FISH OUT OF WATER? EXAMINING THE PRIVY COUNCIL'S CONSTITUTIONAL INTERPRETATION AND DETERMINATION OF ARONGA MANA CUSTOM IN *FRAMHEIN V ATTORNEY-GENERAL* [2022] UKPC 4

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ABSTRACT

The case of *Framhein v Attorney-General of the Cook Islands* [2022] UKPC 4 concerned the lawfulness of government expansion of a purse seine fishery in the Cook Islands' exclusive economic zone. Heard on appeal, a key issue determined by the Judicial Committee of the Privy Council was whether the government's failure to consult with the local Aronga Mana was a breach of custom. While the Committee overturned the findings of the courts below to find the appellant had proved a consultative duty in custom, the appeal was dismissed. The Committee held the inconsistent operation of the *Marine Resources Act 2005* enlivened art 66A(3) to un-bind the relevant custom from domestic law. There was, therefore, no unlawful breach. This case note explores the Committee's decision as both a forwards and backwards step for the position of custom in Cook Islands law. While the decision signals a more pragmatic approach to proving custom, this case note argues it adopts a narrow, rule-based approach and (erroneously) fashions art 66A(3) contrary to judicial dicta, legislative intention and logic. Applying a post-colonial lens, the decision in *Framhein* raises broader questions about the long-term security of custom as binding domestic law and the position of the United Kingdom Privy Council in the Cook Islands court hierarchy.

I INTRODUCTION

In early 2022, the five-member Judicial Committee of the Privy Council ('the Committee') handed down its judgment in *Framhein v Attorney-General of the Cook Islands*.[1] Heard on appeal from the Cook Islands Court of Appeal, the case concerned governmental expansion of a purse seine fishery in the Cook Islands' exclusive economic zone ('EEZ'). This case note discusses the judgment with a focus on the Committee's findings concerning the government's alleged breach of duty in custom to consult with the Aronga Mana (traditional local leaders) about the fishery expansion. Noting the binding status of custom according to art 66A of the Cook Islands' Constitution 1964, the case raises various questions of legal pluralism. Specifically, the decision interrogates the interplay between Aronga Mana custom and domestic law in the context of environmental management, but it also has precedential value more broadly.

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[1] [2022] UKPC 4. The Committee consisted of Rose, Lady, Hodge, Briggs, Leggatt and Burrows LLJ.

The decision is significant for it further develops the operation of art 66A and reveals a shift in judicial attitude. While previous procedural barriers to reliance on custom are overcome, the Privy Council decision also enlarges the court's power to determine the substance of custom, and adopts a liberal attitude to the application of art 66A(3) to 'un-bind' custom from the general law. More broadly, the decision illustrates the threat of erosion of customary law in the Cook Islands and highlights the enduring colonial legacy in the Pacific. As Potter J noted in Her Honour's decision at first instance, these issues are 'of general and constitutional importance'.[2]

II BACKGROUND TO FISHERIES DEVELOPMENT IN THE COOK ISLANDS

A Historical and legislative background

The Cook Islands has permitted large-scale commercial fishing within its exclusive economic zone since the early 1960s.[3] The main method of fishing has historically been longline fishing, but more recently purse seine fishing has become more popular. This method involves using large netting to surround and capture schools of fish,[4] and is controversial due to the increased risk of catching non-target species. While formally permitted in the Cook Islands since the 1980s by a multilateral treaty with the United States,[5] no significant catches had been made until 2012.

To grant fishing rights in an area of Cook Islands waters, the *Marine Resources Act 2005* provides that the Ministry of Marine Resources must declare the area a 'designated fishery'.[6] As part of this process, the Secretary of Marine Resources must prepare a fishery plan, setting out management measures to ensure sustainable use and the process for the allocation of any fishing rights.[7]

B Chronology

In early 2011, the Cook Islands' Ministry of Marine Resources ('the Ministry') began to explore potential expansion of skipjack tuna purse seine fishing in its exclusive economic zone.[8] As part of this consideration process, the Ministry commissioned several scientific reports, including a report by Dr Patrick Lehodey simulating the effect of increased skipjack purse seine fishing in the area.[9]

The Ministry engaged in four public meetings and consulted various local bodies about the proposed development. Among these bodies was the Te Ipukarea Society Inc, an environmental non-governmental organisation formed to advocate for positive environmental outcomes in the Cook Islands (and joint plaintiff in the first instance and Court of Appeal proceedings). During

[2] *Framhein v Attorney-General* (High Court of the Cook Islands, Potter J, 15 December 2017), [126].
[3] *Framhein v Attorney-General,* above n 3, [4].
[4] *Framhein v Attorney-General,* above n 3, [6].
[5] *Treaty on Fisheries between the Governments of Certain Pacific Island States and the United States of America,* opened for signature 2 April 1987, 26 ILM 1048 (entered into force 15 June 1988).
[6] *Marine Resources Act 2005* s 11(1) ('*MRA*').
[7] *MRA,* above n 7, s 6(3).
[8] *Framhein v Attorney-General,* above n 3, [9].
[9] *Framhein v Attorney-General,* above n 1, [5].

this process, the Ministry did not consult the local Aronga Mana, which is the group of traditional leaders appointed in each of the village of the Cook Islands.

