From:	9(2)a
To:	takutaimoana; 9(2)a
Subject:	Takutai Moana Pānui - Dual pathway consultation and resource management reform information CRM:0290169 Ex
Date:	Friday, September 30, 2022 8:03:12 PM

Kia ora ra,

I have been thinking about this dual pathway for a while.
It causes dissension.
Have always referred to both models as tentacles from the same monster.
I am not surprised by the crossover and potential to undermine any solution that could be reached.

Although our hapu , Ngāti Haua ki Te Rarawa has been allocated nearly half a million dollars by you for legal representation,
it may appear as fairness is seen to be done.

The best legal solution for the government is to return stolen customary title (2004) to Māori.
Whangape Moana is shared by Te Uri o Tai and Ngāti Haua.
We are the only people who will live and or be buried there.
Pakeha who marry into us wont live there- it's too hard.

You will save money, years and years of lawyers fees in court rooms.
Aotearoa as a nation has got bigger problems to sort out- than inch by inch legal posturing.

If you handed customary title back - the government could do something useful- like assist local hapu, Iwi and concerned citizens in fixing coastal erosion.
Labour started this mess, Labour should clean it up.
Very simple.

9(2)a

SUBMISSION

From: 9(2)a
To: takutaimoana
Subject: Re:CMT Takutaimoana
Date: Sunday, October 2, 2022 9:12:51 PM

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1. Kia Ora, it is my submission that I do select option No. 2. moving forward with this application.

2. It seems to be the fairest option of choice.

Nga mihi
9(2)a

SUBMISSION

From: 9(2)a
To: takutaimoana
Subject: Changes to RMA
Date: Friday, October 7, 2022 8:30:52 AM

Tena koe
I have read the letters and the options.

My opinion is this:
1. In areas that have already had a Waitangi Tribunal Settlement, the manamoana should not be open to any further challenges. Rather, if the claimants have already satisfied the Waitangi Tribunal that they have manawhenua, then manamoana should naturally follow.

2. There should be only one pathway for claimants, so that all evidence is presented in one forum. If a claimant feels that the decision was unfair, then they should have the right to take it to the High Court along with all the evidence presented by all contenders, in the hopes of changing the decision.

Oku whakaaro noa iho

9(2)a

SUBMISSION

From: 9(2)a
To: takutaimoana
Cc: 9(2)a
Subject: RE: Takutai Moana Pānui - Dual pathway consultaion and resource management reform information CRM:0290096
Date: Wednesday, November 2, 2022 3:24:44 PM

Tēnā koe

We are writing in regard to the below email seeking feedback on solutions to the dual pathway problems under the Marine and Coastal Area (Takutai Moana) Act 2011.

As you may be aware, there is currently a Kaupapa Inquiry before the Waitangi Tribunal considering the Takutai Moana Act and the various issues arising out of that legislation. One of those issues is the dual pathway framework for rights recognition.

Upon receipt of the below email by parties in this Inquiry, several counsel jointly wrote to the Waitangi Tribunal by way of the Joint Memorandum of Counsel ("JMOC") dated 6 October 2022. As noted in the JMOC, we consider this consultation process to be flawed. Instead, we seek a process for the Crown and claimants in the Inquiry to address this matter by way of evidence and submissions to the Waitangi Tribunal itself. It was also made clear in the JMOC that there should be no changes to the Takutai Moana Act while the Tribunal is in its report writing phase and until the Crown has properly engaged with claimants on the report.

We wish to reiterate the contents of the JMOC in our feedback to Te Arawhiti.

Ngā mihi, nā,

9(2)a
Level 2, Cuilam Building, 15 Osterley Way, Manukau City, PO Box 75517, Manurewa, Auckland, 2243 New Zealand | office: +64 9 263 5240 or 0800 37 10 37 | www.tamakilegal.com

Please note I only work Tuesday to Friday, 10am – 3pm

Please consider the environment before printing this email

From: takutaimoana <takutaimoana@tearawhiti.govt.nz>
Sent: Friday, 30 September 2022 4:28 PM

To: [redacted]
Subject: Takutai Moana Pānui - Dual pathway consultaion and resource management reform information CRM:0290096

Tēnā koe, nga rau rangatira ma

This Pānui has information about, and invites you to provide feedback on, solving a problem with the dual pathway under te Takutai Moana Act 2011. A copy of the consultation document is attached and submissions are open until **5pm** on **11 November 2022**.

The Pānui also informs you of an update to the information on our website about the resource management reforms which are underway and how takutai moana rights will be upheld.

If you have any questions regarding this Pānui please get in contact with me or my team at takutaimoana@tearawhiti.govt.nz.

Ngā mihi nui

Jo Taite
Director, Te Kāhui Takutai Moana

SUBMISSION

TE RŪNANGANUI O NGĀTI HIKAIRO SUBMISSION ON TAKUTAI MOANA DUAL PATHWAY CONSULTATION DOCUMENT

SUBMITTER DETAILS

Name: Te Rūnanganui o Ngāti Hikairo Incorporated

Contact person: 9(2)a 9(2)a

Postal address: 9(2)a

Phone: 9(2)a

Email: 9(2)a

SUMMARY

1. Te Rūnanganui o Ngāti Hikairo Incorporated (**Te Rūnanganui**) welcomes the opportunity to provide feedback on the options set out in the Takutai Moana Dual Pathway Consultation document to reform the pathways for determining applications under the Marine and Coastal Area Act 2011 (MACA).

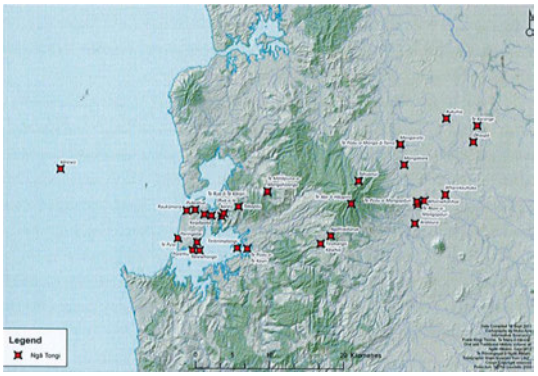
2. For the reasons that follow in the remainder of this submission, Te Rūnanganui requests that Option 3 be adopted, and that further resourcing be provided to enable applicants to pursue their preferred pathway.

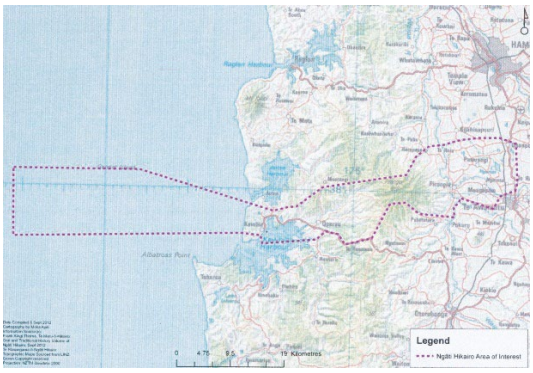
OVERVIEW OF NGĀTI HIKAIRO, TE RŪNANGANUI, AND ITS CLAIMS

About Ngāti Hikairo

1. Ngāti Hikairo is an independent iwi of Tainui waka origin.

2. Ngāti Hikairo maintain mana Motuhake and rangatiratanga in Kāwhia, Ōpārau, and Waipā. Ngāti Hikairo's rohe stretches from Kāwhia to Waipā as illustrated on the two maps below:





3. Ngāti Hikairo hapū include the following:

   (a) Te Whānau Pani

   (b) Ngāti Te Mihinga

(c) Ngāti Horotakere

(d) Ngāti Pare

(e) Ngāti Rāhui

(f) Ngāti Purapura

(g) Ngāti Wai

(h) Te Matewai

(i) Ngāti Parehinga

(j) Ngāti Whatitiri

(k) Ngāti Puhiawe

(l) Ngāti Hineue

(m) Ngāti Te Uru

(n) Ngāti Pōkaia

(o) Ngāti Taiuru

(p) Ngāti Waikaha

(q) Ngāti Huritake

(r) Ngāti Wai

(s) Ngāti Paretaikō

(t) Ngāti Te Rahopupuwai.

4. Ngāti Hikairo have three active marae and three further marae reserves:

(a) Waipapa (active)

(b) Mōkai (active)

(c) Pūrekireki. (active)

(d) Kai Ewe (marae reserve)

(e) Te Haona Kaha (marae reserve)

(f) Hīona (marae reserve).

TE RŪNANGANUI O NGĀTI HIKAIRO SUBMISSION ON TAKUTAI MOANA DUAL PATHWAY CONSULTATION DOCUMENT

About Te Rūnanganui

5. Te Rūnanganui o Ngāti Hikairo Incorporated (**Te Rūnanganui**) was established on 7 February 1995 as the mandated iwi authority for Ngāti Hikairo ki Kāwhia (**Ngāti Hikairo**).

Ngāti Hikairo MACA claims

6. On 23 April 2017 the (then) Chair of Te Rūnanganui filed an application with the High Court under s.98 of the Marine and Coastal Area Act (Takutai Moana) Act 2011 seeking the recognition of customary marine title and protected customary rights for Ngāti Hikairo. This application is recorded in the High Court list of marine and coastal applications as: *CIV-2017-485-000202 Te Rūnanganui o Ngāti Hikairo*.[1]

7. At around the same time, an application was also filed with Te Arawhiti (then the Office of Treaty Settlements) seeking direct engagement with the Minister regarding Ngāti Hikairo's application for the recognition of customary marine title and protected customary rights. This application is recorded on Te Arawhiti's direct engagement list as: MAC-01-04-007 Te Rūnanganui o Ngāti Hikairo.[2]

DUAL PATHWAY CONSULTATION OPTIONS

The issue and general support for the need for reform

8. The consultation document acknowledges the issue that arises under the current MACA legislation for the determination of overlapping claims for customary marine title (**CMT**) where the claims follow different pathways (High Court v Direct Negotiation).

9. Te Rūnanganui:

   (a) agrees that MACA is not well set up to support the determination of overlapping CMT applications via different pathways;

   (b) considers it is important that the rangatiratanga of different iwi are recognised and their choice of preferred pathway is respected; and

   (c) strongly supports the need for amendments to the legislation to ensure that all applications for customary marine title in an area are able to be considered.

10. Te Rūnanganui also acknowledges that there may be a need for further reform following the Waitangi Tribunal's report on Wai 2660, but considers it is appropriate that steps are taken now so that applicants are not shut out from processes that may affect them.

The options and Te Rūnanganui's view

11. The consultation document proposes three options:

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1 https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/marine-and-coastal-list-applications/civ-2017-485-000202-te-runanganui-o-ngati-hikairo/

2 https://tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/applications/tainui/

- Option 1 - enabling decision makers to take account of all relevant applications for an area at the same time;

- Option 2 - enable a CMT to be varied to take account of decisions in the other pathway;

- Option 3 – a combination of options 1 and 2.

12. Te Rūnanganui's primary concern with each of these options is that they all are likely to require participation by an applicant in multiple processes in order to ensure their claims are considered and/or not derogated from in subsequent processes. Such participation will result in additional cost, time and resource implications for all applicants.

13. Of the three options, option 3 appears to provide the best compromise in that it enables an applicant to stay in their preferred pathway, the decision maker to take account of applications in other pathways, and amendments to be made to recognise overlapping claims.

14. However, Te Rūnanganui remains concerned that due to resourcing constraints at Te Arawhiti and the delays associated with the direct negotiation pathway, the 'choice' of a pathway is somewhat illusory.

15. While Te Rūnanganui's strong preference would be to directly negotiate these matters with the Crown (as that is more reflective of the partnership envisaged in Te Tiriti), Te Rūnanganui has been advised that it would take at least another 10 years (if not longer) for its application to come up for consideration via the direct negotiation pathway. Given this process commenced in 2017, such delays are a significant deterrent to the use of that pathway.

What Te Rūnanganui seeks

16. To ensure that the Crown appropriately gives effect to its partnership, good faith, active protection and other obligations under Te Tiriti, Te Rūnanganui requests that:

    (a) the MACA legislation is amended to ensure whichever pathway is chosen overlapping claims are able to be considered and overlapping applicants are able to participate;

    (b) further resourcing is allocated to the direct negotiation pathway so that it becomes a more viable option for applicants;

    (c) applicants are appropriately resourced to participate in processes involving overlapping claimants – irrespective of the pathway chosen.

TE RŪNANGANUI O NGĀTI HIKAIRO SUBMISSION ON TAKUTAI MOANA DUAL PATHWAY CONSULTATION DOCUMENT

Dated: 8 November 2022

Signed for and on behalf of Te Rūnanganui by:

9(2)a

9(2)a

SUBMISSION

9(2)a
[redacted]

HOCKLY LEGAL

8 November 2022

Te Arawhiti

By Email

Kia ora

RE: Dual Pathway Consultation - Submission

1. This letter is sent on behalf of my clients 9(2)a and her applicant rōpu the Rewha & Reweti Whānau, who have an application in the High Court and Crown Engagement process under the Takutai Moana (Marine and Coastal Area) Act 2011, their application is CIV-2017-485-352. They also made a corresponding application for Crown Engagement.

2. The consultation documents sets out to address one of the identified issues with the legislation, being the lack of connection between the two processes, such that they can act independently of each other. Your documents have set out three options to address this issue.

3. The view of my clients is that this is one of a plethora of issues with the legislation, and that solving this one problem is far from sufficient to make the legislation suitable, functional and compliant with Te Tiriti.

4. My clients 9(2)a and their submission and view is that the government should await the report from the Waitangi Tribunal on this legislation, consider the recommendations and then consult on those recommendations with Māori, adopting those that are supported.

5. Given that an entire Inquiry has been conducted into this legislation the government would be ill-advised to proceed with making piecemeal changes, when the Waitangi Tribunal will likely address this exact issue in their report and recommend ways to improve it, along with other aspects of the legislation.

6. For this reason, my clients wish to make the submission that they do not support any one of the solutions proposed in isolation, but that the correction to this issue needs to be a part of a more wholesale approach that improves the legislation, gives Māori proper recognition of their customary rights in the takutai moana and is compliant with Te Tiriti.

Ngā mihi nunui

9(2)a

9(2)a
[redacted]
PO Box 59211
Mangere Bridge
Auckland 2151

SUBMISSION

From: Anderson, Megan
To: Buchanan, Tessa; Holmes, Monique
Cc: Galvin, Anna; Allan, Jenna-Faith
Subject: FW: Dual Pathway Consultation
Date: Thursday, November 10, 2022 9:46:44 AM
Attachments: image005.png
image006.png

From: macafunding <fundingtakutai@tearawhiti.govt.nz>
Sent: Tuesday, 8 November 2022 4:13 pm
To: Anderson, Megan <Megan.Anderson@tearawhiti.govt.nz>
Cc: macafunding <fundingtakutai@tearawhiti.govt.nz>; 9(2)a
Subject: Dual Pathway Consultation

Kia ora Megan

This morning I had a call from a 9(2)a representing the Crown Engagement only applicant group PukeTapu Whānau / Hapū O Te Mana Whenua (MAC-01-10-011). 9(2)a wanted to give verbal feedback on our request for comments on the Dual pathway issue.

9(2)a stated their groups preference was for Option # 3.

The group's main concern is they do not want to be excluded from participation in the High Court hearings of any group in their area in Taranaki. 9(2)a identified the dual applicant group Te Atiawa o Taranaki (CIV-2017-485-310) represented by Te Kotahitanga o Te Atiawa Trust currently progressing their application in the High Court as a particular group whose application they had an interest in. The PukeTapu Whānau want to be kept informed well in advance when this groups hearing dates are scheduled by the High Court so they can prepare and participate.

The second matter 9(2)a identified was the need for professional Assistance for PukeTapu Whānau in advancing their application. 9(2)a did not identify the exact assistance required.

Currently PukeTapu Whānau / Hapū O Te Mana Whenua (MAC-01-10-011) have not requested access to funding. However as a result of our conversation this morning I will be working with 9(2)a to arrange approval of funding.

9(2)a

Nga mihi
Alisdair

Alisdair Neate (he/him)
FUNDING ADMINISTRATOR
CEL: +64 4 524 9184 I Ext: 40184 DDI: +64 4 524 9184 I Ext: 40184
WEB: tearawhiti.govt.nz

The Office for Māori Crown Relations – Te Arawhiti
Level 3, Justice Centre, 19 Aitken Street, SX10111, Wellington 6011

SUBMISSION

FEEDBACK ON THE TAKUTAI MOANA DUAL PATHWAY CONSULTATION

To:	Te Kāhui Takutai Moana - Te Arawhiti Level 3, The Justice Centre 19 Aitken Street SX1011 WELLINGTON 6011 takutaimoana@tearawhiti.govt.nz
Name of Submitter:	Trustees of the Te Uri o Hau Settlement Trust on behalf of the Hapu of Te Uri o Hau (**Te Uri o Hau**)
Marine and Coastal Area (Takutai Moana) Act 2011 CIV number:	CIV-2009-448-205
Address for service:	c/- MinterEllisonRuddWatts PO Box 105249 AUCKLAND 1143 9(2)a [redacted] 9(2)a [redacted]

Introduction

1. Te Uri o Hau appreciates the opportunity to provide feedback on consultation being undertaken by Te Arawhiti on options to address issues with the dual pathway problem under the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACAA**).

2. The dual pathway problem has been expressed by Te Arawhiti as:[1]

Applications have been made under the Act to the Crown, the High Court, or both to recognise customary marine title on behalf of iwi, hapū, and whānau groups. The High Court can only make decisions on applications that were made to the High Court, and the Crown can only make decisions on applications that were made to the Crown.

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

[1] Te Arawhiti website, accessed 6 November 2011: https://www.tearawhiti.govt.nz/te-kahui-takutai-moana-marine-and-coastal-area/dual-pathway-consultation/.

problem because the Act doesn't say how this should work – this is the dual pathway problem. If we don't fix this, there is a real risk that some groups may not be able to have customary marine title recognised because of it.

Te Uri o Hau

3. Te Uri o Hau is a hapū of the Ngāti Whātua tribe, and their rohe is located in the North Island embraced by the Mangawhai and Kaipara Harbours and coastal marine area. Te Uri o Hau are the tangata whenua and kaitiaki of natural resources within the rohe of Te Uri o Hau.

4. Te Uri o Hau has mandate by its beneficiaries to pursue their claims of customary marine title and protected customary rights.

5. Te Uri o Hau started discussions with the Crown for recognition of customary marine rights under the previous foreshore legislation, the Foreshore and Seabed Act 2004 (**FSA**).

6. Te Uri o Hau has made the following applications:

   (a) An application to the High Court for territorial customary rights under section 33 of the FSA, file number CIV-2009-488-205, lodged on 9 April 2009. This application was transferred to the High Court under MACCA and is treated as if it is an application for customary marine title. It must be given priority ahead of any applications for customary marine title filed under MACAA (section 125 MACAA); and

   (b) An application for the recognition of protected customary rights and customary marine title by direct engagement with the Crown under section 95 of the MACAA, filed in August 2013.

7. These applications are live, and no decision has yet been made.

8. Te Uri o Hau and the Crown have prepared a work plan to guide engagement in relation to its applications, which both parties are working through. Te Uri o Hau is continuing to undertake research to support its applications, particularly in relation to the west coast portion of Te Uri o Hau's rohe, which is an important step in Te Uri o Hau's engagement with the Crown.

9. Te Uri o Hau has been and continues to kōrero and hui with other applicants under the Act with overlapping interests.

10. However, a small part of Te Uri o Hau's claim area on the east coast of Te Uri o Hau's rohe, has been included in the 9(2)a [redacted]

    (a) Claims 9(2)a [redacted] (Stage 1(a)); and

    (b) Claims 9(2)a [redacted]

11. The setting down of the above hearings will cause Te Uri o Hau to be involved in 9(2)a [redacted] irrespective of its direct engagement with the Crown in relation to its applications. This is an example of how the dual pathway problem may arise.

Submission on options to resolve proposed dual pathway

12. Te Arawhiti has requested feedback on three options proposed to address the dual pathway problem.

13. Te Uri o Hau's view is that there are material issues with each of the options proposed that need to be resolved, but on balance it prefers proposed option one.

14. Te Uri o Hau's feedback on each option, followed by general feedback applicable to all three options is set out below.

Option one: Enable decision makes to take account of all relevant applications of an application area at the same time

15. Te Uri o Hau **supports** option one in principle, and option one is Te Uri o Hau's preferred option for resolving this issue.

16. Option one would require all relevant applications in an area to be considered at the same time by either the High Court or the Crown. If applicants did not wish to have their application considered by that decision maker, they may

choose not to participate, but would not be able to have a customary marine title decision made in the other pathway for that area.

17. Te Uri o Hau considers that this option provides claimants with the greatest certainty both in terms of process and outcome.

18. It provides the most straightforward process for claimants by requiring one pathway for all claimants in an area. It also ensures finality of recognition orders and removes any risk of re-litigation or amendment to customary marine title once the decision maker determines all applications in a claim area.

19. Te Uri o Hau consider that this option can also be implemented in a manner that is consistent with principles of tikanga by providing an opportunity for claimants to work cooperatively with their whakapapa and whanaungatanga to progress overlapping claims. This is particularly so if the pathway used is direct negotiations with the Crown.

20. However, it is unclear who the ultimate decision maker would be for this option – the option at this stage simply states all relevant applications would be considered by either the High Court or the Crown. However, overlapping applicants may have different preferences as to which pathway is the best option. To identify one pathway and require all applicants to participate in that pathway (irrespective of whether that is their preference) would not align with the interests of all. Further this approach would potentially disadvantage those iwi who have already made steps to progress their claim in the alternative pathway.

21. A fair process needs to be developed to identify a pathway for determining claims under this option. In determining a pathway for a particular claim area, the pathway that has been identified by priority applicants, such as Te Uri o Hau, should be given weight. In Te Uri o Hau's case, this is direct negotiations with the Crown.

22. The claim area to which a particular pathway will be assigned is also not clear. In Te Uri o Hau's view, there are some relatively clear geographical boundaries that can be drawn to group claimants. However, the boundaries will not be clear in all cases, and there is a risk that the claim area of some applicants will straddle two (or multiple) areas of interest – this may potentially cause those claimants to need to participate in two pathways, which may disadvantage that

group in terms of progressing its claim, and in additional cost and resource. It is important that the boundaries of any claimant 'groups' are drawn in kōrero and hui with claimants.

23. The timing for consideration of a group's claims via a particular pathway also needs to be carefully considered. Some claimants, like Te Uri o Hau, have progressed research and evidence collection to support their claims, while others are less advanced. Bringing together claimants at different stages of preparedness could potentially cause delays while all claimant groups ready themselves for the relevant pathway. In Te Uri o Hau's view, direct consultation with the Crown provides more flexibility in terms of timing and would enable some discussions to commence while all parties undertake research and prepare evidence.

24. Overall, despite the concerns raised above, Te Uri o Hau considers that this is the most appropriate option presented as it provides the greatest certainty and finality for applicants in the determination of their claims and can be implemented in a manner that is consistent with tikanga principles.

Option two: Enable a customary marine title to be varied to take account of decisions in the other pathway

25. Te Uri o Hau **supports** option two, in principle, but considers that this approach is less preferable than option one.

26. Option two would mean decision makers could only consider and determine applications made in their pathway but would enable a customary marine title issued in that pathway to be varied to include application groups if the other decision maker is satisfied that they also meet the test for customary marine title.

27. The advantage of this option over option one is that it enables applicants to continue to pursue their claims in their preferred pathway, and to not be disadvantaged by being forced to have their claim determined collectively under one pathway that may not be of their choosing.

28. However, under this option, if a recognition order for customary marine title is made, it may not be final and will remain uncertain until all other overlapping claims have been determined. This raises a number of material issues:

    (a) There is a risk that the evidence and resource expended by parties to determine a recognition order will be 'undone' or not properly honoured when a further overlapping claim is considered.

