in accordance with tikanga.

Furthermore, reclamation of land where a title has been or will be issued has the effect of a substantial interruption as the land is no longer part of the common marine and coastal area. We have serious concerns over the reclamation regime, which we address in chapter 5 (see section 5.5.4).

Having considered the test's elements of 'exclusively used and occupied' and 'without substantial interruption', we now turn to the ownership of abutting land, which, in accordance with section 59(1)(a)(i) of the Act may be relevant when determining whether customary marine title exists. Some claimants express concern that in many cases the ownership of abutting land was lost due to a historical Treaty breach by the Crown. The claimants submit this should not now be used to undermine their claim for a customary marine title. We do not see this provision, on its own, as a significant hurdle. Before the Takutai Moana Act came into force, the Foreshore and Seabed Act 2004 provided that an applicant group must own abutting land. That mandatory requirement would have rendered many, if not most, applications made under this Act unsuccessful. However, the mandatory requirement to own abutting land has not been maintained in the Takutai Moana Act. Instead, section 59 provides that this *may* be taken into account. This threshold is at the lower end of the scale of possible tests; its relevance and weight will be assessed by the courts in the applications before it. Even if ownership of abutting land was not expressly mentioned in section 59 of the Act, the courts would still be entitled to take this into account in the event that loss of abutting land affected the claimant group holding the relevant takutai moana in accordance with tikanga. In *Re Edwards (Te Whakatōhea No 2)*, the Court found that the raupatu of adjoining dry land did not interrupt the applicants holding te takutai moana in accordance with tikanga.

In summary, we make the interim finding that, the requirement to hold the land 'without substantial interruption', as part of the test for customary marine title under section 58 of the Takutai Moana Act, is in breach of the Treaty principles of partnership and active protection.

Furthermore, Māori would be prejudiced if they could not meet the test for customary marine title due to prior Crown Treaty breaches. The Crown has said that, in these circumstances, affected applicant groups can seek to settle their grievances through a historical Treaty settlement. However, this approach faces two significant hurdles. First, section 94(2) of the Act provides that a protected customary right or customary marine title cannot be recognised in any way other than provided for in the Act. Secondly, if the applicant group in question has already settled, any further settlement may be prevented by the 'full and final' settlement clause in the deed of settlement (or empowering legislation). This could be the case even if customary rights in te takutai moana were not contemplated or provided for in the settlement itself. As the Crown maintains that a historical Treaty settlement is a suitable alternative for groups that cannot obtain customary marine title because of Crown Treaty breaches, section 94 should be amended to clarify that this remedy is available.

(b) Principle of equal treatment

Like the protected customary rights test, the test for customary marine title must not treat different Māori groups differently without justification. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 grants customary title comprising a very similar set of rights to customary marine title under the Takutai Moana Act (we consider the differences between them in section 6.5.3). Section 111(3) provides that an application for customary marine title in an area of ngā rohe moana o ngā hapū o Ngāti Porou must

> (c) include evidence that the hapū—
>
> (i) hold the area in accordance with tikanga; and
>
> (ii) have, in relation to the area,—
>
> (A) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
>
> (B) received it, at any time after 1840, through a customary transfer.

Apart from very minor grammatical differences, the customary marine title test under the Takutai Moana Act is the same. Therefore, we find no breach of the Treaty principle of equal treatment with regard to the comparison of these two acts.

(c) Principle of whanaungatanga

The principle of whanaungatanga requires the Crown to actively work 'to maintain amicable relationships' between different iwi, hapū, and whānau.[114] As emphasised

114. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 22

above, tribal conflict over moana and whenua is not new. The Crown too has been directly or indirectly engaged in numerous conflicts over te takutai moana (for example, in Te Tau Ihu and Whanganui-a-Tara areas) for many years before 2011. However, both the Foreshore and Seabed Act 2004 and the Takutai Moana Act 2011 have added fuel to the fire. The requirement of exclusivity, coupled with initial uncertainty over the possibility of shared exclusivity, has been particularly problematic. It has created new tensions and exacerbated existing ones among many Māori who filed overlapping applications. In this context, we note Ms Masterton's evidence acknowledging that the previous Crown engagement strategy required applicant groups to take care of resolving overlapping claims themselves:

> [O]ne of my motivations for moving away from [the previous policy] is [that there is] actually no funding available to groups until you engage with the Crown. So, therefore, it felt to me that it was quite a large imposition to put on to groups that they should look to deal with all of their overlapping and competing claims in their area before they could engage with us.[115]

We agree with Ms Masterton that this strategy, which was in place for almost 10 years, was an imposition on almost all applicant groups. It was a particularly problematic imposition on those who filed their applications solely in the Crown engagement pathway, where the Crown's original approach was to refuse to engage with claimants who faced overlapping claims. We heard about one such instance concerning Ōnauku Bay and the area around Arapāoa Island in Queen Charlotte Sound. The Minister responsible declined to engage with the applicants, based on the following reasoning:

> The information supplied to me suggests that other overlapping customary interest groups may also have a long-standing presence in your application area, including related hapū and whānau of Te Ātiawa. This third-party interest/use of your application area may be considered an obstacle to your application constituting an arguable case for customary title in the Ōnauku Bay application area.[116]

We are pleased that the Crown is now seeking to assist and support groups to resolve overlapping claims. This includes the Crown undertaking a review of its funding matrix and investigating how the two pathways can be better aligned (we cover the Crown's plans in relation to the two pathways in section 4.6).[117] We encourage the Crown to continue these efforts and remind it of our stage 1 recommendation on the support and assistance required to properly address overlapping

115. Transcript 4.1.9, pp 525–526
116. Submission 3.3.178, pp 52–53, referring to doc B83(e), paras 11–12
117. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, pp 97–98; memoranda 3.4.3(b), 3.4.3(c)

issues.[118] It is also positive that the possibility of shared exclusivity has now been confirmed by the Court, thus relieving initial anxiety on this issue.

Given these positive developments, we make no finding of Treaty breach on this issue.

(d) Result

We make the interim finding that the test for customary marine title under section 58 of the Takutai Moana Act breaches the Treaty principles of partnership and active protection (but not the principles of equal treatment or whanaungatanga).

(e) Prejudice

The inclusion of 'without substantial interruption' as an express element of the test increases the risk that some applications will be unsuccessful. Protecting existing interests in te takutai moana has already been comprehensively provided for in other parts of the Act. Therefore, there is no need to include the absence of substantial interruption as a part of the test. This element is not the result of a legitimate balancing exercise, and will likely cause prejudice for some applicants if their applications fail.

Claimants will also be prejudiced if their application is not successful because of a previous Treaty breach by the Crown. This will create a new and significant grievance, thus exacerbating the overall prejudice Māori would suffer in these circumstances.

(f) Interim recommendation

We recommend that the Crown amend the Takutai Moana Act by removing the words 'without substantial interruption' from section 58(1)(b)(i) of the Act. This amendment would need to be accompanied by transitional provisions to ensure that any applicants whose applications for customary marine title have been denied on the grounds of a substantial interruption can re-submit their applications under the amended Takutai Moana Act.

Removing the element of substantial interruption from the test alone would minimise but not eliminate the prejudice resulting from previous Treaty breaches by the Crown. Therefore, we also recommend that the Crown amend the Takutai Moana Act to make it clear that, where an applicant group is unable to meet the test for a customary marine title because of a previous Treaty breach by the Crown, the applicant group can negotiate an appropriate settlement with the Crown. Any such settlement should not be precluded by section 94 of the Act or full and final settlement provisions in existing deeds of settlement (or empowering legislation) unless customary rights in te takutai moana were expressly contemplated and provided for in the settlement.

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

118. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 80

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.

4.2 The Burden of Proof

4.2.1 Overview

The burden of proof for meeting the statutory tests is provided for in section 106 of the Act:

> **106 Burden of proof**
>
> (1) In the case of an application for recognition of protected customary rights in a specified area of the common marine and coastal area, the applicant group must prove that the protected customary right—
>
> (a) has been exercised in the specified area; and
>
> (b) continues to be exercised by that group in the same area in accordance with tikanga.
>
> (2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the specified area—
>
> (a) is held in accordance with tikanga; and
>
> (b) has been used and occupied by the applicant group, either—
>
> (i) from 1840 to the present day; or
>
> (ii) from the time of a customary transfer to the present day.
>
> (3) In the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.

4.2.2 The claimants' position

According to the claimants, when applicants seek recognition of their protected customary rights or customary marine title under the Takutai Moana Act, the wording of the Act (especially section 106) means it largely falls to them to prove that their application meets the necessary criteria. Claimants raise two main concerns.

First, counsel argue that there is a discrepancy between the wording of section 106 – the burden of proof provision – on the one hand, and how it has been

interpreted on the other. Here, claimant counsel focus more on the burden of proof for customary marine title than protected customary rights. They state that, 'on the plain language of section 106', applicants do not bear the burden of proving exclusive use and the absence of substantial interruption when applying for recognition of a customary marine title. However, they say that the High Court has read these additional requirements into section 106.[119] They refer to decisions in which the High Court holds that, although section 106 of the Act does not replicate each element of the statutory tests set out in sections 51 and 58, the Act's overall structure and the phrasing of section 98 (concerning the Court's jurisdiction to make a recognition order) suggest that the applicants still need to prove each element of the tests – except the absence of extinguishment.[120]

Contrary to the High Court's interpretation, claimant counsel argue that the Crown has consciously omitted the elements of exclusive use and substantial interruption to make it clear that applicants need prove only the positive elements of the two tests – 'held in accordance with tikanga' and 'exclusive use and occupation'.[121] This would arguably make it easier for applicants to satisfy the statutory test. Counsel note that Ms Masterton, Director of Te Kāhui Takutai Moana at Te Arawhiti, confirmed during hearing that the Crown's intention to leave 'the exclusivity limb and the substantial interruption limb . . . out of the burden of proof [was] quite deliberate'.[122] According to claimants, the Act should have expressly placed the burden to prove the negative elements on the Crown or any other opposing party (be it in the High Court pathway as an interested party, or in the Crown engagement pathway): namely, the onus should be on the Crown or any other opposing party to prove that an applicant group's use and occupation of the area in question has not been exclusive or that the group's occupation has been subject to substantial interruption.[123] Given the confusion about the phrasing and interpretation of section 106, some claimant counsel refer to it as 'flawed and practically confused' and 'ill drafted'.[124]

Secondly, claimant counsel argue that it is inconsistent with the principle of partnership for applicants to bear an excessive amount of the burden of proof. In this context, claimants refer to both protected customary rights and customary marine title. They contend that it is 'incongruous not only with the actions of a reasonable Tiriti partner, but with the common law principle that the onus of proving extinguishment must be on the Crown'.[125] Moreover, placing the burden of proof on applicants is at odds with the culture of Māori, 'known to be geographically remote and heavily reliant on oral tradition', and the resulting absence of

119. Submission 3.3.156, p 16; submission 3.3.159, p 12; submission 3.3.181, p 1
120. Submission 3.3.159, p 15, referring to *Re Tipene* [2016] NZHC 3199, para 39; *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 78–99; *Re Clarkson* [2021] NZHC 1968, para 37
121. Submission 3.3.159, pp 13–15; submission 3.3.181, p 1
122. Submission 3.3.159, p 14, referring to transcript 4.1.9, pp 485–489
123. Submission 3.3.159, p 14
124. Ibid, p 13; submission 3.3.181, pp 1–2
125. Submission 3.3.97, p 9

written records.[126] Counsel assert that Native Land Court records do not provide any information about groups' occupation and use of te takutai moana.[127] A legislative regime that asks Māori to prove 170 years of occupation and use under these circumstances effectively strips them of their taonga.[128] Another claimant counsel argues that the Act's burden of proof provision, as currently phrased, makes it more difficult for applicants to meet the statutory tests and is thus prejudicial to claimants.[129] Witness Sheena Ross captured the sentiment of these arguments when she asked:

> Why not create a process whereby the Crown has to disprove our tino rangatiratanga and disprove our interests in the takutai moana? The Crown holds the funding purse so wouldn't it be more suitable for the Crown to do some hard yards and try to disprove our rights and interests?[130]

Te Kapotai claimants state that even 'the notion of having to prove the existence of their ancestral rights in a Western court' is inconsistent with tikanga.[131] In his evidence, expert witness Bruce McIvor (a lawyer and historian from Canada) explained that legal scholarship lends support to the claimants' argument that the burden of proof should lie with the Crown. He stated that

> legal scholars have argued that Indigenous Peoples should be entitled to rely on prior or present-day occupation to establish a rebuttable presumption of Aboriginal title, thereby shifting the burden of proof to the Crown to establish that it holds title to those lands.[132]

4.2.3 The Crown's position

The Crown also focuses on the burden of proof for customary marine title, which is more contentious between the parties than that for protected customary rights. Crown counsel maintain that applicants for customary marine title need to prove exclusivity and the absence of substantial interruption. The only element of the test that the Crown needs to prove is extinguishment. Crown counsel agree 'that not all the factual elements for proving the existence of a protected customary right and customary marine title (as required by sections 51 and 58) are replicated in s 106'. However, they contend that, when section 106 is read in conjunction with sections 51, 58, and 98, 'it is clear the High Court must be satisfied that the requirements in the tests for customary marine title and protected customary rights are met before it can grant a recognition.'[133] For completeness, the Crown also notes

126. Submission 3.3.95, p 4; submission 3.3.131, p 4
127. Submission 3.3.95, pp 4–5; submission 3.3.131, p 4
128. Submission 3.3.95, p 4; submission 3.3.131, p 4
129. Submission 3.3.181, p 2
130. Document B48, p 6
131. Submission 3.3.171, p 18
132. Document B147, para 28
133. Submission 3.3.187, p 244

that, in relation to the Crown engagement pathway, section 95 of the Act provides that 'The Crown must not enter into an agreement unless the applicant group satisfies the Crown that they meet the statutory tests of sections 51 and/or 58'.[134]

Regarding the distribution of the burden of proof, Crown counsel state that, '[a]t common law, a legal or persuasive burden of proof ordinarily lies on the plaintiff to prove any fact that is an essential element of a cause of action.'[135] The Honourable Christopher Finlayson KC, Attorney-General when the Act was drafted, states in his brief of evidence that the burden of proof for meeting the statutory tests under the Takutai Moana Act was designed accordingly.[136] He told us that, '[i]n keeping with a legal, principled approach to the question of title', he considered it important that 'applicants be required to lay out the foundations of their case'.[137] However, the Crown emphasises that, overall, the burden of proof for meeting the statutory tests is shared between applicants and the Crown (or a third party, such as a cross-applicant who disputes that another applicant has held the specified area exclusively), given that extinguishment of customary interests is to be proven by the Crown or a third party, not the applicants.[138]

Finally, the Crown argues that the claimants have not produced any evidence to suggest that section 106 of the Act has caused prejudice.[139]

4.2.4 The Tribunal's analysis and findings

The Tribunal has repeatedly found that the principle of good government requires the Crown to adhere to its own laws – in other words, to uphold the rule of law.[140] In its report *He Kura Whenua ka Rokohanga* (2016), which considered decision-making mechanisms under Te Ture Whenua Maori Act 1993, the Tribunal held that the Crown has a duty 'to ensure good government for a national system of individualised Māori title which the Crown's own earlier statutes had imposed on Māori'.[141] As the Tribunal's He Whiritaunoka report observed, the Crown's actions cannot be truly consistent with good government unless they are also just and fair – a fundamental idea, the Tribunal noted, 'that was imported to New Zealand in the language of the Treaty'.[142] We therefore ask: is an outcome which requires Māori to bear the burden of proving their customary interests for the purposes of a replacement statutory regime just and fair?

134. Submission 3.3.187, p 246
135. Ibid, p 245
136. Document B117, p 8
137. Ibid, p 8
138. Submission 3.3.187, p 245; see also doc B117, p 8; 'TOW (10) 5 Review of the Foreshore and Seabed Act 2004: Proposals for public discussion document', 12 March 2010 (CLO.003.0018), para 57 (doc B3(a), pp [11037]–[11038])
139. Submission 3.3.187, p 246
140. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 429
141. Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Lower Hutt: Legislation Direct, 2016), p 202
142. Compare Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Lower Hutt: Legislation Direct, 2015), vol 3, pp 1473–1474

Like the parties, we focus on the burden of proof in relation to customary marine title, as that is the main point of contention. We accept the claimants' submission that section 106 of the Act is confusing. It states that the applicant need only prove certain elements of the test for a customary marine title, namely, that the specified area:

> (a) is held in accordance with tikanga; and
> (b) has been used and occupied by the applicant group, either—
> (i) from 1840 to the present day; or
> (ii) from the time of a customary transfer to the present day.[143]

This gives the impression that applicant groups do not have to prove that their use and occupation is 'exclusive' or 'without substantial interruption'. However, the High Court found that 'exclusively' and 'without substantial interruption' are positive elements of section 58 of the Act, and must therefore be proven by the applicant.[144] The High Court explained that, if there was an 'automatic assumption that the mere assertion of such rights was sufficient without the need for any proof, then the Court would have no way of determining whether the applicants asserting such rights in fact met the requirements' of the statutory tests.[145] Therefore, the burden of proof for the section 58 test for customary marine title (and of section 51 for protected customary rights) lies with the applicants. The only exception is extinguishment, which must be proven by the Crown or whoever asserts that extinguishment has occurred.

As we have stated in section 4.1.4, even if there was a presumption in favour of a customary marine title, the applicant group would still need to demonstrate in evidence that they hold the relevant area in accordance with tikanga. This would require the same evidence of use and occupation, and the tikanga that applies, as is required now. Imposing a burden on the applicant group to demonstrate this in evidence per sections 58 and 106 makes little practical difference to a regime of presumed customary interests. Accordingly, we find the burden of proof for this part of the test is not a breach of the Treaty principle of good government.

As outlined above, we are concerned that applicants are required to prove that they have used and occupied the relevant area 'without substantial interruption'. However, we have already recommended that this part of the test should be removed. If the Crown follows our recommendation, the element of 'without substantial interruption' will no longer be a positive element of the test, and no burden would lie on the applicants in that regard. This will also bring the positive elements of the test in section 58 in line with the burden of proof set out in section 106, a level of consistency that all legislation should strive to achieve, particularly when dealing with customary Māori interests.

143. Marine and Coastal Area (Takutai Moana) Act 2011, s 106(2)
144. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, para 98
145. Ibid, paras 96–97

This leaves the issue of proving *exclusive* use and occupation. As noted, the Court has already held that 'shared exclusivity' is possible under the Takutai Moana Act where this is consistent with the relevant tikanga. The applicant group must already demonstrate that it holds the area in accordance with tikanga. Evidence of use and occupation of the area from 1840 to the present day is an integral part of that. Where use and occupation of the area has been shared with other applicant groups, this will naturally form part of the evidence and the relevant tikanga that applies. Therefore, we do not consider that the element of exclusivity as interpreted by the High Court adds an additional or undue burden to the elements of use and occupation. Accordingly, we find that the Takutai Moana Act's burden of proof provision is not in breach of the Treaty principle of good government.

4.3 The Statutory Deadline

4.3.1 Overview

The statutory deadline is incorporated into the statutory requirements for applying for a recognition agreement with the Crown and for applying to the High Court for a recognition order. It requires that applications in either pathway had to be filed by 3 April 2017.

- Section 95(2) of the Act provides that the responsible Minister cannot enter into a recognition agreement 'unless the applicant group, not later than 6 years after the commencement of this Act, has given notice to the responsible Minister of its intention to seek an agreement recognising a protected customary right or customary marine title'.
- Section 100(2) of the Act provides that an application to the High Court 'must be filed not later than 6 years after the commencement of this Act, and the Court must not accept for filing or otherwise consider any application that purports to be filed after that date'.

4.3.2 The claimants' position

Claimants submit that the statutory deadline for applying for protected customary rights and/or customary marine title breaches the principles of partnership, good faith, and active protection.[146] While some claimants object to there being a statutory deadline at all, others are concerned with the particular duration of six years. Accordingly, many claimants call for the statutory deadline to be repealed, while others say the deadline must be revised or temporarily lifted.[147]

Claimant counsel describe the deadline as an 'unnecessary burden' that created 'a lot of unnecessary urgency' for applicants, and showed the Crown ignored the significant work that applicants were already progressing at the time.[148] This

146. Submission 3.3.100, pp 9–10; submission 3.3.174, p 229; submission 3.3.183, p 17; submission 3.3.203, p 5

147. Submission 3.3.149, p 33; submission 3.3.155, p 33; submission 3.3.156, p 20; submission 3.3.159, p 19; submission 3.3.182, p 105; transcript 4.1.10, pp 107–108, 120

148. Submission 3.3.141, p 6; submission 3.3.162, p 8

argument is supported by the evidence of several witnesses who maintained that six years was not sufficient time for applicants – many of whom are active kaitiaki – to prepare strong, detailed applications.[149] Several claimant counsel describe the six-year deadline as 'arbitrary'.[150] Another argues that the Crown's reason for imposing the deadline was to benefit commercial interests.[151] Another claimant counsel alleges that the rationale for the deadline was to force Māori to enter into a legislative regime that undermines their customary rights.[152] Many claimants also highlight that the six-year deadline deviates from the standard 12-year limitation period for claims relating to recovering Māori land under the Limitations Act 2010.[153] Furthermore, counsel for the New Zealand Māori Council characterise the deadline as 'discriminatory', 'inconsistent with Te Tiriti principles', and 'prejudicial' when compared to various land-related deadlines 'ranging from 12 . . . to 60 years' under the Limitations Act 2010.[154] Overall, claimants object to the Crown's argument that no one could have missed out on lodging an application, given that 'the whole of the marine and coastal area is claimed'. They note that numerous applicants 'claimed large areas in the fear that a group may have failed to make an application'.[155]

As we noted in our stage 1 report, claimants also allege that the Crown's attempts to consult with or inform Māori about the deadline were poor.[156] Claimants and witnesses said in evidence that many Māori found out about the deadline late – in some cases only a week prior or even on the day of the deadline – and from their own contacts rather than from the Crown.[157] Some said that they missed the deadline altogether because they were unaware of it.[158] Due to the short period between becoming aware of the deadline and its expiry, intending applicants found themselves 'unprepared' and 'uninformed'.[159] Claimant counsel submit that the 'lack of engagement with the Act, followed by the rush of applications, was due to a lack of information, a lack of funding/resources, and a reluctance to engage'.[160] The Act did not allow for applications to be filed within a certain period after the deadline had passed, if the applicants had 'late knowledge' of the Act, counsel argue. Counsel name section 14 of the Limitation Act as an example of a late knowledge

149. Document B13, p 5; doc B21, p 12; doc B47, p 10; doc B50, paras 83–84
150. Submission 3.3.155, p 9; submission 3.3.156, pp 6–7; submission 3.3.157, p 11; submission 3.3.164, p 41
151. Submission 3.3.145, p 10; submission 3.3.158, p 13
152. Submission 3.3.155, pp 9, 32
153. Submission 3.3.160, p 25, referring to Limitation Act 2010, s 23B(1)(b); submission 3.3.178, pp 46–47, referring to Limitation Act 2010, ss 21(1), 28.
154. Submission 3.3.204, p 5
155. Submission 3.3.137(b), p 93
156. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act Inquiry Stage 1 Report*, pp 39–42
157. Document B21, p 12; doc B27, paras 53–54; doc B50, para 83; doc B99, pp 20–21; doc B137, paras 14–15; doc B139, paras 51–55; see also submission 3.3.146, p 6.
158. For example, see doc B15(a), p 4; doc B49, p 5.
159. Submission 3.3.145, p 10
160. Submission 3.3.137(b), p 91

period; they state that the omission of a late knowledge period from the Takutai Moana Act was a breach of the Treaty principles of active protection and good faith.[161] One claimant counsel also states that the Crown should have explored the possibility of regionally staggered deadlines.[162]

According to claimants, both the imposition of a deadline and the paucity of information about it from the Crown hindered applicants from taking a tikanga Māori approach to the application process. Claimant counsel submit the pressure of the deadline prevented them from properly consulting with other – or sometimes even within their own – iwi, hapū, or whānau.[163] This caused 'significant damage to whanaungatanga', one claimant counsel alleges.[164] The evidence of claimant Marie Tautari, of Te Whakapiko hapū, supports this argument; in her view, the existence of overlapping claims is the result of the statutory deadline effectively 'cutting short' discussions between applicant groups.[165]

Finally, many claimants describe the statutory deadline as 'a de facto extinguishment' of their customary interests, and say its inclusion in the Act is a breach of Treaty principles of partnership, good faith, and active protection.[166] Claimants also reject the Crown's argument that any given group which did not submit an application would still have customary interests in te takutai moana. In joint closing submissions, counsel argue that, while it 'may be correct at a factual level' to say such a group retains customary interests, 'the issue is that if you cannot enforce those rights, then they do not hold much weight.'[167]

4.3.3 The Crown's position

The Crown refutes the idea that including a statutory deadline in the Act was against Treaty principles, intentionally prejudicial to Māori, or arbitrary.[168] Instead, it contends that there was good policy rationale for setting the deadline, as the Honourable Mr Finlayson's evidence set out: 'A period of limitation for making applications is a key component of any durable legislative framework. It provides certainty for all interests in the marine and coastal area, including applicants, business, recreation, conservation and local government.'[169] This responsibility – to consider and develop policy in response to multiple interests – is fundamental to the Crown's role, counsel argue.[170] The Crown also submits that the certainty provided by the statutory deadline is beneficial for all parties, including applicants. Without a deadline, Crown counsel say, applications could be lodged at any time,

161. Submission 3.3.206, p 49
162. Submission 3.3.174, pp 222–223
163. Submission 3.3.141, p 6; submission 3.3.161, p 7
164. Submission 3.3.183, p 20
165. Document B87, p 8
166. Submission 3.3.212, p 37; see also submission 3.3.100, pp 9–10; submission 3.3.137(b), p 93; submission 3.3.145, pp 10–11; submission 3.3.174, p 229; submission 3.3.175(b), p 22; submission 3.3.183, p 17; submission 3.3.201, p 29; submission 3.3.203, p 5.
167. Submission 3.3.196, p 5; see also submission 3.3.145, pp 10–11; submission 3.3.191, p 6.
168. Submission 3.3.187, pp 255, 257–258
169. Document B117, p 8
170. Submission 3.3.187, p 256

'even if the Crown was about to enter into a recognition agreement with another group, or the High Court was hearing an application for the same area.'[171] This, they maintain, 'would likely have had disruptive and costly consequences.'[172]

Crown witnesses explained that the six-year deadline was decided on the basis of valid policy considerations. The original deadline proposed in a Cabinet paper dated 20 August 2010 was four years, although the paper also raised the possibility of a seven-year deadline.[173] In her evidence, Ms Masterton said that the Attorney-General 'continued to recommend that the deadline should remain at four years' as 'seven years would not provide certainty for business and mining interests'. The Attorney-General also considered that a four-year deadline would helpfully align with 'the then existing timeframe for concluding Treaty settlements'.[174] Ms Masterton noted that Te Puni Kōkiri supported a deadline but considered that it should be 10 years: the agency thought four years insufficient for potential applicants to assess whether they had a claim and then submit it. Te Puni Kōkiri also considered a four-year period could lead to 'a large number of pro forma claims to create place-holders, and this could have the potential to clog the High Court and create an extensive backlog' – as occurred when the Crown set the 2008 deadline for filing historical claims with the Waitangi Tribunal. According to Ms Masterton, Te Puni Kōkiri 'also highlighted that the overlap with the timeframe for completing settlements of historical Treaty claims would create a significant burden for applicants who were seeking to conclude Treaty settlements'.[175] According to Crown witnesses, after the Attorney-General considered these arguments, he proposed to Cabinet that the deadline be changed from four to six years.[176] Speaking to these events and circumstances, the Honourable Mr Finlayson himself described the timeframe finally agreed upon as 'the result of a political balancing act'.[177] Crown counsel emphasise the importance of this statement, explaining that 'it points to the political realities that attend the making of policy decisions and obtaining the required consensus to carry those policy decisions through the legislative process.'[178]

The Crown acknowledges that the deadline could have been longer, given that different proposals were on the table during negotiations, ranging from four years to 10. The compromise was six years, which the Crown maintains gave applicants sufficient time to lodge applications.[179] It says the evidence is that 'nearly everyone who wanted to apply under the Act did so by the time the deadline passed'.[180]

171. Ibid
172. Ibid
173. Document B3, p 72, referring to 'CAB (10) 435 Marine and Coastal Area (Takutai Moana) Bill 2010: Approval for Introduction', 20 August 2010 (CLO.026.0157), pp 6, 11 (doc B3(a), pp [21351], [21356])
174. Document B113, p 13
175. Ibid, p 14; see also doc B3, p 72.
176. Document B113, p 14; see also doc B3, pp 72–73.
177. Document B117, p 8
178. Submission 3.3.187, p 258
179. Document B113, p 14; transcript 4.1.9, p 496
180. Submission 3.3.187, p 260

Crown counsel acknowledge that no 'late knowledge' exception was provided for in the Act, even though other statutes allow for such exceptions to deadlines (we note section 14 of the Limitation Act 2010 had defined that type of exception the previous year). Crown witnesses could not confirm whether a late knowledge exception was ever considered for this Act, nor was there any record in the documents the Crown provided to the Tribunal. However, this lack of documentary evidence 'highlights what can be a reality in the policy development process', counsel submit.[181] They add that, since the Attorney-General was familiar with the law of limitation, it can be inferred that the omission from the Act of a late knowledge period was due not to a lack of consideration but to a conscious policy choice.[182] Similarly, counsel say that having regionally staggered deadlines would likely have 'caused a confusing situation for applicants, particularly those whose applications related to more than one region'. Rather, Crown counsel consider a single deadline for all applicants provided the clearest approach.[183]

Finally, the Crown acknowledges in closing submissions that some claimants would like a new statutory deadline or want the statutory deadline repealed or temporarily lifted. However, it says that this would create undue uncertainty, including for existing applicants who are now preparing for Crown engagement or High Court proceedings.[184]

4.3.4 The Tribunal's analysis and findings

The statutory deadline provided for in sections 95(2) and 100(2) of the Act precludes anyone from lodging applications for protected customary rights or customary marine titles since 3 April 2017. In this section we determine whether imposing any deadline, and this deadline in particular, is consistent with the Treaty principles of partnership, active protection, equity, options, and whanaungatanga and, if not, whether it has caused prejudice for claimants.

(1) *Principles of partnership and active protection*

As is well-established in Treaty jurisprudence, the principle of partnership requires that both parties 'act reasonably and in the utmost good faith towards the other'.[185] Accordingly, when imposing a statutory deadline that limits something as significant as the ability of Māori to have their customary interests legally recognised, the Crown needs a reasonable justification for doing so. The evidence shows that the Crown did not consider the existence or duration of the statutory deadline until late in the policy development process, shortly before introducing the Marine and Coastal Area Bill to Parliament in September 2010.[186] As we have

181. Submission 3.3.187, p 259
182. Ibid
183. Ibid, pp 257–258
184. Ibid, pp 259–260; submission 3.3.187(a), pp 8–9
185. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, p 207, referencing *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353, 369–370
186. See transcript 4.1.9, p 292, indicating that Ms Smith said the deadline of six years was not settled until July 2010.

already set out, the Attorney-General initially proposed a four-year deadline, Te Puni Kōkiri advocated for 10 years, and the final version of the Bill specified six years.[187] The Ministry of Justice's report on the Bill did not propose changing the statutory deadline in response to public submissions to the Select Committee considering the proposed legislation.[188]

Compared to other statutory limitations in land law, six years is short. As claimants pointed out, under the Limitation Act 2010 the deadline for making a claim relating to Māori customary land in the Māori Land Court is 12 years.[189] Even the statutory deadline for making an application under the Foreshore and Seabed Act 2004 (just under 11 years) was nearly five years longer than the Takutai Moana Act's deadline.[190] Certainly, there are situations where a six-year statutory limitation period applies – six years is common in the case of monetary claims, among other matters.[191] But seeking recognition of Māori customary interests is far more significant, and it will typically require applicants to undertake much more difficult and protracted evidence-gathering processes.

We are not persuaded by the Crown's submission that setting the deadline at six years was an act of pragmatism or 'a political balancing act'. As we have noted elsewhere (see section 3.1.4), the 'political realities' that surround the process of policy making are not a valid excuse for the Crown to compromise, ignore, or abandon its obligations under the Treaty.[192] So-called 'political realities' certainly do not justify potentially extinguishing customary interests guaranteed to Māori by the Treaty.[193]

The Crown argues that the primary policy reason for setting a statutory deadline was to achieve legal certainty.[194] However, to assess the Treaty consistency of the deadline, we cannot be satisfied by an assurance of legal certainty alone; we need to consider *for whom* the statutory deadline achieves legal certainty. We accept that, when considering the statutory recognition of customary interests, the Crown was 'required to consider the multiple interests that exist in the takutai moana, weigh them up and develop a policy response that is fair and reasonable in all the circumstances'.[195] However, we are not convinced that the Crown managed to do so. By way of comparison, we note how much time the Crown has given

187. Document B3, p 72, referring to 'CAB (10) 435 Marine and Coastal Area (Takutai Moana) Bill 2010: Approval for Introduction', 20 August 2010 (CLO.026.0157), p 11 (doc B3(a), p [21356])

188. Marine and Coastal Area (Takutai Moana) Bill, cls 93(2), 98(2); Ministry of Justice, 'Marine and Coastal Area (Takutai Moana) Bill: Departmental Report', 4 February 2011 (CLO.005.0302), paras 2204, 2300 (doc B3(a), pp [23625], [23635])

189. Limitation Act 2010, s 28(1). We note that there is also a six-year limitation period in the context of claims relating to Māori customary land (Limitation Act 2010, s 28(2)). However, this limitation period does not concern the land itself. Rather, it relates to claims for damages or an injunction in respect of trespass or injury to Māori customary land.

190. Foreshore and Seabed Act 2004, ss 2, 48(2), 68(2)(a)

191. Limitation Act 2010, s 11

192. See submission 3.3.187, pp 258–259

193. Document B117, p 8

194. Submission 3.3.187, p 256

195. Ibid

itself to conduct negotiations under the Crown engagement pathway – anything from 10 to 50 years (see section 4.5.4). The Crown's willingness to live with the uncertainty created by such very loose estimations in that context undermines its insistence that it had to impose a statutory application deadline on Māori to achieve certainty.

As we have already noted in section 4.1.4, the Crown has imposed a number of provisions to protect existing interests in te takutai moana throughout the Act. Public rights of access, navigation, and fishing are preserved, as are the rights of owners of existing structures in te takutai moana.[196] RMA permission rights and conservation permission rights do not apply to accommodated activities, which exempts a very broad range of existing (and some new) activities and infrastructure.[197] There is also a comprehensive regime which vests reclaimed land in the Crown and allows developers of reclaimed land and network utility operators to apply for an interest in that land. These aspects already provide for the certainty the Crown was seeking to achieve. If so, this leaves little justification for imposing a statutory deadline that prevents Māori from seeking legal recognition of their customary rights after that date.

Crown counsel maintain that the statutory deadline was beneficial for applicants in the High Court and Crown engagement pathway. Without a deadline, Crown counsel say, applications could be lodged at any time, 'even if the Crown was about to enter into a recognition agreement with another group, or the High Court was hearing an application for the same area.'[198] This, they contend, 'would likely have had disruptive and costly consequences.'[199]

It is difficult for the Crown to argue that the statutory deadline was inserted to benefit Māori when no Māori support it. All claimants who appeared before us strongly opposed it. Any paternalistic approach that the Crown knows what is best for Māori cannot be maintained in the face of Māori opposition.

We accept that there could be some disruption from an applicant seeking to join a proceeding in the High Court or the Crown engagement pathway at a very late stage. However, there are other, more flexible, options available that could have been adopted to address this. For example, the Court has adopted the approach of hearing related applications within a defined geographic area. As part of the interlocutory process, the Court could have required public notification of the proceeding and a deadline by which any related or overlapping claims had to be filed. Any applications filed after that deadline would not be accepted unless leave was granted by the Court. When deciding whether to grant leave the Court could consider relevant factors such as the reason for the late filing and any prejudice to the other parties if the late filing is accepted. While this still imposes a deadline, it

196. Marine and Coastal Area (Takutai Moana) Act 2011, ss 18, 26–28
197. Ibid, ss 63–66, 71.
198. Submission 3.3.187, p 256
199. Ibid

is a far more flexible approach that would minimise the risk of an injustice arising. Such an approach would also strike a more reasonable balance between promoting legal certainty and maintaining the ability of Māori to seek legal recognition of their customary interests.

Crown counsel acknowledged and accepted that: '[T]here are alternatives that . . . would be more flexible than the deadline we have in the Act.'[200] As the statutory deadline permanently prevents Māori from seeking legal recognition of their customary interests in te takutai moana, in our view the Crown should have taken a more flexible approach. The hard deadline adopted is not a reasonable balance between Māori interests and other public and private interests. Even if a hard deadline was to be imposed, six years is too short. Ultimately, the six-year deadline was arbitrary, being somewhere between the two other options that had been proposed.

Overall, we consider that the statutory deadline was not and is not justified by any policy considerations that meet the standard of acting reasonably and in good faith toward Māori. We have formed this view after noting how the Takutai Moana Act's deadline compares with other land-related statutory deadlines, the absence of convincing evidence about why exactly the Crown chose a six-year deadline, and the Crown's flawed argument about legal certainty. We find that the Act's statutory deadline is in breach of the Treaty principles of partnership and active protection.

(2) *Principle of whanaungatanga*

The principle of whanaungatanga requires the Crown to actively work 'to maintain amicable relationships' between different iwi, hapū, and whānau that have filed overlapping claims.[201] Even where the Crown has multiple, possibly conflicting, duties, it must 'avoid creating new grievances'.[202] In our view, after the protests in reaction to the Crown's foreshore and seabed policy in 2004, the Crown should have anticipated how deeply Māori care about their customary rights in te takutai moana, and that there would be an influx of applications before the deadline expired. The deadline added to the stress that applicants were under. The lack of time made it more difficult for them to confer with neighbouring groups about potentially resolving overlapping claims as tikanga required.[203] When this lack of time is coupled with the initial uncertainty concerning the requirement of exclusivity in the test for customary marine title, it becomes clear that this caused a high level of tension – and in some cases conflict – between iwi, hapū, and whānau. By setting a statutory deadline, the Crown has therefore missed an opportunity to

200. Transcript 4.1.11, p 388

201. Waitangi Tribunal, *The Whakatōhea Mandate Inquiry Report*, p 22; see also Waitangi Tribunal, W*haia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Lower Hutt: Legislation Direct, 2015), pp 31–32.

202. Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report* (Lower Hutt: Legislation Direct, 2020), p 32

203. See, for example, submission 3.3.163, p 9; doc B27, para 57; doc B76, p 9.

protect relationships among Māori. This failure amounts to a breach of the Treaty principle of whanaungatanga.

(3) *Result*

The Takutai Moana Act's statutory deadline for filing applications is in breach of the Treaty principles of partnership, active protection, and whanaungatanga.

(4) *Prejudice*

The deadline has caused prejudice to those who missed the deadline altogether, as they can no longer seek legal recognition of their customary interests in te takutai moana. This not only undermines recognition of their property rights, but prevents them from exercising tino rangatiratanga.

The deadline has also prejudiced those claimants who filed applications in only one application pathway. A number of claimants told us that they filed an application in only the Crown engagement pathway as they were under pressure to meet the deadline and simply filed an application without understanding the process and benefits of the two pathways. They have now been left in a Crown engagement pathway that has made little progress while others are having applications determined in the High Court pathway. The delay is prejudice on its own. There is also concern at the lack of cohesion between the two pathways, which we address further below. If this is not resolved, those claimants risk their takutai moana claim area being determined in one pathway while they are stuck in another.

The prejudice that follows from the statutory deadline is also discernible in the administrative regime supporting the Takutai Moana Act. It is evident that the deadline resulted in a rush of applications being filed at the last minute to meet the deadline. Both application pathways are now clogged, causing delay and tension among applicants. If there was no hard deadline, there would not have been this same rush of applications, and no administrative bottleneck would have occurred.

Furthermore, as we heard in evidence, the statutory deadline meant many applicants rushed to file applications without the opportunity to first coordinate, discuss, and negotiate overlapping interests in accordance with tikanga; the resulting damage to their whanaungatanga with other iwi, hapū, or whānau is another, especially painful, form of prejudice.

(5) *Recommendation*

We recommend repealing the statutory deadline. Doing so would address the significant prejudice we have identified above.

Repealing the deadline would have no detrimental effect on the legal certainty of those who have already obtained a protected customary right or a customary marine title. Ongoing proceedings could be regulated by an interlocutory process as discussed above. This could be provided by legislative amendment to the Act (see, for example, section 107 of the Act, which deals with procedure), by making Rules per section 108 of the Act, or by using the Court's inherent jurisdiction or other ability to regulate its practice and procedure.

4.4 The High Court Pathway

4.4.1 Overview

Section 98 of the Takutai Moana Act provides that the High Court may recognise protected customary rights or customary marine title:

> **98 Court may recognise protected customary right or customary marine title**
> (1) The Court may make an order recognising a protected customary right or customary marine title (a recognition order).
> (2) The Court may only make an order if it is satisfied that the applicant,—
> (a) in the case of an application for recognition of a protected customary right, meets the requirements of section 51(1); or
> (b) in the case of an application for recognition of customary marine title, meets the requirements of section 58.
> (3) No other court has jurisdiction to make a recognition order.
> (4) On and after the commencement of this Act, the jurisdiction of the Court to hear and determine any aboriginal rights claim is replaced fully by the jurisdiction of the Court under this Act.

