Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill

Government Bill

As reported from the Justice Committee

Commentary

Recommendation

The Justice Committee has examined the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill and recommends by majority that it be passed. We recommend all amendments unanimously.

About the bill as introduced

The purpose of the bill is to amend the Marine and Coastal Area (Takutai Moana) Act 2011 to define the applicable requirements for recognising customary marine title. In particular, the bill would alter aspects of the existing law that are:

- specified in new section 59A (set out in clause 12); and
- expressed, for example in parts of the judgment of the Court of Appeal in *Re Edwards*[1] and of other High Court judgments specified in new section 59B (also set out in clause 12).

Customary marine title (CMT) grants the holder the rights listed in section 62 of the Marine and Coastal Area (Takutai Moana) Act. The rights include the ability to withhold permission for certain resource consents and a prescribed process for the involvement of CMT holders in decision making on major new infrastructure that requires resource consents. CMT holders may derive commercial benefit from exercising the rights, but they cannot sell or transfer the rights, except in accordance with

[1] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252.

section 60(3) of the Act. This allows for a delegation or transfer of the rights in accordance with tikanga.

The test for CMT is primarily contained in section 58(1) of the Act and has two limbs. It provides that CMT exists in a specified area of the common marine and coastal area if the applicant group:

- holds the specified area in accordance with tikanga; and
- has either exclusively used and occupied the area from 1840 to the present day without substantial interruption, or has received it, at any time after 1840, through a customary transfer in accordance with section 58(3).

In 2023, the Court of Appeal interpreted provisions of the Act about the requirements for recognising CMT, which materially reduced the threshold in the second limb of the above test.[2] In the Government's view, the Court's interpretation fails to give effect to the intended requirement that applicants for CMT must prove they have exclusively used and occupied the area from 1840 to the present day without substantial interruption.

The bill seeks to clarify the Government's view of the intended meaning of certain sections of the Act that relate to the legal test for CMT. It also aims to provide interpretational direction to decision-makers (the High Court and Minister for Treaty of Waitangi Negotiations) to ensure that the test is interpreted and applied accurately. This is consistent with the Government's understanding of Parliament's original intent in passing the principal Act.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendment we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Overriding effect of the amendments to customary marine title

Clause 6 would insert new sections 9A to 9C into the principal Act. Proposed new section 9A relates to the purposes and application of the CMT amendments and how they would override other aspects of the law.

Proposed new section 9B sets out an interpretation duty for the CMT amendments, which makes clear how a decision maker (including the Court) is required to interpret those amendments. As part of those amendments, section 9B would also override

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[2] See Note 1.

other law. (In the bill as introduced, new section 9B(3) only explains, and so duplicates, the effect of the overriding provision in section 9A(3) and (4)(a)).

Proposed new sections 9A(3) to (5) of the bill as introduced provide that the CMT amendments would prevail over any other law. This includes sections 4, 6, and 7 of the principal Act and the reasoning and conclusions in the parts of the judgments specified in section 59B.[3]

Submitters expressed a range of concerns about these provisions, including that they undermine the purpose provision of the principal Act and breach Treaty principles. One submitter noted that section 9A(3) would effectively establish the bill as a form of supreme law that prevailed over any other legislation. They pointed out that overriding provisions should ordinarily list the legislation that they intend to override, and suggested that using such a broad provision was constitutionally improper. A submitter was also concerned that the proposal to override section 6 of the Act would cause significant uncertainty as to how and when it would operate. That section restored any customary interests in the common marine and coastal area that had been extinguished by the Foreshore and Seabed Act 2004. Section 6(1) says they are restored and "given legal expression in accordance with" the principal Act.

Section 6 links to section 4(2)(a) and (c), which indicates that to implement the Act's purpose (as stated in section 4(1)), the Act:

- repeals the Foreshore and Seabed Act 2004 and restores customary interests extinguished by that Act; and
- gives legal expression to customary interests.

Part 3 of the Act (as stated in section 46) "sets out the legal rights and interests that give expression to customary interests in the common marine and coastal area of New Zealand". Those legal rights and interests include customary marine title (under subpart 3 of Part 3).

We were advised that these proposed sections 9A and 9B were included in the bill to reflect the Government's desire to strongly indicate to decision-makers Parliament's intent regarding the test for CMT. That intent is set out in the provisions of the bill and section 58 of the Act, and decision-makers should focus on these sections of the legislation.

