



28 September 2022

Minister for Trade and Export Growth

For action by

6 October 2022

Wai 2522 E-commerce Report – Findings and proposed response

BRIEFING Overview Submission

PURPOSE To update you on the Waitangi Tribunal's third and final Wai 2522 report and its findings on Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) e-commerce provisions, and to seek approval of the proposed Government response.

Tukunga tūtohua – Recommended referrals

Prime Minister	For information by	20 October 2022
Minister of Finance	For information by	20 October 2022
Minister for Māori Crown Relations: Te Arawhiti	For information by	20 October 2022
Minister for Treaty of Waitangi Negotiations	For information by	20 October 2022
Minister of Foreign Affairs	For information by	20 October 2022
Minister for Māori Development	For information by	20 October 2022
Minister of Internal Affairs	For information by	20 October 2022
Minister of Justice	For information by	20 October 2022
Minister for Digital Economy and Communications	For information by	20 October 2022
Minister of Statistics	For information by	20 October 2022
Associate Minister of Statistics	For information by	20 October 2022
Minister of State for Trade and Export Growth	For information by	20 October 2022
Parliamentary Under-Secretary to the Minister for Trade and Export Growth	For information by	20 October 2022

Taipitopito whakapā – Contact details

NAME	ROLE	DIVISION	WORK PHONE
Wendy Matthews	Divisional Manager	Trade Policy and Negotiations Division	s9(2)(a)
Jeremy Salmond	Corporate Counsel	Corporate Legal Unit	s9(2)(a)

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Pito matua – Key points

- The Waitangi Tribunal released its third and final Wai 2522 report on the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) Agreement, in November 2021. The report focused on four articles in the CPTPP's e-commerce chapter.
- The Tribunal found that in negotiating this chapter, the Crown breached the Tiriti o Waitangi/Treaty of Waitangi ("Treaty") principles of partnership and active protection for the taonga that is mātauranga Māori.
- The Tribunal said that this was due to the Crown's lack of understanding in regard to the nature of Māori interests potentially impacted by these CPTPP commitments, and a consequent failure to negotiate outcomes that actively protected those interests.
- The Tribunal concluded there was a material risk of regulatory chill, but at the same time acknowledged that it was difficult to quantify or determine these risks to Māori interests and whether such risks will result in actual prejudice. s9(2)(h)
- In a notable departure from normal practice, the Tribunal did not issue any recommendations in its report. The constructive changes demonstrated by the Crown over the period of the inquiry, including the establishment of new structures and practices in the Crown's engagement with Treaty partners, were cited as reasons for this "novel" approach taken by the Tribunal.
- Officials nevertheless acted immediately to respond to the Tribunal's findings, including building on existing engagement with Māori and making substantive changes to FTA negotiating practices to enable Māori to exercise more and genuine influence on negotiations, resulting in adjustments to e-commerce provisions in FTAs (including changes to text in the NZ-EU FTA) and changes to FTA content more broadly. This has involved significant engagement with Treaty partners, including Te Taumata and Ngā Toki Whakarururanga, and other Māori bodies. Previous submissions to you in the context of UK-FTA, EU-FTA and other ongoing negotiations and in regard to the upcoming digital trade strategy, have provided advice reflecting the Wai 2522 findings.
- In parallel, domestic policy initiatives such as the Digital Strategy for Aotearoa and the development of a Māori Data Governance framework, are further addressing underlying Māori interests and concerns raised by claimants in the digital area.
- Officials therefore propose the Crown respond to the Wai 2522 report by continuing the ongoing good faith engagement with Treaty partners on international digital trade policy and FTAs more broadly. This will sit alongside the digital trade policy review, and Treaty partner involvement in the domestic digital policy agenda. Officials propose to share the Government approach in writing with the claimants, but do not consider that a formal public announcement is required. s9(2)(g)(i)

Signed by Vangelis Vitalis

Vangelis Vitalis

Wai 2522 E-Commerce Report – Findings, Analysis, Response

for Secretary of Foreign Affairs and Trade

Tūtohu – Recommendations

It is recommended that you:

- | | | |
|---|--|------------------|
| 1 | Note that the Waitangi Tribunal’s Wai 2522 Report on the CPTPP’s e-commerce provisions found that the Crown failed to meet the Treaty principles of partnership and active protection, due to failure to understand and actively protect Māori interests, resulting in risks to Māori interests; | Yes / No |
| 2 | s9(2)(h) | Yes / No |
| 3 | Note that, in a departure from normal practice, the Tribunal did not issue any recommendations, citing constructive changes in Crown engagement with Treaty partners, a significant shift in government policy, and other aspects of the breach that have been, or are being, remedied; | Yes / No |
| 4 | Note that officials are working to proactively address Māori interests in e-commerce provisions and digitalisation generally, at international and domestic levels, and note previous submissions to Ministers have provided advice on current and upcoming trade negotiations and the digital trade strategy that reflect Wai 2522 findings; | Yes / No |
| 5 | Note that the range of domestic activities under way to work with Māori in digital policy is s9(2)(h) | Yes / No |
| 6 | Note that proactive steps include deeper and regular engagement and good faith dialogue with Treaty partners; changes to negotiating positions on e-commerce provisions and digital trade policy, and a range of domestic policy initiatives; | Yes / No |
| 7 | Agree that the Government’s approach responding to the Wai 2522 e-commerce Report, s9(2)(g)(i) will: | Agree / Disagree |
| | 7.1 Acknowledge the useful and constructive contribution the Tribunal’s Report has made; | Agree / Disagree |
| | 7.2 Continue engagement by officials with Māori representatives on digital issues, and in particular by MFAT with Treaty partners to learn about Māori digital trade interests and to collaborate to protect their interests; | Agree / Disagree |
| | 7.3 Continue digital policy work at international and domestic levels to proactively identify, provide for, and advocate for protections for Māori interests within the digital trade sphere s9(2)(j) | Agree / Disagree |