4.4.2 The claimants' position

The claimants characterise the High Court pathway as 'culturally inappropriate'.[204] Some say the Court is a 'foreign environment' for them, or that the High Court process is difficult to understand.[205] Specifically, the claimants point out that the High Court does not sit on marae, and that exposing kaumātua to the process of cross-examination is not consistent with the claimants' tikanga.[206] Some claimants consider that the Māori Land Court would be a more appropriate forum.[207]

Furthermore, the claimants say that the High Court pathway is too slow and cumbersome.[208] For example, claimant Angeline Greensill, of Tainui hapū, told us:

> The process is long, unwieldy, expensive and a waste of court time and resources. It is over 3 years since we lodged our claim. The hearing schedule has our claim being heard in the High Court in 2027. I will be 79 years old and I don't know how old the judge will be.[209]

Claimants also assert that the cost of participating in the High Court process should not be underestimated. This is especially so given that claimants in the Crown engagement pathway are essentially forced to participate in the High Court pathway if they want to continue to be able to exercise tino rangatiratanga, kaitiakitanga, and manaakitanga where overlapping claims are being heard in the

204. Submission 3.3.150, p 6
205. Ibid; submission 3.3.154, pp 18–20; doc B14(a), pp 4–5; doc B76, p 9
206. Submission 3.3.138, p 46; doc B76, p 9
207. Submission 3.3.161, p 6; doc B36, pp 7–8
208. Submission 3.3.154, p 19; doc B32, p 3; doc B47, pp 11–12; doc B104, pp 28–29
209. Document B63, p 4

High Court.[210] Claimant Mr Willoughby added that it is a 'considerable amount of work for people who have families and are trying to maintain full time jobs'.[211] This was endorsed by claimant Tracy Hillier, of Ngāi Tamahaua, who gave the following insight into the work required to pursue an application in the High Court pathway:

> The preparation and lead up to [the 8 weeks Edwards/Whakatōhea hearing in the High Court in Rotorua] has been intense. I am in regular contact with my lawyer by email, text and phone (our phone conversations regularly last well over an hour). In addition there is work and time involved in reviewing documents, administrative tasks to do with the Crown funding of our application, and trying to keep whanau abreast of what is happening. The amount and depth of evidence we are required to assemble to support our claim is significant and, while heavily assisted by our lawyers, has still taken me and other members of Ngai Tamahaua hundreds of hours of work to prepare. . . . Overall, our High Court application has cost the hapu significant funds.[212]

The claimants also argue that the High Court process risks damaging whanaungatanga. They say that the process is designed to be 'adversarial', pitting applicants against one another, thus producing 'winners and losers'.[213] Mr Tawhiao, for example, was concerned about the potential for conflict 'if the process is not supported and led well'.[214]

Secondly, the claimants state that the Act 'lacks any practical guidance' on the role of pūkenga.[215] Claimant counsel submit that it is unclear who the pūkenga will be, whether they will have sufficient knowledge of local tikanga, and how to deal with any disagreements arising from the pūkenga's advice.[216] Counsel for the Rongowhakaata Iwi Trust and the Ngāti Pāhauwera Development Trust argue that this confusion is especially problematic given the High Court's lack of tikanga expertise, which makes the involvement of pūkenga very likely.[217]

Finally, some claimants argue that the participation in the High Court pathway of interested parties, such as private enterprises, is inconsistent with the principles of the Treaty.[218] According to claimant witness Rick Witana, involving third parties potentially makes the proceedings longer and consequently more expensive for claimants; it also amplifies their adversarial nature.[219] There is also particular criticism of the Attorney-General's involvement as a third party, with one counsel alleging he had opposed applicants in the High Court pathway 'in an

210. Submission 3.3.173, p 29
211. Document B59, p 21
212. Document B99, p 19
213. Submission 3.3.145, p 7
214. Document B17, para 32
215. Submission 3.3.137(b), p 124
216. Submission 3.3.138, p 46
217. Ibid
218. Submission 3.3.182, p 150
219. Document B33, p 12

overly-adversarial manner' and acted 'in bad faith.'[220] Claimant counsel point to the adversarial content of the notices of appearance initially filed on behalf of the Attorney-General, which stated that the evidence supporting the application in question did not establish the statutory criteria for protected customary rights and for customary marine title.[221] For example, these notices argue that overlapping interests are inconsistent with the requirement of exclusive use and occupation:

> The Attorney-General understands the application for customary marine title overlaps with other applications listed in the schedule to this notice. To the extent that there is any overlap with other applications, the Attorney-General says such overlap is inconsistent with the applicant's claim to exclusive use and occupation of the application area without substantial interruption since 1840.[222]

4.4.3 The Crown's position

The Crown submits that it gave 'careful consideration to whether the Māori Land Court or High Court should have jurisdiction' to determine applications made under the Act.[223] The High Court was chosen because the Crown considered it had experience 'in a wide range of legal matters, including routinely dealing with Māori issues.'[224] The claim that the High Court lacks the necessary tikanga expertise for determining applications lacks a factual basis, Crown counsel submit.[225] In response to some claimants' preference for the Māori Land Court because of the tikanga expertise of its judiciary, the Crown notes that there is no requirement for Māori Land Court judges (like their High Court counterparts) to have special tikanga, te reo, or Treaty expertise. However, the Crown acknowledges that, under Te Ture Whenua Maori Act 1993, a person must not be appointed to be a Māori Land Court judge 'unless the person is suitable, *having regard to* the person's knowledge and experience of te reo Māori, tikanga Māori, and the Treaty of Waitangi' (emphasis in original).[226] Finally, the Crown rejects the claimant argument that the cross-examination of kaumātua is not consistent with tikanga, saying that 'cross-examination would still have been part of the process if the Māori Land Court had been selected as the court to determine applications.'[227]

In his brief of evidence, the Honourable Mr Finlayson tells us that, when the Act was being drafted, one of the reasons he favoured the High Court having jurisdiction was 'the significance of the foreshore and seabed in New Zealand', which a High Court jurisdiction would best reflect.[228] He continues: 'The High Court has

220. Submission 3.3.182, pp 139–140; see also doc B77, p 3.
221. Submission 3.3.160, p 26, referring to doc A76(a), pp 451–454; submission 3.3.162, p 7, referring to doc B21(a), pp 8–12
222. Document B21(a), p 10; doc A76(a), p 452
223. Submission 3.3.187, p 280
224. Ibid, p 281
225. Ibid
226. Ibid, p 282; see Te Ture Whenua Maori Act 1993, s 7(2A).
227. Submission 3.3.187, p 282
228. Document B117, p 5

a long history of dealing with Māori issues. I have never thought it appropriate for matters of tikanga to be sealed hermetically behind the doors of a specialist court.'[229]

As for the role of pūkenga, the Crown considers that the wording of section 99 of the Act gives sufficient guidance.[230] It states that a pūkenga is a 'court expert . . . appointed in accordance with the High Court Rules 2016 who has knowledge and experience of tikanga'.[231] The Crown also refers to the *Re Edwards (Te Whakatōhea No 2)* proceedings, in the context of which Justice Churchman held that the High Court Rules 2016 (which cover the appointment of expert witnesses) are pertinent to the appointment of pūkenga under the Takutai Moana Act.[232] The relevant High Court rule provides that a 'court expert in a proceeding must, if possible, be a person agreed upon by the parties and, failing agreement, the court must appoint the court expert from persons named by the parties'.[233] Finally, the Crown draws attention to the involvement of pūkenga in both the *Re Edwards (Te Whakatōhea No 2)* and the *Re Clarkson* proceedings, which signals that 'involvement of court-appointed pūkenga in applications under the Act is likely to remain an important part of the High Court process'.[234]

The Crown defends the Attorney-General's role as an interested party in past proceedings before the High Court, saying that parts of the Attorney-General's submissions were beneficial for applicants as they pointed out legal issues that needed addressing.[235] However, the Crown recognises that, in hindsight, 'some of the language associated with this process (and the procedure itself) is likely to have been unsettling for applicants'.[236]

4.4.4 The Tribunal's analysis and findings

In this section, we consider whether the design of the High Court pathway under the Takutai Moana Act is consistent with the principle of active protection, and, if not, whether this has prejudiced, or is likely to prejudice, claimants.

(1) *Applicable Treaty principles*

The Tribunal has previously found that the principles of options and equity mean that 'Māori are entitled to their options under the law' and 'to have their property rights defined by the courts'.[237] In the *Report on the Crown's Foreshore and Seabed Policy*, the Tribunal compared the ability of Māori to access the courts in the periods immediately after the 2003 *Ngāti Apa* decision and after the Crown had enacted its foreshore and seabed policy a year later. The Tribunal held that making

229. Document B117, p 5
230. Submission 3.3.187, p 283
231. Marine and Coastal Area (Takutai Moana) Act 2011, s 99(1)(b)
232. Submission 3.3.187, pp 283–284, referring to minute 18 of Churchman J, 8 July 2020, para 14
233. High Court Rules 2016, r 9.36(3)
234. Submission 3.3.187, p 281
235. Ibid, p 289
236. Ibid
237. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 134

a choice between the High Court and the Māori Land Court 'is the exercise of both a Treaty right and a legal right'.[238] On the basis of this past Tribunal finding, we consider that the Crown also needs to provide Māori with adequate options as to how they may choose to seek recognition of their customary rights under the Takutai Moana Act.[239]

(2) *Jurisdiction*

As to which Court is the most appropriate forum for determining these rights, we agree with the Crown that the High Court has had to deal with many significant Māori claims concerning both Treaty entitlements and inter-iwi disputes. It has considerable expertise and experience dealing with such issues. We also consider that many of the concerns raised by claimants would not be solved merely by granting jurisdiction to the Māori Land Court instead of the High Court. The Māori Land Court is still a court. Witnesses are still cross-examined, particularly where proceedings are run in a manner akin to litigation in the mainstream courts. The projected delay of applications being heard by the High Court reflects the large number and complexity of the applications before it. These issues would still remain if the proceedings were transferred to the Māori Land Court.

However, some applicants are more familiar with the setting of the Māori Land Court, having brought applications before it concerning their ancestral lands. As the Māori Land Court avoids unnecessary formality, most applicants are not legally represented.[240] The Court's regular use of te reo and tikanga Māori as part of its everyday process creates a familiar and comfortable environment. Laying out one's whakapapa in order to prove a customary interest is a demanding task that can put applicants in a vulnerable place. Being able to choose a familiar forum to do so where the applicant feels comfortable matters greatly. This does not mean that the Māori Land Court is better suited than the High Court to hear applications under the Takutai Moana Act. But at the very least the Crown should have considered granting concurrent jurisdiction to the Māori Land Court and the High Court. Crown counsel acknowledged that, surprisingly, the Crown had not considered the option of concurrent jurisdiction.[241]

We find that, in accordance with the principle of options, Māori should have a choice whether to have their applications heard by the High Court or the Māori Land Court. Undoubtedly, enabling Māori to exercise that choice will have practical and procedural implications for the Courts. But there are already examples of concurrent jurisdictions between the High Court and the Māori Land Court, and established legal mechanisms to deal with issues arising from such arrangements.[242] Moreover, extending jurisdiction to the Māori Land Court would offer

238. Ibid, p 134
239. See, generally, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed (Wellington: GP Publications, 1996), p 195.
240. Te Ture Whenua Maori Act 1993, s 66
241. Transcript 4.1.11, pp 428–429
242. See, for example, Te Ture Whenua Maori Act 1993, ss 20A, 131, 236–237, 338A; Law Reform Testamentary Promises Act 1949, s 5; and Family Protection Act 1955, s 3A.

some advantages. For example, the Māori Land Court has access to the Native Land Court's extensive historical records of customary rights, which are still being used by Māori and non-Māori today. It would also provide additional judges to assist with reducing the backlog of applications before the High Court.

For these reasons, we find that the Crown's failure to provide Māori with a choice between having their applications under the Act heard in the High Court or the Māori Land Court breaches the principle of options.

(3) *Involvement of pūkenga and Māori Appellate Court opinions*

Another matter is how the High Court may obtain advice on tikanga under its current jurisdiction. Pursuant to section 99 of the Act, the Court may refer to pūkenga or the Māori Appellate Court for opinions or advice on tikanga. We support the High Court's ability to do so. Competing applications for a recognition order (particularly for customary marine title), for example, can be complex, and section 99 allows the High Court to draw on external expertise (from the Māori Appellate Court or pūkenga) to resolve complex questions of tikanga. This provides an opportunity to enhance the Court's decision-making process, leading to more robust decisions and better outcomes for Māori.

However, concerning the involvement of pūkenga, we observe that it is important *how* pūkenga are included in the court process. While we consider the current provisions governing the involvement of pūkenga are clear, they may not go far enough. We note that High Court judges have full discretion whether to appoint pūkenga and their advice is not binding.[243] While we acknowledge and respect the expertise of the High Court judiciary, the appointment of pūkenga adds a te ao Māori lens to the whole statutory regime. It would be preferable if the Act required the appointment of a pūkenga whenever the High Court needs to address questions of tikanga. We also consider such pūkenga should sit alongside the judges as joint decision makers on matters of tikanga. This recognises the significant expertise they provide and only enhances the decisions in the High Court pathway. There are other examples of panel decision-making where expertise on te ao Māori is required – for example, the Waitangi Tribunal or freshwater hearing panels under the Resource Management Act 1991. There are also many examples of procedures for determining the composition of such panels and their decision-making procedures.[244] For example, the Treaty of Waitangi Act 1975 requires that any sitting of the Tribunal comprises the presiding officer and two to six other members.[245] At least one of the panel members must be Māori. Tribunal practice generally requires a kaumātua member to be appointed to each inquiry. In terms of decision-making procedure, the Treaty of Waitangi Act 1975 provides:

243. Marine and Coastal Area (Takutai Moana) Act 2011, s 99

244. Treaty of Waitangi Act 1975, s 4(2A), sch 2, cl 5(6)(c); Resource Management Act 1991, sch 1, cl 59(1)(c)

245. Treaty of Waitangi Act 1975, s 4(2A), sch 2, cl 5(6)

> In the event of disagreement in respect of any matter, the decision of the majority of the members dealing with the matter shall be the decision of the Tribunal, and, where those members are equally divided, the decision of the presiding officer shall be the decision of the Tribunal.[246]

These examples provide some guidance on how panel decision-making could be implemented in the Takutai Moana Act. However, while we make these suggestions to enhance the High Court pathway, on balance, we do not find that this reaches the threshold of a Treaty breach.

Turning to the High Court's other option for external expertise, seeking an opinion from the Māori Appellate Court, we note that the opinions of the Māori Appellate Court are binding on the High Court.[247] As we have stated already, we support the ability of the High Court to refer such questions to the Māori Appellate Court. However, it is not clear whether there is a right of appeal against an opinion of the Māori Appellate Court under this referral process.

A referral to the Māori Appellate Court under section 99 of the Takutai Moana Act is made in accordance with section 61 of Te Ture Whenua Maori Act 1993. This provision requires the Māori Appellate Court to consider the question referred to it and to transmit a certificate of its opinion on the matter back to the High Court.

Section 112(1) of the Takutai Moana Act states that 'A party to a proceeding under [part 4 subpart 2 of the Takutai Moana Act] who is dissatisfied with a decision of the Court may appeal to the Court of Appeal on a matter of fact or law.' This right of appeal only relates to a decision of the High Court. A binding opinion of the Māori Appellate Court may not be considered a decision of the High Court for the purposes of section 112. Although there is a right of appeal against Māori Appellate Court decisions available under section 58A of Te Ture Whenua Maori Act 1993, it does not apply to the proceedings under the Takutai Moana Act, because section 58A engaged only following an appeal from the Māori Land Court to the Māori Appellate Court.

Consequently, where the High Court refers a question of tikanga to the Māori Appellate Court, there is no express right of appeal against the Māori Appellate Court's opinion (unless the opinion falls within the meaning of 'a decision of the [High] Court' for the purposes of section 112 of the Takutai Moana Act). This is surprising given the binding nature of the Māori Appellate Court's opinion. Although the opinion would be subject to judicial review, this procedure provides a narrower pathway to challenge a decision than a general right of appeal would.

It is likely that the High Court would refer questions of tikanga to the Māori Appellate Court in particularly complex situations, for example in cases with overlapping claims. We consider this process should be used to enhance the Court's decision-making process, thus achieving better outcomes for Māori rather than disadvantaging an unsuccessful applicant by removing the general right of appeal

246. Ibid, s 4(2A), sch 2, cl 5(7)
247. Marine and Coastal Area (Takutai Moana) Act 2011, s 99(2)

they would have enjoyed if the same question was resolved by the High Court alone. This could lead to reluctance from applicants to request that the High Court refer questions of tikanga to the Māori Appellate Court.

We consider that the omission of a right of appeal against the Māori Appellate Court's binding opinions breaches the duty of active protection, as these opinions can directly and significantly affect the ability of Māori applicants to have their customary rights recognised under the Act.

(4) *Result*

We find that the Crown's failure to provide Māori with a choice between having their applications under the Act heard in the High Court or the Māori Land Court breaches the Treaty principle of options.

Furthermore, we consider that the omission of a right of appeal against the Māori Appellate Court's binding opinions breaches the duty of active protection, as these opinions can directly and significantly affect the ability of Māori applicants to have their customary rights recognised under the Act.

Apart from these main findings, we note the Crown's partial acknowledgement that some of the language the Attorney-General used when making submissions as an interested party in High Court proceedings is likely to have unsettled applicants.[248] We agree with the Crown's analysis, but add that the evidence before us shows it is not just 'likely' that the applicants were unsettled – it is certain.

(5) *Prejudice*

We find that the Crown's Treaty breach in relation to the matter of jurisdiction has created, and is likely to continue creating, prejudice for the claimants, as it has limited their choice of forum. Being able to choose an appropriate forum to hear their applications for recognition of customary interests is central to exercising tino rangatiratanga. We accept claimant counsel's argument that the 'inability to exercise rangatiratanga in the current procedural arrangements is a form of prejudice in itself'.[249]

Furthermore, in relation to the matter of the Māori Appellate Court's opinions, applicants to the High Court could only challenge these opinions on the grounds of judicial review, which are narrower than a general right of appeal. The omission of an appeal right in this regard will likely prejudice unsuccessful applicants in the future.

(6) *Recommendation*

To alleviate the prejudice regarding jurisdiction, we recommend amending part 4 subpart 2 of the Takutai Moana Act to allow for a concurrent jurisdiction between

248. Submission 3.3.187, p 289

249. Submission 3.3.137(b), p 127; see also submission 3.3.138, p 54; submission 3.3.156, p 18; submission 3.3.165, p 7; see also, more generally, submission 3.3.81, p 6; submission 3.3.107, pp 6–7; submission 3.3.146, p 3; submission 3.3.149, p 31; submission 3.3.158, p 35; doc B35, p 8; doc B44, p 27.

the High Court and the Māori Land Court. This should include the possibility for current applicants to transfer their applications from the High Court to the Māori Land Court and vice versa. As the Crown itself stated in its public consultation document, jurisdiction to hear applications under the Takutai Moana Act does not have to be 'an either/or decision.'[250]

To alleviate prejudice arising from the current procedure for obtaining opinions from the Māori Appellate Court, we recommend that section 112 of the Act be amended to read: 'A party to a proceeding under this subpart who is dissatisfied with a decision of the Court *or an opinion of the Māori Appellate Court under section 99(1)(a)* may appeal to the Court of Appeal on a matter of fact or law.' (Our proposed insertions are in italics.)

4.5 The Crown Engagement Pathway

4.5.1 Overview

Section 95 of the Takutai Moana Act specifies how applicants can engage with the Crown to obtain recognition of protected customary rights or customary marine titles:

> **95 Recognition agreements**
> (1) An applicant group and the responsible Minister on behalf of the Crown may enter into an agreement recognising—
> (a) a protected customary right:
> (b) customary marine title.
> . . . . .
> (3) Nothing requires the Crown to enter into the agreement, or to enter into negotiations for the agreement: in both cases this is at the discretion of the Crown.
> (4) The Crown must not enter into an agreement unless the applicant group satisfies the Crown that,—
> (a) in the case of a protected customary right, the requirements in section 51 are met; or
> (b) in the case of customary marine title, the requirements in section 58 are met.

Section 96 specifies how a recognition agreement is to be brought into effect:

> **96 How recognition agreements to be brought into effect**
> (1) An agreement is of no effect unless and until it is brought into effect,—
> (a) in the case of an agreement to recognise a protected customary right, on the date prescribed by an Order in Council, which must also specify—
> (i) the applicant group in sufficient detail to identify it; and

250. 'Reviewing the Foreshore and Seabed Act 2004: Consultation Document', 31 March 2010 (CLO.009.0294), p 30 (doc B3(a), p [15424])

(ii) the area to which the agreement relates, with a map or diagram that is sufficient to identify the area; and

(b) in the case of an agreement to recognise customary marine title, by an Act of Parliament on the date specified in the enactment.

4.5.2 The claimants' position

Claimants submit that the Crown engagement pathway breaches several Treaty principles and is prejudicial. First, the Act gives the Crown the discretion to engage with applicants or not – something the claimants contend is unacceptable.[251] Counsel cite various reasons, including that, if the Crown opts not to engage, applicants are left without legal expression of their customary rights.[252] Some claimants submit that engagement at the Crown's discretion is a breach of partnership.[253] Others argue that, in exercising its discretion, the Crown might prefer to deal with well-constituted post-settlement governance- or legally-constituted entities over smaller iwi, hapū, and other groups.[254]

Secondly, claimants allege that they are 'in limbo' about not only *whether* the Crown will engage but also *when*.[255] They submit that applications progress through the Crown engagement pathway too slowly, and the Crown does not communicate proactively with applicants.[256] Several said that they have not heard anything from the Crown since it acknowledged that their application had been received.[257] For claimant Sheena Ross, it was 20 months before she received that acknowledgement.[258] A number of claimants say they have been advised their engagement with the Crown is likely to begin sometime between 2035 and 2045.[259] Others point to Crown documentation from 2017 estimating a timeframe of 40–50 years for their applications to be completed.[260] Claimant counsel state that this rate of progress has 'created an environment of uncertainty, unfairness, and mistrust for Maori'.[261]

Meanwhile, 'constant changing of Crown policy and processes' is adding to the uncertainty.[262] Even though claimants acknowledge that the Crown has attempted to improve the Takutai Moana Engagement Strategy, 'there is no statutory base

251. Document B7, para 7; doc B9, para 12; doc B99, p 18; submission 3.3.95, p 6; submission 3.3.157, p 12; submission 3.3.175(b), p 27
252. Submission 3.3.175(b), p 28
253. Submission 3.3.1, p 3
254. Document B76; p 8; submission 3.3.161, p 6; submission 3.3.163, p 10; submission 3.3.174, p 259
255. Document B32, p 6
256. Document B7, para 7; submission 3.3.162, pp 9–10; submission 3.3.165, pp 11–14; submission 3.3.201, p 42
257. Document B23, p 1; doc B88, pp 4–5; doc B89, pp 4–5; doc B99, p 18; submission 3.3.85, p 5
258. Document B48, p 2
259. Document B21, p 14; doc B23, p 1; doc B24, para 5; doc B31, p 3; doc B32, p 5; doc B33, p 13; doc B48, p 2; doc B83, p 5; doc B125, para 14
260. Document B59, p 19; doc B96, para 4, referring to doc A62(a), p 76.
261. Submission 3.3.102, p 70
262. Submission 3.3.175(b), p 28

which confirms and gives effect to this change.'[263] Claimants also contend that low staff numbers at Te Arawhiti contribute to the slow progress of applications, and they say that the Crown's intent to employ 12 new staff is insufficient.[264]

The slow progress of the Crown engagement pathway has significant consequences, claimants argue. Claimant Bonny Craven, on behalf of Waimate Taiamai, tells us that the Crown's estimated timeframe for engagement is 'an entire generation from now'.[265] This has a dual effect, claimants say. Not only does the protracted timeframe create an inter-generational burden – the applicants' mokopuna will have to take on the task of staking claim over customary marine and coastal rights – but it also diminishes the likelihood of a successful outcome.[266] As Mr Willoughby explains:

> Our elders who are the holders and safe-guards of our traditional knowledge are passing away. The longer that we are delayed in the opportunity to enforce and give effect to our customary rights, the less likely it is that we will be able to successfully prove them.[267]

Claimant Sailor Morgan, of Ngāti Ruamahue hapū, raises an environmental concern, saying that the Crown 'has failed to consider the damage that can be done to our Moana in this timeframe. The exponential rate of overfishing and environmental degradation will only continue.'[268] Moreover, claimant Pita Tipene tells us that the slow pace at which applications are progressing undermines the claimants' rangatiratanga: the Crown has an obligation 'to recognise our rangatiratanga over the takutai moana now, not in 15 or 20 years' time'.[269] Claimant counsel characterise the pathway's slow progress as a failure of active protection, arguing that '[t]he Crown has failed to actively protect the Claimants' right to have their interests in the marine and coastal area recognised by the Crown in a timely manner.'[270]

4.5.3 The Crown's position

The Crown contends that the evidence in this inquiry shows that the Crown engagement pathway is not 'prejudicing applicants to an extent or in a manner that supports a finding of Treaty breach'.[271]

Claimant concerns about the pathway were 'speculative or premature', Crown counsel argued, pointing to its new Takutai Moana Engagement Strategy, which was 'developed as a result of a consultation process that invited feedback from

263. Ibid, p 31
264. Submission 3.3.174, pp 197–198; submission 3.3.201, p 43
265. Document B23, p 1
266. Document B59, p 19; see also doc B21, p 5.
267. Document B59, pp 20–21; see also doc B21, p 5; doc B33, p 12.
268. Document B125, para 14
269. Document B31, pp 3–4
270. Submission 3.3.206, p 43
271. Submission 3.3.187, p 291

applicants.'[272] With the new strategy in place, the Crown anticipates that 'most Crown engagement applications will be determined within the next ten to twenty years [which is] considerably quicker than if [the] previous practice had continued.'[273] It will allow for concurrent engagement with multiple applicants in the same region, which will assist decision-making about overlapping claims.[274] Counsel also highlight the evidence of Ms Masterton, Director of Te Kāhui Takutai Moana at Te Arawhiti. She confirmed that Te Arawhiti's staffing levels will be increasing in order to deliver the new strategy, and that Te Arawhiti aims to actively assist 'smaller whānau applications' because often their needs are greater than 'bigger iwi organisations' that already understand government processes.[275]

Furthermore, the Crown rejects claimant concerns about its discretionary powers in the Crown engagement pathway. It notes that 'all discretionary powers granted by Parliament have to be exercised in good faith and in accordance with standard administrative law principles'.[276] If discretionary power is exercised 'unreasonably, arbitrarily, irrationally or for an improper purpose', it may be challenged by judicial review.[277] This standard, the Crown says, also applies to the Minister's decisions about whether or not to pursue engagement with applicant groups.[278]

4.5.4 The Tribunal's analysis and findings

In this section, we consider whether the Crown's design and application of the Crown engagement pathway are consistent with the principles of the Treaty. If not, we must consider whether they have prejudiced, or likely will prejudice, claimants.

(1) *Applicable Treaty principles*

Because it is alleged that the Crown engagement pathway lacks administrative efficiency, we consider the principle of good government particularly relevant. As we have noted elsewhere (see section 1.2.3), this principle essentially requires the Crown to adhere to its own laws.[279] In the context of a national system for granting customary marine title to Māori, the principle of good government also requires that applicants are provided with some degree of legal certainty (applicants have a right to know what criteria their applications will be determined against) and administrative efficiency (processing times for applications must not be excessive).

The principle of active protection is also relevant here, since the Crown engagement pathway is one of two ways to obtain legal recognition of customary interests

272. Submission 3.3.187, pp 291–292, referring to doc B113(g), p 1
273. Submission 3.3.187, p 292
274. Ibid, pp 292–293
275. Ibid, pp 292–294, referring to transcript 4.1.9, p 508
276. Submission 3.3.187, p 294
277. Ibid
278. Ibid
279. Compare Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 429.

in a taonga. As we have already found in our stage 1 report, the principle of active protection requires the Crown 'to ensure that the progress of . . . applications is not unreasonably delayed'.[280]

(2) *Scope of discretion*

The Act gives the Crown full discretion to decide whether it enters into a recognition agreement and even whether to begin negotiating a recognition agreement.[281] The only restriction on the Crown's discretion is that it must not enter into an agreement if the applicant does not meet the statutory tests for protected customary rights and/or customary marine title.[282] We find that the scope of the Crown's discretion under the Act is too wide. Applicants cannot estimate their chances of being successful in negotiations with the Crown because the Minister can simply refuse to enter into a recognition agreement without giving any reasons, even if the applicants meet the statutory test. We recognise that ministerial decisions made under the Act are subject to judicial review, as the Crown points out.[283] However, the Treaty principles of good government and active protection hold the Crown to a higher standard than merely ensuring that unlawful Crown conduct can be reviewed in the courts. Rather, the Crown must pre-emptively minimise the risk of unlawful actions by its servants or agents. In the context of the Act, this could have been achieved by, for example, transparently setting out objective criteria according to which the responsible Minister enters into recognition agreements. These objective criteria should be publicly available and Treaty compliant.

We also consider that the Crown's discretion should not be so wide that it can simply choose not to negotiate. The rights provided under the Act are the only way that Māori can have their customary interests in te takutai moana legally recognised. A number of claimants filed applications only in the Crown engagement pathway. If the Minister chooses not to negotiate with them, they are left with no recourse to have their interests in te takutai moana legally recognised. At the very least, the Minister should be required to assess every application in the Crown engagement pathway against the statutory requirements. The Minister should then be required to assess whether to enter into a recognition agreement using objective, public, and Treaty-compliant criteria, which can then be challenged on judicial review if necessary. This creates a far more robust process, which is necessary to actively protect Māori interests in te takutai moana under the Crown engagement pathway.

We further note that, in response to Ngāti Pāhauwera's application for Crown engagement, the then Minister, the Honourable Mr Finlayson, advised that the

280. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 67
281. Marine and Coastal Area (Takutai Moana) Act, s 95(3)
282. Ibid, s 95(4)
283. Submission 3.3.187, p 294

applicants could continue to seek recognition of those rights in the High Court pathway to the extent that they should be unsuccessful in the Crown engagement pathway.[284] We consider this was a responsible and Treaty-compliant approach. Based on the principles of partnership, active protection, and equal treatment, this should be adopted as the standard approach for applicants who are unsuccessful with their applications in the Crown engagement pathway.

(3) *Estimated timeframe*

Turning to the estimated timeframe for determining applications through the Crown engagement pathway, we note that this has varied significantly over time. By the time the statutory deadline expired in 2017, 387 applications seeking Crown engagement under the Takutai Moana Act had been lodged.[285] That same year, a Crown briefing paper to the Minister for Treaty of Waitangi Negotiations estimated that it could take 40 to 50 years to work through all applications now in the Crown engagement pathway.[286] To address this problem, the Crown undertook consultation to establish a new engagement strategy (subsequently known as the Takutai Moana Engagement Strategy). Crown witness Ms Masterton was in charge of developing the strategy; she wrote in a 2019 draft that '[a]pplications in tiers three and four will not begin until at least 2027'.[287] A subsequent consultation document about the strategy, which some witnesses received in early 2020, states that it will likely take '20–30 years to assess all applications for a Ministerial determination'.[288] It also specifies that in some areas, including most of Northland, engagement is scheduled for 2035–45 at the earliest.[289] According to Ms Masterton's evidence, following consultation, 'Te Arawhiti sought the Minister's approval for revisions to the draft strategy, including revised timeframes for engagement'.[290] When the Minister for Treaty of Waitangi Negotiations finally unveiled the Crown's new engagement strategy in 2021, he indicated that it would take an estimated 25 years

284. 'Ngāti Pāhauwera Determination of Customary Interests under the Marine and Coastal Area (Takutai Moana) Act 2011', 23 August 2016, www.tearawhiti.govt.nz/assets/Ngati-Pahauwera-Letter-of-Determination-23-August-2016-PDF866KB.pdf, accessed 31 July 2023

285. Minister for Treaty of Waitangi Negotiations, 'Proactive Release – Takutai Moana Crown Engagement Strategy', 9 July 2021, www.tearawhiti.govt.nz/assets/Cabinet-material-Takutai-Moana-Crown-Engagement-Strategy.pdf; 'Applications', no date, https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications, accessed 16 May 2023. Note that, during stage 1 of this inquiry, the evidence was that only 385 applications were filed with the Crown: see doc A131, p 12.

286. 'Strategy for Managing Marine and Coastal Area Applications post 3 April 2017 Deadline', 15 March 2017 (CLO.002.0529), para 5 (doc B113(a), p 4)

287. 'Draft Takutai Moana Engagement Strategy', 13 December 2019 (CLO.048.0804), p 3 (doc B113(a), p 154). The phrase 'tiers three and four' refers to the categories Te Arawhiti uses to organise Crown engagement by region.

288. Document B23(a), p 1

289. Ibid, p 3

290. Document B113(g), p 1

to engage with all applications.[291] This differed from Ms Masterton's evidence in this inquiry, which was that 'most Crown engagement applications will be determined within the next ten to twenty years'.[292] Meanwhile, the official summary of the final Takutai Moana Engagement Strategy gives no indications of timeframes whatsoever.[293] Given the Crown's estimates of how long Crown engagement will take have differed so much over the years, we understand claimants' concerns about the lack of certainty for those applicants who have chosen the Crown engagement pathway.

Tested against the standards of the principles of good government and active protection, we are concerned at the projected timeframes and the uncertainty they create. We acknowledge that the Crown needs to take a 'coastline approach' that considers applications in regional clusters because this allows overlapping applications to be considered together.[294] We also accept that the Crown received and is addressing a large number of applications. However, this occurred as a direct result of the statutory deadline. The Crown should have anticipated the influx of applications; as we remarked in our stage 1 report, 'surges [in application numbers] are common before statutory deadlines of many kinds'.[295] The Crown has chosen to implement this regime and so it must ensure that it progresses it in a reasonable and timely manner. In response to the Crown's description of claimants' concerns as 'speculative or premature', this can hardly be the case, given that it has now been 12 years since the Act came into force and more than four years since the statutory deadline passed.[296]

(4) *Result*

We find that the unacceptably wide scope of the Crown's discretion, in connection with its slow pace of engagement, creates considerable uncertainty for applicants. Furthermore, the Crown's failure to provide objective criteria for obtaining a recognition agreement under the Act or a reasonable speedy schedule for working through applications in this pathway constitutes a breach of the Treaty principles of good government and active protection.

(5) *Prejudice*

Claimant counsel argue that this breach risks preventing an entire generation of applicants from seeing the results of their applications. Meanwhile, they will

291. 'Crown Speeds Up Engagement with Takutai Moana Applicants' 12 June 2021, https://www.beehive.govt.nz/release/crown-speeds-engagement-takutai-moana-applicants, accessed 20 June 2023: '"At the pace we've been going, it would take approximately 100 years to fully determine all applications. That is clearly unacceptable. The new approach seeks to engage all 387 applications within a quarter of this timeframe," Andrew Little said.'

292. Document B113(g), p 3, cited in submission 3.3.187, p 292.

293. Document B113(h)

294. Submission 3.3.187, p 292

295. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 46

296. Submission 3.3.187, p 292

be unable to exercise the rights available under the Act over their rohe moana. Furthermore, by the time Crown engagement commences – let alone finishes – applicants' chances of being granted an application may have diminished as many elders who could provide valuable oral evidence will have passed away. Therefore, we find that this breach has prejudiced, and continues to prejudice, claimants who are applicants in the Crown engagement pathway.

(6) *Recommendation*

We recommend amending section 95(3) of the Act so that the Crown must exercise its discretion whether or not to enter into recognition agreements in accordance with objective criteria. Furthermore, we recommend that the Crown urgently explore ways to speed up its engagement while maintaining the 'coastline approach'.

4.6 The Effects of Having Two Application Pathways

4.6.1 Overview

The Crown's decision to create two concurrent application pathways grew out of its deliberations during 2009 and 2010, when it was considering the procedural cornerstones of the legislative regime then being developed. As the evidence shows, the Crown weighed the merits of a 'litigation model', a 'negotiation model', and a 'blended' model which combined the other two approaches.[297] The Crown opted for the blended model, which ultimately led to dual application pathways being established.[298]

We have already touched upon the effects of having two application pathways in our stage 1 report, where we identified a lack of cohesion between them.[299] Here, we focus largely on the consequences of that shortcoming and the Crown's most recent steps to remedy it.

4.6.2 The claimants' position

Claimant counsel argue that there is a 'lack of cohesion' between the High Court pathway and the Crown engagement pathway.[300] They state that having two pathways makes the application process 'burdensome and unnecessarily complex', and that the resulting administrative load and uncertainty is prejudicial to claimants.[301]

Claimants submit it is unclear how the outcome of an application made in one pathway may affect applicants with overlapping interests who have chosen to

297. Document B3, pp 64–66
298. Ibid
299. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, pp 72–74
300. Submission 3.3.137(b), p 128; submission 3.3.145, pp 12–13; submission 3.3.168, p 24
301. Submission 3.3.98, p 2; submission 3.3.135, p 2; submission 3.3.157, p 10

pursue the other pathway.[302] As witness Rowena Tana, on behalf of Te Rūnanga o Ngāti Hine, puts it in her evidence:

> What happens if applications are determined by the High Court or Crown engagement process first or vice versa? Can two applications for the same area be determined? If one group is determined before another group, what happens to the application of the other group?[303]

The possibility of overlapping applications being considered in both the High Court pathway and the Crown engagement pathway means that, in practice, applicants cannot choose their preferred pathway as the legislation intended, the claimants argue.[304] Rather, claimants say this possibility requires them to actively participate in not one but two cumbersome administrative procedures – or risk losing recognition of part of their rohe:

> [A]ll applicants, whether they opted for the High Court or Crown engagement pathways, are obliged to be active and present in both pathways in order to ensure their interests are preserved, which in counsel's submission has the effect of undermining the choice of pathways in the first place, and places an even greater burden on applicants to ensure their interests are preserved.[305]

Most claimant submissions focus on the situation of applicants for customary marine title who chose the Crown engagement pathway. Some say they are forced to 'watch while others progress High Court applications which overlap with their rohe, without any certainty as to their ability to challenge those applications'.[306] Others say they are now forced to participate in Court proceedings – which are moving at a swifter pace than Crown engagement – even though they had elected to avoid that pathway.[307] Claimants also submit that they are uncertain whether a recognition order made by the High Court for one applicant might be 'overturned' by Parliament enacting a conflicting recognition agreement for another applicant.[308]

4.6.3 The Crown's position

The Crown maintains that the decision to offer a dual application pathway was reasonable. It provided Māori with a choice about how to seek recognition of

302. Submission 3.3.160, p 25; submission 3.3.174, p 12
303. Document B32, p 6
304. See, for example, submission 3.3.145, p 11; submission 3.3.154, pp 15–16; submission 3.3.173, p 30.
305. Submission 3.3.169, p 29; see also submission 3.3.173, p 30; submission 3.3.208, p 8.
306. Submission 3.3.155, p 33; see also submission 3.3.1, p 4; submission 3.3.177, p 17.
307. Submission 3.3.168, p 25; submission 3.3.174, p 12
308. Submission 3.3.198, pp 11–12

their customary interests under the Act.[309] The Crown says it developed the dual pathway concept in response to a recommendation from the Ministerial Review Panel.[310] It 'acknowledges claimants' concerns' that applicants may have to participate in both pathways to ensure their interests are protected.[311] Nevertheless, the Crown argues that claimants have overstated the risk that applications being determined in one pathway may have adverse consequences for applications in the other.[312] Crown counsel also doubts the practical relevance of these concerns; they point out that there has been no evidence put forward to substantiate the concern that 'the tests may be interpreted and applied inconsistently across pathways.'[313]

Concerning the possibility of applicants in the Crown engagement pathway being affected by faster-moving proceedings in the High Court, the Crown submits that the Act provides multiple measures to protect their interests.[314] Sections 102 to 104 of the Act ensure that parties who are not participating in the High Court pathway are aware of Court applications that concern them and allow them to 'participate in High Court proceedings should they wish', Crown counsel point out.[315] Section 102 requires that applicants in the High Court pathway serve their application on multiple relevant authorities as well as on 'any other person who the Court considers is likely to be directly affected'. Section 103 requires applicants to give public notice of their application, while section 104 provides that any interested person may appear and be heard on an application at the High Court.[316] Crown counsel also point out that, if an application is (in part) unsuccessful in the High Court, 'there would be nothing preventing the Minister from subsequently considering a Crown engagement application in respect of the same area' (to the extent that the application was unsuccessful).[317] In relation to interested parties, the Crown also points out that the High Court has frequently allowed interested parties to participate in proceedings, even if they filed their notices of appearance late.[318] Finally, the Crown draws attention to the existence of 'a central, publicly accessible' online database that summarises information about each High Court application.[319]

The Crown also commented on the other possibility: namely, that applicants in the High Court pathway could be affected by a recognition agreement reached in the Crown engagement pathway. Here, the Crown acknowledges that, if 'an

309. Submission 3.3.187, p 297
310. Ibid, pp 53, 297, referring to doc B114, p 73; see also Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel – Ministerial Review of the Foreshore and Seabed Act 2004 Volume 1', 30 June 2009 (CL0.004.0441), pp 149–150, 154 (doc B3(a), pp [25712]–[25713], [25717])
311. Submission 3.3.187, p 301
312. Ibid
313. Ibid, p 303
314. Ibid, pp 297–298
315. Ibid, pp 297–300
316. Ibid, pp 298–299, referring to sections 102–104 of the Takutai Moana Act.
317. Submission 3.3.187, pp 302–303
318. Ibid, pp 299–300
319. Ibid, p 298

application were determined in the Crown engagement pathway and resulted in the recognition of customary marine title', the High Court would be unable to recognise customary marine title being held by another applicant in respect of the same area.[320] However, Crown counsel note that the impact of this problem could be ameliorated 'through prior discussions between all applicant groups in an area, which is something that the Takutai Moana Crown Engagement Strategy provides for'.[321] Finally, the Crown notes that the details of all applications in the Crown engagement pathway (including maps of the application areas) are publicly available online on Te Arawhiti's website.[322]

4.6.4 The Tribunal's analysis and findings

In this section, we consider the consequences of the lack of cohesion between the two pathways, which we previously established in our stage 1 report, and the Crown's most recent steps in remedying it.