We consider that the approach proposed in new sections 9A(3) to (5) is unnecessarily broad, and recommend deleting them. We understand that, for the bill to respond to the Court of Appeal's interpretational approach, the duty in new section 9B about how to interpret CMT amendments would only need to prevail over a few provisions in the principal Act. They are, in particular, the purpose and Treaty of Waitangi provisions (sections 4 and 7) of the principal Act, and the reasoning and conclusions in any inconsistent court judgments. Therefore, we recommend amending proposed new sec-

[3] Sections 4, 6, and 7 deal respectively with the purpose, restoration of customary interest, and Treaty of Waitangi (te Tiriti o Waitangi) provisions.

tion 9B(3) to this effect and removing the independent reference to section 6 of the principal Act.

Our proposed recommendation means that the interpretation duty in new section 9B would prevail over:

- the purpose in section 4(1) (including without limitation, that purpose as given effect to through sections 4(2)(a) and (c) and 6(1))
- section 7 (Treaty of Waitangi (te Tiriti o Waitangi))
- the reasoning and conclusions in the parts of the judgments specified in new section 59B, and any reasoning and conclusions that are:
  - to the same effect, or to materially similar effect, in substance; and
  - in any other judgment, or part of a judgment, under the principal Act.

New Zealand Labour Party differing view

The Labour Party strongly oppose this bill

We do not support these changes, which restrict the ability of Māori/iwi to be able to test their customary rights in the courts. In 2011, the National Party made much of their commitment to Māori "having their day in Court" and this proposed change takes that away once again.

This bill is unfair, unjust, and not necessary

Several significant issues have been highlighted during this process, including:

- the Government's dismissal and lack of meaningful consideration for official advice
- the failure to consult with Māori during the development of this bill
- consulting with the fishing industry before any discussion with Māori
- the lack of any meaningful evidence and rationale as to why the bill is needed
- political expediency overriding judicial rulings that have been ruled in favour of Māori
- adding a retrospective mechanism meaning that applicants will have to be reheard, burdening them with additional emotional and financial costs
- changing the legislation before the matter could be heard in the Supreme Court
- breaching the Treaty principles—namely, participation, partnership, and protection
- the Minister contravened the National Party constitution 4(b) which includes the recognition of the Treaty of Waitangi as the country's founding document as part of a values base that seeks to create opportunities for all New Zealanders to reach their personal goals and dreams
- endangering the Māori Crown relationship.

It is the view of Labour that the Government should immediately stop the progression of this bill. As it stands, this bill represents a significant breach of the Treaty of Waitangi and its principles. It undermines the rule of law and destabilises the relationship between Māori and the Crown.

Green Party of Aotearoa New Zealand differing view

The Green Party opposes the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill ("the bill") in the strongest terms. The Marine and Coastal Area (Takutai Moana) Act ("the Act") was originally created in 2011 to undo the harm caused by the infamous Foreshore and Seabed Act of 2004. Through this bill, the Government is introducing amendments to significantly curtail the rights of Māori to assert customary title over marine and coastal areas in light of a 2023 Court of Appeal judgment—a landmark ruling in making progress towards recognising tikanga Māori in Aotearoa's legal system.

Our opposition stems from the Government's direct breach of Te Tiriti o Waitangi—our foundational agreement and binding contract between Māori and Crown on which our nation is built upon. Iwi and hapū rights to their customary waters are part of tino rangatiratanga and are core to the sovereignty tangata whenua never ceded. This bill will make it near impossible for Māori to meet the requirements to have their customary marine rights recognised. The Green Party will stand alongside te iwi Māori in opposing the Government's raupatu and dismantling of Māori customary rights.

Breach of Te Tiriti o Waitangi and Tribunal findings

The Waitangi Tribunal was damning in its evaluation of the bill, stating that it was a clear breach of Te Tiriti o Waitangi and an "illegitimate exercise of kawanatanga". The Tribunal's Stage One of Wai 3400 report investigated Te Tiriti o Waitangi compliance of the policy development process that the Crown followed in seeking to amend the Act. The Tribunal found that the Crown breached the principles of Te Tiriti o Waitangi in several key areas. No changes have been made to this bill to address any of the Tribunal's findings.

Lack of Māori consultation and partnership

One of the core findings of the report is the failure of the Crown to consult meaningfully with Māori during the policy development process and before proposing amendments. It is clear to the Green Party that the Government disregarded repeated advice from its officials to engage with Māori, opting instead to consult commercial fishing interests first, despite the significance of the marine and coastal areas as taonga to Māori. Claimants were only provided only three weeks to respond. The Tribunal emphasised that under Te Tiriti o Waitangi, partnership requires the Crown to work with Māori at the earliest stages of policy development, especially when Māori rights to taonga, such as the takutai moana (coastal marine area), are concerned.

