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Tēnā koe

Marine and Coastal Area (Takutai Moana) Act 2011 amendments

1. I am writing on behalf of New Zealand Law Society Te Kāhui Ture o Aotearoa (Law Society), regarding intended changes to the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act) announced on 25 July 2024.

2. The Law Society is concerned about aspects of the intended changes affecting te Tiriti o Waitangi Treaty of Waitangi (Treaty) relationships, the rule of law, access to justice, and other constitutional issues including breaches of fundamental rights. The Law Society does not support the proposed changes and recommends they do not proceed.

3. This letter details the Law Society's concerns and recommends changes that should be considered if amendments are made to the Takutai Moana Act.

Proposed amendments to the Takutai Moana Act

4. Cabinet agreed to make changes to the Takutai Moana Act on 8 July 2024.[1] This decision was not made public until 25 July 2024. The proposed amendments are framed as responding to decisions of the High Court and Court of Appeal in the *Re Edwards* case (***Edwards***).[2] Changes to the Act will include:[3]

    a. A declaratory statement that overturns the reasoning in the High Court and Court of Appeal's judgments in *Edwards*, as well as High Court judgments since the *Edwards* High Court decision where they relate to the test for customary marine title (**CMT**) of Māori groups.

    b. Adding text to section 58 of the Act defining the terms 'exclusive use and occupation' and 'substantial interruption'. These were not previously defined in the Takutai Moana Act. While drafting detail is not settled, the stated intention of

1 Cabinet Social Outcomes Committee Paper "Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011" (8 July 2024) (**Cabinet Committee paper**); Cabinet Minute of Decision "Clarifying Section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011" CAB-24-MIN-0256 (**Cabinet Minute**).

2 *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025; *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504.

3 Cabinet Minute at [6] and [9]; Letter from Hon Paul Goldsmith to applicants "Changes to the Marine and Coastal Area Act" (25 July 2024).

this amendment is to tighten the test and, accordingly, reduce the amount of the marine and coastal area in which CMT claims are likely to succeed.[4]

c. Amending the burden of proof in section 106 of the Takutai Moana Act to require applicants to demonstrate exclusive use and occupation from 1840 to the present day.[5]

d. Amending the Act's "framing" provisions (being the preamble, purpose, and Treaty of Waitangi sections) "in a way that allows section 58 to operate more in line with its literal wording". The detail of what changes should be made to the framing sections is being worked through.

e. Providing that the changes, if enacted, would take retrospective effect from the date of the Cabinet policy announcement on 25 July 2024.

The Law Society's concerns

5. The Law Society has significant concerns about the proposals. They relate to:

   a. Treaty of Waitangi consistency and disregard for Treaty principles;

   b. the rule of law, including but not confined to the retrospective application of the intended changes;

   c. arbitrary and inconsistent treatment of applicants, breaching fundamental rights and raising issues of access to justice; and

   d. progressing the changes in an accelerated timeframe that is not consistent with good legislative and policy process.

6. At the end of the letter, options are suggested that could mitigate some aspects of the proposals. However, it should be noted that while adopting these options may assist in mitigating some aspects, they do not resolve the concerns.

The proposed amendments may be inconsistent with the Treaty of Waitangi

7. Claims to the Waitangi Tribunal have already contended that the Takutai Moana Act undermines Māori customary rights in the marine and coastal area and breaches the Treaty of Waitangi. In 2023, the Waitangi Tribunal found that aspects of the Act are inconsistent with the principles of the Treaty,[6] and that on the whole the Act failed to balance Māori rights against other public and private rights in the takutai moana. The Tribunal found:[7]

> On a number of occasions this balancing exercise has been unreasonable, arbitrary, and unjustifiably restrictive of important Māori customary rights and interests that require greater recognition and protection. The Crown has breached the Treaty principles of active protection, equity, and equal treatment in doing so and has caused, and/or will

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4 Cabinet Committee paper at [45] and see also [43] and [47]; Te Arawhiti to Minister for Treaty of Waitangi Negotiations "Further advice on options for section 58 of the Marine and Coastal Area (Takutai Moana) Act" (27 May 2024) at [31] and [41].