    (b) Applicants who have had a recognition order made in their favour will have an interest any further High Court proceedings or negotiations with the Crown that relate to the relevant area and may seek to be involved in that process. Or, alternatively, they may seek to challenge any amendment or addition to a recognition order. These processes will give rise to additional costs and resources, and also contribute to delay in determining the final form of a recognition order.

    (c) As noted in the consultation document, there is a risk that decisions made by an applicant group in reliance on a recognition order could potentially be challenged by a claimant group added to the order at a later date.

29. As discussed above, if a recognition order for customary marine title is made, for example by way of direct negotiations with the Crown, but there remains a High Court hearing or hearing(s), or other direct negotiations with the Crown, to determine other overlapping claims, it is important that the holder of the recognition order ought to be given the right to participate in that further decision-making process.

30. While Te Uri o Hau support this option in principle, primarily because it provides applicants with the option to continue to pursue their chosen pathway, this option is less favourable than option one for all claimants due to the lack of finality of determination of claims and risk of re-litigation.

31. If this option is chosen, it is important that priority applications, such as Te Uri o Hau's customary marine title claim, continue to be given priority of consideration over other applicants, as required by the MACAA.

Option three: Combining options one and two

32. Te Uri o Hau **does not** support option three.

33. Option three combines both options one and two. It would enable either decision maker to take account of all the relevant applications in a coastline at the same time, irrespective of which pathway an application was originally made in. However, if applicants chose to stay in their original pathway and were also found to meet the test for a customary marine title, they could be added to the recognition order that was made in the other pathway.

34. This option does also not identify how priority applications, such as Te Uri o Hau's customary marine title claim, would be dealt with.

35. Although this option allows for some flexibility for applicants to continue with their chosen pathway, it enables a decision maker to hear all relevant applications in an area at the same time.

36. It is unclear how this option would work in practice. How would a decision-maker be able to fairly and appropriately take into account the claims of other parties, and weigh competing interests, without the relevant parties fully participating in the process?

37. It appears that this option has the greatest risk for all claimants in terms of lack of certainty and finality, lack of clarity around how claims in the other pathway will be accounted for, lack of clarity as to the weight given to claims being pursued in the other pathway, and a risk of having to re-litigate a claim determined in an alternative pathway

38. Te Uri o Hau does not support the combined option three.

General feedback applicable to all three options

Uncertainty as to whether claimants have mandate to pursue their claims

39. Te Uri o Hau understands that a mandate for a settlement entity from its people is required for an iwi or hapū to enter into negotiations with the Crown. Under the direct negotiation process, the application form required confirmation that the entity engaging with the Crown had been appointed by iwi, hapū and whenua.

40. Te Uri o Hau has mandate by its beneficiaries to pursue their claims of customary marine title and protected customary rights. However, Te Uri o Hau

is concerned that the same requirement does not apply in the alternative pathway of making a claim to the High Court.

41. Te Uri o Hau is concerned that if option one in particular is adopted, then it will force all relevant applications to be heard by one decision maker, which could include claims of iwi who do have mandate (such as Te Uri o Hau) as well as claims by entities or individuals who do not have mandate, to be considered against one another. Te Uri o Hau does not support this approach.

42. Te Uri o Hau is also generally concerned that some claimants do have mandate as required by the direct Crown negotiation process, but that it is unclear that other claimants also have mandate to pursue these claims, and an inconsistent approach has been taken in respect of different claimants regarding mandate.

The options do not provide for tikanga

43. Te Uri o Hau is concerned that there is limited regard for tikanga in any of the three options put forward by the Crown.

44. As noted above, Te Uri o Hau through their direct negotiation with the Crown have been engaged with overlapping claimants and sought to resolve overlap and issues through a bespoke process true to principles of tikanga. The Crown process has naturally enabled Te Uri o Hau to engage in hui and korero with other claimants in trying to find their own way to mitigate this decision making.

45. Over time, Te Uri o Hau has become comfortable with the process that has grown out of navigating the processes established by the Act that they have been required to participate in to have their customary marine title recognised.

46. Te Uri o Hau do not want to jeopardise relationships with other iwi and hapū as a consequence of any of these options.

47. Te Uri o Hau is concerned that in seeking to alter either or both processes in the manner suggested by the dual pathway options will diminish the opportunity for the processes to adopt principles of tikanga. They have a strong preference that any option adopted to resolve this issue preserves and maintains tikanga in these proceedings.

All options have the potential for re-litigation and unfairness

48. Te Uri o Hau is concerned that all three options will have the adverse consequence of enabling a claim to be determined, and then have that decision re-litigated to account for overlapping claims in the other pathway.

49. Te Uri o Hau is concerned that this will impede on the certainty of the confirmation of their claim, and will also incur further timing, cost and resource in seeking to uphold or defend their claim, already decided, against a competing claim that follows theirs in an alternative pathway.

Kōrero

50. Te Uri o Hau invites kōrero with Te Arawhiti about its feedback on the options.

DATED this 9th day of November 2022

Trustees of the Te Uri o Hau Settlement Trust on behalf of the Hapu of Te Uri o Hau by its solicitors and duly authorised agents

9(2)a

9(2)a

Address for service of Te Uri o Hau
Te Uri o Hau c/- MinterEllisonRuddWatts
PO Box 105249
Auckland 1143

9(2)a

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SUBMISSION

Takutai Moana Dual Pathway Problem: Reform of te Takutai Moana Act 2011

TO: Te Kāhui Takutai Moana, Te Arawhiti
takutaimona@tearawhiti.govt.nz

Feedback on Takutai Moana Dual Pathway Consultation Document

Submitters:

Te Rūnanga o Toa Rangatira on behalf of Ngāti Toa Rangatira

PO Box 50355, Porirua
Email : 9(2)a

Te Ātiawa ki Whakarongotai Charitable Trust on behalf of Te Ātiawa ki Whakarongotai

10 Parata St
Waikanae
Wellington 5036
Email: 9(2)a

Ngāti Raukawa ki te Tonga Trust on behalf of Raukawa ki te Tonga

P O Box 15012, Otaki 5512
Email: raukawakitetonga@gmail.com

A Introduction and summary of submission

1. This submission is made on behalf of the three iwi of Ngāti Toa Rangatira, Te Ātiawa ki Whakarongotai and Ngāti Raukawa ki te Tonga, known as the ART Confederation. The submitters are presently applicants for orders under the Marine Coastal (Takutai Moana) Act 2011. Between them, the iwi have customary takutai moana interests, and for 200 years or so have exercised undisturbed tino rangatiratanga, mana moana and mana whenua, over a large part of the marine and coastal area of the Rangitikei, Manawatu, Horowhenua, Kapiti, Wellington and Te Tau Ihu regions, and extending further down both sides of the South Island coast.

2. The potentially dual but separate pathways approach provided for in the Marine Coastal (Takutai Moana) Act 2011 creates some significant problems for most of these iwi, either because a single pathway was selected by some applicants or because the multiple and separate processes parties in an area will need to follow will create uncertainty, delay and expense for all applicants. It also prevents a fully collaborative and cooperative approach that is consistent with tikanga, being taken by adjacent or overlapping applicant groups.

3. However, the submitters do consider that none of the proposed Options outlined in the Consultation Document provides an ideal solution to all these problems, and in fact creates some new and additional problems or issues. This submission identifies these issues and proposes modification of Option 1.

4. Additional issues arise for some of the applicants under the current regime which are not identified in the Consultation Document. These matters are also noted, and suggestions made.

5. The submitters strongly support reform of the Marine Coastal (Takutai Moana) Act 2011 to remedy these problems as a **matter of urgency**. Not only are their respective applications subject to a High Court timetable but so are many others. It is critical that changes are made to the Act as quickly as possible so that the negative aspects of the legislation are ameliorated as a matter of urgency and avoid the compounding issues and difficulties applicants will face as their cases are progressed through the High Court timetable. Further, if a workable solution is not found, there is a significant risk of prejudice resulting to claimants who may have selected only one pathway, thereby causing uncertainty for all claimant groups.

6. The submitters also strongly submit that any reform must increase flexibility and options available to all applicants, not limit them. Any reform must preserve existing rights and options that applicants have, and not remove them.

B The situation facing the submitters

7. The submitters include applicants under both pathways or one or the other. Details of our applications are attached in a schedule for convenience. Most applicants have applications in both pathways, but Ngāti Toa Rangatira is only in the Crown engagement pathway (apart from an application over a small coastal marine area in the Porirua area).

8. The iwi of the ART Confederation have respective applications that cover the Takutai Moana from Whangaehu River mouth (a point on the west coast of the North Island south of Whanganui) to a large part of Raukawa Moana (Cook Strait), including most of Te Tau Ihu (top of the South Island) and down to the mouth of the Arahura River in the west and Kaikōura in the east.

9. This area is likely to be investigated by either the High Court or by Crown engagement in 3 parts:
   A. The Rangitikei River mouth to Whareroa (south of Paekākāriki)
   B. Whareroa to Turakirae Head (the eastern point of Palliser Bay)
   C. Te Tau Ihu (the Top of the South Island) and further south.

   Maps showing areas A and B are attached.[1]

10. Applicants in the areas in A and B described above, are now subject to active case management by the High Court (referred to by the court as Group N). Several applicants (including some of the submitters) within Group N have sought to have their applications set down for a hearing before the High Court. On 9(2)a Churchman J issued a Minute (Minute (No 3) which has confirmed the timetable for inquiry by the High Court. 9(2)a [redacted]

11. The role of the groups with interests in Te Tau Ihu and the extent of southern seaward boundary of Area B which overlaps with the Takutai moana of the Te Tau Ihu groups has yet to be resolved. The role of other applicants within the Areas A and B (some of whom have single pathways) is also unclear.[2]

12. A significant issue facing the Group N High Court applicants is the role of applicants with no application in the High Court: the largest of these is the iwi of Ngāti Toa Rangatira, which has the largest customary takutai moana application area in this region.

13. The High Court has granted Ngāti Toa Rangatira leave to appear as an interested party[3] because the Court recognised that "Ngāti Toa are an important presence in the broader area concerned – their kōrero will be necessary to ensure that the Court has a full understanding of the customary interests in the area".[4] The Court has therefore made provision in the Area A and B timetable for Ngāti Toa Rangatira and other interested parties to file evidence, submissions and appear at the hearings in due course. [5]

14. However, as the High Court, Consultation Document and related Cabinet papers point out, the High Court has no jurisdiction to make orders in favour of an interested party, and Ngāti Toa Rangatira will have to seek such orders through the Crown engagement pathway. Further, the Court has indicated that it will proceed to hear High Court applications and grant orders to High Court applicants notwithstanding the clear evidence of other claimant's interests. The dual but separate pathway approach provided for in the Marine Coastal (Takutai Moana) Act 2011

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1 Attached as Document 2 in the Appendix. The maps were tabled by the group of applicants in Group N who were seeking a hearing timetable and have been adopted provisionally by the court.

2 Examples include: Te Atiawa ki Te Upoko o Te Ika a Maui [MAC-01-11-014, CIV-2017-485-260]; Rangitane o Manawatu Settlement Trust [MAC-01-11-013] and many others.

3 Group N, Minute of Churchman J dated 14 September 2022, para 10.

4 Ibid.

5 Group N, Minute No 3, Churchman J dated 10 November 2022.

therefore creates some significant problems for most of these iwi, either because only one pathway was selected by some applicants (which cannot now be changed) or because the separate process those parties will need to follow creates uncertainty, delay and expense for all applicants. The dual pathway is prejudicial because it creates a potential for a denial of opportunity for some single pathway applicants to obtain CMTs or to have their applications heard or investigated.

15. The High Court and Cabinet have recognised that this problem creates the distinct potential for unfairness and 'unjust outcomes'.[6]

16. Ngāti Toa Rangatira and any other applicants who only have applications in the Crown engagement pathway will have the burden of further time and expense to pursue a separate process, and the applicants in the High Court will have to await that process also to know the impact on their own areas. No doubt all these issues are well understood by Te Arawhiti, have been flagged in the Consultation material and this is the reason for the proposed reform.

17. As noted above, the proposed options do not provide a complete solution to all of these problems and in fact create some additional problems. In addition to the issues flagged by the Consultation material, the submitters have identified other issues. This submission identifies these issues and proposes modification of Option 1.

C General comments

18. The invitation for feedback on options to fix a problem with the dual pathway invited comments on the 'Consultation Document'. However, in our view the Consultation Document is very high level and provides little information on exactly how the Three Options will work in practice. The related Cabinet papers[7] provide some helpful background and further information, but practical matters remain unclear. It is not clear for example what transitional arrangements will be provided and how the Three Options will work if one or other of the pathways are already underway.

19. We have also learned through discussion with officials that there are may be some critical elements in the Three Options that are not made clear in the Consultation Document or the Cabinet papers. These could have significant impact on how the Three Options will work and could severely prejudice the applicants. Our views on these elements are flagged in our comments on the various Options.

20. Furthermore, it is difficult for claimants to protect their interests in the High Court without any certainty about when a Bill amending the Act will be introduced. The High Court has recently set Group N applications down for a hearing for 6 May 2024 (Stage 1) and 23 September 2024 (Stage 2).[8] However, evidence needs to be filed by as early as 16 October 2023. To protect their interests, all claimants of the ART Confederation need some certainty as to whether Ngāti Toa Rangatira will be able to participate in the High Court as a full party to proceedings.

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6 MCR-22-MIN-0014 para 13 and Appendix 1; and quoting Powell J in *Nga Potiki Stage Two* (unfortunately unreferenced).

7 CAB-22-MIN-0354; MCR-22-MIN-0014.

8 Minute (No 3) of Churchman J

We support reform as a matter of urgency

21. It is our view that resolution of the dual pathway problem is critical to the proper functioning of the Takutai Moana Act 2011. Without this solved the Takutai Moana Act 2011 will fail to deliver its objectives and instead deliver inequal and unfair outcomes.

22. The submitters strongly support urgent change to the Takutai Moana Act 2011 to remedy these problems as a matter of urgency. This is recognised in the Cabinet Committee paper.[9] Not only are their application subject to a High Court timetable but so are many others. Although the Minister has written to the Chief High Court Judge to inform her of the proposed consultation and potential legislative change, the High Court is not able to take that in to account when reviewing the cases before it and must deal with applications under the legislation as it stands.

23. It is critical that changes are made to the Act as quickly as possible so that the negative aspects of the legislation are ameliorated as quickly as possible to avoid the compounding issues and difficulties applicants will face as their cases are progressed through the Court timetable.

Reform must provide flexibility and choice as much as possible

24. The submitters also strongly submit that any reform must increase flexibility and options available to all applicants, not limit them. In the context of legislation which is intended to recognise and restore customary rights, give 'applicants the choice about how they obtain recognition of ..customary interests'[10] and 'to provide a real and meaningful choice for applicants and …. fulfil Cabinet's desire to make takutai moana engagement a mana-enhancing process'[11] any reform should enhance freedom of choice.

25. All applicants should be able to select the pathway that best suits:

- their situation
- the position of other related, adjacent or overlapping applicants, and
- the status of the pathway the Group is in

26. It is acknowledged by the Crown that 'unless all applicants with overlapping application areas are progressing in the same pathway (and therefore to the same decision maker), there is potential for unintended and unjust outcomes'. [12] Consequently, If the majority of the applicants within a given area do decide to proceed down a given pathway, then all applicants should have the ability to have that part of their application heard together or collectively and to obtain orders through that process. In our view this approach is consistent with the principles of natural justice and tikanga.

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9 Minister's briefing paper attached to MCR-22-MIN-0014, para 4 and 11.

10 Ibid, para 4.

11 Ibid, Appendix 1, para 15.

12 Ibid, Appendix 1, para 3.

Reform must not remove existing rights or options

27. Any reform must preserve existing rights that applicants have, and not remove them.

Other issues arising from inflexibility on pathways

28. The separate dual pathways are a significant barrier to and limitation on the ability for related, adjacent, or overlapping iwi groups to adopt a collective approach to areas of shared exclusivity.

29. An additional practical and legal problem (not identified in the Consultation Document) has arisen for some of the applicants where their application area extends outside the area being investigated by the High Court, to another area where the grouping of applicants in that separate area wishes to take the Crown engagement pathway. There is no ability for an applicant to seek to progress different parts of its application area in different pathways to align or work collaboratively with the different collective 'groups' which fall within its application area.

30. This prevents a fully collaborative and cooperative approach being taken by adjacent or overlapping applicant groups. This is very unfortunate as it is not just in the interests of iwi to achieve agreement as to shared areas but would also be beneficial for the Court and the Crown as decision makers.

Procedural and transitional arrangements

31. Procedural and transfer mechanisms will have to be provided. However, it is not clear what transitional arrangements will be provided: that is how the Options will work if one or other of the pathways are already underway. This will be most important and problematic if the High Court process is well underway, the interlocutory timetable is in train and single pathway (Crown engagement) applicants seek to opt into the High Court halfway through. The reform needs to provide a mechanism for this so that such applicants are not prejudiced, and High Court applicants are not unduly inconvenienced.

D Specific comments on the Options

Option 1

32. Option 1 in the Consultation Document suggests that the decision to consider all applications in a defined inquiry area will be conferred by the amended Act on the 'decision maker' and not by the applicant deciding to select one pathway over another. The applicant would only have a choice to 'opt out' or not participate in the pathway proceeding first. If they did decide to not particulate then, if a CMT decision is made, that applicant loses the ability to pursue a CMT in the pathway they originally applied in.

33. This Option does give the ability to a single pathway applicant to be heard and obtain orders in the 'other' pathway if this is proceeding ahead of the other initially chosen by the applicant. It does make matters more efficient and convenient for the management by the High Court and

avoids delays and unnecessary expenditure.[13] However, this approach also fails to acknowledge that applicants who do have dual applications have the ability to decide to switch between pathways as matters progress and situations change. It is possible that a group of applicants may originally have decided to proceed down a High Court path and subsequently decide to move into Crown engagement, or vice versa. This Option could have the effect of simply creating the same problem that currently exists, in reverse.

34. Further, Option 1 does not give single pathway applicants the same rights and ability that dual pathway applicants have – the power of choice. It is taking the ability to choose away from applicants and only giving them an opt out ability. In the context of legislation which is intended to recognise and restore customary rights and be mana enhancing (to quote the Minister's paper) any reform should provide the freedom of choice.

35. ***Proposal***: We suggest that the cleanest and fairest approach would be to deem all applications under one pathway to be an application under both pathways just as if the original application had been made in both. All applicants have the same ability to determine which pathway is in their best interests at any particular time. This will achieve the goal of a fair and transparent process, and which promotes consistency and fairness between applicants.

36. We understand through discussions with Te Arawhiti that under Option 1 if a Crown engagement applicant decided to opt into the High Court pathway (because that is where overlapping cases are proceeding) then that applicant could no longer pursue <u>any</u> outcome under the Crown engagement pathway. That is their application would be shifted in its entirety from Crown engagement to High Court. That is a significant element of Option 1 and its omission from the Consultation Document is concerning. The difficulty with this is that, as the Court recognises, many applications are not covered in their entirety by a single Court investigation. Powell J noted the problems of overlapping applications and customary areas and the management of hearings to accommodate all applications in the Ngā Pōtiki case.[14]

> *It is quite simply impossible, given the nature of claimed customary interests, for every applicant to expect a single discrete hearing to address all of their interests under the Act. Instead, there will inevitably be overlaps that can only accommodated by splitting hearings such that parts of one application are heard with the whole of others.*

37. Many large iwi will have to be heard in several grouped hearings, and/or the balance could fall within a district where the other applications will seek to have a collective Crown engagement. This is quite possible for Ngāti Toa Rangatira, where currently the iwi of Te Tau Iwi are looking to collective Crown engagement.

38. If Ngāti Toa Rangatira were to be part heard as part of Group N in the High Court, the whole of the iwi application could, we understand, only be pursued through the High Court. This would place Ngāti Toa Rangatira outside the Crown engagement pathway for Te Tau Ihu groups. The Option 1 'solution' would in fact create a new 'dual pathway' problem for Ngāti Toa Rangatira and the other Te Tau Ihu iwi for the rest of its application in the South Island. Option 1 as it

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13 Minute (no 4) Powell J 19 March 2021, CIV-2011-485-793, para 12.

14 Ibid (reference as for Note 9 above). Para 10.

stands is not giving those single pathway applicants any additional options to avoid an 'unjust outcome' but potentially creates a new problem for that applicant.

39. ***Proposal***: The solution must be to permit all applicants the ability to make a choice as to which pathway they should progress their application in depending on how other applicants are proceeding in the relevant grouped area. That is, they can split their application area into different pathways if the majority of applicants in those areas are proceeding down one pathway or another. This is already contemplated by the Ministerial paper which suggests Option 1 only applies to the area with the scope of the other pathway. [15]

40. This would permit Ngāti Toa Rangatira, for example, to have its application heard in the High Court for the North Island areas (Area A and B) but its application over areas in Te Tau Ihu in the Crown engagement pathway if other Te Tau Ihu iwi decided to proceed collectively down that path.

Option 2

41. Option 2 would not change the ability for single pathway applicants to move to the other or switch between them. It merely provides that if a CMT is issued in one pathway it can or will be varied to reflect subsequent outcomes in the other pathway.

42. In our view this is no solution for either the single pathway applicant OR the active participants in the other pathway. As Powell J has noted in respect to a proposal for a series of ad hoc court hearings, such an approach leads to 'considerable uncertainty', and make it unclear as to what the ultimate outcome might be once everyone has been considered by the decision maker. [16]

43. It is assumed that this Option will not remove the ability of a single pathway applicant to still participate in the High Court as an interested party as it can at the present time. To remove this right would be to remove the rights of applicants as affected parties. A single pathway applicant in Crown engagement (such as Ngāti Toa) will, in most cases we believe, still want to participate in the High Court process both to ensure the Court was fully aware of their interests and the collective history of the area concerned, and will have a fuller picture if the situation before the Court makes appropriate findings as to customary interests within their application area.

44. Given the current delays in the Crown engagement process applicants under that pathway have low confidence in the speed with which such an engagement is likely to proceed and will want to ensure that their interests are brought to the attention of the court.

45. The other applicants in the High Court will not be assisted by this approach either. They will be aware that any orders made by the Court could be changed at some time in the future through a Crown engagement process. Firstly, this uncertainty will undermine any potential 'value' and scope of their rights granted by the High Court; second, they will not know when this may occur or if it may as they are not a party to the Crown engagement process; and third, they will not have an ability to test the evidence of the party who is proceeding through the Crown

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[15] Minister's briefing paper attached to MCR-22-MIN-0014, para 20: "…no subsequent determination can be made in the other pathway *for the same area*" (our emphasis).

[16] Ibid at paras 9 and 11.

engagement process. This approach will not provide transparency to all applicants as to how decisions were reached. High Court applicants however will be forced to somehow engage the Crown on any Crown engagement applications in order to 'protect' or 'defend' the orders granted in their favour by the High Court; however, as they are not a party to the Crown engagement application their status as regards any such application is unclear.

46. Also, a party to High Court proceedings can appeal a decision of the Court. However, there is no right of appeal of a Minister's decision to grant CMT to an applicant through Crown engagement. The ability to judicially review Ministerial decisions of this nature is also limited because of their inherently political nature.

47. We do not see that Option 2 provides any useful or helpful outcome or can be improved by any adjustments.

Option 3

48. We have difficulty in understanding how Option 3 adds a great deal to Option 2. As noted above, many single Crown engagement applicants will wish to participate in the High Court as an interested party in any case, and the Court will thereby become aware of their presence and interests. The filing of independent expert evidence by historians and the role of the pūkenga should also ensure that the Court will know about other groups in the area which could have a bearing on its decision.