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- s9(2)(j) noting the considerable work under way across the public sector;
- 7.4 Continue coordination across agencies to share information, best practice, and promote policy coherence as the Government’s digital work progresses; **Agree / Disagree**
- 7.5 Report to Ministers in 18 months on progress; **Agree / Disagree**
- 7.6 Engage with claimants including through their successor bodies to advise them in writing of the proposed current and ongoing Government approach to the Tribunal’s e-commerce report, alongside inviting them to meet, to give effect to their views on the response to date, and the future actions, into the ongoing engagement identified in point 7.2 above. **Agree / Disagree**
- 8 **Agree** that a public announcement of the Government’s response to Wai 2522 is not required; **Agree / Disagree**
- 9 **Note** that work associated with the Government’s approach has funding implications. MFAT is considering these and will prepare advice for Ministers on its broader engagement with Māori across MFAT’s work programme, including the implications for funding and resourcing; and **Yes / No**
- 10 **Refer** for information a copy of this submission to the Prime Minister, the Minister of Finance, the Minister for Māori Crown Relations: Te Arawhiti, the Minister of Treaty of Waitangi Negotiations, the Minister of Foreign Affairs, the Minister for Māori Development, the Minister of Internal Affairs, the Minister of Justice, the Minister for the Digital Economy and Communications, the Minister of Statistics, the Associate Minister of Statistics, the Minister of State for Trade and Export Growth and the Parliamentary Under Secretary to the Minister for Trade and Export Growth. **Yes / No**

Hon Damien O'Connor
Minister for Trade and Export Growth

Date: / /

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Pūrongo – Report

1. In November 2021, the Waitangi Tribunal released its third and final Wai 2522 Report, concluding its inquiry.¹ The Report considered a claim against the consistency of certain electronic commerce (e-commerce) provisions in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) with the Government's Tiriti o Waitangi/Treaty of Waitangi ("Treaty") obligations. The claimants also raised underlying concerns about the governance and control of Māori data.
2. However despite finding a Treaty breach and prejudice, the Tribunal stated "To the extent we retain a discretion to make recommendations...we have come to the (perhaps novel) conclusion that it is not appropriate to do so in the particular circumstances of this case"². The Tribunal acknowledged that aspects of the breach have been, or are in the process of being, remedied. The Tribunal also recognised that opportunities to seek changes internationally are limited and difficult and that, while encouraging ongoing review and good faith efforts, significant or rapid change is unlikely.³ s9(2)(h) the Tribunal acknowledged that Treaty compliance is possible within current settings.
3. The key Tribunal findings are that:
 - the Crown failed to understand the nature of the Māori interests potentially impacted by the e-commerce provisions and consequently did not negotiate measures to actively protect those interests beyond existing policy – a particular issue given the relationship of these rules to mātauranga Māori⁴;
 - risks to Māori interests arising from three CPTPP e-commerce provisions⁵, when considered cumulatively, were significant, and that reliance on exceptions⁶ to mitigate that risk fails to meet the Treaty principle of active protection; and
 - constructive changes in Crown engagement with Treaty partners on international trade policy and processes since the claims were lodged were material to the Tribunal's decision not to issue recommendations.
4. This briefing responds to the Report's findings by:
 - providing a legal assessment of the Tribunal's findings;
 - summarising ongoing efforts to respond to the risks identified by the Tribunal at international and domestic levels;

¹ More information about the Wai 2522 inquiry and key findings is contained in Annex 1.

² At 194.

³ At 195-196.

⁴ 'Mātauranga Māori' was described by the Waitangi Tribunal in relation to its Wai 262 Report as "the unique Māori way of viewing the world, encompassing both traditional knowledge and culture".

⁵ These articles relate to cross border data flows, data localisation and source code. A fourth article in the e-commerce chapter, non-discriminatory treatment of digital products, was also considered by the Tribunal as part of the claim, however no breach was found.

⁶ Exceptions are provisions in trade agreements listing circumstances in which a government can, if they meet the conditions of the exception, adopt measures that would otherwise be inconsistent with the agreement. The CPTPP contains both general and specific exceptions. General exceptions apply across the agreement, as does the Treaty of Waitangi exception. Specific exceptions apply to a particular Article or Articles, such as the legitimate public policy exceptions in the e-commerce chapter.

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- proposing next steps for the Government's approach to the Report; and
 - proposing engagement with the claimants, in particular (but not only) on the Government's approach.
5. This follows earlier advice to Ministers after the report's release on time sensitive digital trade issues, including approaches to the recently concluded NZ-UK FTA, as well as the EU FTA and ongoing negotiations, and the forthcoming Trade for All mandated Digital Trade Review.⁷ Further information on the s9(2)(h)

s9(2)(h)

What is being done in response?