Breach of tino rangatiratanga

The Tribunal found that the Crown's proposed amendments diminish Māori control over their customary marine areas, effectively prioritising public rights over Māori rights without justification. The Green Party cannot support a bill that breaches Te Tiriti o Waitangi principle of tino rangatiratanga, which guarantees Māori authority over their lands, taonga, and resources. By failing to involve Māori meaningfully and ignoring their interests, the Crown breached Māori self-determination in decisions over their coastal areas.

Breach of active protection

The principle of active protection requires the Crown to safeguard Māori rights to the fullest extent practicable. However, the Tribunal found that the Crown's proposed amendments did the opposite. Retrospective application of new rules would force many Māori groups that had already spent significant time and resources applying for CMT to undergo rehearings under more stringent requirements. This would place an unfair emotional and financial burden on Māori applicants, and further strain on whanaungatanga. The Tribunal also found that the retrospectivity aspect of the bill means that some applicants who would have been granted CMT under the old test might find themselves unable to meet the standards of a new test. The Tribunal viewed this retrospectivity as fundamentally unfair and a breach of active protection, as it disproportionately disadvantages Māori applicants.

Breach of good governance

The Tribunal concluded that the Crown's approach to amending the Act was rushed, lacked transparency, and disregarded orthodox policy development processes. The Crown failed to establish a legitimate "problem" that required the drastic amendments proposed. The Crown also failed to demonstrate how it arrived at its understanding of "Parliament's original intent" and by seeking to amend the Act before the Supreme Court can hear the matter. The report describes the process as one driven by political commitments rather than sound policymaking. The Green Party note that officials' advice for a measured, transparent process was ignored, and the Tribunal found the Crown's approach inconsistent with the principles of good governance. This undermines the Crown's obligation to enact robust, well-considered policies that balance Māori and public interests.

Retrospectivity and burden of rehearings for existing claimants

Both retrospectivity and rehearings disproportionately disadvantage Māori claimants and will cause significant emotional, financial, and time burden. The amendments will reduce the ability for Māori to claim CMT and will be retrospective to July 2024. As a result, claims of CMT granted between July 2024 and when this bill passes will be reversed, and numerous live claims will be stopped and/or have to restart under this new regime. The Green Party, alongside the Tribunal, experts, and claimants view the retrospective application of the test for CMT as fundamentally unfair and a breach of the Treaty principle of active protection.

Many applicants detailed to the select committee the arduous yet robust processes they had undertaken to have their claims heard by the courts. This includes years-long preparation, finding appropriate researchers and time to conduct research, understanding key overlapping claimants, and finally starting to gain clarity as to how the test was going to be applied by the Courts. These submissions detailed that while there were concerns and misgivings with the current legislation, claimants were proud of the progress they had made. For those claimants who have already completed or are currently completing High Court hearings, they will now face unfair emotional, time, and financial burden of the rehearing process under the amended test, which will undoubtedly require significantly more work, including the gathering of additional evidence, meetings with overlapping claimants, and further legal analysis. There will be the devastating loss of taonga tuku iho with the increased risk of kaumatua who hold knowledge of specific areas dying prior to rehearings.

A notable concern raised by claimants is the difficulty to fund their appearances at the courts, particularly as a result of the Government-imposed limitations on financial assistance. Budget 24 reduced funding available to MACA claimants (to support court appearances) via Te Arawhiti as part of its public service cost-cutting.

Comity and pre-empting Supreme Court decision

With this bill, the Government is seeking to make a law to overrule a court decision. The correct avenue to challenge what the law is (in this case, the Court of Appeal decision), and thereby "Parliament's intent", is on appeal to the Supreme Court. An appeal has already been sought and granted. Yet, the bill being progressed this year before the appeal has been heard at the Supreme Court is a clear, unjust interference with judicial processes. This demonstrates that the Government does not want to wait for a Supreme Court decision, setting a dangerous precedent for the Parliament to just overturn the decisions of the courts when find those decisions to be unfavourable. More broadly, there are implications of the bill's approach to comity and the separation of powers, which further points to a concerning shift in the Government's disregard for the role of the judiciary.

Relatedly, the Tribunal and other legal experts have said that the policy rationale for this bill—namely, restoring Parliament's original intent of the 2011 Act—is spurious. The Minister has asserted that the intent was to create a very restricted pathway to gaining CMT. This was not the Court of Appeal's, or the Tribunal's interpretation.