49. A statutory direction to the Court to take account of 'all the relevant applications in a coastline at the same time', may be useful, but a review of decisions and minutes of the Court suggests this is already undertaken in practice. It is also not clear how this 'taking account' is to be achieved, who will prepare any relevant information or evidence and how the relevant evidence is to be filed with the Court. The Court merely being made aware of the existence of an application without obtaining any evidence as to the scope of the potential customary interests does not advance the situation of the Court at all, apart from merely being able to flag in its decision that at some point in the future its orders may need to be modified in some way due to a determination by the Minister.

50. We do not see any benefit from this Option.

E Conclusion

51. We consider that the only Option which is viable and fair to all applicants is Option 1 but subject to the following adjustments:

Deeming: All applications under the Act are deemed to also be an application under both pathways just as if the original application had been made in both. All applicants should have the same ability to determine which pathway is in their best interests at any particular time. This will achieve the goal of a fair and transparent process, and which promotes consistency and fairness between applicants. If the High Court commences inquiry into an area, and an applicant decides not to particulate then they will be aware of the potential consequences of that decision as contemplated by Option 1.

Flexibility as to pathways: All applicants should have the ability to make a choice as to which pathway they should progress their application in depending on how other applicants are proceeding in the relevant grouped area. That is, they can split their application area into different pathways if the majority of applicants in those areas are proceeding down one pathway or another.

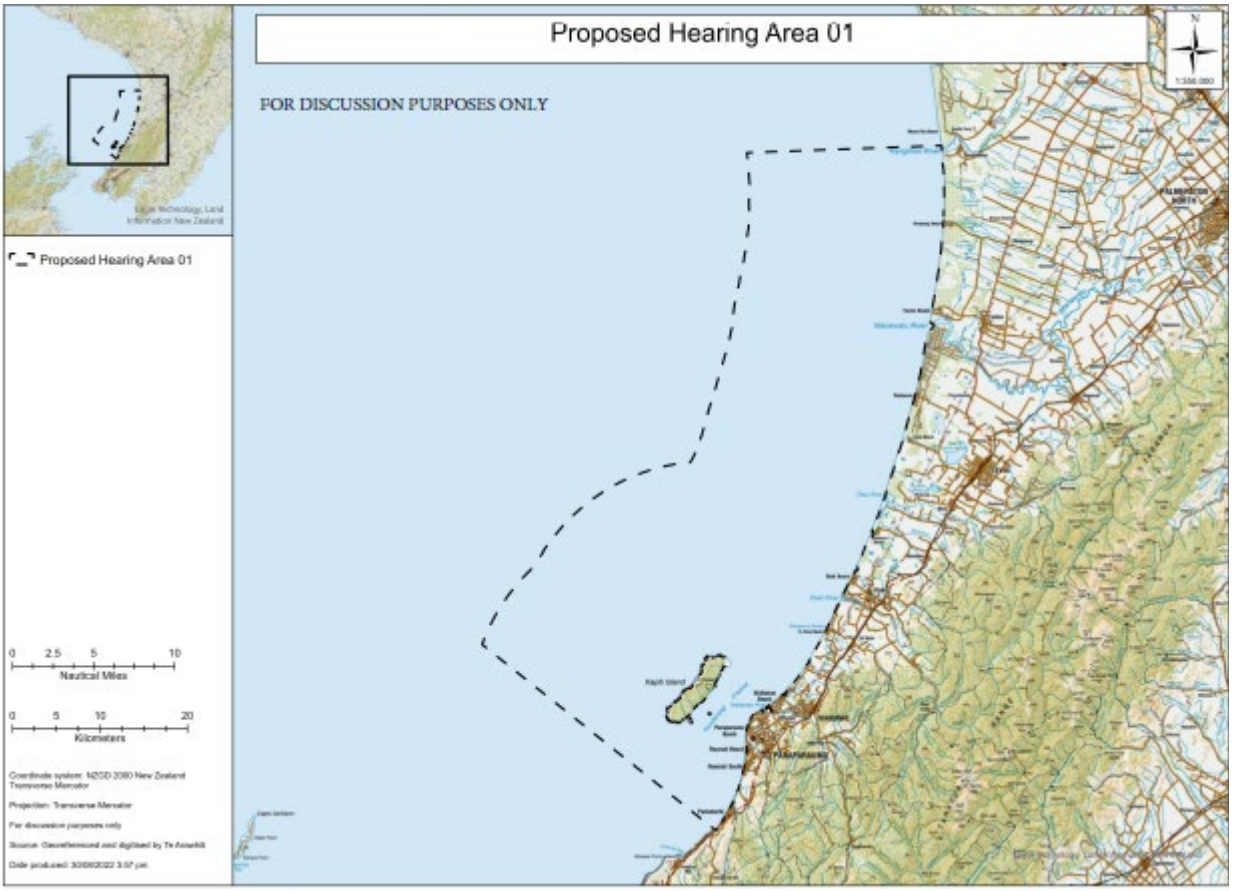
52. This submission makes broader submissions into the necessity for urgency in reform and transitional provisions to enable an affected applicant to fairly transition into a High Court inquiry which is already underway and ensure existing High Court applicants are not unduly inconvenienced.

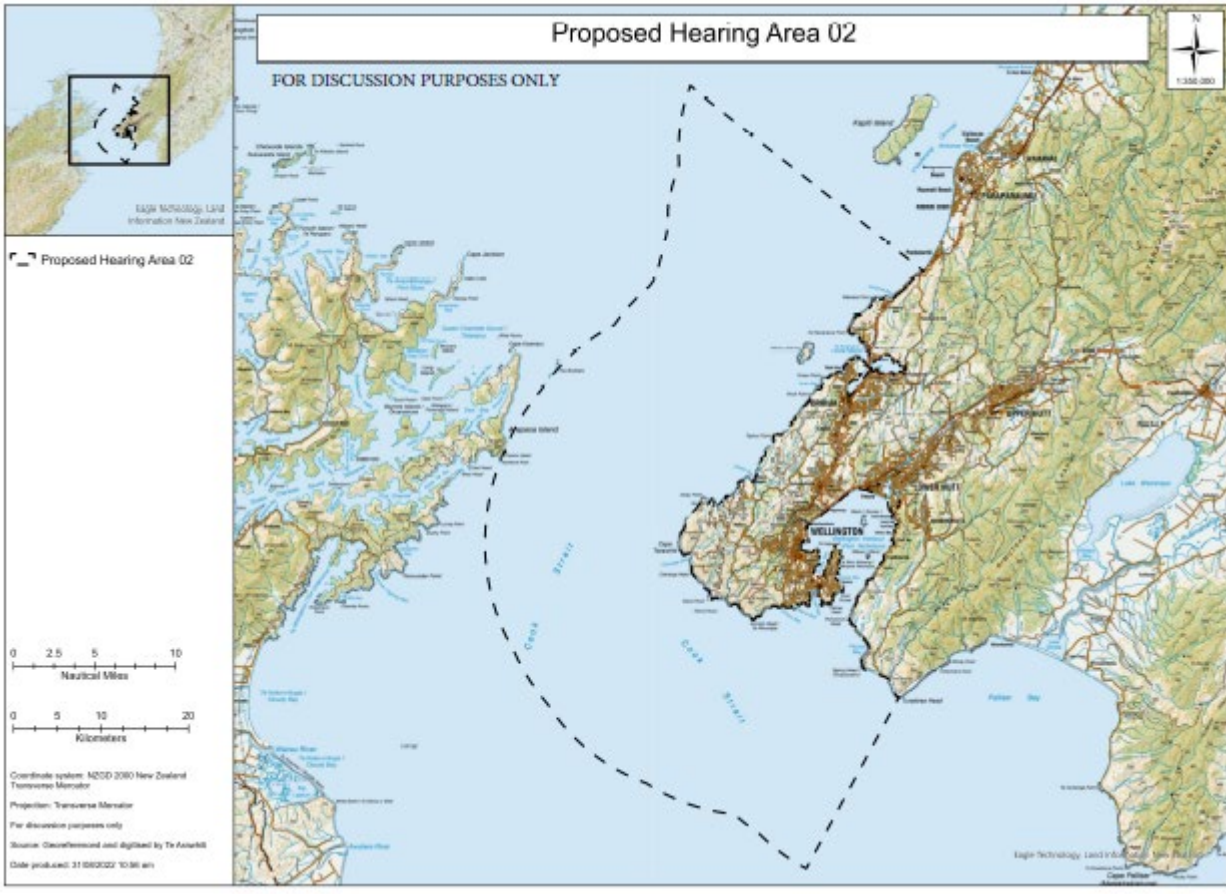
APPENDIX:

1 The applications under the Takutai Moana Act 2011

IWI	APPLICANT	PATHWAY	REF
Ngāti Toa Rangatira	Te Rūnanga o Toa Rangatira, post settlement trustee of Ngāti Toa Rangatira Trust and mandated iwi organisation (MIO) under the Māori Fisheries Act 2002.	Crown Engagement	MAC-01-12-021
	9(2)a [redacted] on behalf of the owners of the Hongoeka land blocks	High Court	CIV-2017-485-258
Te Ātiawa ki Whakarongotai	Te Ātiawa ki Whakarongotai Charitable Trust	Both	CIV-2017-485-248 ; MAC-01-11-015
Ngāti Raukawa ki te Tonga	9(2)a [redacted] Ngāti Raukawa ki te Tonga Trust, a mandated iwi organisation (MIO) under the Māori Fisheries Act 2002.	Both	CIV-2017-485-229 ; MAC-01-11-019

2 The Maps for proposed High Court inquiry for Areas A and B





SUBMISSION

18 November 2022

Attention: Te Arawhiti
Via email: takutaimoana@tearawhiti.govt.nz

Tēnā koe,

RE: TE ARAWHITI CONSULTATION ON THE DUAL PATHWAY OPTIONS FOR APPLICANTS UNDER THE MARINE AND COASTAL (TAKUTAI MOANA) ACT 2011

1. We are in receipt of Hon. Andrew Little's letter (undated) and the accompanying document ("the document") which sets out options to change the Marine and Coastal (Takutai Moana) Act 2011 ("Act) in an attempt to harmoniously accommodate the two recognition pathways under the Act.

2. The document identifies three options ("the options") to alleviate issues associated with an applicant who is seeking customary marine title ("CMT") over an area that overlaps with another applicant who has elected recognition via the alternative pathway. This letter responds to these the options.

3. Our office is currently instructed by three separate applicants[1] each pursuing recognition of their customary interests under the Act. The applicants have elected their respective recognition pathways and our office is subsequently involved in both the High Court and direct engagement pathways.

4. At the outset, while our clients welcome any consultation, their preference is to await the Waitangi Tribunal Wai 2660 Inquiry[2] Stage Two Report which is likely to give findings and recommendations on the dual pathways which was the subject of extensive evidence before the Tribunal.

5. We note as a general comment that the trade-offs listed in the document do not reflect a comprehensive list of the trade-offs that may exist between the options in practice. The ramifications and consequences of adopting any of the options involve complex intricacies that must be contemplated to accurately record the trade-offs that may practically eventuate with any given option.

6. In a similar vein, the options provide solutions without addressing the amendments to the Act which are required to provide for the same. It is therefore difficult to appreciate the true ramifications that will follow.

[1] CIV-2017-485-238; CIV-2017-419-081; MAC-01-01-170.
[2] Wai 2660 Marine and Coastal Area (Takutai Moana) Act Inquiry.

Option 1

7. Option 1 creates prejudice for applicants who may not choose to participate in both pathways and as a consequence not be entitled to CMT where CMT is made out in the pathway they sought not to participate in. This leaves applicants to choose between either participating in a pathway they did not originally seek to participate in, or don't participate, but risk not receiving CMT if the other parties satisfy the test. This option puts immense pressure on applicants and would force them to dedicate extra resources to participate in a pathway for the sake of protecting their CMT interests.

Option 2

8. Option 2 allows for groups to be added to CMT orders after it has already been found that CMT exists in the area, and does not provide the opportunity to "switch" over to other pathway should they wish to do so.

9. It is unclear under option 2 whether the Judge/Minister will review all of the evidence submitted in the alternative pathway before making a determination in their own pathway.

10. Concerns of potential prejudice arise, particularly, whether there may be differences in the burden of proving "exclusively use and occupy" an area "without substantial interruption since 1840" given that the group/applicant up first may have already done so. Groups who are looking to be added to an existing application may find it more difficult to prove "exclusive use and occupation" given this may have already been found in the predetermined area. This may have the effect of creating substantial benefits and drawbacks to either pathway, which were not clear at the time that applicants decided on their chosen pathway.

Option 3

11. Option 3 has an additional trade-off omitted in the "commentary on the options", namely parties will somewhat be enticed to participate in an alternative pathway that was not initially elected. In a practical sense autonomy is not preserved, should a party satisfy CMT in one pathway but choose not to receive an order, as they prefer to wait to be engaged via the alternative pathway.

12. Options 2 and 3 fail to address the situation where joint exclusivity is not agreed to by parties pursuing recognition via different pathways. In the abstract, and assuming High Court applicants are considered first, the options are silent on how a competing interest engaged with the Crown will be addressed where there is a disagreement. Specifically, questions need to be asked such as; what powers are inherited by the Minister in relation to a lack of agreement between parties or the Pukenga Report? Is there an issue of comity in this approach?

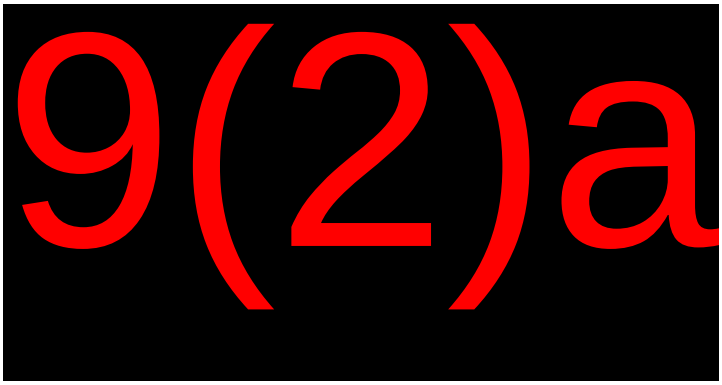
13. We further note the dangers of the High Court being confined to justiciability whereas should the Minister be given powers to amend an order in the absence of due consideration of all adduced evidence, in turn, appears to give a quasi-judicial function to the Minister.

14. It is also unclear the ramifications options 2 and 3 will have on mandate matters. Will it remain an interlocutory matter (in the High Court) and/or does this open the dangers of two groups being given CMT in different pathways, yet each operate under a different mandate?

15. It is clear that the options need to give guidance on the ramifications, if any, to allow for an informed deliberation for applicants to select an option.

16. Our office participated in *Re Edwards* which is subject to appeals and cross-appeals. The options prima facie appear to adopt the findings of Justice Churchman in *Re Edwards* which are subject to appeal. Therefore, there is added uncertainty around the legal position which is the foundation of the options listed in the document.

Ngā mihi,



SUBMISSION

From: 9(2)a
To: takutaimoana
Cc: 9(2)a
Subject: Dual pathway option.
Date: Friday, November 18, 2022 5:32:29 AM

Tena Koutou,

Our clients of Nga Poutama nui-a-awa have made their application only under the direct crown engagement pathway. We have discussed the three options with them and they choose option 1- for the first decision maker to make CMT orders binding all applicants in that area.

Regards

9(2)a

Sent from my iPad

SUBMISSION

NGĀTI WHĀTUA ŌRĀKEI

13 Dockside Lane, Auckland, 1010
PO Box 106-649, Auckland City 1143
www.ngatiwhatuaorakei.com

18 November 2022

Te Kāhui Takutai Moana – Te Arawhiti
Level 3, The Justice Centre, 19 Aitken Street
SX1011, WELLINGTON 6011

By email: takutaimoana@tearawhiti.govt.nz

Tēnei ka mihi,

RE: TAKUTAI MOANA DUAL PATHWAY CONSULTATION – NGĀTI WHĀTUA ŌRĀKEI SUBMISSION

This letter is in response to the request for feedback on the options proposed to fix the problem identified by Minister Little with the takutai moana dual pathway. Thank you for the opportunity to provide our feedback.

We have carefully considered all three options presented by the Minister and wish to submit another option for consideration – that all applications be considered by the Crown in the first instance, with a right to appeal to the High Court in the event of a dispute between parties that is unable to be resolved in the Crown process. This is our preferred option for resolving the dual pathway problem.

One of the key benefits of this option is that it creates certainty for the parties. This is because it ensures all applications for each takutai moana are considered alongside each other by the same decision-maker and it avoids the risk of either decision-maker "re-opening" a Customary Marine Title (*CMT*) issued by the other in the event it determines the CMT for that takutai moana should be shared.

We believe it will be a fairer process if all the applicants for each takutai moana are directly side-by-side in the first instance of dealing with their applications. It enables them to each contest who should or should not be issued a CMT within the confines of the same process and to then have the same right of appeal to the High Court.

Another key benefit of this option is that it will ensure consistency in the standards by which decisions to issue a CMT are made. The High Court and the Crown will likely take different approaches to the CMT test, which is fundamentally unfair and means a CMT granted by one standard can be amended by another.

For example, an applicant may be issued a CMT in the High Court for its takutai moana, and then be forced to share that CMT at a later date through a materially different Crown process and decision. This creates uncertainty for all of the applicants and delays any sense of finality.

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We would welcome the opportunity to kōrero further with you on how to fix the dual pathway problem.

Noho ora mai,

9(2)a

9(2)a

Ngāti Whātua Ōrākei Trust

SUBMISSION

18 November 2022

Te Arawhiti
Level 3, The Justice Centre
19 Aitken Street
SX10111
Wellington 6011
BY EMAIL takutaimoana@tearawhiti.govt.nz

Tēnā koe,

Re: Submissions on behalf of Ngāti Tū

On behalf of Ngāti Tū (CIV-2017-404-573), I, 9(2)a [redacted], am writing to submit my feedback in regard to the proposed Dual Pathway amendments to the Marine and Coastal Area (Takutai Moana) Act 2011.

We as Ngāti Tū have not had the opportunity to engage in the Waitangi Tribunal process for Takutai Moana, and so have not been privy to the kōrero regarding the dual pathway proposal. We are aware by engaging with whanaunga that there are a number of applicants who are concerned with the dual pathway amendment and the Crown's proposal to invite submissions regarding the amendment. The dual pathway problem has already been raised by other applicant's counsel within the Waitangi Tribunal inquiry process and have provided extensive evidence and submissions for the consideration of the Tribunal to be published in the inquiry report.

We believe that this call for feedback from applicants is premature, and that without the findings of the report by way of background, particularly to applicants like us who have not engaged in the Tribunal process. Without having access to the final report to inform our perspective as well as the reasoning for the proposed changes, it is as though we are not being afforded complete transparency or sufficient opportunity to make informed decisions with consultation with members of our hapū.

This also goes against the standard process for the Waitangi Tribunal and its inquiries, where a report with findings and recommendations of the tribunal come in response to evidence and submissions of claimants who have been directly impacted, followed by the Crown implementing legislation after consulting the report. This is one of the reasons why we believe the call for feedback is premature and should be halted until the report and its findings are published.

We acknowledge the Crown's admission in their Memorandum dated October 10 that the possibility that a determination by one decision maker recognising customary marine title (CMT) will prevent other applicants who are pursuing CMT for the same area through another avenue from obtaining recognition. As well as the recognition by the Crown that would be remiss to not initiate a process to attempt to address this problem given the severity of consequences if not remedied. The Crown have also acknowledged that the Tribunal is likely

to be at an advanced stage in the writing of the report, stating that by the time the report is issued the legislative changes could not have been implemented anyway. To this, we see that because the report is not likely to be far from completion, and so question why this does not justify the Crown to halt all consultation until the issuing of the report.

After reading the joint memorandum of counsel dated October 6, we endorse the call for a judicial conference for the purposes of expediting the report, and we suggest that all consultation regarding the implementation of this amendment be halted until the report is published.

Comments on options provided

Of the three available options, and without having access to the inquiry report to further inform our decision, our initial views are as follows.

Option one:

We do not support this option and believe that it is ill thought out. We do not agree with the notion that if applicants did not wish to have their application considered by a certain decision maker, that they would be left behind and not have recognition by way of a CMT to a certain area for choosing to not participate. This undermines the purpose of offering alternative pathways to begin with by way of direct negotiation or High Court proceedings and would be incredibly prejudicial to applicants such as us, who have chosen to pursue a certain pathway because it best suits the interests of our hapū.

Option two:

This option made more sense than the first, but we have questions as to how this would practically function after its implementation. We would prefer to read the report to gain an understanding of the reasoning for this in order to have a more informed perspective before providing more detailed feedback.

Option three:

We felt that of all options provided, the third was able to provide for a more holistic approach, however, did not allow space for critiques.

This option seems most compelling of those available, as it allows neighbouring hapū and iwi to engage alongside one another and strengthen the Māori voice in relation to our shared spaces. The acknowledgement of those who share the area with us is important, but the proposed amendment does not allow for the ability for us to defend our exclusive autonomy in respect of areas that are undisputedly ours.

Overall:

As it is written now, we feel as though our right to tino rangatiratanga over our taonga is being overlooked and impeded upon by all options, and that they do not empower our respected autonomy over our own lands. Again, we believe it would be beneficial to have the option of seeing the reasoning outlined in the Tribunal's report so that our feedback could be better informed.

We request that Te Arawhiti directly responds to the issues raised in our feedback and that they continue to notify us of any further developments in this area.

Ngā mihi, nā

9(2)a [redacted]

Ngāti Tū (CIV-2017-404-573)

SUBMISSION

18 November 2022

Te Arawhiti
Level 3, The Justice Centre
19 Aitken Street
SX10111
Wellington 6011
BY EMAIL takutaimoana@tearawhiti.govt.nz

Teenaa koe,

Re: Submissions on behalf of Iwi me Hapuu ki Marokopa

On behalf of Iwi me Hapuu ki Marokopa (CIV-2019-419-082), I, 9(2)a [redacted], am writing to submit my feedback in regard to the proposed Dual Pathway amendments to the Marine and Coastal Area (Takutai Moana) Act 2011.

This is an application for Customary Marine Title and Protected Customary Rights on behalf of the West Coast Iwi me Hapū Ki Marokopa , which is a collective that incorporates Ngāti Rarua Ki Marokopa, Ngāti Toa Tupahau, Ngāti Peehi, Ngāti Te Kanawa and Ngāti Kinohaku ki Marokopa, based in the rohe of Hapū Ki Marokopa Marae (Hapū Ki Marokopa) over our rohe moana o Marokopa me Kiritehere.

We continue to assert that in its current form, the Marine and Coastal (Takutai Moana) Act 2011 Iwi me Hapū Ki Marokopa through implementing a dual pathway process for recognition of Customary Marine Title and Protected Customary Rights over our rohe moana o Marokopa me Kiritehere.

We as Iwi me Hapuu ki Marokopa have had the opportunity to engage in the Waitangi Tribunal process for Takutai Moana, so are aware that there are a number of applicants who are concerned with the dual pathway amendment and the Crown's proposal to invite submissions regarding the amendment. The dual pathway problem has already been raised by other applicant's counsel within the Waitangi Tribunal inquiry process and have provided extensive evidence and submissions for the consideration of the Tribunal to be published in the inquiry report.

We believe that this call for feedback from applicants is premature, and that without the findings of the report by way of background. Without having access to the final report to inform our perspective as well as the reasoning for the proposed changes, it is as though we are not being afforded complete transparency or sufficient opportunity to make informed decisions with consultation with members of our hapū.

This also goes against the standard process for the Waitangi Tribunal and its inquiries, where a report with findings and recommendations of the tribunal come in response to evidence and submissions of claimants who have been directly impacted, followed by the Crown implementing legislation after consulting the report. This is one of the reasons why we believe the call for feedback is premature and should be halted until the report and its findings are published.