On 26 February 2013, the Ministry published the *Marine Resources (Purse Seine Fishery) Regulations 2013,* bringing into force the Skipjack Tuna Purse Seine Fishery Plan ('Fishery Plan') and declaring the fishery a designated fishery. The Fishery Plan imposed certain fishing limits,[10] and required the Ministry to consult with 'key stakeholders' in the fishery at least once per year.[11]

In October 2015, the Cook Islands entered into an agreement with the EU, permitting EU vessels to catch 7,000 tonnes of tuna annually in return for €5.3 million over four years.[12]

III PARTIES, CLAIMS AND PROCEDURAL HISTORY

The applicants, Mr William Framhein (on behalf of his father, Apai Mataiapo for the Aronga Mana of Te Au O Tonga)[13] and Te Ipukarea Society Incorporated challenged the government decisions to publish the Regulations and the Fishery Plan, and to enter into the EU agreement.

The High Court was asked to determine the following:

A. Whether the Ministry unlawfully failed to consult the Aronga Mana?

B. Whether the Ministry unlawfully failed to carry out a proper environmental impact assessment?

C. In the alternative, whether the Ministry breached the Fishery Plan?

The applicants also sought an order setting aside the Regulations and the Fishery Plan.

This commentary will focus on the first of these issues concerning the Ministry's legal obligation to consult the Aronga Mana.

Mr Hikaka, as counsel for the applicants, argued that the Cook Islands government unlawfully failed to consult the Aronga Mana in breach of:

1. custom of the Cook Islands, which forms part of binding domestic law pursuant to art 66A(3) of the Cook Islands' Constitution.
2. section 4(d) of the *MRA,* which provides that the Ministry must take 'social, cultural and equitable' principles into account when exercising its functions under the Act, including encouraging broad participation by Cook Islanders in activities relating to the sustainable use of marine resources.[14]
3. (in the alternative) clause 12 of the Fishery Plan, which provided the Ministry was to consult with 'key stakeholders' at least once per year.

[10] Fishery Plan, cl 13(a).
[11] Fishery Plan, cl 12.
[12] *Framhein v Attorney-General,* above n 1, [9].
[13] Traditional leader of the vaka Te Au O Tonga (one of the three local areas of Rarotonga).
[14] Above n 1, [154].

1 *First Instance and Court of Appeal Decisions*

On the basis of the evidence adduced, Potter J, at first instance, flatly rejected the assertion that consultation with the Aronga Mana took place.[15] In issue was whether this was a legal duty. Her Honour held there was no obligation to consult with the Aronga Mana arising from any of the sources of law put forward by the applicants. The non-constitutional matters arising under s 4(d) of the *MRA* and cl 12 of the Fishery Plan can be dealt with in brief, noting that the Court of Appeal and the Committee agreed with Potter J on these points.

(a) Non-constitutional bases for duty to consult the Aronga Mana

In relation to the s 4(d) argument, Potter J held that while engagement with the Aronga Mana may have discharged the Ministry's obligations under s 4(d), the section did not mandate any specific consultation.[16] Consideration of social, cultural and equitable principles did not necessarily involve consultation with the Aronga Mana and therefore non-consultation did not amount to a breach of the section.

The applicants also argued that the Ministry breached the Fishery Plan in not consulting with members of the Aronga Mana, who were 'key stakeholders' in the fishery. However, Potter J held that the Fishery Plan did not define 'key stakeholders' and Her Honour did not consider the Aronga Mana a key stakeholder, leaning on her reasoning as to the lack of customary law obligation (discussed below).[17] This point was strengthened in the Court of Appeal decision, which held that given that the phrase was undefined, the Ministry had a discretion as to who were key stakeholders for the purposes of consultation, and it was not unreasonable to exclude the Aronga Mana from this group.[18] The Committee agreed with this line of reasoning.[19]