Engagement practice

8. A fundamental lesson from Wai 2522 is that the Crown did not adequately understand, and did not take sufficient steps to understand, what the implications are for Māori in the evolving area of digital trade policy. s9(2)(g)(i), and while the claim was limited to e-commerce trade policy, this lesson applies more broadly.
9. MFAT has taken significant steps since the Wai 2522 claims were launched to set up new engagement mechanisms and processes that are more consistent with Tiriti/Treaty expectations. These include three important developments to formalise partnerships:
- Signature of the **Memorandum of Understanding (MOU) with Te Taumata, September 2019**, to deepen MFAT's engagement with Māori on trade policy and Māori priorities within trade. Te Taumata is a group of recognised Māori leaders with significant networks across Māoridom. The MOU complements MFAT's existing

⁷ WAI 2522: *Update and consideration for current digital trade negotiations with the UK*, 26 November 2021; *WAI2522 and UK FTA: Treaty Partner and UK engagement and communications Plan*, 13 December 2021; *UK FTA: Treaty Partner Responses to the Proposed Digital Trade Chapter Early Review Clause*, 1 February 2022; *Current and upcoming digital trade negotiations and consideration of Wai2522*, 20 May 2022; *Launch of Digital Trade Review*, 10 May 2022; s9(2)(f)(iv)

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structured engagement with Māori and reflects MFAT's shared motivation to uphold Te Tiriti/Treaty principles of partnerships;

- Signature of the **Mediation Agreement with the Wai 2522 Claimants, October 2020**, to formalise and develop a relationship reflecting Te Tiriti o Waitangi principles and providing claimants with the ability to protect rights and interests in relation to trade policy through a range of measures outlined in the Agreement. The Agreement proposed to establish Ngā Toki Whakarururanga (the claimants' successor body), a new independent trade engagement body⁸; and
 - **MFAT support for Te Taumata's ongoing work and most recently the establishment of Ngā Toki Whakarururanga throughout 2021 and 2022** and development of its relationship and engagement with Ngā Toki Whakarururanga, including through regular meetings with MFAT's Trade and Economic Group (TEG). MFAT also provides financial support to Ngā Toki Whakarururanga and Te Taumata to provide technical advice and for operational needs.
10. These changes were positively noted by the Tribunal in its November 2021 report, which found that, "to its credit, the Crown has responded constructively" and "[it] has been remarkable to observe a shift from adversarial positions towards constructive engagement and dialogue", which was demonstrated through the establishment of Te Taumata, Ngā Toki Whakarururanga, Te Pae Tawhiti, the Trade for All report and action on its recommendations.⁹
 11. The Crown's commitment to improving engagement with Māori has been a fundamental component of the Government's Trade for All agenda since 2019. Central to Trade for All is that Māori and the Crown, as Treaty partners, work closely together to ensure that te ao Māori, tikanga Māori, and mātauranga Māori are taken into consideration when developing trade policy; that a strong Māori economy and its trade and investment potential are supported; and that trade delivers for Māori.
 12. The Government's response to the Trade for All Advisory Board's recommendations also included a commitment to review New Zealand's interests in digital trade. MFAT will shortly commence the Digital Trade Review, focusing on engagement in digital trade and the policy settings affecting digital trade and supporting the digital economy, including as reflected in digital provisions negotiated in international trade agreements. The Review will include significant engagement with Māori on Māori digital trade interests, along with wider public consultation.
 13. MFAT continues to make significant efforts to mainstream Māori engagement on trade within the Trade and Economic Group at all levels and in particular (but not only) with Ngā Toki Whakarururanga, Te Taumata, the Federation of Māori Authorities (FOMA) and National Iwi Chairs Forum Pou Tahua. Further detail on engagement is in Annex 2.
 14. Engaging with a broad range of Māori partners highlights that Māori views and concerns in respect of digital trade are not homogenous, nor yet fully elaborated in some instances. Māori are major consumers and increasingly significant exporters of digital products.

⁸ s9(2)(h)

⁹ *Wai 2522 Stage 3 Report*, pp 194-196.

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There are as a result a range of views as to the risks and opportunities (and the appropriate balance between these) resulting from the interface between the digital world and mātauranga Māori for issues of identity, knowledge and systems of knowledge. This point was strongly acknowledged by the Tribunal. The Crown continues to be informed through engagement with Treaty partners of the range of Māori interests, including commercial /export as well as more broadly in digital trade and seeks to reflect this in its balancing of interests and the advice it provides Ministers with regard to FTA negotiation mandates (and other processes, such as initiatives at the WTO).

E-commerce, FTAs and international digital trade

15. Flowing from the engagement discussed above, MFAT has substantively adjusted FTA negotiating positions and practices to work together with Treaty partners so that the range of Māori interests are understood and better reflected as far as possible in FTA negotiations and outcomes. In practical terms, this has included working closely with Ngā Toki Whakarururanga and Te Taumata on digital trade following the November 2021 e-commerce report's release.
16. s9(2)(j), s6(b)(i)

MFAT also resourced Treaty partners to engage and provide input into these texts and wider negotiations. Another new practice was the commissioning of independent research from Dr Jason Mika during negotiation of the NZ-UK FTA, to map Māori interests in the FTA and inform negotiating positions.

17. In making these changes, the Government has had to, and will need to continue to, balance broader New Zealand interests as well as the international circumstances and negotiating realities that constrain officials' ability to achieve all of New Zealand's objectives, as recognised by the Tribunal. This includes reflecting current Government positions and legislative frameworks on difficult issues (which may differ from claimants' views of what these should be).
18. Development of credible positions to advance with negotiating partners is also important, particularly for partners where processes are well advanced and/or where those partners perceive the New Zealand position to materially (and in commercial terms) reduce the benefit of the agreement to them. s9(2)(j), s9(2)(g)(i)

This requires meaningful and ongoing dialogue with partners, though it also requires an acknowledgment that, at times, securing all the objectives pursued by Treaty partners is not possible, despite good faith attempts to pursue these.

19. Changes in practice have enabled Māori to exercise more and genuine influence on the negotiations, contributing to the achievement of innovative new outcomes including:
 - New language in the NZ-EU FTA Digital Trade chapter, to ensure as far as possible given the negotiating context, that Māori interests and sensitivities are adequately reflected, and that the text responds as far as possible to the Wai 2522 report. This

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outcome was acknowledged by Ngā Toki Whakarururanga, though it maintains its strongly critical overall position on the FTA;

- Specific Māori Trade and Economic Cooperation (MTEC) chapters in the EU and UK FTAs, for which officials worked together with Treaty partners to develop text, and other new provisions across the FTAs that respond to identified Māori interests;
- Reflection of Māori environmental views in the NZ-UK FTA environment chapter; and
- Achieving a set of outcomes on Mānuka honey in the EU FTA, including text in the MTEC Chapter and immediate tariff elimination for Mānuka honey in the EU's tariff schedule, reflecting close engagement and text development with the Mānuka Charitable Trust.