We acknowledge the Crown's admission in their Memorandum dated October 10 that the possibility that a determination by one decision maker recognising customary marine title (CMT) will prevent other applicants who are pursuing CMT for the same area through another avenue from obtaining recognition. As well as the recognition by the Crown that would be remiss to not initiate a process to attempt to address this problem given the severity of consequences if not remedied. The Crown have also acknowledged that the Tribunal is likely to be at an advanced stage in the writing of the report, stating that by the time the report is issued the legislative changes could not have been implemented anyway. To this, we see that because the report is not likely to be far from completion, and so question why this does not justify the Crown to halt all consultation until the issuing of the report.

After reading the joint memorandum of counsel dated October 6, we endorse the call for a judicial conference for the purposes of expediting the report, and we urge that all consultation regarding the proposed amendment be halted until the report is published.

Initial feedback

We do seek to provide initial feedback about issues relating to the proposed amendments to the legislation regarding the dual process, however will also reserve the right to provide further feedback after the release of the report.

As has been stated in our submissions to the Wai 2660 Inquiry, we reiterate that the dual process pathway is incongruent with tikanga, and does not adequately cater for overlapping interests. We maintain this position and feel that the proposed changes to the legislation will not adequately alleviate our concerns about this.

Dual Process Pathway Incongruent with Tikanga

As has been stated in our evidence in the Wai 2660 Inquiry, the MACA Act process, particularly the application for PCR and CMT through the High Court pathway, is incongruent with tikanga. Hearing applications in the High Court setting is a foreign and uncomfortable environment. In my evidence I wrote:

> "We challenge these issues being worked out in a non-Māori environment. The High Court process is not set up around our tikanga and our decision-making processes. For us, taking our kaumatua there, and exposing them to cross-examining is not tikanga. It is not a safe space to protect them and all of our whanau. Putting our kaumatua into this environment where they can't be comfortable in who they are and to express that, a lot of them have had historical experiences with Crown organisations that hold them back in wanting to participate in the process. It is insulting that we are unable to speak Te Reo. A lot of our kaumatua cannot speak their essence as they are unable to speak their native tongue."[1]

We had a negative experience when filing our application. As stated in our evidence, we felt that the Act "does not recognise the importance of meeting with our hapū to ensure that we continue to have hapū support for our mahi. We are also not funded by Te Arawhiti to engage in sufficient hui for this purpose. This tikanga is based on our traditional decision-making processes. We have been given the tautoko by our collective to undertake this mahi, but this is not a single approval that continues until the task is completed. Instead, we need to

[1] Wai 2660, #B076 *Signed Brief of Evidence of* 9(2)a [redacted] dated 14 August 2020 at [44].

continuously involve our hapū in the process to retain their support, as without their support, we do not have the authority to continue with the work for this application." [2]

Treatment of Overlapping Interests Not Adequately Covered in Act or Options

The tests provided for under the MACA Act to prove CMT and PCR are the same for both the High Court and Crown engagement pathway. Irrespective of whatever path we follow, we assert that the tests do not promote whanaungatanga. In my evidence, I described that "[t]his is about how the Crown recognises Large Natural Groupings and the impact that this has on our iwi and Hapū. This causes tension and dissension between our own whanau, many of whom share whakapapa and connections through iwi and Hapū but are artificially divided as part of the Crown's settlement and MACA processes. This is what the process has done. There have been many wars over the years, but we consider that this is as a result of the Crown's processes."[3]

The dual pathways process also does not recognise overlapping interests, and the suggested amendments to the legislation do not adequately cater for these either. In my evidence before the Wai 2660 Waitangi Tribunal, I stated that "(e)ach applicant group, particularly through the High Court process, is encouraged to make separate applications and prove 'exclusive use' of an area in accordance with the Act. This encourages division and encourages applicants to push against each other in a competitive environment when in fact in accordance with tikanga we would usually come to decisions on matters like this in a less adversarial way with a consensus approach."[4]

Comments on options provided

As we are involved in both the High Court and Direct Crown Engagement pathways, we see that significant changes do need to be made to the Act to ensure that it is compliant with Te Tiriti.

If we are expected to participate in the process under the Act, as a bare minimum we expect that all parties should have the ability to participate in both processes.

The proposals do not alleviate our concerns about the lack of tikanga in the High Court process, or the ability for the Act to recognise overlapping interests. The Act would need to be drafted in a way so that overlapping interests are able to be recognised in accordance with tikanga, rather than through a determination of the Court.

If other groups are able to be added retrospectively, we reserve the right to be able to participate in the process as an interested party to provide submissions in support or against the other party.

We also will need assurance that steps will be taken to ensure the process itself is tikanga-compliant through incorporating our own tikanga as an affected roopu.

Concluding remarks

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[2] Wai 2660, #B076 *Signed Brief of Evidence of* 9(2)a dated 14 August 2020 at [57].
[3] Wai 2660, #B076 *Signed Brief of Evidence of* 9(2)a dated 14 August 2020 at [33]
[4] Wai 2660, #B076 *Signed Brief of Evidence of* 9(2)a dated 14 August 2020 at [65]

Fundamentally these options are being presented to us without consideration of the Waitangi Tribunal process that we have participated in. We have not been given adequate time to gather feedback from our wider iwi and hapu to provide input into the process. There has been no co-design element to this to allow us as the iwi and hapu affected to have input into the development of options to be presented, which we would expect to do through dialogue with Te Arawhiti.

We request that Te Arawhiti directly responds to the issues raised in our feedback and that they continue to notify us of any further developments in this area.

Naaku noa naa,

9(2)a

Iwi me Hapuu ki Marokopa (CIV-2019-419-082),

SUBMISSION

Marine and Coastal Area (Takutai Moana) Act 2011
Submission on Proposed Changes

To: Te Kahui Takutai Moana

Re: Consultation on Proposed Amendments to the Marine and Coastal Area (Takutai Moana) Act 2011

Submitter: Te Kapu o Waitaha

Kupu Whakataki – Introduction

1. Te Kapu o Waitaha ("TKOW") welcomes the invitation to contribute to this consultation. TKOW is the mandated iwi body for the people of Waitaha situated in the Bay of Plenty. Waitaha trace their descent to the Te Arawa waka.

2. On 2 April 2017, TKOW made application for recognition of Waitaha's customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011. In doing so, TKOW opted for direct engagement and did not apply for High Court recognition.

3. As a result, TKOW was obliged to seek special leave to participate in the *Re Reeder* proceedings, CIV-2011-485-793, that commenced in September 2021, before Justice Powell.

4. The Coastal Marine Area claimed by TKOW completely overlapped the area under investigation in those proceedings and it was critical that TKOW was given leave to be heard in the proceedings.

5. This submission is based on TKOW's experience in seeking to be heard and giving evidence of its customary interests as an interested party in those proceedings.

He Whakarāpopoto – Summary

6. TKOW supports Option 3, which allows for applicants to have their interests considered, and if appropriate recognised, via either pathway. This approach would avoid the potential for injustice to parties such as TKOW and is more likely to give effect to the purpose of the Act.

Ngā Tāpaetanga – Submissions

7. It is TKOW's view that Option 3 is the option that will best give effect to the purpose of the Marine and Coastal Area (Takutai Moana) Act 2011 and avoid injustice to parties who have opted for one pathway only.

8. The purposes of the Act are well known and include:

   (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;

   (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapu and whanau 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).

9. The potential for injustice is well recognised. In *Re Edwards* at paragraph [406], Churchman J cautioned that:

> A finding that an applicant group in these proceedings held CMT in the overlapping area would arguably have the effect of prohibiting the Crown from coming to an agreement for a grant of CMT in respect of the same area. This may produce an injustice.[1]

10. His Honour went on to observe that where the party pursuing direct engagement has "participated in the hearing by calling evidence and having their counsel cross-examine and make submissions, the potential for injustice is reduced, although not eliminated".[2]

11. Through its participation in the Re Redder proceedings the potential for injustice to TKOW was reduced but not eliminated. TKOW was granted leave to participate in the hearing, but only as an interested party, with leave to cross examine other parties' witnesses and to call one witness of its own.[3]

12. In *Re Reeder*, the closing submissions for the Attorney-General acknowledged that there is a lacuna within the Act, namely lack of provision for applicants who did not file an application with the High Court for a recognition order, but whose evidence satisfies the test under s 58. Irrespective of the evidence, the High Court is not able to recognise those parties by inclusion in a CMT order.

13. The Attorney-General acknowledged that this could lead to an injustice in certain cases. An excerpt from the Attorney-General's closing submissions is set out below:

> *The Act*
>
> 210. The Attorney-General maintains the position that it is not possible for the Court to include Waitaha in any customary marine tidal order it might make, as the Act is clear that the Court only has jurisdiction on an application under s 100.

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[1] *Re Edwards* [2021] NZHC 1025, at [411].

[2] *Re Edwards* [2021] NZHC 1025, at [406]

[3] Minute (No. 13) of Powell J [Nga Potiki Minute No. 22], 9 August 2021.

14. It was submitted that because TKOW had not filed an application with the High Court for a recognition order, there was no jurisdiction for the High Court to include TKOW within any recognition order.

> 211. There is no provision in the Act to allow a Crown engagement application to be treated as an application for a recognition order from the Court. Conversely, the Act does not allow an application for a recognition order from the Court to be treated as a Crown engagement application. The Act is silent as to how the two pathways for recognition of customary marine title inter-relate, particularly the point when a determination is made. This omission may lead to the result in some circumstances that prevents applicant groups in one pathway from having customary marine title recognised, if such title has already been determined over the same area in the other pathway. The Crown recognises that this could lead to an injustice in certain cases.
>
> 212. This lacuna within the Act raises and issue for the Court in the present case. If the Court were to find that the evidence of Waitaha met the test for customary marine title across part or all of the priority application area, the Act does not provide a mechanism through which Waitaha, as an interested party without an application under s 100, can be recognised in a High Court recognition order.[4]

15. The Attorney-General's submissions expressly argued that the lack of jurisdiction to include TKO applied, even if the Court was satisfied that TKOW had met the tests in s 58.

> 214. It is submitted that the Court's assessment of the evidence relevant to Waitaha's application should be undertaken in conjunction with its assessment of the evidence of the other applicants. A Crown engagement applicant's participation as an interested party in the High Court process is one way in which the potential for injustice arising from the dual pathways under s 94 can be mitigated. This is because participation as an interested party allows a Crown engagement-only applicant to lead evidence of its customary interests in an application area, to ensure the Court is aware of those interests when making its decision.
>
> 215. However, because there is a disconnect between the two ways under which customary marine title can be recognised, the practical outcome for Waitaha, given the statutory scheme, remains that if the s 58 test is met, it cannot be included within a recognition order.[5]

16. It is respectfully submitted that, based on those submissions, the purpose of the Act might never be achieved for some parties. The primary pre-determinant of recognition is the good fortune of having opted for the correct pathway rather than the party's customary rights.

17. Against the background of that experience, TKOW favours option 3. It is anticipated that the adoption of option 3 will eliminate the potential for prejudice to parties in Waitaha's position and better realise parliament's intention as expressed in the purposes of the Act.

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[4] *Re Reeder* CIV-2011-485-793, Attorney-General's closing submissions dated 7 November 2021, para [210] – [212].

[5] *Re Reeder* CIV-2011-485-793, Attorney-General's closing submissions dated 7 November 2021, para [214] – [215].

18. It is anticipated that through the adoption of option 3:

    (a) Parties who opted for direct engagement only will be permitted to participate with full party status in High Court proceedings as opposed to appearing as interested parties only; and, will be permitted to appear as of right.

    (b) The High Court will be empowered to include within any CMT order, all parties whose evidence has satisfied the requirements of s 58 irrespective of whether application had originally been made for High Court recognition or not.

    (c) That provision will be made to allow CMT orders to be re-opened if applicants on the direct engagement pathway satisfy the requirements of s 58 after the CMT order has issued.

E hoki whakamuri? – Retrospective effect

19. TKOW does not favour amendments giving effect to option 3 having retrospective effect.

20. Per the directions of Powell J[6], TKOW was granted leave to appear in the *Reeder* proceedings as an interested party only. TKOW was given leave to make submissions, cross examine witnesses of other parties, however its own evidence was expressly limited to one witness only. This placed TKOW at a huge disadvantage relative to all other participants in the proceeding.

21. It would be unjust if the High Court was to determine TKOW's application for recognition on a final basis, based on the limited evidence that TKOW was permitted to present before the Court.

22. It is therefore respectfully submitted that such amendments as may be required to give effect to option 3, should not have retrospective effect.

Hei whakaotinga – In closing

23. TKOW acknowledges the work that the Takutai Moana Team is doing to address these aspects of the Act and looks forward to seeing the proposed amendments in draft form in due course.

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[6] Minute (No.13) of Powell J [Nga Potiki Minute No. 22], 9 August 2021.

SUBMISSION

18 November 2022

Te Kāhui Takutai Moana – Te Arawhiti
Level 3, The Justice Centre, 19 Aitken Street
SX1011, WELLINGTON 6011

By email: takutaimoana@tearawhiti.govt.nz

HC Application Ref: CIV 2017-485-240-A/U
Crown Engagement Ref: MAC- 01-01-122

Kia ora rā,

RE: Dual Pathway Consultation (Takutai Moana Act 2011)

This letter is provided on behalf of Te Rūnanga Nui o Te Aupōuri in response to the letter received from Minister Little on takutai moana dual pathway consultation. The Minister has asked that feedback be provided on options to amend the Takutai Moana Act 2011 (the Act) to address the fundamental issue with the dual pathway model, stemming from the Crown's oversight in drafting the Act.

We have considered the options presented by the Minister, and wish to say first and foremost that the amount of moving parts with the takutai moana applications, namely the pending report from the Waitangi Tribunal, the fact applications have already started to be granted in the High Court, and the extremely ambiguous guidance on timelines for Crown negotiations provided by your office, have all amounted to a confusing, distressing and uncertain process. We do not think the dual pathway problem you have highlighted is the only one, and therefore do not think addressing this problem now will address the fundamental issues with the Act and its associated regimes.

Turning now to the options proposed by the Minister, nor do we think any of those are entirely satisfactory in addressing this particular problem. The short answer is, the only way to fix the dual pathway problem is to remove it completely, and instead have a singular pathway.

We therefore submit some other options (and in no particular order):

1. That all applications within a single coastal area be considered by the same decision-maker in the first instance, to be agreed to by all of the relevant applicant parties. If that is with the Crown in the first instance, then there should be a right to appeal to the High Court in the event of a dispute between parties in the Crown process. If that is with the High Court in the first instance, then there shall also be a right to appeal (either to the Crown, or the higher courts – this would need to be considered further).

2. Taking the decision out of the Crown and High Court's hands altogether – setting up a separate adjudicative body (similar to the Waitangi Tribunal) to consider all applications made under the Act and grant CMT to successful applicants, as part of singular process (as opposed to a dual pathway).

We think these options are better than those proposed by the Minister because they avoid – locking any applicants out of CMT for an application area if they decide for whatever reason not to participate in the process and a decision is then made (Minister's Option 1); and any risk of re-opening or devaluing CMT orders if side-swept by another decision-maker, if determined that another applicant should be added to the title, which may not be agreeable to those already granted the CMT (Minister's Options 1 & 2).

At least if all applicants are pooled into the same process when dealing with applications in the same area, they are subject to the same process, the same standards for the CMT test, and any appeal rights would still drag all of the interested parties along the way.

Otherwise, the uncertainty of the process will remain and the Act will continue to operate in an unprincipled manner, likely creating further grievances under Te Tiriti.

Please keep us informed as to how the Crown progresses this matter.

Nāku noa, nā

9(2)a

9(2)a
9(2)a
Te Rūnanga Nui o Te Aupōuri

SUBMISSION

18 November 2022

Te Kāhui Takutai Moana - Te Arawhiti
Level 3, The Justice Centre, 19 Aitken Street
SX1011
WELLINGTON 6011

By e-mail: takutaimoana@tearawhiti.govt.nz

Tēnā koe,

DUAL PATHWAY CONSULTATION

Introduction

1. This submission on the "Dual Pathway Consultation" is made on behalf of the management arrangements recognised under the Nga Rohe Moana o Nga Hapu o Ngati Porou Act 2019 (the **Management Arrangements**):

   Potikirua ki Whangaokena Takutai Kaitiaki Trust

   Whangaokena ki Onepoto Takutai Kaitiaki Trust

   Te Papatipu o Uepohatu me te Papatipu o te Ngaere Takutai Kaitiaki Trust

   Whanau Hapu of Te Aitanga a Mate Te Aowera and Te Whanau a Hinekehu Takutai Kaitiaki Trust

   Nga Hapu o Waipiro Takutai Kaitiaki Trust

   Ngāti Wakarara – Ngāti Hau Takutai Kaitiaki Trust

2. Collectively the Management Arrangements are the holders of 14 of the 15 customary marine title (**CMT**) orders currently recorded on the LINZ-administered CMT register.[1] The other CMT order recorded on the register was acquired via the High Court pathway. To date direct engagement under the Marine and Coastal Area (Takutai Moana) Act 2011 has resulted in no CMT orders.

Executive Summary

3. The Management Arrangements oppose any legislative amendments that will interfere with or potentially undermine the Deed, Deed to Amend, Nga Rohe Moana o Nga Hapu o Ngati Porou Act 2019 or any CMT recognised within Nga Rohe Moana o Nga Hapu o Ngati Porou.

4. The Management Arrangements are not opposed to further consideration of the options in the Te Arawhiti consultation document outside Nga Rohe Moana o Nga Hapu o Ngati Porou.

[1] https://www.linz.govt.nz/our-work/maori-and-iwi-development/marine-and-coastal-area-register

The "dual pathway problem"

5. The Te Arawhiti consultation document[2] describes the problem as follows:

> "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 [in respect of the same area] by the Crown, then there is a problem because the Act doesn't say how this should work – this is the dual pathway problem. If we don't fix this, there is a real risk that some groups may not be able to have customary marine title recognised because of it."

Option 1

6. The consultation document states that Option 1 to solve this problem is to permit a decisionmaker under one pathway to "consider" or "take into account" applications that were made only under the other pathway. We understand that Te Arawhiti's proposal is that the decisionmaker be permitted to decide or determine applications made under the other pathway, i.e. the High Court would be permitted to decide an application for direct engagement-only, or the Minister be permitted to decide an application made to the High Court-only.

7. The Management Arrangements' experience has been that the Minister or the Crown already considers or takes into account overlapping High Court applications as part of the direct engagement process. Because recognition of CMT via direct engagement under the Marne and Coastal Area (Takutai Moana) Act 2011 requires legislation[3] it would appear to be open for such legislation to include one or more groups that may be High Court-only applicants.

8. In applications currently before the High Court, the Court is proposing including provision for a direct engagement-only applicant. It is not clear whether any party, including the Crown, has opposed or objected to such arrangements. It is therefore not clear there is a problem that requires addressing.

9. The consultation document (and associated Cabinet paper) does not disclose whether any contact has been made with any single pathway applicants or, if these has been contact, their views and whether they agree with Te Arawhiti that there is a problem to be addressed. Before progressing Option 1 it would be useful for the Crown to consider a scoping exercise involving:

    (a) identifying exactly how many single pathway applicants for CMT there are;

    (b) liaising directly with those single pathway applicants to identify:

        (i) whether these applicants agree there is a "dual pathway problem" requiring a solution; and

        (ii) whether those applicants wish to now apply under the other pathway as well; and

[2] https://www.tearawhiti.govt.nz/assets/MACA-docs/Dual-Pathway-Consultation/2022-0928_FINAL_Dual_pathway_consultation_document-signed.pdf

[3] See section 96, Marine and Coastal Area (Takutai Moana) Act 2011. The situation under section 112 Nga Rohe Moana o Nga Hapu o Ngati Porou Act 2019 is different, with CMT brought into effect by order in council.

(c) consider providing for a discrete period of time to permit those single pathway applicants to apply under the other pathway.

10. Provided it does not interfere with arrangements and recognition of CMT under the Nga Rohe Moana o Nga Hapu o Ngati Porou Act 2019, the Management Arrangements are not opposed to Option 1 being further explored outside of Nga Rohe Moana o Nga Hapu o Ngati Porou.

11. The Management Arrangements note that Option 1 raises fairness or equity issues. The Management Arrangements, and others, had a statutory period of time to decide whether to seek CMT recognition under one or both pathways. A decision was made to apply under both pathways. Single-pathway applicants under the Marine and Coastal Area (Takutai Moana) Act 2011 made their decision in April 2017 to only apply under one pathway and should be allowed the dignity of that decision. The Marine and Coastal Area (Takutai Moana) Act 2011 was high-profile legislation and its enactment, and the 3 April 2017 deadline, were all well-publicised.

Option 2

12. Option 2, as proposed by Te Arawhiti, would be to permit a CMT recognised through one of the two pathways to be amended or varied via the other pathway, at a later date, to add "one or more groups" to the CMT order if the later decisionmaker considered that these one or more other groups had also satisfied the test for CMT.

13. The Management Arrangements are staunchly opposed to Option 2 if it would, or may, involve amending or varying any of the CMT orders held by the Management Arrangements or applying to Nga Rohe Moana o Nga Hapu o Ngati Porou.

14. We have been advised that Te Arawhiti officials have indicated that Option 2, if adopted, is intended to have retrospective effect, meaning that CMT orders already made would be able to be amended or varied. Neither the consultation document or the Cabinet paper discussing this issue[4] discloses the intention for Option 2 to apply retrospectively, to existing CMT orders. Retrospective application of legislation is a significant step.[5] Any retrospective application of Option 2 to the CMT orders held by the Management Arrangements, or applying to Nga Rohe Moana o Nga Hapu o Ngati Porou, is opposed.

15. The Management Arrangements, and the representatives that preceded the Management Arrangements, have been engaged with the Crown since at least 2004[6] seeking recognition of customary interests of nga hapu o Ngati Porou in the takutai moana. The onerous threshold for CMT contained in the Marine and Coastal Area (Takutai Moana) Act 2011 has been satisfied, just as the threshold for Territorial Customary Rights, under the Foreshore and Seabed Act 2004, was agreed to have been satisfied in the 2008 Deed of Agreement in relation to certain areas. Those CMT orders have been recorded in the LINZ register. It undermines finality and certainty, as well as the commitments in the Deed and Deed to Amend, if the Government were

[4] https://www.tearawhiti.govt.nz/assets/Publications/Proactive-releases/2022-09-Proactive-release-Takutai-moana-dual-pathway-problem.pdf

[5] See Legislation Design and Advisory Committee, *Legislation Guidelines,* (2021 Edition), paragraph [4.7] [**Emphasis** added] "The presumption against retrospectivity: **Legislation should not affect existing rights** and should not criminalise or punish conduct that was not punishable at the time it was committed" and Chapter 12, generally and paragraph [12.1] [**Emphasis** added]: "*Does the legislation have direct retrospective effect?* Legislation should not have retrospective effect. **The starting point is that legislation should not have retrospective effect. It should not interfere with accrued rights and duties**. …"

[6] The Terms of Negotiation between the Crown and Te Runanga o Ngati Porou, on behalf of the hapu o Ngati Porou, were signed 1 November 2004, prior to the enactment of the Foreshore and Seabed Act 2004.

to legislate to permit these CMT orders can be amended or varied by the High Court to add one or more groups.

16. If Option 2 were permitted to apply to CMT orders held by the Management Arrangements or to Nga Rohe Moana o Nga Hapu o Ngati Porou, the Management Arrangements would potentially be drawn into High Court litigation. This is despite having satisfied the Crown, over several years of discussion, that the "exclusive use and occupation" limb of the CMT test had been satisfied, obtaining CMT orders, and these orders being registered on the LINZ-administered CMT register.

17. During the passage of the Marine and Coastal Area (Takutai Moana) Act 2011, Ministers of the day committed to CMT being "full-blooded title". It would undermine that commitment, and the Deed and Deed to Amend if CMT orders were now permitted to be amended or varied without consent of the holders.[7]

18. Given the Management Arrangements are the holders of 14 of the 15 CMT orders recognised to date, and party to the only recognition agreement reached to date, their views opposing retrospective application of Option 2 within Nga Rohe Moana o Nga Hapu o Ngati Porou should be accorded greater weight.