(b) Constitutional basis for duty to consult the Aronga Mana

Inserted by s 7 of the *Constitution Amendment Act 1994-95,* art 66A(3) of the Cook Islands' Constitution provides:

> [C]ustom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision or of any enactment.[20]

In conjunction with this subsection, art 66A(4) provides that an opinion of the Aronga Mana regarding the existence of custom shall be 'final and conclusive and shall not be questioned in any court of law'.[21]

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[15] *Framhein v Attorney-General,* above n 1, [135].
[16] *Framhein v Attorney-General,* above n 3, [146].
[17] *Framhein v Attorney-General,* above n 3, [153].
[18] *Framhein v Attorney General* (Court of Appeal of the Cook Islands, Williams P, Barker and Paterson JJA, 26 September 2018) [157].
[19] *Framhein v Attorney-General,* above n 1, [154].
[20] *Cook Islands Constitution* art 66A(3).
[21] *Cook Islands Constitution* art 66A(4).

In the High Court proceedings, the applicants adduced three documents signed by a range of Aronga Mana from across the Cook Islands to establish custom stating that:

i. The Aronga Mana members are responsible for the protection and preservation of environment and cultural heritage.[22]

ii. The Aronga Mana must be consulted in matters concerning kai moana, including fisheries activities,[23] to carry out their rights and responsibilities.[24]

iii. Conservation measures exercised by the Aronga Mana include ra'ui, which imposes a restriction on harvesting anything in a particular section of land or ocean. This can be done for various purposes, including environmental protection, food security or to improve commercial activities.[25]

Mr Hikaka argued that, pursuant to art 66A(4) of the Constitution, these statements constituted a final opinion of the Aronga Mana. As nothing in the Constitution or any other enactment contradicted the custom, the tiaki (guardian) role of the Aronga Mana in relation to kai moana (including the right to be informed about development proposals) was therefore binding law, applying art 66A(3).[26]

Potter J rejected this submission on two grounds. Firstly, Her Honour held that the evidence did not establish custom. The signed statements were not signed by all the Aronga Mana members, and it was not clear in art 66A(4) that a majority was sufficient to comprise a conclusive opinion. There was also no evidence tendered to verify the signatories were actually the Aronga Mana members of the vaka.[27] Her Honour restated concerns expressed by the Court of Appeal in *Hunt v Miguel*[28] about the lack of constitutional guidance regarding the composition and verification of the Aronga Mana. Her Honour stated these problems 'continue[d] to loom' and concluded that no custom was established.[29]

Secondly, Potter J held that even if the statements were conclusive as to the existence of custom, the Ministry was not obligated to consult with the Aronga Mana because the Ministry did not know, and could not be expected to know, about the custom.[30] Her Honour held that to impose such a duty on the government would be 'immense' and undesirable.[31]

On appeal, the Court of Appeal accepted and reiterated much of Potter J's reasoning to find no relevant custom had been established to oblige consultation with the Aronga Mana. As obiter, the Court added its voice to the string of judicial 'plea[s] for enlightenment'[32] to the legislature

[22] *Framhein v Attorney-General,* above n 1, [121] (quoting Pio Ravarua, one of the Aronga Mana of Pukapuka).
[23] *Framhein v Attorney-General,* above n 1, [135] (quoting Jon Tikivanotau Michael Jonassen, one of the Aronga Mana of the vaka of Puaikura).
[24] *Framhein v Attorney-General,* above n 1, [140] (quoting Manavaroa Phillip Marama Nicholas, Independent High Chief of the vaka of Takitumu).
[25] *Framhein v Attorney-General,* above n 1, [138] (quoting Matapo Paiere Mokoroa, one of the UI Mataiapo of the island of Atiu).
[26] *Framhein v Attorney-General,* above n 3, [131].
[27] *Framhein v Attorney-General,* above n 3, [141].
[28] (Cook Islands Court of Appeal, Williams P, Barker and Paterson JJA, 19 February 2016) ('*Hunt*').
[29] *Framhein v Attorney-General,* above n 3.
[30] *Framhein v Attorney-General,* above n 3, [145].
[31] *Framhein v Attorney-General,* above n 3, [142]-[143].
[32] *Framhein v Attorney-General,* above n 24, [137].

to define the Aronga Mana and outline a process for providing an opinion about custom.[33] The appeal was dismissed.

IV PRIVY COUNCIL DECISION

The issue of whether the Ministry owed a duty in custom to consult with the Aronga Mana regarding the proposed fishery development was appealed to the Committee. The appeal was again dismissed, though for different reasons from those of the courts below. The Committee's findings can be distilled into three matters:

A Proving custom for the purposes of article 66A(4)

The Committee firstly held that the applicants could establish custom by adducing evidence that constituted the opinion of the Aronga Mana of the vaka to which the custom was said to relate.[34] In assessing whether the standard of proof was met, the Committee departed from the lower courts in three respects.

