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Report of Te Rōpū Tai Timu Tai Pari

Whakarāpopototanga – Summary of key points

1. Because we were given limited information about the detail of the reform proposals, we found it difficult to propose meaningful and tailored options to transition rights under the te Takutai Moana Act 2011[1] into the new regime.

2. We were not asked to consider, and we make no comment on, whether the existing te Takutai Moana Act and the new regime are compliant with Tiriti/Treaty principles as they relate to rights and interests protected under the te Takutai Moana Act.

3. The Randerson report did not consider specifically the situation of Māori interests in the common marine and coastal area. The report's broad recommendations were not informed by a detailed consideration of Māori rights and interests in the takutai moana.

4. Ministers should be aware of some basic background to the legal rights and interests of Māori in the takutai moana. Te Tiriti o Waitangi guaranteed active protection of those interests. Despite that, the legal system failed to recognise Māori interests in the takutai moana until the 21st century. Rights were then developed to fit within an existing legal regime as it applied to the coastal marine area.

5. All of the common marine and coastal area is subject to customary marine title or applications for customary marine title. It is likely to take some 10-20 years for the High Court and Crown to process the majority of those applications. Because Māori have held, and will prove in substantial areas that they have held, customary interests since at least 1840, Māori should not be prejudiced by the establishment of a new legal regime before they are able to prove their rights and interests.

6. The transition of rights under the te Takutai Moana Act should be logical and consistent with Cabinet's decision that the new regime should "give effect to" Te Tiriti/Treaty principles and give greater recognition to Te Ao Māori. There is the potential to create inconsistency. Existing te Takutai Moana Act rights should not be diminished effectively or otherwise. To give effect to Te Tiriti/Treaty principles requires decision-makers to recognise rights and interests that exist, whether or not they have been proven under the Act.

7. Decisions about any new system of allocation of the common marine and coastal area must give full recognition to the existing RMA permission right. To be Te Tiriti/Treaty compliant, any transitional regime (occurring between the new regime coming into effect

[1] Also known as the Marine and Coastal Area (Takutai Moana) Act 2011.

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and applications for customary marine title being determined) must give proper recognition to the potential underlying customary rights and interests.

8. The new regime should recognise customary interests at all levels recognised by the te Takutai Moana Act, including at the level of iwi, hapū and whānau. That may require an adjustment to the recognition of "iwi and hapū" interests in te taiao, which appears to exclude the interests of whānau.

Hei tīmatatanga - Introduction

9. Te Arawhiti formed Te Rōpū Tai Timu Tai Pari to support it in providing advice to Ministers on the transition of rights under the Marine and Coastal Area (Takutai Moana) Act 2011 into the new regime being developed to replace the Resource Management Act 1911. Members of Te Rōpū Tai Timu Tai Pari all currently act for Māori with takutai moana claims under the te Takutai Moana Act.

10. We held meetings with Te Arawhiti on 7, 14 and 21 April, 5 and 20 May and 2 June 2022. Te Arawhiti provided us with various documents in advance of those meetings setting out some of the relevant policy development relating to aspects of the new regime and how existing rights under the te Takutai Moana Act might be transitioned into the new regime. Officials (mostly) from the Ministry for the Environment attended most of those meetings to provide updates and explanations on the policy development of the new reforms and to answer our questions.

11. We found our task difficult. We understood our core function was to assist in developing options for transitioning existing rights under te Takutai Moana Act into the new regime. We found it difficult to consider specific options because:

    11.1. we were given limited information about the current status of the policy development and decisions of Minister in that regard; and

    11.2. as we understood it, the policy development underpinning the new regime was in a state of flux.

12. We were not asked to consider whether the existing te Takutai Moana Act and the new regime are compliant with Treaty principles as they relate to interests protected under the te Takutai Moana Act. We have made some comments about how the new regime may be inconsistent with Tiriti/Treaty principles, given the high-level decision that the regime is to "give effect to" those principles. We have not, however, assessed whether the new regime as whole is consistent with Tiriti/Treaty principles. We expect that analysis will occur at some stage.