19. The situation elsewhere is different. CMT has not been recognised outside Nga Rohe Moana o Nga Hapu o Ngati Porou[8]. Outside of Nga Rohe Moana o Nga Hapu o Ngati Porou the Management Arrangements do not express a view on Option 2 being adopted. With one exception, outside of Nga Rohe Moana o Nga Hapu o Ngati Porou there are no existing CMT orders that would be displaced or affected by Option 2.

20. If Te Arawhiti has any questions on the position of the Management Arrangements on this submission, the consultation document or wishes to discuss these matters further please contact 9(2)a [redacted] 9(2)a [redacted]

Noho ora mai
KĀHUI LEGAL

9(2)a [redacted]

9(2)a [redacted]
9(2)a [redacted]

[7] Section 116 of the Nga Rohe Moana o Nga Hapu o Ngati Porou Act 2019 provides for and permits the Management Arrangements to vary, or amend or cancel CMT orders.
[8] With the exception of Tamaitemioka and Pohowaitai Island: https://www.linz.govt.nz/resources/marine-register/customary-marine-title-order-tamaitemioka-and-pohowaitai-islands

SUBMISSION

LYALL & THORNTON
BARRISTERS AND SOLICITORS

9(2)a

18 November 2022

Hon Andrew Little
Minister for Treaty of Waitangi Negotiations
Private Bag 18888
Parliament Buildings
Wellington 6160

BY EMAIL: takutaimoana@tearawhiti.govt.nz

Tēnā koe,

Feedback on Dual Pathway Consultation Marine and Coastal Area (Takutai Moana) Act 2011

Applicant Group

1. This feedback is provided on behalf of Ngai Tumapuhia-A-Rangi Ki Motuwairaka Incorporated and Ngai Tumapuhia-A-Rangi Ki Okautete Incorporated. Our clients have an application under the Marine and Coastal Area (Takutai Moana) Act 2011 ("**MACA Act**") in the Crown engagement pathway MAC: 01-09-009.

Background

2. In September 2022, Te Arawhiti released the Pānui Takutai Moana for applicants. The pānui requests applicant's feedback on how it should fix the admitted problems with the dual pathway under the Act.

3. Our clients consider that the fact that the pathways are not progressing at the same speed is prejudicial. 9(2)a [redacted]. This has been set down for 8 weeks.

9(2)a [redacted]

4. While our clients must participate to protect their position, the Court has no jurisdiction to make an award in their favour.

5. To ensure Treaty compliance, the Crown should take the opportunity to benefit from the findings of the Wai 2660 Tribunal. Any changes must be able to be altered or 'unpicked' to take the Tribunal's recommendations into account.

Three Proposed Options

6. The options presented for feedback are:

   a. Option 1: Enable decision makers to take account of all relevant applications for an application area at the same time.

   b. Option 2: Enable a CMT to be varied to take account of decisions in the other pathway.

   c. Option 3: Combining options 1 and 2.

Option 1

7. As noted in the discussion paper, Option one would force those who do not wish to participate in one pathway to do so.

8. While this might appear administratively efficient, these are risks including creating division or animosity between applicant groups.

9. Our clients rohe is being heard 9(2)a [redacted]. It appears unrealistic to expect that any amendments would be in place in time for this hearing.

Option 2

10. Option two may allow the prejudice described above to be remedied, but comes with its own set of issues including:

    a. A question as to what happens if the groups on the order oppose the group being added. We are unclear on whether this could then have the effect of negating an order as shared exclusivity may no longer be available.

    b. It is unclear at what point protected customary rights would be addressed.

c. It is unclear how wāhi tapu sites would be addressed. The recent decision by Churchman J in *Re Edwards (No 7)*[1] found that wāhi tapu must be recognised by all groups on a CMT. The Court considered that it has no jurisdiction to "award wāhi tapu protection in respect of sites that are contested or in respect of which there is conflicting evidence" (at [155]). There is potential for existing wāhi tapu recognition to be undermined.

d. It is unclear whether or how survey plans might be required to be amended, and who is to take responsibility for that work and cost.

Option 3

11. The process suggested by option three is unclear, however appears the most palatable out of the options. The issues outlined above remain to be addressed however.

Process Considerations

12. Any proposed legislative amendment to the Act should pass through a joint select committee, which should obtain expert assistance from pūkenga or tikanga expert(s) in an advisory (this can be funded through the Vote Office of the Clerk).[2]

Sincerely,

9(2)a

9(2)a

9(2)a

[1] *Re Edwards (Whakatohea Stage Two) No. 7* [2022] NZHC 2644 [13 October 2022].
[2] See McGee *Parliamentary Practice in NZ* (4th Ed, Oratia Books, 2017) at 301–302.

SUBMISSION

LYALL & THORNTON
BARRISTERS AND SOLICITORS

9(2)a

18 November 2022

Hon Andrew Little
Minister for Treaty of Waitangi Negotiations
Private Bag 18888
Parliament Buildings
Wellington 6160

BY EMAIL: takutaimoana@tearawhiti.govt.nz

Tēnā koe,

Feedback on Dual Pathway Consultation Marine and Coastal Area (Takutai Moana) Act 2011

Applicant Group

1. This feedback is provided on behalf of Ngā Whānau o Hauiti ("**NWOH**"). The group has applications under the Marine and Coastal Area (Takutai Moana) Act 2011 ("**MACA Act**") in both the Crown engagement and High Court pathways (applications MAC: 01-08-02 and CIV: 2017-485-255 respectively).

2. NWOH are currently advancing direct negotiations with the Crown and have recently participated in the High Court Tokomaru Akau hearing as an interested party.

Three Proposed Options

3. The options presented for feedback are:

   a. Option 1: Enable decision makers to take account of all relevant applications for an application area at the same time.

   b. Option 2: Enable a CMT to be varied to take account of decisions in the other pathway.

9(2)a

c. Option 3: Combining options 1 and 2.

4. We are instructed that NWOH considers that all the above are examples of attempting to remedy an unfixable system. They do not favour taking any action until the Waitangi Tribunal has reported back to the Crown following stage two hearings in the Wai 2660 Inquiry.

Sincerely,

9(2)a

9(2)a

9(2)a

SUBMISSION

LYALL & THORNTON
BARRISTERS AND SOLICITORS

9(2)a

18 November 2022

Hon Andrew Little
Minister for Treaty of Waitangi Negotiations
Private Bag 18888
Parliament Buildings
Wellington 6160

BY EMAIL: takutaimoana@tearawhiti.govt.nz

Tēnā koe,

Feedback on Dual Pathway Consultation Marine and Coastal Area (Takutai Moana) Act 2011

Applicant Group

1. This feedback is provided on behalf of Ngāti Porou ki Hauraki ("**NPKH**").

2. NPKH has applications under the Marine and Coastal Area (Takutai Moana) Act 2011 ("**MACA Act**") in both the Crown engagement and High Court pathways (applications MAC: 01-03-007 and CIV: 2017-404-556 respectively).

Background

3. In September 2022, Te Arawhiti released the Pānui Takutai Moana for applicants. The pānui requests applicant's feedback on how it should fix the admitted problems with the dual pathway under the Act.

4. The main issue is that the MACA Act allows applicants to take different pathways through different decision-makers to recognise CMT – through an application to the High Court, direct engagement with the Crown, or both. However, the MACA Act is silent on how these pathways interact.

9(2)a

5. The pathways are not progressing at the same speed. The High Court has begun issuing decisions while the Crown engagement pathway is yet to make progress on applications. The Crown must take urgent steps to address this. NPKH has been in negotiation towards recognition of their extant and obvious rights in the takutai moana for almost a generation.

6. The Crown's failure to progress the engagement pathway is prejudicial for applicants who have only engagement applications, those who wish to elect to progress by engagement, or those that were in negotiations prior to the MACA Act coming into force.

7. A concrete example is found in *Re Edwards,* where with respect to Ngāti Awa, a Crown engagement applicant group that overlapped with the High Court applications, Justice Churchman observed that:

> *A finding that an applicant group in these proceedings held CMT in the overlapping area would arguably have the effect of prohibiting the Crown from coming to an agreement with Ngāti Awa for a grant of CMT in respect of the same area. This may produce an injustice. The potential for injustice is lessened where the party pursuing direct engagement has participated in the Court hearing as an interested party but the problem is that the Court will not always hear from such overlapping parties or even be aware that they exist.*

8. Section 58(1)(b)(i) provides that CMT requires an applicant group establish exclusive use and occupation of the takutai moana. Under the current interpretation taken by the Courts, only one CMT order can be issued per area of the takutai moana.

9. Although the recent *Re Edwards* decision has confirmed an order for jointly held CMT that provides for shared exclusivity is possible under the MACA Act, Justice Churchman found that such an order could only be granted where the groups in the relevant area could reach agreement that the area be shared in accordance with tikanga.

10. This means that if overlapping applications are not heard under the same pathway, they may not be considered alongside each other. This risks some groups not having CMT recognised, as the first decision maker may be unable to consider their application.

11. A concrete example of this was seen during the hearing of applications of Ngāti Pāhauwera and others. The Mana Ahuriri Trust ("**MAT**") appeared in the proceedings as an interested party, as it was in direct engagement with the Crown. However, MAT's application significantly overlapped with the application areas of Maungaharuru-Tangitū Trust ("**MTT**") and Ngāti Pārau. While appearing as an interested party, the MAT had little ability to influence the outcome of the hearing.

12. Churchman J noted that this put the Court in an impossible position, as the Court will be reluctant to stay parts of a proceeding where there are overlapping claims with an applicant in direct engagement to wait for the engagement to occur.

13. His Honour found the Court could not bind the MAT to a shared CMT agreement that they did not seek themselves. However, if the Court made a finding of CMT excluding the MAT, knowing that MTT acknowledge at least some element of shared exclusivity, it would be likely to result in the MAT being unable to be awarded CMT when they enter direct engagement with the Crown.

14. There was also no ability for Justice Churchman to make a declaration of "preliminary findings" about CMT within parts of the application area where there is overlap, and commented that it seemed unjust that the option of choosing direct engagement over litigation could potentially result in the Mana Ahuriri hapū losing the opportunity to obtain a shared CMT order.

15. His Honour observed that the best solution may be found in how section 111 of the MACA Act authorises the Court to vary a recognition order, following a variation application on behalf of the holder of the order. If, in direct engagement, the MAT hapū are able to satisfy the Crown that they are entitled to an order for CMT on the basis of shared exclusivity with Ngāti Pārau and MTT, those two applicant groups could formally apply to the Court for a variation of the recognition order to refer to the interests of the Mana Ahuriri Trust applicant group.

16. However, this relies on the good will of the applicant groups and may result in prejudice. Justice Churchman in commented that:

> *There would appear to be a question as to whether the legislation, by providing for two separate and potentially mutually exclusive avenues for obtaining recognition orders/agreements achieves the obligation of active protection.*

17. This also undermines the durability of the MACA regime.

Feedback on Proposals

Relevant Treaty Principles

18. The honour of the Crown is an overarching principle of Te Tiriti o Waitangi. Implicit in the principle of the honour of the Crown is that the promises made in Te Tiriti will be upheld, and that the Crown will act in good faith towards its Tiriti partner. Any reform of the MACA Act must be consistent with Te Tiriti o Waitangi.

19. The Waitangi Tribunal heard claims relating to the scheme of the MACA Act in late 2021. The final hearing was held on 10 November 2021. The report is yet to be released. Many claimants raised the difficulties of the dual pathway as an issue.

20. To ensure Treaty compliance, the Crown should take the opportunity to benefit from the findings of the Wai 2660 Tribunal. Any changes must be able to be altered or 'unpicked' to take the Tribunal's recommendations into account.

Three Proposed Options

21. The options presented for feedback are:

    a. Option 1: Enable decision makers to take account of all relevant applications for an application area at the same time.

    b. Option 2: Enable a CMT to be varied to take account of decisions in the other pathway.

    c. Option 3: Combining options 1 and 2.

Option 1

22. As noted in the discussion paper, Option one would force those who do not wish to participate in one pathway to do so.

23. While this might appear administratively efficient, these are risks including creating division or animosity between applicant groups.

24. Option 1 on its own will also not remedy the prejudice that groups such as MAT and others have already encountered.

Option 2

25. Option two may allow the prejudice described above to be remedied, but comes with its own set of issues including:

    a. A question as to what happens if the groups on the order oppose the group being added. We are unclear on whether this could then have the effect of negating an order as shared exclusivity may no longer be available.

    b. It is unclear at what point protected customary rights would be addressed.

    c. It is unclear how wāhi tapu sites would be addressed. The recent decision by Churchman J in *Re Edwards (No 7)*[1] found that wāhi tapu must be recognised by all groups on a CMT. The Court considered that it has no jurisdiction to "award wāhi tapu protection in respect of sites that are contested or in respect of which there is conflicting evidence" (at [155]). There is potential for existing wāhi tapu recognition to be undermined.

    d. It is unclear whether or how survey plans might be required to be amended, and who is to take responsibility for that work and cost.

Option 3

26. The process suggested by option three is unclear, however appears the most palatable out of the options. The issues outlined above remain to be addressed however.

[1] *Re Edwards (Whakatōhea Stage Two) No. 7* [2022] NZHC 2644 [13 October 2022].

Further Suggestions

27. The most workable change that could be made to the Act would be to remove the word "exclusively" from section 58(1)(b)(i).

28. Removing the requirement for exclusivity would mean the test for CMT could allow for multiple CMT orders and recognition agreements over the same area.

29. This would remedy the dual pathway problem because CMT could be granted within the same area to different groups at different times and by different decision makers.

30. Overlapping applicants would not have to be heard by or negotiate with the same decision-maker to have their customary rights recognised through the MACA Act. Instead, an additional order or agreement could be recognised by the different decision-maker alongside one(s) that have already been recognised.

31. This proposal is consistent with the legislative schema. In *Re Edwards* Churchman J read the requirement of exclusivity consistently with the tikanga element of the test for CMT. Section 58(1)(a) requires an applicant group to hold the area in accordance with tikanga. The tikanga obligations on applicant groups of whanaungatanga and manaakitanga are not compatible with exclusive use and occupation. Therefore, his Honour established that 'exclusivity' must have a meaning compatible with holding the area in accordance with this tikanga. His Honour's solution was shared exclusive orders.

32. Removing the requirement of 'exclusivity' would simplify the Court's task and create consistency within the legislation.

33. This proposal would not be dissimilar to how the Court currently recognises shared exclusivity amongst overlapping groups. Currently, per *Re Edwards*, multiple overlapping groups are represented on a single order. These groups are encouraged to come to an agreement in accordance with tikanga of a structure that allows co-governance.

34. Removing "exclusivity" from the test would not substantially change the practical nature of how the Court has recognised interests. Instead of consolidating groups into a single order, multiple orders or agreements could be layered over different

orders or agreements, with areas of shared and sole interests. Applicants could then discuss in how co-governance works over areas with shared interests in accordance with tikanga.

35. The legislation currently creates zero-sum game as if applicants cannot agree to be held on a single order, then the CMT order will not be granted. This has led to multiple strike out applications, bitterly contested hearings focusing on mandate or representation and not the legal test, and a general difficulty for the Courts in grappling with their role in determining complex overlaid tikanga.

36. Removing the requirement of exclusivity to allow for the Court and Crown to make multiple overlapping recognition orders would make the application process run smoother as it reduces the need for applicants to act so defensively and does not put decision-makers in the position of conclusively determining tikanga and whakapapa of applicant groups.

Process Considerations

37. Any proposed legislative amendment to the Act should pass through a joint select committee with recognised tikanga experts. This would allow actual scrutiny of the proposed changes to ensure they affirm tikanga. It would also show the Crown is acting with honour in engaging its Tiriti partners in the development of such crucial legislation.

Sincerely,

9(2)a

9(2)a

9(2)a

SUBMISSION

TE KAUNIHERA MAORI O TE TAI TOKERAU

TE TAI TOKERAU DISTRICT MAORI COUNCIL

AND

KAWANATANGA

TAKUTAIMOANA ACT 2011

AND

CHANGES TO THE LEGISLATION

SUBMISSION

TE ARAWHITI'S 3 OPTIONS

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1. The Waitangi Tribunal wrote to the Minister for Maori Development, the Minister for Crown Maori Relations, the Minister for Justice and the Attorney General on 29 June 2020 outlining its conclusions on Stage 1 of the Takutaimoana Act 2011 Kaupapa Inquiry and reminding kawanatanga that Stage 2 was pending.
2. As chairman of Te Kaunihera Maori O Te Tai Tokerau/Te Tai Tokerau District Maori Council ["Te Kaunihera"] since 2015 and the demise of Sir Graham Latimer I state that Te Kaunihera was established in 1962 decades before runanga, iwi authorities and/or Maori land trusts, under the auspice of the 1962 Maori Community Development Act and that Te Kaunihera has pursued its objectives at Section 18 of the Act despite external assumptions of authority over mana motuhake of our affiliated Maori constituents whanau hapu ki Te Tai Tokerau NgaPuhi Nui Tonu.
3. Under duress of the tight 2017 timeframes extensively complained of in the 2020 Stage 1 Kaupapa Inquiry, the following are details of my claim on behalf of Te Kaunihera' MACA applications CIV 2017-404-538/MAC 01-01-133 :

Application #	MAC-01-01-133
Representative group/person	9(2)a [redacted]
Contact	9(2)a [redacted]
Application for	CMT and PCR
Application area	1. Mangawhai ki Hauraki 2. Kaipara South to Manukau 3. Takou bay to Okupe beach 4. Ngunguru to Mangawhai 5. Whangape harbour to Waipoua 6. Whangaroa harbour to Takou bay
Local authority area	Northland Regional Council, Far North District Council, Whangarei District Council, Kaipara District Council and Auckland Council
Map	**1. Mangawhai ki Hauraki. [PDF, 114 KB] 2. Kaipara South to Manukau [PDF, 153 KB]. 3. Takou bay to Okupe beach. [PDF, 209 KB] 4. Ngunguru to Mangawhai. [PDF, 135 KB] 5. Whangape harbour to Waipoua. [PDF, 194 KB] 6. Whangaroa harbour to Takou bay. [PDF, 188 KB]**

4. Consequently, and also under duress of kawana's tight 2017 MACA timeframes it was only by resolution 02140817, moved Ahipara and seconded Whangarei that Te Kaunihera agreed THAT the *[Kaunihera]* MACA development plan be approved for progress and Te Kaunihera Maori O Te Tai Tokerau pursue a hapu claimant case with contiguous cases that are prosecuting the same principle of mana moana mana whenua in order to consolidate the contiguous claims and call duly notified hui to work through the process. Carried unanimously.
5. **Attachment "A"** is the confirmed list of 2018 accredited members of Te Kaunihera a number of whom, in their own right are MACA claimants and as agreed in the drafting of the 2018 Kaunihera management plan by resolution from Wananga held at Otangarei, Whangaroa on 15th June 2018, moved Hihiaua seconded Whakarapa and Whangaroa : THAT the wananga presentation of He Wakaputanga 28th October 1835 and Te Tiriti O Waitangi 6th February 1840 [Maori version] underpinned by the Waitangi Tribunal Stage 2 Report dated 14th November 2014 be

reaffirmed as the overarching tahuhu and whariki by which Te Kaunihera Maori O Te Tai Tokerau (Tai Tokerau District Maori Council) are bound to honour their obligations to their Maori constituents whanau hapu. Carried.

6. Whilst it is appreciated that CIV 2017-404-538/MAC 01-01-133 contained administrative discrepancies and lacked information that should have been provided by legal counsel at the time, it was with some disdain that we were found to be struck by Judge Churchman on 11 August 2020. I state that the essence of our MACA plan did have a clear purpose for whanau hapu constituents ki Te Kaunihera the gist of which is now irreversible yet causing kawanatanga considerable angst.

OPTIONS

7. **Option 1: Enable decision makers to take account of all relevant applications for an application area at the same time**

Option 1 would enable all relevant applications to be considered at the same time by either the High Court or the Crown. If applicants did not wish to have their application considered by that decision maker, they may choose not to participate. However, if CMT is recognised for other applicants in the area as part of this process, any applicant who chose not to participate would not be able to have a CMT decision made in the other pathway for that area.

7.1 Public notification by kawanatanga in 2017 calling for interested MACA parties to file their claims was inadequate and is now proving cumbersome, ineffective and divisive;

7.2 By "relevant applications" kawanatanga means "claims filed and referenced in 2017" which does not meet the benchmark "ko matou hapu rangatiratanga" and is basically a further breach of He Wakaputanga 28 October 1835 me Te Tiriti O Waitangi 06 February 1840 *[Maori version]* in regard to tikanga Maori tuturu;

7.2 Protected customary rights are negotiated between whanau hapu and then made known to kawanatanga not the other way around. Legal recognition of those rights would emanate by way of Customary Marine Title issued by the High Court no doubt enshrined in a Deed of Partnership of sorts.

7.3 Kawanatanga accepting applications to claim one pathway without the other was deceitful and in breach of Te Tiriti O Waitangi 1840 development rights. Furthermore, as kawanatanga now realises, it simply defeats the purpose of the intent of customary rights.

7.3 Whanau hapu ki Te Kaunihera are acutely aware that protected customary rights on their own are a myth and have the potential to become subject to change with the change of kawanatanga.

7.4 Option 1 is therefore not supported.

8. Option 2: Enable a CMT to be varied to take account of decisions in the other pathway

Option 2 would mean decision makers could still only consider and determine the applications made in their pathway, but would enable a CMT issued in that pathway to be varied to include applicant groups if the other decision maker is satisfied, they also meet the test for CMT (a shared CMT). For example, if the High Court made a CMT recognition order for one or more applicant groups in an area, and then at a later date the Minister determined further applicant groups in that area also meet the test for CMT, the further applicant group(s) could be added to the existing recognition order.

8.1 Again, inadequate public notification by kawanatanga is proving problematic eighteen years after passing the 2004 Takutaimoana Act and eleven years after hastily passing the 2011 Act, a huge issue in the Waitangi Tribunal Stage 1 Kaupapa Inquiry held in 2020.

8.2 Whanau hapu ki te takutaimoana are continuously disenfranchised politically, administratively and legally by the lack of

communication, information and/or consultation by kawanatanga and its agents allowing non-residential developers to enhance their coastal properties in our customary coastal areas rushed through by virtue of the 2020 Fast Track (Covid) legislation.

8.3 This third deferral of legislation pertaining to protection of whanau hapu customary rights and legal Title thereto is another blatant kawanatanga breach of Te Tiriti O Waitangi 1840 and is vehemently opposed.

8.4 The 2011 Act had no means of ensuring tikanga Te Ao Maori ki te taiao would be given due recognition by kawanatanga nor any hope of any type of management being passed to the rightful owners leave alone this additional delay in its much needed review;

8.2 The High Court is already hearing strike-out claims intended to be inclusive under tikanga Maori such judgements being determined by the court in the wake of kawanatanga's three crucial options for claimants to consider in changing the 2011 Act;

8.3 It stands to reason protected customary rights can only be sustainable if recognised by a High Court issuance of customary marine title therefore "relevant" MACA applications ie those filed for both PMR and for CMT by closing date in 2017 must be given priority region by region firstly to negotiate with kawanatanga the protection of those rights and if successful to have those rights legislated in Customary Marine Titles by order of the High Court;

8.5 MACA claimants did not have the information that would have helped them to choose between the pathways, how each pathway would work and nor were there any engagement processes and procedures with groups whose customary interests overlapped with others and I state that those issues continue to remain uncertain.