Firstly, the Committee rejected the lower courts' evidential thresholds to prove custom. Adopting a 'facilitat[ive] rather than hinder[ing]' role,[35] their Lordships took a less stringent view of proving custom for art 66A(4). They held:

1. proving custom does not require a party to file evidence from every Aronga Mana from every island. To do so 'would render art 66A inoperable'.[36]
2. an opinion of the Aronga Mana need not be unanimous to be final and conclusive;[37] and
3. a group claiming to be Te Aronga Mana does not need to adduce evidence to prove they are an appropriate body of Te Aronga Mana (as was required by the Court of Appeal in *Hunt v de Miguel*).[38]

Secondly, the Committee rejected Potter J's second strand of reasoning that, even if custom were established, the Ministry could not be bound because it was not aware of the custom. The Committee noted 'there is nothing in art 66A that makes the application of the law conditional on the awareness of the person affected by it of that law.'[39]

Thirdly, the Committee rejected the lower courts' analysis that Mr Framhein had not established custom. Their Lordships' judgment revisited significant portions of the evidence adduced by Mr Framhein at the High Court level and concluded that the courts below erred in not accepting this evidence.[40] They held that the evidence established a custom that the Aronga Mana were to be consulted or informed about plans for harvesting kai moana (seafood) as part of the

[33] *Framhein v Attorney-General,* above n 24, [137]-[145].
[34] *Framhein v Attorney-General,* above n 1, [143].
[35] Above n 1, [130].
[36] *Framhein v Attorney-General,* above n 1, [133].
[37] *Framhein v Attorney-General,* above n 1, [143].
[38] *Hunt,* above n 29, [74].
[39] *Framhein v Attorney-General,* above n 1, [132].
[40] *Framhein v Attorney-General,* Above n 1, [146]-[147].

exercise of their powers as tiaki.[41] This custom applied to the whole of the Cook Islands[42] but did not extend to a customary right to be consulted about fishing plans for any other purpose.[43]

B Article 66A(3) operation

The Committee held that although the applicants had established a duty in custom to consult the Aronga Mana as tiaki moana (guardians of the sea), that custom was inconsistent with s 3 of the *MRA* and therefore no longer part of the general law, pursuant to art 66A(3).[44] Specifically, the Committee held that the custom was inconsistent with s 3 (quoting subsection (2) at [148]). Section 3(2) of the *MRA* states:

> The Ministry of Marine Resources has the principal function of, and authority for the conservation, management, development of the living and non-living resources in the fishery waters in accordance with this Act and the Ministry of Marine Resources Act 1984.

The Committee reasoned:[45]

> [T]he rules for fishing in the Cook Islands' EEZ are now set out in legislation and those statutory provisions override any former powers and responsibilities that the Aronga Mana had over kai moana in the EEZ.
>
> This does not prevent the Aronga Mana from continuing to exercise their role […] as a matter of custom. But that custom is no longer part of the law of the Cook Islands pursuant to article 66A … .

On this ground, the Committee dismissed the appeal.

C Article 66A(4) operation

The Committee noted, obiter, that there was conflicting evidence about the extent of the Aronga Mana's customary authority over waters beyond the reef.[46] The Committee stated that in cases where reported custom conflicts, the Court's role is still to decide what the custom is and apply it in accordance with the Constitution. While art 66A(4) provides that an established custom shall not be questioned in a court of law, this does not proscribe the conventional role of the court of deciding the law before applying it.[47] The intention of the art is to prevent custom being discounted for a reason other than as set out in art 66A(3) (namely, inconsistency with other enactments).[48]

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41 *Framhein v Attorney-General,* Above n 1, [147].
42 *Framhein v Attorney-General,* Above n 1, [143].
43 *Framhein v Attorney-General,* Above n 1, [147].
44 *Framhein v Attorney-General,* above n 1, [149]-[150].
45 *Framhein v Attorney-General,* above n 1.
46 *Framhein v Attorney-General,* above n 1, [144]-[146].
47 *Framhein v Attorney-General,* above n 1, [146].
48 *Framhein v Attorney-General,* above n 1.