5 Compare *Re Edwards* at [435]–[436]. According to the majority of the Court, the applicant group does not need to prove "without substantial interruption".

6 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (pre-publication version, Wai 2660, 2023) (**Wai 2660**).

7 At 237.

> likely cause, prejudice to Māori. As the Crown has failed to achieve a proper balance, the resulting restriction of Māori customary rights and interests in this significant taonga is expropriatory.

8. The Tribunal issued a suite of interim recommendations, which it considered must be implemented as a package.[8] Among these, the Tribunal criticised the 'without substantial interruption' test in section 58, recommending that this part of the test be removed.[9] It also observed that many of the initial and significant tikanga-focused concerns that claimants legitimately expressed about the test for a customary marine title had not materialised because of the way in which courts had applied the test.[10]

9. These Tribunal findings are relevant to the present proposals because, rather than addressing the existing Tribunal recommendations, the Crown seeks to revisit the balance and further restrict the expression of Māori customary rights and interests in the takutai moana. The amendments proposed, including, the decision to take steps to set a statutory definition of 'without substantial interruption' in section 58 runs counter to the Tribunal's findings and risks prejudicing applicants — for example, by denying their:

   a. Ownership over, and the ability to undertake extraction of, minerals and resources in their takutai moana.

   b. Ability to exercise kaitiakitanga (for example, through the loss of the right to approve or reject resource consents in a customary marine title area, and through the loss of the right to suggest changes to New Zealand Coastal Policy Statement).

   c. Ability to demarcate areas of wāhi tapu and protect wāhi tapu.

10. The preamble, purpose and Treaty of Waitangi sections of the Takutai Moana Act position the Act as a regime to recognise (as opposed to being a barrier to the recognition of) customary interests.[11] Courts have interpreted section 58 of the Act in that context. As the Cabinet paper notes, the contemplated changes to these framing sections are likely to be seen by Māori and others as "an erosion of the objective and political compromise of the Act — that distinguished this Act from the original Foreshore and Seabed Act 2004".[12]

11. The Waitangi Tribunal has also emphasised the need to undertake meaningful engagement with Māori about matters which could affect their rights and interests in the takutai moana,[13] noting this engagement may extend beyond mere consultation with Māori and require informed consent "to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2".[14] No such consultation or engagement occurred before Cabinet agreed to amend the Takutai Moana Act.

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8 At xix and 238.
9 At 98–99.
10 At 95–96.
11 Te Arawhiti "Further advice" at [25].
12 Cabinet Committee paper at [67].
13 Wai 2660 at 24.
14 Waitangi Tribunal *He Maunga Rongo* (Wai 1200, 2008) at 173; see also Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 235: the "[f]ull, free, and informed consent of Māori is required when a legislative change substantially affects or even controls a matter squarely under their authority".

12. Bearing in mind these issues, the proposed changes risk jeopardy to the Treaty relationship. Treaty principles of good faith, good government, partnership, equity, and redress are engaged, including (as discussed below) by a process that allows only brief feedback from applicant groups, and the making of policy decisions ahead of that process.[15] To date, the publicly available briefing and Cabinet policy materials released following the announcement do not appear to include the evaluation of policy and legislative proposals' consistency with the Treaty and Treaty principles that Cabinet processes ordinarily require.[16] We expect these evaluations to be made publicly available at the time an amendment bill is introduced to the House. Among other matters, they should assess whether and how the proposed amendments to the Takutai Moana Act respond to concerns raised by the Waitangi Tribunal (including any findings and recommendations from the Wai 3400 urgent inquiry that is currently underway).[17]

The amendments undermine the rule of law

13. Parliament is entitled and empowered to pass laws to clarify its intent where it disagrees with a judicial interpretation.[18] However, where it does so, care is needed not to upset the balance between the branches of government or disrupt fundamental principles underpinning the rule of law. The proposed approach risks undermining these constitutional conventions, including:

    a. the presumption that laws should not take effect retrospectively; and

    b. principles of comity and of the separation of powers.