Reduced recognition of CMT impedes kaitiakitanga

Reducing or impeding CMT will limit the rights of iwi and hapū to exercise kaitiakitanga in their area. Kaitiakitanga of coastal areas is guaranteed to Māori under Article 2 of Te Tiriti o Waitangi. Iwi and hapū having kaitiakitanga and decision-making power over the planning and conservation of the marine and coastal environment benefits all that live in Aotearoa. The Green Party highlight that when areas are managed in accordance with tikanga, the whole ecosystem flourishes and all New Zealanders benefit.

As noted in the departmental report, Te Arawhiti officials, "accept that a more exacting test for CMT (by likely reducing the number or size of CMT awards) would reduce the potential for the exercise of CMT rights associated with kaitiakitanga". This overriding of Māori rights facilitates the Government's raupatu (confiscation) to pursue their aspiration to exploit our oceans and destroy our natural resources for private profit.

Green Party vision: Legislative regime recognising Māori customary rights

The Green Party do not support these amendments as we see the current framework as one that many hapū and iwi have spent time and energy understanding and participating in. However, we also recognise that some submitters advocated for fundamental changes to this framework. The Green Party did not support the Foreshore and Seabed Act 2004 or the principal Act, the Marine and Coastal Area Act. As the Green Party noted in the differing view on the latter in 2011: "This bill extinguishes customary rights by operation of law, without the consent of the customary owners. This constitutes a confiscation." Therefore, we believe there is a need for a fundamental shift in how Māori customary interests in the coastal marine area are recognised and upheld, and that this bill goes in the opposite direction.

Appendix

Committee process

The Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill was referred to the committee on 24 September 2024. The House instructed us to report the bill back no later than 5 December 2024. We called for submissions on the bill with a closing date of 15 October 2024. We received and considered submissions from 6,692 interested groups and individuals. We heard oral evidence from 69 submitters at hearings by videoconference and in Wellington.

Advice on the bill was provided by Te Arawhiti | the Office for Māori Crown Relations. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

James Meager (Chairperson)

Hon Ginny Andersen

Jamie Arbuckle

Cameron Brewer

Tākuta Ferris

Paulo Garcia

Dr Tracey McLellan

Rima Nakhle

Tamatha Paul

Todd Stephenson

Hon Dr Duncan Webb

Related resources

The documents we received as advice and evidence are available on the Parliament website.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Paul Goldsmith

Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill

Government Bill

Contents

Preamble

In 2023, in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252, the Court of Appeal interpreted provisions of the Marine and Coastal Area (Takutai Moana) Act 2011 about the requirements for recognition of customary marine title. The Court's interpretation of those provisions changed the effect that Parliament intends them to have, and materially reduced those requirements (for example, that an applicant group must prove exclusive use and occupation of a specified area from the start to the end of the applicable period without substantial interruption). Amendments to those provisions are needed to ensure that they have the effect that Parliament intends. The enactment of this legislation makes those amendments:

The Parliament of New Zealand therefore enacts as follows:

1 Title

This Act is the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Act **2024**.

2 Commencement

This Act comes into force on the day after Royal assent.

Part 1
Amendments to Marine and Coastal Area (Takutai Moana) Act 2011: general

3 Principal Act

This Part amends the Marine and Coastal Area (Takutai Moana) Act 2011.

4 Preamble amended

(1) In the Preamble, before recital (1), insert:

Background to Act as enacted

(2) In the Preamble, after recital (4), insert:

Background to amendments made by CMT Amendment Act

(5) In 2023, in *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252, the Court of Appeal interpreted provisions of this Act about the requirements for recognition of customary marine title. The Court's interpretation of those provisions changed the effect that Parliament intends them to have, and materially reduced those requirements (for example, that an applicant group must prove exclusive use and occupation of a specified area from the start to the end of the applicable period without substantial interruption). Amendments to those provisions are needed to ensure that they have the effect that Parliament intends. The enactment of the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Act **2024** makes those amendments:

5 Section 9 amended (Interpretation)

In section 9(1), insert in their appropriate alphabetical order:

applicable period, for a determination of whether customary marine title exists in a specified area of the common marine and coastal area (*see* sections **57A**, **57B**, 58, 59, 95, 98, and 106), means the period specified (as applicable)—

(a) in section 58(1)(b)(i) (from 1840 to the present day); or

(b) in section 58(3)(c)(ii) and for the purposes of section 58(1)(b)(ii) (from 1840 to the time of a customary transfer); or

(c) in section 58(3)(d)(ii) and for the purposes of section 58(1)(b)(ii) (from the time of a customary transfer to the present day)