13. We understand that some of our more specific comments will be included in advice to Ministers. We wanted to set out for Ministers, in this report, our key comments on the way in which it is proposed to transition existing rights under the te Takutai Moana Act into the new regime.

The Randerson report

14. We note that the Randerson report did not consider specifically the situation of Māori rights and interests in the common marine and coastal area. How a new resource

management system might provide for rights under the te Takutai Moana Act was within scope of the Randerson review.[2] The report did not discuss or recommend, however, any specific ways in which Māori interests, including rights under the te Takutai Moana Act, might be recognised in, or transitioned into, any new regime. As such, the broad recommendations that were made were not informed by any detailed consideration of Māori rights and interests in the takutai moana.

Background to legal recognition of Māori interests in the takutai moana

15. Ministers should be aware of some basic background about the legal system's lack of recognition of Māori interests in the takutai moana and how the rights under the te Takutai Moana Act were developed.

16. We think the following background is important:

    16.1. From time immemorial, Māori have exercised mana in relation to the takutai moana in accordance with their tikanga.[3] That mana was not equivalent to a western notion of property rights, as the High Court has recently recognised.[4]

    16.2. In 1840 the Crown made certain guarantees in Te Tiriti o Waitangi. These included the Article 2 guarantee of tino rangatiratanga to Māori of their whenua, kāinga and all of their taonga. The Article 2 guarantee of tino rangatiratanga extended to the takutai moana. That guarantee meant, amongst other things, that the New Zealand legal system would recognise the mana Māori exercised over their takutai moana. Article 2 also stated that Māori could retain their property rights so long as that was their wish and desire. The Crown has accepted that Article 2 applies to the takutai moana.[5] It follows naturally that the principles of the Te Tiriti/the Treaty require the Crown to protect actively Māori interests in the takutai moana.

    16.3. The legal system that unfolded in New Zealand recognised Māori property rights in dry land, that is land above the high-water springs. There was a presumption that all land in New Zealand was subject to customary title.[6] Communally held customary interests were transformed into individualised property rights capable of alienation. With some important exceptions (such as, for instance, confiscation),

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2 See *New Directions for Resource Management in New Zealand – Report of the Resource Management Review Panel, June 2020* at 503, para [20] (Appendix 6, Terms of Reference).

3 See, generally, *Pākia ki Uta, Pākia ki Tai – Ministerial Review of the Foreshore and Seabed Act 2004* (vol 1) at 5.1.2 (pp 98-100) "The nature and extent of mana whenua in the foreshore and seabed". The Waitangi Tribunal has also found that, in accordance with tikanga, Māori held dominion and exercised tino rangatiratanga over the foreshore and seabed: Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 20 and 38.

4 *Re Edwards (Te Whakatōhea, No 2)* [2021] NZHC 1025 at [139] and [144].

5 See, for example, the Crown's closing submission in the Wai 1040 Te Paparahi o te Raki/Northland Inquiry, #3.3.416 at [90]: "Today, the Crown accepts that to the extent foreshore and seabed is within the boundaries of New Zealand and to the extent that foreshore and seabed is properly the subject of extant Māori property rights, article 2 of the treaty applies to it such that the Crown has a duty to confirm and guarantee those property rights."

6 See, for example, the comments of Elias CJ in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [37]: "From the beginning of Crown colony government, it was accepted that the entire country was owned by Maori according to their customs". See also *Pākia ki Uta, Pākia ki Tai – Ministerial Review of the Foreshore and Seabed Act 2004* (vol 1) at p 95: "the predominant assumptions applying from the establishment of the colony were, first, that the whole country was Māori owned or, more technically, was held in Native Title …" and at p 103: "the basic assumption that has always applied in New Zealand since 1840 is that Māori had title to the whole of the land area of the country".

so long as Māori wished to retain their dry land interests, the legal system generally respected that Article 2 guarantee.[7]

