Te Hunga Roia Maori o Aotearoa
(Maori Law Society Inc.)

Te Hunga Roia Maori O Aotearoa
Maori Law Society Inc.

SUBMISSION: Foreshore and Seabed Act Review

21 MAY 2009

TE HUNGA ROIA MAORI O AOTEAROA, SUBMISSION REGARDING THE FORESHORE AND SEABED ACT REVIEW

1 Appearance

1.1 Te Hunga Roia Māori o Aotearoa / The New Zealand Māori Law Society Inc (THRMOA) does wish to appear before the Ministerial Review Panel.

2 Te Hunga Roia Maori o Aotearoa

2.1 This submission is made for and on behalf of Te Hunga Roia Maori o Aotearoa (THRMOA).

2.2 THRMOA has a membership totalling more than 350 members of Maori lawyers. In addition to these members THRMOA also incorporates students who are studying towards a Bachelor of Laws (LLB).

2.3 THRMOA ensures the effective networking of members, holds a mandate to make submissions on a range of policies and proposed legislation, ensures representation of its membership on selected committees and organises regular national hui which provides an annual opportunity for Maori lawyers to discuss and debate issues relevant to Maori.

2.4 The current co-presidents of Te Hunga Roia are Damian Stone and Jolene Patuawa.

3 Previous Submissions on Foreshore and Seabed Act 2004

3.1 THRMOA made substantial written submissions to the Foreshore and Seabed Select Committee prior to the passing of the Act in 2004. THRMOA urges the Panel to include those submissions as part of their review.

4 Repeal of the Foreshore and Seabed Act

4.1 THRMOA's submissions to the Select Committee considering the legislation rejected the Act in its entirety. Consistent with that opposition THRMOA now considers that the Act be repealed in its entirety. THRMOA contends that the Act was passed into law whilst its provisions remained in breach of the Treaty of Waitangi. THRMOA states that this contention is consistent with the findings of the Waitangi Tribunal, that the process for developing the legislative policy was fundamentally flawed, and that the principles upon which the legislation was to be based, which remained unchanged at the time of enactment, were inconsistent with the principles of the Treaty of Waitangi.

5 Non-Extinguishment of Customary Rights / Aboriginal Title

5.1 THRMOA considers that the vesting of the full and beneficial ownership of the foreshore and seabed in the Crown (section 13(1)) constituted an attempted extinguishment of customary or aboriginal title in the foreshore and seabed. THRMOA notes that there is a substantial body of customary international law that requires extinguishment of customary aboriginal rights to require the consent of the aboriginal rights holders in order to be effective. THRMOA notes that in New Zealand the free, prior and informed consent of hapu to the extinguishment of their customary rights, as protected by the Treaty of Waitangi, has never been given. In fact hapu protested and opposed the Foreshore and Seabed legislation at every opportunity, and continue to do so today. Therefore THRMOA considers that as a matter of fact, and in law, the extinguishment

attempted by the Government with the passing of the Foreshore and Seabed Act has never been properly effected.

6 Discriminatory Application of the Foreshore and Seabed Act 2004

6.1 THRMOA contends that the Act is discriminatory because non-Maori property rights are not affected by the Act. If anything non-Maori property rights, regardless of their contentious existence in some instances, are legally protected, elevated and additionally provided with access to compensation if modified or removed.

7 The Creation of Legislative Recognition of Common Law Fictions

7.1 THRMOA asserts that the Foreshore and Seabed Act 2004 creates legislative recognition of common law fictions that were not, at the enactment of the legislation, properly established in Aotearoa / New Zealand. The two most obvious examples are the Crown assertion that there exists in Aotearoa / New Zealand a common right of access on the foreshore, and that common law rights of navigation exist as imported from colonial England. THRMOA asserts that a proper approach for ascertaining the common law of Aotearoa / New Zealand must include reference to tikanga Maori, and that in fact the relationship created by the Treaty of Waitangi prohibits the importation of the common law of England without reference to the tino rangatiratanga over lands, territories and resources contained in Article 2 of the Treaty of Waitangi.

