IN THE WAITANGI TRIBUNAL
KEI MUA I TE TARAIPIUNARA

WAI 2660

UNDER

The Treaty of Waitangi Act 1975

CONCERNING

Claims concerning the Marine and Coastal Area (Takutai Moana) Act 2011

JOINT MEMORANDUM OF COUNSEL

Dated: 1 October 2026

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Ministry of Justice
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TĒNĀ, E TE TARAIPIUNARA,

1. This memorandum is filed jointly for the parties listed in Appendix A.

2. The Tribunal has directed claimants and interested parties to make submissions on: [1]

    a. the effects of the Supreme Court's findings in the stage one appeals; and

    b. whether, in light of those findings, the interim findings and recommendations in *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (***Stage Two Report***) are still relevant and appropriate.

3. Before moving to address those points, the claimants and interested parties condemn the Crown's decision to ignore the Tribunal's recommendations in the *Stage Two Report* and instead amend the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA Act**) in ways which further undermine the rights of applicants. The Tribunal has already found that the MACA Act breached te Tiriti. The fact that applicants now face an even more restrictive regime does not cast the 2011 Act in a more favourable light.

Interim findings

4. This Tribunal made the interim finding that the test for customary marine title (**CMT**) breaches the Treaty principles of partnership and active protection, in particular due to the 'without substantial interruption' requirement:[2]

[1] Wai 2660, #2.7.8 at [26].
[2] Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2024) at 108.

> 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.

5. The Tribunal made the interim recommendation that 'without substantial interruption' should be removed from section 58(1)(b)(i) of the MACA Act.

6. The Tribunal further recommended that the Crown amend the MACA Act to make it clear that, where an applicant group is unable to meet the test for a CMT because of a previous Treaty breach by the Crown, the applicant group can negotiate an appropriate settlement with the Crown.[3]

7. Importantly, these interim recommendations formed one part of a suite of recommendations that the Tribunal considered must be "implemented as a package to restore a fair and reasonable

[3] At 108.

balance between Māori interests and those of the public in the takutai moana".[4]

Supreme Court judgment

8. On 2 December 2024, the Supreme Court issued its per curiam judgment in *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka*, establishing the correct approach to the s 58 test for CMT.[5]

9. The Court considered that the requirement to have exclusively used and occupied the application area without "substantial interruption" is ultimately a question of fact.[6] The physical extent and the duration of any interruption will be relevant. What is required is "interruption" and mere interference will not be enough.[7]

10. This reflects the Court's view that, since 1840, some impairment of prior rights will have been inevitable and should not necessarily be disqualifying. This is particularly so given the recognition of third-party fishing and navigation rights in the MACA Act and the fact that from 1870–2003 and from 2004–2011 the law did not recognise the customary rights of hapū and iwi in their marine spaces so they could not lawfully prevent others from crowding them out.[8]

11. An approach that is sensitive to these historical realities was found to be required.[9] What must be substantially interrupted is,

[4] At 238.
[5] *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka, Ngāti Patumoana, Ngāti Ruatākenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea)* [2024] NZSC 164.
[6] At [201].
[7] At [194].
[8] At [194].
[9] At [195].

therefore, the continuing integrated or holistic order under which the applicant community uses and controls the claim area.[10]

12. As an example, the Supreme Court considered that intensive use of the area by commercial shipping or occupation of an area by major port infrastructure, involving not just reclamation and structures at scale but also associated intensification of activity in the immediate vicinity, may well amount to substantial interruption if it is of sufficient duration.[11] However, the Supreme Court cautioned that the courts should be slow to conclude that continuity is so broken or exclusivity so compromised as to preclude the grant of CMT, given the reconciliatory purpose of the MACA Act.[12]

13. Section 106 shows how this element of the test works in practice. First, applicant groups must prove they hold the area according to tikanga and have used and occupied it from 1840 to the present day. [13] Second, the burden shifts to contradictors to prove that use and occupation was not exclusive, or that there has been a substantial interruption.[14] Substantial interruption may be expressly authorised by statute or may simply be 'not unlawful'.[15]

14. If substantial interruption is a live issue, a factual assessment will be undertaken to determine the extent of the spatial and/or temporal interruption, in the context of the application area and considering the applicant group's particular relationship with the area and its resources.[16]

[10] At [195].
[11] At [200].
[12] At [204].
[13] At [189].
[14] At [189].
[15] At [199].
[16] At [195].

Relevance to Tribunal's findings

15. The Tribunal previously found that existing interests in the CMCA are adequately protected throughout the MACA Act. In those circumstances, the Tribunal considered that there was no proper reason as to why the Crown should require that those same interests may be a substantial interruption preventing the grant of CMT.[17]

16. Although the Supreme Court somewhat softened the requirement for continuity in the applicant's use and occupation of the common marine and coastal area, as compared with the plain text of the MACA Act, applicants are still able to be 'crowded out' by those same interests that the Tribunal described.

17. In its second judgment, issued on 15 August 2025, the Supreme Court confirmed the approach to s 58 set out in its first judgment, including that the burden lies on contradictors to prove substantial interruption and that mere interference is insufficient.[18] However, the requirement remains part of the test, and applicants can still lose recognition because of it. The High Court has already excluded parts of the Ōpōtiki Harbour Development Project from CMT Order 1 on the basis of substantial interruption.[19]

18. This continues to breach the Treaty principles of active protection and partnership, and the Tribunal should confirm its interim finding that the requirement to hold the area 'without substantial interruption', as part of the test for CMT is in breach of the Treaty principles of partnership and active protection.

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[17] *Stage Two Report* at 105.
[18] *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka, Ngāti Patumoana, Ngāti Ruatākenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea)* [2025] NZSC 104 at [2].
[19] At [25]. This finding remains subject to an appeal.

19. The recommendation that the Crown should amend the MACA Act by removing the 'without substantial interruption' requirement should be confirmed.

Amended MACA Act

20. Although the leave reserved addresses only the 'substantial interruption' test in the original MACA Act, the claimants and interested parties submit that the Tribunal should take account of recent developments.

21. It is submitted that the 2025 Amendments cannot be ignored. They represent a breach of the principle of equal treatment as between those few applicants who, like Te Upokorehe and others, will have their application decided under the 'old law' and those that must meet the new test.

22. That new test, through s 57B, defines substantial interruption. Of note:

    a. An interruption can affect either the group's use and occupation of the area, or the exclusivity of that use and occupation.

    b. In deciding whether there has been a substantial interruption, the Court must now consider the nature, extent, duration and cause of any interruption.

    c. An interruption can be caused by lawful use or activities carried out in the area by people outside the group. This expressly includes fishing and navigation. It can also be caused by changes to the group's own lawful use or activities.

    d. The combined or cumulative effect of two or more such activities can also amount to a substantial interruption.

23. This is a far broader scope than the test outlined in *Te Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka* which requires an applicant group's holistic use of the seascape to be crowded out.

24. The Tribunal has already found that including substantial interruption as an element of the test breaches te Tiriti. The claimants and interested parties submit that the Tribunal should now make further findings that the Crown breached te Tiriti by:

    a. legislating for a broader test for substantial interruption; and

    b. applying different tests to applicants depending on when their applications were decided, contrary to the principle of equal treatment.

Dated: 1 October 2026

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