The principle of active protection demands that Māori must not be 'unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences'.[323] In the context of the Takutai Moana Act, this requires us to ask whether the legal design and implementation of the two pathways amounts to an administrative constraint that unnecessarily inhibits Māori from exercising tino rangatiratanga over their rohe. The principle of good government requires in this context that applicants are provided with some degree of administrative efficiency. Finally, the principle of partnership demands that Māori interests are balanced against other public and private interests in a reasonable and principled way.

In theory, the two pathways could represent such a constraint on protected customary rights if two conflicting rights were to be granted in separate pathways. However, given that such rights are not designed to exclude other groups from exercising the same or similar rights, we consider this issue easy to resolve. The possibility that having two pathways constrains Māori from using their resources as they wish is, in our view, more relevant to customary marine titles. This is because they are necessarily exclusive. Under the current model, once a customary marine title is granted in one pathway, applicants in the other pathway could be automatically precluded from obtaining a title for the same area.

To establish what the legal consequences of the lack of cohesion between the two pathways are, two main scenarios need to be considered. In the first, the High Court grants a recognition order for customary marine title before the Crown enters into a recognition agreement concerning the same area. This scenario has already arisen in the *Re Edwards (Te Whakatōhea No 2)* and the *Re*

320. Ibid, p 302
321. Ibid
322. Ibid, p 301
323. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 31; Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993*, 2nd ed (Wellington: Legislation Direct, 2006), p 100

Ngāti Pāhauwera cases.[324] In *Re Edwards*, Ngāti Awa initially participated as an interested party, in *Re Ngāti Pāhauwera*, the Mana Ahuriri Trust participated as an interested party; both were seeking direct engagement with the Crown concerning an area that then overlapped with applications in High Court proceedings.[325] In both instances, the High Court did not consider it a 'durable solution' to delay its proceedings until Crown engagement concerning the relevant area had concluded.[326] However, in both cases there were pragmatic avenues available to the High Court to overcome the lack of express ability to move readily between the two pathways. In *Re Edwards*, Ngāti Awa had also filed a separate application with the High Court, but agreed to have it considered in the Whakatōhea judgment in respect of Ōhiwa Harbour. In *Re Ngāti Pāhauwera*, the applicants who ended up satisfying the criteria for a joint customary marine title agreed to include a representative from the Mana Ahuriri Trust (which did not satisfy the criteria) on the future trust designed to hold customary marine title.[327] Therefore, we have not yet seen what approach the High Court would take if an interested party satisfied the criteria for customary marine title without having filed a High Court application.

In the second scenario, the Crown finalises a recognition agreement for customary marine title before the High Court grants a recognition order for the same area. This has not yet occurred but could do so once the Crown engagement strategy gains momentum.

Both unfortunate scenarios are the unavoidable result of the Crown developing legislation that grants recognition of customary interests by means of two distinctly separate pathways that have not been equipped with the necessary procedural mechanisms to achieve a coordinated or integrated outcome. Whether the dual pathway framework is consistent with the principle of active protection depends on the measures taken to address these potential conflicts.

For scenario one (the High Court acting faster than the Crown), Crown counsel point out that the Takutai Moana Act provides for procedural measures that would help prevent applicants in the Crown engagement pathway from being disadvantaged. Namely, applicants in the High Court must serve their applications on anyone with an interest in the area and also notify the public of their applications.[328] The problem is that, while interested parties are able to join High Court procedures, they are unable to gain title in that way if they have not sought to use the High Court pathway.[329]

What also remains unclear is the effect of a High Court recognition order on ongoing negotiations in the Crown engagement pathway: for example, can the

324. See *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, paras 399–412; *Re Ngāti Pāhauwera* [2021] NZHC 3599, paras 285–299.

325. *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 405; *Re Ngāti Pāhauwera* [2021] NZHC 3599, para 286

326. *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 409; *Re Ngāti Pāhauwera* [2021] NZHC 3599, para 296

327. *Re Ngāti Pāhauwera* [2021] NZHC 3599, para 500

328. Marine and Coastal Area (Takutai Moana) Act 2011, ss 102–103

329. Ibid, s 104

Crown lawfully use a recognition agreement to turn an existing exclusive customary marine title granted by the High Court into a shared customary marine title? Section 111(4) of the Act allows the Court to vary a recognition order but only at the request of the holder. This could provide an avenue to vary a High Court order to align with a Crown recognition agreement but would likely require consent from the holder of the Court order. We agree that the Act lacks clarity in this respect. This causes further uncertainty for applicants.

As for scenario two (the Crown acting faster than the High Court – which, from the evidence before us, appears less likely), the Act makes no provision for applicants from the High Court pathway to take part in ongoing negotiations between the Crown and other applicants in the Crown engagement pathway. Again, it remains unclear what the legal consequences for ongoing High Court proceedings are if a recognition agreement in the Crown engagement pathway is reached first. There are no apparent procedural barriers that prevent the High Court from considering an application for a customary marine title concerning an area already specified in an existing customary marine title. But any such later application may not be able to demonstrate exclusivity, given that exclusivity has already been proven by the earlier Crown recognition agreement in favour of another applicant. It remains to be seen whether the High Court would consider granting a new, shared customary marine title that stands in conflict with an existing, exclusive customary marine title granted in the Crown pathway. There is no express provision in the Act which allows amending a recognition agreement with the Crown. As this is an agreement between the Crown and the applicant group, presumably it could be amended by consent. However, as a recognition agreement for customary marine title is given effect by an Act of Parliament, any amendment to the agreement would also require amending the enabling legislation.

Having heard evidence highlighting numerous potential (and, in some cases, already realised) consequences of the dual application pathway, we have reached an inescapable conclusion. The Crown – despite what we are convinced were good intentions – has not only undermined the idea of providing applicants with a real choice between two pathways, but also significantly increased the administrative burden necessary for them to obtain a customary marine title. Multiple overlapping applicants have been affected. And the existence of the deadline has inhibited the High Court and the Crown pathway from resolving the problem of coordinated decision-making on overlapping claims in the separate pathways.

In theory, a dual application pathway is Treaty compliant, as it provides Māori with options on how to have their rights recognised. However, the Crown's decision to implement this regime without any cohesion between the two pathways breaches the Treaty principle of active protection, as we have found in our stage 1 report already.[330] It also breaches the Treaty principles of good government and partnership.

330. Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report*, p 74

The Crown has recognised this problem.[331] In September 2022, Te Arawhiti sent out a pānui and consultation document to all customary marine title applicants acknowledging this:

> As you know, applications for recognition of customary marine title have been made to the High Court, the Crown, or to both. When all applications in an area are being decided by the same decision-maker this doesn't create any problems. But if some applications over an area are being decided in the High Court, and others by the Crown, then there is a problem because the Act doesn't say how this should work.[332]

The consultation document went on to spell out the potential consequences in more detail. If overlapping applications for customary marine title had not been made to the same decision maker, whether the High Court or the Crown, the overlapping applications may not be considered together because of the institutional separation between the High Court and Te Arawhiti. The document stated: 'This leads to a risk that some groups that can meet the test may not have their [customary marine title] recognised, because the first decision-maker is unable to consider their application. This is clearly wrong.'[333]

To further explain the document and reiterate some aspects of our analysis above, this quote is referring to a situation where applicant A has filed their application only in pathway A, whereas applicant B has filed their application concerning the same or an overlapping area only in pathway B. Depending on whether pathway A or pathway B considers the respective application first, either applicant A or B may not be able to obtain customary marine title, given its exclusive character: If A has already been successful in obtaining a customary marine title, B cannot obtain one for the same area and vice versa. The consultation document presented applicants with three options to remedy the problem:[334]

- The first would enable both the High Court and the Crown 'to take account of all relevant applications for an application area at the same time'. If this resulted in a customary marine title being granted, any applicant who had not participated in the relevant pathway would be unable to obtain a customary marine title for the same area in the other pathway later on.[335]
- The second would allow for customary marine titles to be 'varied to take account of decisions in the other pathway' – in other words, to transform an *exclusive* customary marine title into a *shared* customary marine title later if necessary.[336]

331. Transcript 4.1.11, pp 325–326
332. Memorandum 3.4.3(b), p 1
333. Memorandum 3.4.3(c), p 1
334. Memorandum 3.4.3(b), p 1; memo 3.4.3(c), para 2. These memoranda were filed in October 2022, after hearings had concluded. Judge Armstrong declined the request for filing of further evidence and submissions, but stated that we would note this new development in our report: memo 2.7.2, pp 2–3.
335. Memorandum 3.4.3(c), para 2
336. Ibid

- The third would combine both these options. It would allow all applications for the same area to be decided at the same time, but would also allow applicants from another pathway to be included in a shared customary marine title later on.[337]

Those affected were invited to make submissions on these options by mid-November 2022.[338]

We acknowledge that the Crown is trying to address the shortcomings associated with the two pathways by consulting with affected Māori – a process we welcome. We emphasise that Māori should be enabled to meaningfully engage on this question. Therefore, we will not make a finding on the proposed solutions. We merely note that the Treaty principle of redress requires that, when seeking to make remedial amends for its actions towards a particular group, the Crown must not create further grievances for another group.[339]

We also hope that our analysis of different scenarios that may arise from the lack of cohesion between the two pathways – as set out above – can inform the work of the Crown and affected Māori as they seek a solution. Specifically, we suggest that a fourth option to address the lack of cohesion could be considered, namely allowing applicants to transfer to either pathway on their own initiative (rather than the Crown or the High Court taking their application into account as per option 1). This option would allow applicants in the Crown engagement pathway to transfer to the High Court pathway (and vice versa) should they choose to do so, even if they did not file an application in that pathway. This would give applicants the freedom to choose how they would like their applications determined, and could assist to alleviate prejudice from those who are concerned about the prolonged timeframes in the Crown engagement pathway.

337. Ibid

338. Ibid, para 3

339. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 47; see also Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 29; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 134–135; Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 695.

CHAPTER 5

ARE THE INDIVIDUAL RIGHTS AVAILABLE UNDER THE ACT TREATY COMPLIANT?

5.1 How We Approach this Chapter

In this chapter, we examine various discrete issues concerning individual rights which have been raised by claimants. We do so primarily from the perspective of the principle of partnership (only occasionally referring to the principle of active protection), assessing specifically whether each right is the result of the Crown fairly and reasonably balancing interests. We assess the broader question of whether the rights available under the Act are, in sum, sufficient to satisfy the Crown's obligations under the principles of active protection, equity, and equal treatment in chapter 6.

5.2 The Scope and Effect of Protected Customary Rights

5.2.1 Overview

Protected customary rights recognise customary activities such as collecting certain stones, wood, or plants; non-commercial whitebait fishing; or launching waka.[1] However, there are several types of activities that cannot be recognised as protected customary rights. Section 51(2) of the Act lists various activities that lie outside the scope of protected customary rights:

> **51 Meaning of protected customary rights**
> (1) . . .
> (2) A protected customary right does not include an activity—
> (a) that is regulated under the Fisheries Act 1996; or
> (b) that is a commercial aquaculture activity (within the meaning of section 4 of the Maori Commercial Aquaculture Claims Settlement Act 2004); or
> (c) that involves the exercise of—
> (i) any commercial Māori fishing right or interest, being a right or interest declared by section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled; or
> (ii) any non-commercial Māori fishing right or interest, being a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; or
> (d) that relates to—

1. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 366–386

(i) wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act:
(ii) marine mammals within the meaning of the Marine Mammals Protection Act 1978; or

(e) that is based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource (within the meaning of section 2(1) of the Resource Management Act 1991).

Section 52 of the Act sets out the scope and effect of a protected customary right:

52 Scope and effect of protected customary rights

(1) A protected customary right may be exercised under a protected customary rights order or an agreement without a resource consent, despite any prohibition, restriction, or imposition that would otherwise apply in or under sections 12 to 17 of the Resource Management Act 1991.

(2) In exercising a protected customary right, a protected customary rights group is not liable for—
(a) the payment of coastal occupation charges imposed under section 64A of the Resource Management Act 1991; or
(b) the payment of royalties for sand and shingle imposed by regulations made under the Resource Management Act 1991.

(3) However, subsections (1) and (2) apply only if a protected customary right is exercised in accordance with—

. . . . .

(d) any controls imposed by the Minister of Conservation under section 57.

(4) A protected customary rights group may do any of the following:
(a) delegate or transfer the rights conferred by a protected customary rights order or an agreement in accordance with tikanga:
(b) derive a commercial benefit from exercising its protected customary rights, except in relation to the exercise of—
(i) a non-commercial aquaculture activity; or
(ii) a non-commercial fishery activity that is not a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992:

The Act also defines the effect a protected customary right has on applications for resource consents sought or obtained under the RMA. Section 55 states '[a] consent authority must not grant a resource consent' for an activity in a protected customary rights area (after the recognition order or agreement takes effect) if the activity 'will, or is likely to, have adverse effects that are more than minor' on the exercise of the protected customary right. This does not apply, however, if 'the relevant protected customary rights group gives its written approval for the

proposed activity'.[2] There are a number of exceptions to this, including resource consents granted for maintaining aquaculture activities, emergency activities, accommodated infrastructure, and deemed accommodated infrastructure.[3] We explain these exceptions in more detail in section 5.2.4.

A protected customary right is subject to any controls imposed by the Minister of Conservation under section 56:

> **56 Controls on exercise of protected customary rights**
> (1) If, at any time, the Minister of Conservation determines that the exercise of protected customary rights under a protected customary rights order or agreement has, or is likely to have, a significant adverse effect on the environment, the Minister may impose controls, including any terms, conditions, or restrictions that the Minister thinks fit, on the exercise of the rights.
> (2) Any person may apply to the Minister of Conservation for controls to be imposed on the exercise of a protected customary right, stating the reasons for the application.

5.2.2 The claimants' position

Overall, claimants argue that 'the rights recognised under the Act are a significant reduction from what was guaranteed under te Tiriti and at common law'.[4] They submit that a protected customary right 'does little to truly facilitate Māori interests' in te takutai moana, given the 'severe limitations' that the Crown imposes on them.[5] Claimants consider this to be a Treaty breach.[6]

One of the claimants' primary concerns with the statutory test for recognising protected customary rights is the narrow scope of activities for which a protected customary right can be sought.[7] They argue that a number of traditional activities are excluded, thereby diminishing the claimants' tino rangatiratanga and jeopardising their ability to protect their rohe moana. For example, one claimant counsel submits it is 'problematic' that the Act excludes spiritual or cultural associations from protected customary rights unless they manifest in a physical activity.[8] This could mean, counsel argues, that even 'whakapapa[,] which manifests itself in a spiritual connection', rather than being distinctly material, is excluded from being a protected customary right.[9] Claimants are also critical that fishing rights and the ability to impose rāhui are excluded from being recognised as protected customary rights.[10] Overall, claimants submit the limited scope of protected customary rights

2. Marine and Coastal Area (Takutai Moana) Act 2011, s 55(1), 55(2)
3. Ibid, s 55(3)
4. Submission 3.3.177, p 10
5. Submission 3.3.182, pp 3, 184
6. Ibid, pp 2–3
7. Submission 3.3.160, pp 31–32
8. Submission 3.3.170, p 33
9. Ibid
10. Submission 3.3.169, p 17; doc B51, paras 53–54

'fails to recognise or protect the rangatiratanga and kaitiakitanga responsibilities' of Māori.[11] Claimant Pereri Mahanga, on behalf of Te Waiariki, Ngāti Korora, and Ngāti Taka Pari, told us that the effect of a protected customary right does not equate to full tino rangatiratanga as guaranteed under the Treaty.[12]

In addition to criticising these statutory limitations on the scope of protected customary rights, claimants submit that the remaining legal effect of protected customary rights is 'inadequate and inconsistent with tikanga'.[13] They say that the contrast between the statutory test, 'which requires the applicant to demonstrate a right "exercised in a particular part of the common marine and coastal area in accordance with tikanga"' and the rights that are awarded for meeting the test is 'stark'.[14] Claimants therefore find themselves wondering 'whether the substantive outcomes are worth the effort'.[15] Specifically, they argue:

- A holder of protected customary rights has no way of excluding the public from the area of te takutai moana in question; this, they say, undermines the holder's mana.[16] Some activities falling within the scope of protected customary rights may be territorial, claimants submit. For example, the use of the maramataka (the Māori lunar calendar) is territorial in the sense that it applies in the rohe moana of the hapū.[17] Yet, a protected customary right cannot 'prevent third parties from fishing in or harvesting from the takutai moana in contravention of the maramataka'.[18]
- The limited scope of protected customary rights 'fails to recognise or protect the rangatiratanga and kaitiakitanga responsibilities' that Māori have toward te takutai moana.[19]
- Restricting to whom a protected customary right may be delegated or transferred 'undermines the rights holders and their tikanga'.[20]

Finally, claimants are concerned that if exercising protected customary rights has, or is likely to have, 'a significant adverse effect on the environment', the Minister of Conservation 'may impose controls, including any terms, conditions, or restrictions that the Minister thinks fit'. He or she is free to do so without any joint decision-making process with the holders of protected customary rights and without their consent.[21] This is not consistent with active protection of tino rangatiratanga, claimants say.[22] Claimants state that putting the Minister in a position of control over holders of protected customary rights is 'unacceptable'.[23]

11. Submission 3.3.169, p 17
12. Document B45, p 14
13. Submission 3.3.137(b), p 75
14. Submission 3.3.160, p 32
15. Submission 3.3.102, p 62
16. Submission 3.3.156, p 14
17. Submission 3.3.206, pp 16, 18
18. Ibid, p 16
19. Submission 3.3.169, p 17
20. Submission 3.3.157, p 32
21. Submission 3.3.142, p 41; see Marine and Coastal Area (Takutai Moana) Act 2011, s 56.
22. Submission 3.3.142, p 41
23. Submission 3.3.156, p 14; submission 3.3.157, p 32

5.2.3 The Crown's position

The Crown responds to the claimants' concerns about the scope of the activities which can constitute a protected customary right by saying that some of the excluded activities are 'already provided for or regulated by other legislative regimes'.[24] The Maori Commercial Aquaculture Claims Settlement Act 2004 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 are cited as examples.[25] As for the exclusion of activities based on spiritual or cultural associations that are not manifested in a physical activity, the Crown says that the Act elsewhere recognises broader Māori relationships to coastal areas (in the purpose section and in the section outlining participation rights in conservation processes).[26] Other regulatory frameworks that concern te takutai moana, such as the Resource Management Act 1991, provide similar recognition.[27] The Crown also points to the *Re Edwards (Te Whakatōhea No 2)* case, in which the High Court held that karakia can be considered a protected customary right if performed at the takutai moana.[28]

The Crown states that the 'policy underpinning the provision of protected customary rights was to provide recognition of rights and interests that are non-exclusive and usufructuary [use and enjoyment-related] in nature, in contrast to rights that are exclusive and territorial in nature (which are recognised through customary marine title)'.[29] The Crown adds that it is therefore logical that 'protected customary rights do not include an ability to prohibit or restrict how third parties carry out activities in the takutai moana'.[30] Its intent, the Crown says, was to allow rights holders to continue exercising their customary activities without the need to obtain a resource consent, and to generate a commercial benefit from those activities.[31]

The Crown submits that the Minister of Conservation's power to control the exercise of protected customary rights 'clearly has an environmental protection purpose' and is 'a reasonable exercise of kāwanatanga'.[32] The Crown adds that the power is 'far from unfettered', saying it 'is constrained by the threshold of "significant adverse effects"', which need to be either present or likely for the Minister to be able to exercise the power.[33] According to the Ministry for the Environment, an adverse effect is something that was 'more than minor when it was noticeable and

24. Submission 3.3.187, p 199
25. Ibid
26. Marine and Coastal Area (Takutai Moana) Act 2011, ss 4, 47
27. Submission 3.3.187, pp 199–200
28. Ibid, p 200, referring to *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 381. The Court's ruling on karakia was against the Attorney-General, who had submitted that karakia should not be recognised through a protected customary right.
29. Submission 3.3.187, p 198
30. Ibid
31. Ibid
32. Ibid, pp 200–201
33. Ibid, p 201

may cause an adverse impact but could be potentially mitigated or remedied'.[34] Furthermore, part 2 of schedule 1 of the Act sets out detailed requirements for exercising this power.[35] These include that the controls need to be reasonable and necessary, and 'will not prevent the exercise of the right'.[36] Moreover, the Minister may only impose controls after receiving a copy of an adverse effects report, or carrying out an adverse effects assessment and completing a report on it. The Minister must have also consulted with the relevant protected customary rights group and the Minister of Māori Affairs before imposing controls.[37] Finally, Crown counsel note that '[s]tandard administrative law principles would also apply to the Minister's decision-making process to impose controls on a protected customary right'.[38]

5.2.4 The Tribunal's analysis and findings

(1) *Preliminary remarks*

In chapter 4, we found that the statutory test for protected customary rights, in contrast to that for customary marine title, does not in itself breach the principles of the Treaty (see section 4.1.4). But we have yet to inquire into the effectiveness – and Treaty compliance – of the rights that Māori eventually obtain if they manage to satisfy the statutory test. Here, the principle of partnership is relevant. It is especially relevant to the question of whether the Act strikes a fair and reasonable balance between the holders of protected customary rights, and the potentially conflicting commercial interests of third parties such as companies wanting to use or extract natural resources found in the marine and coastal area. Under the principle of partnership, the Treaty partners need to respect the status and authority of the other partner in their respective spheres.[39] As noted in chapter 2, protected customary rights recognise customary activities carried out in the marine and coastal area. The Takutai Moana Act does not specify those activities. However, the High Court's recent *Re Edwards (Te Whakatōhea No 2)* judgment gives an insight into what types of activities may be recognised under the Act: collecting firewood, stones, and shells; fishing for whitebait; gathering driftwood, sand, mud and rocks; launching and landing vessels; using wai tai (seawater) for medicinal purposes, traditional practices such as wānanga, hui, tangihanga, and burying of whenua, and so on.[40] A group holding protected customary rights may exercise these activities without obtaining a resource consent, even if it would normally

34. Ministry of Justice, 'Māori Affairs Committee Marine and Coastal Area (Takutai Moana) Bill', 19 October 2010 (CL0.005.1025), para 10 (doc B3(a), p [22283])
35. Submission 3.3.187, p 201
36. Marine and Coastal Area (Takutai Moana) Act 2011, sch 1, pt 2, cl 5(1)(b)
37. Ibid, sch 1, pt 2, cl 5(2)
38. Submission 3.3.187, p 201
39. Waitangi Tribunal, *Whaia Te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Lower Hutt: Legislation Direct, 2015), p 28, referring to Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: Legislation Direct, 1998), pp 27–28.
40. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, para 669

be required under the Resource Management Act 1991.[41] The group does not need to pay coastal occupation charges or royalties for sand and shingle in exercising their protected customary right.[42] Moreover, a resource consent authority may not grant resource consents for any activities that would adversely affect protected customary rights.

This last aspect is the main effect that protected customary rights have on the interests of other private rights holders. To determine what balance the Act has struck between Māori interests in protecting customary activities, and interests of third parties to undertake resource management activities in te takutai moana, we need to answer two fundamental questions about protected customary rights. First, how broad or narrow is the scope of protected customary rights, and the range of activities they apply to? Secondly, how broad or narrow is the scope of activities for which a resource consent could be denied on the basis that it would adversely affect a protected customary right?

(2) *The scope of protected customary rights*

We start by first assessing the scope of protected customary rights themselves. Here, the main point of contention between the claimants and the Crown is whether excluding some activities from the scope of protected customary rights is justified. The Act provides that the following activities cannot be covered by a protected customary right:

- activities regulated under the Fisheries Act 1996;
- commercial aquaculture activities as defined in the Maori Commercial Aquaculture Claims Settlement Act 2004;
- activities that involve exercising settled commercial Māori fishing rights under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992;[43]
- activities that involve exercising non-commercial Māori fishing rights or interests that have been provided for under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992;
- activities that relate to wildlife or marine mammals; or
- activities based on a spiritual or cultural association, unless that association is manifested by the relevant group in a physical activity or use related to a natural or physical resource.[44]

All exceptions, save the last, concern activities that are already regulated under other legislation. As we heard from claimants, this means they must navigate multiple pieces of complex legislation in order to ascertain their rights. We understand their frustration. We also acknowledge the criticism from some claimants that those other legislative regimes do not adequately recognise and provide for their customary rights and interests. However, the Takutai Moana Act was never

41. Marine and Coastal Area (Takutai Moana) Act 2011, s 52(1)
42. Ibid, s 52(2)
43. This aspect lies outside the Tribunal's jurisdiction and is therefore considered no further in this analysis; see Treaty of Waitangi Act 1975, s 6(7).
44. Marine and Coastal Area (Takutai Moana) Act 2011, s 51(2)

intended to reform and replace all existing legislative regimes that apply to the marine environment. Such an immense undertaking would have caused considerable delay and may have resulted in new grievances. Moreover, our focus in this inquiry is on the Takutai Moana Act alone. We consider that when it was enacted, it was reasonable for the Crown to limit the scope of protected customary rights, so that the Act did not overlap with other legislative regimes that had already been established. Whether those other regimes are Treaty compliant is a different question that lies outside the scope of this inquiry.

However, the last exception, relating to activities based on a spiritual or cultural association, is the object of some concern from claimants. They argue that it excludes crucial parts of te ao Māori that do not directly manifest in a physical activity, such as whakapapa.[45] The Crown argues that this exclusion is appropriate because the rights provided for under the Act 'relate to the recognition of a specific common law-based use right'. Furthermore, it states there are other measures in place in different legislation that should be considered in this context. Finally, the Crown submits the High Court has clarified that a number of cultural practices based on a spiritual or cultural association can be recognised as protected customary rights despite the exception.[46]

Under the principles of partnership and active protection, any restrictions of Māori customary rights must be principled and reasonable; the Crown's balancing exercise must not lead to arbitrary results. Furthermore, in its *Report on the Crown's Foreshore and Seabed Policy*, the Tribunal emphasised the importance to Māori of 'a spiritual dimension and a relationship based on ritual and whakapapa' in relation to te takutai moana.[47] We consider that the Crown has not provided a convincing reason for excluding this important subset of customary practices from the scope of protected customary rights. The Crown has not demonstrated that there are important public or private rights that would be impacted or affected if Māori were granted protected customary rights for an activity based on a spiritual or cultural association that do not manifest in a physical activity or use. If the Crown cannot point to such public or private rights that outweigh Māori rights, then there is no reasonable balancing exercise. Therefore, we find this restriction of Māori rights is arbitrary and in breach of the Treaty.

We acknowledge the Court's finding that going down to te takutai moana to perform a karakia or for the purpose of wānanga, tangihanga or sharing mātauranga manifests in a physical activity and so can be recognised under the Act.[48] We support this interpretation, but it does not address other activities based on spiritual and cultural association that do not manifest in a physical activity or use. Furthermore, we consider that in te ao Māori, the lines between spiritual, cultural, and physical activities are often blurred. Therefore, imposing a harsh distinction

45. See, for example, submission 3.3.170, p 33.

46. Submission 3.3.187, pp 199–200, referring to 'Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill', 4 February 2011 (CL0.005.0302), para 1151 (doc B3(a), p [23461]).

47. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 130

48. *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 381

between activities that are and are not based on a spiritual or cultural association leads to arbitrary results. We find that this amounts to a breach of the principle of partnership.

(3) ***The scope of section 55 of the Act***

We turn now to consider the scope of resource consents that, under section 55 of the Act, can only be granted if they do not adversely affect protected customary rights. Again, there are exceptions. Section 55(3) states that the existence of a protected customary right does not limit or otherwise affect the grant of a resource consent

- that permits existing aquaculture activities to continue, provided that there is no increase in the area, or change to the location, of the coastal space occupied;
- for an emergency activity;
- for an existing accommodated infrastructure, provided the effects on the protected customary rights are minor or temporary, or at least similar to the ones before the grant of the resource consent; or
- for a deemed accommodated activity.

We agree that emergency activities (for example, in response to a severe weather event like a cyclone) should be exempt in this context, and we elaborate on the general meaning of accommodated and deemed accommodated activities in the context of permission rights in the next section (see section 5.3.1). For now, it is sufficient to state that accommodated and deemed accommodated activities reduce the scope of section 55 significantly.

We address in more detail the consequences of existing aquaculture activities being free to continue, provided the coastal space in question does not increase in size or move location. This still makes it possible for aquaculture activities to continue with a change in farmed species or farming methods. This is a problematic policy choice. In aquaculture, the type of farmed species can have far-reaching consequences for the environment. For example, claimant witness Peter Clark, of Te Kapotai hapū, tells us about pollution in the Waikare Inlet caused by oyster farming in his brief of evidence:

> The environmental impacts of the oyster farms are painfully evident. Today, there are no more cockles and all that remains are a few scattered shells found in places where we once had picnics. What used to be beautiful sandy beaches, are now dumping grounds for oyster shells, silt, and rocks that are too dangerous for children to walk on. On top of that, there is also rubbish from the oyster farms scattered about and derelict oyster beds with rotting poles under and above the water.[49]

Resource management legislation takes into account whether coastal permits need to be replaced if those engaged in a permitted aquaculture activity seek to farm a different consented species than that covered by the original permit.

49. Document B25, para 37

Specifically, the Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020 dedicate some 20 clauses to '[r]eplacement coastal permits for existing marine farms to change consented species'.[50] This recognises the potential impact on the environment of a change in species. Such provisions are missing from section 55 of the Takutai Moana Act. The effect for Māori is that decision makers do not need to take into account whether a change of the consented species has, or could likely have, adverse effects on the exercise of protected customary rights.

(4) *Result*

Overall, we conclude that the Act's exclusions we have highlighted – spiritual activities being exempt from protected customary rights, and aquaculture activities being allowed to continue even if they adversely affect protected customary rights – amount to significant shortcomings. We accept claimants' argument that these exclusions mean the scope of the protected customary rights available to them under the Act does not equate to full tino rangatiratanga as guaranteed under the Treaty. Even though protected customary rights are not meant to fully achieve tino rangatiratanga on their own, they constitute a separate bundle of rights with its own statutory test. The mere existence of other rights under the Takutai Moana Act or other legislation cannot entirely compensate for the inadequacies of protected customary rights. The fact remains that the excessively wide scope of exceptions allowed under the Act undermines the legal award of protected customary rights. We find that this amounts to a breach of the Treaty principle of partnership.

(5) *Prejudice*

This Treaty breach is likely to cause prejudice in the future, as it will prevent many Māori customary activities excluded from the scope of protected customary rights from being practised.

Further prejudice will likely arise when resource consents allow aquaculture activities to continue despite a change of the consented species, without any consideration of the effect on protected customary activities.

(6) *Recommendation*

To address the first instance of prejudice, we recommend repealing section 51(2)(e) of the Takutai Moana Act, so that activities based on a spiritual or cultural association are no longer excluded from the scope of protected customary rights.

To address the second instance of prejudice, we recommend repealing section 55(3)(a) of the Takutai Moana Act so that all continued aquaculture activities are subject to the regime of section 55 (that a consent authority must not grant a resource consent that would likely have adverse effects on a protected customary right). At the very least, we recommend amending section 55(3)(a) of the Takutai

50. Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020, pt 4

Moana Act so that continued aquaculture activities are unaffected by section 55 only if there is no increase in the area, or change to the location, of the coastal space, *and* if there is no change in the species farmed or in the method of marine farming.

5.3 The Scope and Effect of Customary Marine Title

5.3.1 The resource management and conservation permission rights

(1) *Overview*

The Takutai Moana Act does not affect existing resource management and conservation activities. Section 11(5) provides:

> **11 Special status of common marine and coastal area**
>
> . . . . .
>
> (5) The special status accorded by this section to the common marine and coastal area does not affect—
>
> (a) . . . . .
>
> (b) any lawful use of any part of the common marine and coastal area or the undertaking of any lawful activity in any part of the common marine and coastal area; or
>
> (c) . . . . .
>
> (d) any power or duty, by or under an enactment, to grant resource consents or permits (including the power to impose charges) within any part of the common marine and coastal area;

Furthermore, section 20 of the Act provides that:

> **20 Act does not affect existing resource consents or lawful activities**
>
> Nothing in this Act limits or affects—
>
> (a) any resource consent granted before the commencement of this Act; or
>
> (b) any activities that can be lawfully undertaken without a resource consent or other authorisation.

However, permission rights give holders of customary marine title the possibility to approve or veto any activity for which resource consents are granted under the Resource Management Act 1991 or approvals given under conservation legislation, such as the Conservation Act 1987 and the Marine Reserves Act 1971. These are known as 'RMA permission rights' and 'conservation permission rights', respectively.

Section 66 explains the RMA permission right. In essence, it enables a customary marine title holder to veto an activity for which resource consents are granted (especially coastal permits, which are a special type of resource consent relating to te takutai moana) that would otherwise allow third parties to carry out activities that affect te takutai moana. Examples include consents for extracting seabed

materials including sand, shingle, or shell, or for depositing substances in te takutai moana. Section 66 reads:

66 Scope of Resource Management Act 1991 permission right

(1) An RMA permission right applies to activities that are to be carried out under a resource consent, including a resource consent for a controlled activity, to the extent that the resource consent is for an activity to be carried out within a customary marine title area.
(2) A customary marine title group may give or decline permission, on any grounds, for an activity to which an RMA permission right applies.
(3) Permission given by a customary marine title group cannot be revoked.
(4) . . . . .
(5) An RMA permission right, or permission given under such a right, does not limit the discretion of a consent authority—
  (a) to decline an application for a resource consent; or
  (b) to impose conditions.

Section 71 explains the conservation permission right. Similar to the RMA permission right, the conservation permission right enables a customary marine title holder to prevent certain activities – such as declaring or extending a marine reserve under the Marine Reserves Act 1971, or activities in conservation areas requiring a concession under the Conservation Act 1987 (such as guiding and hunting operations). Section 71 reads:

71 Scope and effect of conservation permission right

(1) A conservation permission right enables a customary marine title group to give or decline permission, on any grounds, for the Minister of Conservation or the Director-General, as the case requires, to proceed to consider an application or proposal for a conservation activity specified in subsection (3).
(2) A conservation permission right applies only in the case of an application or proposal made on or after the effective date.
(3) The conservation activities to which a conservation permission right applies are activities wholly or partly within the relevant customary marine title area and for which—
  (a) an application is made under section 5 of the Marine Reserves Act 1971 to declare or extend a marine reserve:
  (b) a proposal is made under the enactments relevant to a conservation protected area to declare or extend a conservation protected area:
  (c) an application for a concession is made.
(4) Permission given by a customary marine title group cannot be revoked.
(5) A conservation permission right, or permission given under such a right, does not limit—
  (a) the discretion of the Minister of Conservation or Director-General, as the case may require,—
    (i) to decline an application or a proposal; or

(ii) to impose conditions, including conditions not sought by the customary marine title group, or more stringent conditions than those it may have sought; or

(b) the matters provided for in sections 74 and 75.

Section 69 of the Act makes it an offence to commence an activity to which the RMA permission right applies in a customary title area without permission from the relevant customary marine title group.[51]

Both the RMA permission right and the conservation permission right are subject to exceptions listed in sections 63 to 65 (termed 'accommodated activities' and 'deemed accommodated activities').[52] Section 64 enumerates accommodated activities:

64 Accommodated activities

(1) An accommodated activity—

(a) may be carried out in a part of the common marine and coastal area despite customary marine title being recognised in respect of that part under subpart 1 or 2 of Part 4; and

(b) is not limited or otherwise affected by the exercise of an RMA permission right or a conservation permission right; but

(c) does not limit or otherwise affect the exercise of any other right referred to in section 62(1).

(2) For the purposes of this subpart, accommodated activity means any of the following activities, to the extent that they are within a customary marine title area:

(a) an activity authorised under a resource consent, whenever granted, if the application for the consent is first accepted by the consent authority before the effective date:

(b) an activity that may be carried out under a resource consent, whenever granted, for a minimum impact activity (as defined in section 2(1) of the Crown Minerals Act 1991) relating to petroleum (as defined in section 2(1) of that Act):

(c) accommodated infrastructure:

(d) the management activities for which a resource consent is required in relation to—

(i) an existing marine reserve:

(ii) an existing wildlife sanctuary:

(iii) an existing marine mammal sanctuary:

(iv) an existing concession:

(e) an activity carried out under a coastal permit granted under the Resource Management Act 1991 to permit existing aquaculture activities to continue to be carried out in a specified part of the common marine and coastal area,—

51. Marine and Coastal Area (Takutai Moana) Act 2011, s 69(1)
52. Ibid, ss 64(1), 66(4), 71(6)

(i) regardless of when the application is lodged or whether there is any change in the species farmed or in the method of marine farming; but
(ii) provided that there is no increase in the area, or change of location, of the coastal space occupied by the aquaculture activities for which the existing coastal permit was granted:

(f) an emergency activity:
(g) scientific research or monitoring that is undertaken or funded by—
(i) the Crown:
(ii) any Crown agent:
(iii) the regional council with statutory functions in the region where the research or monitoring is to take place:
(h) a deemed accommodated activity.

The provision also includes a mechanism for resolving disputes about which activities qualify as accommodated activities:

64 Accommodated activities

. . . . . .

(3) Subsection (4) applies if, in relation to whether an activity is an accommodated activity, there is a dispute between—
(a) a customary marine title group; and
(b) the person who owns, operates, or carries out the activity that is the subject of the dispute.
(4) Either party to the dispute may refer the dispute to the Minister for Land Information for resolution.
(5) The decision of the Minister is final.

The other category of activities to which the RMA permission right and the conservation permission right do not apply are termed 'deemed accommodated activities', which are treated as accommodated activities.[53] They include, under certain conditions, 'accommodated infrastructure' which the Takutai Moana Act defines as follows:

65 Deemed accommodated activities

(1) . . . the following activities are deemed to be accommodated activities:
(a) the construction or operation of any proposed infrastructure that—
(i) is within the meaning of paragraph (b) of the definition of accommodated infrastructure; and
(ii) cannot practicably be constructed or operated in any location other than within a customary marine title area; and
(iii) is essential for—
(A) the national social or economic well-being; or

53. Marine and Coastal Area (Takutai Moana) Act 2011, s 64(2)(h)

(B) the social or economic well-being of the region in which the infrastructure is located; and

(iv) in any case where the construction of infrastructure is to take place at any time after the commencement of this Act, that construction is either—

(A) agreed in principle in accordance with Part 1 of Schedule 2 (subject to all necessary consents being obtained) by the group that holds a customary marine title order in the area relevant to the proposed infrastructure; or

(B) classified by the Minister for Land Information as a deemed accommodated activity (subject to all necessary resource consents being obtained) in accordance with Part 1 of Schedule 2:

Deemed accommodated activities also include new minerals-related activities and minerals-related activities carried out under pre-existing privileges (a term that refers to different types of mining-related permits):

65 Deemed accommodated activities

(1) . . . the following activities are deemed to be accommodated activities:

(a) . . .

(b) any activity—

(i) that, at any time after the commencement of this Act, is necessary for, or reasonably related to, prospecting, exploration, mining operations, or mining (as those terms are defined in section 2(1) of the Crown Minerals Act 1991) for petroleum under a privilege; and

(ii) for which an agreement or an arbitral award has been made under Part 2 of Schedule 2[.]

(c) any activity—

(i) that, at any time after the commencement of this Act, is necessary for, or reasonably related to, the exercise of a privilege in existence immediately before the effective date and of the rights associated with that privilege, as provided for in section 84(1); and

(ii) for which an agreement or arbitral award has been made under Part 2 of Schedule 2.