V EVALUATING *FRAMHEIN:* A PRETTY KETTLE OF FISH

The Committee's decision represents a significant development in the interpretation of art 66A. As at the time of writing, only three other judgments published on PacLii judicially interpret art 66A, *Framhein* being the first in which the Court accepted adduced evidence to establish custom.[49]

This case note posits that the Committee was right in its finding for established custom, but wrong as to the scope of that custom and in its application of art 66A(3) to un-bind that custom from the general law. This case note will also consider the potential implications of the law's development, to suggest a gradual erosion of customary authority in the Cook Islands jurisprudence and call for a re-consideration of the Cook Islands judiciary structure to better realise Cook Islands independence and ensure custom is protected.

A *Forwards and Backwards Steps for Establishing Custom*

The Committee's application of art 66A(4) partially resolves the ambiguities that have formerly hindered its operation, but also signifies a slide to weaker legal pluralism, extending curial power over customary authorities.

1 *Reducing Barriers to Entry*

Article 66A(4) has been the subject of judicial scrutiny regarding the identification and verification of the Te Aronga Mana, ultimately impairing its operation. The Constitution does not define who comprises the Te Aronga Mana, nor how an opinion or decision about custom is to be validly expressed by an appropriate Te Aronga Mana in matters of non-consensus.[50] In *Hunt,* the applicant's failure to adduce evidence as to the composition of the appropriate Te Aronga Mana contributed to the Court's rejection of his submissions to establish custom.[51] This was, the Court noted, a 'matter of regret'.[52] In *Browne v Munokoa,*[53] the Privy Council went even further, stating that these constitutional issues were 'highly unsatisfactory' and made it 'difficult for the courts to give effect to section [sic] 66A(4)'.[54]

In step with these curial attitudes, both courts below rejected Mr Framhein's adduced evidence to establish custom (for the reasons above).[55] Departing from these findings, the Committee took a comparatively pragmatic approach to partially resolve these 'problematic questions'.[56] The bar to establish custom was seemingly lowered: the Committee sought to carefully examine the evidence as to custom to see what custom was established, rather than to look for

[49] Cf *Hunt,* above n 29, (no custom established), cf *Browne v Munokoa* [2018] UKPC 18 (custom decided by the Court), cf *Re the Estate of Richard Pare Browne* (High Court of the Cook Islands (Land Division), Isaac J, 29 July 2016) (no evidence adduced as to custom).

[50] See Miranda Forsyth, 'The challenges of legal pluralism in the Cook Islands and beyond: An insight from *Hunt and Tupou & Ors v Miguel,* Cook Islands Court of Appeal, 19 February 2016' [2016] (2) *Journal of South Pacific Law* A-36.

[51] *Hunt,* above n 29, [74].

[52] *Hunt,* above n 29, [75].

[53] [2018] UKPC 18 ('*Browne'*).

[54] *Browne*, above n 54, 19 [34].

[55] See above n 3, [140]-[141].

[56] *Hunt,* above n 29, [75].

gaps in evidence or challenge the verifiability of those claiming to be part of the Aronga Mana.[57]

This point may be qualified by the fact that Mr Framhein adduced evidence to prove a *general* custom in the Cook Islands, not a custom specific to a certain vaka of Aronga Mana. The Committee's approach in *Framhein* may therefore not wholly resolve the issue of establishing 'appropriate' Aronga Mana. Nonetheless, the Committee's approach suggests that establishing custom for art 66A(4) in future may be substantially easier, at least in some respects.

2 *Weak(er) Legal Pluralism*

The wording in art 66A(4), which states that the Aronga Mana's opinion and decision on custom is final raises the question of whether the Constitution officially recognises the decisions of the Aronga Mana as having legal force or whether the courts still maintain total authority over the status of law (weak legal pluralism). The Court addressed this question in *Hunt* and adopted the latter position: while the Aronga Mana determines a custom's substance, the courts still apply the custom to a particular case,[58] thereby retaining 'their role as the final arbiters'.[59] Article 66A did not provide for deep legal pluralism.

Forsyth has previously argued this interpretation is inconsistent with the wording of art 66A(4),[60] which provides that the Aronga Mana's opinion on custom is final as to matters concerning 'usage or the existence, extent or **application**' (emphasis added).[61] This indicates that the Aronga Mana, and not the courts, is to decide whether custom applies to a case. Irrespective of the correctness of this view, the Committee in *Framhein* rolls back the interpretation in *Hunt* even further. The Committee stated, obiter, that the intention of art 66A(4) was not to derogate from the courts' role as determiners of the substance and application of law, but to prevent custom from being rejected for 'some extrinsic reason'.[62] The Court is therefore still bound to decide what the law is before applying it.[63] This sits uneasily with previous High Court and Court of Appeal authority to the effect that the Court must *follow* custom, not determine it.[64] The decision signifies a shift in the interpretation of art 66A away from any deep legal pluralism, instead favouring formal court authority over customary Aronga Mana authority, even on matters of custom.