Retrospective effect, comity and the separation of powers

14. There is a "well-established" and "longstanding" common law presumption that legislation generally has prospective and not retrospective effect, codified in section 12 of the Legislation Act 2019.[19] Further, as a matter of convention arising out of important constitutional principles of comity and the separation of powers, legislation should not generally:[20]

    a. interfere with the judicial process in cases before the courts; or

    b. deprive individuals of their right to benefit from judgments obtained in proceedings brought under earlier law or continue proceedings under that law asserting rights and duties.

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15 See letter from Hon Paul Goldsmith to applicants "Changes to the Marine and Coastal Area Act" (25 July 2024), which notes Cabinet has already agreed to certain amendments to the Act.

16 Cabinet Office *Cabinet Manual 2023* (Department of the Prime Minister and Cabinet, Wellington, 2023); Legislation Design and Advisory Committee *Legislation Guidelines* (2021 edition, September 2021) (**LDAC Guidelines**) at 28–32.

17 See Waitangi Tribunal "Reasons for granting an urgent inquiry into the Marine and Coastal Area (Takutai Moana) Financial Assistance Scheme and proposed amendments to the Act" (Wai 3400, #2.5.4, 26 July 2024) at [74], which suggests the Tribunal intends to make findings and recommendations regarding the proposed amendments.

18 LDAC Guidelines at 59; see generally ch 12.

19 Legislation Act 2019, s 12; Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th edition, LexisNexis, Wellington, 2021) at 819 (**Burrows and Carter**).

20 LDAC Guidelines at 59; and, generally, Burrows and Carter at ch 18.

15. *Te Rūnanga o Ngāti Whātua v Attorney-General* (***Ngāti Whātua v A-G***) is a timely illustration of the importance of strictly maintaining boundaries between Parliament and the courts, and the mutual restraint and respect that at times will be entailed.[21]

16. While Parliament has the power to pass retrospective legislation,[22] strong reasons are generally required to justify a departure from the presumption against retrospectivity in order to avoid infringing the rule of law.[23] This will be particularly so where statutes affect substantive rights. The common law "leans against retrospective application of statutes, particularly where they take away existing rights" or give rise to a "palpable injustice".[24]

17. This is why some legislation may specifically preserve the position of proceedings currently under consideration by the courts. Even when there are good reasons for a law to apply with retrospective effect and alter the law as determined by a court, the public interest in having the law clarified generally needs to be weighed against the competing interest of allowing litigants to conclude their proceedings under the law as it was when they commenced their proceedings.

18. If enacted, the amended section 58 test and other Takutai Moana Act changes will be retrospectively applied from 25 July 2024, the date on which Cabinet decisions were announced, and will affect all applications undetermined at that date. Court judgments delivered between 25 July 2024 and the date of enactment will be overturned. In this case, giving retrospective effect to the proposed amendments gives rise to several significant concerns:

    a. It undermines the separation of powers and the principle of comity by allowing Parliament to interfere with judicial processes, as discussed further below.

    b. It creates uncertainty in respect of applications which have been fully or part-heard, and risks creating perverse outcomes where a part of an application has already been determined under the current law, and the remainder of the application is subsequently determined under the new law.

    c. As a result, it has the potential to undermine the rule of law, and create tension between applicants who did not get the benefit of the earlier test despite making an application while the earlier test was in effect.

    d. The need to rehear some applications under the new law will result in further delays, disruptions and significant additional costs for the affected applicants. These delays and additional costs will impact their abiity to access justice, and have their matter determined in a timely manner.

19. Against these concerns, the Law Society is of the view that the reasons given in this case in support of retrospective effect (that there could be an "incentive for cases pending judgments to rush to decisions" so they can be made on the basis of the Court of Appeal's

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21 *Te Rūnanga o Ngāti Whātua v Attorney-General* [2024] NZHC 2271 (13 August 2024).