16.4. The legal system failed, however, throughout the 19th and 20th centuries to recognise or provide any form of protection to Māori interests to the takutai moana. Māori were prevented from seeking title to their takutai moana in the Native Land Court. Māori first sought legal recognition of their takutai moana interests in the 1870s in various applications relating to the foreshore at Thames.[8] The Crown responded at first arguing that, as an incident of sovereignty and by virtue of Crown prerogative, the foreshore belonged to the Crown and not to Māori.[9] Following the Native Land Court's limited recognition of fishing rights,[10] the Crown suspended the jurisdiction of the Native Land Court to land below the high-water mark[11] and then defined the districts of the Native Land Court to exclude the seabed,[12] thereby removing any capacity for the Court to award any form of customary title to Māori henceforth.

16.5. Despite claims by Māori to the takutai moana in the mudflats at Porirua in 1883,[13] to Te Whanganui-a-Orotu (Napier Inner Harbour) in 1916,[14] to Awapuni Lagoon (near Gisborne) in 1928,[15] to lands that had accreted in Hokianga, Herekino and Orakei in the 1940s,[16] and by Ngāpuhi to their seabed in 1955,[17] the legal system did not recognise any form of customary title to the takutai moana. In 1963 the Court of Appeal in the *Ninety-Mile Beach* decision held that when the Native (or Māori) Land Court investigated and determined title to land that adjoined the foreshore any customary title to the foreshore was thereby extinguished.[18]

16.6. Throughout the 19th and 20th centuries the legal regime that related to the coastal marine area was predicated on there being no legal recognition of the mana Māori held to their takutai moana. Throughout New Zealand's ports and harbours, lands were reclaimed and vested in various private entities, without reference to the

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7 Other examples of problems in the manner in which Māori interests in dry land were alienated included: individualised interests in land were capable of alienation without reference to the wider customary group, interests were acquired compulsorily under the Public Works legislation, interests were acquired to pay for the costs (eg survey costs) in determining title and (at a certain time) some uneconomic interests in Māori land were compulsorily acquired. There were other problems as identified in numerous reports of the Waitangi Tribunal.

8 See Whakaharatau (Thames foreshore) (1870) 4 Hauraki MB 202; Kauwaeranga (Thames foreshore) (1870) 4 Hauraki MB 236 (which is reproduced at (1984) 14 VUWLR 229); and Kapanga Parumoana (Coromandel Harbour foreshore) (1872) 2 Coromandel MB 315.

9 *Kauwaerenga* (1870) 4 Hauraki MB 236.

10 In the Kauwaeranga (Thames foreshore) decision.

11 (29 May 1872) 28 *New Zealand Gazette* 347.

12 The Native Land Act 1873 (s 5) provided that the Governor in Council could divide the Colony into districts for the purposes of the Act. In 1874 the Governor did so: see (19 February 1874) 9 *New Zealand Gazette* 101; dividing the Colony into 11 districts, defining each district in terms of dry land. For instance, the Northern District was defined as "all that portion of the North Island" northward of a certain line "together with the adjacent islands". The eastern and western coastal boundaries of the Kaipara District were defined as being "bounded … by the sea". So were the other districts.

13 Parumoana (Porirua Foreshore) application (1883) 1 Wellington MB 147.

14 Te Whanganui-a-Orotu (Napier Inner Harbour) (1916) 66 Napier MB 235.

15 Awapuni Lagoon (Gisborne) (1928) 56 Gisborne MB 285.

16 Ngakororo Mudflats (Whakarapa Estuary, Hokianga) (1942) 12 Auckland NAC MB 137; Herekino (Rangikohu) Mudflats (Kaitaia) (1941) 72 Northern MB 82; and Orakei foreshore (Auckland) (1942) 12 Auckland Appellate MB.

17 The Te Moana-nui-a-Kiwa (the Pacific Ocean) claim (1955) 26 Hokianga MB 306.

18 *In Re The Ninety-Mile Beach* [1963] NZLR 461 at 480.

customary interests of tangata whenua. Section 12(2) of the Resource Management Act 1991, under which the foreshore and seabed is allocated, was enacted on the premise that the Crown was presumed to own the foreshore and seabed.[19]

16.7. There was never a time where Māori were asked whether they no longer wished to retain their interests in the takutai moana, as Article 2 of Te Tiriti/the Treaty guaranteed.