7.2 In relation to access over the foreshore, no such common law right has been established in New Zealand. It has merely been assumed, without proof or testing. THRMOA asserts that in order for the common law right to be applied in Aotearoa / New Zealand it must be subject to the same rigours of testing that other legal rights are subject to. In this specific case this testing would need to examine the alleged existence of that right alongside the exercise of traditional authority by the indigenous peoples.

7.3 Likewise, navigation is also a right that needs to be established, not assumed. THRMOA asserts that there are ample examples where tribal groups have monitored and controlled navigation according to their customary mana for generations. This exercise of authority may well displace the English common law assumption relating to free rights of navigation. The Act overrides this potential displacement, and creates instead a statutory right of navigation based on a common law right that may or may not have actually existed. The creation of a statutory right is not of itself problematic save for when that right, like in the present case, interferes with or impinges on a pre-existing customary right of authority (rangatiratanga). The use of statutory instruments to subjugate or modify a customary right without the consent of the customary rights holder is a breach of natural justice, customary international law and the promises contained in the Treaty of Waitangi.

7.4 The Act contains other codifications that are based on a flawed assumption of an existing common law right. THRMOA contends that these all need to be examined for their validity, and where not valid, corrected. A further example of this within the Act is the Crown right to accretion or naturally reclaimed land. This arbitrary determination by the Act is based on a common law assumption regarding the dominion of the Crown over lands within its territory. The applicability of this area of common law to Aotearoa / New Zealand needs to be examined within the context of the Treaty relationship, with particular reference to the rights of hapu over their lands and territories as contained in Article 2.

7.5 THRMOA urges the Panel to recommend the thorough investigation of the applicability of these common law assumptions into Aotearoa / New Zealand without reference to the rights protected under the Treaty of Waitangi. There certainly is a valid argument that tikanga in fact displaces English common law in matters specifically referenced in Article 2 of the Treaty.

8 Statutory Tests – Inappropriate Importation of Canadian and Australian Jurisprudence into New Zealand Law

8.1 Group Definition

a. THRMOA is concerned that the Act anticipates the recognition of the rights of 'groups'. Hapu and iwi are the traditional holders of mana over the foreshore and seabed area. This is problematic in that it creates legal avenues of redress for entities that may not have been traditional rights holders.

8.2 Customary Rights Orders

a. Customary Rights Orders are a creation of the Act. They have the effect of extinguishing and replacing aboriginal title (which is inherent and inalienable) with a title created and derived from the Crown. This is then subject to unilateral Crown revision at any time. This falls drastically short of the international standard for the recognition and maintenance of indigenous rights and as a legal mechanism falls well short of the type of equity required by the Treaty relationship.

b. In addition, Customary Rights Orders are vague as to their entitlements. Testimony to the lack of clarity and confidence is the fact that since the passing of the Act not one Customary Rights Order has been made by the Maori Land Court. The farcical wording of the Customary Rights Orders provisions cannot conceal the very obvious fact that the orders are meaningless, and, on a indigenous rights analysis, self defeating because they provide the Crown with the requisite consent required to constitute extinguishment of customary rights in exchange for a statutory right.

8.3 Territorial Customary Rights Orders

a. The Territorial Customary Rights (TCR) Orders test illustrates the danger of importing foreign jurisprudence into Aotearoa / New Zealand without careful thought. The use of Canadian and Australian jurisprudence for the source of common law tests without the exploration of our own indigenous common law is a flawed approach to law making. The applicant in a TCR case must, in filing their application, state that 'but for the passing of the Foreshore and Seabed Act 2004' they would have held customary rights over the foreshore and seabed in their respective area. The employment of the 'but for' expression requires the applicant to concede at the outset of the application that the Act displaced their rights. THRMOA finds this abhorrent.

