

**Te Hunga Roia Māori o Aotearoa
(The New Zealand Māori Law Society Incorporated)**



**Submission on the
Marine and Coastal Area Bill
to the Māori Affairs Select Committee**

19 NOVEMBER 2010

TE HUNGA ROIA MĀORI O AOTEAROA

SUBMISSION ON THE MARINE AND COASTAL AREA BILL

1 Introduction and Summary

- 1.1 This submission on the Marine and Coastal Area (Takutai Moana) Bill (**Bill**) to the Māori Affairs Select Committee (**Committee**) is made for and on behalf of Te Hunga Roia Māori o Aotearoa (**THRMOA**), also known as the New Zealand Māori Law Society Incorporated.
- 1.2 THRMOA has a membership of more than 350 lawyers. THRMOA also welcomes Māori tertiary students who are studying towards a Bachelor of Laws and law related papers offered at Wānanga throughout Aotearoa New Zealand.
- 1.3 THRMOA ensures the effective networking of its 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 that provides an annual opportunity for members and other persons interested in Māori related legal issues to discuss and debate those issues.
- 1.4 When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū and iwi (**WHI**), but rather seeks to highlight areas of concern, and suggest further reform options where appropriate. In this respect also, THRMOA acknowledges the diversity of Māori opinions on the Bill.
- 1.5 This submission is structured as follows:
 - a. Previous Submissions on the Foreshore and Seabed Act 2004 and related matters;
 - b. Guiding Principles;
 - c. Key Areas of Concern with the Bill;
 - d. Additional submissions; and
 - e. Concluding remarks.

2 Previous Submissions on the Foreshore and Seabed Act 2004 and related matters

- 2.1 THRMOA made written submissions to the Foreshore and Seabed Select Committee prior to the passing of the Foreshore and Seabed Act 2004 (**FSA**). THRMOA also made a submission to the Ministerial Review Panel on the FSA in May 2009 and a submission to the Government on its Consultation Document on the FSA in April 2010.
- 2.2 All of THRMOA's submissions to the Foreshore and Seabed Select Committee, the Ministerial Review Panel, and the Government on the FSA, recommended that the FSA be repealed in its entirety. THRMOA maintains that the FSA was enacted with provisions that were effectively in breach of the common law, te Tiriti o Waitangi / the Treaty of Waitangi (the **Treaty**), and international law. THRMOA supports the repeal of the FSA proposed in the Bill.¹

¹ Clause 14.

3 Guiding Principles

THRMOA considers that there are a number of guiding principles that should be used for the enactment of any laws in relation to Tangaroa/Hinemoana, marine and coastal areas, and Māori rights in respect of these matters and generally. These principles are reinforced by:

3.1 The Declaration on the Rights of Indigenous Peoples especially:

- a. **Article 19**
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- b. **Article 25**
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
- c. **Article 26**
 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
- d. **Article 27**
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
- e. **Article 28**
 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
- f. **Article 32**
 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
 2. States shall consult and cooperate in good faith with the indigenous peoples

concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

g. **Article 38**

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

3.2 Standard legal principles in the common law, including that Māori rights are determined by rights in accordance with Māori custom (tikanga Māori); and

3.3 The Treaty.

4 Key Areas of Concern with the Bill

Consent of Māori

4.1 THRMOA continues to be uncertain as to whether a legislative regime is the appropriate way to optimise expression of Māori rights in the marine and coastal area, especially where (like here) that regime gives some definition on what tikanga constitute.

4.2 In any event, THRMOA considers it is unlikely that a legislative regime that is not subject to free, prior and informed consent by Māori, is the best way to recognise Māori rights in the marine and coastal area and in relation to Tangaroa/Hinemoana.

4.3 In that respect, there continues to be a number of alternatives for Parliament to seek free, prior and informed **consent** of Māori prior to enactment of the legislation including:

- a. Formal consent by (a majority of) Iwi to the legislation; and/or
- b. Formal consent/approval by a majority of Māori electors who are on registered on the Māori Electoral Roll (by way of a referendum or other electoral mechanism).

At this time, THRMOA is unaware that consent of Māori to the proposed legislation has been formally sought (as opposed to merely consultation and participation in the policy-making and legislative drafting). The issue of Māori consent continues to be an overarching constitutional challenge for the proposed legislative regime and the legislative process generally.