CMT Amendment Act means the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Act **2024**

CMT amendments means this Act's provisions as amended, inserted, or replaced by the CMT Amendment Act

exclusive use and occupation has the meaning given in **section 57A**

substantial interruption has the meaning given in **section 57B**

6 New sections 9A to 9C inserted

Before section 10, insert:

9A Customary marine title amendments: purposes~~,~~ and application~~, and overriding effect~~

Purposes

(1) The purposes of the CMT amendments (for example, sections **57A, 57B,** 58, 59, and 106) are—

(a) to define the applicable requirements for recognising customary marine title (namely, requirements for, and for proof of, exclusive use and occupation of a specified area from the start to the end of the applicable period without substantial interruption); and

(b) in particular, consistent with **recital (5)** of the Preamble of this Act, to alter aspects of the law that are—

(i) specified in **section 59A**; and

(ii) expressed~~, for example,~~ in judgments, or parts of judgments, under this Act that include, for example, the parts of the judgments specified in **section 59B**.

Application

(2) The customary marine title decisions, agreements, and orders to which the CMT amendments apply are specified in **Part 1 of Schedule 1AA**.

~~*Effect overrides other law*~~

~~(3) The CMT amendments prevail over any other law.~~

~~(4) In particular, any **other law**, for the purposes of **subsection (3)**, includes any law in all or any of the following:~~

~~(a) any provision of this Act that is not a CMT amendment, for example, sections 4, 6, and 7 of this Act:~~

~~(b) without limitation, the reasoning and conclusions in the parts of the judgments specified in **section 59B**.~~

~~(5) **Subsection (4)** and **section 59B** (including the parts of the judgments specified in that section) do not limit the generality of **subsection (3)**.~~

9B Customary marine title amendments: interpretation and overriding effect

Provisions to which duty applies

(1) This section applies to—

(a) the CMT amendments; and

(b) in particular, sections **57A, 57B,** 58, 59, and 106 of this Act.

Duty to interpret provisions to promote their purposes~~,~~ and application~~, and effect~~

(2) A decision maker (including the Court) must interpret the CMT amendments in a way that promotes their purposes~~,~~ and application~~, and effect~~ (as stated in **section 9A**).

~~*Relationship with other sections*~~

~~(3) Under **section 9A(3) and (4)(a)**, this section prevails over—~~

~~(a) section 4 (purpose):~~

~~(b) section 6 (customary interests restored):~~

~~(c) section 7 (Treaty of Waitangi (te Tiriti o Waitangi)).~~

Overriding effect

(3) This section prevails over—

(a) section 4 (purpose) (including, without limitation, that purpose as given effect to through sections 4(2)(a) and (c) and 6(1)):

(b) section 7 (Treaty of Waitangi (te Tiriti o Waitangi)):

(c) the reasoning and conclusions in the parts of the judgments specified in **section 59B**, and any reasoning and conclusions that are—

(i) to the same effect, or to materially similar effect, in substance; and

(ii) in any other judgment, or part of a judgment, under this Act.

9C Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

7 New sections 57A and 57B and cross-heading inserted

In Part 3, after the subpart 3 heading, insert:

Interpretation matters

57A Meaning of exclusive use and occupation

(1) This section applies to a group or its members that is or are—

(a) an applicant group; or

(b) making a customary transfer; or

(c) a group or members of a group to whom a customary transfer was made.

(2) This section defines whether, for the purposes of this Act, the group or its members has, had, or have exclusive use and occupation of a specified area of the common marine and coastal area from the start to the end of the applicable period without substantial interruption.

(3) The group or its members has, had, or have **exclusive use and occupation** of the area from the start to the end of the applicable period without substantial interruption only if the group or its members had both the intention and the ability to control the area, to the exclusion of others, from the start to the end of the applicable period without substantial interruption.

57B Meaning of substantial interruption

In this Act, **substantial interruption**, to a group's exclusive use and occupation of a specified area of the common marine and coastal area,—

(a) means any 1 or more substantial interruptions to 1 or both of the following:

(i) the group's use and occupation of that area:

(ii) the exclusivity of the group's use and occupation of that area:

(b) requires a decision maker (including the Court) to consider the nature, extent, duration, and cause of any interruption to the group's exclusive use and occupation of the specified area:

(c) can be caused (without limiting **paragraph (a)**) by an activity (including, without limitation, an activity that is or includes fishing or navigation) carried out—

(i) wholly or partly in that area; and

(ii) by a person, or persons, who did not belong to the group; and

(iii) with or without any authorisation by or under legislation:

(d) can be caused (without limiting **paragraph (a)**) by changes to the use and occupation, or to an activity carried out,—

(i) wholly or partly in that area; and

(ii) by a person, or persons, who did belong to the group; and

(iii) with or without any authorisation by or under legislation:

(e) can be caused (without limiting **paragraphs (a) to (d)**) by the combined or cumulative effects of, or of changes to, 2 or more activities of the kind described in **paragraph (c) or (d)**:

(f) has not occurred (despite **paragraphs (a) to (e)**) only because, in relation to that area, an activity is carried out wholly or partly in that area under a resource consent granted at any time between—

(i) the commencement of this Act; and

(ii) the effective date.

8 Section 58 amended (Customary marine title)

(1) After section 58(1), insert:

(1A) In considering whether the requirements of subsection (1)(b)(i), (3)(c)(ii), or (3)(d)(ii) are met, no inference may be drawn about all or any of the geographic scope, continuity, or exclusivity of a group's use and occupation of a specified area in a period unless that inference—

(a) is based on evidence of a physical activity, or of a use, related to natural and physical resources (within the meaning of section 2(1) of the

Resource Management Act 1991) in all or part of the area, by the group in that period; and

(b) is not based on a spiritual or cultural association with all or part of the area unless that association is manifested in a physical activity, or in a use, related to natural and physical resources (within the meaning stated in **paragraph (a)**) in all or part of the area, by the group in that period.

(2) Repeal section 58(2).

(3) Replace section 58(4) with:

(4) Customary marine title does not exist if that title is extinguished as a matter of law.

(5) For the purposes of **subsection (4)**, customary marine title is extinguished as a matter of law if, in relation to a specified area of the common marine and coastal area,—

(a) legal title was vested, before 17 January 2005, in a legal person or a group, other than the applicant group, by any means, including—

(i) Crown grants made by or under any lawful authority, including ordinances, statutes, or the prerogative; or

(ii) the common law; or

(iii) a statutory vesting; or

(iv) administrative action; or

(b) an interest has been established before, on, or after 17 January 2005 that is legally inconsistent with exclusive use and occupation of the area by the applicant group.

(6) **Subsection (5)(a) or (b)** applies even if the person is the Crown or a local authority and is, under section 11(3), divested of that title as owner, because—

(a) section 11(3) does not revive customary interests in any part of the common marine and coastal area that existed before any vesting of title, or establishment of an interest, divested under section 11(3); and

(b) section 6 only restores and gives legal expression in accordance with this Act to customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004.

(7) **Subsection (4)**—

(a) does not limit **section 57B** (which sets out the requirements for determining whether substantial interruption has occurred to an applicant group's exclusive use and occupation); and

(b) is not limited by **subsections (5) and (6)** (which state some ways, but not the only ways, that customary marine title is extinguished as a matter of law for the purposes of **subsection (4)**).

9 Section 59 amended (Matters relevant to whether customary marine title exists)

(1) Replace section 59(1) and (2) with:

(1) Matters to which a decision maker (including the Court) must have particular regard in determining whether customary marine title exists in a specified area of the common marine and coastal area include whether the applicant group or any of its members—

(a) own land abutting all or part of the specified area and have done so, without substantial interruption, for all of the applicable period:

(b) exercise non-commercial customary fishing rights in all or part of the specified area, and have done so for all of the applicable period:

(c) exercise non-commercial customary fishing rights in named fishing grounds in all or part of the specified area, and have done so for all of the applicable period:

(d) have marae near all or part of the specified area.

(2) To avoid doubt, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 does not limit **subsection (1)(b)**.

(2A) In complying with **subsection (1)(a), (b), or (c)**, the decision maker must also have particular regard to the extent to which there has been such ownership, or such exercise of fishing rights in the specified area, for all of the applicable period.

(2) In section 59(3), after "does not, of itself, preclude the applicant group from establishing the existence of customary marine title", insert ", unless that use causes or contributes to substantial interruption under **section 57B**".

(3) In section 59(4), replace "subsection (1)(a)(i)" with "**subsection (1)(a)**".

10 Section 106 amended (Burden of proof)

Replace section 106(2) with:

(2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the group—

(a) holds the specified area in accordance with tikanga, as required by section 58(1)(a); and

(b) had exclusive use and occupation of the specified area from the start to the end of the applicable period without substantial interruption, as required by section 58(1)(b)(i) or (ii).

11 New Schedule 1AA inserted

Before Schedule 1, insert the **Schedule 1AA** set out in the **Schedule** of this Act.