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[57] *Framhein v Attorney-General,* above n 1, [133].

[58] *Hunt,* above n 29, [63].

[59] Forsyth, above n 51, A-29.

[60] Above n 51 .

[61] *Cook Islands Constitution* art 66A(4).

[62] *Framhein v Attorney-General,* above n 1, [146].

[63] *Framhein v Attorney-General,* above n 1.

[64] See *Re the Estate of Richard Pare Browne* (High Court of the Cook Islands (Land Division), Isaac J, 29 July 2016) [23] ('*Re the Estate of Richard Pare Browne'*); see also *Re Vaine Nooroa o Taratangi Pauarii (No 2)* (Cook Islands Court of Appeal, McCarthy P, McMullin and Roper JJ, 8 October 1985).

B Reductive customary role of the Aronga Mana

While the Committee accepted Mr Framhein's evidence when finding for an established customary duty to consult with the Aronga Mana,[65] the decision as to the scope of that authority appears reductive in light of the adduced evidence.

The established customary duty to consult is a qualified duty, limited to fishing plans for harvesting kai moana. The Committee expressly carved out any duty to consult about fishing plans for any other purpose.[66] Such a construction is odd for two reasons. Firstly, the Committee did not expand on what it had in mind regarding fishing plans that do not relate to harvesting fish. Indeed, it is difficult to conceive of fishing plans that do not relate to fishing. The carve-out therefore appears superfluous. Secondly, given the Committee accepted evidence that Aronga Mana members are guardians of the sea with conservationist powers to regulate fish stocks and harvesting practices, limiting the custom to a duty to be consulted or informed of fishing plans seems unnecessarily reductive.

This framing of custom is significant because it affects the *ratio* of the case: that the customary duty to consult with the Aronga Mana about plans for harvesting kai moana is not binding because it is inconsistent with domestic legislation, that is, art 66A(3) of the Constitution. The effect, however, is unclear and potentially damaging for the position of customary authority in Cook Islands law.

One possibility is that the ratio is limited to extinguishing only a narrowly defined customary duty. While the evidence adduced may have indicated broader customary powers of, and duties owed to, the Aronga Mana, the Committee did not consider them because they were outside the scope of the case before it. This leaves alive a duty to consult with the Aronga Mana about other matters, potentially even for other powers of the Aronga Mana regarding fisheries or protection of kai moana.[67] The limited customary duty established in the case is therefore beneficial for customary authority, as it minimises the extent to which that authority has been formally ousted by art 66A(3).

Another possible outcome, however, is that the decision restricts the customary authority of the Aronga Mana in a way that may affect future findings as to custom. This has already been observed on the subject of adoption rules in *Browne,* where the Privy Council summarised the status of customary rules for adoption with reference to previous case law.[68] Forsyth notes that the court's focus of 'creating fixed rules' of custom which can be applied to facts may diminish the flexibility of custom.[69] There is a risk that the decision in *Framhein* may be regarded as authority for the proposition that the Aronga Mana have only consultative authority on matters relating to kai moana harvest. Construing the scope of Aronga Mana authority this way would be at odds with much of the evidence adduced and supposedly accepted by the Committee about the broader guardianship role of kai moana the Aronga Mana occupy. This could significantly limit the sphere of Aronga Mana influence in future matters relating to environmental protection and consultation. While recent judicial statements have regarded

[65] *Framhein v Attorney-General,* above n 1, [143].
[66] *Framhein v Attorney-General,* above n 1, [147].
[67] However, the operation of art 66A(3) might also extinguish any pleaded binding custom in this regard.
[68] See *Browne,* above n 54, [28]. The Court of Appeal also adopted a similar approach in *Hunt*, above n 29.
[69] Forsyth, above n 51, A-33.

court findings as to custom as 'interpretation of custom' and not definitive of custom,[70] this requires a nuanced judicial approach to the limits of the doctrine of precedent to findings on custom, a nuance that, as seen in *Browne,* has not always been appreciated.

C Inconsistent operation of article 66A(3) inconsistency

A third issue is the correctness of the Committee's decision that the duty to consult was inconsistent with the *MRA,* thereby excluding such a duty from the general law. This question can be answered as a matter of statutory construction, with reference to previous judicial interpretation and the statute's intention.

1 *Interpretation of 'inconsistency'*

The Committee's reasons for concluding that the custom is inconsistent with existing legislation are brief – spanning only one paragraph – and not immediately clear. This case note considers two possible rationales.