8.6 MACA claimants choosing one pathway or the other are secondary to the relevant applicants and need to be collectivised

by kawanatanga to be heard at the same time in one or other of their chosen pathways region by region in a separate pathway from "relevant" applications in both pathways;

8.5 The inclusion of secondary or new applications for CMT requires Kawanatanga to work closely with the primary relevant MACA applicants in the event of issuing CMT status;

8.6 Option 2 is therefore not supported as is.

9. Option 3: Combining options 1 and 2

Option 3 would enable either decision maker to take account of all the relevant applications in a coastline at the same time, irrespective of which pathway an application was originally made in. However, if applicants chose to stay in their original pathway and were also found to meet the test for CMT, they could be added to the recognition order or Act that was made in the other pathway.

9.1 Option 3 is not supported as is but the intent is supported on the basis that my own and other MACA claims were promptly filed by closing date in 2017 for the purpose of facilitating the inclusion of "one or other" and/or "new" MACA secondary applications as tikanga Maori has dictated since time immemorial;

9.2 Whanau noho ki te takutaimoana have maintained customary traditional undisclosed rights to toka in their hapu rohe for generations. Tikanga must continue to allow them to retain those rights ake ake tonu atu.

9.3 Tikanga involves protection and sustainability measures. It has been this way for generations prior to the rampant commercialisation o nga taonga tuku iho that whanau hapu and communities in general are now plagued with.

9.4 Whanau ki te tuawhenua (inland) have reciprocated by also not necessarily disclosing their best eeling, koura, watercress and other inland toka to their takutaimoana whanau for the same tikanga reasons;

9.3 Te Kaunihera cannot over-emphasise the misfortune of the disproportionate number of whanau hapu ki te takutaimoana who missed the opportunity to file takutaimoana claims in 2017 through no fault of their own excepting kawanatanga's lack of knowledge of tikanga Maori notwithstanding their total immersion in kaupapa inquiries following the Stage 2 WAI 1040 Te Paparahi O Te Raki Inquiry;

9.4 Option 3 is Te Kaunihera's preferred kaupapa moving forward; however tikanga ki nga kawa ki Tangaroa in arriving at agreement with hapu that will achieve inclusion of the secondary PCR and CMT and how best this can be achieved, can only be negotiated between contiguous whanau hapu, not kawanatanga;

9.5 Kawa ko matou may not differ to any great degree between hapu but tikanga ko matou (inclusivity) will do so in small ways to retain, maintain and regain depleting fish stocks and monitoring of customary take quantities, locations, times and days of the Matariki belong to and are nergotiable only by hapu to hapu

9.6 Whanau hapu living on the coasts have protected tuawhenua whanau customary rights to the moana since time immemorial and vice versa tuawhenua ki nga takutaimoana whanau hapu. This kawa must also continue; however the onus of CMT must remain with coastal hapu who successfully prove PMR in negotiations with kawanatanga;

9.6 Takutaimoana management plans ia rohe ia rohe will play an integral part in balancing Option 3 towards an agreeable dual pathway.

10. CONCLUSION

- Hapu are and must remain the paramount balancing factor in kawanatanga's proposed dual pathway forward.
- Whanau trusts, ahuwhenua trusts, charitable trusts and runanga have all been acknowledged as relevant applicants by kawanatanga and is a

blatant breach of hapu rangatiratanga rights He Wakaputanga 1835 me Te Tiriti O Waitangi 1840.

- Not only is the 2011 Takutaimoana Act flawed, there are scathing discrepancies in the customary fishing regulations that detrimentally impact on hapu manamoana rights and must also be reviewed to fit a reviewed 2011 Act.
- For a number of years customary fishing permits have proved cumbersome for whanau hapu ki te takutaimoana due to kawanatanga extending authority for issuing customary fishing permits to hapu ki te tuawhenua inland. Fishers launch from elite coastal areas to get to significant kaimoana toka in the bays of Tai Tokerau and they disembark at those same places yet there is no ability or authority for duly gazetted tangata kaitiaki ki te takutaimoana to monitor the stocktakes of those customary permitted fishers from inland. Consequently this discrepancy encroaches on whanau hapu ability to accurately monitor and record fish stocks in their traditional rohe moana which is disagreeable and unacceptable.
- Kawanatanga's proposal for a dual takutaimoana pathway requires definition and clarity of preferred whanau hapu intent based on tikanga rather than legalese in its raw state.
- "Relevant" claims are the primary claims and justly deserve to be given priority, firstly in the protected customary rights negotiations process region by region, underpinned by customary marine title by the High Court as and when successful and secondly because we have been held for up too long and Tangaroa is dying.
- Applicants seeking to hold title must have inclusive, durable takutaimoana management plans according to whakapapa hapu takutaimoana kawa me nga tikanga ki te Matariki ia rohe ia rohe to substantiate the legal title sought.
- "Secondary" applications are submitted as those for one or other pathway and/or "new" applications for both. For durability of purpose their consideration follows the "primary" relevant applications to ease the

burden and unfairness on the relevant applicantions claimants who are expected to incur tikanga kawa for all historical customary coastal rights.

- Secondary approved negotiations with kawanatanga for protected customary rights must ne referred to the primary approved CMT holder in their respective takutaimoana region for such internal negotiations to happen in amendinng their management plans as and where appropriate.
- Re-registration of CMTs as amended without prejudice by the High Court will ensure title-holders continue to exercise authority of the approved primary CMT.

SIGNED at Moerewa this 18th day of November 2022.

9(2)a

9(2)a

Chairman

Te Kaunihera Maori O Te Tai Tokerau/

Te Tai Tokerau District Maori Council.

SUBMISSION

SUBMISSION TO THE MINISTER FOR TREATY OF WAITANGI NEGOTIATIONS REGARDING TAKUTAI MOANA DUAL PATHWAY CONSULTATION

ON BEHALF OF THE TRUSTEES OF THE RONGOWHAKAATA IWI TRUST

18 NOVEMBER 2022

INTRODUCTION

1. This submission is made by the Trustees of the Rongowhakaata Iwi Trust (Trustees) in response to the Takutai Moana dual pathway consultation document released by Te Arawhiti in September 2022.

2. Rongowhakaata Iwi is a principal iwi of Tūranganui-a-Kiwa (Gisborne) and descends from the eponymous ancestor Rongowhakaata and, in particular, Rongowhakaata's wives, Turahiri and Moetai and their issues.

3. Since 2012, the definition of Rongowhakaata Iwi has been legally defined through our Treaty Settlement legislation. The Trustees represent Rongowhakaata Iwi as defined in section 12 of the Rongowhakaata Iwi Treaty Claims Settlement Act 2012:

> **13 Meaning of Rongowhakaata**
>
> (1) In this Act, **Rongowhakaata**, which includes Ngā Uri o Te Kooti Rikirangi, means—
>
> (a) the collective group of individuals who descend from 1 or more Rongowhakaata ancestors; and
>
> (b) every whānau, hapū, or group, to the extent that it is composed of the individuals referred to in paragraph (a), including Ngāti Maru, Ngāi Tawhiri, and Ngāti Kaipoho; and
>
> (c) every individual referred to in paragraph (a).
>
> (2) In this Act, **Ngā Uri o Te Kooti Rikirangi** means—
>
> (a) those who descend from Te Kooti Rikirangi through his marriage to Irihapeti Puakanga; and
>
> (b) every individual referred to in paragraph (a); and
>
> (c) any whānau, hapū, or group of individuals to the extent that that whānau, hapū, or group of individuals is composed of individuals referred to in paragraph (a).
>
> (3) In this section,—
>
> **customary rights** means rights according to tikanga Māori, including—
>
> (a) rights to occupy land; and
>
> (b) rights in relation to the use of land or other natural or physical resources
>
> **descend** means—
>
> (a) direct descent by birth; or
>
> (b) legal adoption; or

(c) whāngai (Māori customary adoption) in accordance with,—

(i) in the case of Rongowhakaata, the tikanga of Rongowhakaata; and

(ii) in the case of Ngā Uri o Te Kooti Rikirangi, the tikanga of Ngā Uri o Te Kooti Rikirangi

Rongowhakaata ancestor means, in relation to persons who exercised customary interests within the area of interest after 6 February 1840, —

(a) Rongowhakaata and, in particular, his wives Turahiri, Uetupuke, and Moetai and their issue:
(b) any other ancestor of the hapū named in subsection (1)(b)

tikanga means customary values and practices.

4. The Trustees are the elected representatives of Rongowhakaata Iwi and make this submission on behalf of Rongowhakaata Iwi.

MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011

5. In 2017, the Trustees filed an application in the High Court under the Marine and Coastal Area (Takutai Moana) Act 2011 (**Act**) seeking Customary Marine Title (**CMT**), Protected Customary Rights (**PCR**) and Wāhi Tapu Protection (**WTP**). This application is yet to be heard, and is not currently scheduled for hearing.

6. The Trustees also applied to engage with the Crown under section 95 of the Act and are presently working with Te Arawhiti to progress that application. The Rongowhakaata application area for both the High Court and engagement pathways is between the northern side of Pouawa River and Te Kowhai (**application area**). There are a number of other applications that overlap with the Rongowhakaata application area in both pathways.

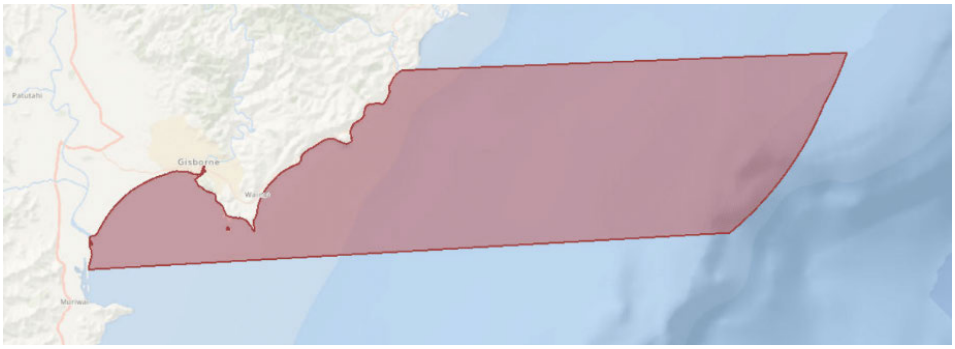

Figure 1 : Map showing the length of coastline for the Rongowhakaata application (Source: Te Arawhiti Kōrero Takutai mapping tool - the shaded area is was mapped by Te Arawhiti, not Rongowhakaata, and is not an accurate reflection of the Rongowhakaata area of interest)

7. Rongowhakaata also participated in the Waitangi Tribunal's Wai 2660 Inquiry which is currently awaiting a decision.

THE DUAL PATHWAY PROBLEM

8. Whether there is a dual pathway problem as set out in the dual pathway consultation document is a question of interpretation. While some judges have indicated that there could be a problem, there is nothing explicit in the Act to prevent parties from another pathway being added to a CMT at a later date. Because we have not reached the point on the applications that have been decided to date where successful parties from a different pathway have sought to be added to an existing CMT, it is not yet clear how new parties would be added. How this process would occur under the amendments proposed in options 2 and 3 is also unclear from the consultation document.

9. It may be preferable that the Act be amended to clarify (1) that additional parties can later be added to a CMT and (2) how that would occur. We do note, however, that amendments to this effect are premised on the basis of the findings in the High Court that only one CMT can be granted in an area where there are multiple groups who are found to hold CMT. This finding may yet be challenged in the Court of Appeal.

10. Many of the problems that currently exist with the dual pathways would still remain even if the amendments proposed in the dual pathway consultation document are enacted. As a result, the Trustees submit that more comprehensive amendments to the Act are required. Furthermore, as many of the problems with the dual pathways arise or are exacerbated due to the length of time between decisions in each pathway, it is essential that the timing of decisions between the two pathways become more aligned.

11. We have set out our position in relation to each option below along with some possible solutions to some of the problems that arise in each option.

NGĀ ROHE MOANA O NGĀ HAPŪ O NGĀTI POROU ACT 2019

Introduction

12. An added complexity is the existence of the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (**Ngāti Porou Act**). The Ngāti Porou Act effectively adds two additional

pathways in the area to which it applies. The areas covered by the Ngāti Porou Act are set out in schedule 2 of the Ngāti Porou Act, and are shown in the map below.

Figure 2: Map of ngā rohe moana o ngā hapū o Ngāti Porou (Source: Ngāti Porou Act, Schedule 3)

13. The Ngāti Porou Act modifies the Act for applicants who meet the definition of the Ngāti Porou Act of being ngā hapū o Ngāti Porou in the area covered by the Ngāti Porou Act. Groups that qualify to participate under the Ngāti Porou Act can make an application for engagement under that Act, or can seek orders from the High Court. The Ngāti Porou Act provides groups that qualify under that Act with a number of additional advantages that are not available to applicants under the Act.

14. Neither Rongowhakaata in the overlapped area, nor any other group anywhere in Aotearoa, receive the following awards that Ngāti Porou Act groups receive without having to meet a test:

14.1. The requirement that the map of Ngā Rohe Moana o ngā hapū o Ngāti Porou be attached to the Gisborne District Council regional policy statement, regional plan (including regional coastal plan), district plan, combined document, conservation management strategy (DOC), and fisheries plan (Ministry of Fisheries);[1]

14.2. The right to be a party to any Environment Court hearing regarding a resource consent application;[2]

14.3. The right to be provided with resource consent applications;[3]

14.4. The right to nominate a person, that the Minister must appoint, to any Board of Inquiry into matters of national significance;[4]

14.5. The right to be treated as persons directly affected by a decision of, or the exercise of a power by Heritage New Zealand Pouhere Taonga;[5]

14.6. The right to develop and sign (with the relevant Minister) an environmental covenant which:

14.6.1. Must be recognised in the Gisborne District Council regional policy statement, regional plan (including regional coastal plan), district plan, combined document;[6]

14.6.2. The Gisborne District Council must review each public document against[7] and amend its public documents or justify why no amendment is required[8] (there are also transitional provisions and provision for Council reconsideration, Environment Court Appeal and periodic review and amendment);

1 Ngāti Porou Act, s 14.
2 Ngāti Porou Act, s 15.
3 Ngāti Porou Act, s 16.
4 Ngāti Porou Act. s 17.
5 Ngāti Porou Act, s 18.
6 Ngāti Porou Act, s 20.
7 Ngāti Porou Act, s 21.
8 Ngāti Porou Act, s 22. There are also transitional provisions (s23-24) and provision for Council reconsideration (s25-26), Environment Court Appeal (s27) and periodic review and amendment (s29-30).

14.6.3. Must be considered by the Minister when preparing a proposed national environmental standard, and must be treated as relevant to a proposed national policy statement;[9]

14.6.4. Has an effect on Heritage New Zealand Pouhere Taonga decisions;[10]

14.6.5. Has an effect on Gisborne District Council decision making processes;[11]

14.7. Recognition of a customary food gathering and customary fishing area which extends into the Exclusive Economic Zone (beyond the scope of the MACA Act);[12]

14.8. Regulations for customary fishing;[13]

14.9. A permission right for applications to possess wildlife matter or marine mammal matter;[14]

14.10. Two official geographic name changes;[15]

14.11. Relationship instruments with the Minister of Arts Culture and Heritage, Minister of Conservation, Minister for the Environment, Minister of Fisheries, Minister of Energy and Resources, and a Whakamana Accord with the Crown;[16]

15. Ngāti Porou Act groups also receive additional awards when they meet the tests under the Ngāti Porou Act.

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9 Ngāti Porou Act, s 31.
10 Ngāti Porou Act, s 32.
11 Ngāti Porou Act, s32.
12 Ngāti Porou Act, s 48.
13 Ngāti Porou Act, s 49.
14 Ngāti Porou Act, s 57-63.
15 Ngāti Porou Act, 64-67.
16 Ngāti Porou Act, s 68-73.

PCRs

16. Ngāti Porou have some important improvements on the awards for PCRs, which in the Ngāti Porou Act are called protected customary activities (**PCAs**), including:

    16.1. PCRs can have controls imposed on them by the Minister of Conservation,[17] but any controls on PCAs must be agreed between the Minister and the relevant Ngāti Porou hapū;[18]

    16.2. There are no deemed accommodated activities as exceptions to the restriction on resource consents with more than minor adverse effects on PCAs as there are for PCRs.[19]

CMT

17. Ngāti Porou have some important improvements on the awards for CMT, including:

    17.1. The permission right Ngāti Porou receives as an award for CMT includes not just resource consent applications decided by the local authority but proposals of national significance which are decided by the Environmental Protection Authority;[20]

    17.2. There are no deemed accommodated activities as exceptions to the Ngāti Porou permission right, as there are for other Māori;[21]

    17.3. Ngāti Porou can request further information before determining whether to give permission;[22]

    17.4. CMT for Ngāti Porou includes extended mechanisms for customary fishing; the environmental covenant, and conservation processes.[23]

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17 MACA Act, s 52(3)(d).
18 S34(2)(c)(iii).
19 MACA Act, s 55.
20 Ngāti Porou Act, s 74.
21 MACA Act, s55.
22 Ngāti Porou Act, s 78.
23 Ngāti Porou Act, s 85-91.

Four extra years to apply

18. Ngāti Porou Act groups had two years from the passing of the Ngāti Porou Act, i.e., until May 2021 to apply for CMT, PCRs and/or WTP under the Ngāti Porou Act. This gave Ngāti Porou groups four years longer than any other group in Aotearoa to apply.

Ngāti Porou receive $15 million "implementation funding"

19. Ngāti Porou received $15 million payment for "implementation funding". No other group is being offered implementation funding or compensation.

Rongowhakaata is particularly impacted by Ngāti Porou Act

20. Rongowhakaata is particularly impacted by the Ngāti Porou Act as the southern part of the Ngāti Porou Act area overlaps with a substantial portion of the Rongowhakaata application area between Pouawa River and Te Toka ā Taiao. The area of overlap is the southernmost area shaded blue in the map below.

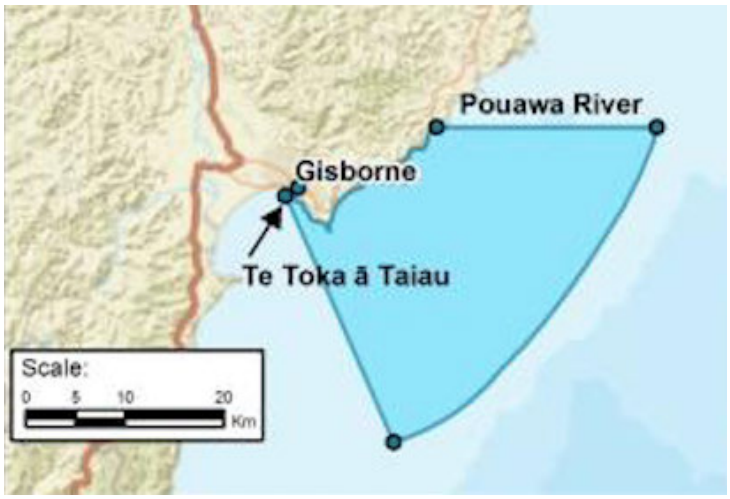

Figure 3: Map showing area where Ngāti Porou Act overlaps with Rongowhakaata application area (Source: Ngāti Porou Act, Schedule 3)

21. Rongowhakaata has always opposed the special treatment provided to Ngāti Porou and does not accept that Ngāti Porou has rights in the Rongowhakaata application area. Attached as appendix "**A**" is a copy of Rongowhakaata's submission to the Select Committee on the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill.

22. Rongowhakaata made submissions in the Wai 2660 Inquiry on the impact of the Ngāti Porou Act on groups whose interests overlap with the area to which the Ngāti Porou Act applies. The recommendations sought by Rongowhakaata in the Wai 2660 Inquiry include amendments to the Act to apply the same treatment to all applicants as has been granted to groups who fall under the Ngāti Porou Act.[24]

Dual pathway impacts of Ngāti Porou Act

23. The dual pathway consultation document does not give any consideration to the added complexities for parties impacted by the Ngāti Porou Act. Depending on how Ngāti Porou Act applications are treated, it is possible that the Ngāti Porou Act adds two additional pathways in the areas to which the Ngāti Porou Act applies: a pathway for Ngāti Porou group engagement, and a pathway for Ngāti Porou groups to apply to the High Court. It is unclear whether those applications will be considered alongside applications made under the Act (for example, whether Ngāti Porou Act High Court applications would be heard in the same hearing group as High Court applications under the Act).

24. If the Ngāti Porou Act does add additional pathways, we consider that those additional pathways exacerbate all of the problems set out below in relation to the three options proposed, as there would then be further decisions being made and further processes where additional groups need to be brought into the CMT holder (if the position remains that there can only be one CMT holder). It is not clear how to balance the Ngāti Porou decision making processes within the options that have been proposed. Some of these difficulties could be resolved if the processes under the Ngāti Porou Act are considered alongside the processes in the Act. For example, if Ngāti Porou Act engagement applications are considered together with engagement applications under the Act. However, it is not clear from the consultation document whether this is the intention of the Crown.

25. Further detail regarding the impact of the Ngāti Porou Act is set out below in relation to each proposed option.

[24] Wai 2660, #3.3.138 (https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_175247304/Wai%202660%2C%203.3.138.pdf).

Impact of additional pathways on Rongowhakaata

26. We have not been able to determine whether any applications for engagement were made under the Ngāti Porou Act in the southern part of the Ngāti Porou Act area that overlaps with the Rongowhakaata application area before the 2021 statutory deadline passed. If there are any engagement applications in that area, then a third engagement pathway exists in this area which will add to the complexities of the different options as explained below. This complexity could be reduced if the Crown engages with the Ngāti Porou Act groups together with other groups in the area, including Rongowhakaata. This would not, however, remove the complexities of having to manage a CMT area where groups under both Acts are successful in obtaining CMT, but have different rights under the Acts under which CMT was granted. This is discussed further below.

27. The date for High Court applications under the Ngāti Porou Act has passed with six applications having been made. Those applications only extend as far south as Marau, which is north of the Rongowhakaata application area, so there is no additional High Court pathway in the Rongowhakaata application area. This means there is no fourth pathway in the Rongowhakaata application area.

THE PROPOSED OPTIONS

Option 1: Enable decision makers to take account of all applications at the same time

28. This option would enable <u>all</u> applications to be considered at the same time by either the High Court or the Crown. We understand this to mean that the first decision maker to reach the point of making a decision would consider all of the applications for that area, irrespective of whether the application was originally made in a different pathway.

29. This option effectively forces applicants who have chosen to participate in one or both pathways to proceed with their application in the pathway that is likely to reach a decision first OR to proceed in their preferred pathway but risk that the other pathway reaches a decision first and they cannot get CMT over any areas where CMT is granted in the first decision. This creates a number of problems for applicants.

30. Firstly, it deprives applicants of their choice of forum. If, for example, an applicant wishes to engage with the Crown to resolve their application, but the High Court proceedings in their application area are to proceed first, then that applicant would need to participate

in the High Court process to protect their rights in any part of their application area that will be determined in the High Court. If they do not participate and a decision is made granting CMT, then the applicant would lose their right to pursue CMT in this area.

31. Secondly, this option is likely to cause duplication of work for applicants where engagement and High Court processes are running in parallel. For example, if a party is engaging with the Crown and preparing evidence for that process, but the High Court process is also well advanced, an applicant may need to prepare evidence or submissions for that process also. This is costly for applicants both in terms of their time and financial cost. If option 1 was selected, claimants would need to be adequately funded in both pathways to ensure they can meet the financial burdens of participation as there may be a "race" to reach the point of decision in applicants' preferred pathway.

32. It is also not clear what would happen if engagement continued to advance parallel to the High Court process, and the High Court proceedings reached the point of hearing before the engagement decision is made or vice versa. For example, if both pathways continued to run in parallel, there could be a situation where the High Court reaches a decision while the Minister was still considering an engagement application, despite discussions having been well advanced. Alternatively, the Minister might make his or her decision while the High Court judgment is pending.