22 Burrows and Carter at 809, 811 and 818; LDAC Guidelines at 59. There is said to be "a 'sliding scale' of injustice, so that some retrospective legislation is unobjectionable": Burrows and Carter at 814.

23 LDAC Guidelines at 59.

24 Burrows and Carter at 818, 819 and 825.

present interpretation of the Takutai Moana Act) do not justify a departure from the presumption against retrospectivity.[25]

Precedent for approach to a declaratory statement

20. The Parliamentary Privilege Act 2014 (**PPA**) is referred to as a precedent for altering law from previous court cases by way of a declaratory statement.[26] That Act defined, for the avoidance of doubt, "proceedings in Parliament" for the purposes of article 9 of the Bill of Rights 1688. It did so to alter the law in the decision in *Attorney-General v Leigh*.[27]

21. In the Law Society's view, the PPA does not support the approach proposed. The PPA specifically excluded application of the change to existing legal proceedings.[28] Consequently, the PPA approach is an example of legislation that was enacted to be declaratory of the law as Parliament had intended and to apply despite a named court decision, while avoiding the rule of law concerns relating to retrospectivity discussed above. However, the PPA could provide a useful precedent if it were fully applied. It suggests an approach that is more consistent with best practice legislative guidance and principles of comity and the separation of powers.

Arbitrary and inconsistent treatment of applicants breaches fundamental rights and raises issues of access to justice

22. The intended commencement date of the changes to the Takutai Moana Act results in the arbitrary and inconsistent treatment of applicant groups in ways that are incompatible with their fundamental rights, including the principle of natural justice, and raise issues of access to justice.[29] The announcement of 25 July 2024 affects applicants whose hearings were otherwise imminently set down to proceed, in addition to others whose cases have been heard in whole or part and are awaiting judgment. Public statements have made clear that, regardless of whether cases do proceed prior to a new law being enacted, those applicants can no longer have their rights and interests determined under the existing law and judgments will be overturned. Effectively altering the law by public announcement not legislative process also has rule of law implications.[30]

23. Applicants whose cases have not been determined by way of a judgment before 25 July 2024 will be treated differently from those who have, because:

    a. While wording is not settled, the statutory test will be reframed in ways that are harder for applicants to meet. Applications re-heard under the amended Takutai Moana Act are less likely to succeed in achieving orders granting CMT.

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25 Cabinet Committee paper at [88] and, generally, [77]–[89]; see also "Takutai Moana: Clarifying section 58 of the Marine and Coastal Area (Takutai Moana) Act 2011" (draft Cabinet paper, 18 April 2024) at [39]–[40]. As Te Arawhiti noted ("Further advice" at [64]): "There are … only a small number of CMT awards to date, and these (while larger than the Crown may have anticipated), are not so far beyond what could be expected going forward as to cause issues."

26 Cabinet Committee paper at [55].

27 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 (SC); Parliamentary Privilege Act 2014, ss 3(2)(c) and 10(7).

28 Parliamentary Privilege Act 2014, s 16.

29 New Zealand Bill of Rights Act 1990, s 27; and see *Ngāti Whātua v A-G* at [63]: "In an administrative (as opposed to a legislative) context, a person's right to natural justice engages when a decision might be made which affects that person's rights, obligations or interests."