The first takes the Committee's reasoning as a broad 'cover the field' approach. As the 'rules for fishing' are now set out in legislation,[71] these rules extinguish any former customary authority pertaining to marine life in Cook Islands waters. However, art 66A(3) only excludes custom from binding law where it is 'inconsistent' with legislation. That the Act sets out the rules for fishing does not indicate any inconsistency with a duty to consult with the Aronga Mana about fishery plans. Such an inconsistency might arise where the Act expressly purported to cover the field of marine life conservation, but there is nothing in the Act to suggest this. Moreover, the words of limitation of 'to the extent that it is … inconsistent' in art 66A indicates a 'cover the field' approach is too broad an application.

The second possible interpretation is that because s 3(2) of the Act provides that the Ministry is the principal authority for the conservation and management of living and non-living resources in fishery waters, it would be inconsistent to require the Ministry to consult with or inform another body (in this case, the Aronga Mana) on matters relating to fishery development. This point seems strongest in relation to 'consultation' when understood to involve an element of requiring permission or approval from the Aronga Mana to take kai moana.[72] Such a 'gatekeeper' role would appear to be inconsistent with the *principal* authority of the Ministry to manage fisheries. However, it is not clear that consultation would necessarily impair the Ministry's principal authority. To the contrary, it is easily imagined that a government body could consult with other parties without relinquishing its authority on the subject. It is even less clear that a duty to *inform* the Aronga Mana about fishery development is inconsistent with such authority. In fact, it seems consistent with the *MRA*, which provides that the Ministry is to ensure the participation of local communities in fishery management.[73] By failing to distinguish between a duty to consult and a duty to inform, the Committee

[70] *Re the Estate of Richard Pare Browne* (High Court of the Cook Islands (Land Division), 29 July 2016) [24].
[71] *Framhein v Attorney-General,* above n 1, [149].
[72] This is custom as described by Manavoroa Mataiapo Tutara of the vaka of Takituma, quoted in *Framhein v Attorney-General,* above n 1, [140].
[73] *MRA,* above n 7, s 4(d)(ii).

collapsed these two separate duties, ultimately leaving both to be (wrongly) declared inconsistent with existing legislation.

2 *Previous treatment of article 66A(3)*

While *Framhein* is the first case to use the inconsistency proviso in art 66A(3) to un-bind customary law, the courts have considered the article before. In *Hunt,* the Court stated obiter that the effect of art 66A(3) was that 'custom and usage shall take precedence in the Cook Islands, unless *expressly ousted* by statutory law, or else inconsistent with the Constitution' (italics added).

It was not argued before the Committee, nor is it true, that the *MRA* expressly ousts custom. To the contrary, s 4(d) requires the Ministry to take into account social, cultural and equity principles, including 'maintenance of traditional forms of sustainable fisheries management'[74] and local island community participation in such management.[75] Rather than ousting custom, the *MRA* seems to mandate ministerial consideration of custom. This supports a conclusion that art 66A(3) would not apply to the scenario in *Framhein*. However, given the Court did find custom was un-bound by art 66A(3) in the absence of statute expressly ousting custom, it can be assumed this statement in *Hunt* is no longer good law.[76]

3 *Statutory intention*

Article 66A was inserted in the Constitution in 1995 by an amending Act. In the second reading of the bill, the Prime Minister Sir G A Henry stated:[77]

> We all know that each individual islands [sic] have their own customs. Those customs Mr Speaker are good, however they tend to be overruled by modern day Courts. What we are trying to do in this Bill Mr Speaker, is protect our customs through over [sic] constitution. For example, we do not want modern day laws to be forced upon the islands of Pukapuka, if they are not appropriate for that island.
>
> This Amendment Mr Speaker is providing the members of the House the opportunity to keep our customs alive for the coming generations.

In *Hunt,* the Court of Appeal also explained that the intention of art 66A was 'to provide for greater recognition and protection of custom and usage in the Cook Islands.'[78] Either interpretation of the Committee's rationale offered above is antithetical to this original intention. The application of art 66A(3) to overrule custom on the basis of broad conceptions of inconsistency is to force 'modern day laws' on the various vakas of the Cook Islands, which is exactly what the article was intended to avoid.

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[74] *MRA*, above n 7, s 4(d)(i).
[75] *MRA*, above n 7, s 4(d)(ii).
[76] Noting the United Kingdom Privy Council is the apex appellate court in the Cook Islands jurisdiction. See further discussion in the next section.
[77] See Cook Islands, *Parliamentary Debates,* 31 March 1995, 1944–1945 (Prime Minister Sir G A Henry).
[78] *Hunt,* above n 29, [56].