(2) *The claimants' position*

(a) Arguments in relation to the RMA permission right

Claimants are concerned with the limitations the Act imposes on the RMA permission right. Dr Sarah Shaw, an expert and practitioner in resource management, summarises the effect of the RMA permission right in her evidence as 'a limited ability in some circumstances [and] in some time periods to be able to say no.'[54]

54. Transcript 4.1.8, p 384; see also doc B148, pp 62–63, 69.

Claimant counsel submit that the limitations Dr Shaw refers to are inconsistent with the Treaty, arguing that:[55]

- The RMA permission right does not apply to accommodated activities, which significantly reduces the RMA permission right's scope.[56] Several witnesses point to dredging activities at the Port of Tauranga as examples of accommodated activities against which the permission right offers no protection.[57] In this context, claimants also note that the mechanisms for resolving disputes over whether an activity is an accommodated activity do not provide for joint decision-making between the Crown and the customary marine title group.[58] Rather, the Act authorises the Minister for Land Information to unilaterally impose a final decision on the customary marine title group.[59]
- As for deemed accommodated activities, claimants submit that these are so broadly defined as to allow major new infrastructure to proceed, despite what may be very significant effects, without coastal marine title holders being able to exercise permission rights. Claimants also argue that the compensation available under schedule 2 of the Act to title holders who lose their permission rights in such circumstances is inadequate compared with compensation under the Public Works Act 1981.[60]
- Another limitation that concerns claimants is that once the customary marine title holders have given their permission, it cannot be revoked. Nor is it possible for title holders to decline permission for an activity adjacent to the customary marine title area.[61] They say that because of both those limitations, the permission right fails to provide for tino rangatiratanga.[62]
- Finally, claimants submit that the RMA permission right does not give them the ability to allow activities it approves of if the consent authority declines the resource consent in question.[63]

Claimant counsel submit that these limitations constrain the legal effect of customary marine titles both in legal and practical terms. They argue that if the Act is not repealed entirely, the exceptions for accommodated activities should, at the very least, be removed.[64]

Beyond the specific limitations that the Takutai Moana Act places on the RMA permission right, claimant counsel also point to a broader problem: that 'the resource consent process is weighted in favour of resource consent applicants'

55. Submission 3.3.142, p 47
56. Ibid; submission 3.3.148, p 8; submission 3.3.211, p 13
57. Document B17, paras 25–28; doc B18, paras 99–104; doc B19, paras 52–55
58. Submission 3.3.93, p 15
59. Marine and Coastal Area (Takutai Moana) Act 2011, s 64(3)–(5)
60. Submission 3.3.174, pp 171–174
61. Submission 3.3.142, pp 42–44
62. Ibid, p 44
63. Submission 3.3.95, p 16
64. Submission 3.3.156, p 8

rather than customary marine title groups exercising their permission right.[65] A number of claimant counsel quote Dr Shaw's observation (which is very similar to that expressed in the Resource Management Review Panel's 2020 report on 'New Directions for Resource Management in New Zealand') about a 'systemic bias toward the status quo in the RMA'.[66] Again relying on Dr Shaw's evidence, claimants argue that this bias manifests in the following ways:

- Holders of customary marine title are unable to exercise their permission right in relation to a specific activity authorised by a current resource consent until that resource consent has expired.[67] This can considerably delay their ability to exercise the RMA permission right. Dr Shaw's quantitative analysis of resource consent practices showed that a 'high proportion of the coastal permits' granted 'appear to have terms (duration) at or near the statutory maximum of 35 years'.[68] Counsel argue that such terms will prevent holders of customary marine title from using their permission rights 'for another generation'.[69] Dr Shaw added that, if a resource consent holder seeks to renew a consent within three to six months before it expires, they can continue operating under the existing consent even after it expires 'until the new application is granted or declined and all appeals determined'.[70] Thus, the authorised activity may simply roll on for many months or even years after expiry.[71] Claimants also voice concerns that section 64(2)(e) of the Act creates a permanent exemption from the RMA permission right for activities carried out under a coastal permit to permit existing aquaculture activities.[72] The permission right can only be used if there is an extension of the area or the location of the aquaculture activity changes, claimant counsel notes.[73] The wording the Act adopts here is the same as under section 55, which restricts the ability of consent authorities to consider the effect of some ongoing aquaculture activities on protected customary rights.
- In her evidence, Dr Shaw states that the overwhelming majority of resource consents and extensions to them are granted rather than declined.[74] The longer applicants must wait for customary marine title to be awarded, the greater their loss of influence or ability to exercise rangatiratanga in te takutai moana, given the 'continuous wave of coastal permit applications

65. Submission 3.3.206, p 28
66. Submission 3.3.170, p 28; submission 3.3.174, p 109; see also doc B148, p 7; Resource Management Review Panel, *New Directions for Resource Management in New Zealand* (Wellington: Resource Management Review Panel, 2020), p 17
67. Submission 3.3.148, p 8
68. Document B148, p 6
69. Submission 3.3.130, p 5
70. Document B148, p 72; see also Resource Management Act 1991, s 124
71. Document B148, p 72
72. Submission 3.3.192, p 9
73. Ibid; see also Marine and Coastal Area (Takutai Moana) Act 2011, s 64(2)(e)(ii)
74. Document B148, pp 29–30, 35

and renewals', claimant counsel warns.[75] Dr Shaw notes a spike in resource consent applications in the period leading up to the Act's statutory deadline for lodging applications for customary marine title, saying there was likely a causal link.[76]

- To prevent the RMA regime's 'systemic bias' from weakening the legal substance of the RMA permission right, claimant counsel propose there 'should have been a hiatus' on resource consent applications until applications for customary marine title are determined.[77] The failure to do so constitutes a breach of the principles of active protection, good faith, and partnership, claimants allege.[78] Claimants acknowledge that the Resource Management Act 1991 requires resource consent applicants to notify and seek the views of an applicant group while that group's application for customary marine title is still in train. However, this obligation does not alter or substantially improve the applicants' position beyond what it was before the Act came into force; in practice, said Dr Shaw during hearing, resource management practitioners would 'routinely inform the mana whenua' of their proposal anyway.[79]

In summary, claimants submit that the Crown is breaching Treaty principles by allowing the Resource Management Act's 'systemic bias' to continue, thereby 'diminishing the value' of rights granted under the Takutai Moana Act.[80]

Claimants also have concerns about the practicalities of exercising the RMA permission right. Claimant counsel state that expecting a group to 'meaningfully engage with the scope and nature of what is proposed' in a resource consent application within 40 days is unrealistic and prejudicial.[81] Significant resources would be required to navigate the complexities of the permission right in such a short space of time, and customary marine title groups are not adequately funded to do so.[82] In addition, the task of responding to 'extensive and technically demanding' consent applications often falls to volunteers who may require specialist training of 'RMA system guidance', counsel argue.[83] Overall, the system imposes on holders of customary marine titles an 'undue' and 'considerable' burden, they submit.[84] As witness Peter Clark, of Te Kapotai hapū, explains:

> We also have to consider all the resource consent applications, but we have no resourcing to do that under [the Takutai Moana Act]. I am bombarded with application after application. One has to wonder how we are supposed to satisfy our

75. Submission 3.3.164, p 25
76. Document B148, p 6
77. Submission 3.3.174, pp 11–12
78. Ibid, pp 148–149
79. Transcript 4.1.8, p 368; see also Marine and Coastal Area (Takutai Moana) Act 2011, s 62(3).
80. Submission 3.3.182, pp 2–3
81. Submission 3.3.157, p 22
82. Submission 3.3.174, p 12; submission 3.3.178, pp 43, 54–55
83. Submission 3.3.174, p 133
84. Submission 3.3.155, p 17; submission 3.3.157, pp 19–20

obligations to the hapu without adequate resourcing. The short answer is that we cannot.[85]

Likewise, claimant Angeline Greensill, of Whāingaroa, says the extensive travel that can be required to attend hearings where resource consent applications are determined can add to the burden, especially for those living on 'traditional lands', which are often far from the metropolitan centres.[86]

Further, claimant counsel point out that the Act presumes a customary marine title group has given their permission for a resource consent if they do not notify the applicant and the consent authority of their decision (whether for or against the consent application) within 40 working days.[87] This presumption is 'substantively and procedurally unfair' and 'prejudicial', they submit. Claimants are also critical that applicants for resource consents are not required to notify relevant customary marine title groups at the start of the consent application procedure.[88] It is only after the consent has been granted 'and all appeals are exhausted' that the consent holder has to inform the group, something that claimants say 'radically impedes the [customary marine title] grantee's ability to exert their mana over their rohe'.[89] The only notification requirement stipulated in the Act applies to resource consent applications made while a group has lodged a customary marine title application but has not yet obtained a recognition order or agreement; in this case, the consent applicant must notify and seek the views of the group before applying for consent.[90]

Finally, claimants raise concerns about the pending Natural and Built Environment Bill and Spatial Planning Bill: once they are enacted and replace the Resource Management Act 1991, it is uncertain how they may affect the permission rights under the Takutai Moana Act.[91]

(b) Arguments in relation to the conservation permission right

Here, claimants chiefly express concerns about section 74 of the Act. Under this section, the Minister of Conservation or the Director-General of Conservation can proceed with establishing or extending a marine reserve or conservation protected area without the customary marine title group's permission if 'the proposal is for a protection purpose . . . of national importance'. Claimant counsel argue that this 'undermines the scope of the right and the ability of iwi, hapū or whānau to exercise kaitiakitanga over the mauri of the waters and whenua in accordance with their tikanga', and that it compromises the protection of Māori

85. Document B25, para 55
86. Document B63, pp 10–11
87. Submission 3.3.155, pp 16–17; submission 3.3.157, p 20; submission 3.3.164, p 17; see Marine and Coastal Area (Takutai Moana) Act 2011, s 67
88. Submission 3.3.164, p 17
89. Submission 3.3.174, p 133
90. Marine and Coastal Area (Takutai Moana) Act 2011, s 62(3)
91. Submission 3.3.139, p 15; submission 3.3.157, p 29

that customary marine title grants.[92] Claimant counsel submit that the Minister's discretion in these conservation matters is an example of 'power residing solely with the Minister of Conservation or Director-General rather than with or shared with the [customary marine title] holder'.[93] They add that this inequity constrains claimants' authority and fails to protect their tino rangatiratanga.[94]

Claimant arguments also briefly touch upon marine mammal permits, to which the conservation permission right does not apply. Instead, the Act requires the Director-General of Conservation to 'recognise and provide for the views of the [customary marine title] group on the proposed permit'.[95] Claimants note that there is no provision for joint decision-making about how to provide for the views of the group.[96] They consider that this is 'inconsistent with the arrangement agreed under Te Tiriti . . . and the principle of active protection of Tino Rangatiratanga'.[97]

(3) *The Crown's position*

The Crown submits that both the RMA permission right and the conservation permission right represent 'a valuable and effective right to veto activities from being carried out in the area to which the rights relate', and that claimants have understated their significance.[98]

(1) Arguments in relation to the RMA permission right

The Crown argues that the exceptions from the RMA permission right (listed in sections 63 to 65 of the Act: see section 5.3.1(1)) strike 'a reasonable balance' between the various interests in te takutai moana.[99] The key policy rationale for providing for accommodated activities was to protect existing use rights.[100] Crown counsel quote a Cabinet paper from May 2010, in which the Attorney-General states that exempting accommodated activities from the permission rights is done 'to provide certainty to other interests' in customary marine title areas.[101] Crown counsel add:

> it was reasonable for the Government not to take away the rights of existing users of the takutai moana. The requirements of contemporary New Zealand mean a range of interests, including business and development interests critical to New Zealand's modern-day needs, occupy and use the area.[102]

92. Submission 3.3.160, p 36; see also submission 3.3.155, p 16; submission 3.3.157, p 21
93. Submission 3.3.192, p 10
94. Ibid
95. Marine and Coastal Area (Takutai Moana) Act 2011, s 76
96. Submission 3.3.142, p 52
97. Ibid
98. Submission 3.3.187, p 177
99. Ibid, p 179
100. Ibid, pp 177–178
101. Ibid, referring to 'TOW (10) 12 Review of the Foreshore and Seabed Act 2004: Report on Public Consultation Process and Proposals for a New Regime', 31 May 2010 (CLO.001.0390), para 97 (doc B3(a), p [20323]).
102. Submission 3.3.187, p 178

In relation to aquaculture-related activities being accommodated activities under the Act, the Crown emphasises that this exception does not apply 'if there is an increase in the area of an existing aquaculture activity, or if there is a change of location.'[103]

As for the inclusion of deemed accommodated activities in the Act, the Crown submits that they were considered nationally important exceptions to the exercise of the permission rights.[104] Again, their inclusion is 'the product of a reasonable balancing exercise', the Crown states.[105] There are safeguards in place to protect holders of customary marine titles, say Crown counsel, noting that the Crown has not lowered the threshold for deemed accommodated activities despite the requests of many submissions during the Select Committee process to do so.[106] Other safeguards include 'the requirement for deemed accommodated infrastructure to be "essential" for national or regional social or economic well-being', as well as compensation for the removal of permission rights under schedule 2 of the Act.[107] Crown counsel say the Government has thereby acknowledged that limiting the scope of the permission right by exempting accommodated activities from it 'diminishes the extent to which the awards for customary title reflect the rights of a land owner'.[108] Recognising this, the Act provides a right to create a planning document and a right to participate in conservation processes instead.[109]

Crown counsel submit that 'it is difficult' to compare the compensation provisions under schedule 2 of the Act with the compensation provisions under the Public Works Act 1981. The former deals with 'the removal of a customary marine title group's permission rights in respect of a particular activity', whereas the latter is about 'the taking of land'.[110] Further, the Crown considers it 'highly unlikely that the Minister, acting in accordance with ordinary principles of administrative law, would decide to grant no – or a nominal amount of – compensation.'[111] In this context, the Crown disagrees with the claimants' argument that the Act's compensation provisions covering deemed accommodated infrastructure are 'illogical because similar provisions are not provided for existing (old) infrastructure.'[112] Counsel submit that the policy rationales between those two cases differ. While the Crown sought to protect pre-existing infrastructure consistent with its bottom line of 'protecting existing use rights', this reasoning does not apply to infrastructure built after a group had obtained a customary marine title for the relevant area.

103. Ibid, p 181
104. Ibid, p 178
105. Ibid
106. Ibid, p 179
107. Ibid
108. Ibid, p 178, referring to 'TOW (10) 12 Review of the Foreshore and Seabed Act 2004: Report on Public Consultation Process and Proposals for a New Regime', 31 May 2010 (CLO.001.0390), para 99 (doc B3(a), p [20324]).
109. Submission 3.3.187, p 178
110. Ibid, p 211
111. Ibid
112. Ibid, pp 210–211

Therefore, such groups should be compensated if nationally important infrastructure that impacts on their rights needed to be built.[113]

The Crown also submits that the scope of the RMA permission right, and the effect of accommodated and deemed accommodated activities, both need to be assessed in the context of other, pre-existing Resource Management Act provisions that protect Māori interests. These include the possibility for customary marine title groups (or anyone else) to appeal against resource consents granted to third parties, including companies. This would apply, for example, if a consent authority used its discretionary ability 'to decline an application for a resource consent or impose conditions not sought by the customary marine title group', and more importantly, if a consent authority granted a resource consent for an accommodated activity to which the permission right did not apply.[114]

Crown counsel point out that the Resource Management Act 1991 also requires consent authorities to notify customary marine title groups of relevant resource consent applications that relate to accommodated activities.[115] In other words, in the case of resource consents to which the permission right does not apply, the customary marine title group must at least be made aware; it can then choose to lodge a submission in opposition and later make an appeal. The Crown thus rejects the claimants' argument that holders of customary marine title do not get notified at the start of a resource consent application procedure.[116] Crown counsel submit that they do, unless it is a resource consent for which the permission right applies. In that case, the Crown considers it unnecessary to legally require a notification duty at all. It is in the resource consent applicant's best interest to consult with the customary marine title holders anyway in order to secure their permission later, counsel submit. They add that this was acknowledged by some claimant counsel and Dr Shaw.[117] Crown counsel explain their reasoning thus:

> [I]t is illogical and unrealistic for resource consent applicants to proceed to obtain a resource consent without first consulting with customary marine title groups that have the right to decline to give permission to the activity that is to be carried out under the resource consent.[118]

Crown counsel consider that there is insufficient evidence to support Dr Shaw's statement that the statutory deadline contributed to a spike in the volume of coastal permit applications being lodged before it expired.[119] The Crown also notes that Dr Shaw accepted during hearings that it is possible that other factors contributed to this increase in application numbers.[120]

113. Submission 3.3.187, pp 210–211
114. Ibid, pp 166, 179–182; see Resource Management Act 1991, ss 95B, 120.
115. Resource Management Act 1991, s 95B(2)(b)
116. Submission 3.3.187, p 180
117. Ibid, pp 182–184
118. Ibid, p 182
119. Ibid, p 180
120. Ibid, pp 180–181

Regarding the impending reform of resource management legislation, the Crown considers there is no evidential basis for the claimants' concerns about the continued existence of permission rights under the Takutai Moana Act. Rather, Crown counsel point to a 2020 Cabinet paper indicating that the Government is committed to upholding 'existing agreements reflected in legislation' and 'the integrity of the rights recognised under Te Takutai Moana Act'.[121]

(b) Arguments in relation to the conservation permission right

The Crown states that the discretion of the Minister of Conservation or the Director-General of Conservation

> to decline applications or proposals to which the conservation permission right applies, or to impose conditions not sought by the customary marine title group, are subject to standard administrative law principles and would be susceptible to judicial review if not exercised appropriately.[122]

In response to claimants' concern that a proposal to declare or extend a marine reserve or conservation protected area of national importance can proceed without the permission of the customary marine title group, the Crown states that 'this reflects a reasonable accommodation of the interests of all New Zealanders, including Māori, for the protection of the environment'.[123]

(4) *The Tribunal's analysis and findings*

In this section, we determine whether the Crown has struck a fair and reasonable balance between the interests of customary marine title holders (namely, their ability to withhold permission for certain resource management and conservation activities) and the interests of private rights holders (their ability to carry out these activities). Again, the question of whether the permission rights allow Māori to exercise tino rangatiratanga over te takutai moana – and whether they constitute rights significant enough for equitable treatment with non-Māori – can only be answered if the permission rights are considered in conjunction with other relevant rights under the Act. Examples are the conservation participation rights, the wāhi tapu protection right, or the right to create a planning document. Therefore, as we did in our analysis of the scope and effect of protected customary rights (see section 5.2.4), we focus only on the principle of partnership in this section.

We start by analysing four distinct aspects of the permission rights:

- their scope and effect,
- the dispute resolution mechanism in place for disagreements about exceptions to the permission rights,
- the Act's compensation regime for some of the exceptions to permission rights, and

121. Ibid, pp 184–185
122. Ibid, p 182
123. Ibid

- certain structural bias in resource management that affect the practical exercise of the RMA permission right.

Subsequently, we make our overall findings about the permission rights.

(1) Scope and effect of the permission rights

In theory, the RMA permission right and conservation permission right are powerful rights that allow a holder of customary marine title to control what activities can take place in a customary marine title area. However, the breadth of the exceptions to these rights is extensive. We start by asking: what remains of the permission rights once all exceptions are subtracted? The RMA and conservation permission rights allow the customary marine title group to decline permission for resource consents or a conservation permission only if:

- the activity concerned has not been declared a permitted activity by means of a regional coastal plan, which puts it outside the scope of the RMA permission right;[124]
- the area affected by the resource management or conservation activity is within the customary marine title area;[125]
- the resource consent was applied for after the customary marine title was recognised;[126]
- the activity is not a 'minimum impact activity' relating to petroleum;[127]
- the activity is not related to mining for petroleum under a privilege after the commencement of the Act, provided an agreement or an arbitral award has been made under part 2 of schedule 2 of the Act;[128]
- the activity does not concern lawfully established infrastructure that is owned or operated by the Crown, a local authority or a council-controlled organisation, a network utility operator, an electricity generator, a port company, or a port operator, and is reasonably necessary for either the regional or national social or economic well-being;[129]
- the activity is not the construction or operation of any proposed infrastructure owned or operated by the Crown, a local authority or a council-controlled organisation, a network utility operator, an electricity generator, a port company, or a port operator that is essential for either the regional or national social or economic well-being, and that cannot practicably be constructed or operated in any location other than within a customary marine title area. Where the construction of the infrastructure is to take place after the commencement of the Act, the construction must be agreed in principle with the group that holds the customary marine title or classified by the

124. Resource Management Act 1991, ss 64, 87A(1), sch 1
125. Marine and Coastal Area (Takutai Moana) Act 2011, ss 66(1), 71(3)
126. Ibid, ss 64(2)(a), 66(4), 71(6)
127. Ibid, ss 64(2)(b), 66(4), 71(6)
128. Ibid, ss 65(1)(b), 66(4), 71(6)
129. Ibid, ss 63, 64(2)(c), 66(4), 71(6). The term 'network utility operator' is broadly defined in section 166 of the Resource Management Act 1991. It includes, among others, operators of pipeline systems, telecommunications networks, sewage or water supply systems, and airports.

Minister as a deemed accommodated activity per part 1 of schedule 2 of the Act;[130]

- the activity is not a management activity in relation to an existing marine reserve, wildlife sanctuary, marine mammal sanctuary, or concession under the Conservation Act 1987;[131]
- the activity is not carried out under a coastal permit to allow existing aquaculture activities to continue to be carried out, provided that there is no increase in the area or change of location of the coastal space concerned;[132]
- the activity is not an emergency activity;[133]
- the activity is not scientific research or monitoring funded by the Crown or a regional council;[134]
- the activity is not related to the exercise of a privilege and the associated rights in existence immediately before the customary marine title takes effect, provided an agreement or an arbitral award has been made under part 2 of schedule 2 of the Act;[135]
- the activity is not a proposal to declare or extend a marine reserve or conservation protected area that is of national importance;[136]
- the group has not previously agreed to the resource management or conservation activity;[137] and
- the group has notified the applicant within 40 working days after it has received notice from the applicant that the applicant has been granted the relevant resource consent or conservation activity concession that permission is declined.[138]

This demonstrates that there are many situations in which customary marine title groups cannot exercise their permission rights – so many situations, in fact, that we consider the value and effectiveness of those rights are significantly undermined. In the context of compulsory acquisitions under the Public Works Act 1981, the Tribunal previously held that taking Māori land can only be justified by 'exceptional circumstances as a last resort in the national interest'.[139] We accept that the effect of the Takutai Moana Act's provisions is not exactly analogous: in the case of deemed accommodated activities, Māori will not lose their customary marine title. They are not losing title to the underlying land. However, if a title holder is unable to exercise their permission right, it means that the proposed activity can be carried out in the customary marine title area without the title holder's consent.

130. Marine and Coastal Area (Takutai Moana) Act 2011, ss 63, 64(2)(h), 65(1)(a), 66(4), 71(6)
131. Ibid, ss 64(2)(d), 66(4), 71(6)
132. Ibid, ss 64(2)(e), 66(4), 71(6)
133. Ibid, ss 64(2)(f), 66(4), 71(6)
134. Ibid, ss 64(2)(g), 66(4), 71(6)
135. Ibid, ss 65(1)(c), 66(4), 71(6)
136. Ibid, s 74
137. Ibid, ss 66(3), 71(4)
138. Ibid, ss 67(3), 73(1)
139. For an overview, see Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 293–295.

Given the significant impact this can have on the rights and interests of the title holder, we consider the same standard applies.

We accept that, generally, the RMA and conservation permission rights are 'a valuable and effective right to veto activities', as Crown counsel argued in their closing submissions.[140] However, as we have stated, the large number of exceptions to which the permission rights do not apply significantly undermine the value and effectiveness of those rights. We acknowledge the need for some of these exceptions, such as those intended for emergency activities and for critical or lifeline infrastructure.

In other instances, such as the unrestricted continuation of aquaculture activities, there are no national or regional interests at stake at all (other than the indirect value of any commercial return benefitting the wider economy). These exceptions simply protect the continuation of private business interests. Furthermore, as we have already stated in the context of protected customary rights (see section 5.2.4), we consider it highly problematic that the exception for continued aquaculture activities does not take into account any change in the species farmed or in the method of marine farming.

Of even greater concern is that a permission right does not apply to an activity carried out under a resource consent, whenever granted, if the application for the consent is first accepted by the consent authority before the effective date.[141] This is not limited to a resource consent that is granted before a customary marine title order or agreement takes effect. It also applies to a resource consent granted after a customary marine title takes effect as long as the application seeking the consent was filed before that date. This is not a reasonable balancing exercise. The Crown has said that the Act strikes a balance between Māori rights and existing interests in te takutai moana. An application is not an existing interest as no resource consent has been granted. If a resource consent is granted after a customary marine title takes effect, the resource consent holder should be required to obtain permission per section 66 of the Act.

We now wish to highlight a number of issues raised by the current design of the permission rights that add to these fundamental problems.

(b) Dispute resolution

The Minister for Land Information is able to determine whether a certain activity qualifies as an accommodated activity.[142] The Minister's decision is final and there is no right of appeal to any court other than through judicial review. Grounds for judicial review are far more limited than a general right of appeal. A determination that an activity is an accomodated activity can have a significant and long-lasting impact on the rights and interests of the customary marine title holder in the customary marine area. Given the significance of these decisions, the parties should have a general right of appeal to the Environment Court (being the

140. Submission 3.3.187, p 177
141. Marine and Coastal Area (Takutai Moana) Act 2011, s 64(2)(a)
142. Ibid, s 64(3)–(5)

specialist jurisdiction court dealing with resource management issues). This right of appeal will also provide important precedent and guidance to the Minister on what constitutes an accommodated activity.

There are other examples of appeals against ministerial decisions, such as the possibility to object against a Minister's decision under section 24 of the Public Works Act 1981, which is heard by the Environment Court. The court's report and findings are binding on the Minister.[143] A number of Māori Land Court judges also hold an alternative warrant as Environment Court judges.[144] To support the Environment Court as the appropriate jurisdiction to determine such appeals, Māori Land Court judges often sit alongside Environment Court judges when significant issues affecting Māori arise.

(c) Compensation under schedule 2

Regarding deemed accommodated activities, we draw attention to the compensation regime under schedule 2 of the Act which was given relatively little acknowledgement by most claimant counsel. If the owner or operator of proposed new infrastructure applies to the Minister for Land Information for this infrastructure to be declared a deemed accommodated activity, the Minister must 'invite the customary marine title group to identify appropriate compensation for the removal of its RMA permission right or conservation permission right'. The Minister must then 'negotiate in good faith with the customary marine title group in an attempt to compensate for the waiver of its permission rights'.[145]

However, the schedule 2 regime only applies to the construction or operation of proposed new infrastructure. It does not apply to any (other) accommodated activities.[146] One glaring consequence is that while a newly constructed piece of accommodated infrastructure falls under the compensation regime of schedule 2, the renewal of a resource consent for the continuing operation of pre-existing infrastructure of the same type does not. That is because the continuation of existing accommodated infrastructure in the same location are 'associated operations', which themselves are accommodated infrastructure. The phrase 'accommodated infrastructure', in turn, falls within the definition of accommodated activities, which are exempt from the permission rights.[147] We consider this different treatment is illogical and unjustified. Although the Crown submits that a different policy rationale applies (namely, that the Crown's 'bottom line' of securing pre-existing interests in te takutai moana), from the perspective of Māori, their customary interests precede those in both scenarios. Māori customary interests are adversely affected in each case and the consequences, in terms of Treaty entitlements, should be similar. Yet, they can obtain compensation in only one of the examples (a newly constructed piece of accommodated infrastructure) but not

143. Public Works Act 1981, s 24(10)
144. Resource Management Act 1991, s 249
145. Marine and Coastal Area (Takutai Moana) Act 2011, sch 2, cl 6(b), 6(c)
146. Note that all deemed accommodated activities are accommodated activities under section 64(2)(h) of the Act.
147. Marine and Coastal Area (Takutai Moana) Act 2011, ss 63, 64(2)(c); see also doc B148, p 58

in the other (the renewal of a resource consent for the continuing operation of pre-existing infrastructure).[148]

This illogical outcome clearly justifies extending the compensation provisions to include situations involving the renewal of a resource consent for pre-existing infrastructure. Such an extension would also be consistent with the Crown's policy aims – the possibility of exercising the permission right would still be removed, and the pre-existing infrastructure would still be secured. The major difference for Māori, however, would be that they would be entitled to fair and proper compensation for having their permission rights removed. When determining what compensation is appropriate, the Minister would have to consider whether the customary marine title holder is being compensated for being unable to exercise the permission right for the duration of the resource consent (which would then have to be reassessed on further renewal) or for the anticipated lifetime of the infrastructure itself.

Finally, although the matter of coastal occupation charges was not addressed in detail by the parties, we briefly note that the Resource Management Act still enables a regional council to adopt coastal occupation charges in their regional plans, even though it appears only a few have. If councils were to impose such a regime, holders of customary marine title should receive a reasonable proportion of the coastal charges, because those charges are designed to assist with the costs of environmental management of the coastal resource. That is a role which in the future will be shared by regional councils performing their statutory functions and by customary marine title holders performing their kaitiaki responsibilities.

(d) Structural bias in resource management

We are also concerned by the trend Dr Shaw identified in her evidence – namely, how speedily resource consents are granted compared to the slow pace at which applications for customary marine title have progressed and are predicted to take (many decades for some claimants). The longer it takes for the High Court and/or the Minister for Treaty of Waitangi Negotiations to work through the outstanding applications in each pathway, the higher the risk for permission rights to be undermined through pre-existing resource consent applications and deemed accommodated activity applications.

A related problem is that those seeking to undertake resource management activities can, under certain conditions, use plan changes under section 64 of the Resource Management Act 1991 to have the desired activity declared a 'permitted activity'. Such an activity does not require a resource consent and consequently the RMA permission right does not apply. This follows from the wording of section 66(1) of the Takutai Moana Act, which provides 'An RMA permission right applies to activities that are to be carried out under a resource consent, including a resource consent for a controlled activity', and of section 20(b), which provides 'Nothing in this Act limits or affects . . . any activities that can be lawfully undertaken without a

148. See submission 3.3.187, pp 210–211.

resource consent or other authorisation.' A plan change could therefore be used to bypass the RMA permission right. Dr Shaw drew attention to this possibility in her evidence and speculated that the result would be 'increased pressure on regional councils to provide for permitted activities in regional plans.'[149] We observe that such an approach was utilised in Marlborough Sounds in 2011 and 2017 in respect of applications of major significance relating to the relocation of salmon farms on two occasions.[150] In her brief of evidence, she adds that 'the Māori policy provisions in the [New Zealand Coastal Policy Statement] are not expressed as "avoid" policies, and therefore do not benefit' from the interpretation of these policies in the Supreme Court's *New Zealand King Salmon* judgment.[151]

Finally, we accept the claimants' submission that the deadline of 40 working days for customary marine title holders to notify resource consent applicants of their decision is procedurally unfair. The unfairness is compounded by the absence of any duty on the consent applicants to notify customary marine title holders of the resource consent application, unless the activity concerned is an accommodated activity.[152] If customary marine title holders have no prior knowledge of a resource consent application until it is granted, 40 working days may not be enough time to consider properly whether to give permission and under which conditions (we address the issue of imposing enforcable conditions in section 5.3.4).[153] During the hearing, Crown counsel acknowledged this time pressure.[154] Even if it is general practice for resource consent applicants to inform customary marine title holders at the time the application is lodged, this cannot be relied on in every case.

(e) Result

We conclude that, although the permission rights are the strongest statutory rights recognised under the Act, their impact is severely undermined by the exceptions of accommodated activities and deemed accommodated activities. Several of the exceptions cannot be justified. For example, exempting resource consents that were granted after a customary marine title took effect in the area is not justified. The bias of the Act towards prioritising existing resource consents over the RMA permission right, and the possibility it allows for the RMA permission right to be bypassed through plan changes, add to this problem. Overall, we find that the Act's provisions for recognising – but then restricting – the permission rights of customary marine title are flawed and amount to a breach of the Treaty principle

149. Document B148, p 61; transcript 4.1.8, pp 360, 404
150. Marlborough Salmon Farm Relocation Advisory Panel, 'Report and recommendations of the Marlborough Salmon Farm Relocation Advisory Panel', July 2017, www.mpi.govt.nz/dmsdocument/27447-Report-and-Recommendations-of-the-Marlborough-Salmon-Farm-Relocation-Advisory-Panel, accessed 31 July 2023.
151. Document B148, p 15; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38
152. Resource Management Act 1991, s 95B(2)(b)
153. Marine and Coastal Area (Takutai Moana) Act 2011, s 67(3)
154. Transcript 4.1.11, p 364

of partnership. They do not strike a fair and reasonable balance between the interests of Māori to protect their customary interests and other private rights holders to engage in resource management and conservation activities.

(f) Prejudice

These breaches of the principle of partnership have prejudiced, and will likely prejudice, all those claimants who have gone or will go through the complex process of seeking a customary marine title, yet still find themselves with a restricted influence on resource management and conservation matters in their rohe.[155] The breaches will continue to have that effect even after customary marine title has been granted.

(g) Recommendation

To address this prejudice, we recommend repealing section 64(2)(e) of the Takutai Moana Act to remove 'an activity carried out under a coastal permit granted . . . to permit existing aquaculture activities' from the list of accommodated activities. At the very least, we recommend – as we did in relation to section 55 for protected customary rights – amending section 64(2)(e) to the effect that continued aquaculture activities are only accommodated activities if there is no increase in the area, or change to the location of the coastal space, *and* if there is no significant change in the species farmed or in the method of marine farming. We recommend that section 64(2)(a) be amended to read 'an activity authorised under a resource consent granted before the effective date'.

Apart from reducing the list of accommodated and deemed accommodated activities, we also recommend that the compensation regime under schedule 2 of the Act, which currently applies only to deemed accommodated infrastructure, be extended to all accommodated infrastructure. As far as pre-existing infrastructure is concerned, we recommend applying schedule 2 to those only from the date of renewal of the consent or permit in question. This amendment would compensate customary marine title holders for their inability to exercise their permission right for previous and new infrastructure.

Furthermore, we recommend that, if the new resource management legislation package still enables a regional council to decide to adopt coastal occupation charges in their regional plans, holders of customary marine title should receive a reasonable proportion of this.

Finally, we recommend addressing the 40 working days response deadline that is imposed on customary marine title holders wishing to exercise their permission right. As noted, there is no comparable requirement on resource consent applicants – they are not required to notify customary marine title holders of their application at all, unless the activity in question is an accommodated activity. They only have to notify the customary marine title holder once the resource consent is granted and before commencing the activity. There is no other timeframe or deadline for doing so. One way to reduce the stress of the 40 working day deadline

155. See, for example, submission 3.3.174, pp 256–257.

on customary marine title holders is to amend section 95B(2)(b) of the Resource Management Act 1991, so that a consent applicant must first notify any affected customary marine title groups, regardless of whether their application is for an accommodated activity or not. This will give customary marine title holders more time to consider their view on the application before the period of 40 working days commences. This will also give them the opportunity to participate in the resource consent process, if they wish, to ensure appropriate conditions are imposed. This early engagement will likely better facilitate permission being granted later on.

We have not made more extensive recommendations on amending the permission right regime, as we have instead recommended removing the 'without substantial interruption' element from the test of customary marine title. This provides a fair and reasonable balance between recognising Māori interests in obtaining a customary marine title and protecting existing interests through exceptions to the permission rights.

5.3.2 Limits on alienation

(1) *Overview*

Section 60(1)(a) of the Act clarifies that customary marine title may not be alienated:

> **60 Scope and effect of customary marine title**
> (1) Customary marine title—
> (a) provides an interest in land, but does not include a right to alienate or otherwise dispose of any part of a customary marine title area; and

(2) *The claimants' position*

Claimants criticise that customary marine title cannot be alienated.[156] They argue that this is a key difference between coastal marine title and fee simple title and draw attention to the fact that even Māori freehold land can, under certain conditions, be alienated.[157] Natasha Willison-Reardon, on behalf of the Iwi and Hapū Ki Marokopa, adds that making customary marine title inalienable 'falls far short of both the rights and interests that we practice under tikanga and . . . our iwi and hapū aspirations to restore our mana motuhake over our moana.'[158]

Claimants clarify that they do not think that customary marine title should be 'a disposable commodity'.[159] However, they are critical that the Act does not provide customary marine title holders with any ability to lease, license, or mortgage the customary marine title area.[160] Claimant counsel submits that this would have been a 'much simpler, more efficient mechanism' to gain a commercial benefit than charging resource consent holders for the customary marine title holders

156. Submission 3.3.95, pp 14–15; memo 3.3.137(a), p 6; submission 3.3.156, pp 11–12; submission 3.3.138(b)
157. Memorandum 3.3.174(c), pp 4–5, 16; submission 3.3.208, pp 6–7
158. Document B76, pp 4–5
159. Memorandum 3.3.174(c), p 4
160. Ibid; submission 3.3.178, p 38

permission under the RMA permission right, which the Crown claims is a suitable substitute.[161]

(3) *The Crown's position*

Crown counsel explain that the Attorney-General recommended making customary marine title inalienable 'in order to recognise the "unbroken, inalienable and enduring mana held by coastal hapū/iwi"'.[162] They argue that approach was consistent with the Tribunal's recommendations in its Foreshore and Seabed report.[163] Furthermore, Crown counsel note that the Crown's approach was mostly backed by the Iwi Leaders Group, which had advised that customary marine title should be 'an interest in land that was not a fee simple title, and that the interest should not be able to be mortgaged or leased but could be licensed in some circumstances'.[164]

Crown counsel emphasise that, although customary marine title holders are unable to alienate the title, 'it is open to customary marine title groups to enter into side agreements with resource consent holders so as to derive a commercial benefit'.[165] During the policy development process, Crown officials had stated that 'it would be "entirely reasonable" for a customary marine group to "charge resource consent applicants" as a condition of the group providing its permission for the activity to occur'.[166]

Finally, Crown counsel respond to claimants who compare customary marine title to the rights Māori could have obtained immediately after the *Ngāti Apa* judgment by saying that even if aboriginal title could still be recognised by the High Court, it could only be alienated to the Crown, which holds the right of pre-emption.[167]

(4) *The Tribunal's analysis and findings*

(a) Means of alienation

Holders of customary marine title have no 'right to alienate or otherwise dispose of any part of a customary marine title area'.[168] We acknowledge that there are valid reasons to restrict permanent alienation, such as a sale or gift. However, we consider that customary marine title holders should be able to lease or license the land for commercial return without any other restriction. During questioning, Crown counsel Mr Melvin acknowledged that the Crown excluded the possibility of

161. Submission 3.3.178, p 38
162. Ibid, p 136, quoting 'TOW (10) 5 Review of the Foreshore and Seabed Act 2004: Proposals for Public Discussion Document', 12 March 2010) (CLO.003.0018), paras 88–89 (doc B3(a), pp [11044]–[11045])
163. Submission 3.3.187, p 136
164. Ibid
165. Ibid, p 137
166. Ibid, quoting Ministry of Justice, 'Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill', 4 February 2011 (CLO.005.0302), para 1584 (doc B3(a), p [23517])
167. Submission 3.3.187, p 139
168. Marine and Coastal Area (Takutai Moana) Act 2011, s 60(1)(a)

licensing customary marine title areas despite contrary input from the Iwi Leaders Group. He stated 'that the ability to enter into side agreements with resource consent applicants provides a comparable ability to obtain a financial benefit through the title that customary owners have'.[169] However, Crown counsel could not explain how the prohibition of licensing would further the interests of customary marine title holders.[170] Nor is there any public interest that militates against the grant of a lease or license as part of a legitimate balancing exercise.

(b) Side agreements

Furthermore, we are not convinced by the Crown's argument that the possibility of entering into side agreements as a condition for granting permission for resource consent or conservation permit activities is sufficient for customary marine title holders to gain commercial benefit while protecting their interests. Side agreements may come with considerable risks for customary marine title holders. First, the Act does not allow the customary marine title holder to impose conditions in the permission granted. The customary marine title holder can give or decline permission on any grounds, but once given, the permission cannot be revoked. This means that if there is an agreement entered into (such as for the payment of money to carry out the activity in the customary marine title area), this would be based in contract and would operate outside the framework of the Act. If there was a breach of the agreement, the customary marine title holder could sue for specific performance, but only to recover the money owed. The customary marine title holder could not seek to cancel the contract in conventional terms, because the resource consent and RMA permission right, which allow the third party to carry out the activity, are not part of the contract itself. Therefore, even if there is a serious breach of the contract terms, the customary marine title holder cannot prevent the third party from continuing to use the customary marine title area, even though this is one of the strongest contractual remedies available for the use of dry land (such as cancelling the lease or license).

These problems would increase if the resource consent was transferred to a different person who was not a party to the side agreement. Resource consents (including coastal permits) can be transferred to a different person per sections 134 to 138A of the Resource Management Act 1991. If the resource consent is transferred after the customary marine title holder gave permission, the permission could not be revoked. The new holder of the consent is not privy to the contract. Therefore, the customary marine title holder may not be able to recover from the new consent holder money owed under the side agreement.

Finally, if the consent holder (and party to the side agreement) was made bankrupt, the customary marine title holder would become an unsecured creditor and may not be able to recover the money owed under the side agreement. Meanwhile, the resource consent vests in the official assignee, who can deal with it to the same

169. Transcript 4.1.11, pp 362–363
170. Ibid, p 363

extent as the holder would have been entitled to do.[171] This would allow the official assignee to transfer the resource consent to another person in order to pay creditors. In these circumstances, the customary marine title holder loses their rights under the side agreement, cannot recover the money owed, and cannot revoke the permission for the new consent holder to continue to carry out the activity in the customary marine title area.

Even if compliance with the side agreement was made a condition for granting a resource consent, significant legal difficulties would arise because resource consent conditions must serve an environmental rather than a commercial purpose.[172] Furthermore, there is no obligation on the resource consent applicant to notify the customary marine title holder of the resource consent application.[173] They must notify the customary marine title holder only once the consent is granted and before the activity commences. This would limit any opportunity for the customary marine title holder to provide input into the resource consent conditions.