30 See *Fitzgerald v Muldoon and Others* [1976] 2 NZLR 615.

b. Applicants who have engaged in and prepared for Takutai Moana Act proceedings (which are lengthy, complex and costly processes) in good faith and at significant time and cost will need to revise their cases and, for some, repeat the process.

c. There are risks of applicants' ability to adequately present their cases being affected by consequent delay, such as where pūkenga for applicant groups providing evidence as to tikanga and mātauranga are elderly or unwell.

d. The Law Society understands that there have been recent funding changes for Takutai Moana Act applicants. There is uncertainty what continuing funding will be available for applications which require rehearing or further preparation to address the new law. These concerns are reflected in the 15 August 2024 decision of *Re Ngāti Kere* where Gwyn J noted that the well-documented funding constraints are limiting the ways in which applicants are able to participate in hearings.[31]

24. The potential for arbitrarily differential treatment and prejudice arising for applicant groups, based on when their cases were scheduled for hearing and determined by the courts, is noted in draft advice from Te Arawhiti — saying that timing is not within applicant groups' control and consequently would be seen as unfair.[32] The Law Society concurs with this view. While applying the law change retrospectively may minimise some overall disparity by ensuring that as many applicants as possible are dealt with under the new law, it does not eliminate the problem of arbitrary inconsistency that seriously disrupts and disadvantages some applicants. Instead, it creates a group of applicants who are disproportionately affected. It also raises further rule of law concerns — effectively changing the law by public statement of the Executive, rather than through Parliamentary process.

25. Prejudice is not unique to those in the courts. Avoiding retrospectivity would also allow those applicants that have been progressing through direct engagement for many years (some having been transferred from negotiations under the Foreshore and Seabed Act 2004) and are approaching the end of the process to complete engagement on the legal tests that, since filing, they have been working toward.

Inadequate legislative and policy process

26. Te Arawhiti is carrying out targeted consultation with what it describes as Takutai Moana Act stakeholders for a three-week period. This does not include all applicants. In the Law Society's view, the swift timeframe for progressing these proposals does not meet expectations of a good policy and legislative process, particularly in the light of the significance of the change. The likely impact of the short consultation timeframe is acknowledged by officials, noting that "[i]t would allow time to inform applicant groups of the proposed amendments and invite them to provide their views, but it would allow very little time for those views to be taken into account".[33] The time frame also provides

31 *Re Ngāti Kere (Application for Leave to Appeal Decision Re CMT Application Area)* [2024] NZHC 2298 at [43].
32 Cabinet Committee paper at [83].
33 Te Arawhiti "Takutai Moana: section 58 options" (briefing paper, 11 April 2024) at [59].

insufficient time for the Wai 3400 Waitangi Tribunal to hear claims, issue its report, and for that report to be meaningfully taken into account.

27. Public statements and consultation material further state that a decision has been made to introduce changes, and that in broad terms the nature of those changes has been decided.[34] The purpose of the limited consultation, and whether that consultation can have any impact, is therefore unclear. Publicly released materials anticipate the continuing speed of the legislative process,[35] and call attention to risks such as "limited time for consulting with applicant groups on the amendments; condensed time for drafting amending legislation; and significantly expediting the select committee process".[36] Particular risks are identified relating to the decision to revise the framing provisions of the Act, potentially requiring amendments of significant scope and complexity to be done in a very short time:[37]

> [These] are not technical drafting measures to secure clarity. They would likely involve a substantial redrafting of a number of provisions of the Act – requiring careful and time-consuming drafting in order to provide sufficient and enduring direction to the judiciary.

28. The Law Society is always concerned where policy and legislative reform processes are truncated, affecting the ability to adequately draft, consider and respond to legislative proposals at likely detriment to the resulting quality of the law. On this matter, our views are consistent with those expressed by the Attorney-General in her letter of 25 March 2024, advising that "rushing legislation and skipping steps increase the risk that we get it wrong".[38] In this case, the concerns are made more pressing by the risks of Treaty inconsistency which arise from reduced consultation with Māori, on matters closely affecting them. These concerns remain, notwithstanding the decision of the High Court in *Ngāti Whātua v A-G* that duties on the Crown to consult as part of its policy and legislative process are not a matter for the court.[39]

Alternative options

29. We note finally that there remains potential for some mitigations to the proposals.

Section 58

30. Where applicant groups have, customarily, shared parts of their takutai moana, it is not clear if the Government intends to rule out the possibility of CMT being jointly held. Regardless of intended changes to the section 58 test, there seems no reason not to provide for the concept of 'shared exclusivity' addressed by the High Court and Court of Appeal in *Edwards*. As the Waitangi Tribunal has noted, this view is more consistent with

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34 Letter from Hon Paul Goldsmith to applicants "Changes to the Marine and Coastal Area Act" (25 July 2024); Hon Paul Goldsmith "Test for Customary Marine Title being restored" (media release, 25 July 2024).

