

# **SUBMISSION BY THE NEW ZEALAND CHAMBERS OF COMMERCE ON THE MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL**

## **1. INTRODUCTION**

The New Zealand Chambers of Commerce welcomes the opportunity to make a submission on the Marine and Coastal Area (Takutai Moana) Bill.

The New Zealand Chambers of Commerce (Inc), NZCCI, is an umbrella organisation serving the interests of 29 Chambers of Commerce nationwide. These, in turn, represent more than 24,000 businesses around the country. While many of our members are in the SME category, our membership includes most of the largest corporations in New Zealand.

NZCCI confirms that it wishes to present in support of this submission. Address for service is:

- Ms Julie Cooke, PA Michael Barnett, Chairman, Management Committee, NZ Chambers of Commerce (09) 302 9916 or email: [jcooke@chamber.co.nz](mailto:jcooke@chamber.co.nz) .

## **2. OVERVIEW**

As submitted previously<sup>1</sup> NZCCI supports the government's proposal to repeal the Foreshore and Seabed Act 2004 on the basis that the current legislation is unfair, unclear and has created an environment of uncertainty for business in respect of foreshore matters.

Accordingly, NZCCI strongly supports any new legislation that addresses these concerns, and in particular sets a clear vision for well into the future that is underpinned by sound principles that enable:

- The sustainable management of New Zealand's marine and coastal resources and environment;
- Public access to the marine and coastal (foreshore) environment for all New Zealanders;
- Certainty to business and development interests in how the coastal marine area is controlled and regulated;
- Respect for property rights and customary (traditional) interests.

Although NZCCI is supportive of Government's objective to deliver legislation that provides a permanent solution to matters affecting the foreshore and seabed area and agrees with comments by Attorney-General Chris Finlayson when introducing the Marine and Coastal Area Bill that "it's in the public interest that we have a durable piece of legislation", NZCCI is greatly concerned that the Bill, as it stands, may not achieve these objectives.

Indeed, the public debate since the introduction of the Bill indicates that it is proving as controversial as the Act it repeals.

In particular, we are concerned that the Bill:

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<sup>1</sup> Reference NZCCI submission to Foreshore consultation document including Chamber and Min of Justice websites and submission number

- Does not provide a long-term settlement to concerns New Zealanders have in the marine and coastal area;
- Lacks explicitness in key areas, leaves many unanswered questions and creates significant uncertainty;
- Potentially undermines the existing regime under the Resource Management Act (RMA) from applying to an entire area – i.e. those parts of the marine and coastal area where customary rights have been established;
- Creates the possibility that a range of property rights can be transacted and changed by secret negotiation;
- May not, as it stands, contribute positively and fairly to enable business interests to engage and invest efficiently in the development of marine and coastal area resources and other commercial opportunities.

Our overall conclusion from assessing the Bill is that major changes are required in order for the above concerns to be satisfied, and possibly a more pragmatic outcome should be that the Bill be withdrawn and replaced by an approach based on making a fresh start guided by overarching principles which the overwhelming majority of New Zealanders would likely agree with.

The balance of this submission is presented in four sections. Section 3 provides an assessment of the specific provisions in the Bill to protect business and commercial interests. Section 4 considers the provisions for recognising Maori customary interests in the common marine and coastal area, with particular focus on provisions for Maori groups to derive commercial benefit from customary marine title. Section 5 outlines the basis for an alternative approach for achieving an enduring solution that balances and protects the interests of all New Zealanders in the coastal (foreshore and marine) environment. Section 6 provides a conclusion.

### **3. PROTECTION OF BUSINESS AND COMMERCIAL INTERESTS**

NZCCI welcomes the general policy statement in the explanatory note to the Bill that New Zealanders have a broad range of recreational, commercial, conservation, and customary interests in the common marine and coastal area.

NZCCI welcomes the provisions in the Bill, as a starting point, to protect these interests by providing more certainty than in the current Act about roles and responsibilities. The Bill explicitly provides that nothing in the Bill affects existing commercial, recreational, and customary fishing rights and preserves rights of navigation in the area.