33. We consider this to be the least preferable of the options proposed.

Impact where Ngāti Porou Act applies

34. It is not clear from the discussion document how option 1 would be applied in the Ngāti Porou Act area. For example, would applications under the Ngāti Porou Act be treated the same as applications under the Act, so that if an application under the Ngāti Porou Act was first to reach the point of decision and the decision under the Ngāti Porou Act found that a Ngāti Porou Act group qualified for CMT would this block groups in the other pathway from being able to obtain CMT in that area? The Trustees submit that such an interpretation could be grossly prejudicial to groups who do not come under the Ngāti Porou Act if an engagement decision under the Ngāti Porou Act is made first, as it is not clear whether other applicants would be involved in the Ngāti Porou Act engagement.

Option 2: Enable a CMT to be varied to take account of decisions in the other pathway

35. Option 2 enables one decision maker to proceed with a decision on an application(s) in their pathway and for CMT to be issued to successful applicants in that pathway, while decisions are pending on applications in the other pathway. If applicants in the other pathway are then successful, they are added to the CMT. This option enables parties to maintain their choice of forum, while still having the option to be added to the CMT later.

36. There is, however, a risk that parties may still feel the need to participate in both pathways to preserve their rights. For example, parties may hold concerns that if they participate in the engagement pathway and do not lead evidence in the High Court, but the High Court decision is made first, findings made in the High Court that are detrimental to the applicant's position could influence the engagement decision. Similarly, if applicants who prefer the engagement pathway do not participate in the High Court pathway also, it is possible that CMT may be granted to parties over areas where there is a dispute between different groups over CMT rights. For example, in *Re Pāhauwera*, the High Court found that where multiple parties could be granted CMT but those parties were not able to agree to share CMT then no CMT could be granted.

37. Under option 2 it could be possible for an applicant to be granted CMT over an area in one pathway and then later another group be granted CMT over that same area in the other pathway. If those groups do not agree to share CMT then it is unclear how this can be resolved. In *Re Edwards* and *Re Pāhauwera* parties in this position were given the opportunity to work together to try and resolve their differences so that a shared CMT could be granted. It is not clear how this process would work if this situation were to arise in circumstances where a party is granted CMT in one pathway, and then later another applicant is granted overlapping CMT rights in the other pathway. Would the first CMT be revoked if agreement cannot be reached? Or does the first CMT not activate until the decision in the second pathway is made?

38. This ties into another risk of option 2, which is that where CMT is granted to one or more groups in one pathway but there are applications pending in another pathway, the CMT rights exercised by the groups who are successful in the first decision could prejudicially affect the interests of groups who are later granted CMT. This calls into question what rights (if any) the first CMT groups should be able to exercise while the decision in another pathway is pending.

39. CMT provides the holder with a bundle of valuable rights. Some of those rights can easily be exercised by multiple groups without substantially impacting the rights of other groups – for example, the right to create a planning document under section 85 of the Act. However, other rights do have the potential to seriously impact the rights of groups who are later granted CMT – for example, if a CMT holder granted CMT in the first process exercises rights under section 62(1)(f) of the Act to exploit minerals within a CMT area that is also the subject of applications that are being considered in the other pathway, it could be possible for the first CMT holder to exploit a substantial amount of minerals before the second decision is made. Thus potentially reducing the value of the CMT award to successful applicants that are added later unless measures are put in place to protect their potential rights in the resources. It is estimated that the resolution of all engagement applications could take 25 years or longer. If this is the case, then there is a lengthy period of time in which those applicants who are successful in the first pathway can exercise rights under the CMT before applicants in the second pathway have their decision considered.

40. It is also unclear from the consultation document how RMA permission rights would work. Under section 66 of the Act, a successful CMT group effectively has the right to veto certain types of resource consent applications. How these rights will operate in practice is a grey area at present, as we are yet to see how it will be exercised in situations where there are multiple groups within one CMT. However, there is a possible dual pathway risk for groups whose CMT is to be decided by the second decision maker. For example, if a group chooses the engagement pathway and in the meantime a decision is made granting CMT to other parties in the High Court, those parties have the option to decide whether or not to veto resource consents. That could mean that those parties allow consents to go through that later CMT applicants do not agree with. It could also mean that those earlier CMT applications make their own consent applications in the area and choose not to exercise the veto right. The opposite of this is that an applicant in the engagement pathway wishes to make an application for resource consent that is subject to the veto right under section 66. Those parties who hold CMT could then choose to veto the other applicant's consent while the applicant's CMT decision is pending. This could be unjust in circumstances where the later decision maker finds that there is an overlapping CMT but because the parties do not agree, CMT should not have been granted to those earlier successful CMT holders.

41. It is also unclear what would happen if one pathway made findings that contradict the other. For example, if one decision maker finds substantial interruption, or finds that there is exclusive use and occupation for a group and the other disagrees. It appears that the assumption is that the decision making will be sequential with the first decision maker (at present this is usually the High Court) making the primary decision and the second decision maker making a "top up" decision that addresses areas not covered by the first decision maker. However, this has not been explicitly addressed in the consultation document and would be inconsistent with the idea of two decision making processes running in parallel.

42. Another risk is that the first CMT holders would have established the entity that is to hold the CMT. At present, it is not clear who the CMT holder will be where there are multiple groups overlapping, but it is likely that a new trust or similar entity would need to be formed between the various CMT groups to hold the CMT. If this is the case it is possible that the earlier groups have already made decisions about the CMT holder before CMT rights are granted by the second decision maker. For example, voting rights, proportional representation etc. This could be prejudicial to later CMT groups who need to come into that organisation.

Some possible solutions

43. There are a few solutions that could provide protection for applicants if option 2 is selected.

44. Firstly, many risks of the dual pathways can be reduced if decisions in both pathways are made close together. A substantial part of the issue with the dual pathways is that there may be lengthy periods of time between decisions being made in the different pathways. The longer the delay between decisions, the longer the prejudice exists. Consequently, we consider that it is essential for the two pathways to run together, and to have decisions made close together in time (i.e. no more than 3 months apart), to reduce the prejudices that exist with the dual pathway system.

45. For example, under the current High Court process, a first stage hearing is held where CMT is decided. A stage two hearing is then held to help determine how the CMT will be held between the successful applicants. If the engagement process for an area where the stage one hearing is underway is prioritised, it might be possible for the Minister's decision to be made prior to the stage two hearing. This would mean that there is likely

to be less prejudice to parties who are granted CMT under the engagement process, as the details of the CMT holder would likely not have been determined. It may be that the stage two hearing is then dispensed with and successful CMT applicants in both pathways work together to finalise the details of how the CMT will be held.

46. Another option would be for limitations to be placed on the first CMT holders to prevent some or all CMT rights from being exercised while the decision on the other pathway is pending. This would be desirable where the CMT rights that might be exercised by the first CMT group(s) would impact upon the rights that might be granted by the second decision maker. Restrictions could, for example, be put in place to prevent mineral extraction until all CMT decisions in that area are decided. This would protect potential rights to minerals of CMT groups that are added later. It may, however, not be desirable to place restrictions on all CMT rights. For example, it may be desirable for the first CMT groups have the opportunity to start putting planning documents in place and to have the option to exercise the veto option, as it may be preferable that some tangata whenua groups have these rights than none. Careful consideration would need to be given by the Crown as to how allowing each CMT right to be exercised would impact the groups that may later be granted CMT. Any prejudice from placing restrictions would be reduced by ensuring that the decisions in both pathways are made close together.

47. Another necessary safeguard would be to put in place a process to resolve any differences in opinion between two decision makers. It is not clear from the consultation document how conflicting decisions could be resolved. There is already provision in the Act for matters of tikanga to be referred to the Māori Appellate Court for its opinion. It may be an option for an additional role to be added to enable the Māori Appellate Court to provide an opinion on how to balance two decisions in a tikanga based way.

Impact where Ngāti Porou Act applies

48. The issues described above for option 2 are exacerbated where the Ngāti Porou Act applies, as the Ngāti Porou Act adds one or two additional pathways that will need to be incorporated. This could lead to significant costs in time and money to the CMT groups involved in the area to which the Ngāti Porou Act applies as they would need to work through the amendments to the CMT and CMT holder each time a new group is added. Again, these prejudices can be reduced if the decisions under the Ngāti Porou Act are made at around the same time as the processes under the Act.

49. It is also not clear how the interests of overlapping groups would be balanced where a Ngāti Porou Act group is also found to be entitled to CMT under this option. For example, if a decision is made under the Act granting CMT to a number of groups to which the Ngāti Porou Act does not apply and a CMT holding entity is established, then later a decision is made under the Ngāti Porou Act granting CMT to a Ngāti Porou Act group that has more comprehensive CMT rights under that Act how would those rights be reconciled with the rights of other groups under the existing CMT?

50. This complexity would be reduced if all CMT groups were given the same rights as Ngāti Porou Act groups receive under the Ngāti Porou Act, as there would not then be differences between CMT groups represented by the CMT holder as to how their CMT rights apply. However, the other issues described below in relation to options 2 and 3 would still apply as there would still be multiple decisions being made, with further CMT groups potentially being added with each new decision.

Option 3: Combining options 1 and 2

51. Option 3 is a combination of both options 1 and 2, as it allows the relevant decision maker to "take account of" all of the relevant applications in an area, but if the applicant chooses to stay in their chosen pathway, they can later be added to the CMT.

52. It is not clear whether there is intended to be a distinction between the wording "considered" (option 1) and "take account of" (option 3). It appears that there is a distinction and that "consider" in option 1 is being interpreted as "determine" or "decide" because option 1 removes the ability for applicants to be granted CMT over the area that is subject to the first decision. Option 3 appears to allow for other applications to still be considered, so it takes away one of the main elements of concern from option 1 on its own.

53. This option enables parties to maintain their choice of forum while still having the option to be added to the CMT later. It also allows applications in the other pathway to be taken into consideration, so it may be possible in this option for the first decision maker to make appropriate qualifications to its decision while the decision on other applications is pending.

54. Under this option, it may be desirable for a party independent of the decision maker to provide a summary of the position in the other forum to ensure that the interests of the parties in that forum are taken into consideration. This might be a role for legal counsel or possibly an independent researcher appointed by the Court.

55. However, this option still has some of the same concerns as option 2. In particular, this option doesn't resolve the concerns listed under option 2 regarding the structuring of the CMT holder or how CMT rights can be exercised while the decision in another pathway is pending. It is also not clear how conflicting decisions would be resolved (although it does provide better opportunities for applications from the other pathway to be considered, so it is possible that there could be fewer conflicting decisions).

Impact where Ngāti Porou Act applies

56. The issues with option 2 that are carried into option 3 are exacerbated where the Ngāti Porou Act applies. While there is the advantage with this option that the interests of groups under each pathway can be taken into account, the process would be more complex in applications where the Ngāti Porou Act applies as there could be one or two additional sets of applications to consider.

WAI 2660 MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT INQUIRY

57. The Waitangi Tribunal has been inquiring into the Act (**Wai 2660 Inquiry**). Stage one of the Wai 2660 Inquiry addressed funding issues. Stage two of the inquiry addressed substantive issues with the Act. The stage two hearings were completed in 2021, and the decision is expected by the end of 2022. It is anticipated that the Waitangi Tribunal will make a number of recommendations in its stage two report regarding how the Act should be amended, including amendments to help address issues arising due to the dual pathways.

58. The Trustees submit that it is premature for the Crown to be making amendments to the Act while the Waitangi Tribunal's stage two report on the Wai 2660 Inquiry is outstanding. The amendments proposed in the dual pathway consultation document do not address many of the related issues that complicate the dual pathways situation. The Tribunal's stage two report is likely to address some of the wider issues that also impact upon the dual pathways issue.

59. Once the Tribunal Report has been released, the Crown can review the report and prepare a comprehensive consultation document that addresses all of the required amendments to the Act. Given that it is due to be released shortly, there is likely to be little prejudice in waiting.

THE QUESTIONS

60. Te Arawhiti has asked for responses to the following three questions:

    1. Which of the three options do you support and why?
    2. Are there any options you do not support and why?
    3. Are there any other matters you think should be taken into account when considering which of these options to progress with?

1. Which of the three options do you support and why?

61. We do not support any of the options. If we had to choose one of the three options proposed, we would choose option 3. However, option 3 still has a number of problems. At this stage insufficient information has been provided on how this option would work for applicants to be able to make thorough submissions on the proposal.

62. We submit that further work needs to be done to consider what amendments to the Act are needed in light of the Waitangi Tribunal's report on the Wai 2660 Inquiry. We also consider that further work needs to be done by the Crown to consider the impact of the proposed amendments to the Act, where the Ngāti Porou Act creates additional pathways.

2. Are there any options you do not support and why?

63. We do not support any of the options, but in particular, we do not support option 1 because it takes away the ability of groups to proceed in their preferred pathway if the pathway that proceeds to decision first is not that applicant's preferred pathway.

3. Other matters to take into account

64. As set out above, there are a number of additional factors that need to be taken into account. In particular, in the area where the Ngāti Porou Act applies, consideration

needs to be given as to how the additional pathways interact with the other pathways in whatever solution is proposed. Extending the same rights to all other applicants would assist in reducing the prejudice but does not prevent the additional complexity of having multiple pathways, nor does this remove the unfairness of Ngāti Porou Act groups receiving preferential treatment through a separate piece of legislation.

65. In addition, with all of the pathways, it is essential that applicants are fully funded. For options 1 and 2, and possibly also option 3, it is likely that applicants will need to engage in both pathways for at least part of the process. In some cases, applicants may need to have extensive involvement in both pathways. At present, funding provided appears to be directed to applicants for one pathway at a time. This needs to be reconsidered as there are often circumstances where applicants will need to be involved in more than one pathway concurrently.

NEXT STEPS

66. The Trustees would be happy to meet with Te Arawhiti representatives to discuss our submission further. Our legal counsel, 9(2)a [redacted], would also be available to discuss our submission further would Te Arawhiti should this be of assistance.

SUBMISSION

TE TAKUTAI MOANA RESPONSE:

To whom it may concern:

The two words Takutai Moana comes from a term that the Crown is comfortable with. Meaning, ‘Our ties to the sea’. However we at Nga Hapu o te Akau a Tokomaru as do many other hapu, still deem it to be much more than that, when talking about our Taonga Tuku Iho. This is indicated in an instance by one of our karakia which aspires to this in the words, ***‘Kia whakapapa taonga te Moana me te whenua’.***

Karakia:

Kia hora te Marino

May this moment of peace and calm be raised up

Kia whakapapa Taonga te Moana me te whenua

May the sea and the land glisten like treasure as a greenstone

Hei Huarahi tuku Iho ma tatau I te rangi nei

As the pathway given to us from above as each day dawns

Aroha atu, aroha mai

Love given, love received

Tatau ia tatau katoa

All of us united, gathered together.

Haumi e hui e Taiki e

Gather in support, Go forward!!

HISTORICAL: (Plus 2004 FSSB Act)

On the 9th of June 1840, the Treaty of Waitangi was signed by the representatives of Nga Hapu in Tokomaru Bay at Taratara a te Koura. When as explained and written, the contract guaranteed certain rights unto us under the terms and conditions of that document for both parties, as they understood it. For our ancestors, their binding and eternal intention was that we as the Hapu of the Akau O Tokomaru (NHOTA)

became ‘Treaty Partners’ with the Crown. This ideology as we see it, has not changed from then until now. Unfortunately for us as a people, the introduction of the Maori Land Court protocols (1870s onwards,) many diversions, division and conquering situations began to arise and still abundantly exist as a stumbling block to Hapu more than 180 years later. Land blocks and succession orders were given to various whanau, who did not have the total or recognised rights to them.

Furthermore, the system has been and is still manipulated by those who side with Crown protocols (Kupapa Maori). In the year 2004, the Labour Government of the time, implemented the FSSB act without consultation with their ‘Historical Treaty Partner’. Failure to do so in that instance was always going to be a problem. Ultimately, this created the situation that we have today.

If it is not addressed in this timeframe, another 100 years will go by and things will not change. Maori will still be battling for their rights in some way, big and small. Our

Grandsons will be unfairly committed to stand in the same arena that we are in at present, negotiating the same thing to try and get it right..

Te Takutai Moana Act 2011

When the National party came into power at the following elections, they repealed the act and eventually there was a nationwide ratification process which took place under the umbrella of ‘Te Takutai Moana Act 2011’. In our area, The Runanga O Ngati Porou was given the task of orchestrating this process however, two Crown assessors were appointed to monitor the situation. It would be interesting to get hold of the feedback report or manuscripts from these assessors to ascertain their opinion of each meeting held in our area as well as the others.

The guidelines of title from 1840 to the present day of undisturbed or ‘Exclusive Use’ without any major interruptions was the first and major mistake that was made.

I say this because we have just completed stage One in our High Court case for NHOTA at Gisborne whereby Justice Cull asked a question as to why our history was going back to a time prior to the 1840 Crown prescribed period, determined by the **‘MACA Act**’ protocol.. The reason given to her was quite simple as we showed to the Court that our CMT and PCIs and relevant Manamotuhake did not start on the 1st of January 1840, but it was ancient and ancestral in its progressive retention throughout the centuries that followed. Therefore, our Tokotoko a Maru (Tokomaru Bay) work in preparation for the high Court case needed to reflect a solid past that encompassed the Maui Tikitiki a Taranga period of discovery, through to the 1250AD (the Horouta Waka Period) then the 1350AD era (Takitimu Waka) through those successive years until 1840. In doing so, it makes the judge more aware of an unerring ancestral and correct pathway **(Te Ara Tika)** through and until 2022. Not just 500 metres offshore or three or twelve miles, our history encompassed an area far greater than that. It enhances her prospects of issuing the appropriate order.

The next period of concern within the HC case came by the second group that lodged a claim when they were not successful within the Ratification process to sign up to a Crown and TRONP embodied plan. Nor was there success in a following

mandate process to try to represent one of two Hapu within the prescribed area according to the requirements under the terms of the MACA Act. They were in reality the “Nays” in the election process. This group relied heavily upon the amount of false testimonies, put up in the MLC during the late 1800s and early 1900s, There were many who did not have entitlement to lands within the Tokomaru boundaries that were pushing alternate whakapapa and history so much so that the historical impact is a feature of some continuing and major divisions within the two Hapu. In 2021 another group then presented overlapping boundaries outside of the April 2017 deadline for MACA claims to be lodged (under the Act) when historically there have never been any within the Rohe. However, we are working to rectify that particular issue.

Dual Pathway Consultation.

Once again, this is a situation that Te Arawhiti and the Crown have created by not listening nor consulting with the right people or political spokesperson/s within the Hapu. Instead TAW took a shortened route off to the Iwi leadership forums then signed off the work of consultation as being ‘Done’. I have attended 5 Waitangi Tribunals in recent years and have watched Te Arawhiti get caned by the many law firms who represent different Hapu, waiting to address various issues. We saw why there are now more than 200 outstanding HC cases and more than 300 Crown engagements due to the level of required consultative work that had not been done between the Crown and its treaty partner, namely the Hapu. In our case, we are hopeful of gaining our desired outcome, through the High Court pathway at first.

High Court Pathway

Ultimately In our minds, this is not one pathway or the other even though it seems so. The two pathways in the end are inseparable and must merge at some stage or else the foundational principles of **te Treaty of Waitang**i will be fought over in the years ahead as I have mentioned. In our case we hope to have the deficiencies put forward (As per MLC records) and they be seen as a stumbling block to a true Crown engagement. After that milestone is reached, it will be beneficial for the Crown to come to the table under a perceived **Crown Engagement Protoco**l, to discuss and reach an amicable agreement out of the expected order from the court. This process will finally bring a dual pathway back unto the one. Failure to achieve this old vision of **Kotahitanga** (Oneness), the battle will continue to rage on forever.

When I look at your **Option 3** under the heading of **Potential Changes to the Legislation,** this looks nearer to the point that we are suggesting. For me, having been engaged in the HC throughout September, we see the relevance even though there will be some who will agree to not agree on boundaries as in the recent **Ngati Pahauwera** case. Our **NHOTA** HC pathway is the same where we will go back to a mediation process amongst ourselves whereby our two parties will agree collectively on the way forward to settlement under that model.

Crown engagement

In our opinion, those groups that did not have encumbered historical backgrounds and were happy within their Hapu Frameworks to engage with the Crown, that was

fine. However, a generalised and extended claim parameter was allowed which enabled small whanau groups within a Hapu, to put forth their individual claim. This then created many overlapping boundaries as in some examples of **Pahauwera.** The overlapping boundary is indeed a major problem.

Solutions

1. Stop meeting and engaging with the Iwi Leadership Forums about our business both ancestral and political.

2. As in the time when the Crown emissaries were sent around the country in 1840 to garner signatures to sign the TOW from within various **Hapu**, the Minister's must come into the community and meet with the people to hear the voice of the people and not the Runanga authority.
3. The true **Crown Engagement** is what has been said above. Andrew Little and others are the voices in the wilderness and yet are asking for our input. I and others like me, represent 1000s of shareholders in our Rohe Whenua and Rohe Moana and have never caught up to him in our roles as a '**Claimant'** even though I have attended 2 select Committee hearings on MACA issues and many Wai Tribunal sittings over the years. We recommend that his office do not administer our rights from a concrete jungle without sharing the outcome/s of private meetings that have taken place with other groups without our prior knowledge. However, the impacts on the welfare of our respective Rohe is unsettling.
4. Te Arawhiti to be more engaged in knowing who they are dealing with and our areas of concern and not just a number. During the past two years, NHOTA extended an invite to TAW to travel up to Tokomaru Bay to which Libby Masterton accepted and brought along Joey and Megan. Fortunately, the visit coincided with a meeting that we were having with the Mayor and her executive of the **Gisborne District Council.** This proved how much we at NHOTA are involved in the '**ENGAGEMENT PROCESSES'** with other government Departments to ensure our pathways are where we want to be heading upon.

RESOURCE MANAGEMENT REFORMS:

On the day that Te Arawhiti arrived in Te Ariuru at Waima, They (The GDC leaders) had been taken over some of the areas of **Wahi Tapu** along the foreshore and coastal regions of Tokomaru Bay. It was one of a number of meetings that had taken place between our two groups from a period spanning the last 30 years. Meaning under the mantle of the Honourable John Clarke, Meng Foon and now Rehette Stoltz. Te Arawhiti should have had an insight on how we do our business in the Akau. This series in the latest of three meetings, was to do with how best we as two parties can work closer in the resource consents processes. Already, works to be done that impact upon the rivers and foreshore areas, were negotiated to ensure that environmental protection processes are being followed before work began. Added to that, our Kaumatua was available on sight to express the Karakia before the project started. We prized this relationship as it took years to build up

In your third paragraph, you say that you have worked alongside the Ministry for the Environment as well as with a group of Takutai Moana and resource management experts to uphold rights through the reforms. As I have said we have not been consulted on any of these protocols to do with our Rohe Moana. Added to that, we have no clue as to whom you refer to. Who are the faces of these names?

Within our group we have professionals who do this type of work everyday and know the Hapu Areas intimately. Every taonga Tuku Iho has its own character that only we as URI WHENUA, know and understand. A marine biologist and also environmental scientists amongst others.

Professionally, 9(2)a [redacted] I am able to work through the building and consent plans with local infrastructure and engineers to ensure that the proper environmental protections are in place, before we as a Hapu sign off on the project. The most recent one being the Te Puka sea wall in Tokomaru. Everything went well after the Karakia and the protection of **wahi tapu** was up to the collective standard. 9(2)a [redacted]
So once again, who are the experts that Te Arawhiti has spoken to?

The Ministers have asked through your establishment for input to change something that we have already worked hard to fix in agreement with other involved parties. As well as DOC and MPI to continue. Instead we are heading off in another direction at the whim of whom.The consultation between us and the GDC also involved our waterways ie: Rivers streams and springs. Now the three water reform protocols are changing everything between us all. I see a battle on the horizon where another mistake is going to cause more disputes. How can we help when experts keep changing the goalposts without talking to the true experts first? I suppose time will tell as we await the results..