20. The approach to digital trade negotiations has changed and will require a tailored and incremental approach in different FTA outcomes. s9(2)(h)

21. As noted in an earlier submission to Ministers¹⁰, and as a complement to our Treaty of Waitangi exception clause, officials will continue to seek to better reflect active protection of Māori interests in New Zealand's digital trade practice in current and upcoming negotiations on digital trade.

Domestic policy

22. In addition to MFAT's increased engagement with, and contribution from, Treaty partners on international digital trade, there is substantial domestic work under way across the public sector to address, engage, protect and prosecute Treaty partner interests in digital and data issues. This tackles some of the underlying issues around data governance and Māori control of data raised in the Tribunal. This work will also bring clarity to, and improve understanding of, the interests and priorities that the Crown needs to pursue via international mechanisms including trade agreements.

23. Other Government departments also have their own mechanisms for engagement with Māori. Engagement with Māori as Treaty partners will therefore be a cornerstone of the Government's response to the Tribunal's findings, in the development of New Zealand's regulatory framework and policy settings in respect of digital policies, across the board.

24. Key examples of movements in domestic policy are listed below, with others in Annex 3:

- **Digital Strategy for Aotearoa:** The Government has launched its Digital Strategy for Aotearoa (DSA). It recognises that a thriving and equitable digital future provides an unprecedented opportunity to realise the aspirations for tāngata whenua and Treaty partners. It brings stronger coherence to the range of different work underway across government, and aims to give effect to the Treaty and its principles;
- **Māori Data Governance model:** The Māori Data Governance (MDG) model, being co-designed by Statistics NZ and the Data Iwi Leaders Group (Data ILG), will bring

¹⁰ *Current and upcoming digital trade negotiations and consideration of Wai 2522*, 20 May 2022.

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an All-of-Government approach to data governance, recognising and reflecting Māori, iwi, and hapū data needs and interests;

- **Strengthening the Māori-Crown relationship on digital policy:** Department of Internal Affairs' (DIA) Chief Executive and Government Chief Digital Officer, signed a Mana Ōrite Agreement with the Data ILG in 2021, to realise the potential of digital capability to make a sustainable and positive difference for iwi, hapū and whanau;
- **The Cloud and Māori Data Sovereignty for Cloud use:** DIA is undertaking a co-design process with Data ILG to deliver Te Tiriti advice for Government's Cloud-First policy, and Te Tiriti guidance for Government Cloud adoption.

25. Parallel to domestic policy development, there have been recent announcements by Amazon Web Services, Google, Microsoft and others, of greater localisation of data centres in New Zealand (and therefore under national jurisdiction). This presents new opportunities and choice in how and where data may be stored in New Zealand, previously not possible on a large scale.

Material Risk of Regulatory Chill and Preserving Policy Space

26. As outlined above, the Tribunal considered significant risks arise for Māori interests, and that the reliance on exceptions to mitigate that risk posed a "material risk" of regulatory chill, which could inhibit future regulation or legislative processes. Officials consider that the range of work summarised above and in Annex 3 to work with Māori and give effect to Treaty responsibilities demonstrate that this risk has not eventuated. s9(2)(h)

27. Further, preserving policy space, along with positive statements of the interests to be preserved, was already a priority for officials, and will remain so, due to the fast paced nature and evolution of digital trade and the need to ensure Governments can respond to future challenges that might arise. In addition to exceptions, policy space is maintained through a number of different mechanisms, including Agreement-wide protections, in-built protections and carve outs within the Digital Trade Chapter and rules themselves.¹¹ General exceptions apply to the whole agreement, and enable governments, if they meet the conditions of the exception, to adopt measures that might otherwise be inconsistent with the Agreement's commitments including, importantly for New Zealand, the Treaty of Waitangi exception.

Proposed Government's e-commerce report approach and next steps

28. The proposed Government approach to the Tribunal's Report is set out below. s9(2)(g)(i)

¹¹ The Digital Trade chapter also contains a number of "carve outs" which specify specific issues to which the commitments do not apply at all. These differ across New Zealand's trade agreements, but have included: government information; procurement; AV services, and privacy. There are also further protections provided within rules themselves, such as the legitimate public policy objective in the data rules or the ability for regulators to require disclosure of source code for regulatory reasons. In addition, in some FTAs (e.g. CPTPP) the policy space reserved in New Zealand's services and investment schedules also function as policy space exceptions to our e-commerce obligations.

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s9(2)(g)(i)

29. s9(2)(h)

30. Based on these considerations the recommended Government response is to:

- **Acknowledge the useful and constructive contribution** the Tribunal's Report has already made to the Government's digital work and engagement practices, which will continue to be informed by, and take account of, the Tribunal's findings along with the broader New Zealand interests, domestic policy considerations and international constraints;
- **Continue active and substantive engagement** by officials with Māori representatives across the public sector on digital issues (as welcomed by the Tribunal), and in particular by MFAT with Treaty partners, including to continue to learn about Māori digital trade interests (commercial and otherwise) and to collaborate to further promote and protect their interests;
- **Continue digital policy work** at international and domestic levels, across the public sector. Such work will help to proactively identify, provide for, and advocate for protections for Māori interests within the domestic and international trade sphere, noting the considerable work under way across the public sector;
- **Coordinate across agencies** to share information, best practice and promote policy coherence as the Government's digital work progresses. MFAT has consulted with agencies in the preparation of this submission, and will continue to work with agencies on its implementation;
- **Report to Ministers on progress** in 18 months on engagement with Māori to reflect and address Māori interests in international digital trade policy settings, progress in the development of domestic digital policy settings, and to update Ministers on claimant views; and
- **Engage with claimants** including via their successor bodies to advise them in writing of the proposed current and ongoing Government approach to the Tribunal's e-commerce report, inviting them to meet to discuss the approach, along with continuing to give effect to their views on the response to date, and the future actions, in the ongoing engagement identified in point 2 above.