16.8. The Te Ture Whenua Māori Act 1993 provided that all "land" in New Zealand had one of six statuses.[20] The Act gave the Māori Land Court the jurisdiction to declare the status of any land.[21] In 2003 the Court of Appeal overturned the *Ninety-Mile Beach* decision and held that the Māori Land Court had jurisdiction to declare whether the takutai moana (out to 12 nautical miles to the edge of the territorial sea) had the status of Māori customary land.[22] That jurisdiction would have resulted in the recognition of customary title to areas of the takutai moana.

16.9. Parliament reacted by enacting the Foreshore and Seabed Act 2004. That Act vested the full legal and beneficial ownership of the public foreshore and seabed in the Crown[23] and ensured the Māori Land Court could not declare the public foreshore and seabed to be Māori customary land.[24] The Act provided a limited form of recognition of Māori interests in the takutai moana (essentially) through territorial customary rights[25] and customary rights orders.[26] The former could be obtained through an application to the High Court or through negotiation with the Crown. The latter could be obtained through those processes and by application to the Māori Land Court. The Act did not specify the legal consequences of territorial customary rights. Rather, it declared that the only redress for a successful application would be provided by the Crown.[27] The consequences of a

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19 Section 12(2), as it is currently worded, provides that no person may, unless expressly allowed by a national environmental standard, a rule in a regional coastal plan or in any proposed regional coastal plan for the same region, or a resource consent, —
(a) occupy any part of the common marine and coastal area; or
(b) remove any sand, shingle, shell, or other natural material from that area.

20 Te Ture Whenua Māori Act 1993, s 129(1).

21 Te Ture Whenua Māori Act 1993, s 131(1).

22 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

23 Foreshore and Seabed Act 2004, s 13.

24 Foreshore and Seabed Act 2004, s 46(2).

25 Customary or aboriginal title that could be recognised at common law and that is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed and which entitled the group, until the commencement of that part of the Foreshore and Seabed Act, to exclusive use and occupation of that area: Foreshore and Seabed Act 2004, s 32(1).

26 These orders recognised activities, uses or practices that:
- were, and had been since 1840, integral to tikanga;
- were carried on, exercised, or followed in accordance with tikanga in a substantially uninterrupted manner since 1840;
- continued to be carried on, exercised, or followed in accordance with tikanga; and
- were not prohibited by law.

(Foreshore and Seabed Act 2004, s 50(1)).

27 Foreshore and Seabed Act 2004, s 38.

customary rights order was that the rights holder could undertake the activity without the need for a resource consent, despite s 12(2) of the RMA.[28]

16.10. In 2008 Ngā Hapū o Ngāti Porou and the Crown reached an agreement that included redress in recognition of territorial customary rights in areas of the takutai moana o Te Tai Rāwhiti. The agreement represented a compromise. Both parties acknowledged that:[29]

16.10.1. the mana of Ngā Hapū o Ngāti Porou is unbroken, inalienable and enduring;

16.10.2. Ngā Hapū o Ngāti Porou continued to assert they had ongoing and enduring ownership interests in the takutai moana; and

16.10.3. the Crown asserted ownership to the takutai moana through the Foreshore and Seabed Act.

16.11. The agreement was premised on the continuation of various "accommodated matters", including (for instance) public access, navigation and existing fishing rights, amongst other things.[30] As such, the agreement did not confer on Ngā Hapū o Ngāti Porou the typical incidents of title that ordinarily follow from property ownership, such as those conferred under Te Ture Whenua Māori Act. Instead, the agreement provided redress that, in part, equated to aspects of property ownership or provided some form of regulatory control.