I hope that the changes you desire are successful in their application which is to bring about the outcomes that are sought. However, the only reason that I and our team have participated in this process, is a hope that the status quo will be changed for the better. As I understand it, our lawyers at Tamaki Legal have also expressed our collective opinion on the situation and we are only adding to it in this letter.

Nga Mihinui
9(2)a [redacted]

SUBMISSION

Holmes, Monique

From: 9(2)a
Sent: Tuesday, 29 November 2022 2:23 pm
To: takutaimoana
Cc: 9(2)a
Subject: Takutai Moana Pānui - Dual pathway consultation and resource management reform information CRM:0290107

Categories: Tracked To Dynamics 365

Tēnā koe,

We refer to correspondence received from the Minister of Te Arawhiti on 30 September 2022 requesting parties to provide feedback on, solving a problem with the dual pathway under te Takutai Moana Act 2011.

Unfortunately, due to our clients' commitments particularly with local body elections over the October period they were not in a position to finalise instructions prior to the 18 November 2022 deadline for formal feedback. Our client, the Patuharakeke Te Iwi Trust Board have asked us to convey their position urging the Minister to await the Stage 2, WAI 2660 Waitangi Tribunal report before any decision is made by cabinet as to the three options put forward in the notice documents. Question 10 of the Statement of Issues, specifically asked *'To what extent if at all, do the High Court Processes and Crown Engagement process work cohesively? What impact does this have on Māori applicant/rights holders'*, inevitably the Stage 2, Wai 2660 report will therefore provide the Crown with recommendations on how to remedy this dual pathway problem informed by the claimant position.

We therefore seek that the Crown pause its consideration of the options and that further time is given to the claimants to respond once we are in receipt of the stage 2 report.

Ngā manaakitanga,

9(2)a
9(2)a

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DIXON & CO
LAWYERS

SUBMISSION

9(2)a

9(2)a

December 3, 2022

Hon Andrew Little
Minister, Te Arawhiti
Parliament
Private Bag
WELLINGTON

Email: takutaimoana@tearawhiti.govt.nz

Tēnā koe Minister,

Re: Pānui Takutai Moana September 2022 – Information for applicants: Dual Pathway Consultation

I am 9(2)a who conduct litigation mainly before the Waitangi Tribunal and act as counsel for 11 applicants pursuing recognition orders in the High Court under the *Marine and Coastal Area Act* 2011 (MACA).

This letter responds to the invitation from the Minister (Hon Andrew Little) for feedback on the three proposed options in terms of prospective changes in the *Marine and Coastal Area Act* 2011 (MACA). This submission comes later than the deadline (11 November 2022). My chambers hopes that this submission on the three options may, nevertheless, be taken into account by way of explanation for my chambers' delay, which is as follows:

(a) The panui of the three options was received late by counsel;
(b) Consultation with the applicants on the High Court and Crown engagement pathway related to 11 cases being progressed by my chambers;
(c) Consideration being given to the Stage One report on MACA issuing from the Waitangi Tribunal;
(d) Evidence and submissions in the Stage Two MACA inquiry before the Waitangi Tribunal.

The reply in summary is to support option 3.

Option 3

Option 3 proposes combining options 1 and 2, enabling either decision-maker (the High Court or the Crown) to take account of all the relevant applications in a coastline at the same time, irrespective of the pathway in which an application was originally made.

Option 3, however, may permit applicants the choice to stay on their original pathway (Court or Crown or both) and, should those also be found to meet the test for CMT, they could be added to the recognition order or Act that was made in the other pathway.

View of Counsel on Behalf of Applicants

Were option 3 to become law, this would potentially obviate the existing process and operational complexities that have now, obviously, arisen as a result of the two distinct pathways currently provided for by the legislation.

From my appearances in Court over the past five years and in hearing from the High Court Judge, His Honour Justice Churchman, on some of those occasions, it is clear to me that the Court, at least, is unaware of 'what is happening on the Crown engagement pathway.' This judicial commentary evinces that both pathways (Court and Crown) are estranged from one another legally and practically.

For example, while significant documentation about the High Court cases is readily available on the internet, it is hard to otherwise source from the available records what the state of play is concerning 'who is doing what and for what purposes' on the Crown engagement pathway. That is relevant because it is, at least, reasonably possible that the Court and Crown pathways may result in collision with one another. Does, for instance, a statute containing CMT and PCR recognition in these circumstances trump Court orders for what might amount to the same recognition?

Although in practical terms there may be signals early enough in the process to avoid what may occur if the pathways produced rival and conflicting outcomes, clearly the law, as it currently stands, is unsatisfactory if the Crown engagement pathway remains opaque to Court applicants and, indeed, the judiciary forensically handling these cases.

What you are suggesting is a form of hybridisation, by way of option 3. It can practically provide flexibility for applicants, being able to move between pathways in a bespoke manner without the current apparent limitations and, importantly, greater information-sharing and transparency in process and procedure. That is preferable and can produce continuity and confidence for all parties concerned, the Crown included. The hybrid approach would appear to promise better coordination, a higher level of sophistication in outcomes and results (Court and Crown) and would better accord with the expectations reasonably envisaged by MACA.

Naku noa, na

SUBMISSION

FEEDBACK ON OPTIONS TO ADDRESS DUAL PATHWAY PROBLEM

Dated this 30th day of November 2022

TUKAU
LAW AND CONSULTANCY

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Introduction

1. On 30 September 2022, a pānui and consultation document was distributed by Te Kāhui Takutai Moana providing information about a "problem with the dual pathway under te Takutai Moana Act 2011" and inviting submissions from parties by 11 November 2022.

2. The date for feedback was subsequently extended until 18 November 2022.

Pānui Takutai Moana

3. The pānui articulated the dual pathway problem as follows:

> 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 – this is the dual pathway problem.

4. The consultation document stated that the Minister for Treaty of Waitangi Negotiations, Hon Andrew Little, was considering ways to change the legislation in order to address the dual pathway problem. The following options were advanced:

   (a) Option1: Enable decision makers to take account of all relevant applications for an application area at the same time;

   (b) Option 2: Enable a CMT to be varied to take account of decisions in the other pathway; and

   (c) Option 3: Combining options 1 and 2.

5. The applicants listed below have reviewed and considered the consultation document and the feedback that follows is provided on their behalf:

   (a) Waikare Māori Committee on behalf of Te Kapotai (CIV-2017-488-26);

   (b) Te Rūnanga o Ngāti Hine on behalf of Ngāti Hine (CIV-2017-485-231); and

   (c) 9(2)a [redacted] on behalf of ngā uri o Tareha Kaiteke Te Kemara I, Ngāti Kawa and Ngāti Rāhiri (CIV-2017-485-265).

   (together referred to as the applicants)

Which option is preferred?

6. As noted in the consultation document, there is an inherent trade-off to be made between enabling all applications for CMT to be considered and providing for CMT, once issued, to be enduring. What this means is that there are disadvantages for the applicants regardless of which option is supported.

7. As a starting point the applicants continue to oppose the Marine and Coastal Area (Takutai Moana) Act 2011 given the many ways in which it prejudices Maori. There was no proper consideration of the practical consequences by the Crown when it devised the dual pathway approach and the options provided by Te Arawhiti do not sufficiently alleviate the applicants' concerns in this regard.

8. Taking into account the repercussions of all options, option 3 is preferred by the applicants because the risk of not having their application considered at all (which is associated with option 1)

is one that they are not willing to accept. For that reason, option 1 is not supported.

Other matters: the dual pathway problem has already been raised by claimant counsel

9. The dual pathway problem has been raised many times throughout the course of the Wai 2660 Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry through both evidence and submissions.[1] For instance, in reply submissions for stage two, it was argued that the existence of dual pathways has "caused concern, uncertainty and anxiety" and has "left some applicants at risk of being left without any mechanism for their rights to be recognised."[2] If they cannot or do not proceed in the High Court and customary marine title is issued over their rohe in their absence, then this will obviously be prejudicial to their rights and interests, as only one customary marine title can be issued for a particular area.

10. The interplay between the two pathways and the prejudice arising from the lack of cohesion between the two also came to the fore in the Whakatohea application where Churchman J said:[3]

> A finding that an applicant group in these proceedings held CMT in the overlapping area would arguably have the effect of prohibiting the Crown from coming to an agreement with Ngāti Awa for a grant of CMT in respect of the same area. This may produce an injustice. The potential for injustice is lessened where the party pursuing

[1] For instance, see: Wai 2660, #3.3.137, *Joint Generic Closing Submissions for Stage 2* [30 July 2021], at [3.0], [6.57]-[6.82] (**attached** as **Appendix A**); Wai 2660, #3.3.56, *joint Claimant Specific Closing Submissions* [12 July 2019], at [4.43]-[4.50]; Wai 2660, #3.3.201, *Joint Reply Submissions for Stage Two* [1 February 2022], at [16.0].
[2] Wai 2660, #3.3.201, *Joint Reply Submissions for Stage Two* [1 February 2022], at [16.0] (**attached** as **Appendix B**).
[3] Wai 2660, #B154, *Re Edwards (Te Whakatōhea No. 2)) [2021] NZHC 1025 [7 May 2021]* [17 May 2021], at [406].

> direct engagement has participated in the Court hearing as an interested party but the problem is that the Court will not always hear from such overlapping parties or even be aware that they exist.

11. In closing submissions, while the Crown acknowledged claimants' concerns that applicants may need to participate in a pathway involving the determination of an application that overlaps with theirs in order to ensure their interests are protected (even if they are not applicants in that pathway, or they are but have a preference for their customary rights to be determined in the other pathway), the Crown maintained that the Act and current policy and practice (through the new Takutai Moana Engagement Strategy) "does provide opportunities for applicants to participate in both pathways".[4]

12. The Crown also argued that the consequences of applications being determined in one pathway are "not as stark" as some claimants suggested.[5]

13. The Crown went on to submit that no evidence had been advanced in this inquiry to substantiate the concern raised by some claimants that the tests may be interpreted and applied inconsistently across the pathways.[6]

14. Despite these assertions, the Crown has now conceded that the dual pathway problem exists.

15. It is suggested that the most appropriate course of action would have been for the Crown to acknowledge or concede that the

[4] Wai 2660, #3.3.187, *Crown Closing Submissions for Stage Two* [8 October 2021], at [706].
[5] At [707].
[6] At [712].

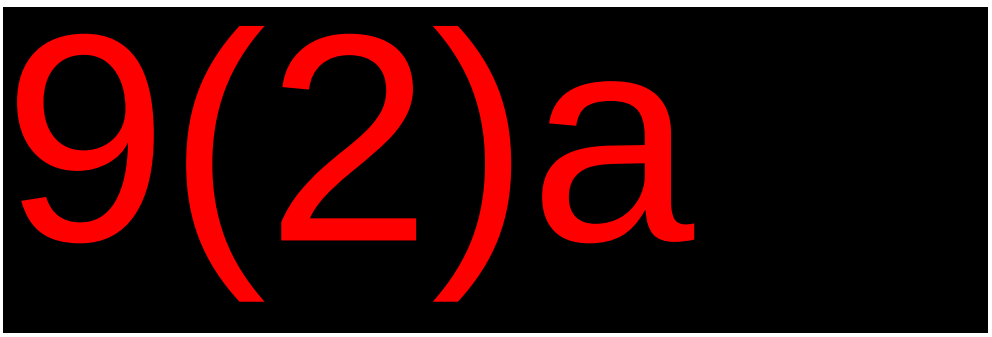
dual pathway problem existed when it was initially raised by the applicants in the Wai 2660 inquiry

Funding

16. Another significant problem with the dual pathway which needs to be rectified (whichever option is taken) is that currently as we have been advised by Te Arawhiti staff, Crown funding is only available for one pathway at once. It is therefore our understanding that effectively applicants who have High Court funding already cannot access funding to progress their Crown engagement application until and unless they formally transfer to the Crown engagement pathway. Given that rights and interests may be determined in the High Court at a faster pace than in the Crown engagement pathway it would be highly risky for an applicant group to abandon their High Court application in favour for Crown engagement, yet that is the only way they might be able to access funding to explore and progress this pathway.

17. Any changes to the policy settings must also address the funding problems that currently exist and which limit the ability of groups with applications in both pathways to have adequate funding to explore and seek advise on their options.

DATED at Turanganui-a-Kiwa this 30th day of November 2022



SUBMISSION

Marine and Coastal Area Takutai Moana Act

Dual Pathway Consultation – Te Arawhiti

Submission by The Langs Beach Society Incorporated

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To whom it may concern

Tena kotu katoa

This is a submission on the TAKUTAI MOANA DUAL PATHWAY CONSULTATION document as issued by Te Arawhiti.

This submission is presented by the Langs Beach Society, an incorporated society formed specifically to represent the Langs Beach community's interests in the Marine and Coastal Area (Takutai Moana) 2011, (MACA) process.

The role of the Society is to identify all applications in the Langs beach area, develop an understanding of the potential outcomes of the granting of customary titles, communicate these with the local community, and to represent the Society's members in any active participation in public consultations and hearings held to review those applications.

The Society acknowledges that it is not itself an applicant group, but wishes to make its submission in the capacity of a registered interested party as referred to under section 104 of the MACA legislation, wherein we may choose to actively appear and participate in any hearing or public consultation with respect to specific applications we have identified as

As an active participant in the MACA process, the Society welcomes and appreciates the opportunity to make a submission on the Dual-Pathway Consultation.

The community at Langs Beach has been established for over 170 years and has a substantial residential footprint, with significant recreational use of the CMA. The local community is actively engaged in conservation projects along the coastline and abutting natural landscape. There is therefore significant interest in preserving the continued means of use and enjoyment of the coastline and marine offshore area - for everyone.

Our Society has deemed it appropriate to register as an interested party in all applications that overlap with the coastline and immediate offshore sea area around Langs Beach. This at least affords us the right (should we so choose) to appear at and participate in any or all public consultation processes or hearings related to applications that may affect our community.

Langs Beach is a community of over 500 residential and holiday properties situated at the eastern end of Bream Bay.

- *Refer Appendix A showing a map of the Langs Beach area*

The Bream Bay area is one of the most "congested" areas in respect to the number of overlapping applications for customary rights to the CMA.

- There are at 46 distinct applications that directly overlap with the coastline and immediate offshore sea area around Langs Beach.
- Of these, 30 appear to be "pairs" of applications by the same applicant group, for the same area, but submitted under both the High Court hearing and Crown Engagement processes.

- *Refer Appendix B showing a list of related MACA applications*

Our community's primary concerns relate to the time and cost of a protracted process of consecutive determination of customary interests, both on a local and national basis.

As an unfunded participant, the cost of participation in this process is substantial, exponentially so if we were required to engage in each and every application individually

Unlike the applicants, all aspects of our participation must be borne by individual members of our community, at a time of significant inflationary pressure on individuals and households.

The High Court process necessitates the engagement of legal counsel throughout the process, and with over 16 applications for hearings within our scope, could result in our costs running into several thousands of dollars.

As members of the public, we are also aware that the cost of reimbursing applicant groups for their costs in preparing and presenting their applications is also a significant cost to the public at large, at a time when there are pressing demands for government to fund improvements to social services and infrastructure.

We see significant benefits in any option that will significantly streamline the processing of applications, and especially those applications with overlapping areas and interests.

SUPPORT FOR OPTION 1

The Society therefore supports and endorses Option 1

Our understanding is that this would involve a consolidated approach to processing applications in specific sections of the coast, with a single determination of customary interests and rights to qualifying applicant groups, regardless of the pathway submitted to, and whether determined as exclusively exclusive or jointly exclusive.

Furthermore, we understand that there would be no subsequent determination of additional rights or shared interests in that specific area.

If our understanding of Option 1 is correct, then we see significant benefits to all parties in the MACA process, from efficiencies and in the impact, both financial and societal with respect to the determination of customary interests over the CMA.

We have followed with interest the progression of hearings with respect to the Whangarei Harbour and South Coast, and the ability of many applicant groups to convene and address their overlapping interests, or at least show interest in engaging in the accelerated timetable for the hearings. We see this as a demonstration of how overlapping interests can be addressed in a consolidated format.

We seek a fair process that gives justice to all applicant and interested party groups.

OBJECTIONS TO OPTIONS 2 and 3

We foresee significant ongoing detrimental outcomes of adopting options 2 or 3

Firstly, we see a major detriment would arrive from the prospect that each party granted a customary right has the potential to see those rights diluted by a subsequent determination of rights of another party. Within our area of interests, we can't conceive of how 32 individual groups could derive a collectively acceptable outcome from a succession of consecutive independent determinations.

Secondly, we would foresee the process inherently becoming an inter-generational one, potentially suffering from a loss of capacity and will, and worse still, loss of knowledge and engagement of originating applicants. With evolving social views on such processes as this, there could be potential for unreasonable or unintended expectations of outcomes, or worse still social divisiveness from unexpected outcomes or the financial burden to the nation.

Thirdly, we would foresee an exorbitant cost (both financial and timewise) to all parties from the need for each applicant group and interested party (assuming that applicants themselves are commonly registered as an interested party in other applications that overlap their own specified area) to actively monitor and participate in multiple successive determinations of customary interest.

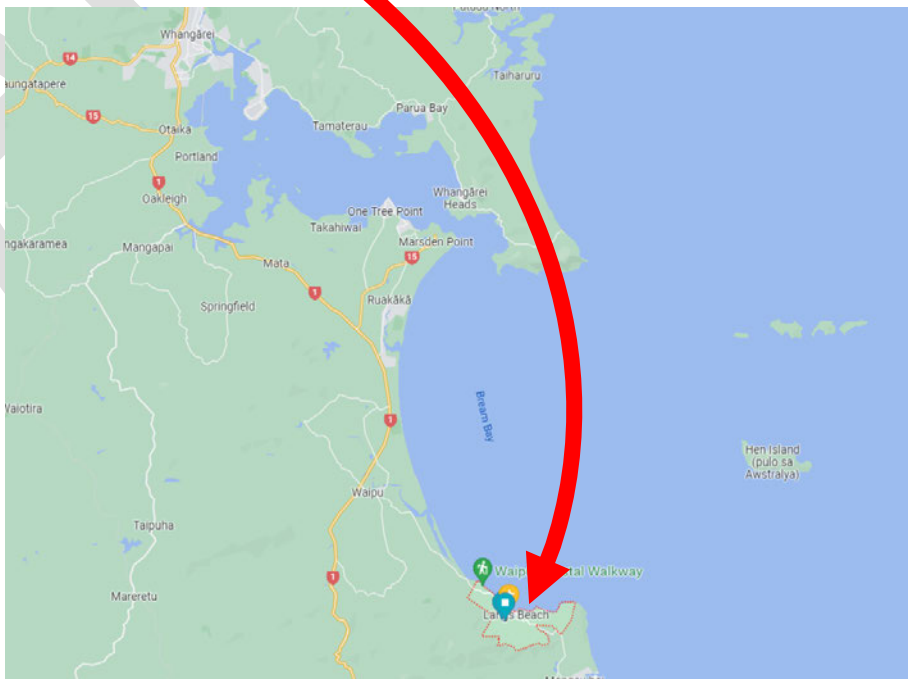
Appendices

A. Map of the LBA
B. List of MACA Applications overlapping the LBA

Appendix A – Langs Beach Area

The maps below show the Langs Beach area, a residential coastal settlement at the eastern end of Bream Bay

The Society has a specific interest in the CMCA surrounding the area shown in this map and have identified 46 applications abutting this area – as listed in Appendix B



Appendix B

MACA Applications of Interest to the Langs Beach Society

	CROWN ENGAGEMENT (24)		HIGH COURT (21)				
#	CE Reference	CE Applicant Group	HC Reference	Ct	Type	HC Applicant Group	
1	MAC-01-01-143	Te Uri o Hau Settlement Trust	CIV-2009-488-205	W+A	Not Stated	The Hapū of Te Uri o Hau	[redacted]
2	MAC-01-01-039	Ngā Hapū o Ngāti Wai Iwi	CIV-2017-404-554	W	CMT & PCR	Ngā Hapū o Ngāti Wai Iwi	
3	MAC-01-01-131	Iwi, whānau and Hapū of Ngātiwai	CIV-2017-485-283	W	CMT & PCR	Ngātiwai Whānau, Hapū and Iwi	
4	MAC-01-01-079	Ngāti Manuhiri	CIV-2017-404-545	A	CMT & PCR & WT	Ngāti Manuhiri	
5	MAC-01-01-084	Ngāti Rehua Ngātiwai ki Aotea	CIV-2017-404-546	A	CMT & PCR & WT	Ngāti Rehua	
6	MAC-01-01-105	Reti Whānau	CIV-2017-485-515	W	Not Stated	Reti Whānau	
7	MAC-01-01-090	Ngāti Wai					
8	MAC-01-01-102	Patuharakeke Te Iwi					
9			CIV-2017-485-281	W	???	Patuharakeke Te Iwi	
10			CIV-2017-485-286	W	CMT	Patuharakeke	
11	MAC-01-01-136	Te Parawhau Hapū	CIV-2017-485-799	W	??	Te Parawhau Hapū	
12	MAC-01-01-137	Te Parawhau ki Tai	CIV-2017-485-305	W	???	Tamihana Akitai Paki	
13	MAC-01-01-040	Ngā Hapū o Tangaroa ki Te Ihu o Manaia tai atu ki Mangawhai	CIV-2017-404-579	W	CMT & PCR	Ngā Hapū o Tangaroa ki Te Ihu o Manaia tae atu ki Mangawhai	
14	MAC-01-01-146	Te Uri o Tautohe					
15	MAC-01-01-056	Ngāpuhi Nui Tonu (Te Kotahitanga Marae)	CIV-2017-404-537	W	CMT & PCR	Ngāpuhi nui toni, Ngāti Rahiri, Ngāti Awa, Ngā Tahuhu and Ngāitawake	[redacted]
16	MAC-01-01-050	Ngāpuhi Nui Tonu (Awataha Marae)					
17	MAC-01-01-060	Ngāpuhi, Ngāti Wai, Haki Pereki and Ngāwhetu Sadler Whānau Trust					
18	MAC-01-01-059	Ngāpuhi Nui Tonu-Kota-toka-tutaha-moana o whaingaroa					
19	MAC-01-01-037	Ngā Hapū o Ngāi Tahuhu	CIV-2017-404-442	W	CMT & PCR	Ropu o Rangiriri	[redacted]
20			CIV-2017-404-573	W	CMT & PCR	Ngāi Tahuhu, Ngāti Tuu, Ngāti Kukukea	
21			CIV-2017-404-563	A	CMT & PCR	Ngāti Whātua	
22	MAC-01-01-125	Te Hikutu Whānau and Hapū	CIV-2017-404-570	W	Not Stated	Te Hikitu Hapū	
23	MAC-01-01-073	Ngāti Kawau and Te Waiariki Korora	CIV-2017-485-398	W	Not Stated	Ngāti Kawau and Te Waiariki Korora	
24	MAC-01-01-013	Hapū o Te Waiariki, Ngāti Korora, Ngāti Takapari	CIV-2017-404-566	W	Not Stated	Te Waiariki, Ngāti Korora, Ngāti Takapari Hapū/Iwi of Niu Tireni	
25	MAC-01-01-153	Te Whānau o Hone Papita raua ko Rewa Ataria Paama	CIV-2017-404-555	A	CMT & PCR	Te Whānau o Hone Papita Raua Ko Rewa Ataria Paama	
26			CIV-2017-404-558	W	Not Stated	Ngāitawake	
27			CIV-2017-404-564	A	Not Stated	Ngāi Tai ki Tāmaki	
28	MAC-01-01-027	Kariatiana Whānau					
29	MAC-01-01-133	Te Kaunihera o Te Tai Tokerau					
30	MAC-01-01-023	Ihaia Paora Weka Tuwhera Gavala Murray Mahinepua Reserve Trust Ngātirua Iti NgātiMuri Nagatiruamahue NgātiKawau Ngāti Haiti Ngāitupango					