9 Burden of Proof

9.1 The formulation of the tests places an undue burden of proof on hapu and iwi. It requires them to establish authority, to the exclusion of all others, over virtually every grain of sand in the foreshore and seabed area. In addition, hapu and iwi need to be able to show this authority has been exercised continuously or at least 'without substantial interruption' over a 250+ year period (from 1840 to the passing of the legislation in 2004).

9.2 The test takes no account for when the interruption of the exercise of customary authority has been caused by established Crown breaches of the Treaty of Waitangi. Instead, in those cases where hapu and iwi have been alienated from their land due to illegal Crown confiscations, they will suffer legal 'double jeopardy' by not being able to show they exercised their authority over the adjacent foreshore and seabed area.

9.3 If a hapu or iwi is able to provide the overwhelming proof required by the tests this proof is then able to be rebutted by a mere assertion by an outside party (any outside party including the Crown themselves) that the said authority was not exercised, or was not recognised by them to be exercised, or not recognised by them to be legitimate.

9.4 THRMOA urges the Panel to recommend the immediate review of the burden of proof required by the Act.

10 Creation of a Statutory 'Right to Talk'

10.1 THRMOA is concerned that, having fulfilled impossibly high statutory tests, a group that is successful in obtaining a customary rights order or territorial customary rights order in their favour is entitled to nothing more than the ability to sit down and talk with the government over appropriate recognition and redress. This is arguably a right hapu and iwi already have protected by the Treaty relationship. To require a Treaty partner with pre-existing rights to go through an extensive and expensive judicial process in order to prove the other partner has wrongfully abrogated their rights with the eventual outcome; to be allowed to sit down and negotiate an agreement with the government seems to be an extraordinary waste of time, energy and resources, not to mention a clear breach of the Treaty relationship.

10.2 The Act has been criticised as not providing any greater protection for hapu and iwi than what is already available under the Resource Management Act 1991 and the Treaty Settlements process. THRMOA shares this concern. The processes created by the Act are unfair and unworkable, and the remedies ultimately available are ineffective.

11 Committee on the Elimination of Racial Discrimination (CERD) Decision 1 (66) (2005)

11.1 **Committee on the Elimination of Racial Discrimination (CERD) Decision 1 (66) (2005) stated that** "[T]he legislation appears to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress. [The Committee] urges the State party, in a spirit of goodwill and in accordance with the ideals of the Waitangi Treaty, to resume a dialogue with the Māori community with regard to the legislation in order to seek ways of lessening its discriminatory effects, including where necessary through legislative amendment."

11.2 THRMOA is concerned that the government has never implemented the recommendations of the CERD committee to enter into proper and meaningful dialogue with Maori.

12 Special Rapporteur on the Fundamental Freedoms and Human Rights of Indigenous Peoples Country Report (2006)

12.1 The Special Rapporteur on the Fundamental Freedoms and Human Right of Indigenous Peoples stated in 2006 that "[T]he Foreshore and Seabed Act should be repealed or amended by Parliament and the Crown should engage in treaty settlement negotiation with Maori that would recognize the inherent rights of Maori in the foreshore and seabed and establish regulatory mechanisms allowing for the free and full access by the general public to the country's beaches and coastal area without discrimination of any kind."

12.2 THRMOA is concerned that the recommendations of the Special Rapporteur have never been implemented, and furthermore that the government's response to the Special Rapporteurs report was to attack his personal character despite being a respected

member of the international legal community duly appointed to examine New Zealand in his official role as a Rapporteur for the United Nations.

13 CERD Concluding Observations on Country Examination (2007)

13.1 In 2007 the CERD Committee reiterates its recommendations that a renewed dialogue between the State party and the Maori community take place with regard to the Foreshore and Seabed Act 2004, in order to seek ways of mitigating its discriminatory effects, including through legislative amendment where necessary; that the State party continues monitoring closely the implementation of the Act; and that it take steps to minimize any negative effects, especially by way of a flexible application of the legislation and by broadening the scope of redress available to the Maori.