The Crown has prevented the customary marine title holder from granting a lease or a license over a customary marine title area and from imposing enforceable conditions for granting permission under an RMA permission right or conservation permission right. Side agreements do not provide an adequate substitute, as they place the customary marine title holder at risk. The side agreements leave the customary marine title holders with little to no recourse in the case of a breach of the agreement or a transfer of the consent. There is no public or private interest that militates against these options. It follows that the Crown is not restricting these rights as part of a legitimate balancing exercise.

(c) Result

As a result, we find that the Takutai Moana Act's limitations on alienation of customary marine title are in breach of the Treaty principles of partnership and active protection.

(d) Prejudice

The Takutai Moana Act's limitations on alienation of customary marine title will likely cause prejudice for claimants in situations where they aim to gain commercial benefits from customary marine title.

(e) Recommendation

We recommend that the Act be amended to allow the customary marine title holders to give permission (under the RMA permission right and the conservation permission right), subject to enforceable conditions such as the payment of money. The customary marine title holder should also be able to revoke that permission

171. Resource Management Act 1991, s 122(2)(b)

172. Ibid, ss 108, 108AA; see also transcript 4.1.11, p 366.

173. Other than for accommodated activities, to which the permission rights do not apply: Resource Management Act 1991, s 95B(2)(b).

if the conditions are breached. To ensure this is regulated fairly, the amendments could state that revoking permission is treated as cancelling a contract and that the provisions of the Contract and Commercial Law Act 2017 apply.

5.3.3 The wāhi tapu protection right

(1) *Overview*

The Takutai Moana Act's definitions of wāhi tapu and wāhi tapu area are taken from section 6 of the Heritage New Zealand Pouhere Taonga Act 2014. It reads 'wāhi tapu means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense', and 'wāhi tapu area means land that contains 1 or more wāhi tapu'.

Section 78 of the Act provides for the protection of wāhi tapu and wāhi tapu areas as part of customary marine title:

> **78 Protection of wāhi tapu and wāhi tapu areas**
>
> (1) A customary marine title group may seek to include recognition of a wāhi tapu or a wāhi tapu area—
>
> (a) in a customary marine title order; or
>
> (b) in an agreement.
>
> (2) A wāhi tapu protection right may be recognised if there is evidence to establish—
>
> (a) the connection of the group with the wāhi tapu or wāhi tapu area in accordance with tikanga; and
>
> (b) that the group requires the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area.
>
> (3) If a customary marine title is recognised under subpart 1 or 2 of Part 4, the customary marine title order or agreement must set out the wāhi tapu conditions that apply, as provided for in section 79.

Section 79 sets out the conditions that must be included in a recognition order or agreement for customary marine title:

> **79 Wāhi tapu conditions**
>
> (1) The wāhi tapu conditions that must be set out in a customary marine title order or an agreement are—
>
> (a) the location of the boundaries of the wāhi tapu or wāhi tapu area that is the subject of the order; and
>
> (b) the prohibitions or restrictions that are to apply, and the reasons for them; and
>
> (c) any exemption for specified individuals to carry out a protected customary right in relation to, or in the vicinity of, the protected wāhi tapu or wāhi tapu area, and any conditions applying to the exercise of the exemption.
>
> (2) Wāhi tapu conditions—
>
> (a) may affect the exercise of fishing rights, but must not do so to the extent that the conditions prevent fishers from taking their lawful entitlement in a quota management area or fisheries management area; and

(b) do not affect the exercise of kaitiakitanga by a customary marine title group in relation to a wāhi tapu or wāhi tapu area in the customary marine title area of that group.

To enforce restrictions around a wāhi tapu area, a customary marine title group can appoint a warden, as specified in section 80:

80 Wardens and fishery officers

(1) Wardens may be appointed by a customary marine title group with an interest in a wāhi tapu or wāhi tapu area, in accordance with regulations made under section 118, to promote compliance with a prohibition or restriction imposed under section 79.

(2) A warden appointed under subsection (1) is responsible to the customary marine title group for the following functions:
  (a) to assist in implementing any prohibition or restriction:
  (b) to enter a wāhi tapu or wāhi tapu area for the purpose of performing the warden's functions:
  (c) to advise members of the public of any applicable prohibition or restriction:
  (d) to warn a person to leave a wāhi tapu or wāhi tapu area:
  (e) to record—
    (i) any failure to comply with a prohibition or restriction if the warden has reason to believe that the failure is intentional; and
    (ii) the name, contact details, and date of birth of a person who the warden has reason to believe is intentionally failing to comply with a prohibition or restriction:
  (f) to report to a constable any failure to comply with a prohibition or restriction in any case where the warden has reason to believe that the failure is intentional.

(2) *The claimants' position*

Problems with the present wāhi tapu provisions are identified by a number of claimants, including those who nonetheless give credit for the inclusion of such provisions in the Act.[174]

Some claimants submit that applicants should not be required to apply for wāhi tapu protection (or a customary marine title) to protect wāhi tapu. They argue that by asking claimants to apply for 'protection of their taonga', the Crown fails to recognise the claimants' rangatiratanga.[175] Several claimants and witnesses elaborated on this point in their evidence. For example, claimant witness Lily Stone, of Ngāti Mihiroa, observes that 'protecting waahi tapu, protecting wild life, that's kaitiakitanga, and we've been doing it for generations. We never needed [the Takutai Moana Act] to do what we've always been doing.'[176] Apart from this

174. Submission 3.3.168, p 31
175. Submission 3.3.202, p 8
176. Document B49, p 2

argument, counsel also question why wāhi tapu protection should be linked to customary marine titles specifically. They say that the Crown has agreed that a different approach – making the wāhi tapu protection right available outside the customary marine title regime – could have been taken.[177]

On a related, but slightly different note, some claimants consider there could be a test for customary marine title but not an additional one for wāhi tapu protection. They argue that meeting the customary marine title test should enable them to 'declare a wahi tapu without outside sanction or endorsement', and submit that denying this prerogative to customary marine title holders falls short of recognising tino rangatiratanga.[178]

Claimants are also concerned that the wāhi tapu protection right does not prevent fishers from taking whatever fishing quota they are legally entitled to – thus favouring commercial interests over those of Māori. They say the 'provisions prioritise public interest/rights and curb those of Māori'.[179] Claimants add that, especially with depleting fish numbers, it would be 'entirely likely that fishers could adduce evidence that in order to get their lawful entitlement they would need to go into a wahi tapu area'.[180] Furthermore, they say that some wāhi tapu require blanket bans on fishing at all times, which the Act does not provide for. Overall, several claimants complain that the wāhi tapu protection right under section 79 does not allow customary marine title holders to exercise tino rangatiratanga over fisheries.[181]

Some claimants take issue with the fact that applying for recognition of customary marine title requires the disclosure of wāhi tapu. For example, witness Tania Martin, who gives her evidence for a claim on behalf of Ngāti Tamainupō, says in her brief of evidence she has 'no trust in the Crown in terms of disclosing exactly where our wāhi tapu are. For a number of wāhi tapu, this type of information should be held by kaitiaki only.'[182] Others accept the Crown needs to know where wāhi tapu areas are in order to protect them. However, they consider it problematic that applicants must publicly disclose the location of wāhi tapu areas if they want them protected.[183] Should such an application be declined, they say, 'they are in a position where their waahi tapu are now publicly known with no protections' – a situation which could lead to breaches of tikanga.[184] Claimants say that this is 'not an appropriate way to deal with matters of tapu' and that the Crown should have designed a 'more culturally safe' application process.[185] The failure to provide one is, they say, a breach of the Treaty.[186] To the Crown's statement that 'witnesses

177. Submission 3.3.202, p 8, referring to transcript 4.1.11, p 368.
178. Submission 3.3.142, p 51; submission 3.3.192, pp 4–5
179. Submission 3.3.202, p 8
180. Submission 3.3.192, p 6
181. Submission 3.3.142, pp 51–52; submission 3.3.157, pp 22–23
182. Document B80, p 11
183. Submission 3.3.141, p 7
184. Ibid, pp 7–8
185. Ibid
186. Submission 3.3.141, p 8

have been unable to offer a solution to this issue', claimant counsel reply: 'With respect, it is not the witnesses' job to find solutions, it is the Crown's.'[187] However, the claimants offer as a solution 'a blanket rule' that presumes protection of all disclosed and undisclosed wāhi tapu locations.[188]

Some claimant groups also raise concerns about the role of wardens. Under the Act, a customary marine title group may appoint a warden who can, in essence, enforce restrictions around a wāhi tapu area. The Governor-General has the power to define the roles, function, and appointment of wāhi tapu wardens under section 118 of the Act, but there is no requirement for the Governor-General to take into account the 'voice of the rights holders'. Claimants describe this lack of consideration as unsatisfactory.[189] Claimants also highlight the potential vulnerability of wardens to judicial review, which, they say, the Honourable Christopher Finlayson KC admits in his evidence.[190] Other claimants consider the requirement for customary marine title groups to fund their wardens as prejudicial.[191]

(3) *The Crown's position*

The Crown submits that the wāhi tapu provisions in the Act are appropriate. It argues that it is reasonable to require a customary marine title group to apply for wāhi tapu protection, rather than being granted it outright, 'given the prohibitions or restrictions that attend a wāhi tapu protection' are some of the few limitations on the public rights of access and navigation within the Act.[192] Counsel also note that objectively determining the existence and location of a wāhi tapu is consistent with the requirements of other relevant legislation, such as the Resource Management Act 1991 and Te Ture Whenua Maori Act 1993.[193]

As for the claimants' concern that wāhi tapu conditions cannot prevent fishers from reaching their legally entitled quota, the Crown says that the Act still 'provides a valuable right to prohibit or restrict fishing in a wāhi tapu area, provided the total allowable commercial catch for a stock can be taken in the remainder of the relevant quota management area or fisheries management area.'[194] Crown counsel note that ministry officials 'considered it unlikely a wāhi tapu area could cover such a large area . . . so as to affect fishing rights to the extent they needed to continue in the wāhi tapu area.'[195]

187. Submission 3.3.196, p 7
188. Ibid
189. Submission 3.3.157, pp 23–24
190. Submission 3.3.160, p 37, referring to doc B113, p 52.
191. Submission 3.3.157, p 23; submission 3.3.160, p 37
192. Submission 3.3.187, p 145
193. Ibid, p 146
194. Ibid, p 148
195. Ibid, p 149, referring to Ministry of Justice, 'Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill', 4 February 2011 (CLO.005.0302), paras 1853–1854 (doc B3(a), p [23555])

The Crown observes that 'it is difficult to see how applicants can realistically expect protection of wāhi tapu areas without disclosing their existence'.[196] The Crown also highlights that claimant witnesses were unable to propose a solution to this dilemma. Counsel point to a draft management plan prepared by the Bay of Plenty Regional Council after reaching a memorandum of understanding with Te Ūpokorehe which 'anticipates the disclosure of wāhi tapu sites' to the public by means of signage.[197] This example, Crown counsel argue, is 'difficult to reconcile with claimants' submission that sites of wāhi tapu should not be publicly disclosed'.[198] Crown counsel further note that the High Court may be able to protect confidential material under section 69 of the Evidence Act 2006, and that similar arrangements could likely be made in the Crown engagement pathway.[199] However, the Crown also considers it unlikely that confidentiality orders or agreements could be used to prevent the disclosure of any wāhi tapu conditions, given that the location and boundaries of a wāhi tapu area need to be communicated to the public if they are to comply with the conditions.[200] Counsel cite the Ministry of Justice's report on the Marine and Coastal Area Bill, which states that 'the purpose of requiring the location of the wāhi tapu to be specified as part of the wāhi tapu conditions is to "ensure people know about them"'.[201]

Regarding the provisions for wāhi tapu wardens, the Crown submits that despite the concern of some claimants, it is unlikely that a warden would be subject to judicial review.[202] The Crown also explains that, generally, the Act does not provide funding for customary marine title groups because 'it is difficult to predict what implementation costs any customary marine title group will have, as it will depend on a range of factors specific to each group and which might change over time'.[203]

(4) *The Tribunal's analysis and findings*

(a) The standard of Treaty compliance

We consider the principles of active protection and partnership most relevant when considering whether the Act's wāhi tapu protection right is consistent with Treaty principles. The principle of active protection applies to whether the wāhi tapu protection right enables Māori to exercise tino rangatiratanga over wāhi tapu in the marine and coastal area. The principle of partnership concerns the balance that the Crown has struck between Māori interests to protect wāhi tapu, and the general public's interests in accessing the marine and coastal area and exercising

196. Submission 3.3.187, p 146
197. Ibid, pp 146–147; transcript 4.1.7, pp 154–155
198. Submission 3.3.187, p 147
199. Ibid, pp 147–148
200. Ibid, p 148
201. Ibid, referring to Ministry of Justice, 'Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill', 4 February 2011 (CLO.005.0302), para 1894 (doc B3(a), p [23561])
202. Submission 3.3.187, p 149
203. Ibid, p 216

fishing rights (subject to other statutory restrictions). Again, we find that the Crown's duty to actively protect Māori customary interests in the seabed and foreshore needs to be considered alongside other rights under the Act that might help protect wāhi tapu, such as the RMA permission right or the right to create a planning document. As we consider them jointly in chapter 6 (see section 6.5.1), this section focuses solely on the principle of partnership and its implications for wāhi tapu protection.

The Tribunal previously outlined the implications of the principle of partnership for te takutai moana in its *Foreshore and Seabed* report (2004). It held that in 'the balancing of interests required for a successful partnership . . . there is a place for both peoples and their interests in the foreshore and seabed'. The Tribunal further stated that while the Crown has 'the authority to develop a policy in respect of the foreshore and seabed', it needs to 'do so in a way that gives meaningful effect to te tino rangatiratanga, and balances the interests of both peoples in a fair and reasonable manner'.[204] The Tribunal also found that both Treaty partners need to 'respect the other's status and authority in their respective spheres', which also holds true for how Treaty partners acknowledge each other's interests in, and authority over, natural resources.[205] Furthermore, the principle of partnership requires the Crown to consult with Māori on matters of significance to them, and where important resources are at stake (see section 1.2.3(1)). The standard for reasonable consultation is determined by 'the nature of the resource or taonga, and the likely effects of the [Crown's] policy, action, or legislation'.[206]

Having established this standard for Treaty compliance in respect of the takutai moana, has the Crown struck a reasonable balance between Māori interests to protect wāhi tapu and competing public interests?

(b) Limitations

As noted above, the balance in question is between the Māori interest to protect wāhi tapu and wāhi tapu areas on the one hand and the interest to maintain public access and use (including fishing) on the other. A customary marine title group can seek to include recognition of a wāhi tapu or a wāhi tapu area in the order or agreement.[207] Public access, navigation, and fishing can be restricted or prohibited for this purpose. However, the wāhi tapu protection is subject to a number of limitations.

First, applicants seeking wāhi tapu protection must establish in evidence a 'connection . . . with the wāhi tapu or wāhi tapu area in accordance with tikanga' and that they require 'the proposed prohibitions or restrictions on access to protect the

204. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 131

205. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 28, referencing Waitangi Tribunal, *Te Whanau o Waipareira Report*, pp 27–28; see also Waitangi Tribunal, *The Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 65.

206. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1237

207. Marine and Coastal Area (Takutai Moana) Act 2011, ss 78–79

wāhi tapu or wāhi tapu area.'[208] The Crown argues that imposing an application process for establishing which wāhi tapu or wāhi tapu areas require protection is reasonable, 'given the prohibitions or restrictions that attend a wāhi tapu protection right represent one of the only limitations on the public rights of access and navigation' within the Act.[209] We would be concerned if the test per section 78 of the Act set a high threshold, making it too difficult to obtain the safeguards to protect wāhi tapu and wāhi tapu areas. That is not the case. We consider the test appropriately recognises the applicant group's relationship with the area and will not create an unnecessary burden to obtain the safeguards available.

Of greater concern is that in order to be eligible for the wāhi tapu protection right the applicant group must first obtain a customary marine title. We do not see any logical reason to require an applicant group to first obtain a customary marine title before they can obtain a wāhi tapu protection right. An application for customary marine title may be unsuccessful for many reasons, such as the applicant group being unable to demonstrate exclusive use and occupation of the area. Even so, that does not change the cultural siginficance and importance of a wāhi tapu. Wāhi tapu are the most significant and sacred sites to Māori. Māori should have the ability to seek their protection regardless of whether they can successfully establish customary marine title to that area.

Early on in the Crown's development of its takutai moana policy, the ability to place 'rāhui over wāhi tapu' was considered as part of the prospective award for 'non-territorial interests'.[210] These non-territorial interests later became protected customary rights under the Act. However, the Attorney-General later recommended moving this provision to the customary marine title regime.[211] This was after public consultation had closed, thus significantly reducing the possibility of feedback on his recommendation and engagement with Māori. The Crown's explanation for requiring groups to meet the test for customary marine title in order to obtain a wāhi tapu protection right is that 'the test for customary [marine title] will identify aspects of a group's relationship with a particular geographical area.'[212] We do not accept this explanation. The test under section 78 of the Act already requires the applicant group to demonstrate their connection with the wāhi tapu or wāhi tapu area in accordance with tikanga. The requirement to also demonstrate customary marine title is unnecessary, creates an unreasonably high threshold and, we find, breaches the Crown's duty to actively protect the most sacred and important sites to Māori.

Thirdly, the wāhi tapu protection right 'may affect the exercise of fishing rights, but must not do so to the extent that the conditions prevent fishers from taking

208. Ibid, s 78(2)

209. Submission 3.3.187, p 145; Marine and Coastal Area (Takutai Moana) Act 2011, ss 26(2), 27(3), 79(1)(b)

210. 'TOW (10) 5 Review of the Foreshore and Seabed Act 2004: Proposal for Public Discussion Document', 12 March 2010 (CL0.003.0018), para 105 (doc B3(a), p [11048])

211. 'CAB (10) 291 Review of the Foreshore and Seabed Act 2004: Report on Public Consultation Process and Proposals for a New Regime', 11 June 2010 (CL0.047.0020), para 280 (doc B3(e), p 358)

212. Submission 3.3.187, p 158

their lawful entitlement in a quota management area or fisheries management area.'[213] This provision is ambiguous, creates considerable uncertainty, and risks the desecration of wāhi tapu through continued fishing in the area despite wāhi tapu conditions that may restict or prohibit this. The Crown says that at the time the wāhi tapu protection right was being developed, Ministry of Justice officials 'considered it unlikely a wāhi tapu area could cover such a large area . . . so as to affect fishing rights to the extent they needed to continue in the area.'[214] In this case, we wonder why the legislation included this proviso at all.

It is also concerning that, at the hearings, the Crown could not say with any certainty in what circumstances fishers may or may not be able to fish in a wāhi tapu protection area.[215] Section 79(2) refers to 'fishers' generally, which comprises both commercial and recreational fishers. Commercial fishers are entitled to an annual catch based on the quota management system;[216] recreational fishers are entitled to daily limits for various fish and aquatic species.[217] Does this mean that if a recreational fisher had a slow day and was unable to get their daily limit for rock lobster (crayfish), they could dive in a wāhi tapu protection area to obtain their lawful entitlement? Similarly, if a commercial fisher is having a bad season and is unable to obtain their annual catch of snapper, could they start dropping long lines in a wāhi tapu protection area to catch their lawful entitlement? This might be a tempting prospect, as a restriction on fishing in that area will likely mean that it holds greater fish stocks. Crown counsel emphasised that the quota management areas and fishing management areas are large, and fishers should be able to obtain their catch elsewhere.[218] We agree, but the proviso in section 79(2)(a) of the Act must have some application. It is concerning that the Crown could not tell us with any specificity what the purpose and effect of this proviso is and how it would work in practice.

(c) Disclosure of wāhi tapu areas

Some claimants expressed concern about being required to disclose the location and details of wāhi tapu and wāhi tapu areas. They argue this is sensitive information, is important mātauranga Maori, and should not be made available to the public.

We understand the claimants' concerns. Disclosing the location and nature of wāhi tapu has long been a concern for many Māori on dry land. It comes as no surprise that they hold similar concerns over wāhi tapu in te takutai moana. Courts already have the power to issue confidentiality orders for various types of

213. Marine and Coastal Area (Takutai Moana) Act 2011, s 79(2)
214. Ministry of Justice, 'Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill', 4 February 2011 (CL0.005.0302), paras 1853–1854 (doc B3(a), p [23555])
215. Transcript 4.1.11, pp 369–371
216. Fisheries Act 1996, ss 17B, 20, 42, 66
217. Fisheries (Amateur Fishing) Regulations 2013
218. Transcript 4.1.11, pp 369–370

privileged or confidential information.[219] We see no reason why confidentiality orders could not be granted to protect wāhi tapu locations, and evidence of the wāhi tapu, where a group is seeking a wāhi tapu protection right.

We accept that the Crown could have taken a proactive step by imposing a presumption that evidence relating to wāhi tapu is confidential. However, we did not hear any evidence or submissions that the existing regime of confidentiality orders does not provide sufficient protection. While a presumption of confidentiality would create stronger protection, in the absence of evidence or argument to the contrary, we we consider that existing confidentiality orders are sufficient.

We acknowledge that once a protection right is granted, members of the public need to be made aware of the existence and location of wāhi tapu in order to comply with restrictions around them. Some claimants still expressed concern about this. However, the public cannot be expected to comply with restrictions around wāhi tapu and wāhi tapu areas if they do not know where these areas are. Despite this, section 79(1)(b) provides that the wāhi tapu conditions in the order or agreement must set out not only the location of the wāhi tapu and the prohibitions or restrictions that apply, but also the reasons for the restrictions and prohibitions.

We are not clear why the reasons for the restrictions or prohibitions have to be included in the order or agreement. Both a court (recognition) order and an Act of Parliament (to give effect to a recognition agreement) are public documents. The reasons for the restrictions or prohibitions may contain culturally sensitive information that is not appropriate for the public arena. The applicant group must already demonstrate to the High Court or the Minister that prohibitions or restrictions on access are necessary to protect the wāhi tapu. Why must they demonstrate this again to the public after a wāhi tapu protection right has been granted? We consider this is unnecessary and unreasonable, as it places sensitive mātauranga Māori at risk.

(d) Result

Overall, we consider that the wāhi tapu protection right does not allow Māori to effectively protect wāhi tapū and wāhi tapu areas. The Act requires Māori to first obtain a customary marine title before they can seek protection of their wāhi tapu. This is an unnecesary and unreasonable hurdle. The requirement to disclose the reasons for wāhi tapu prohibitions and restrictions in the order or agreement is also unnecesarry and places senstive mātauranga Māori at risk. The requirement that wāhi tapu conditions may affect the exercise of fishing rights but not to prevent fishers from taking their lawful entitlement is ambiguous and creates considerable uncertainty around how the wāhi tapu conditions are to apply. We find that these failings breach the Treaty principles of partnership and active protection.

(e) Prejudice

We consider these breaches will likely prejudice Māori and their ability to protect wāhi tapu and wāhi tapu areas. An unsuccessful applicant for a customary marine

219. Evidence Act 2006, ss130–149; High Court Rules, r 8.28

title cannot seek protection of their wāhi tapu. Mātauranga Māori concerning wāhi tapu is a taonga. Disclosing unnecessary and sensitive parts of that mātauranga Māori undermines its status and the tapu nature of the knowledge itself. The restrictions on fishing are so ambiguous that they create considerable uncertainty. This could also lead to fishers desecrating wāhi tapu areas in order to take their lawful entitlement relying on the provisions in the Act.

(f) Recommendation

To address these prejudicial effects on Māori, we recommend separating the Act's wāhi tapu protection measures from protected customary rights or customary marine title. The statutory test in section 78(2) could remain. However, we consider it important that the wāhi tapu protection right is not contingent on the award of either protected customary rights or customary marine title.

Furthermore, we recommend amending section 79(2)(a) to the effect that holders of a wāhi tapu protection right can prohibit fishing in wāhi tapu areas entirely. The applicants will still need to demonstrate to the Court or the Minister that the prohibition is required to protect the wāhi tapu so as to prevent the unreasonable or large-scale prohibition of fishing rights.

We also recommend removing the words 'and the reasons for them' from section 79(1)(b) so that the wāhi tapu conditions that must be set out in a customary marine title order or agreement include the prohibitions or restrictions that are to apply but not the reasons for them.

5.3.4 The right to create a planning document

(1) *Overview*

Section 85 of the Act provides customary marine title holders with the right to create a planning document in accordance with their tikanga.

85 Planning document

(1) A customary marine title group has a right to prepare a planning document in accordance with its tikanga.

(2) The purposes of the planning document are—

- (a) to identify issues relevant to the regulation and management of the customary marine title area of the group; and
- (b) to set out the regulatory and management objectives of the group for its customary marine title area; and
- (c) to set out policies for achieving those objectives.

(3) . . . . .

(4) A planning document may relate—

- (a) only to the customary marine title area of the group; or
- (b) if it relates to areas outside the customary marine title area, only to the part of the common marine and coastal area where the group exercises kaitiakitanga.

(5) The planning document may include only matters that may be regulated under—

- (a) the Conservation Act 1987 or the Acts listed in Schedule 1 of that Act:

(b) the Heritage New Zealand Pouhere Taonga Act 2014:
(c) the Local Government Act 2002:
(d) the Resource Management Act 1991.

Sections 88 to 93 outline the obligations that local and central government authorities have if a customary marine title group lodges a planning document with them:

- Regional councils or local authorities must take the planning document into account when making any decisions under the Local Government Act 2002 in relation to a customary marine title area. Regional councils have additional duties to recognise and provide for resource management matters included in the planning document and to decide whether changes to regional plans or regional policy statements are required.[220]
- Heritage New Zealand Pouhere Taonga must have particular regard to matters set out in the document when considering an application to destroy or modify an archaeological site within a customary marine title area.[221]
- The Director-General of Conservation must take the relevant matters set out in the document into account when reviewing or amending a conservation management strategy that directly affects a customary marine title area.[222]
- The Minister of Fisheries must have regard to the planning document (insofar it is relevant to fisheries management) when setting or varying sustainability measures in a customary marine title area under the Fisheries Act 1996.[223]

(2) *The claimants' position*

The claimants' key concern about the Act's provision for customary marine title groups to prepare and lodge a planning document (which in this section we call a 'CMT planning document', to differentiate it from regional council planning documents) is that it fails to require decision-making authorities to implement policies and objectives included in the CMT planning documents.[224] Therefore, claimants submit, the right to create a CMT planning document does not put customary marine title groups 'on equal footing' with decision-making authorities, as is required for them to exercise rangatiratanga.[225]

The claimants make several arguments about the limitations the Act places on the CMT planning document:

- First, they argue that the obligation of local authorities (principally regional councils) to take the CMT planning document into account is the lowest

220. Marine and Coastal Area (Takutai Moana) Act 2011, ss 88, 93
221. Ibid, s 89
222. Ibid, s 90
223. Ibid, s 91
224. Submission 3.3.140, paras 22, 44, 46; submission 3.3.178, p 43
225. Submission 3.3.142, p 54

level of obligation found under the Resource Management Act 1991.[226] They assert the Takutai Moana Act requires local authorities to weigh resource management arrangements proposed in CMT planning documents against other factors, but not to give effect to them.[227] Claimants consider that this fails to give effect to their tikanga and rangatiratanga.[228] Claimant counsel acknowledge that regional councils must consider whether to 'recognise and provide for' resource management matters included in a given CMT planning document, which is a stronger obligation.[229] However, the provision 'still has its limitations' because the CMT planning document will only be recognised and provided for if the regional council decides to alter its regional plans.[230] The creation of a CMT planning document does not require them to do so, counsel argue.[231] Rather, claimants say that regional councils can simply decide not to incorporate into regional planning documents the recommendations of a customary marine title group's planning document.[232]

- Secondly, counsel say that the CMT planning document can only cover matters regulated by the Conservation Act 1987, the Heritage New Zealand Pouhere Taonga Act 2014, the Local Government Act 2002, or the Resource Management Act 1991. Claimants submit Māori have suffered 'significantly' under these Acts, and ongoing doubts remain as to whether they 'give effect to te Tiriti obligations'.[233] Overall, these Acts 'heavily' limit the ability for iwi and hapū to regulate or manage their takutai moana in accordance with their tikanga.[234]
- Thirdly, claimants note that in order to incorporate a CMT planning document into regional planning documents, regional councils must undertake public consultation. This could 'take many years', according to expert witness Dr Shaw.[235] Dr Shaw also argues in her evidence that the requirement for regional councils to consider a CMT planning document in their capacity as resource consent authorities is only temporary, it loses its effect once the decision is made on whether or not to incorporate the CMT planning document issues into the regional planning documents.[236]

Some claimants also say that the right to create a CMT planning document does not enhance existing mana whenua rights, such as rights arising from iwi management plans and Mana Whakahono ā Rohe (iwi participation arrangements) under

226. Submission 3.3.169, pp 21–22
227. Ibid
228. Submission 3.3.169, p 22
229. Submission 3.3.137(b), p 83
230. Ibid
231. Ibid
232. Submission 3.3.157, pp 28–29; submission 3.3.164, p 23
233. Submission 3.3.137(b), p 84
234. Ibid
235. Transcript 4.1.8, p 379; see also submission 3.3.164, p 23.
236. Submission 3.3.164, p 23; transcript 4.1.8, p 379

the Resource Management Act 1991.[237] The claimants consider that the Crown breached the Treaty by failing to provide regulatory rights that truly compensate for infringements of their customary rights.[238] They contend that, in effect, 'writing a planning document meant it would simply be put on a shelf along with other iwi and hapū environmental management plans that are sitting at councils with a statutory requirement to consider those when plans are being prepared'.[239]

Finally, claimants draw attention to the financial and administrative costs that come with the creation of a CMT planning document.[240] A customary marine title group must go through the 'arduous process of writing the document and then lodging it with all relevant agencies, with only the limited funding available and their own personal capital'.[241] Furthermore, a group must 'constantly' monitor the status of operative regional coastal plans, as well as legal developments surrounding them.[242] These tasks, without adequate funding, place an undue burden on customary marine title groups and are therefore prejudicial, claimants submit.[243]

(3) *The Crown's position*

Overall, the Crown submits the right to create a CMT planning document is 'a powerful right' that non-Māori (including private landowners) do not have.[244]

With regard to regional councils' obligations, the Crown acknowledges that a CMT planning document does not 'directly impose rules in a regional coastal plan'.[245] However, Crown counsel emphasise the importance of regional councils having to 'recognise and provide for' the policies and objectives presented in a CMT planning document. The Crown also clarifies under which circumstances a regional council is required to alter its regional documents to recognise and provide for the resource management matters included in the document. Crown counsel explain:

> Unless the policies and objectives [included in the planning document] are already provided for in the regional document, [or] would not achieve the RMA's purpose of promoting sustainable management of resources, or could be better addressed in another way, the council is required to alter its regional document to recognise and provide for them.[246]

237. Submission 3.3.164, pp 23–24; submission 3.3.178, pp 44–45; doc B148(d), p 15; for iwi management plans, see Resource Management Act 1991, ss 61(2A)(a), 66(2A)(a), 74(2A); for Mana Whakahono ā Rohe, see Resource Management Act 1991, ss 58L–58U.
238. Submission 3.3.178, pp 44–45
239. Submission 3.3.164, p 21, referring to transcript 4.1.8, p 410.
240. Submission 3.3.178, pp 44–45
241. Submission 3.3.157, p 29
242. Submission 3.3.178, pp 44–45
243. Submission 3.3.157, p 29
244. Submission 3.3.187, p 189
245. Ibid, p 190
246. Ibid

The Crown further says that 'the regional council's obligation to recognise and provide for a planning document could result in the imposition of rules in regional plans to implement policies'.[247] Accordingly, the Crown argues, a CMT planning document enables customary marine title groups to influence regional councils' rules and policies, thereby also influencing what types of activities may occur within a customary marine title area – as was the intended purpose of these documents.[248] Their power to influence will be particularly relevant

- for giving customary marine title groups the ability to indirectly affect applications for resource consents to which the permission right does not apply,
- for providing prospective resource consent applicants with information about the policies and objectives of relevance to their proposed activities where the permission right does apply, and
- for giving customary marine title groups the ability to indirectly influence resource management decisions that apply outside the customary marine title area.[249]

In response to claimants' dissatisfaction with the Act's public consultation requirements, the Crown emphasises the 'public benefit in providing broad opportunities for participation in the preparation of policies and plans'.[250] Here, the Crown disputes expert witness Dr Shaw's assertion that regional councils must only temporarily consider a customary marine title group's planning document. The Crown emphasises that where a planning document is incorporated into a regional plan, this is 'on an ongoing, rather than temporary basis'.[251] To support its argument, the Crown points to the Court of Appeal case *R J Davidson Family Trust v Marlborough District Council*, which made similar findings.[252]

The Crown rejects the claimants' suggestion that the right to create a CMT planning document does not materially add to existing processes under the Resource Management Act 1991 in respect of iwi management plans and Mana Whakahono ā Rohe.[253] It argues that Dr Shaw's evidence in this regard 'does not address the absence of any specific obligation to have regard to an iwi management plan or Mana Whakahono ā Rohe when a regional council considers an application for a resource consent under the RMA'.[254]

Finally, the Crown addresses the claimants' concern that creating a CMT planning document is an unacceptable financial burden. It says the alleged prejudice – in the form of costs and time commitment beyond those ordinarily associated with kaitiakitanga duties – is difficult to quantify and likely variable.[255]

247. Submission 3.3.187, p 190
248. Ibid, pp 190–191. For further discussion, see pp 192–193.
249. Ibid, p 191
250. Ibid, p 196
251. Ibid, p 195
252. Ibid, pp 195–196
253. Ibid, p 194
254. Ibid, p 195
255. Ibid, p 197

(4) *The Tribunal's analysis and findings*

We start our analysis by noting that it is misleading to say that the Takutai Moana Act provides a 'right to create a planning document'. Anyone can create such a document. What the Act confers on customary marine title holders can only truly be considered a right if there is a concomitant obligation on central and local government authorities to consider its implementation. Therefore, in the following discussion, when we refer to the 'right to create a CMT planning document', what we are really concerned with are the corresponding obligations of the relevant authorities.

(1) Applicable Treaty principles

In this section, we consider whether the 'right to create a CMT planning document' under the Takutai Moana Act is consistent with the principle of partnership. This principle is particularly relevant to whether the Act strikes an appropriate balance between the Crown's obligations to adopt an effective statutory framework for processes that control spatial planning, conservation, and sustainable environmental management on the one hand, and the interests of Māori to influence the outcomes of these processes on the other. We accept that, as the Tribunal found in its *Foreshore and Seabed* report, the Crown has 'the authority to develop a policy in respect of the foreshore and seabed', but it needs to 'do so in a way that gives meaningful effect to te tino rangatiratanga, and balances the interests of both peoples in a fair and reasonable manner'.[256] Has it done so in relation to the ability of customary marine title holders to present CMT planning documents that will be adequately considered and acted on where appropriate?

In addition to some identified central government authorities, the Takutai Moana Act tasks local authorities with considering matters set out in a CMT planning document. This is because spatial planning is generally a responsibility of local authorities operating under powers the Crown has delegated to them. Nevertheless, the Tribunal has clarified in the past that 'it is the Crown's sole responsibility to ensure that its Treaty obligations to Māori are fulfilled. Those responsibilities remain undiminished, even where delegation has occurred.'[257] If the Crown delegates the fulfilment of Treaty duties to local authorities, the 'duties remain and must be fulfilled, and [the Crown] must make its statutory delegates accountable for fulfilling them too.'[258] One way to do so is to create a statutory obligation for decision makers to give effect to the principles of the Treaty, as section 4 of the Conservation Act 1987 does, and to audit and monitor whether local

256. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 131
257. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p 155
258. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 270

authorities comply with this obligation.[259] However, the Takutai Moana Act does not feature a similarly strongly worded Treaty clause (see section 3.2.4).

We acknowledge that the Crown is faced with a difficult balancing exercise. On the one hand, it seeks to uphold the legal powers of local authorities that reflect the democratic legitimacy and statutory functions vested in them. On the other hand, it aims to provide customary marine title holders with a tool allowing them to wield greater influence on spatial and environmental planning, consistent with the special connection Māori have to te takutai moana. These two aims can sometimes conflict. Overall, we consider that the Crown has come up with a solution that has high-level theoretical merits but fails in detailed practice. In our opinion, two main factors impede on the right to have a CMT planning document considered by the competent authorities.

(b) Legal issues

First, with a minor exception, the Takutai Moana Act does not oblige central or local government authorities to give effect to or provide for CMT planning documents lodged by customary rights holders. Instead, it only requires authorities to consider these documents, and to varying degrees. These requirements range from taking CMT planning documents 'into account' (local authorities under the Local Government Act and the Director-General of Conservation), to having 'regard' (Minister of Fisheries) and 'particular regard' for them (Heritage New Zealand Pouhere Taonga).[260] None of these phrases impose obligations on the decision makers that reflect the high threshold of the customary marine title test that applicants need to meet in order to obtain the right to lodge a CMT planning document (see section 4.1.4).

The exception arises when, under certain conditions, regional councils are obliged to determine whether to alter their own planning documents to 'recognise and provide for' some matters set out in a CMT planning document.[261] But even this obligation can be avoided, given that the regional council can decide not to alter any relevant regional documents. The grounds on which that can occur are very broad and not readily defined – for example, if doing so would not achieve the purpose of the Resource Management Act 1991; or that the issue could be more effectively and efficiently addressed in another way; or that the council considers the matters addressed in the CMT planning document are already addressed in the council's own planning documents.[262] The language around these circumstances is vague. For example, the purpose of the Resource Management Act 1991 is 'to promote the sustainable management of natural and physical resources'.[263] Local authorities and Māori may well disagree whether matters set out in a CMT

259. Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, Pre-publication Version (Wellington: Waitangi Tribunal, 2019), pp 49–53, 66; Waitangi Tribunal, *Ko Aotearoa Tēnei*, vol 1, p 315

260. Marine and Coastal Area (Takutai Moana) Act 2011, ss 88–91

261. Ibid, s 93(6)(a)

262. Ibid, s 93(10)

263. Resource Management Act 1991, s 5

planning document meet that sustainable management purpose. The same applies to the question of whether a certain matter raised in a CMT planning document 'would be more effectively and efficiently addressed in another way'. The Crown and regional councils may well have a different view of what is the most appropriate manner of environmental management than Māori.

(c) Practical issues

Secondly, some very real practical issues arise concerning the right to create and lodge a CMT planning document. We consider that the provisions are impractical for regional councils, for example, if they must consider multiple, quite possibly conflicting, CMT planning documents for areas within the same region. Furthermore, creating a CMT planning document requires a high level of planning and possibly ecological knowledge and expertise, substantial financial resources, and time. Yet, there is no provision for Māori to receive any Crown support through funding, administrative assistance, or expertise to be able to effectively develop and draft such a complex document – something borne out by the evidence of witnesses, who are already straining under the administrative workload that the Act's statutory tests impose on them.[264] In our view, the way the provisions are currently worded places a heavy, unsupported burden on Māori if they want their voices heard on matters of spatial or environmental planning. We note that the CMT planning document was a new concept proposed by the Crown. It was part of the Crown's partnership Treaty duty to provide a practical institutional framework with adequate support to ensure the concept would actually work – both for Māori and for regional councils. We have concerns it may not, for either. What was supposed to be a 'right' for customary marine title holders has turned into an impractical concept with little likely practical effect.

(d) Result

As a result, we find that the CMT planning document provisions fail to achieve a fair and reasonable balance between Māori and other public and private interests. Therefore, we find these provisions are in breach of the principle of partnership.

(e) Prejudice

We accept the claimants' argument that the excessive workload associated with creating a CMT planning document, in combination with the lack of consideration given to their inputs, is prejudicial.[265] Using this mechanism, claimants either have been or likely will be unable to meaningfully affect spatial or environmental planning in their marine rohe.

(f) Recommendation

To address this prejudice, we recommend adding a right of appeal to sections 88, 90, and 93 of the Act. This would enable customary marine title holders to

264. Document B41, pp 9–10; doc B52, p 9; doc B78, p 8; doc B99, p 20
265. See submission 3.3.157, p 33.

make an appeal to the Environment Court against a regional council's decision not to amend the relevant planning documents. The Resource Management Act 1991 and fisheries legislation provide their own appeal processes, though we note that many past Tribunal reports have found the Resource Management Act 1991 is insufficient to protect Māori.[266] However, we consider that all matters relating to the incorporation of a CMT planning document into regional documents should be subject to a right to appeal to the Environment Court.

5.4 Fishing Rights and Fisheries Management

5.4.1 Overview

Section 28 states that 'Nothing in this Act prevents the exercise of any fishing rights conferred or recognised by or under an enactment or by a rule of law.'

Section 51(2) exempts fishing activities from the scope of protected customary rights:

> **51 Meaning of protected customary rights**
> (1) . . . . . .
> (2) A protected customary right does not include an activity—
> (a) that is regulated under the Fisheries Act 1996; or
> (b) that is a commercial aquaculture activity (within the meaning of section 4 of the Maori Commercial Aquaculture Claims Settlement Act 2004); or
> (c) that involves the exercise of—
> (i) any commercial Māori fishing right or interest, being a right or interest declared by section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled; or
> (ii) any non-commercial Māori fishing right or interest, being a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; . . .

Section 79(2)(a) sets out that, under customary marine title, wāhi tapu conditions

> may affect the exercise of fishing rights, but must not do so to the extent that the conditions prevent fishers from taking their lawful entitlement in a quota management area or fisheries management area . . .