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31. Officials will also pursue opportunities to review existing CPTPP provisions as these arise, as encouraged by the Tribunal, **s6(a), s9(2)(g)(i) and s9(2)(j)**
32. The Tribunal noted in its 18 November 2021 letter of transmittal to Ministers accompanying the Wai 2522 Stage 3 CPTPP e-commerce report, that this ended the Tribunal's inquiry into claims that began with the Trans-Pacific Partnership Agreement (TPP). **s9(2)(g)(i)**

Proposed Engagement with Claimants and Māori

33. Officials discussed the Tribunal Report with Treaty partners on its release and have since worked with those bodies to apply the findings in good faith and as far as possible to negotiations. Treaty partners have advised officials that the Crown response to the Report should be worked through with Ngā Toki Whakarururanga in the first instance, given they are the successor body to the Wai 2522 claimants group.
34. Officials propose, subject to your approval, to write to Ngā Toki Whakarururanga outlining the Government's approach, proactively sharing a copy of this submission (with appropriate redactions) alongside an invitation to meet and discuss. MFAT would also write to the Wai 2522 e-commerce claimants directly (not all of whom overlap with Ngā Toki Whakarururanga) to inform them of the approach, alongside an invitation to meet and following this, other Treaty Partners, including Te Taumata.
35. Given the very rare, "perhaps novel" decision by the Tribunal to not make recommendations, and that the Tribunal acknowledged significant progress made in engagement and that aspects of the breach have been, or are in the process of being, remedied, officials consider that the proactive sharing of the approach in writing is appropriate. This is consistent with the evolving, ongoing nature of MFAT's engagement with Treaty partners. **s9(2)(g)(i)**

36. **s9(2)(g)(i)**

s9(2)(h)

37. In the context of the NZ-EU FTA, Ngā Toki Whakarururanga acknowledged "progress" and that the FTA had positive outcomes, including the Māori Trade and Economic Chapter, adjustments made to the Digital Trade Chapter and outcomes in goods. Nevertheless Ngā Toki Whakarururanga letters to Ministers and public commentary on the EU FTA continues to be critical overall, including alleging that the agreement is not Treaty-compliant.

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38. Officials will keep you apprised of the outcome of discussions with Treaty partners and any issues arising, including as part of the proposed progress report in 18 months.

Funding Implications

39. The proposed response will have funding implications. s9(2)(f)(iv)

s9(2)(f)(iv)

Proactively Released

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ANNEX 1: s9(2)(h)

s9(2)(h)

Proactively Released

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- s9(2)(h)

Proactively Released

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s9(2)(h)

Proactively Released

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ANNEX 2: Detail of MFAT Trade and Economic Group engagement with Māori on trade issues

MFAT continues to make significant efforts to mainstream Māori engagement on trade within the Trade and Economic Group at all levels, including:

- Regular engagement with the Federation of Māori Authorities (FOMA). FOMA is a long-standing partner, voiced its support for the CPTPP and has made valuable contributions on trade policy outcomes and FTA negotiations;
- A strong working relationship with the National Iwi Chairs Forum Pou Tahua through regular engagement and seeking input on key trade issues of importance to Māori;
- MFAT support for quarterly regional trade Hui organised by Te Taumata, and regular briefings with Te Taumata;
- Close engagement with Treaty partners (Ngā Toki Whakarururanga, Te Taumata, FOMA and Iwi Chairs) during the closing stages of the UK and EU FTA negotiations, including collaborating to develop text towards the Māori Trade and Economic Cooperation Chapters in each of those FTAs;
- Engagement with Treaty partners on other work programmes, such as the Digital Economy Partnership Agreement (DEPA), Indo-Pacific Economic Framework (IPEF), Indigenous Peoples Economic and Trade Cooperation Arrangement (IPETCA) and ASEAN-Australia-New Zealand FTA (AANZFTA) Upgrade negotiations
- Monthly (separate) meetings between MFAT's Deputy Secretary of the Trade and Economic Group and the leadership of Ngā Toki Whakarururanga, Te Taumata and FOMA and a standing offer to the Iwi Chairs' Forum for briefings and engagement, as needed;
- Meetings between MFAT and Ngā Toki Whakarururanga at various levels on at least 35 occasions since the November 2021 report release; and
- Public webinars and roadshows specifically focused on Māori interests in the NZ-UK and NZ-EU FTA during negotiations and post-signature.

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ANNEX 3: Table of international and domestic digital and data policy actions

The table below provides additional detail on actions that have been taken at the international and domestic levels, which contribute to addressing the Waitangi Tribunal's CPTPP e-commerce report findings.