We are pleased to note that resource consents granted before the Bill is passed will continue as normal, and expected nothing less in this regard. NZCCI also notes and agrees with provisions in the Bill for activities that already have resource consents (such as aquaculture and mining), along with operations that are a necessary part of New Zealand's infrastructure (such as pipelines and cables) are exempted from the veto powers granted to customary title holders (discussed in Section 4 below).

In particular, we note and support the provisions in the Bill that:

- Essential infrastructure such as ports must be allowed to operate without any new restrictions flowing from the granting of new Maori customary marine titles, and also the pragmatic proposition that fee simple title be issued for port reclamations;
- Roads in the coastal marine area will continue to be owned by the Crown, local authorities or whoever commissioned them;

- Structures such as boat ramps, marinas, cables, and pipelines will remain the personal property of the owner and resource consents will continue to be paid as at present;
- Proprietary interests such as leases, licenses and permits that do not require a resource consent but include a right of renewal or a right of extension, will be deemed to have been granted by the Crown, and renewals and extensions may be granted; and,
- Nationalised minerals such as petroleum, gold, silver and uranium will continue to be owned by the Crown (and Pounamu will continue to be owned by Ngai Tahu).

However, NZCCI is deeply concerned that whilst existing commercial and other property rights are guaranteed (and this is supported), other than for essential infrastructure the Bill is silent on the status of any future rights or applications to use the foreshore for commercial and other private sector activities.

The Bill, as it stands, introduces uncertainty that future business and commercial development proposals for the foreshore area (such as tourism and recreation, fishing and marine farming) will continue to be properly considered through the existing RMA regime, and won't become subject to the outcome of other provisions in the Bill giving iwi the right to seek customary title to marine and coastal areas.

The validity of these concerns is reinforced, firstly, by widespread commentary indicating a lack of certainty and clarity about the Bill and whether it will achieve its core objectives, including by sponsors of the Bill as well as many other commentators and authorities.

Secondly, the Bill's provisions granting the holder of a protected customary right the sole right to grant or deny a development proposal within the area, as it stands, amounts to a potential power of veto over business and commercial development proposals in the whole of the marine and coastal area. The submission elaborates these concerns below.

#### **4. PROVISIONS FOR RECOGNISING MAORI CUSTOMARY INTERESTS**

The Bill recognises the traditional importance of the common marine and coastal area to Māori by restoring customary interests that were extinguished by the 2004 Act, and providing for the legal recognition, protection, and expression of customary interests in 3 ways.

##### **Mana tuku iho**

This is a universal provision which applies around the whole coast and is open to local iwi to participate without the need for proof and with the ability for more than one iwi group to apply to apply for rights to the same area.

*Clauses 49-52 Powers:* allow iwi and hapū to take part in the statutory conservation processes within their relevant common marine and coastal area. These processes include the establishment and/or extension of marine reserves and conservation areas and the management of stranded marine mammals.

##### **Protected customary rights**

Secondly, the Bill sets out a process by which customary rights (such as launching waka and gathering hāngi stones) that were exercised in 1840 and continue to be exercised today in accordance with tikanga can be given legal effect, and the future exercise of such rights can be

protected. Like many other activities in the common marine and coastal area, these customary rights are not exclusionary and do not stop others from legitimately carrying out activities.

*Clauses 53-59 Protected Customary Right Order:* enables the rights holder to establish commercial coastal practices without needing resource consents, although the Minister retains the power to impose controls.

These rights may be delegated or transferred for commercial benefit. The group also has the right of veto over any other RMA consent application in the area with no right of appeal.

### **Customary marine title**

Finally, the Bill provides for the right to seek customary marine title to a specific part of the common marine and coastal area if an area has been used and occupied by a group according to tikanga and to the exclusion of others without substantial interruption from 1840 to the present day.

Customary marine title recognises the longstanding and continuing connection between a group and a specific part of the common marine and coastal area.

*Clauses 64-91 Customary Marine Title Rights:* provide for the legal recognition, protection, and expression of this ongoing connection between a group and a place. A customary marine title also provides an interest in land, but that land cannot be sold or otherwise disposed of. A customary marine title group can derive commercial benefit from customary marine title, and may transfer or delegate its rights in accordance with tikanga.