5.4.2 The claimants' position

Claimants submit that the Act fails to provide for Māori fishing rights.[267] Counsel state in joint opening submissions that they 'do not see how fisheries management

266. For an overview see Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, pp 49–51.

267. Submission 3.3.174, pp 254–255

can be divorced from the management of the takutai moana'. They consider this separation 'artificial' and 'nonsensical', as well as inconsistent with the principles of the Treaty.[268] Several other submissions support this notion, with claimants expressing concern that an Act that deals with customary rights in the marine and coastal area should mostly exclude the integral aspect of fisheries from its scope.[269]

Claimants argue that fisheries are a taonga and that tino rangatiratanga cannot be divided into territorial and non-territorial rights.[270] They point to past Tribunal findings that where a taonga is in a vulnerable state, the onus on the Crown to provide protection is greater.[271] This, they say, applies to customary fishing grounds or fisheries.[272] Therefore, the claimants argue that the Act needs to give Māori 'authority or control over commercial or recreational fishing and its impact on customary (non-commercial) fisheries'.[273] Furthermore, they say that the Crown needs to involve Māori in the management of fisheries, and that this 'involvement must not be tokenistic'.[274] Claimants consider it 'unreasonable' to exclude fisheries management tools from the scope of rights available under the Act.[275] They argue that including them would not have compromised the Crown's bottom line of protecting existing fishing rights.[276] Overall, claimants argue that the Act's exclusion of fisheries and related rights is a missed opportunity for the Crown to provide for Māori tino rangatiratanga over them.[277] Some claimant counsel consider this breaches the Crown's duty of active protection.[278]

Some claimants add that the customary fisheries mechanisms as they stand fail to adequately recognise Māori rights, deliver little, and are rarely used by Māori. Therefore, counsel submit that these failures place 'an obligation on the Crown to improve recognition and in particular to utilise the Act to do so'.[279] Similarly, other claimant counsel state that the Act does not 'fill the gaps left by existing legislation such as the Fisheries Act'.[280] In fact, they say, the Crown's reliance on existing legislation has created a confusing network of overlapping statutes.[281]

Finally, some claimants compare the fishing rights under the Takutai Moana Act to those under Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, which, claimants argue, grants ngā hapū o Ngāti Porou more extensive fishing rights.[282]

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268. Submission 3.3.83, p 10
269. Submission 3.3.168, pp 32–33
270. Submission 3.3.189, p 10
271. Ibid, pp 6–7, referring to Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), pp 19, 21, 87; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 38.
272. Submission 3.3.189, pp 7–8
273. Ibid, p 10
274. Submission 3.3.200, p 4
275. Ibid, p 3
276. Ibid, pp 3–5
277. Submission 3.3.168, p 33
278. Submission 3.3.189, p 11
279. Submission 3.3.168, pp 35–36
280. Submission 3.3.209, p 8
281. Ibid
282. Submission 3.3.168, p 34; submission 3.3.174, pp 81–82

5.4.3 The Crown's position

The Crown submits that it was reasonable to exclude fisheries management tools from the bundle of protected customary rights recognised in the Takutai Moana Act, since those tools are already provided for in the existing fisheries regime.[283] Crown counsel reiterate that 'one of the Government's bottom lines for the policy process was the protection of existing fishing rights'.[284] Therefore, it was important that neither the protected customary rights nor the customary marine title provisions undermined existing rights.

The Crown submits that it was reasonable for fishing rights to be excluded from the bundle of protected customary rights because 'Māori commercial fishing rights have been settled and non-commercial customary fishing rights and interests have been comprehensively provided for under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.'[285] In particular, the Crown argues that under the 1992 Act:

- all current and future claims by Māori in respect of commercial fishing are finally settled;[286]
- claims by Māori in respect of non-commercial fishing continue to give rise to Treaty obligations on the Crown but are not legally enforceable;[287] and
- regulations must be – and have been – made to recognise and provide for customary food gathering and protected sites of customary food gathering.[288]

The Crown further notes that the Fisheries Act 1996 allows the Minister of Fisheries to temporarily close fishing areas or restrict fishing methods.[289] In doing so, Crown counsel elaborate,

> the Minister must consult those people he or she considers to be representative of persons having an interest in the species or in the effects of fishing in the area concerned, including tangata whenua, and provide for the input and participation of tangata whenua in the decision-making process, having particular regard to kaitiakitanga.[290]

The Crown draws further attention to possibilities under the Fisheries Act 1996 to provide 'for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article 11 of the Treaty of Waitangi', specifically for fisheries

283. Submission 3.3.187, p 154; submission 3.3.200, p 2
284. Submission 3.3.187, p 154
285. Ibid, p 154
286. Ibid, referring to section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
287. Submission 3.3.187, p 154, referring to section 10(d) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
288. Submission 3.3.187, pp 154–155, referring to section 10(c) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
289. Submission 3.3.187, p 156
290. Ibid, referring to section 186A of the Fisheries Act 1996.

waters that are significant to iwi or hapū, either as a source of food or for spiritual or cultural reasons.[291]

Finally, the Crown outlines how other legislation provides for managing customary food gathering. For example, it says, the Fisheries (Kaimoana Customary Fishing) Regulations 1998 allow tangata whenua to authorise customary non-commercial fishing within a defined area. These regulations also allow tangata whenua to apply for a mātaitai reserve, where commercial fishing can be generally prohibited.[292]

5.4.4 The Tribunal's analysis and findings

The Tribunal's jurisdiction to inquire into matters of fishing and fisheries is very limited. Specifically, section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 provides that all current and future claims regarding rights and interests of Māori in commercial fishing are settled. Accordingly, section 6(7) of the Treaty of Waitangi Act 1975 excludes commercial fishing and fisheries from the Tribunal's jurisdiction.

Furthermore, the Takutai Moana Act makes very few references to fishing rights and fisheries management, reflecting the Crown's wish to ensure that existing fishing rights (as provided for in other legislation) remain unaffected by the Takutai Moana Act.[293] The Act only briefly mentions fishing rights and fisheries management where it preserves those rights, where it exempts fishing-related activities from the scope of protected customary rights, and where it provides that wāhi tapu conditions 'may affect the exercise of fishing rights, but must not do so to the extent that the conditions prevent fishers from taking their lawful entitlement in a quota management area or fisheries management area.'[294]

We have already discussed the scope of protected customary rights and the legal effect of wāhi tapu conditions earlier in this chapter (see section 5.2 and section 5.3.3). As for the absence of any other specialised fishing-related provisions from the Act, because of the prior settlements, we do not consider their absence here constitutes a breach of Treaty principles. However, in section 6.5.3, we will discuss differences in the customary fishing regulations in the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 and the Takutai Moana Act.

5.5 Reclaimed Land

5.5.1 Overview

Section 29 of the Act defines reclaimed land as:

291. Submission 3.3.187, p 156 n, referring to section 174 of the Fisheries Act 1996.
292. Ibid, p 155
293. Ibid, p 154
294. Marine and Coastal Area (Takutai Moana) Act 2011, s 79(2)

permanent land formed from land that formerly was below the line of mean high-water springs and that, as a result of a reclamation, is located above the line of mean high-water springs, but does not include—

(a) land that has arisen above the line of mean high-water springs as a result of natural processes, including accretion; or

(b) structures such as breakwaters, moles, groynes, or sea walls

Sections 30 and 31 provide that, as a rule, reclaimed land vests in the Crown:

30 Certain reclaimed land to vest in Crown

(1) Subsection (2) applies to any reclaimed land that is formed from the common marine and coastal area as a result of a lawful reclamation.

(2) The full legal and beneficial ownership in any reclaimed land to which this subsection applies vests in the Crown absolutely if, after the commencement of this Act, a regional council approves a plan of survey, under section 245(5) of the Resource Management Act 1991, in respect of that land.

(3) Subsection (4) applies to reclaimed land that is formed from the common marine and coastal area as a result of an unlawful reclamation.

(4) The full legal and beneficial ownership in any reclaimed land to which this subsection applies vests in the Crown absolutely if the Minister signs a certificate that—

  (a) describes the position and extent of the reclaimed land; and

  (b) states that this subsection applies to the reclaimed land.

(5) A certificate signed under subsection (4) is, in the absence of proof to the contrary, sufficient evidence of the matter stated in the certificate.

(6) The Land Act 1948 does not apply to reclaimed land vested by this section.

31 New status of existing reclaimed land

(1) This section applies to reclaimed land (existing reclaimed land) that,—

  (a) immediately before the commencement of this Act, was—

    (i) part of the public foreshore and seabed under the Foreshore and Seabed Act 2004; or

    (ii) vested in the Crown under the Land Act 1948; or

    (iii) subject to the Foreshore and Seabed Endowment Revesting Act 1991; or

    (iv) otherwise owned by the Crown; and

  (b) is not set apart for a specified purpose.

(2) On the commencement of this Act, the full legal and beneficial ownership of all existing reclaimed land vests in the Crown absolutely and, so far as it is, immediately before that commencement, subject to the Foreshore and Seabed Act 2004, the Foreshore and Seabed Endowment Revesting Act 1991, or the Land Act 1948, ceases to be subject to those Acts.

(3) However, this section does not affect—

  (a) any lesser interest held, immediately before the commencement of this Act, by a person other than the Crown in existing reclaimed land; or

(b) the ownership in structures fixed to, or under or over, existing reclaimed land.

Under section 35, a developer or network utility operator may apply to the responsible Minister for the grant of an interest in reclaimed land that vests in the Crown:

35 Eligible applicants for interests in reclaimed land subject to this subpart

(1) A developer of reclaimed land subject to this subpart that has been, or is being, or is to be formed may apply to the Minister for the grant to the developer of an interest in that reclaimed land.

(2) A network utility operator may apply to the Minister for the grant to the network utility operator of a lesser interest in reclaimed land subject to this subpart that has been, or is being, or is to be formed on the ground that the lesser interest is required for the purposes of the network utility operation undertaken by the network utility operator.

(3) Subsection (4) applies if—
  (a) reclaimed land has been subject to this subpart for more than 10 years; and
  (b) no interest has been granted in that land; and
  (c) no current application for the grant of an interest in that land is awaiting the Minister's determination.

(4) If this subsection applies, any person may apply to the Minister for the grant to the person of an interest in the reclaimed land.

(5) A developer or other person who makes an application under this section becomes liable to pay any fees payable under regulations made under this Act.

(6) The fees referred to in subsection (5) are recoverable as a debt due to the Crown.

(7) In this section, network utility operator and network utility operation have the same meanings as in section 166 of the Resource Management Act 1991.[295]

Section 36 lists the matters that the Minister must determine and which criteria to take into account.

Section 37 creates a presumption that certain applicants are to be granted freehold interest in reclaimed land rather than lesser interests. These applicants are listed in section 37(2):

(a) any port company (as defined in section 2(1) of the Port Companies Act 1988):
(b) any port operator (as defined in Part 3A of the Maritime Transport Act 1994):
(c) the company (as defined in section 2 of the Auckland Airport Act 1987) that operates Auckland International Airport . . . :
(d) the company (as defined in section 2 of the Wellington Airport Act 1990) that operates Wellington International Airport . . . .

295. Subsection (7) was repealed on 24 August 2023 by section 805(3) of the Natural and Built Environment Act 2023.

5.5.2 The claimants' position

Claimants are critical of the Act's reclamation provisions because they vest ownership of reclaimed land in the Crown, 'irrespective of whether the reclamation was a breach of te Tiriti, or that the reclaimed areas are part of hapū domains.'[296]

Claimant counsel further argue that the Act's treatment of reclaimed land does not appropriately balance business and Māori interests. They say that the reclamation provisions 'explicitly privilege business interests' and that they 'were specifically designed to provide certainty for business and developer interests in reclamations.'[297] They add that the Crown's approach 'has denied an opportunity for a solution to be explored where potentially all parties' aspirations could be met.'[298]

Some claimants are concerned that the responsible Minister has discretionary powers to decide not to grant customary marine title holders who reclaim land in the relevant area an interest in that land.[299] They further point out that the Minister is under no duty to consider the interests of a customary marine title holder when determining applications for granting interests in reclaimed land to a developer or network utility provider.[300] Although counsel acknowledge in their submission that the Minister must take several matters into account that indirectly relate to the interests of customary marine title holders, they maintain that these matters do not necessarily capture 'all hapū with mana whenua interests.'[301]

Finally, claimants argue that the reclamation provisions extinguish customary rights in the common marine and coastal area without compensation.[302] They consider customary marine title holders should be compensated for reclamations in their customary marine title area.[303]

5.5.3 The Crown's position

The Crown submits that the Act's reclamation provisions provide potential benefits to Māori.[304] This is, Crown counsel explains, because:

- the term 'developer' includes Māori developers;
- any person (which naturally includes Māori) may apply to the Minister for an interest in the reclaimed land if, after 10 years, no interest has been granted and there is no current application for it to be granted;
- the Act creates a statutory presumption that the customary marine title group will be granted a freehold interest if it reclaims land in a customary marine title area; and

296. Submission 3.3.166, p 26
297. Ibid, p 24
298. Submission 3.3.201, p 20
299. Submission 3.3.164, pp 34–35
300. Ibid, p 35
301. Submission 3.3.158, pp 22–23
302. Submission 3.3.174, pp 183, 258
303. Submission 3.3.178, p 56
304. Submission 3.3.187, pp 203–204

- reclaimed land, if the developer disposes of their interest, must be offered to iwi and hapū in the area after it has been offered to the Crown.[305]

To claimants' concerns about the Minister's discretion under section 43 of the Act not to grant freehold interest to customary marine title holders who reclaim land, the Crown replies that this understates the Minister's obligation. The Minister can only decide not to grant a freehold license under narrowly defined circumstances, and customary marine title holders, like any other applicant for an interest in reclaimed land, have a right to seek a variation of the Minister's determination.[306]

With regard to the matters the Minister must take into account under section 36(2) of the Act, the Crown lists matters that are likely to require consideration of a customary marine title group's interests. These include

> any historical claims made under the Treaty of Waitangi Act 1975 in respect of the reclaimed land; the 'cultural value of the reclaimed land and surrounding area to tangata whenua'; and any natural or historic values associated with the reclaimed land.[307]

However, the Crown acknowledges that it is 'not clear from the documentary record' why section 36(2) of the Act does not specifically refer to groups that have obtained customary marine title. Crown counsel suggests that, possibly, 'it was not thought necessary because such groups may be able to exercise their RMA permission right to decide whether to give or decline permission for a proposed reclamation.[308] But Crown counsel also accept that there might be cases of reclamations where the RMA permission right does not apply.[309]

5.5.4 The Tribunal's analysis and findings

(1) *The Act's treatment of reclaimed land*

Reclaimed land is defined in the Act as 'permanent land formed from land that formerly was below the line of mean high-water springs and that, as a result of a reclamation is located above the line of mean high-water springs'.[310] The Act's provisions on reclaimed land are intended 'to provide certainty to business and development interests in respect of investments in reclamations and to balance the interests of all New Zealanders, including their interests in conservation'.[311] We note that the Crown's policy on reclaimed land was focussed on ports. The

305. Ibid, pp 203–204
306. Ibid, pp 204–205
307. Ibid, p 205
308. Ibid
309. Ibid, pp 205–206
310. Marine and Coastal Area (Takutai Moana) Act 2011, s 29(1). The term does not include 'land that has arisen above the line of mean high-water springs as a result of natural processes, including accretion' or 'structures such as breakwaters, moles, groynes, or sea walls'; see also section 13 of the Act in this context.
311. Ibid, s 29(2)

2010 public consultation document advised that '[p]ort companies are involved in reclamations, and they have a particular need for certainty. The government is considering how to provide this certainty.'[312]

There was no change to this policy as indicated by the Honourable Mr Finlayson during the hearing. Asked in more detail about the purpose of the reclamation provisions, he said 'it was just the underpinning principle . . ., as we know from the Ports Reform in the late 1980s, how fundamental ports are to the welfare of all of us and how we need to make sure that they are able to operate for the benefit of everyone efficiently and economically'.[313] However, the scope of the reclamation provisions goes far beyond just ports or even significant infrastructure.[314] The relevant section 30 provides 'any reclaimed land that is formed from the common marine and coastal area as a result of a lawful reclamation' vests in the Crown absolutely, provided a regional council approves a plan of survey.[315] Even unlawfully reclaimed land vests in the Crown if the responsible Minister signs a certificate describing the land's position and extent.[316] Section 31 provides that any existing reclaimed land (reclaimed before the commencement of the Act) also vests in the Crown unless it was set apart for a specified purpose.[317] This does not affect a lesser interest held by a person other than the Crown in the existing reclaimed land or the ownership of structures fixed to, under, or over existing reclaimed land. Crown counsel could not explain why the scope of the reclamation provisions was so much wider than necessary to cover ports, as the following exchange between Judge Armstrong and Geoff Melvin, Crown counsel, demonstrates:

> **Q.** . . . Why was [the reclamation provision] worded so widely that it includes all reclamations?
> **A.** We're not sure of the answer to that question Sir. Apart from perhaps for the desirability of having a comprehensive regime relating to reclamations.
> **Q.** What about unlawful reclamations? Are you aware of what the idea was there?
> **A.** No.[318]

In the *Re Edwards (Te Whakatōhea No 2)* decision, Justice Churchman summarised the effect of the Act's subpart on reclamation thus:

> Th[e] subpart . . . sets out a range of provisions which comprehensively vest reclaimed land from the common marine and coastal area as the absolute property of

312. 'Reviewing the Foreshore and Seabed Act 2004: Consultation Document', no date (CLO.009.0294), p 45 (doc B3(a), p [15439])
313. Transcript 4.1.9, p 155
314. Marine and Coastal Area (Takutai Moana) Act 2011, s 29(2)
315. Ibid, s 30(1)–(2)
316. Ibid, s 30(3)–(4)
317. This does not include a lesser interest in the reclaimed land held by a person other than the Crown or the ownership of structures fixed to, under or over reclaimed land: see Marine and Coastal Area (Takutai Moana) Act 2011, s 31(3).
318. Transcript 4.1.11, p 380

the Crown, outside of the limited exceptions in subpart 3 of the Act. It will be apparent that applications for PCR and CMT over reclaimed land that is subject to the subpart cannot succeed, given that such land is entirely vested in the Crown.[319]

The effect of these provisions is to extinguish any Māori customary interests in the reclaimed land, as Māori cannot receive protected customary rights or customary marine title with regard to reclaimed land. There is no provision for the payment of compensation for the extinguishment of these rights. This is even more egregious when it comes to unlawful reclamations. While that term is not defined, it would likely include land reclaimed without a resource consent, and without obtaining permission from the customary marine title holder. Those are the two main protections available for Māori to recognise and protect their interests in te takutai moana (participating in the RMA regime and exercising the RMA permission right). Yet, if a developer circumvents those requirements and reclaims the land illegally, the land still vests in the Crown with no compensation for Māori.

(2) *Interest in reclaimed land*

A developer of reclaimed land and a network utility operator can apply to the Minister to receive a freehold or lesser interest in reclaimed land. Where no interest has been granted, there are no outstanding applications, and the reclaimed land has been subject to the Act for more than 10 years, any person can apply for an interest in the reclaimed land.[320] Customary marine title holders cannot obtain an interest in reclaimed land unless they are the developer or the exception in section 35(4) applies (which is available to the public generally). Where an application is made, the Minister can decide whether to grant an interest and whether it should be a freehold or lesser interest. When making this decision the Minister must take into account 'whether any historical claims have been made under the Treaty of Waitangi Act 1975 in respect of the reclaimed land or whether there are any pending applications under Part 4'.[321] Surprisingly, the Act does not expressly require the Minister to take into account whether a customary marine title was granted for the area (only whether there is an outstanding application for one). However, it does require the Minister to take into account 'the cultural value of the reclaimed land and surrounding area to tangata whenua'.[322] This is sufficiently wide to (likely) include the grant and holder of a customary marine title.

Nor is there any express provision requiring the payment of compensation to the customary marine title holder (or the applicant seeking a customary marine title), if an interest in the reclaimed land is granted to a third party. However, section 36(1)(e) provides that the Minister must determine any consideration for the grant of the interest 'whether by payment of price, rental or other charge, or by way of set-off, or in whole or partial settlement of any claim, including any

319. *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, para 239
320. Marine and Coastal Area (Takutai Moana) Act 2011, s 35
321. Ibid, s 36(2)(e)
322. Ibid, s 36(2)(f)

claim under the Treaty of Waitangi Act 1975'. Again, this is sufficiently wide as to (likely) allow the payment of compensation to a customary marine title holder (or applicant). There is a presumption that a freehold interest will be granted to a port operator, a port company or the companies that operate Auckland and Wellington International airports.[323] There is also a presumption that a freehold interest will be granted to a customary marine title holder where they are the developer of the reclaimed land and it is within the customary marine title area.[324]

Where an interest in the reclaimed land is granted, the holder of that interest can dispose of it by first offering it to the Crown, then to iwi and hapū within the area, and finally to the public.[325]

Developers and network utility operators can apply for an interest in the reclaimed land, an option not available to Māori unless they are the developer, or the exception in section 35(4) applies (which is available to the public generally). When considering whether to grant an interest, the Minister must take Māori interests into account and can grant compensation to Māori (though the provisions recognising this could be clearer). If these interests are disposed of, Māori are offered the second right of refusal after the Crown. We acknowledge there is some recognition of Māori rights in these provisions, though it does not make up for the overall shortcomings of the reclamation regime. We also consider that iwi and hapū should have the first right of refusal (before the Crown) to acquire the interest in the reclaimed land, given that Māori customary rights are extinguished by the vesting of the land in the Crown.

(3) *Result*

Overall, we find that the regime for reclaimed land constitutes a significant Treaty breach. The Crown policy behind this regime was to protect ports. Yet, the provisions in the Act were extended to all include all reclamations (existing, new, and unlawful). The Crown could not explain why the regime was expanded in such a comprehensive way. The regime vests reclaimed land in the Crown, extinguishing Māori customary rights and preventing the grant of a customary marine title and protected customary rights, all without the payment of compensation. There is no balancing exercise here, this is not good government, and we thus find the Crown in breach of the principles of active protection and good government.

(4) *Prejudice*

The reclamation regime has caused,[326] and will likely continue to cause, significant prejudice to Māori, as it will extinguish their customary interests without payment of compensation.

323. Marine and Coastal Area (Takutai Moana) Act 2011, s 37
324. Ibid, s 43
325. Ibid, s 45
326. See *Re Edwards* (*Te Whakatōhea No 2*) [2021] NZHC 1025, paras 250, 271.

(5) *Recommendation*

If this regime is maintained we recommend that compensation should be paid to affected iwi, hapū, and whānau for all reclaimed land vested in the Crown. We also recommend amending section 45 of the Act so that any offer to dispose of an interest in reclaimed land is first made to iwi, hapū, and whānau in the area, secondly to the Crown, and then finally to the public.

5.6 Summary

In this chapter, we have considered whether the individual rights available under the Takutai Moana Act are Treaty compliant.

Regarding protected customary rights, we found that some exceptions – spiritual activities being exempt from protected customary rights and aquaculture activities being allowed to continue even if they adversely affect protected customary rights – amount to breaches of the principle of partnership.

Regarding customary marine title, we focused on resource management and conservation permission rights, limitations on the alienation of these permission rights, the wāhi tapu protection right, and the right to create a planning document. We found that, for different reasons, these rights breach Treaty principles. The main reasons were the following:

- the impact of permission rights is severely undermined by the exceptions of accommodated activities and deemed accommodated activities;
- the Crown has prevented customary marine title holders from granting a lease or a license over a customary marine title area without providing an adequate regulatory substitute;
- the wāhi tapu protection right does not allow Māori to effectively protect wāhi tapū and wāhi tapu areas; and
- the CMT planning document provisions fail to achieve a fair and reasonable balance between Māori and other public and private interests.

Finally, the chapter also covers the overarching topics of fishing rights and fisheries management and the legal status of reclaimed land. We did not consider the absence of any other specialised fishing-related provisions from the Act a breach of Treaty principles. However, we found that the reclamation regime is in breach of the Treaty principles of active protection and good government, as it vests reclaimed land in the Crown without compensation for Māori who have customary interests in that land.

CHAPTER 6

IS THE OVERALL LEGAL EFFECT OF THE RIGHTS AVAILABLE UNDER THE ACT TREATY COMPLIANT?

6.1 How We Approach this Chapter

Having considered the rights available under the Act individually in chapter 5, we now consider the combined legal effect of all rights, asking whether they sufficiently protect the tino rangatiratanga of Māori over te takutai moana, whether they amount to equitable treatment compared to non-Māori rights holders, and whether they treat all Māori equally.

6.2 Overview

Part 3 of the Takutai Moana Act sets out the rights available to give effect to Māori customary interests. Subpart 1 sets out Māori participation in conservation processes in te takutai moana. Section 49 provides that the Director-General of Conservation must have particular regard to the views of affected iwi, hapū, or whānau when considering applications or proposals for certain conservation processes. Section 50 requires marine mammal officers to have particular regard to the views of affected iwi, hapū, or whānau concerning marine mammals stranded in or on the common marine and coastal area. These are the only limited participation rights directly available to Māori that do not require an application process.

More substantial rights, in the form of protected customary rights and customary marine title, are set out in subparts 2 and 3 of part 3 the Act. We have discussed in chapter 4 the statutory tests and application procedures by which these bundles of rights can be sought. Now we turn to the nature and effects of the available rights themselves.

6.3 The Claimants' Position

Claimants make extensive submissions on the adequacy of the overall bundles of rights available under the Takutai Moana Act. Their arguments fall into four broad groups – namely, that the available rights are:

- less than what is required to protect Māori tino rangatiratanga over te takutai moana;
- less than a fair balance between Māori and other public and private interests would require;

Customary Marine Title

The main effect of a statutory protected customary right is that the recognised protected customary activity in question does not require a resource consent and is exempt from certain occupation charges and royalties that might otherwise apply. This is set out in section 52 of the Act.

Section 60 of the Act outlines the effect of a customary marine title:

60 Scope and effect of customary marine title

(1) Customary marine title—
- (a) provides an interest in land, but does not include a right to alienate or otherwise dispose of any part of a customary marine title area; and
- (b) provides only for the exercise of the rights listed in section 62 and described in sections 66 to 93; and
- (c) has effect on and from the effective date.

(2) A customary marine title group—
- (a) may use, benefit from, or develop a customary marine title area (including derive commercial benefit) by exercising the rights conferred by a customary marine title order or agreement, but is not exempt from obtaining any relevant resource consent, permit, or approval that may be required under another enactment for the use and development of that customary marine title area; and
- (b) is not liable for payment, in relation to the customary marine title area, of—
  - (i) coastal occupation charges imposed under section 64A of the Resource Management Act 1991; or
  - (ii) royalties for sand and shingle imposed by regulations made under the Resource Management Act 1991.

The Act also gives an overview of the rights conferred by customary marine title in section 62:

62 Rights conferred by customary marine title

(1) The following rights are conferred by, and may be exercised under, a customary marine title order or an agreement on and from the effective date:
- (a) a Resource Management Act 1991 (RMA) permission right (see sections 66 to 70); and
- (b) a conservation permission right (see sections 71 to 75); and
- (c) a right to protect wāhi tapu and wāhi tapu areas (see sections 78 to 81); and
- (d) rights in relation to—
  - (i) marine mammal watching permits (see section 76); and

(ii) the process for preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement (see section 77); and

(e) the prima facie ownership of newly found taonga tūturu (see section 82); and

(f) the ownership of minerals other than—

(i) minerals within the meaning of section 10 of the Crown Minerals Act 1991; or

(ii) pounamu to which section 3 of the Ngai Tahu (Pounamu Vesting) Act 1997 applies (see section 83); and

(g) the right to create a planning document (see sections 85 to 93).

- less than the rights that come with fee simple title and therefore discriminatory against Māori; and
- less than the rights that are granted to other Māori groups.

Therefore, claimants submit the Act is in breach of numerous Treaty principles, including the principles of rangatiratanga, active protection, partnership, equity, equal treatment, and redress.[1]

6.3.1 Rights are less than what is required to protect Māori tino rangatiratanga over te takutai moana

Claimants submit that the scope and effect of the Act's provisions fail to actively protect the relationship between Māori and te takutai moana, in particular their mana and tino rangatiratanga, as well as their ability to perform kaitiakitanga duties.[2] This affects them prejudicially, they say.[3] The provisions of the Act do not provide for 'full recognition of applicable tikanga' either, claimants note.[4] They also claim that the Act is internally inconsistent, submitting that the rights available under the Act are 'not the same as the inherited rights and interests' referred to in the preamble.[5] Rather, customary rights are only given effect in accordance with the terms and conditions set out in the Act.[6] Claimants go further, describing the available rights as 'unreasonable'[7] and 'so limited that they are almost pointless'.[8]

1. Submission 3.3.138, p 36; submission 3.3.146, p 3; submission 3.3.164, p 39; submission 3.3.168, pp 6–7; submission 3.3.169, pp 4–5
2. Submission 3.3.142, p 6; submission 3.3.145, p 4; submission 3.3.148, pp 7–9; submission 3.3.164, pp 39–40; submission 3.3.168, p 7; submission 3.3.169, p 5; submission 3.3.173, pp 2, 7; submission 3.3.175(b), p 16; submission 3.3.183, p 3
3. Submission 3.3.175(b), p 16
4. Submission 3.3.141, p 10; submission 3.3.154, p 1
5. Submission 3.3.164, p 8
6. Submission 3.3.149, pp 23, 30, 33
7. Submission 3.3.159, p 15
8. Submission 3.3.137(b), p 133

Claimant Bella Thompson and witness Robert Willoughby, on behalf of the Rewha and Reweti Whānau, say that the rights are 'insufficient and abhorrent'.[9] Likewise, claimant witness Mylie George, of Ngātiwai ki Whangaruru, said that 'nothing in this legislation atones for the Crown's original sin of confiscating our Foreshore and Seabed in 2004'.[10] Furthermore, claimants point to the 'severe limitations' imposed on the awards for protected customary rights and customary marine title; these have the effect of extinguishing the customary title of whānau, hapū, and iwi, and are therefore in breach of the Treaty.[11]

Claimants also submit on the adequacy of customary marine title in particular, which they characterise as a 'relatively weak' and 'significantly diminished award' that is 'more symbolic' than effective in facilitating Māori interests.[12] It is 'all shiny on the outside – but there is nothing in it', say one claimant group.[13] Other claimants consider customary marine title to be a 'misnomer', arguing that what is meant by the term is neither customary nor a title.[14] It is misleading to call it a title, the claimants say, given that customary marine title contains no right of exclusive control or to use it for economic advantage.[15] And it cannot be called customary, given that it does little 'to genuinely embody Māori interests', even though it does allow Māori to protect wāhi tapu.[16]

Claimants argue that neither the wāhi tapu provisions under the Takutai Moana Act nor the rāhui provisions under fisheries legislation, can give effect to all types of rāhui that exist under tikanga.[17] The Act provides only for permanent rāhui to protect wāhi tapu sites. Options for temporary rāhui under the Fisheries Act 1996, on the other hand, are limited to 'temporary closures of fishing areas, and . . . to consideration of fish stocks and customary fishing practices'.[18] As a result, claimants argue, neither the Fisheries Act 1996 nor the Takutai Moana Act cover the whole spectrum of rāhui. For example, temporary rāhui following drownings at sea are not provided for.[19] In joint closing submissions, counsel allege that the Crown originally considered options for this type of rāhui, but later abandoned them without justification.[20] Claimants submit that the Crown's failure to provide for this contingency compromises their rangatiratanga and ability to exercise kaitiakitanga.[21]

9. Document B21, p 6
10. Document B77, p 8
11. Submission 3.3.182, pp 2–3
12. Submission 3.3.137(b), pp 77–78; submission 3.3.156, p 8; submission 3.3.182, p 183
13. Submission 3.3.164, p 3
14. Submission 3.3.157, p 13
15. Submission 3.3.137(b), pp 87–88; submission 3.3.140, para 6; submission 3.3.168, p 26
16. Submission 3.3.182, p 183
17. Submission 3.3.164, pp 6–9
18. Submission 3.3.160, p 39
19. Submission 3.3.85, pp 3–4; submission 3.3.160, pp 38–39
20. Submission 3.3.168, pp 30–31, referring to transcript 4.1.9, p 562; see also submission 3.3.187, pp 158–159.
21. Submission 3.3.202, p 8

Claimants consider the principle of active protection particularly relevant to the adequacy of the rights the Act provides, and state that where taonga are involved, 'the principle of active protection is amplified'.[22] Furthermore, claimants explain that because the Foreshore and Seabed Act 2004 left te takutai moana in a vulnerable state, the Crown needs to take particularly decisive active protection measures.[23] They argue that, through the Takutai Moana Act, the Crown has not taken 'adequate or appropriate steps' to actively protect property rights, management rights, self-regulation, tikanga Māori and the claimants' relationship with their taonga.[24]

6.3.2 Rights are less than a fair balance between Māori interests and other public and private interests would require

Claimants argue that the rights available under the protected customary rights and customary marine title regimes are not the result of fair balancing between 'the rights of both peoples' or between 'the claimants' rights and other policy objectives'.[25] They say that the Act prioritises the rights of third parties, such as the general public's right of access, over Māori customary rights.[26] Furthermore, claimants argue that the awards under the current regulatory regime 'are not a fair exchange for what was taken away', and that there is a mismatch between the high threshold that must be met to obtain rights under the Act and the meagre substance those rights deliver.[27] Some claimants argue that the rights available under the Act have not substantially added to the pre-existing regulatory rights that tangata whenua already hold under the Resource Management Act 1991.[28] Specifically, claimants say that 'the right to submit a planning document, the right to give permission to an RMA consent or a conservation permission . . . already exist, or are reduced or negated'.[29]

Regarding mineral ownership, one claimant counsel submits that the Crown's argument that its ownership of nationalised minerals was not the result of the Takutai Moana Act fails to 'ameliorate the fact that [Crown ownership] is inconsistent with Te Tiriti's guarantee of resources'.[30] The claimants also argue that the Act's provisions around the ownership of minerals privilege the interests of the Crown and of private landowners over Māori interests.[31] They are also critical of

22. Submission 3.3.158, p 34
23. Ibid, p 17; submission 3.3.174, pp 127, 130
24. Submission 3.3.173, p 7
25. Submission 3.3.168, p 6; submission 3.3.183, p 3
26. Submission 3.3.136, p 2; submission 3.3.154, p 2; submission 3.3.164, p 12; submission 3.3.203, pp 3, 5
27. Submission 3.3.171, p 25; see also submission 3.3.149, p 34; submission 3.3.159, pp 10, 16, 18.
28. Submission 3.3.109, pp 6–8; submission 3.3.164, pp 3, 23–24; submission 3.3.170, pp 28–29; submission 3.3.178, p 45; doc B1, pp 3–5
29. Submission 3.3.164, p 3
30. Submission 3.3.192, p 7
31. Submission 3.3.137(b), p 87

the fact that the Act vests reclaimed land, whether reclaimed lawfully or unlawfully, in the Crown.[32]

Overall, claimants consider the balance of interests the Crown struck in developing the Act 'did not give proper weight to Māori and the Treaty' and is inconsistent with the principle of good government and the Crown's fiduciary duty of good faith.[33] Claimants say that this is prejudicial to them.[34]

6.3.3 Rights are less than the rights that come with fee simple title and therefore discriminatory against Māori

Claimants argue that the rights available under the Act are lesser rights than those available immediately after the Court of Appeal's *Ngāti Apa* decision, which they say were the rights of fee simple title.[35] They consider this discrepancy amounts to an 'expropriation', 'confiscation', 'another Crown land grab', and outright 'theft'.[36] '[W]ith the stroke of a pen', claimants state, 'the Crown has taken away what are essentially property rights belonging to Maori and given some of those rights to the public'.[37] They add that Māori did not give consent to, nor can receive any compensation for, their loss of property rights.[38] In contrast, claimants point out that local authorities – unlike Māori – may apply for compensation for the loss of areas that the Act vested in the Crown.[39]

Some claimants compare the access to justice they had in 2003, immediately after the *Ngāti Apa* decision, with today, arguing that they are 'left with a mere shadow' of their former customary interests and access to the Courts.[40] They say that because the Act removes the jurisdiction of the Māori Land Court and the High Court to consider whether customary title under Te Ture Whenua Maori Act 1993 or aboriginal title exists, it therefore breaches the principles of equity and options.[41] Some claimants make other comparisons. For example, claimants note that the rights under the Takutai Moana Act are 'narrower and much more limited rights than the claimants' ancestors would have enjoyed as of 1840'.[42] Claimants also make the point that the 'common law doctrine of aboriginal title should be regarded as a minimum protection for Treaty property rights'.[43] The submissions on behalf of claimant Muriwai Maggie Jones refer to even earlier times, stating that the available rights today 'are in no way equal to the interests that Ngai Tai

32. Submission 3.3.166, pp 24–26; see also submission 3.3.201, p 20.
33. Submission 3.3.169, p 6; submission 3.3.183, p 3
34. Submission 3.3.154, p 16
35. Submission 3.3.148, p 7; submission 3.3.169, pp 8–10, 19; submission 3.3.177, p 10; submission 3.3.182, pp 171, 187; submission 3.3.201, pp 18–19
36. Submission 3.3.157, p 4; submission 3.3.164, p 4; submission 3.3.201, p 18; doc B28, para 69
37. Submission 3.3.136, p 6
38. Submission 3.3.140, paras 5, 24, 48; submission 3.3.157, p 33; submission 3.3.174, pp 185–186; doc B28, para 69
39. Submission 3.3.156, p 18; submission 3.3.174, p 258
40. Submission 3.3.136, pp 4–5; submission 3.3.173, p 25
41. Submission 3.3.138, p 36
42. Submission 3.3.155, pp 2–3; see also doc B28, para 69.
43. Submission 3.3.211, p 6

held customarily under tikanga and have been enjoying since their tupuna arrived in Aotearoa over 30 generations ago'.[44]

Claimants submit that the Act's differentiation between private land and the common marine and coastal area breaches the principle of equity.[45] They argue that the no-ownership regime awards Māori fewer rights than those who own freehold land in the marine and coastal area.[46] Claimants consider it discriminatory that customary marine title does not confer fee simple estate on its holders.[47] Compared with owners of non-Māori land, this treatment breaches the principle of equity, claimants argue.[48] Claimants submit that there are fewer 'controls and Crown oversight on what a private title holder can do when compared to the many limitations placed on a [customary marine title] award', and they dispute that rights under protected customary rights and customary marine title are greater than fee simple title.[49] According to claimants, the opposite is true.[50] They say there are several differences between customary marine title and fee simple title:

- First, customary marine title does not allow its holders to exclude others from accessing and using the area in question, which is one of the foundational principles of fee simple title at common law.[51] The public right to access applies only to the common marine and coastal area where Māori can obtain customary marine titles; it does not apply to specified freehold land.[52] Fee simple title holders, on the other hand, can exclude anyone from the enjoyment of their land, claimants argue.[53]
- Secondly, the ability to exclude others gives fee simple title holders a more 'effective veto' on various third-party activities on their land than those holding customary marine title, claimants allege. Such activities include all resource consent applications, conservation applications, marine mammal watching activities, activities permitted by the New Zealand coastal policy statement, or activities permitted by the New Zealand Historic Places Trust, Department of Conservation, or the Ministry of Fisheries.[54] Claimants consider this discrepancy between a fee simple title and a customary marine title to be in breach of the Treaty.[55]
- Thirdly, claimants point to another, more specific, discrepancy, this one between Māori freehold land and customary marine title. Under Te Ture

44. Submission 3.3.145, pp 8–9
45. Submission 3.3.82, p 11; submission 3.3.137(b), pp 104–108; submission 3.3.156, p 20; submission 3.3.157, p 33; doc B77, p 3
46. Submission 3.3.137(b), pp 59–61
47. Submission 3.3.138, p 37; submission 3.3.174, p 12; submission 3.3.206, pp 25–26
48. Submission 3.3.137(b), pp 58, 104–108
49. Memorandum 3.3.137(a), pp 5–6; submission 3.3.138(b), p 1; submission 3.3.160, p 42; submission 3.3.174, p 180
50. Submission 3.3.206, pp 29–30
51. Submission 3.3.138, p 39
52. Ibid; submission 3.3.142, pp 37–39; submission 3.3.206, p 15; submission 3.3.208
53. Submission 3.3.138(b), p 1
54. Ibid; memorandum 3.3.174(c), pp 7–8, 15–17
55. Submission 3.3.142, pp 37–39

Whenua Maori Act 1993, Māori freehold land includes a right to alienate the land, as well as to mortgage, lease, or license it (if approved by the Māori Land Court).[56] Claimants say the same is not true for a customary marine title, which allows customary marine title groups to obtain a commercial benefit only by charging third parties for giving permission to resource consents ('side agreements').[57]

6.3.4 Rights are less than the rights granted to other Māori groups

Claimants submit that, in designing the Takutai Moana Act, the Crown has not only failed to treat Māori and non-Māori fairly and equally, but also to treat Māori tribes fairly compared with one another.[58] Counsel for Ngāti Pāhauwera and Rongowhakaata argue that 'legislation that treats one Māori group differently to all other Māori groups is in breach of the principle of equity'.[59]

Claimants compare the rights available under the Takutai Moana Act primarily with the rights available under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (hereinafter 'the Ngāti Porou Act 2019'). They argue that ngā hapū o Ngāti Porou were able to gain advantages that are outside of the Takutai Moana Act's scope,[60] and that this is a 'differential' – or, more specifically, a 'preferential' – treatment of ngā hapū o Ngāti Porou in comparison with all other Māori.[61] Rongowhakaata, who are an interested party in this inquiry, are particularly concerned about this, because the scope of the Ngāti Porou Act 2019 overlaps with their application area under the Takutai Moana Act.[62]