16.12. The agreement included (amongst other things):

16.12.1. a permission right – giving Ngā Hapū o Ngāti Porou the right to approve or withhold approval for any application for resource consent in areas of territorial customary rights);[31]

16.12.2. an environmental covenant instrument – requiring key public documents, that related to areas of territorial customary rights, to recognise and provide for the issues, objectives, policies, rules and methods set out in an environmental covenant to be prepared by Ngā Hapū o Ngāti Porou;[32]

16.12.3. a conservation mechanism – giving Ngā Hapū o Ngāti Porou the right to give, or refuse to give, their consent to: applications to establish marine reserves and conservation protected areas, applications for concessions, proposals to establish marine mammal sanctuaries and applications for marine mammal permits in areas of territorial customary rights;[33]

28 Foreshore and Seabed Act 2004, s 52.
29 Deed of agreement dated 31 October 2008, cl 3.1.
30 Deed of agreement dated 31 October 2008, sch 5, cls 3.1 and 3.2.
31 Deed of agreement dated 31 October 2008, cl 6.1(a).
32 Deed of agreement dated 31 October 2008, cl 6.1(c).
33 Deed of agreement dated 31 October 2008, cl 6.1(d).

16.12.4. a protected customary activities instrument – that entitled Ngā Hapū o Ngāti Porou to continue their ongoing customary activities in ngā rohe moana o Ngā Hapū o Ngāti Porou;[34] and

16.12.5. a wāhi tapu instrument – that enabled the making of prohibitions or restrictions on persons accessing wāhi tapu and wāhi tapu areas.[35]

16.13. In 2011 the te Takutai Moana Act was enacted.

16.14. The Preamble to the Act stated (amongst other things):

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

16.15. The Act repealed and replaced the Foreshore and Seabed Act. The Act declared that no one (including the Crown) was capable of owning the common marine and coastal area.[36] The Act also restored any customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act, stating those interests were to be given legal expression in accordance with the Act.[37] The legal expression given to those interests was provided in the form of recognising:

16.15.1. customary marine title,[38] with a test similar to, but less stringent than, the test for territorial customary rights; and

16.15.2. protected customary rights,[39] being essentially the same as the activities formerly protected by customary rights orders.

16.16. The Act stated that customary marine title provided an interest in land, but did not include the right to alienate (or otherwise dispose of) any part of the common marine and coastal area.[40] The Act otherwise specified the following rights exercisable once the test for customary marine title had been proved:[41]

16.16.1. the RMA permission right: premised on the Ngā Hapū o Ngāti Porou permission right;[42]

34 Deed of agreement dated 31 October 2008, cl 5.1(c).
35 Deed of agreement dated 31 October 2008, cl 5.1(d).
36 Te Takutai Moana Act 2011, s 11(2).
37 Te Takutai Moana Act, s 6(1).
38 Te Takutai Moana Act, s 58.
39 Te Takutai Moana Act, s 51.
40 Te Takutai Moana Act, s 60(1)(a).
41 The list is summarised in Te Takutai Moana Act, s 62(1).
42 Te Takutai Moana Act, ss 66-70.

16.16.2. the planning document: premised on the Ngā Hapū o Ngāti Porou environmental covenant instrument;[43]

16.16.3. the conservation permission right and rights in relation to protection purposes and marine mammal watching permits: premised on the Ngā Hapū o Ngāti Porou conservation mechanism;[44] and

16.16.4. protection of wāhi tapu and wāhi tapu areas: premised on the Ngā Hapū o Ngāti Porou wāhi tapu instrument.[45]

16.17. The Act also guaranteed public rights of access to, and navigation within, the common marine and coastal area.[46]

16.18. The 'rights' or consequences of customary marine title were therefore developed to fit within a regime that for 170 years had not recognised legal Māori interests in the takutai moana and was premised on the mistaken assumption the Crown owned the takutai moana. That regime was not developed to accommodate Māori interests in the takutai moana. Rather, recognition of Māori interests in the takutai moana was made subject to certain accommodated matters.[47]

16.19. Our legal system therefore currently treats Māori legal rights and interests to dry land (above mean-high water springs) in a very different way to Māori legal rights and interests to the takutai moana (below mean-high water springs). For example:

16.19.1. Owners of Māori freehold land may exclude non-owners from their land. The holders of customary marine title cannot. Every person has a legal right of access to and navigation within the common marine and coastal area, including areas of customary marine title.[48] Subject to the rights of public access and navigation, customary marine title holders may effectively decide (through the permission right and planning document) who may occupy space in a customary marine title area.