A customary marine title will have the following associated rights in respect of the title area, subject to certain exclusions:

- The right to give or withhold permission for applications under the RMA;
- The right to give or withhold permission for specified conservation activities;
- The right to participate in certain conservation decisions;
- The protection of wāhi tapu or wāhi tapu areas within the title area;
- The presumption of ownership of newly formed taonga tūturu;
- The ownership of minerals (other than petroleum, gold, silver, and uranium);
- The right to create a planning document for the customary marine title area that imposes obligations on local authorities.

Public access is guaranteed to areas in customary marine title except where wāhi tapu and wāhi tapu areas, such as burial caves, require protection and to which access can be restricted.

The Bill also provides that protected customary rights and customary marine title can be recognised in 2 ways:

- By application to the High Court; or,
- By agreement with the Crown given effect through Order in Council (i.e. negotiation with a Minister of the Crown).

The tests for recognition of customary marine title are the same whether title is sought through the courts or through direct negotiation with the Crown.

The Bill also requires a marine and coastal area register to be set up to record all orders made by the High Court and agreements with the Crown granting protected customary rights and customary marine titles.

## **NZCCI response**

NZCCI has some major concerns with the sections in the Bill providing for the legal recognition, protection, and expression of customary interests:

### *Granting property rights in secret negotiations – strongly opposed*

If an applicant for a customary interest is negotiating with the Crown, the discussions can take place in secret; that is, there is nothing in the Bill to inform the public of the negotiation and/or any other prospective applicant for a resource consent in a similar or competing venture to identify what the discussions are about, whether they are potentially creating unfair competition and/or undermining other rights and interests.

The provisions in the Bill enabling property rights to be negotiated in secret are well beyond existing processes under the RMA or regional plans, which currently require any activity that is contrary to a regional plan to be confirmed by an application for resource consent within six months of the provision becoming operational. Such activities are subject to the responsibilities of regional councils in a transparent process.

### *Compliance with RMA by all – strongly supported*

Allowing a customary rights holder to establish commercial coastal practices without needing resource consents or having to pay coastal occupation charges is unfair, discriminatory to the rest of the business community and potentially undermining to the credibility of New Zealand's overall RMA processes in that:

- Unfair competitive advantage - a customary rights holder establishing, say, a hotel or recreation fishing business without having to comply with RMA process and meet associated costs gains an immediate commercial advantage over other similar nearby businesses. This 'exception' from compliance with the RMA raises unanswered questions and creates significant uncertainty about customary rights holders compliance with other regulatory matters such as payment of development contributions and other local authority charges and rates.
- Discriminatory – a 'them and us' culture is embedded in the Bill's provisions enabling tribal groups not only to establish and run commercial ventures without the need for a resource consent (or any other form of official approval) but also to veto competing interests. No appeal process is provided for in the Bill.
- Potentially undermines the existing RMA process – despite the widely publicised faults associated with the RMA regime (which are being addressed in a review process), the Act provides an over-arching, robust and transparent approach whereby all competing considerations, including the relationship of Maori with their ancestral lands and water, are assessed and weighed in an open, democratic and contestable forum, with decisions on use and allocation made by an independent party; i.e. the Environment Court. The Bill removes the universal status of the RMA by establishing a class of activity no longer subject to its process and oversight.

*Ministerial oversight – needs strengthening to include important principles of access to justice, property rights and a fair go for all*

If the Select Committee decides to ignore this submission's call for a change to the Bill's provisions enabling a customary rights holder to establish commercial coastal practices without needing resource consents, then we strongly recommend that the Minister's powers under the Bill to impose controls should be strengthened.

At the very least, a Minister of the Crown who is asked to award a customary marine title in a secret process needs to be satisfied that the wider public interest is being protected. If the application is not going to be exposed to full public view in an open forum (either a Court or RMA-based process), then NZCCI suggests Government will be opening itself to considerable political risks if it doesn't take steps to ensure that critical public interest matters are openly addressed. For business, these include – good faith, respect for and protection of other commercial interests, property rights and fair competition, certainty and efficiency.

As the Bill currently stands it will need considerable amendment to deliver on these concerns. The Bill, as it stands, has the potential to impact negatively on the performance and confidence of business and may not, over time, contribute positively to the sustainable management and development of coastal resources.