14 Declaration of the Rights of Indigenous Peoples

14.1 Since the passing of the Act the international community has adopted the Declaration of the Rights of Indigenous Peoples. This is a minimum standards document detailing the nature of the inherent and inalienable rights of indigenous peoples. It is a human rights document, contains strong parallels to the International Covenant on Civil and Political Rights, and the International Covenant on Social, Economic and Cultural Rights. An overwhelming majority of the member states of the United Nations endorsed the Declaration, with only New Zealand and the United States of America still choosing to decline endorsement. THRMOA asserts that it is arguable that the Declaration of the Rights of Indigenous Peoples has now become customary international law, which takes its legitimacy from the standards established by an overwhelming majority of international state parties to a particular rule, law or standard.

14.2 THRMOA recommends the review of the Act take into account the now internationally accepted standards contained in the Declaration of the Rights of Indigenous Peoples. In particular, the Declaration requires state parties to honour historic treaties, and recognises the rights of indigenous peoples to their lands, territories and resources.

15 Alternative Approaches to Recognising Customary Relationships, Rights and Responsibilities

15.1 THRMOA contends that it is not enough just to amend the Act. A broader solution is needed that addresses the cause of the foreshore and seabed issue. The foreshore and seabed issue started with objections to poor management of the marine environment and therefore, any solution must improve management of the marine environment. This could amount to a comprehensive review of management of the marine environment.

15.2 THRMOA further states that any alternative must be designed by both Treaty partners working collaboratively. No real enduring resolution can occur as long as one Treaty partner continues to dictate to the other the nature and extent of their rights.

15.3 THRMOA asserts that any alternative system established to replace the fundamentally flawed Act will need to be able to appropriately recognise mana whenua, and mana moana. It will need to be able to recognise the nature of mana, and the fact that this type of customary authority is not derived from the Crown, and is not determined by the Crown. Mana instead is a pre-existing inherent right that hapu and iwi possessed prior to the signing of the Treaty of Waitangi. Hapu and iwi are therefore entitled to assert how that mana is to be exercised and reflected within the Treaty partnership. THRMOA is concerned that this inherent mana is being diminished by legislative mechanisms designed to provide Maori with a means to ‘exercise their mana’ that really equate to little more than mechanisms to increase Maori participation in government processes.

16 Moving Past the Foreshore and Seabed Act

16.1 THRMOA recommends that the Foreshore and Seabed Act must be repealed to remedy the injustice that Māori continue to experience. In doing so, the customary and property rights that the Act sought to extinguish, must be restored as a matter of law.

16.2 THRMOA further recommends that the government engage in real, meaningful dialogue with hapu and iwi to find an appropriate pathway forward. This dialogue should be based in the Treaty relationship, and enable hapu (as Treaty signatories) and the government to engage as equal parties. The process for this engagement should be developed in partnership, rather than one party dictating how the process is to be managed.

17 Additional Submissions

17.1 THRMOA has previously raised concerns about the process undertaken by the Government for the passing of the Act. It remains a concern that a fundamental issue regarding the customary and aboriginal rights was mismanaged by the Crown to such an extent that it caused gross racial tension.

17.2 In addition, THRMOA has concerns about the process established for the review of the legislation. While THRMOA congratulates the new government in their approach to treat the review as a matter of priority, it does not believe a meaningful result can come from a process that is rushed and does not allow adequate time for true dialogue between Treaty partners. The time constraints put on the Review Panel by the terms of reference make genuine resolution of these issues difficult - six weeks is simply not sufficient time to adequately consult with hapu and iwi. If the Review process mirrors the unfortunate haste with which the Foreshore and Seabed legislation was enacted, then a process of full and proper engagement with hapu and iwi should be a primary recommendation of the Review report. THRMOA notes here that a move away from the unilaterally controlled 'consultations' of recent years that have been characterised by Maori being 'talked to' rather than 'talked with' would be required in order to make this engagement effective. True Treaty partnership requires both parties to enter into genuine discussions to resolve differences in good faith. THRMOA urges the government to talk with iwi and hapu about developing a better model of engagement to give effect to the Treaty relationship.