16.19.2. Owners of Māori freehold land may dispose of their interests in that land.[49] Holders of customary marine title may not alienate or otherwise dispose of a customary marine title area,[50] but may delegate or transfer their rights in accordance with tikanga.[51]

43 Te Takutai Moana Act, ss 85-87.
44 Te Takutai Moana Act, ss 71-76.
45 Te Takutai Moana Act, ss 78-81.
46 Te Takutai Moana Act, ss 26 and 27.
47 Te Takutai Moana Act, ss 63-65.
48 Te Takutai Moana Act, ss 26 and 27.
49 See Te Ture Whenua Māori Act 1993, Part 7 (ss 145-150E).
50 Te Takutai Moana Act, s 60(1)(a).
51 Te Takutai Moana Act, ss 60(3), 61.

16.19.3. Owners of Māori freehold land have no special role in the drafting of RMA plans that relate to their land. The holders of customary marine title do through the planning document.[52]

16.20. It would be fair to describe the status quo as having conferred on Māori, once they prove the tests for customary marine title and protected customary rights, a mix of regulatory functions and private rights over their takutai moana.

No prejudice should arise from the time taken to prove customary interests

17. An important timing issue arises. The interests recognised by the te Takutai Moana Act have been held since time immemorial. The tests for customary marine title and protected customary rights require proof that the interests have existed since 1840. The Act, however, confers rights only once the interests are proved to exist. And it takes considerable time to prove that the tests for customary interests have been met.

18. Because Māori have held (and will prove that they have held) customary interests since at least 1840, Māori should not be prejudiced by the establishment of a new legal regime before Māori are able to provide the proof of their interests.

19. The Marine and Coastal Area Register, which records all customary interests recognised under the te Takutai Moana Act,[53] records the following customary rights and interests that have been recognised to date:[54]

19.1. a discrete area of customary marine title off the south west coast of Rakiura (Stewart Island);

19.2. 14 discrete customary marine title areas along the Te Tairāwhiti coastline (between Pōtikirua (near Cape Runaway in the north) to Koutunui Head (near Te Puia Springs in the south); and

19.3. no protected customary rights.

20. In addition, the High Court has recognised customary marine title exists:

20.1. in a substantial area of the common marine and coastal area in the Bay of Plenty – in the western portion of the Ohiwa Harbour and the adjacent sea from the coast (from Maraetōtara to Te Rangi) out to the 12 nautical mile limit,[55]

20.2. in an area of Tauranga Moana;[56] and

20.3. in areas of Hawkes Bay out to 5km offshore, the 12 nautical mile limit and over certain reefs.[57]

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52 Te Takutai Moana Act, ss 85-93.

53 See the Marine and Coastal Area Register administered by LINZ: https://www.linz.govt.nz/about-us/māori-and-iwi-development/marine-and-coastal-area-register (last updated 4 February 2022; accessed on 17 May 2022)

54 Te Takutai Moana Act, s 114(1).

55 *Re Edwards (Te Whakatōhea, No 2)* [2021] NZHC 1025 at [660].

56 *Re Reeder (Tauranga Moana)* [2021] NZHC 2726 at [149].

57 *Re Pahauwera* [2021] NZHC 3599 at [598].

21. Currently, the entire common marine and coastal area of New Zealand (including out to the 12 nautical mile limit) is subject to applications for customary marine title and protected customary rights. It is difficult to predict precisely how long the High Court and Crown will take to process these applications. We anticipate substantial progress over the next ten years, but finally determining all applications is likely to take longer. It would be fair to say applications relating to substantial areas of the common marine and coastal area will be determined within the next 10-20 years.