## **5. ACHIEVING AN ENDURING SOLUTION THAT BALANCES AND PROTECTS THE INTERESTS OF ALL NEW ZEALANDERS**

NZCCI notes legal opinion<sup>2</sup> that it is unclear whether ultimately Parliament intended that the holder of a customary marine title should have the sole right to give, or deny, an RMA permission right to any other person proposing a development within the area, and with no right of appeal or objection against the decision.

However, it is noted that the necessary amendments to the RMA to give effect to the Bill are outlined in Schedule 3 of the Bill, and while the criteria to obtain a protected customary right are relatively specific, there is a number of potential evidential issues to be met. As there is little guidance to interpretation, it will be left to case law to establish the required threshold of proof. This suggests costly, legal proceedings associated with the projected innumerable claims by iwi and hapu over coming years, and ultimately, as many have predicted, disappointment that the Bill will be the platform to achieve a permanent solution.

NZCCI also notes that the concerns canvassed in this submission over the business and commercial environment implications are matched in other areas of the Bill<sup>3</sup> by many groups, including within Maoridom, that what is being proposed in the Bill is far from providing an open, democratic and enduring solution.

So what is the long-term solution? Could a principle-based approach pave the way to an enduring solution?

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<sup>2</sup> See Bell Gully Environment/ Resource Management Update, "Controversial Marine and Coastal Area (Takutai Moana) Bill Causes Concern – An RMA Perspective," October 2010 – [www.bellgully.com](http://www.bellgully.com).

<sup>3</sup> For example, whether the Bill provides 'free' access for all to the foreshore, how 'wahi tapu' areas will be decided and what restrictions on the general community these will create, and constitutional issues.

NZCCI recognises the importance of the principles of the Treaty of Waitangi to Maori and all New Zealanders. However, as the Foreshore and Seabed Act 2004 Consultation Document asserted and NZCCI agrees, these principles and any new legislation need to be balanced with other interests<sup>4</sup> and principles, and in particular certainty and efficiency. According to the Discussion Document at page 7, these principles are defined as follows:

- **Certainty** – there must be transparent and precise processes that provide clarity for all parties, including for investment and economic development;
- **Efficiency** – there must be a simple, transparent and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

Clearly, as this submission shows, these two principles have NOT informed or been applied to the proposals set out in the Bill to repeal and replace the Foreshore and Seabed Act 2004. There is a lack of transparent and precise process. There is a lack of clarity for many parties. The affordability and compliance costs associated with the Bill's processes are potentially high and time intensive.

Other principles in the Discussion Document that it is suggested the Bill should be based on<sup>5</sup> – but arguably have not been sufficiently taken into account - include:

- **Good faith** – it must achieve a good outcome for all following fair, reasonable and honourable processes;
- **Recognition and protection of interests** – it must recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
- **Equity** – it must provide fair and consistent treatment for all;

And arguably most important of all:

- **Access to justice** – it must provide an accessible framework for recognising and protecting rights in the foreshore and seabed.

NZCCI notes that in its decision on the Ngati Apa case in 2003, the Court of Appeal said that iwi and hapu had the right to go to court to prove customary title in areas of the foreshore and seabed. However, the Foreshore and Seabed Act in effect took this right away and pre-emptively removed any property rights that could have been recognised by the courts.

An obvious option to consider is to restore both rights, and this appears to be the primary objective of the Maori and National parties in bringing forward the Bill. According to Minister Finlayson<sup>6</sup> the two values that have informed the Bill are access to justice through the courts and respect for property rights.

NZCCI supports both principles. As outlined above, our major difficulty with the Bill is the additional processes, secrecy, over-riding of the RMA and other complexity in the Bill surrounding the provisions enabling iwi and hapu to go to court and try to prove customary title.

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<sup>4</sup> The interests to be taken into account in any legislation on the foreshore, as stated in the Discussion Document, where recreational and conservation interests, customary interests, business and development interests, and local government interests. See Discussion Document, page 19.

<sup>5</sup> See Discussion Document, page 8.

<sup>6</sup> Sunday Star Times article "Bill promotes access to justice and respect for property rights," 31 October 2010.

Accordingly, NZCCI strongly recommends that the Select Committee seriously look at an alternative option to apply the principles of access to justice through the courts and respect for property rights more simply and directly than is enabled by the Bill.