17.3 THRMOA draws the Panels attention to the Waitangi Tribunal's first recommendation about the foreshore and seabed: the need for a longer conversation. "It may be that the conversations would be long ones, and would take place over an extended period. We think that is appropriate. The issues are complex. The rights being interfered with are important ones." The need for dialogue with Maori to seek ways to mitigate the discriminatory effects of the Foreshore and Seabed Act was also recommended by the UN Committee on the Elimination of Racial Discrimination in 2005 and 2007.

17.4 THRMOA respectfully reminds the Panel that the Treaty relationship requires the government to engage with their Treaty partners, hapu. The government is not able to unilaterally redefine who their Treaty partners are and appoint alternative groups or individuals to treat with. This may mean that the government needs to be prepared for a lengthy process, and a process that results in different arrangements for different groups. A 'one-size-fits-all' approach is not likely to be appropriate or enduring. Each hapu has their own mana, and are entitled to have that mana recognised in their relationships and dealings with the Crown. This may mean that some hapu prefer to negotiate a individual agreements with the Crown regarding the management of the coastal marine area in their tribal territory. It may also mean that some hapu form alliances with others to come to an arrangement with the Crown. THRMOA urges the government to be open minded about either possibility. An enduring solution will require real dialogue, and the willingness of all parties to work together to find a solution for the best management and regulation of the coastal marine area.

17.5 THRMOA further recommends that the New Zealand constitutional arrangements be examined to ensure that nothing like the Foreshore and Seabed Act can ever happen again – this will require proper recognition of the Treaty of Waitangi and full protection of indigenous human rights standards.

18 Concluding Remarks

18.1 THRMOA continues to be concerned that the Act is an ongoing major injustice to Maori. It involves substantial breaches of the Treaty of Waitangi, of human rights protected in domestic legislation and international law, and it removed the possibility of common law recognition, inadequate though that might be, of the full extent of Maori title and rights in foreshore and seabed areas.

18.2 THRMOA contends that there are viable alternatives to the legislation which would not have discriminated against hapu and iwi, but these were not even considered, let alone explored, by the government in 2003/04. The present government's commitment to review the Act provides an opportunity for these alternatives to be explored now. THRMOA urges that these alternatives be explored in the context of a true and proper Treaty partnership, and that the government engage genuinely with hapu and iwi to find an enduring solution.

18.3 THRMOA restates that the Act must now be repealed and a more positive way forward, which fully respects the rights of Maori, must be set in place. True dialogue cannot occur while the Act, as an illegal confiscation and breach of Treaty rights, remains in place. The process going forward should be the reverse of what has occurred to date, that is, it must be based on the assumption that the foreshore and seabed areas belong to hapu and iwi, rather than on an assumption of Crown ownership. THRMOA contends that it is essential that this time round a just and durable resolution is reached - while the government may consider it politically expedient to rush through the Review, that is only likely to result in a further travesty of justice.

18.4 Lastly, THRMOA states that it is important for the government to recognise that the Act was symptomatic of the dysfunctional state of the Treaty relationship. The ongoing failure of successive governments to honour the Treaty and the associated need for constitutional change to give full effect to its provisions gave rise to the political environment in which the foreshore and seabed legislation was passed. Ultimately there is no other way to ensure that the rights of hapu and iwi are fully respected and protected from the whims of the government of the day than to review these constitutional arrangements so that they provide the legal framework for the proper implementation of the Treaty promises. A government that has the courage to enter into these discussions is likely to find that genuine and enduring solutions are available, with a little creativity, and a commitment to achieving justice. THRMOA is excited by the possibility that this review may signal the current government's intention to embark on the journey towards true Treaty partnership.

CONTACT PERSON REGARDING THIS SUBMISSION

Jaimee Kirby-Brown
Submissions Officer
Te Hunga Roia Maori o Aotearoa
C/o NZLS
PO Box 5041
Wellington

Phone: (09) 367 8813
Email: maorilawsociety@lawsociety.org.nz Attention: Jaimee Kirby-Brown