35 Letter from Hon Paul Goldsmith to applicants "Changes to the Marine and Coastal Area Act" (25 July 2024): the Government intends "to finalise the drafting of the Amendment Bill so it can be introduced into Parliament and passed by the end of 2024".

36 Cabinet Committee paper at [15].

37 Te Arawhiti "Further advice" at [51].

38 Marc Daalder "Attorney-General warns Govt against rushed lawmaking" (Newsroom, New Zealand, 19 July 2024); and see Te Arawhiti "Further advice" at [73].

39 [2024] NZHC 2271.

the way in which Māori groups proceeded according to tikanga and it would be desirable for the Takutai Moana Act to be clear and unambiguous.[40]

Definitions of 'substantial interruption' and 'exclusive use and occupation'

31. The Waitangi Tribunal recommended removing the 'substantial interruption' test from the Takutai Moana Act.[41] If, however, it is not removed, the terms 'substantial interruption' and 'exclusive use and occupation' should be defined in a tikanga-sensitive way. As the assessment needs to be made relative to the application, and the circumstances of each application are likely to be different, definitions should leave room to allow for this and leave the Court with something to decide as the decision-maker on applications. The minority decision in *Edwards* could be considered as one possible appropriate source of wording.[42]

32. For 'substantial interruption', it appears an evaluative, rather than quantitative, definition is favoured (such as "any sufficiently significant interruption regardless of its nature"). In principle, this seems appropriate.

Changes to the framing sections (preamble, purpose and Treaty sections).

33. If changes are to be made in the framing provisions, the most appropriate option would be to have something in the Preamble. For example, a new recital (5) could be added about interpretation post-*Edwards* to give effect to recital (4). In the Law Society's view, more significant changes to the Preamble would be undesirable, as doing so risks straying into a broader policy change than intended. Additional changes to the purpose and te Tiriti sections would be more consequential, as they go to the overall policy of the Takutai Moana Act, not confined to determination of CMT. If that is the intention, a wider and longer process to make the changes would be indicated (as done for the process leading up to enactment of the Takutai Moana Act) to ensure proper consideration of relevant matters and continue rebuilding relations after the Foreshore and Seabed Act (as was the Act's intent).

Retrospectivity

34. Amendments should not apply retrospectively to decisions made by the courts or to applications heard but not determined prior to the date of enactment of the more restrictive test.

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40 Wai 2660 at 96.

41 At 99.

42 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, per Miller J at [162] and see also para [143]. Miller J considered that exclusive use and occupation: "requires both an externally-manifested intention to control the area as against other groups and the capacity to do so. Exclusivity is a question of fact, heavily dependent on the characteristics of the specified area, the kinds, frequency and intensity of use, and the circumstances of claimant groups. The inquiry must be sensitive to the methods that were and are available to assert mana. It must also be sensitive to the practice of whanaungatanga and the existence of whakapapa linkages which mean that other groups may not have been physically excluded from the specified area but rather used its resources with permission of the applicant group."

Repeal or reset of statutory deadline for applications

35. The Waitangi Tribunal has already recommended that the statutory deadline in the Takutai Moana Act should be repealed. Given the proposed changes, the Law Society supports repeal of the deadline or, failing that, a fresh deadline being set for existing applications to be amended to better reflect the way in which the takutai moana is held, and new applications to be filed. This would also go some way to remedy the "dual pathway" problem that the previous Minister for Treaty of Waitangi Negotiations identified and consulted on in 2022.

Nāku noa, nā

David Campbell
Vice President