Wai 2522 E-commerce: International level actions	
<p>Engagement with Māori in order to understand Māori digital trade interests and ensure active protection of those interests in international digital trade rules.</p>	<ul style="list-style-type: none"> • MFAT has substantive and regular engagement with the new trade focused Treaty partner bodies Te Taumata and Ngā Toki Whakarururanga pursuant to the 2020 Mediation Agreement, in addition to established engagement with the Federation of Māori Authorities and Iwi Chairs Forum, to identify, understand and advance Māori interests in partnership with Māori, including how these may be affected by international trade measures. This engagement occurs at both senior official (Deputy Secretary) and technical levels. • Establishment of the Indigenous Trade Reference Group, a separate engagement mechanism (comprising Ngā Toki Whakarururanga, FOMA, Iwi Chairs and Te Taumata representatives), to discuss content and scope in the NZ-UK FTA negotiations. Engagement with this Group enabled Māori to exercise genuine influence on the negotiations, including through direct feedback on text proposals. • MFAT regularly engages with the Mānuka Charitable Trust on trade issues broadly, as understanding these issues is integral to their strategy for protecting the mana and mauri of the taonga Mānuka. The Mānuka Charitable Trust also engaged with MFAT directly in proposing text for the Māori Trade and Economic Cooperation Chapter of the EU FTA, and on its interests in goods market access and intellectual property. • During New Zealand's hosting of APEC 2021, New Zealand led the development and negotiation of the Indigenous Peoples Economic and Trade Cooperation Arrangement (IPETCA), and ensuring that Indigenous Peoples participated in those negotiations. IPETCA includes a focus on cooperation and advancement of opportunities in digital trade and e-commerce. • Indigenous Trade Missions: MFAT in collaboration with NZTE, are working with Māori businesses on a specific Māori Trade mission that will engage directly with potential international markets. This is in addition to Māori participation in broader trade missions the Prime Minister has led in 2022 to Singapore, Japan, the United States and Australia (where

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	<p>13 out of a total of 56 participants across accompanying business delegations were Māori or had iwi affiliations).</p>
<p>E-commerce, digital trade and FTA related actions</p>	<ul style="list-style-type: none"> • Officials have secured provisions that respond to Wai2522 concerns in recent digital trade negotiations as part of the UK and EU FTAs.¹⁶ Māori were involved in the development of the text proposals, although the outcomes did not always meet their desired ambition given negotiating constraints. • Officials have also developed, in consultation with Māori, a s9(2)(j) and s9(2)(f)(iv) to Wai 2522 concerns, on which Ministers have been briefed.¹⁷ • MFAT will continue to consult with Māori in relation to digital trade provisions arising in international negotiations s9(2)(j) For example, MFAT is currently consulting with Māori regarding IPEF, AANZFTA Upgrade and DEPA negotiations. • Officials have begun the process of awareness raising with CPTPP partners issues relating to Wai 2522, including through the discussions on the CPTPP Review and through the Inclusive Trade Action Group (ITAG) Review of the CPTPP, and will also pursue opportunities that may arise in the context of our CPTPP Chairing role in 2023. s6(a), s9(2)(g)(i) and s9(2)(j)
<p>Digital Trade Review</p>	<ul style="list-style-type: none"> • Following on from the conclusion of the broader all of Government Digital Strategy for Aotearoa, MFAT is preparing to commence a review of New Zealand’s interests in digital trade. The review was recommended by the Trade for All Advisory Board (TFAAB) and accepted by the Government as part of its broader response to the TFAAB’s Report. The Waitangi Tribunal endorsed such a review in its e-commerce

¹⁶ In the UK FTA, officials secured an early review clause of the digital chapter given the proximity of the report’s release to the conclusion of negotiations. The EU FTA went further and included new language in a number of areas, and in particular new references that build on the Treaty of Waitangi exception recognising the Government’s ability to undertake measures to promote and protect Māori rights, interests, duties and responsibilities in the context of digital trade.

¹⁷ *Current and upcoming digital trade negotiations and consideration of Wai 2522*, 20 May 2022

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	<p>report. It will start later this year and is expected to take approximately 12 months.</p> <ul style="list-style-type: none"> • The Review will involve significant public consultation, with a particular focus on engagement with Māori, businesses, unions, civil society and agencies. Consultation will be based on a discussion document to be approved by Cabinet later this year. It will focus on engagement in international digital trade and the policy settings affecting digital trade and supporting the digital economy, including as reflected in digital provisions negotiated in international trade agreements. • Officials have started engaging with Ngā Toki Whakarururanga and Te Taumata on planning, and will continue to work with Treaty partners on its development, in addition to seeking their input during the Review. • The anticipated outcome is a high level report that provides a principles/mātāpono-based framework to guide future digital trade policy development.
<p>Support to domestic policy development involving trade considerations</p>	<ul style="list-style-type: none"> • MFAT regularly provides technical, legal and policy advice to other agencies in the development of domestic policies that intersect with or engage New Zealand’s trade policy and trade law obligations, which can also include consideration of concerns expressed during Wai 2522. • Consideration is being given to providing proactive advice and capability building training to agencies on digital trade rules and how these should be interpreted to support domestic agencies to develop frameworks that are consistent with the Treaty of Waitangi as well as any relevant trade rules. • A letter is being prepared for agencies that provides an outline of New Zealand’s international trade commitments alongside the concerns expressed during Wai 2522, and encourages engagement with MFAT on policy development in order to prevent any risk of overly cautious policy development or ‘regulatory chill’.
<p>s9(2)(f)(iv)</p>	<ul style="list-style-type: none"> • s9(2)(f)(iv)

s9(2)(f)(iv)