D Post-colonial commentary

The above assessment draws attention to the position of the Judicial Committee of the Privy Council in determining this matter. While post-colonial dominator/dominated dichotomies are often simplistic,[79] both the appeal procedure and outcome in *Framhein* demand comment through a post-colonial lens.

The court hierarchy in the Cook Islands still involves a right of appeal to the United Kingdom Privy Council, per art 59(2) of the Constitution.[80] The position of the Privy Council as the apex appellate court - not just in the Cook Islands but several Pacific Islands states - has both practical and symbolic colonial implications.[81]

One practical implication observed in *Framhein* is that the Privy Council becomes the ultimate arbiter of Cook Islands custom. Whether such a body is in the best position to recognise and apply local Aronga Mana custom is dubious. As Corrin and Zorn note, a danger involved in allowing customary law to be interpreted or applied by a foreign court is that the 'judge … may miss nuances or qualifications that are important to those living the culture'.[82] Forsyth also notes a distinction between establishing customary rules (as is orthodox for common law precedential systems) and customary values, which better align with recognising the flexibility of custom in the Pacific.[83] This difference in ontological approach to establishing custom highlights the levels of nuance at play when foreign courts seek to understand and apply traditional laws.[84] These risks are particularly significant in light of the Committee's expansion of judicial authority to determine the *substance* of custom per art 66A(4), not merely to apply that custom.

Moreover, from a symbolic perspective, that Cook Islands' laws, including its Constitution, continue to be interpreted by an external seat of power serves to undermine the country's sovereignty. Noting the tension between the legislature's intention behind art 66A to 'protect our customs,'[85] and the Committee's application of art 66A to un-bind established custom from the general law, there is a question as to whether genuine protection of custom involves more radical judicial reform to keep matters of constitutional interpretation 'in-house'. Discussing rights of appeal of British colonies to the King in Council in 1935, the Privy Council described the United Kingdom as 'the fountain of justice.'[86] In the 90 years since, during which time the Cook Islands has achieved independence, it is questioned whether justice would be better achieved by a Cook Islands court determining for itself what its Constitution means.

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[79] See Stephanie Lawson, 'Postcolonialism, Neo-colonialism and the "Pacific Way": a critique of (un)critical approaches' (Discussion Paper No 4/2010, School of International, Political and Strategic Studies, The Australian National University, 2010) 3.

[80] For further discussion of the historical development of appeal to the King in Council in the Cook Islands, see Alex Frame, 'The Cook Islands and the Privy Council' (1984) 14 *Victoria University of Wellington Law Review* 311.

[81] Niue, Kiribati, Tokelau and Tuvalu.

[82] Jean Zorn and Jennifer Corrin, '"Barava Tru": Judicial Approaches to the Pleading and Proof of Custom in the South Pacific' (2002) 51(3) *International and Comparative Law Quarterly* 611, 620.

[83] Forsyth, above n 51, A-34.

[84] Forsyth, above n 51, A-30.

[85] Cook Islands, *Parliamentary Debates,* 31 March 1995*,* 1944–1945 (Prime Minister Sir G A Henry).

[86] *British Coal Corporation v The King* [1935] AC 500, 511.

VI CONCLUSION

After the Court's decision in *Hunt,* Forsyth commented, '[t]hat such issues [concerning art 66A] continue to arise in the Cook Islands, even fifty years after internal self-governance, is a testimony to the complexity of the task of determining the role of custom … within an introduced legal and governance framework.'[87] *Framhein* illustrates that this task is not over. The Committee's decision is both a forwards and backwards step for the position of custom in the Cook Islands' law. Departing from previous case law, the Committee found that custom can be established for art 66A(4) despite statutory ambiguities concerning the constitution of the Aronga Mana and what amounts to a conclusive opinion. However, the decision also reinforces a recent judicial inclination towards narrow rule-based custom. While it is unclear how this will affect future treatment of Aronga Mana customary authority, it evinces a need for clarity around the precedential value of interpretations of custom. Most strikingly, the Committee's application of art 66A(3) to un-bind custom from domestic law by virtue of inconsistency with legislation seems not only illogical, but also a departure from previous judicial statements about the article's operation and intention.

Considering post-colonial perspectives on *Framhein* raises questions concerning the outlook for Aronga Mana customary authority and the place of the Privy Council as the superior appellate court to rule on questions of constitutional interpretation and findings of local custom in the Cook Islands. This case note has not attempted to answer all these questions, but notes the need for the Cook Islands legislature and wider community to address these issues as they persist and grow in urgency.

[87] Forsyth, above n 51, A-26.