Specifically, claimants say rights available under customary marine title differ from those provided for by the Ngāti Porou Act 2019 in several significant ways:[63]

- First, claimants point out that ngā hapū o Ngāti Porou have had four years longer than any other group in Aotearoa New Zealand to apply for recognition of customary rights in the marine and coastal area. This is because the statutory application deadline under the Ngāti Porou Act 2019 was two years from the Act taking effect (meaning applications could be made until May 2021).[64]
- Secondly, claimants say that the awards under the Ngāti Porou Act 2019 go further than under the Takutai Moana Act's customary marine title. The Minister of Conservation and the Director-General of Conservation do not have the power to override the decision made by the Ngāti Porou customary

56. Submission 3.3.208, pp 6–7
57. Ibid, p 7
58. Submission 3.3.155, pp 7, 32–33; submission 3.3.156, p 20; submission 3.3.157, p 33; submission 3.3.164, p 4
59. Submission 3.3.138, p 73; submission 3.3.205, paras 13–14
60. Submission 3.3.145, p 12; submission 3.3.156, pp 10–11
61. Submission 3.3.138, pp 47–55; submission 3.3.164, p 26; submission 3.3.205, paras 15–16
62. Submission 3.3.138, p 7
63. Submission 3.3.203, pp 8–13
64. Submission 3.3.138, p 52; see also Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, ss 95(2), 98(2).

marine title hapū about extending or declaring a marine reserve or conservation protected area while this is the case under the Takutai Moana Act.[65] Furthermore, claimants explain that the wording relating to the consideration of the environmental covenant under the Ngāti Porou Act 2019 ('must be considered' and 'must treat . . . as a relevant matter') is stronger than the Takutai Moana Act's wording requiring the views of customary marine title holders to be considered when officials are developing coastal policy statements ('must seek and consider').[66] Claimants also argue that ngā hapū o Ngāti Porou have the ability to appeal to the Environment Court if the Regional Council does not 'change or vary a key public document in accordance with Ngā Hapū o Ngāti Porou environmental covenants'.[67]

- Thirdly, claimants submit that the Takutai Moana Act does not go as far as the Ngāti Porou Act 2019 in terms of recognising fishing rights.[68] While the former 'fails to give increased recognition of customary fishing rights to Māori', the latter afford them 'significant recognition'.[69] Claimants seek a Tribunal recommendation to the effect that legislation should 'provide for whānau, hapū, or iwi to exercise authority over commercial or recreational fishing' in accordance with the Treaty.[70]
- Finally, claimants argue that ngā hapū o Ngāti Porou receive more funding and redress than other groups in Aotearoa New Zealand.[71] The Takutai Moana Act 'simply does not provide for outcomes as generous as what Ngati Porou received', claimants note.[72] Claimants argue the Ngāti Porou Act 2019 demonstrates that the Crown had the option to provide a higher level of redress to applicants under the Takutai Moana Act but chose not to.[73]

Claimants consider the Takutai Moana Act's preferential treatment of ngā hapū o Ngāti Porou in comparison with other iwi a breach of the principle of equal treatment.[74] Claimants emphasise that the Tribunal should make findings and recommendations on this matter. At the very least, they say the Tribunal should comment on it, despite the Crown's submission that comparisons with the Ngāti Porou Act 2019 should be approached cautiously.[75]

65. Submission 3.3.164, p 19; see also Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, ss 87–91; compare Marine and Coastal Area (Takutai Moana) Act 2011, s 74.
66. Submission 3.3.164, pp 20–21; see also Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 31; compare Marine and Coastal Area (Takutai Moana) Act 2011, s 77.
67. Submission 3.3.164, p 24; see also Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 27. Note that the Gisborne District Council, which is responsible for environmental covenants of ngā Hapū o Ngāti Porou, is a unitary authority performing the tasks of a regional council in relation to the marine and coastal area.
68. Submission 3.3.174, p 81
69. Submission 3.3.168, pp 33–35
70. Submission 3.3.174, p 269
71. Submission 3.3.138, pp 52–53
72. Submission 3.3.201, p 6
73. Ibid, p 5
74. Submission 3.3.138, p 82
75. Submission 3.3.203, pp 8, 13

Apart from these comparisons with the rights available to ngā hapū o Ngāti Porou, claimants' joint closing submissions also draw attention to an agreement reached between the Crown and Ngāti Pāhauwera, which extends beyond the scope and effect of the Takutai Moana Act.[76] They also note that the Act does 'not provide a procedure that would result in outcomes that put coastal Maori on an equal footing to river and lake Maori'.[77] Finally, some claimants criticise an exemption under section 83 of the Act, which applies to Ngāi Tahu and concerns the ownership of pounamu; claimants say it is further evidence of the Act's mineral provisions giving one iwi preferential treatment over others.[78]

6.4 The Crown's Position

The Crown maintains, in summary, that:

- the rights conferred under the Takutai Moana Act are the result of balancing various competing interests;
- when assessing the adequacy of rights available under the Act, it is wrong to compare them with fee simple title; and
- where legislation applying to certain specific Māori groups has led to them receiving different treatment to Māori under the Takutai Moana Act, it is the result of the Crown honouring the commitments it made in prior negotiations with those Māori groups.[79]

6.4.1 The rights under the Act are the result of balancing various interests in te takutai moana

The Crown submits that the Act has several elements that 'provide for Māori self-regulation and the exercise of tikanga'. Crown counsel add that 'the Act does not preclude other elements or aspects of tikanga from continuing to be exercised by groups in respect of the takutai moana, even if they are not recognised under the Act'.[80]

In reply to claimants who compare the rights under the Act to the legal situation as at 1840, the Crown states that when it was developing the Act, it needed to consider the current situation (namely 2009–2011) and not 1840.[81] By 2009, public rights of navigation and fishing in the takutai moana were recognised by the New Zealand common law. Counsel refer to the *Ngāti Apa* judgment, where the Court of Appeal held 'that "property in sea areas could be held by individuals" but "would in general be subject to public rights such as rights of navigation"'.[82] It was therefore 'reasonable and appropriate', the Crown argues, 'to preserve public

76. Submission 3.3.137(b), pp 113–116
77. Ibid, pp 106–107
78. Ibid, p 131; submission 3.3.170, p 41
79. Submission 3.3.187, pp 19, 132–134, 178, 217–221
80. Ibid, p 141
81. Ibid, p 142
82. Ibid, pp 141–142, referring to *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 135 per Keith and Anderson JJ

access to the takutai moana, in addition to the common law rights of fishing and navigation.'[83]

The Crown submits that 'Treaty principles do not prescribe a particular course of action' the Crown must follow, only that the Act is 'developed in good faith' and that it 'actively protect[s] Māori interests'.[84] Crown counsel also note that 'the duty of active protection is not absolute or unqualified', and that 'the Crown is not required to go beyond what is reasonable in the prevailing circumstances'.[85] The Crown acknowledges that 'claimants view and interact with the takutai moana as a taonga' but considers that 'some caution is needed in characterising the entirety of the takutai moana as a taonga'. It is necessary to account for 'varying levels of interest' that, in turn, affect the nature of the Crown's obligation of active protection.[86]

The Crown further cites the Tribunal's finding in the *Ko Aotearoa Tēnei* report that 'the degree of protection to be accorded the Māori interest in any particular case . . . will depend on the nature and importance of the interest when balanced alongside the interests of other New Zealanders'.[87] According to the Crown, 'the importance of balancing competing interests . . . has particular relevance to this inquiry'.[88]

The Crown also addresses the absence of wāhi tapu protection from the rights that the Act grants under a protected customary right. Crown counsel note that the ability to place rāhui over wāhi tapu was originally included as a proposed award for customary rights (which later became 'protected customary rights').[89] (See section 5.3.3(4)(b).) However, the Crown decided at some point between the public consultation document being circulated and the Bill being drafted that the proposed award should be moved to the customary marine title regime instead.[90] Even without rāhui being expressly included, Crown counsel submit that the 'wāhi tapu provisions in the Act nevertheless provide some ability to impose rāhui (of a permanent nature) so as to exclude the public or public activities from areas where wāhi tapu are located'.[91] To support this argument, Crown counsel point to the High Court's *Re Edwards (Te Whakatōhea No 2)* judgment that rāhui could be exercised within a wāhi tapu location, provided that they 'comply with the identification of boundary requirements' of a wāhi tapu area.[92]

At the same time, the Crown acknowledges that it is 'unlikely' that the wāhi tapu provisions could in practice be used for issuing temporary rāhui because 'the scheme of the Act does not lend itself to seeking the inclusion of (or amendments

83. Submission 3.3.187, p 142
84. Ibid, p 69
85. Ibid, p 67
86. Ibid, p 69
87. Ibid, p 67
88. Ibid, p 68
89. Ibid, p 158.
90. Ibid, pp 158–159
91. Ibid, p 159
92. Ibid, referring to *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 389

to) wāhi tapu provisions at short notice'.[93] The Crown submits that its position on rāhui is 'an example of the balancing of interests that the Government needed to undertake when developing the policy underpinning the Act'.[94] The Crown needed to strike a compromise 'between the provision of public rights of access, navigation and fishing on the one hand, and the provision of an unencumbered ability for customary marine title holders to place rāhui on the other'.[95] The end-product of this balancing exercise – making permanent rather than temporary rāhui possible through the wāhi tapu provisions – is a reasonable position, the Crown contends.[96] Crown counsel cite two other points to support this argument – first, that:

> The Act does not prevent groups from continuing to impose rāhui (or to exercise other incidents of kaitiakitanga in accordance with tikanga (a point that was accepted by claimant witnesses)). The evidence of a number of witnesses in this inquiry was that the public tend to observe the imposition of rāhui in their rohe. This too was recognised by the Court in *Re Edwards*, and is given support by s 79(2) of the Act, which states that wāhi tapu conditions do not affect the exercise of kaitiakitanga by a customary marine title group in relation to a wāhi tapu or wāhi tapu area in the customary marine title area of the group.[97]

Crown counsel elaborate further that:

> There is also some ability to impose some forms of rāhui under the fisheries legislation and regulations (and claimant witnesses referred to instances where they had used these mechanisms). As set out earlier, regulatory measures are available under the Fisheries Act, the Fisheries (Kaimoana Customary Fishing) Regulations 1998 and the Fisheries (South Island Customary Fishing) Regulations 1999 to enable tangata whenua to apply for temporary closures or restrictions to recognise and provide for customary food gathering or the special relationship of an iwi with important fishing areas. These regulatory measures provide groups with an ability to impose some restrictions or prohibitions on fishing from time to time to improve fish stocks or to recognise cultural values relating to fishing.[98]

6.4.2 Comparing the rights conferred by customary marine title to fee simple title is misleading

The Crown submits that 'a comparison between the rights conferred by customary marine title and those that were potentially available immediately after *Ngāti Apa* cannot be made by simply drawing a bare comparison between customary marine title and a "fee simple title"'.[99] Rather, the Crown considers 'appropriate

93. Submission 3.3.187, p 159
94. Ibid, pp 159–160
95. Ibid
96. Ibid, p 160
97. Ibid, referring to *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, para 390
98. Submission 3.3.187, pp 160–161
99. Ibid, p 132

comparators' to be the rights conferred on a group that proves aboriginal title at common law in the High Court, or the rights conferred on a group that proves that the area in question is Māori customary land and obtains a vesting order (through which the area is changed to Māori freehold land).[100] However, the Crown argues that even drawing comparisons between customary marine title and these reference points must always be speculative. Because the Crown chose to adopt the Foreshore and Seabed Act 2004 instead of allowing the regime foreseen in the *Ngāti Apa* judgment to unfold, 'there is a real difficulty in predicting how either the High Court or Māori Land Court would have approached the determination of such applications'.[101]

In any case, neither the High Court nor the Māori Land Court would have been able to grant the equivalent of fee simple title as understood at common law, the Crown adds.[102] Summarising some scholarly works on New Zealand land law, the Crown submits that fee simple estate at common law comprises rights of possession (access and exclusion of others), use and enjoyment, and alienation.[103] Specified freehold land in the takutai moana, on the other hand, is 'subject to limits which prevent full "ownership" in a common law sense'. Specifically, it is subject to public rights of navigation and fishing under the Takutai Moana Act, and other restrictions imposed by relevant statutes such as the Resource Management Act 1991, the Crown Minerals Act 1991, or the Public Works Act 1981.[104] As the Crown explains, the Resource Management Act 1991 and the restrictions on land use that come with it apply to all land in Aotearoa New Zealand, 'regardless of title'. In the case of minerals, the Crown says that no private title holders – whether of the area that is on dry land or within the marine and coastal area – own all minerals under the land, because 'all petroleum, gold, silver and uranium existing in its natural condition in land' is, under section 10 of the Crown Minerals Act 1991, the property of the Crown. The Crown further says that its ownership of uranium specifically has 'strategic reasons' and is necessary for 'security reasons' and 'public safety'.[105] It points out that Crown ownership of nationalised minerals is not a concept that was introduced by the Takutai Moana Act.[106] Moreover, Crown ownership of other, non-nationalised minerals ceases for an area if customary marine title is granted there.[107] Finally, the Crown points out that the Government may take any type of private land for public purposes, such as the construction of certain infrastructure, in accordance with the requirements and procedures set out in the Public Works Act 1981.[108]

100. Ibid, pp 132–133
101. Ibid, p 133
102. Ibid
103. Ibid, pp 134–135
104. Ibid, pp 123, 134, 137–139
105. Ibid, pp 150–151
106. Ibid, p 150
107. Ibid, p 152
108. Ibid, pp 138–139

The Crown also submits there are legal restrictions that would have applied specifically to aboriginal title and Māori freehold land, had the Crown not decided to override the *Ngāti Apa* judgment by passing the Foreshore and Seabed Act 2004. Aboriginal title can only be alienated to the Crown, which holds the right of pre-emption, while 'almost all dealings' with Māori freehold land 'require the assistance or approval' of the Māori Land Court. There are significant restrictions on alienation of Māori freehold land in particular (including leasing for longer than three years, licensing, and mortgaging), the Crown submits.[109]

The Crown acknowledges that, in contrast to the public rights of navigation and fishing, the right of public access under section 26 of the Act does not apply to freehold land in te takutai moana.[110] It only applies to the common marine and coastal area. However, Crown counsel emphasise that the public right to access is not absolute, and that there was 'a sound policy rationale for preserving public access, in addition to the common law rights of fishing and navigation'.[111] Specifically, Crown counsel draw on 'the Ministerial Review Panel's view that any legislation should provide for (and define) reasonable public access'.[112] The Crown states that the panel observed that, 'over the last 100 years, a national culture had developed in which the coastal marine area was seen as "a public recreation ground that is the birthright of every New Zealander"'.[113]

Crown counsel explained that, in developing the Takutai Moana Act, Government officials had considered what legal scholarship refers to as the 'traditional incidents of fee simple title' to form the basis of customary marine title. However, they had to compromise on those 'traditional incidents' to reconcile customary marine title with the 'bottom lines' (preserving public access, rights of navigation, fishing rights, and other existing rights) the Crown had self-imposed.[114] Officials deemed exclusive possession and use, as well as unlimited management and capital gain rights, to be incompatible with these bottom lines.[115] The Crown adds that officials also considered the right to alienate land should not apply to Māori land in the marine and coastal area, given the 'unbroken, inalienable and enduring mana held by coastal hapū/iwi'.[116] Crown counsel argue that the inalienability of land in the marine and coastal area is consistent with findings the Tribunal made in its *Foreshore and Seabed* report (2004). Concerning the right to lease, license, or mortgage a customary marine title area, the Crown states that it had followed the Iwi Leaders Groups's view that 'the interest should not be able to be

109. Submission 3.3.187, pp 140–141
110. Ibid, p 124
111. Ibid, pp 90, 124
112. Ibid, p 90
113. Ibid, referring to Ministerial Review Panel, 'Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel Volume 1', 30 June 2009 (CLO.004.0441), p 12 (doc B3(a), p [25575])
114. Submission 3.3.187, p 135; see also 'Review of the Foreshore and Seabed Act 2004: Possible Awards in Recognition of Customary Title and Customary Rights', 5 October 2009 (CLO.010.1430), paras 8–9 (doc B3(a), pp [9843]–[9844])
115. Submission 3.3.187, pp 135–136
116. 'TOW (10) 5 Review of the Foreshore and Seabed Act 2004: Proposals for Public Discussion Document', 12 March 2010 (CLO.003.0018), paras 88–89 (doc B3(a), pp [11044]–[11045])

mortgaged or leased but could be licensed in some circumstances'.[117] Furthermore, the Attorney-General had considered it possible for customary marine title groups to charge third parties for giving permission to a resource consent to occupy the customary marine title area ('side agreements').[118]

The Crown accepts that 'equity' (which it does not distinguish from the principle of equal treatment) is relevant to evaluating claims concerning inequity of treatment between Māori and non-Māori, and between Māori groups.[119] However, the Crown considers it 'inapt' to compare applicants who must satisfy the statutory tests under the Act to 'those with existing interests in the takutai moana who have their interests "automatically recognised"'.[120]

The Crown submits that 'the Act is neither confiscatory in nature, nor does it extinguish customary rights', as the Crown 'did not forcibly acquire land or legal interests in land' through the Act.[121] Therefore, 'the common law presumption that there should be no expropriation of private property without compensation' does not apply, the Crown says.[122] Nevertheless, Crown officials developing the Act still sought to compensate customary marine title holders 'for the fact that the potential property rights award . . . would necessarily be diminished by accommodating the bottom lines of preserving public access, rights of navigation and fishing', as well as protecting other existing rights, but through 'regulatory rights' rather than through 'monetary compensation'.[123] The Crown disagrees with claimants who criticise these regulatory rights as insufficient, and highlights that 'the right to create a planning document and the rights to exercise RMA and conservation permission rights are valuable rights that are not available to private landowners.'[124] Furthermore, 'unlike activities undertaken by private landowners in respect of their own property', protected customary rights may be exercised by protected customary rights holders without a resource consent.[125]

As to the issue of compensation for affected local authorities under section 25 of the Act, the Crown submits that it is 'reasonable' to compensate local authorities 'for financial loss they have suffered as result of having acquired land by purchase'.[126] The Crown argues that the circumstances that entitle local authorities to compensation are narrowly defined. In their departmental report from 2011, Crown officials had expected 'very few, if any' such cases.[127]

117. Submission 3.3.187, p 136, referring to 'CAB (10) 435 Marine and Coastal Area (Takutai Moana) Bill: Approval for Introduction', 20 August 2010 (CLO.026.0157), para 30 (doc B3(a), pp [21351]–[21352]).
118. Submission 3.3.187, pp 137, 212
119. Ibid, pp 66–67
120. Ibid, p 122, quoting submission 3.3.174, p 257.
121. Submission 3.3.187, pp 112, 209
122. Ibid, p 209
123. Ibid, pp 209–210
124. Ibid, p 210
125. Ibid
126. Ibid, p 213
127. Ibid; see also Ministry of Justice, 'Departmental Report on Marine and Coastal Area (Takutai Moana) Bill', 4 February 2011, para 649 (doc B3(a), p [23377])

Where reclaimed land is concerned, the Crown 'acknowledges that the [Act's] reclamation provisions create the potential for customary marine title to be extinguished' and neither officials nor Cabinet appear to have considered 'the possibility of compensation for such extinguishment.'[128] However, a number of statutory safeguards exist:

- First, the Crown states that the Government intended that 'the customary marine title group may be able to exercise its RMA permission right to decline permission for a proposed reclamation.'[129] However, the Crown notes that this situation would arise only if 'the developer applies for a resource consent prior to commencing the reclamation, and the application is made after a group obtains customary marine title'. Moreover, the permission right 'might not apply to some reclamations' (for example, if they fall within the definition of accommodated activities).[130]
- Secondly, if a group's application for customary marine title has not yet been determined, the Minister is still required to take into account various factors when determining an application for the grant of an interest in the reclaimed land and whether it should be freehold land or a lesser interest. Such factors include 'the cultural value of the reclaimed land and surrounding area to tangata whenua' However, the Crown acknowledges that for certain applicants seeking a grant, such as port companies or operators, the Minister 'must proceed on the basis that the person is to be granted a freehold interest in the reclaimed land'.[131]
- Thirdly, Crown counsel state that if 'a proprietor who has been granted a freehold interest in reclaimed land' wishes to dispose of that interest, they must first offer the land to the Crown, and, if the Crown does not accept the offer, to all iwi and hapū within the area.[132] This, Crown officials had argued in their 2011 departmental report, 'recognises the unique connection of Māori with their rohe and affords them the opportunity to increase their land holdings within their rohe'.[133]

6.4.3 The Crown must honour its commitments made in negotiations under the 2004 Act and in Treaty settlement negotiations

The Crown states that the arrangements which claimants consider amount to unequal treatment among different Māori groups 'are the outcome of previous policy decisions and commitments made by the Government' and were 'agreed upon in the context of Treaty settlement negotiations and negotiations conducted under the 2004 Act'.[134]

128. Submission 3.3.187, p 213
129. Ibid, p 214
130. Ibid
131. Ibid, pp 214–215; see also Marine and Coastal Area (Takutai Moana) Act 2011, ss 36, 37.
132. Submission 3.3.187, p 215
133. Ministry of Justice, 'Departmental Report on the Marine and Coastal Area (Takutai Moana) Bill', 4 February 2011 (CLO.005.0302), para 984 (doc B3(a), p [23428])
134. Submission 3.3.187, p 217

Although section 126 of the Ngāti Porou Act 2019 removes the Tribunal's jurisdiction to inquire into this Act, the Crown accepts that it is within the scope of this inquiry to compare the rights available under the Takutai Moana Act with the rights available to ngā hapū o Ngāti Porou under the Ngāti Porou Act 2019.[135] In other words, as long as the adequacy of the the Ngāti Porou Act 2019 itself is excluded from consideration, the Tribunal may inquire into the Takutai Moana Act's adequacy by comparing it to the Ngāti Porou Act 2019. However, Crown counsel do note that only 'limited evidence has been put forward . . . in relation to Ngā Hapū o Ngāti Porou Act', and that the Tribunal should therefore be 'cautious' about comparing the rights 'on the basis of a bare comparison of the two statutes'.[136] In her evidence during stage 1 of this inquiry, Doris Johnston, general manager of Te Arawhiti since 2018, explained that the Ngāti Porou Act 2019 gives effect to an amended deed of agreement and 'provides a process for the recognition of customary rights'.[137] However, Crown counsel draw attention to the fact that neither 'Ms Benesia Smith nor Ms Johnston's evidence addresses the circumstances that led to the conclusion of the original or amended deed of agreement'.[138] Therefore, the Crown argues, 'the Tribunal is not well-informed on the policy rationale for those differences and the justification for including certain provisions in Ngā Hapū o Ngāti Porou Act'.[139]

The Crown maintains that claims of inconsistency between the Takutai Moana Act and the Ngāti Porou Act 2019 are inaccurate.[140] The Crown argues that the latter is borne of different circumstances, because it was the outcome of negotiations initiated under the Foreshore and Seabed Act 2004.[141] This also applies to the funding for implementation costs agreed with ngā hapū o Ngāti Porou in 2008.[142]

With regard to ownership of pounamu, the Crown submits that the exception for Ngāi Tahu was again the outcome of a negotiated Treaty settlement with the iwi, and that it was 'entirely reasonable' for the Takutai Moana Act to preserve that outcome. The Crown argues that the Act 'would have been inconsistent with Treaty principles had it not ensured the integrity of the settlement with Ngāi Tahu'.[143]

6.5 The Tribunal's Analysis and Findings

In chapter 5, we have analysed discrete issues that claimants argue arise from the rights available under the Takutai Moana Act, assessing them mainly against the principle of partnership. Now we turn to the overall Treaty compliance of those

135. Ibid, pp 14–15
136. Ibid, p 14
137. Document A131(n), p 49
138. Submission 3.3.187, p 15
139. Ibid
140. Ibid, p 220
141. Ibid
142. Ibid, p 216
143. Ibid, p 218

rights when considered collectively. In this overall analysis, we assess them against the following Treaty principles:

- The principle of active protection, which applies to the question of whether the rights protect te tino rangatiratanga of Māori over te takutai moana.
- The principle of equity, which applies to the question of whether the extent of the rights available is discriminatory compared with the property rights of non-Māori in te takutai moana.
- The principle of equal treatment, which applies to the question of whether the extent of the rights available is discriminatory compared with those rights available to other Māori groups under different legislation.

6.5.1 The principle of active protection

As we have already established in chapter 3 (see section 3.1.4), the marine and coastal area is a taonga of great importance to Māori. We have also found that the Takutai Moana Act has a significant impact on how that taonga is accessed, used, managed, and protected – and by whom. The Tribunal stated in its *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (1993) that of all the taonga which the Crown is obliged to actively protect, 'natural and cultural resources are of primary importance'.[144] The minimum requirements for Treaty compliance in this regard are that Māori must not be 'unnecessarily inhibited by legislative or administrative constraints from using their resources according to their cultural preferences', and that the Crown must not fail to provide a form of title that recognises customary and Treaty rights of Māori to their resources.[145] The active protection of resources is especially relevant where Māori clearly have 'a traditional interest in the resource'.[146]

The Foreshore and Seabed Act 2004 has negatively impacted the Māori relationship with te takutai moana, thereby breaching the Treaty guarantee of te tino rangatiratanga. This was established by the Tribunal in its *Foreshore and Seabed* report.[147] We acknowledge the Crown's argument that some claimants have managed to keep exercising aspects of tino rangatiratanga over te takutai moana since the Takutai Moana Act was adopted – for example, by discharging their kaitiakitanga duties.[148] However, these are examples of Māori continuing to fulfil their tikanga duties *despite* the difficulties posed by the 2004 Act and the 2011 Act. They need to be contrasted with the overwhelming number of submissions to the

144. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 31

145. Ibid; Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993*, 2nd ed (Wellington: Brooker and Friend Ltd, 1993), p 100; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1243

146. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 67, referring to Waitangi Tribunal, *Taranaki Maori, Dairy Industry Changes, and the Crown* (Wellington: Legislation Direct, 2001), p 34; Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995), pp 202–203; Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 284

147. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, pp 127–136

148. Submission 3.3.187, pp 116, 141

effect that both the 2004 Act and the 2011 Act fail to assist Māori to exercise tino rangatiratanga over te takutai moana.[149] As a result, the relationship of Māori with te takutai moana is in need of active protection.

Does the Act afford the active protection that is needed? In essence (and this summary list is followed by a more detailed commentary), the rights available under the Act amount to this:

- All affected iwi, hapū, or whānau may participate in certain very prescribed and limited conservation activities and where marine mammals are stranded in te takutai moana. The Director-General of Conservation determines whether iwi, hapū, or whānau are affected by a conservation activity.
- Holders of protected customary rights are exempt from obtaining resource consents for certain customary activities (see section 5.2).[150]
- Holders of customary marine title have an RMA permission right and a conservation permission right. These enable them to give or refuse permission for certain activities that require a resource consent (under the Resource Management Act 1991) or a permit (under conservation legislation). Once given, the permission given cannot be revoked (see section 5.3.1). However, these permission rights are subject to significant exceptions, as they do not apply to the broad category of accommodated activities and deemed accommodated activities.
- Holders of customary marine title have a right to seek conditions they consider will protect wāhi tapu and wāhi tapu areas. However, this right does not practically enable the group to impose temporary rāhui. Any restriction or prohibition on fishing cannot prevent a commercial or recreational fisher from taking their lawful entitlement (see section 5.3.3).
- The Director-General of Conservation has a duty to recognise and provide for the views of a customary marine title group concerning a proposed marine mammal watching permit.
- The Minister of Conservation must seek and consider the views of a customary marine title group when preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement.
- Holders of customary marine title have the prima facie ownership of newly found taonga tūturu.
- Holders of customary marine title own those minerals that are not specifically exempted under section 10 of the Crown Minerals Act 1991 (the exemptions include valuable resources such as petroleum, silver, and gold).
- Different groups within local authorities and central government have duties of varying degrees requiring them to consider a planning document that a customary marine title group lodges with them (see section 5.3.4).

149. See, for example, submission 3.3.81, pp 5–6; submission 3.3.87, pp 4, 8; submission 3.3.123, p 4; submission 3.3.136, p 7; submission 3.3.150, pp 11–13; submission 3.3.169, p 19; submission 3.3.174, p 11.

150. In addition, a benefit that accrues for protected customary rights is that decision makers are under a statutory obligation to take into account the potentially adverse effects of a resource consent on a protected customary rights: Marine and Coastal Area (Takutai Moana) Act 2011, s 55.

Other than prohibitions or restrictions imposed around wāhi tapu areas, none of these rights available under the Act can restrict the public rights of access, navigation, and fishing.[151] Moreover, in respect of all of the listed rights, the Act offers no guidance on how to resolve overlapping claims.

Almost all claimants explained to us that the ability to impose rāhui where necessary, is critical to exercising kaitiakitanga and tino rangatiratanga over te takutai moana.[152] For example, the late Maanu Paul, a Ngāti Awa rangatira, told us: 'In exercising tino rangatiratanga, we protect fauna and flora, and undertake commercial and non-commercial fishing, harvesting of shellfish or kaimoana, gathering edible and aquatic plants, and extractions of fossils, rocks and minerals.'[153] Expert witnesses Associate Professor Carwyn Jones and Dr Richard Benton explain in their evidence that the 'application of a rāhui can be seen as evidence of exercising mana and authority over the takutai moana'.[154] And claimant witness Lily Stone says, on behalf of Ngāti Mihiroa: 'protecting waahi tapu, protecting wild life, that's kaitiakitanga, and we've been doing it for generations'.[155] Therefore, the ability to perform kaitiakitanga duties, including through rāhui, serves as a touchstone when determining if the rights under the Act truly protect the exercise of tino rangatiratanga.

Claimant evidence demonstrates that to recognise and provide for kaitiakitanga duties in a meaningful way there should be corresponding legal powers to enforce kaitiakitanga measures against the effects of unwanted activities by third parties.[156] The RMA and conservation permission rights could, in theory, be powerful legal tools to enable kaitiakitanga, as they give Māori some influence over which types of resource management and conservation activities should or should not be carried out in te takutai moana. Importantly, customary marine title groups can decline permission on any grounds. However, as we have already established in chapter 5 (see section 5.3.1(4)), the application of these rights is significantly limited by the numerous exceptions – namely, the accommodated activities and deemed accommodated activities. But kaitiakitanga duties do not stop simply because an activity is accommodated in the Act. For example, Mr Sayers, claimant witness from Motiti Island, tells us in his evidence that these exemptions concern activities such as mining 'that matter most to Pākehā, and which can damage the mauri of the rohe moana the most'.[157]

The Crown submits that it has sought to balance Māori interests with the interests of other stakeholders in te takutai moana.[158] However, in this case, the balance

151. Marine and Coastal Area (Takutai Moana) Act 2011, ss 26–28, 79
152. Submission 3.3.142, pp 37, 51; submission 3.3.168, p 31; submission 3.3.192, pp 5–6; doc B125, para 33
153. Document B128, p 4
154. Document B146, p 7
155. Document B49, p 2
156. Document B96, para 3
157. Document B20, para 56
158. Submission 3.3.187, pp 17–18, 89, 126, 179

that the Crown has struck fails to enable Māori to exercise their kaitiakitanga duties. The right to create a CMT planning document cannot compensate for this imbalance. As the Tribunal found in its *Ngawha Geothermal Report* (1993):

> the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.[159]

At the same time, the provisions of the Act fail to oblige the Crown or local authorities to implement the policies set out in a planning document or to provide statutory guidance in the event of a region having a multiplicity of CMT planning documents. Although the regional council must determine whether to recognise and provide for certain resource management matters identified in a planning document, it can – for various reasons – decide not to alter its relevant regional documents. Moreover (as we have stated already in section 5.3.4), the provisions outlining the right to create a CMT planning document place an excessive administrative burden on Māori.

Similar concerns apply to other conservation-related rights available to Māori. The Act imposes legal duties on decision makers which mean they must consider Māori views when making decisions about conservation activities or when changing a New Zealand coastal policy statement, but they are not required to give effect to these Māori views.[160]

In the context of exercising kaitiakitanga duties, we accept claimants' argument that the ability to declare rāhui is particularly important.[161] Initially, the Crown intended to provide for Māori issuing temporary rāhui. The 2010 consultation document proposed an award for non-territorial interests that included coastal hapū and iwi restricting or prohibiting 'access to wahi tapu (eg burial grounds) and wahi tapu areas (eg an area of the sea after a drowning)'.[162] However, after the public consulation rounds finished, the Crown moved the wāhi tapu protection provision to form part of a customary marine title. A temporary rāhui for a drowning at sea is issued urgently, usually on the day or shortly after the death occurred. The time required to obtain a customary marine title, with suitable wāhi tapu conditions, or to amend existing wahi tapu conditions, do not reflect the urgent steps required. When faced with this, the Crown acknowledged that

159. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, pp 100–101

160. Marine and Coastal Area (Takutai Moana) Act 2011, ss 49–50, 77. The exception is that the Director-General of Conservation must recognise and provide for the views of customary marine title groups in relation to marine mammal watching permits (s 76).

161. Document B56, pp 2–3; doc B102, pp 4–7; doc B130, p 10; doc B146, p 7

162. 'Reviewing the Foreshore and Seabed Act 2004: Consultation Document', no date (CLO.009.0294), p 38 (doc B3(a), p [15432])

the section 78 wāhi tapu protection right is not practically suitable for an urgent temporary rāhui.[163]

The Crown argues that the Act does not actively prohibit Māori from continuing to impose rāhui. This misses the point.[164] It goes without saying that the Crown would certainly be in breach of the Treaty if it prohibited Māori from declaring rāhui. But the object of this analysis is to establish whether the Act sufficiently supports Māori in exercising kaitiakitanga duties, especially imposing rāhui. It is well established that the Treaty requires the Crown to provide protection in an 'active rather than a passive manner'.[165] Several claimants submit that one way for the Crown to fulfil this duty is to make compliance with rāhui or other restrictions around wāhi tapu legally binding.[166]

However, in practical terms, the Takutai Moana Act only allows Māori to achieve a form of permanent rāhui indirectly (through the wāhi tapu protection right), while the Fisheries Act 1996 only provides for temporary rāhui in relation to fisheries. Neither Act provides for temporary rāhui following a death at sea. This type of temporary rāhui – usually lasting between a few days up to a month, and limited to a specific location – is a very common practice that has continued from pre-1840 to the present day.[167] It is a traditional Māori practice that many, if not most, New Zealanders would be familiar with. Such rāhui have an important practical, as well as spiritual and cultural, purpose. As explained by claimant John Pikari, on behalf of the descendants of Hone Karahina and members of the hapū of Te Uri o Hua and Ngāti Torehina, one of the practical reasons for these rāhui is to give any marine life that have fed on a tupapaku (body) at sea sufficient time to process and excrete the human remains before it is caught and eaten by a human.[168] Such a rationale reflects a practical approach to health and well-being that is likely to be shared by the general public. When taking all these factors into account, we consider that issuing a temporary rāhui for a death at sea is an example of where the Crown's balancing exercise should favour recognising and protecting this important right – one that will have only limited impact (in time and space) on public rights of access, navigation, and fishing. Therefore, we do not consider that the Act sufficiently enables Māori to exercise tino rangatiratanga over te takutai moana in this regard.

The RMA and conservation permission rights can also indirectly serve to impose rāhui, as they allow the customary marine title group to decline permission for activities for any reason. That could include where the activity would affect the wāhi tapu or wāhi tapu area in question. The right to create a CMT planning document can also help the group protect wāhi tapu. Once a CMT planning document has been created, Heritage New Zealand Pouhere Taonga must have particular regard

163. Submission 3.3.187, p 159
164. Ibid, p 141
165. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 94
166. See, for example, doc B82, p 6; doc B96, para 3; doc B104, p 14.
167. Transcript 4.1.5, pp 385–386, 584
168. Ibid, p 385

to relevant matters set out in the document if it is asked to consider an application to destroy or modify an archaeological site within the customary marine title area.[169] However, these rights could be used to enforce rāhui in very limited circumstances only. The RMA and conservation permission rights are subject to the public right of access, navigation, and fishing and do not apply to accommodated activities. Therefore, they can only be used to enforce rāhui if the activity requires a resource consent and is not an accommodated activity. And Heritage New Zealand Pouhere Taonga is under no obligation to actually give effect to the matters set out in a CMT planning document created by customary marine title groups.

Overall, we find that the rights under the Takutai Moana Act do not sufficiently support Māori in their kaitiakitanga duties and rangatiratanga rights. In particular, the rights available to Māori are insufficient when it comes to imposing rāhui, and in the face of the potentially massive effects of accommodated and deemed accommodated activities. The rights fail to provide for important types of rāhui, which are temporary responses to particularly tragic events such as drownings. This particular failure to provide for this important type of rāhui amounts to a failure to actively protect the ability of Māori to exercise tino rangatiratanga over te takutai moana. Therefore, we find it to be in breach of the Treaty principle of active protection.

6.5.2 The principle of equity

The principle of equity is a relational principle; it implies a comparison between how the Crown treats Māori as opposed to other citizens of Aotearoa New Zealand. Applying the principle of equity to the rights granted under the Takutai Moana Act requires us to first define which rights we should compare against each other, a matter of considerable contention between the parties.

Most claimants compare the rights that come with fee simple title at common law against the rights available under a customary marine title, but some also critically compare fee simple title to protected customary rights.[170] However, from the evidence presented in this inquiry, in particular, the briefing papers prepared by Ministry of Justice officials and Cabinet papers as the Act was being developed, it is clear that protected customary interests were never intended to grant an exclusive title like a title in fee simple estate.[171] Nor were they intended to grant rights that substitute for the legal powers that Māori had immediately after *Ngāti Apa*.[172] This is what customary marine title was intended for. As Crown evidence shows, the customary marine title was first designed as a property right and then gradually diluted to give effect to policy decisions such as the Crown's self-described 'bottom

169. Marine and Coastal Area (Takutai Moana) Act 2011, s 89(a)

170. For example, submission 3.3.177, pp 10–11.

171. Ministry of Justice, 'Foreshore and Seabed Review: Possible Test for Customary Title', 4 September 2009 (CLO.010.1326), para 17 (doc B3(a), p [9745]); Ministry of Justice, 'Foreshore and Seabed Review: Possible Test for Customary Rights', 18 September 2009 (CLO.010.1390), para 14 (doc B3(a), p [9791])

172. Submission 3.3.187, p 198

line' on public access.[173] As a result, one side of the comparison must be the rights conferred by customary marine title (as opposed to protected customary rights).

But against which bundle of rights should we compare the rights available under a customary marine title? We do not compare them to the regime under the Foreshore and Seabed Act 2004. The Foreshore and Seabed Act 2004 was in clear breach of the Treaty, and the 2011 Act is undoubtedly an improvement on it. Therefore, little would be gained by using the 2004 legislation concepts to consider whether the 2011 Act is Treaty consistent. A more meaningful comparison that is capable of generating useful conclusions must be, at the very least, with a Treaty consistent bundle of rights.

Therefore, we consider the adequate comparison, in the context of equity, is between customary marine title and some form of fee simple title, because fee simple title in te takutai moana is not available to Māori by way of establishing customary interests. This could potentially be an inequitable treatment of Māori property rights, compared to non-Māori property rights. As to which type of title in fee simple estate we consider appropriate for a comparison with customary marine title, it is Māori freehold land and aboriginal title.[174] These are the titles that would have been available post *Ngāti Apa* if it had not been for the Foreshore and Seabed Act 2004.[175]

Before analysing Māori freehold land and aboriginal title, we briefly examine specified freehold land as defined in the Act, as this land is exempt from the 'no ownership' regime:

> **specified freehold land** means any land that, immediately before the commencement of this Act, is—
>
> (a) Māori freehold land within the meaning of section 4 of Te Ture Whenua Maori Act 1993; or
>
> (b) set apart as a Māori reservation under Te Ture Whenua Maori Act 1993; or
>
> (c) registered under the Land Transfer Act 2017 and in which a person other than the Crown or a local authority has an estate in fee simple that is registered under that Act; or
>
> (d) subject to the Deeds Registration Act 1908 and in which a person other than the Crown or a local authority has an estate in fee simple under an instrument that is registered under that Act

173. 'Review of the Foreshore and Seabed Act 2004: Possible Awards in Recognition of Customary Title and Customary Rights', 5 October 2009 (CLO.010.1430), paras 8–9, 35–37 (doc B3(a), pp [9843]–[9844], [9849]–[9850])

174. We note that post *Ngāti Apa*, Māori could have first sought a determination from the Māori Land Court that the land is Māori customary land. That land could then be converted to Māori freehold land by vesting order (Te Ture Whenua Maori Act 1993, ss 131–132).

175. Another relevant comparison is between customary marine title under the Takutai Moana Act and customary marine title under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019. We will turn to this comparison in the context of equal treatment (see section 6.5.3).