Part 2

~~Aspects~~ Amendment to Marine and Coastal Area (Takutai Moana) Act 2011: aspects of law altered by CMT Amendment Act

11A Principal Act

This Part amends the Marine and Coastal Area (Takutai Moana) Act 2011.

12 New sections 59A and 59B inserted

After section 59, insert:

59A Outline of aspects of law altered by CMT Amendment Act

The altered aspects of the law referred to in **section 9A(1)(b)** include alterations made by provisions that—

(a) define a group's exclusive use and occupation of a specified area of the common marine and coastal area from the start to the end of the applicable period:

(b) require the group's use and occupation of the area to be exclusive in that the group has had both the intention and the ability to control that area, to the exclusion of others, from the start to the end of the applicable period:

(c) require that no substantial interruption has occurred to the group's exclusive use and occupation of that area from the start to the end of the applicable period:

(d) define substantial interruption to the group's exclusive use and occupation of that area as meaning any 1 or more substantial interruptions to 1 or both of the following:

(i) the group's use and occupation of that area:

(ii) the exclusivity of the group's use and occupation of that area:

(e) clarify how substantial interruption to the group's exclusive use and occupation of that area can be caused, and when it has not occurred:

(f) clarify what inferences are permitted, and require particular regard to be had to specified matters, in determining whether the group has had exclusive use and occupation of that area from the start to the end of the applicable period without substantial interruption:

(g) clarify when customary marine title is extinguished as a matter of law by a vesting of a title as owner to any part of the common marine and coastal area (for example, to the bed of a navigable river, to the extent that the bed of the river is any part of that area):

(h) clarify what the group must prove in an application for the recognition of customary marine title in that area.

59B ~~P~~Examples of judgments and parts of judgments referred to in sections 9A and 9B

~~T~~Examples of the judgments and parts of judgments referred to in **sections 9A(1)(b) and ~~(4)(b)~~9B(3)(c)** as being altered and overridden include~~—~~, without limitation, the following parts of judgments:

(a) *Colin Francis Reeder and Ngā Pōtiki ā Tamapāhore Trust on behalf of Ngā Pōtiki* [2021] NZHC 2726, [2022] 3 NZLR 304 (12 October 2021) at [29]–[41], relating to the meaning of exclusive use and occupation from 1840 to the present day:

(b) *Ngāti Pāhauwera and others* [2021] NZHC 3599 (22 December 2021) at [178]–[180] and [462], relating to the meaning of exclusive use and occupation in accordance with tikanga:

(c) *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 (18 October 2023) at [109], [416], [426]–[430], [434], and [435]–[437], relating to the meaning of exclusive use and occupation without substantial interruption (section 58(1)(b)), including where the burden of proof lies (under section 106):

(d) *Ngāi Tūmapūhia-ā-Rangi Hapū Inc on behalf of Ngā Uri o Ngāi Tūmapūhia ā Rangi Hapū and others* [2024] NZHC 309 (26 February 2024) at [88]–[93], [103], [107] and [108], [192] and [193], and [620]–[625], relating to the meaning of exclusive use and occupation without substantial interruption, the relevance of tikanga to that test, and including the burden of proof and the requirement for continuity:

(e) *Ngā Hapū o Tokomaru Ākau and others* [2024] NZHC 682 (25 March 2024; reissued redacted version 1 May 2024) at [100]–[104], [105]–[108], and [393]–[395], relating to the meaning of use and occupation, exclusivity, substantial interruption, and the burden of proof under section 106:

(f) *Muriwai Maggie Jones on behalf of Ngāi Tai Iwi and the Uri of Ngāi Tai Iwi* [2024] NZHC 1373 (28 May 2024; reissued 29 May 2024) at [112] and [116], relating to the scope of substantial interruption and continuity.

Schedule
New Schedule 1AA inserted into Marine and Coastal Area (Takutai Moana) Act 2011

s 11

Schedule 1AA
Transitional, savings, and related provisions

ss 9A, 9C

Part 1
Provisions relating to CMT Amendment Act

1 Definitions

In this Part, unless the context otherwise requires,—

announcement time means midnight on 25 July 2024

commencement means the commencement of the CMT Amendment Act

CMT Amendment Act has the meaning given in section 9(1)

CMT amendments has the meaning given in section 9(1)

CMT decision means a decision relating to whether customary marine title exists in a specified area of the common marine and coastal area and that is—

(a) a decision made by the responsible Minister on behalf of the Crown relating to a notice of intention (*see* section 95)—