In terms of establishing a simple provision for iwi and hapu to access justice through the courts that meets all the above principles, we have two suggestions for the Select Committee to consider as a starting point:

- Strip out the complexity and secret process clauses enabling iwi and hapu to negotiate with a Minister of Crown for establishing a customary title; and,
- Remove the clauses granting (unjustified) privileged commercial development opportunities without compliance with open, democratic RMA processes and no right of appeal by others;

And instead:

- Present Parliament with a principle-based Bill entitling iwi and hapu to the same rights and privileges all other New Zealanders have in respect of settling property rights – i.e. unfettered access to justice through the courts;
- That is, in respect of an iwi or hapu wanting to try to prove customary title, there is a case to be made for the Select Committee to take a serious look at options to return to and build on the Court of Appeal decision by creating a new environment and mind-set to enable claims for a customary title to be established to be heard in the High Court.

In pursuing our suggestion, NZCCI strongly requests that the Select Committee take into account the findings of many of the submissions to the Discussion Document reviewing the Foreshore and Seabed Act.<sup>7</sup>

NZCCI notes that of the 332 submitters (from a total of 1593), who answered the question:

***Should the High Court hear and determine claims?*** ,

- 50% (166 submitters) stated that the High Court should hear and determine claims;
- 43% (143 submitters) stated that the High Court should not hear and determine claims;
- 7% (23 submitters) stated that they had no view or preference.

What is especially relevant in these responses is not the numbers but more that their comments supporting the High Court option were based on principles of open government, equity and good faith, as well as the Treaty of Waitangi.

Opinions expressed by submitters who **agreed** that the High Court should hear and determine claims included:

- *It is more independent/neutral/fair than the Māori Land Court, and more open than direct negotiations ;*
- *It is absolutely imperative that the High Court is the vehicle to decide “Māori customary interests”. The Government cannot be trusted with this duty as they are subject to political pressure, and often fail to uphold their own policies or even matters set out in the law.)*

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<sup>7</sup> Reference the Review document just published on the Min of Justice website

- *It is “the one court for all New Zealanders”;*

Many submitters qualified their agreement, for example:

- *As long as the Court is independent/open/acts in the best interests of all citizens, and that anyone affected can be party to the proceedings*

Some suggested that both High Court and Maori Land Court should have a role. The favoured combination was for the High Court to have jurisdiction in conjunction with, or assisted by, the Māori Land Court if necessary (e.g., in matters of tikanga, to share the workload, or in an appeal relationship).

- *Going through the High Court would result in speedier decisions and the appeal process is more straightforward. The High Court should be able to call on the expertise of the Māori Land Court around [sic] matters of tikanga.*

## **6. CONCLUSION**

The Foreshore and Seabed Act 2004 has been controversial. The Marine and Coastal Area Bill is proving as controversial as the Act it repeals, and won't provide the durable solution that business and many others want to see achieved.

NZCCI does not question the need for the Foreshore and Seabed Act to be reviewed and replaced. However, in order to progress forwards positively it is necessary to have a clear vision for the future that is underpinned by solid principles that are capable of enduring well into the future.

Minister Finlayson correctly identifies two principles required to under-pin the repeal and replacement of the Foreshore and Seabed Act – access to justice through the courts and respect for property rights. NZCCI contends that both principles should apply equally to all New Zealanders, and accordingly a way needs to be found to repeal the 2004 Act in a way that enhances and/or protects the interests of New Zealanders in the marine and coastal area for the benefit of all.

NZCCI considers that the Bill, as it stands, needs to be stripped down to the core principles for moving New Zealand forward in a positive direction that will result in good outcomes for both iwi/hapu and other New Zealanders, as well as for the environment and future economy.

Our considered suggestion is that the Select Committee seriously look at developing a simplified, principle-based proposal enabling iwi and hapu to take their claims for customary title direct to the High Court possibly with input provided by the Maori Land Court. Doing this would achieve the objective of restoring access to justice, uncluttered by the controversial and unprincipled measures that are at the heart of the disquiet of many including the NZCCI concerning the Bill.

Our suggestions and recommendations on the Marine and Coastal Area Bill are put forward in the positive spirit of achieving measurable improvement to resolve New Zealand's foreshore concerns. We look forward to discussing them further and working collaboratively with Government to ultimately achieve an enduring outcome from this singularly important reform process.

ENDS