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ISDS Protocol	<ul style="list-style-type: none"> The Wai 2522 Stage 1 Report suggested the Government adopt a protocol, in dialogue with Māori, to guide New Zealand procedure should New Zealand become party to an investor-state-dispute-settlement (ISDS) case in which the Treaty of Waitangi exception is likely to be relied on. This work has advanced in consultation with Treaty partners and separate advice will be provided to Ministers shortly, seeking agreement to publish the Protocol.
Domestic level policy actions	
Digital Strategy for Aotearoa	<ul style="list-style-type: none"> The Digital Strategy for Aotearoa (DSA) was launched on 14 September 2022. It is framed around three pillars – Mahi Tika (Trust), Mahi Tahi (Inclusion) and Mahi Ake (Growth) – and aims to support everyone in New Zealand to seize the opportunities of digital technologies. As a central focus point for digital policy, the DSA will guide future actions and investment for New Zealand’s digital transformation. The DSA’s vision for 2032 incorporates a strong focus on achieving Māori aspirations, including instilling te ao Māori views on data as a key part of New Zealand’s digital and data system, and supporting iwi and hāpū to use digital tools, services and data to solve problems, support cultural expression and support people’s work. The DSA identifies risks and opportunities for Māori across the three strategic pillars, and emphasises supporting Māori to use and develop digital technologies to improve wellbeing and economic development. The DSA’s Action Plan includes initiatives on Māori data governance, accelerating Māori innovation in the digital sector, and ongoing efforts to provide Marae with broadband connectivity, amongst others. Māori engagement in the DSA’s development highlighted the importance of genuine collaboration on vision and actions, and making room for approaches that are “by Māori, for Māori”. Consultation with the Data Iwi Leaders Group formed an important part of the engagement efforts, and this will continue in the DSA’s implementation. The DSA acknowledges that digital systems present specific issues for Māori, and that work to progress international and domestic measures to actively protect Māori interests is under way in partnership with Māori, informed by the Tribunal’s November 2021 Wai 2522 report on e-commerce provisions. The guidance provided by the Tribunal will also inform future Strategy and implementation measures. The DSA will support stronger coherence in the range of different work programmes already underway across government to support digital transformation in New Zealand,

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	<p>including those addressing Māori interests. It was developed by a cross-agency team from MBIE, DIA, DPMC and Stats NZ and benefitted from inputs from a wide range of agencies, reflecting the relevance of digital issues across all parts of government. Its implementation will similarly benefit from cross-agency coordination.</p>
<p>Data Governance</p>	<ul style="list-style-type: none"> • Statistics NZ signed the Mana Ōrite Relationship Agreement with the Data Iwi Leaders Group (Data ILG) of the National Iwi Chairs Forum in October 2019, to work together to realise the potential of data to make a sustainable and positive difference to outcomes for iwi, hapū and whānau. It is supported by an agreed annual work programme. • The co-design of a Māori Data Governance (MDG) model is a key workstream of this work programme. It will include strategic initiatives and an approach to improve governance of Māori data across government, reflecting te ao Māori needs and interests. • In late 2020, Ohu Raraunga (the Ohu) – a joint working group was established made up of representatives from Te Taha Māori and Te Taha Kāwanatanga, tasked with the development, application and refinement of the MDG model. • Te Taha Kāwanatanga has scanned participating government agencies’ existing data governance practice, policies, and levers, to understand current settings, how to implement the MDG model, and challenges. Te Taha Māori representatives have considered how the MDG model can be designed to best meet Māori data aspirations. • Te Taha Māori is intending to provide a report that includes a draft MDG model in late September. Statistics NZ expects to seek feedback on what is needed to progress and refine the model from Te Taha Kāwanatanga members. A wānanga will be held with original co-design wānanga attendees in early November to report back on the work progressed, gauge their views and inform the draft MDG model. • Statistics NZ also expects to engage with the cross-agency Crown Thought Leadership (CTLG) group on the draft MDG model and on the initial system changes indicated for Māori data aspirations in October. This work will support Te Taha Kāwanatanga to continue to progress discussions across participating government agencies to understand existing data governance practice, policies, and levers. • Statistics NZ is continuing to brief Minister Whaitiri on potential work on the wider system settings for government, scoping an approach that includes policy options

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	<p>to shift the government data system to better deliver for and with Māori, iwi and hapū and align to the MDG model co-design work.</p> <ul style="list-style-type: none"> • Māori data governance policy: In early 2022, the Associate Minister of Statistics presented an oral item at Cabinet Economic Development Committee, setting out ambitions for a government data system that delivers for and with Māori, iwi and hapū and the intention to carry out work including the development of the MDG model. Statistics NZ is progressing work, including in-depth analysis of relevant jurisprudence, understanding Māori perspectives and how to support system-wide change.
<p>Te Pae Tawhiti</p>	<ul style="list-style-type: none"> • The Waitangi Tribunal’s Wai 2522 findings reiterated some aspects of the Wai 262 report in 2011 (Ko Aotearoa Tēnei), which identified that the Crown’s engagement with Māori in the making of international instruments required improvement. In February 2022, Cabinet agreed to a prioritised whole-of-government work programme on Wai 262 related issues led by Te Puni Kōkiri - called Te Tumu mō Te Pae Tawhiti. • A priority pou within Te Pae Tawhiti is focused on using international levers to enable effective Māori and Aotearoa New Zealand engagement internationally. s9(2)(f)(iv) • A further key area of aligned-mahi within Te Pae Tawhiti is Māori Data Governance, led by Statistics New Zealand. The Tribunal’s 2522 findings support that data can record mātauranga and in some cases can be considered a taonga to Māori, afforded Crown protection. Developments on this through Mana Ōrite, the Data Investment Plan and the Māori data governance model will inform more broadly the active protection and appropriate utilisations of mātauranga Māori.
<p>Other domestic digital work streams</p>	<ul style="list-style-type: none"> • Mana Ōrite – GCDO’s approach to building a stronger Māori-Crown relationship: In 2021 Te Tari Taiwhenua Department of Internal Affairs (DIA) Chief Executive, who also holds of the role Government’s Chief Digital Officer, signed a Mana Ōrite Agreement with the Data ILG. Data ILG has the authority to represent the National Iwi Chairs Forum (NCIF) in respect of Digital and Data kaupapa/matters. The purpose of this Mana Ōrite relationship is to realise the potential of digital capability to make a sustainable and positive difference for iwi, hapū and whānau. It sits alongside a similar arrangement between Data ILG and Statistics New Zealand for data, and the Justice Sector for justice.