  (i) to seek an agreement recognising customary marine title; and

  (ii) given by an applicant group; or

(b) a decision made by the Court (as defined in this clause) relating to an application (*see* sections 98 and 100)—

  (i) for a recognition order recognising customary marine title; and

  (ii) made by an applicant group

decision made by the Court, for the purposes of **paragraph (b)** of the definition of CMT decision, includes, but is not limited to, each of the following done, made, or issued by or on behalf of the Court:

(a) an interlocutory decision (for example, a direction, minute, or order) of any kind:

(b) any consideration or any hearing, of any kind, in part or in full, of 1 or both of—

  (i) an interlocutory matter:

  (ii) a substantive matter:

(c) a substantive decision (for example, a direction, minute, or order) of any kind

interim period means the period that—

(a) starts at the announcement time; and

(b) ends on the commencement

old law means the following (as in force before the announcement time):

(a) subpart 3 (customary marine title) of Part 3 (customary interests):

(b) provisions of this Act that relate to that subpart (for example, related definitions in section 9 and related provisions in section 106 (burden of proof)).

2 CMT amendments do not apply to CMT decision made at announcement time

Main rule

(1) The CMT amendments do not apply to or affect a CMT decision made—

(a) before or at the announcement time; and

(b) under the old law.

(2) The CMT amendments also do not apply to or affect the following, made before the announcement time, that give effect to a CMT decision of a kind specified in **subclause (1)**:

(a) an agreement made and entered into under section 95 that recognises and provides for customary marine title:

(b) a customary marine title order made under section 98(1) that recognises customary marine title.

Related interlocutory applications, appeals, or rehearings

(3) The old law continues to apply for any interlocutory application, appeal, or rehearing related to a CMT decision of a kind specified in **subclause (1)**.

If CMT decision not given effect to in agreement or order

(4) This clause applies even if, at the announcement time, a CMT decision of a kind specified in **subclause (1)** is not given effect to in—

(a) an agreement made and entered into under section 95 that recognises and provides for customary marine title; or

(b) a customary marine title order made under section 98(1) that recognises customary marine title.

(5) A CMT decision to which **subclause (4)** applies may, after the announcement time, be given effect to in an agreement or an order specified in **subclause (4)(a) or (b)**.

3 CMT amendments apply to CMT decision made after announcement time

Main rule

(1) The CMT amendments apply to a CMT decision made after the announcement time.

Related interlocutory applications, appeals, or rehearings

(2) The CMT amendments apply for any interlocutory application, appeal, or rehearing related to a CMT decision of a kind specified in **subclause (1)**.

Effect of consideration, without decision, at announcement time

(3) This clause applies even if, at the announcement time,—

(a) the Crown has considered, but has not decided, whether the applicant group has satisfied the Crown that the group has satisfied the requirements of the old law; or

(b) the Court has considered, but has not decided, whether the applicant group has satisfied the Court that the group meets the requirements of the old law.

4 Certain CMT decisions made in interim period, and related agreements and orders made, have no legal effect and never have had legal effect

CMT decisions based on old law (as in force in interim period)

(1) A CMT decision must be taken to have no legal effect, and never to have had legal effect, if it was made—

(a) in the interim period; and

(b) in accordance with the old law (as in force in the interim period).

Related agreements

(2) An agreement must be taken to have no legal effect, and never to have had legal effect,—

(a) if it was made and entered into—

(i) in the interim period; and

(ii) under section 95; and

(b) to the extent that it gives effect to a CMT decision to which **subclause (1)** applies.

Related customary marine title orders

(3) A customary marine title order must be taken to have no legal effect, and never to have had legal effect, if it—

(a) was made—

(i) in the interim period; and

(ii) under section 98(1); and

(b) gives effect to a CMT decision to which **subclause (1)** applies.

5 Court may continue to hear, or rehear, affected applications

Application to which clause applies

(1) This clause applies to an applicant group's application for a recognition order for customary marine title if, at the announcement time, the Court has considered, but has not decided, whether the group has satisfied the Court that the group meets the requirements of the old law.

Court may continue to hear, or rehear, all, or any part of, application

(2) The court may, after the commencement, and in a way that complies with **clause 3**,—

(a) continue to hear or rehear, all, or any part of, the application; and

(b) invite and consider related further submissions from all or any parties to, or other participants in, the application.

6 No entitlement to compensation

A person is not entitled to compensation of any kind on account of the operation of the CMT amendments.

Legislative history

24 September 2024 — Introduction (Bill 83–1), first reading and referral to Justice Committee

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