There are 12,499 parcels of specified freehold land within te takutai moana.[176] Some claimants argue that this is a breach of the principles of equity, as that specified freehold land is not subject to the no-ownership regime, nor is it subject to the significant restrictions the Act imposes on a customary marine title, other than the general rights of fishing and navigation. On the face of it, the number of parcels in te takutai moana that make up specified freehold land give rise to concern. However, a report from Land Information New Zealand on those parcels is enlightening. According to the report, the parcels include a number of parcels of Māori freehold land. As such, this exception to the no-ownership regime also includes existing Māori interests. More importantly, the report demonstrates that the large majority of these parcels relate to dry land adjoining the coastline where the seaward boundary was surveyed to a point that sits within te takutai moana. This means that small strips of these coastal blocks sit within the marine and coastal area. The vast majority of these sit within the foreshore. The report demonstrates:

- 350 parcels were surveyed to the mean high-water springs (the landward boundary of the marine and coastal area). These parcels do not sit in te takutai moana.
- 12,243 parcels were surveyed to the mean high-water mark. This concerns a small strip of land between the mean high-water springs and the mean high-water mark and accounts for 97.9 per cent of the parcels that make up specified freehold land.
- 16 parcels were surveyed to below the mean high-water mark.
- 32 seabed parcels and 208 fully eroded parcels sit below the mean low-water mark.[177]

The different survey boundaries result from differing survey practice and regulations over time. The report demonstrates that the specified freehold land exempt from the no-ownership regime does not consist of large tracts of land in te takutai moana itself. Rather, these are mostly small strips of adjoining coastal land that run into te takutai moana because of changing survey practice. Given the negligible impact of these strips, we find that the exclusion of specified freehold land from the no-ownership regime is not a breach of the Treaty principle of equity.

We now return to consider the comparison to Māori freehold land. Naturally, there are restrictions resulting from resource management law, conservation law, and other statutes. These apply to Māori freehold land to the same extent that they apply to other types of freehold land. Navigation and fishing rights at common law or under the Takutai Moana Act still take priority over the rights of specified freehold land in te takutai moana, because these rights apply to the entire marine and coastal area, not just the common marine and coastal area (which excludes

176. Land Information New Zealand, 'Foreshore Project Final Report', 12 December 2003 (CLO.010.5064), p 9 (doc B3(a), p [22293])

177. Ibid, pp 8–9 (pp [22292]–[22293])

freehold land). The public right of access per section 26 of the Act only applies to the common marine and coastal area. Therefore, specified freehold land is exempt.

Crown counsel state that Te Ture Whenua Maori Act 1993 also places 'significant restrictions' on the alienation of Māori freehold land specifically.[178] This is an overstatement that reflects an archaic and outdated view. The principle of retention, a cornerstone of Te Ture Whenua Maori Act 1993, promotes a number of protection mechanisms concerning Māori land but does not impose significant restrictions. In many cases, an alienation of Māori freehold land only needs to be noted by the Registrar. For example, a sole owner, Māori Land Trust, or Māori Incorporation can mortgage their Māori freehold land without approval from a judge.[179] The same is true for most cases of leasing Māori freehold land. Only a long-term lease (exceeding 52 years) and a sale or gift of Māori freehold land require a judge's approval.[180]

Conversely, there are important elements of land ownership that do not exist in relation to customary marine title because of exemptions to the no-ownership regime. These elements concern limitations on alienation and reclaimed land, which we have already discussed (see section 5.3.2 and section 5.5). Another relevant restriction of rights concerns the ownership of minerals. An exception to the no-ownership regime allows the Crown to retain ownership of all petroleum, gold, silver, and uranium existing in its natural condition in the common marine and coastal area.[181] Claimants consider this to be inconsistent with the Treaty. We accept the Crown's submission that its ownership of nationalised minerals under the Act simply continues its earlier policy under the Crown Minerals Act 1991. The issue of ownership of nationalised minerals has not been created by the Takutai Moana Act. Instead, we refer to the Tribunal's findings on mineral ownership in the *Petroleum Report*:

> [T]he Crown established a sound basis in Treaty principle for the expropriation of the country's petroleum resource in 1937. But it fails in terms of minimum interference with Māori Treaty rights. The Crown could have achieved all its important objectives and also acted to minimise that interference by holding petroleum revenue as a trustee for the landowners who had petroleum rights. The distribution of the revenue should have been effected through the payment of royalties.[182]

In the spirit of the Tribunal's finding on petroleum specifically, we consider that compensation through royalties should be explored for other Crown minerals in the takutai moana as well. This is especially warranted where the main purpose of Crown ownership is to secure potentially significant economic value for the State

178. Submission 3.3.187, p 140
179. Te Ture Whenua Maori Act 1993, ss 147, 150A, 150B
180. Ibid, ss 147, 150A, 150B, 150C.
181. Marine and Coastal Area (Takutai Moana) Act 2011, ss 16, 83
182. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 63

from Crown minerals and to remove that value from Māori. This level of Crown expropriation by statute should not occur without compensation.

Having considered both restrictions that are to be subtracted from the rights that would comprise Māori freehold land in the marine and coastal area on the one hand, and both the restrictions that are to be subtracted from customary marine title on the other, we can now pinpoint the specific rights that remain for Māori freehold land but are absent from customary marine title. These are:

- the right to alienate the land (subject to the conditions set out in Te Ture Whenua Maori Act 1993); and
- the right to exclude others from accessing the land.

We acknowledge that the Crown has attempted to recognise these rights to some extent in the Takutai Moana Act. The Crown says Māori can still benefit commercially from side agreements when exercising their permission right. This resembles the ability to obtain a commercial benefit from granting a lease or a license. However, we have already found in section 5.3.2(4) that such side agreements do not adquately protect Māori interests.

The Crown has also attempted to recognise the right to exclude others through the grant of permission rights. We have found that the significant exceptions to the permission rights undermine the effectiveness of these rights. The contrast between the absolute right to exclude others and the exercise of customary marine title rights has far-reaching consequences. It means that a customary right holder vested with freehold title could:

- object to and prevent access to any resource management activity by third parties on the land or allow access on agreed conditions which might include some financial recompense in the nature of a royalty (except for compulsory acquisitions under the Public Works Act 1981, where a statutory right to compensation would nonetheless apply);
- prevent or allow (subject to conditions) any conservation activity by third parties on the land;
- prevent or allow marine mammal watching activities by third parties on the land;
- place rāhui on (parts of) the land; and
- ban access to wāhi tapu areas of the land.

By comparison, customary marine title confers the rights to:

- refuse permission for carrying out activities under resource consents and conservation permits, but with major exceptions of accommodated and deemed accommodated activities – and with compensation rights being restricted to proposed new infrastructure and new mineral rights;
- create a CMT planning document that must be considered by certain local and central government bodies (in a significantly flawed process), which owners of freehold land do not have;[183] and

183. Marine and Coastal Area (Takutai Moana) Act 2011, ss 85–93

- be the prima facie owners of newly found taonga tūturu in the relevant area (whereas the Crown is prima facie owner of taonga tūturu found outside a customary marine title area).[184]

On balance, Māori freehold title would have contained a much more powerful set of rights than customary marine title – particularly because Māori would have had the right to exclude others from accessing their Māori freehold land, subject to the rights of fishing and navigation. The Takutai Moana Act takes away the possibility for Māori to obtain this more extensive bundle of rights. Instead, Māori are granted a less powerful set of rights while having to meet a statutory test that is as high, if not higher, as the test for Māori customary land (which can then be converted to Māori freehold land).

Immediately after *Ngāti Apa*, the High Court had jurisdiction at common law to determine whether Māori hold land under aboriginal title. This jurisdiction existed in parallel to the Māori Land Court's jurisdiction we have just outlined. However, as the Tribunal found in its *Foreshore and Seabed* report, 'the common law doctrine of aboriginal title has not been much applied in New Zealand'.[185] Generally, the Tribunal found that there was a substantial amount of uncertainty about how aboriginal title would play out in practice in Aotearoa New Zealand.[186] We agree that the details of how exactly the High Court would have made use of its jurisdiction are unclear. However, for the reasons we have already outlined in the context of Māori freehold land, we are confident that the bundle of rights comprised in aboriginal title, too, would have amounted to more significant rights than are available under customary marine title today.

The High Court came to the same conclusion:

> [32] It is important to note that although s 6(1) of the Act states that customary interests in the common marine and coastal area that were extinguished in 2004 are 'restored', the 'restoration' is qualified by the words that immediately follow which explain that pre-existing customary rights are 'given legal expression in accordance with this Act'. The rights given by the Act are not the same as the inherited rights and interests referred to in the Preamble. As cl (4) of the Preamble states those rights are 'translated' into the rights conferred by this Act.
>
> [33] . . . although the Preamble and purpose sections of the Act refer to reinstating pre-existing customary entitlements and translating 'inherited rights into legal rights and interests', the specific rights actually conferred by the Act are much narrower and more limited than the customary title and rights that Māori would have enjoyed and exercised in the foreshore and seabed as at 1840.
>
> . . . . . .
>
> [139] As explained at [33] above, CMT under the Act is not the equivalent of customary title to the takutai moana. It is not property that can be owned, it is subject

184. Protected Objects Act 1975, s 11; Marine and Coastal Area (Takutai Moana) Act 2011, s 82
185. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 45
186. Ibid, p 60

> to the exercise of substantial rights by others including access, navigation and fishing rights . . .[187]

Contrary to the Crown's submissions on the subject, we consider that a subtraction of rights from Māori entitlement to seek freehold land status down to customary marine title constitutes an expropriation, to the extent that it takes away the right to alienate the land in accordance with Te Ture Whenua Maori Act 1993 and the right to exclude others from access to the land.[188] There is ample precedent for this view. In its *Foreshore and Seabed* report, the Tribunal already established that replacing fee simple title with regulatory rights can amount to an expropriation.[189] The Tribunal found that the Crown's foreshore and seabed policy was expropriatory because it 'takes away the power of the courts to declare Māori property rights in the foreshore and seabed, which is effectively an expropriation of the rights themselves, and replaces them with enhanced participation in decision-making processes'.[190] The Tribunal further clarified that the 'proposed customary title, with use-rights recorded on it, is not a property right'.[191] In the *Petroleum Report* (2003), the Tribunal explained the circumstances which could justify an expropriation, taking an approach analogous to the New Zealand Bill of Rights Act 1990.[192] It held:

> When faced with an expropriatory statute, the question for this Tribunal reduces to whether the expropriation was reasonably necessary or whether there was a reasonable alternative available which could have achieved the statutory objective without overriding the fundamental Treaty right. If some form of expropriation can be reasonably justified, the next question is what is the least interference necessary to achieve the policy objective of the statute.[193]

Therefore, in the context of the Takutai Moana Act we must ask: Was the reduction of rights from Māori freehold land status to customary marine title 'reasonably necessary'? And what is the least interference necessary to achieve the policy objective of the statute?

The *Foreshore and Seabed* report was the first report to apply the criteria set out in the *Petroleum Report* to te takutai moana. It identified the following objectives, which the Crown intended pursuing through its foreshore and seabed policy: preventing legal uncertainty arising from the *Ngāti Apa* judgment, securing public access to the foreshore and seabed, and preventing Māori from selling property rights in the foreshore and seabed.[194] However, the Tribunal found that none of

187. *Re Edwards* (*Whakatōhea No 2*) [2021] NZHC 1025, paras 32–33, 139
188. Submission 3.3.187, p 209
189. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 121
190. Ibid
191. Ibid
192. Waitangi Tribunal, *The Petroleum Report*, p 59
193. Ibid, p 60
194. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 121

these objectives required expropriation. The uncertainty arising from the *Ngāti Apa* case was 'not so dire as to require immediate legislative intervention'; giving effect to tikanga Māori in relation to the foreshore and seabed 'would not require the exclusion of the public', and a 'simple legislative limitation on sales could be introduced', given that the claimants and the Crown agreed in that inquiry that property rights in relation to the foreshore and seabed should be inalienable.[195] We now apply the same analysis to the Takutai Moana Act.

The Act's objectives are to

(a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
(b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua;
(c) provide for the exercise of customary interests in the common marine and coastal area; and
(d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).[196]

Out of these four, the only objective that could conceivably justify an expropriation is 'to ensure the protection of the legitimate interests of all New Zealanders'. The Crown repeatedly submits that the Act is the result of balancing multiple interests in te takutai moana.[197] We accept that the Crown was entitled to restrict some Māori rights as part of this balancing exercise to recognise and provide for certain public and private rights and interests. However, in many cases the balancing exercise was weighted too heavily in favour of public and private interests and at the expense of Māori interests. In some cases, Māori rights were restricted without any competing public or private interests. Instead, the rights were restricted as part of a policy decision with little to no justification for doing so. Therefore, we find that the overall legal effect of the rights available under the Takutai Moana Act is in breach of the Treaty principle of equity. We consider that amendments need to be made to ensure a proper and reasonable balance is reached between Māori interests and public and private interests.

6.5.3 The principle of equal treatment

The principle of equal treatment concerns the treatment of Māori in relation to other Māori.[198] The Crown must not 'unfairly advantage one group over another if their circumstances, rights, and interests were broadly the same'.[199]

In considering how this principle applies to the rights available under the Takutai Moana Act, we have consciously set aside several arguments raised by claimant

195. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 121
196. Marine and Coastal Area (Takutai Moana) Act 2011, s 4
197. Submission 3.3.187, pp 17–18, 89, 126, 179
198. Waitangi Tribunal, *Motiti: Report on the Te Moutere o Motiti Inquiry* (Lower Hutt: Legislation Direct, 2023), pp 21–22
199. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 5

cousel. We have not inquired into the adequacy of the rights granted under the Ngāti Porou Act 2019 itself. We accept the Crown's submission that these matters lie outside the Tribunal's jurisdiction.[200] However, we do consider some aspects of the Takutai Moana Act by comparing them to the corresponding aspects of the Ngāti Porou Act 2019. Further, we do not compare the 'implementation funding' that ngā hapū o Ngāti Porou received following negotiations with the Crown with funding available under the Takutai Moana Act. We addressed issues of funding already in our stage 1 report. Nor do we inquire into the Ngai Tahu (Pounamu Vesting) Act 1997, which is outside the scope of this inquiry. Finally, we choose not to engage in a comparison between the Takutai Moana Act and instances where the Crown has vested riverbeds or lakebeds in Māori following Treaty settlements. We consider the legal regime that applies to rivers and lakes and the legal regime that applies to te takutai moana too far apart for a direct comparison.

The main comparison we undertake in the context of the principle of equal treatment is between the Takutai Moana Act and the Ngāti Porou Act 2019. We note several instances where rights granted under the Ngāti Porou Act 2019 go further than the corresponding rights available to other iwi, hapū, or whānau under the Takutai Moana Act. The two Acts are otherwise very similar in relation to the rights they create in the coastal area. However, to the extent that the scope of rights granted under Ngāti Porou Act 2019 exceed what is granted under the Takutai Moana Act, we assess whether the latter complies with the principle of equal treatment. The Crown accepts this is within the scope of this inquiry.[201]

The key differences between the rights that the two Acts grant are:

- Under the Ngāti Porou Act 2019, neither the Minister nor the Director-General of Conservation has the power to override the customary marine title hapū's decision about extending or declaring a marine reserve or conservation protected area. However, they can override the customary marine title group's decisions in that regard under section 74 of the Takutai Moana Act, if they consider that it is a matter of national importance.[202]
- The Ngāti Porou Act 2019 requires the Gisborne District Council (as a unitary authority) and the Minister for the Environment to consider, in certain cases, an environmental covenant (a document that sets out issues around sustainability and cultural integrity) if ngā hapū o Ngāti Porou have elected to develop one.[203] In relation to a proposed national policy statement under the Resource Management Act 1991, the environmental covenant must be treated as a relevant matter.[204] By contrast, the Takutai Moana Act requires the Minister of Conservation to 'seek and consider the views of the customary marine title groups recorded on the register' if the Minister 'is proposing

200. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 126
201. Submission 3.3.187, p 14
202. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, ss 87–91; Marine and Coastal Area (Takutai Moana) Act 2011, s 74
203. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, ss 31(1), 33(1)
204. Ibid, s 31(1)-(2)

to prepare, issue, change, review, or revoke' a New Zealand coastal policy statement.[205]

- Ngā hapū o Ngāti Porou have the ability to appeal to the Environment Court if the unitary authority in the Gisborne District Council does not change or vary a key public document in accordance with ngā hapū o Ngāti Porou environmental covenants. By contrast, the Takutai Moana Act contains no such appeal right for regional council decisions concerning any CMT planning documents that customary marine title groups may create.[206]
- Customary fishing regulations made under the Ngāti Porou Act 2019 prevail over non-customary fishing regulations, and apply instead of the Fisheries (Kaimoana Customary Fishing) Regulations 1998 in respect of ngā hapū o Ngāti Porou. The Takutai Moana Act does not provide for any customary fishing regulations for protected customary rights or customary marine title holders. Nor do protected customary rights under the Takutai Moana Act apply to any commercial or non-commercial fishing (except for non-commercial whitebait fishing).[207]
- The statutory deadline for claims under the Ngāti Porou Act 2019 expired in May 2021, whereas the statutory deadline under the 2011 Act expired in April 2017. Claimants depict this as ngā hapū o Ngāti Porou having four years longer to lodge an application than Marine and Coastal Area Act applicants.[208] However, we note that, given ngā hapū o Ngāti Porou filed their claims for recognition of (territorial) customary rights under the Foreshore and Seabed Act 2004, the two deadlines are difficult to compare.[209]

We do not take issue with ngā hapū o Ngāti Porou negotiating and securing a favourable settlement with the Crown to recognise their mana, rangatiratanga, and kaitiakitanga over their takutai moana. They are acting in the best interests of their people and should be commended for doing so. Secondly, we acknowledge that historical Treaty settlements are a political compact. They are founded on negotiation and compromise, taking into account the historical Treaty breaches, and resulting prejudice suffered by the settling group. While many hapū and iwi had similar experiences, each have their own unique history. This means that while there are many common components throughout, every historical Treaty settlement, and the associated redress, is necessarily different. We do not suggest that all historical Treaty settlements should be the same.

However, we consider that the principle of equal treatment means that all Māori must have an equal opportunity to pursue their rights. That does not mean that all Māori are entitled to receive the same or similar rights as those provided for under

205. Marine and Coastal Area (Takutai Moana) Act 2011, s 77

206. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 27; Marine and Coastal Area (Takutai Moana) Act 2011, ss 88, 93

207. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, ss 48–51; Marine and Coastal Area (Takutai Moana) Act 2011, s 52(2)

208. Submission 3.3.138, p 52

209. Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, ss 95(2), 98(2); Marine and Coastal Area (Takutai Moana) Act 2011, ss 95(2), 100(2)

the Ngāti Porou Act 2019. Ngā hapū o Ngāti Porou undoubtedly have a strong and close association with their takutai moana, which was pivotal in securing this redress. The difficulty here is ngā hapū o Ngāti Porou have received rights that are not available to other iwi under the Takutai Moana Act.[210] This means that even if another group could demonstrate that their circumstances, rights, and interests were broadly the same as ngā hapū o Ngāti Porou, they still could not receive similar rights given the limit on the rights available under the Takutai Moana Act. We find this is a breach of the Treaty principle of equal treatment.

6.5.4 Result

Throughout this inquiry, the Crown has said that the Takutai Moana Act balances Māori rights against other public and private rights in te takutai moana. We have found that, on a number of occasions, this balancing exercise has been unreasonable, arbitrary, and unjustifiably restrictive of important Māori customary rights and interests that require greater recognition and protection. The Crown has breached the Treaty principles of active protection, equity, and equal treatment in doing so and has caused, and/or will likely cause, prejudice to Māori. As the Crown has failed to achieve a proper balance, the resulting restriction of Māori customary rights and interests in this significant taonga is expropriatory.

This result is also relevant to the Treaty compliance of the no-ownership regime. The main function of the no-ownership regime is to establish the legal status of the part of te takutai moana where Māori applicants can gain legal recognition of their customary interests. Other than that, the no-ownership regime in itself has no legal effect. That is why, in our initial analysis of the no-ownership regime in chapter 3 (see section 3.4.4), we said that determining the Treaty compliance of the regime depends on the extent to which the overall regime gives legal recognition to previously extinguished customary interests. Having now undertaken a detailed analysis of the rights granted under the Takutai Moana Act, we are in a position to make that determination. As we have established in this chapter, the overall legal effect of the rights available under the Act is in breach of the Treaty principles of active protection, equity, and equal treatment. As a consequence, the no-ownership regime itself is in breach of the same Treaty principles.

6.5.5 Prejudice

In terms of prejudice, we note that any reduction of legal rights in te takutai moana corresponds to a reduction in the claimants' ability to exercise tino rangatiratanga. As the Tribunal has previously found in *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (2012), rights akin to ownership can be necessary to give effect to tino rangatiratanga.[211] To the extent that the Takutai

210. We acknowledge that similar arrangements may be negotiated in any future Treaty settlements between the Crown and other hapū or iwi. This is likely to affect only those groups who have not yet settled, given the impact of the full and final settlement provisions which feature in most deeds of settlement.

211. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 1; see also doc B146, pp 4–5

Moana Act has made it more difficult, for claimants to exercise tino rangatiratanga, we find the Treaty breaches identified above to be prejudicial.

Furthermore, the way the Ngāti Porou Act 2019 has treated the same matters eight years after the Takutai Moana Act was passed demonstrates that the Crown could have made available to Māori more extensive regulatory rights but chose not to when developing the Takutai Moana Act. Claimants consider themselves prejudicially affected by the unequal treatment between themselves and ngā hapū o Ngāti Porou.[212] We agree that, since 2019, this Treaty breach has been creating prejudice for applicants under the 2011 Act, given that exercising kaitiakitanga duties has been made more difficult for them than for ngā hapū o Ngāti Porou.

6.5.6 Recommendation

We have already made our recommendations to address most instances of the prejudice described above. In addition, we recommend adding the ability to impose temporary rāhui following a death at sea to the award of protected customary rights. We also recommend that the Crown engage in a longer conversation with Māori in order to mitigate the unequal treatment of Māori under the Takutai Moana Act as opposed to the Ngāti Porou Act 2019.

6.6 Concluding Remarks

We have made a number of recommendations in this report to amend various parts of the legislation and the regime to address the prejudice we have identified. We emphasise that the recommendations in this report should be implemented as a package to restore a fair and reasonable balance between Māori interests and those of the public in te takutai moana. We warn the Crown against 'cherry-picking' select recommendations, as this would not restore the balance required.

If the Crown elects to implement some, but not all, of our recommendations, the resulting imbalance will still have to be addressed through other means such as the payment of suitable compensation for the unreasonable restriction of Māori rights in this significant taonga. What that compensation should look like would require proper and meaningful engagement with Māori through the longer conversation already recommended by this Tribunal and the Ministerial Review Panel.

212. Submission 3.3.138, p 55

Dated at Wellington this 4th day of October 2023

Judge Miharo Armstrong, presiding officer

Ron Crosby, member

Professor Rawinia Higgins, member

Tā Pou Temara, member

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APPENDIX I

LIST OF CLAIMS, CLAIMANTS, AND INTERESTED PARTIES

Claims and Claimants

Wai 120
Claim: Opua lands and waterways claim
Claimants: Te Raumoa Kawiti and others

Wai 203
Claim: Mokomoko claim
Claimants: Karen Mokomoko and Pita Biddle

Wai 375, Wai 520, Wai 523
Claim: Whakarara mountain claim, Kerikeri lands claim, and Kapiro Farm claim
Claimants: Anaru Kira and Pita George (deceased)

Wai 420
Claim: Mataikona A2 claim
Claimant: George Matthews

Wai 475
Claim: Whangapoua Forest claim
Claimant: Wanda Brljevich

Wai 619
Claim: Ngāti Kahu o Torongare me te Parawhau hapū claim
Claimant: Waimarie Bruce-Kingi

Wai 745
Claim: Patuharakeke hapū lands and resources claim
Claimants: Paki Pirihi (deceased) and Luana Pirihi

Wai 966
Claim: Ngāpuhi Te Tiriti o Waitangi claim
Claimants: Gray Theodore, Pereme Porter, and Rangimarie Maihi

Wai 1092
Claim: Ūpokorehe claim
Claimant: Charles Aramoana (deceased)

Wai 1308
Claim: Patuharakeke Hapuu ki Takahiwai claim
Claimants: Ngakawa Pirihi, Paraire Pirihi, Harry Midwood, Patricia Heperi, Crete Milner, and Terence Pirihi

Wai 1341
Claim: Ngāti Rēhia hapū claim
Claimants: Remarie Kapa (deceased), Te Huranga Hohaia (deceased), and Nora Rameka

Wai 1524
Claim: Pomare Kingi claim
Claimants: Louisa Collier, Hineamaru Lyndon, and Ira Norman

Wai 1537
Claim: Descendants of Wiremu Pou claim
Claimants: Louisa Collier, Amiria Waetford, and Hineamaru Lyndon

Wai 1541
Claim: Descendants of Hinewhare claim
Claimants: Louisa Collier and Frederick Collier junior

Wai 1673
Claim: Ngāti Kawau (Collier and Dargaville) claim
Claimants: Louisa Collier and Rihari Dargaville

Wai 1681
Claim: Pukenui blocks claim
Claimants: Popi Tahere, Louisa Collier, and Arthur Mahanga

Wai 1758
Claim: Ūpokorehe Hapū Ngāti Raumoa Roimata Marae Trust claim
Claimants: Wallace Aramoana, Lance Reha, Gaylene Kohunui, Wayne Aramoana, and Sandra Aramoana

Wai 1787
Claim: Rongopopoia hapū claim
Claimants: Mekita Te Whenua, Richard Wikotu, and Kahukore Baker

Wai 1837
Claim: Whānau and hapū of Te Tai Tokerau settlement issues (Nehua) claim
Claimant: Deidre Nehua

Wai 1842
Claim: Tauhara, Waiaua, and Te Kaitoa whānau lands claim
Claimant: The Reverend Pereniki Tauhara

Wai 1846
Claim: Ngāti Ruamahue and Ngāti Kahu ki Whangaroa (Sailor Morgan) claim
Claimant: Sailor Morgan

Wai 1857
Claim: Ngāti Korokoro and Te Pouka (Sheena Ross and Kim Isaac) claim
Claimants: Sheena Ross and others

Wai 1940
Claim: Waitaha (Te Korako and Harawira) claim
Claimants: Jane Te Korako, and Te Rungapu (Ko) Ruka

Wai 2003
Claim: Ngāti Korokoro, Ngāti Wharara, and Te Pouka (Turner and others) resource management claim
Claimants: Cheryl Turner and others

Wai 2217
Claim: Children of Te Taitokerau (Broughton) claim
Claimant: Maringitearoha Broughton

Wai 2577
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Kapotai) claim
Claimants: Te Riwhi Reti, Hau Hereora, Romana Tarau, Karen Herbert, and Edward Cook

Wai 2579
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāti Hine) claim
Claimants: Waihoroi Shortland and Pita Tipene

Wai 2580
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Waimate Taiamai) claim
Claimant: Bonny Craven

Wai 2581
Claim: Marine and Coastal Area (Takutai Moana) Act (Ani Taniwha) claim
Claimant: Ani Taniwha

Wai 2582
Claim: Marine and Coastal Area (Takutai Moana) Act (Rosaria Hotere) claim
Claimants: Rosaria Hotere and Jane Hotere

Wai 2583
Claim: Marine and Coastal Area (Takutai Moana) Act (Pomare Hamilton) claim
Claimants: Arapeta Hamilton, Angeline Greensill, and Te Rua Rakuraku

Wai 2584
Claim: Marine and Coastal Area (Takutai Moana) Act (Tangi Tipene) claim
Claimants: James Maxwell, Arapeta Mio, Muriwai Jones, Dave Peters, Te Aururangi Davis, Nola Melrose, and Bettina Maxwell

Wai 2585
Claim: Marine and Coastal Area (Takutai Moana) Act (Aorangi Kawiti) claim
Claimants: Te Raumoa Kawiti and Rhonda Kawiti

Wai 2586
Claim: Marine and Coastal Area (Takutai Moana) Act (Gray Theodore) claim
Claimants: Gray Theodore, Pereme Porter, and Rangimarie Maihi

Wai 2587
Claim: Marine and Coastal Area (Takutai Moana) Act (Deidre Nehua) claim
Claimant: Deidre Nehua

Wai 2588
Claim: Marine and Coastal Area (Takutai Moana) Act (Violet Nathan) claim
Claimants: Maringitearoha Broughton and Violet Nathan

Wai 2602
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Whānau a Apanui) claim
Claimants: Maruhaeremuri Stirling (deceased), Ruiha Stirling, Parehuia Herewini, and Haro McIlroy

Wai 2603
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Rae Trust) claim
Claimants: Steve Panoho and Joy Panoho

Wai 2604
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Ao) claim
Claimants: Maggie Ryland-Daigle and Roger Tichborne

Wai 2612
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāti Te Wehi) claim
Claimants: Nancy Awhitu and others

Wai 2658
Claim: Marine and Coastal Area (Takutai Moana) Act (Marise Lant) claim
Claimant: Marise Lant

Wai 2661
Claim: Marine and Coastal Area (Takutai Moana) Act (Cletus Maanu Paul) claim
Claimants: Cletus Maanu Paul, Desma Ratima, Rihari Dargaville, Titewhai Harawira, and William Jackson

Wai 2669
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Whakapiko) claim
Claimants: David Peters, Marie Tautari, Allan Peters, and Rowan Tautari

Wai 2674
Claim: Marine and Coastal Area (Takutai Moana) Act (Tangihia hapū)
Claimants: Cletus Maanu Paul and David Potter

Wai 2675
Claim: Marine and Coastal Area (Takutai Moana) Act (Reti) claim
Claimant: Elvis Reti

Wai 2680
Claim: Marine and Coastal Area (Takutai Moana) Act (Collier and others) claim
Claimant: Ruiha Collier

Wai 2690
Claim: Marine and Coastal (Takutai Moana) Act (Glennis Rawiri) claim
Claimant: Glennis Rawiri

Wai 2691
Claim: Marine and Coastal Area (Takutai Moana) Act (Edward Parahi Wilson) claim
Claimant: Edward Wilson

Wai 2692
Claim: Marine and Coastal Area (Takutai Moana) Act (Harvey Ruru) claim
Claimant: Harvey Ruru

Wai 2707
Claim: Marine and Coastal Area (Takutai Moana) Act (Motiti Rohe Moana Trust) claim
Claimants: Kataraina Keepa, Umuhuri Matehaere, Graham Hoete, and Nepia Ranapia

Wai 2710
Claim: Marine and Coastal Area (Takutai Moana) Act (Hokianga hapū whānau) claim
Claimants: Anania Wikaira, Ipu Absolum, Claire Morgan, Pairama Tahere, Ellen Toki, Oneroa Pihema, Fiona Ruka, Hinerangi Puru, and Kyrke Watkins

Wai 2711
Claim: Marine and Coastal Area (Takutai Moana) Act (Muaūpoko Tribunal Authority) claim
Claimant: Di Rump

Wai 2712
Claim: Marine and Coastal Area (Takutai Moana) Act (Watson) claim
Claimant: Trevor Watson

Wai 2726
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāti Takapari) claim
Claimant: Keatley Hopkins

Wai 2756
Claim: Descendants of Ani Ngapera and Whānau claim
Claimant: Arohanui Harris

Wai 2764
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngātiwai) claim
Claimant: Haydn Edmonds

Wai 2765
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāti Tu) claim
Claimant: Hori Manuirirangi

Wai 2766
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāti Pu) claim
Claimant: Edward Shaw

Wai 2767
Claim: Marine and Coastal Area (Takutai Moana) Act (Wharekauri) claim
Claimant: Jack Daymond

Wai 2768
Claim: Marine and Coastal Area (Takutai Moana) Act (Willoughby and Papuni) claim
Claimants: Robert Willoughby and Glenys Papuni

Wai 2769
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāi te Rangi) claim
Claimant: Charlie Tawhiao

Wai 2773
Claim: Marine and Coastal Area (Takutai Moana) Act (Mahanga) claim
Claimant: Pereri Mahanga

Wai 2774
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāti te Ara) claim
Claimant: Roimata Minhinnick

Wai 2775
Claim: Marine and Coastal Area (Takutai Moana) Act (Koromatua hapū) claim
Claimant: Hokimate Kahukiwa

Wai 2776
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāi Tupango) claim
Claimant: Michael Williams

Wai 2777
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāti Taimanawaiti) claim
Claimants: Jasmine Cotter-Williams and Faenza Bryham

Wai 2778
Claim: Marine and Coastal Area (Takutai Moana) Act (Watene) claim
Claimant: Kahura Watene

Wai 2779
Claim: Marine and Coastal Area (Takutai Moana) Act (Pikari) claim
Claimant: John Pikari

Wai 2780
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Tuhi) claim
Claimants: James Te Tuhi and Esmeralda Te Tuhi (deceased)

Wai 2781
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Harāwaka) claim
Claimants: Bella Savage and Waipae Persese

Wai 2782
Claim: Marine and Coastal Area (Takutai Moana) Act (hapū ki Marokopa) claim
Claimants: Loretta Poa and Natasha Willison

Wai 2785
Claim: Marine and Coastal Area (Takutai Moana) Act (Griggs) claim
Claimant: Ryshell Griggs

Wai 2786
Claim: Marine and Coastal Area (Takutai Moana) Act (Harper) claim
Claimant: Rebecca Harper

Wai 2787
Claim: Marine and Coastal Area (Takutai Moana) Act (Gabel) claim
Claimant: Robert Gabel

Wai 2788
Claim: Marine and Coastal Area (Takutai Moana) Act (Walker) claim
Claimant: Violet Walker

Wai 2789
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Rarawa ki Ahipara) claim
Claimants: Rueben Porter, John Matiu, Christopher Murray, Linda Harrison, and Sandy Murupaenga

Wai 2790
Claim: Marine and Coastal Area (Takutai Moana) Act (Taueki) claim
Claimant: William Taueki

Wai 2791
Claim: Marine and Coastal Area (Takutai Moana) Act (Kingi) claim
Claimant: Malcolm Kingi

Wai 2792
Claim: Marine and Coastal Area (Takutai Moana) Act (Tau) claim
Claimant: Rawiri Te Maire Tau

Wai 2793
Claim: Marine and Coastal Area (Takutai Moana) Act (Jones) claim
Claimant: Muriwai Jones

Wai 2794
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāi Tamahaua) claim
Claimants: Tracy Hillier and Rita Wordsworth

Wai 2796
Claim: Marine and coastal area (Halkyard-Harawira) claim
Claimant: Hilda Halkyard-Harawira

Wai 2797
Claim: Marine and Coastal Area (Takutai Moana) Act (Kemara) claim
Claimant: Te Rangikaiwhiria Kemara

Wai 2798
Claim: Marine and Coastal Area (Takutai Moana) Act (Tūpara) claim
Claimant: Nick Tūpara

Wai 2799
Claim: Marine and coastal area (Tuteao) claim
Claimant: Verna Tuteao

Wai 2801
Claim: Marine and coastal area (George and others) claim
Claimants: Samuel George, Huhana Lyndon, and Puawai Leuluai-Walker

Wai 2803
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Parawhau) claim
Claimants: Mira Norris and Marina Fletcher

Wai 2804
Claim: Marine and Coastal Area (Takutai Moana) Act (Toki) claim
Claimant: Valmaine Toki

Wai 2808
Claim: Marine and Coastal Area (Takutai Moana) Act (McGrath) claim
Claimants: Richard McGrath and Maraina McGrath

Wai 2809
Claim: Marine and Coastal Area (Takutai Moana) Act (Davis) claim
Claimant: Joseph Davis

Wai 2811
Claim: Marine and Coastal Area (Takutai Moana) Act (Ngāti Mihiroa) claim
Claimant: Ned Tomlins

Wai 2861
Claim: Marine and Coastal Area (Takutai Moana) Act (Te Whānau a Kai) claim
Claimant: David Hawea

Interested Parties

Wai 78: Torere claim
Wai 88: Kapiti Island claim
Wai 89: Whitireia block claim
Wai 121: Ngāti Whatua lands and fisheries claim
Wai 156: Oriwa block claim
Wai 230: Matauri and Putataua Bays claim
Wai 234: Motukawanui claim
Wai 246: Puhipuhi State Forest claim
Wai 492: Kororipo Pā claim
Wai 549: Ngāpuhi land and resources claim
Wai 654: Ngāti Rahiri Rohe claim
Wai 861: Mangakahia Hapū Claims Collective claim
Wai 884: Te Pā o Tahuhu (Richmond, Auckland) claim
Wai 919: Ngāti Tupango lands and resources (Bay of Islands) claim
Wai 1148: Paremata Mokau A16 land claim
Wai 1312: Whakaki claim
Wai 1313: Ngāpuhi (Mahurangi and Tāmaki Makau Rau) claim
Wai 1460: Tauhinu ki Mahurangi claim
Wai 1526: Mahurehure claim
Wai 1536: Descendants of Te Kemara uri o Maikuku rāua ko Hua claim
Wai 1661: Ngāti Rua (Wood, Smith, and Wood) claim
Wai 1623: Ngāti Rangatahi kei Rangitikei claim
Wai 1728: Ngāti Pakau and Ngāti Rauwawe (Kire and others) claim
Wai 1838: Ngāti Ruamahoe hapū (Hikuwai whānau) claim
Wai 1843: Te Aeto hapū claim
Wai 1896: Descendants of Patuone of Ngāpuhi claim
Wai 1941: Kingi and Armstrong (Ngā Puhi) claim
Wai 2179: Ngā Uri o Tama, Tauke Te Awa, and others lands (Dargaville) claim
Wai 2188: Kanihi me ētahi lands (Noble and others) claim
Wai 2244: Descendants of Ngatau Tangihia (Dargaville) claim
Wai 2355: Te Taumata o Te Parawhau (Tuhiwai, Tito, and Nepia) claim
Wai 2257: Te Whānau a Apanui Mana Wāhine (Stirling) claim
Wai 2468: Kaipara lands (Public Works Act and Soliders Resettlement Act) claim
Wai 2484: Te Hīka a Pāpāuma settlement policy claim

Wai 2772: Ngāti Torehina ki Matakaa claim
Wai 2831: Te Rūnanga Nui o te Aupōuri Trust claim
Wai 2832: Marine and Coastal Area (Takutai Moana) Act (Tito) claim
Ngāti Makino Heritage Trust
Kenneth Kennedy
Derek Huata
Ngāi Te Hapū Incorporated on behalf of Ngāi te Hapū
Ngāti Hinewaka me ona Karangaranga Trust on behalf of Ngāti Hinewaka
Hinehau Tahuāroa, Riwaka Houra whānau, Puketapu hapū
Tahuāroa–Watson whānau, Puketapu hapū
Henare Tahuāroa–Watson whānau for the Whanganui inlet
Mōkau ki Runga Regional Management Committee on behalf of Ngā Hapū o Mōkau ki Runga
Christopher Tahana, Edward (Fred) Clark, Hayden Turoa, and Novena McGuckin on behalf of Te Patutokotoko
John Hata on behalf of Ngāti Patumoana hapū of Whakatohea
Ngāi Tu-āhu-riri hapū
Apakura Rūnanga Trust Incorporated on behalf of Ngāti Apakura
Te Tawharau o Ngāti Pūkenga on behalf of Ngāti Pūkenga
Clive Tongawākau on behalf of Araukuuku hapū
Anthony Olsen on behalf of Te Mana o Ngāti Rangitihi
Lesley Te Maiharoa-Sykes on behalf of the Waitaha Taiwhenua o Waitaki Trust
Te Rūnanga o Ngāi Tahu
Otakanini Topu Māori Incorporation
Te Rūnanga o Ngāti Tama
Ngā Potiki a Tamapahore Trust
Te Rūnanga o Ngāti Whakaue Incorporated on behalf of Ngāti Whakaue ki Maketū hapū
John Tamihere on behalf of Te Rūnanga o Ngāti Porou ki Hauraki
Tui Marino and others on behalf of Te Aitanga-a-Hauiti
Bella Thompson on behalf of the Rewha and Reweti whānau
Susan Taylor and Wirihana Morris on behalf of members of Ngāi Tumapuhia-a-Rangi ki Motuwairaka, Ngāi Tumapuhia-a-Rangi ki Okautete, and Ngā Marae o te Kotahitanga o Kahungunu ki Wairarapa
Adriana Edwards on behalf of Whakatōhea hapū
Sir Hekenukumai (Hector) Busby on behalf of Ngāti Kahu, Te Rarawa, and Te Uriohina
Robert Sinclair on behalf of Whānau a Kahu
William Moran on behalf of Ngāti Manu and Ngāti Rahiri
Kare Rata on behalf of Ngā Hapū o Ngāti Wai iwi
Raemon Parkinson on behalf of Te Uri a te Hapū
John Tiatoa on behalf of Ngā Hapū o Taiamai ki te Mairangi
Larry Delamare on behalf of Te Whānau-a-Apanui hapū
Christina Davis on behalf of Ngāti Muriwai hapū
Nicola MacDonald on behalf of Te Whānau o Hone Pipita rāua ko Rewa Ataria Paama
Dean Flavell on behalf of Hiwarau C, Turangapikitoi, Waiotahe, and Ohiwa of Whakatōhea
Te Rūnanga o Ngāti Whatua
Chelsea Terei and Hemaima Rauputu on behalf of Ngā Hapū o Mokau, represented by the Mokau ki Runga Regional Committee ('Ngā Hapū o Mokau') and Ngā Tai o Kawhia

Regional Management Committee in the interest of Ngāti Maniapoto in Kawhia ('Ngā Tai o Kawhia')
Roimata Smail and Erin James on behalf of the Rongowhakaata Iwi Trust