22. Some of the above decisions are subject to appeals to the Court of Appeal. If the High Court's current approach to recognising customary marine title survives appeal, substantial areas of the common marine and coastal area will be found to be subject to customary marine title and protected customary rights out to at least some kilometres off shore and possibly to the 12 nautical mile limit.

23. We also understand from MfE that the first plans drafted under the new regime will be critical to setting the content of plans going forward for the next few decades. We also understand that the initial NBA and RSS plans will likely be developed over the next few years and will likely be operative no later than 2030. As such, influencing the initial plans over the next few years will be critical for Māori if they are to have a meaningful effect on the content of the plans in the new regime.

24. The problem for Māori is that they will not gain the rights under the te Takutai Moana Act for some years to come and before the first series of plans will be set.

25. Because the Crown has a Te Tiriti/Treaty duty to protect actively Māori rights and interests in the takutai moana and because the legal system failed to recognise those rights and interests until the 21st century, in our view Māori should have a significant, if not determinative, say in the setting of the initial plans for the coastal marine area. That would be consistent with:

    25.1. Cabinet's decision to give effect to Te Tiriti/Treaty principles, which must include the Crown's duty of active protection of currently held Māori interests in the takutai moana, and to provide greater recognition of Te Ao Māori, including mātauranga Māori;

    25.2. the fact that the legal system failed through the 19th and 20th centuries to recognise Māori rights and interests in the takutai moana; and

    25.3. the notion that the legal system currently confers regulatory powers to Māori in recognition for their takutai moana interests, as opposed to the ordinary incidents of land ownership.

26. As such, we raised a number of options, particularly in relation to decisions for allocation. We note these options below.

Giving effect to Treaty principles

27. We understand Cabinet decided that the new regime will be designed:[58]

    27.1. to give effect to Te Tiriti/Treaty principles and will, consistently with that decision, require all persons exercising functions under the new legislation to "give effect to" Te Tiriti/Treaty principles; and

    27.2. to give greater recognition of Te Ao Māori, including mātauranga Māori.

28. The transition of rights and interests from the te Takutai Moana Act into the new regime should be logical and consistent with overarching principle of giving effect to Te Tiriti/Treaty principles.

29. We note that the te Takutai Moana Act specifies that in order to "take account of" Te Tiriti/the Treaty, the Act recognises and promotes the exercise of customary interests through recognition of customary marine title, protected rights and participation in conservation processes.[59] It follows that the Act is premised on giving effect to Te Tiriti/the Treaty through providing legal recognition to Māori interests in the takutai moana.

30. As we have noted above, Māori currently hold rights and interests in the takutai moana whether or not those have been recognised legally under the te Takutai Moana Act. In our view, to give effect to Te Tiriti/Treaty principles requires decision-makers to recognise rights and interests that exist, whether or not they have been proven under the Act.

31. We also note that under the status quo regional councils must "recognise and provide for" planning documents (prepared by the holders of customary marine title) in their regional documents.[60] If that requirement is carried through to the new regime at that level of intensity ("recognise and provide for"), an inconsistency would arise: whoever performs the function of regional councils would be required:

    31.1. to "give effect to" Treaty principles, and thereby (in our view) give effect to any planning document; but also

    31.2. to "recognise and provide for" any planning document.

32. As such, there may be aspects of the transition of te Takutai Moana Act rights where the intensity of the right should logically be elevated to be consistent with giving effect to Tiriti/Treaty principles. Doing so is also consistent with Cabinet's decision to give greater recognition to Te Ao Māori.

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58 See the Minister for the Environment's paper to Cabinet, *Reforming the Resource Management System*, 14 December 2020, recommendation [12.3], as redacted and released under the OIA: https://environment.govt.nz/assets/publications/Cabinet-papers-briefings-and-minutes/cabinet-paper-reforming-the-resource-management-system_1.pdf

59 Te Takutai Moana Act, s 7.

60 Te Takutai Moana Act, s 93(6)(a).

A new regime on allocation

33. Policy formation on a new regime for allocation of space within the common marine and coastal area was in a state of flux as we engaged with officials. We understand that officials would be recommending:

    33.1. section 12(2) of the RMA is to be retained in substance, meaning that any allocation of space in the common marine and coastal area will require resource consent; and

    33.2. the RMA permission right would apply to any application for resource consent to occupy space.