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	<ul style="list-style-type: none"> • Te Tiriti o Waitangi provides the context for and underpins the Agreement, and whilst non-legally binding, Parties commit to equal explanatory power within the relationship. Mana Ōrite provides an agreed framework for collaboration that values each other's mana, mātauranga (knowledge) and whāinga (goals), and expected behaviours (in the form of uaratanga, or principles for engagement). • The accompanying Mana Ōrite Funding Agreement between the Parties sets out the agreed work programme and funding arrangements to June 2023. • Cloud and Māori Data Sovereignty for Cloud use: One of these priorities is embedding Te Tiriti in Government's direction for using Cloud capabilities. DIA is undertaking a co-design process with Data ILG to deliver Te Tiriti advice for Government's Cloud-First policy, and Te Tiriti guidance for Government Cloud adoption. • The co-design process has gathered views from over 70 Māori, Crown and Industry participants and informed Government's refreshed Cloud-First policy, due to be considered at Cabinet in October 2022. The Te Tiriti guidance and reference materials for agencies are likely to follow shortly thereafter. • Throughout the course of this process Iwi Māori leaders and specialists have sought to characterise Māori views on government cloud adoption and related areas for further Māori-Crown collaboration. • Work to assess the full findings and recommendations of this report is under the active consideration of Government's Digital, Data and Information Security System Leaders, as part of planning for the next phase(s) of the Mana Ōrite Work Programme. • The Digital Identity Services Trust Framework (led by DIA) will create an opt-in regulatory regime for the digital identity sector. The ability to share information digitally to assert one's information is becoming increasingly vital to daily life and a key foundation for the economy. The Trust Framework will create a set of standards for the industry, which will increase security and privacy as well as build consumer trust and confidence. The Digital Identity Services Trust Framework Bill is currently in the House. DIA has undertaken targeted consultation with experts in te ao Māori identity, Digital Identity New Zealand, Te Puni Kōkiri, Statistics NZ and Te Arawhiti in the development of the Bill. DIA's Mana Ōrite Agreement with the Data Iwi Leaders Group establishes an enduring relationship for engaging with iwi on digital identity.
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	<ul style="list-style-type: none">• Artificial Intelligence (AI): AI technologies are constantly advancing and there are potential applications in a variety of services and industries. Social licence is crucial for the economic potential of AI to be realised, and MBIE has worked with the AI Forum of New Zealand to develop “cornerstones” for an AI Strategy for Aotearoa New Zealand. This work was paused while the DSA was advanced, and potential future work on an AI Strategy is subject to resources and prioritisation. Any work would necessarily involve an important focus on ethics and building trust, including through respecting iwi and Māori interests related to data governance and other core policy issues.• Digital Technologies Industry Transformation Plan (ITP): MBIE has been working in partnership with industry to develop a vision for the development of the digital technologies sector. The forthcoming ITP will include actions that look to build New Zealand’s reputation around tech and innovation, support Software-as-a-Service as a high-growth subsector, invest in digital skills and talent (including to promote a range of pathways for rangatahi), and build Māori participation and activity in the sector. As with all ITPs, this will be a long-term vehicle for aligning efforts within and between industry and government, and partnership with stakeholders including Māori is a core operating principle.• The 2020 Algorithm Charter for Aotearoa New Zealand included provision for an independent review in 2021 to assess implementation. The Taylor Fry Review (Dec 2021) found strong support amongst agencies and subject matter experts for the Charter’s role to facilitate public awareness and public trust in government’s use of algorithms. Implementation progress in performing algorithm stocktakes and categorising algorithms by risk has been good, with further implementation required to ensure compliance with all Charter commitments. Capability and capacity, both within agencies and the expert community, is limited, constraining implementation including of technical aspects and to embed a te ao Māori perspective reflecting the principles of Te Tiriti o Waitangi. Statistics NZ is working on an Algorithm Charter Action Plan to implement the Review’s recommendations.• Bias within algorithm use: Data bias poses a significant challenge for effective algorithm use. Algorithmic systems can have inherent biases which need to be understood and accounted for. Algorithm improvement requires review, assessment of outcomes and adjustment, to ensure there are no unfair, biased, or discriminatory outcomes.
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	<ul style="list-style-type: none"> • Privacy Amendment Bill: The Ministry of Justice is leading work on progressing changes to the Privacy Act 2020 in cooperation with the Office of the Privacy Commissioner. Engagement with Māori partners has been proactively sought to identify Māori privacy interests and potential risks in the context of the proposed changes. • Budapest Convention consultation with Māori: As part of the decision that New Zealand accede to the Budapest Convention on Cybercrime (the 'Convention'), Cabinet agreed that officials should work with Māori to explore the development of a review or oversight mechanism that provides an avenue for ongoing Māori involvement in New Zealand's implementation of and participation in the Convention [CBC-20-MIN-0129 refers]. The Minister for Justice and Minister for the Digital Economy and Communications will be briefed by officials on a model for meaningful engagement on the Convention and to authentically integrate te ao Māori into the development of policy proposals for any cross-border data access agreements on the horizon.
<p>Agency coordination</p>	<ul style="list-style-type: none"> • Agencies are coordinating to ensure relevant knowledge on digital and data policy issues is shared, including in regard to understanding, advocating for and protecting Māori digital and data interests, including potential implications for international digital trade policy. This promotes sharing of best practice and policy coherence across government. This includes via the working-level cross-agency group developed for the DSA, which continues to operate to share information.