Frequently Asked Questions

25 July 2024

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 permision 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); and
- the right to create a planning document for the management of the CMT area that must be taken into accouont by a range of public bodies.

Why is the Government amending the takutai moana legislation?

The Government is concerned the Court of Appeal's interpretation of the section 58 test in Re Edwards, as well as the earlier High Court decisions, have changed the nature of the test and materially reduced the threshold for the recognition of CMT.

What are the amendments to the Act?

The Government is amending the Marine and Coastal Area Act to overturn a Court of Appeal decision and restore Parliament's intent regarding the section 58 test for customary marine title.

These measures include:

- inserting a declaratory statement that overturns the reasoning of the Court of Appeal and High Court in *Re Edwards*, and 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 of the Act (section 106) to clarify that applicant groups are required to prove exclusive use and occupation from 1840 to the present day; and
- making clearer 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.

Why doesn't the government wait for the Supreme Court to consider the appeal, they are an appellant?

The Government's concerns about the Court of Appeal's decision on CMT form the basis of the Crown's ongoing appeal to the Supreme Court. However, applicant groups and the public need to have confidence that the Takutai Moana legislation and its tests are interpreted and applied consistently, and as Parliament intended. This government is committed to delivering on that, as reflected in the coalition agreement commitment between the National Party and NZ First.

What does this mean for current applications?

Existing CMT decisions 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.

Undetermined applications include five High Court cases that have had, or are having, a hearing but where there are no judgments. Any CMT awards made between the date of the policy announcement and the date of enactment would be overturned and those cases would need to be reheard under the clarified test.

The Government acknowledges that until Parliament legislates to amend the Act that the Courts are required to apply the Court of Appeal's decision.

Is this a return to the situation under the Foreshore and Seabed Act (2004)?

No. The changes are about restoring Parliament's original intent under the Marine and Coastal Area (Takutai Moana) Act 2011 which was enacted to protect the interests of all New Zealanders and to recognise the customary interests of whānau, hapū and iwi in the common marine and coastal area.