34. As such, as we understand it, the existing rights of customary marine title groups to exercise the permission right will be retained. We support that. We also support changes to the way in which the RMA permission right is exercised in relation to any allocation decisions or processes to ensure it is exercised at the most optimal time, including to ensure the customary marine title group is as informed as possible about the proposed occupation.

35. It was difficult to understand whether there would in fact be a change in the extent of permitted activities for the occupation of space in the common marine and coastal area. If there is, the RMA permission right needs to be applied to any such activities, whether resource consent is required or not.

36. There is, as noted above, a significant issue, however, with the interim period between the new regime coming into effect and the processing of applications for customary marine title and protected customary rights. As noted above, customary marine title and protected customary rights recognise existing rights and interests that have been exercised since at least 1840. Active protection under te Tiriti/the Treaty of those rights and interests should not occur at a later point in time when the High Court and/or Crown has processed applications, particularly if, in the meantime, important decisions are made in the takutai moana, such as the setting of NBA/RSS plans and/or decisions on the allocation of space. To account for this problem in relation to decisions for the allocation of space, we raised the following options for discussion:

    36.1. Applicants for customary marine title (however they are identified) would have exercise a permission right over any application for allocation pending determination of their application for customary marine title. This removes the risks that the system would not give effect to, and be inconsistent with, te Tiriti/the Treaty. The situation would be temporary: it would only last from the time the new plans come into force (estimated to be by 2030) and the time when customary marine title applications are determined (estimated to be around 2033-2043). That time period seems fair in the circumstances which included the legal system's failure to recognise any form of customary interest in the takutai moana from 1840 until the 21st century.

    36.2. Another option would be as above, but applicants for customary marine title could not unreasonably withhold their permission. That would give rise to an ability to appeal and/or seek judicial review of a decision not to consent.

36.3. Another option would be that any decision-maker on allocation of space would be required to "recognise and provide for" the views of applicants for customary marine title.

36.4. A further option would be for representatives of the customary interest holders (however identified) to be on the decision-making body. This might be a similar arrangement to arrangements for the Te Oneroa-a-Tohe (Ninety Mile Beach) Board with four iwi representatives and four council representatives.[61]

Whānau interests

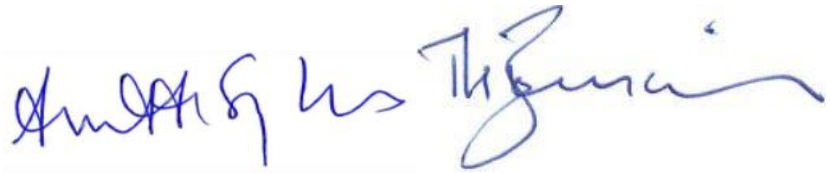
37. The te Takutai Moana Act recognises the interests of iwi, hapū and whānau. The Act permits whānau to seek and obtain recognition of their customary interests. The word "whānau" appears 28 times in the Act.

38. We understand the new regime is predicated, however, on recognition of the interests of "iwi and hapū" in te taiao. The draft exposure Bill did not appear to account for an express whānau interest in te taiao, and therefore in the takutai moana. That is inconsistent with the te Takutai Moana Act's express recognition of whānau interests in the takutai moana.

39. As such, we suggest consideration be given to adjusting the new regime's recognition of "iwi and hapū" interests in te taiao to include whānau.

20 Pipiri 2022

Sarah Shaw



Annette Sykes Tom Bennion

Andrew Irwin

Mātānuku Mahuika

61 See, for example, Te Rarawa Claims Settlement Act 2015, s 79. We note the Te Oneroa-a-Tohe management area includes areas of the marine and coastal area.