

Amendments to the Marine and Coastal Act 2011

Questions and answers

What is the Takutai Moana (and the Act)?

Takutai moana refers to the marine and coastal area which is between the high tide line and 12 nautical miles out to sea.

The Marine and Coastal Area (Takutai Moana) Act 2011 (the **Act**) established a special category of land – the common marine and coastal area – neither the Crown nor any other person owns, or can own, the common marine and coastal area.

The Act provides for ongoing public access (except for the protection of wāhi tapu), fishing, and navigation in the common marine and coastal area.

The Act provided whānau, hapū and iwi Māori with the ability to seek legal recognition of their customary interests by applying for a customary marine title (CMT) or protected customary rights (PCR).

What is section 58?

Section 58 of the Act sets out the test that must be met to determine whether whānau, hapū or iwi groups can be granted a customary marine title (CMT).

Applicant groups must prove that they hold the relevant area in accordance with tikanga and they have 'exclusively used and occupied' an area 'from 1840 to the present day without substantial interruption'.

What does a CMT provide whānau, hapū or iwi groups?

A CMT award recognises Māori customary interests in a specified area and provides a range of rights, including:

- a Resource management permission right – where permission from the CMT-holder must be obtained from progressing resource consents (with some exceptions)
- a conservation activity permission right
- the ability to apply for additional protections for wāhi tapu area
- involvement in coastal policy planning
- the prima facie ownership of newly found taonga tūturu
- the ownership of non-Crown minerals (excluding gold, silver, uranium and petroleum)
- the right to create a planning document for the management of the CMT area that must be taken into account by a range of public bodies.

Why is the Government amending the Act?

The Government considers the Courts' interpretation of the section 58 test changed the nature of the test and materially reduced the threshold for the recognition of CMT.

It also considers that while the Supreme Court's December 2024 judgment that the Court of Appeal was wrong in its interpretation was helpful, it was not sufficiently exacting. It is for Parliament to clarify the test, not the courts, given the significant rights at stake.

What are the amendments to the Act?

The test for CMT will be clarified by:

- overturning the reasoning of the Court of Appeal and High Court in *Re Edwards*, and the reasoning of all High Court decisions since the High Court in *Re Edwards*, where they relate to the test for CMT
- adding text to section 58 to define and clarify the terms 'exclusive use and occupation' and 'substantial interruption'
- amending the 'burden of proof' (section 106) to clarify that applicant groups are required to prove exclusive use and occupation from 1840 to the present day without substantial interruption
- clarifying the relationship between the framing sections of the Act (the preamble, purpose, and Treaty of Waitangi sections) and section 58 in a way that allows section 58 to operate more in line with its literal wording.

What does this mean for CMT applications?

Existing CMT decisions made up to 24 July 2024 will continue to be recognised.

All undetermined takutai moana applications, through the Courts or the Crown engagement pathway, will, if Parliament enacts these amendments, be decided under the clarified test for customary marine title.

If passed, the clarified test will apply to any court decisions made since the Government announced its policy on 25 July 2024. To ensure the test is applied consistently, seven cases will need to be re-heard.

The Government has ensured there is additional funding of up to \$15 million to contribute to the costs of applicants whose applications will need to be re-heard.

Amendment impact on applicant groups

	Applications/ High court Case	Location	Impact of amendment (if Parliament enacts the proposed amendments)
Undetermined	All undetermined applications through the High Court or Crown engagement	Various	These applicant groups are impacted. Applications will be determined under the provisions of amended test in the new Amendment Act.
Impacted (CMT awards made)	Wairarapa (1b)	Wairarapa	As the judgment has been or will be released from 25 July 2024 , the Bill if passed will require these cases to be re-heard under the amended test (in the new Amendment Act). Any decision to award CMT will be overturned.
	Inner Aotea Harbour	Aotea Harbour	
	Kāpiti-Manawatu (1a)	Kāpiti-Manawatu	
Impacted (CMT judgments pending)	Whangārei Coast	Tai Tokerau	
	Whangārei Harbour	Tai Tokerau	
	Re Ngā Pōtiki (2)	Tauranga	
	Ruapuke Island	Foveaux Strait	
Decided and under appeal	Re Edwards	Eastern Bay of Plenty	No impact because these were decided before 25 July 2024.
	Re Ngāti Pāhauwera	Hawkes Bay	Appeals will continue under the pre-amendment law (applying Supreme Court's December 2024 judgment).
	Tokomaru Bay 1 & 2	Tokomaru Bay	
	Wairarapa (1a)	Wairarapa	
Decided	Re Tipene	Titi Island	No impact
	Ngā hapū o Ngāti Porou Tranche 1 & 2	Tai Rāwhiti	
	Re Clarkson	Wairarapa	
	Re Ngā Pōtiki (1)	Tauranga	
Undetermined	Ngā hapū o Ngāti Porou future tranches	Tai Rāwhiti	No impact (will be decided under the pre-amendment law (applying Supreme Court's December 2024 judgment).