Bill is unsatisfactory in the current form

4.4 In the likely event that the House of Representatives seeks to progress the legislative process for the Bill, THRMOA considers that the Bill is unsatisfactory in its current form and recommends that the Select Committee give further thought to enhancing the expression of both tikanga Māori, as well as Māori property rights recognised by the common law, the Treaty, and international law (together collectively defined in this submission as **Māori rights**) by way of amendments to the Bill.

4.5 THRMOA considers that any legislation that provides for Māori rights in relation to Tangaroa/Hinemoana and in the coastal and marine area guarantees the following points:

- a. The mana based relationship that WHI have with the common marine and coastal area (**CMCA**) is not only explicitly acknowledged,² but provided for though the appropriate recognition of customary rights and an appropriate process by which those customary rights are determined;
 - b. The appropriate authorities e.g. pūkenga, are required to contribute to any judicial assessment of customary rights and/or customary marine title;
 - c. WHI are appropriately resourced to bring claims for protected customary rights and/or customary marine title (**CMT**);
 - d. WHI are not restricted from making claims by placing limitation periods on the time WHI have to bring a claim;³ and
 - e. Rights afforded to infrastructure providers are not provided to the detriment of WHI interests.
- 4.6 Further, THRMOA wants to ensure that any further changes through the Select Committee process do not further reduce the expression of Māori rights especially by way of:
- a. Raising the threshold tests for protected customary rights and CMT; nor
 - b. Providing further exceptions for infrastructure providers to the detriment of Māori rights.

Repeal of the FSA

- 4.7 It is THRMOA's understanding that if the Bill is not passed then the FSA will remain in force. This is not acceptable.
- 4.8 In the event that the Takutai Moana Bill is not enacted, THRMOA recommend that the FSA be repealed and the circumstances prior to the enactment of the FSA apply.

Specific comments

- 4.9 As drafted the Bill provides recognition for protected customary rights⁴ and CMT (both as defined by the legislation).⁵
- 4.10 In the event of the Bill progressing, THRMOA will support the recognition of customary rights and CMT in relation to the marine and coastal area. However, THRMOA makes the following points:
- a. THRMOA **suggests** that the Bill be called the Takutai Moana (Marine and Coastal) Area Bill rather than the Marine and Coastal (Takutai Moana) Area Bill;
 - b. The threshold test for protected customary rights is considerable and should not be not raised any further e.g. by suggesting that the recognised customary rights must have been continually exercised from 1840 to the present day imports significant difficulties for a number of WHI given the nature of resource alienation from these groups. In particular, those WHI who have had intermittent physical connection with their specified takutai moana area have

² As it is in clause 4(1)(b).

³ As they will be if the 6 year time limit remains in clause 93(2) in relation to agreements with the Crown and clause 98(2) in relation to applications to the Court.

⁴ Clause 53.

⁵ Clause 60.

almost no opportunity to obtain legislative process to have their customary rights restored.

The threshold test for establishing CMT is unreasonably onerous given the "title" that is effectively recognised. Although the requirement to have continuous title to contiguous land has been removed, the customary group still has to hold that area in accordance with tikanga and have exclusively used and occupied the specified area from 1840 to the present day without substantial interruption.⁶ There is currently no form of "but for" test (i.e. "but for" land confiscation the particular customary group may have been able to assert CMT).

THRMOA suggests:

- i. revisiting the test for CMT to provide for those WHI who, through no fault of their own, were not able to exclusively use and occupy the particular area of the coastal marine area; or
 - ii. if the Select Committee decides not to revisit the current drafting, then ensure that the current threshold for establishing CMT is not made even more difficult.
- c. The exceptions provided for under the accommodated activity and deemed accommodated activity tests are too wide in their current form. The tests to establish CMT are set at a significantly high threshold. The extent of the carve-outs to regulatory and commercial right-holders (e.g. by allowing a project to re-consent without even consulting the CMT holder) does not accord with the high threshold test that it takes to establish CMT. Neither does it recognise that customary rights and CMT may sit comfortably with the various types of accommodated activity set out therein.

If the intention is that CMT provides the CMT group with a strong bundle of rights, then this should be reflected by reducing the number of exceptions allowed to the CMT.

THRMOA suggests:

- i. revisiting the list of exceptions provided for in the definition of "accommodated activity"⁷ especially the inclusion of "associated operations" with respect to existing regionally or nationally significant structure or infrastructure, in the definition of "accommodated activity";⁸ or
 - ii. if the Select Committee decides not to revisit the current drafting, THRMOA submits that the scope of these exceptions should not increase.
- d. As above (at paragraph 4.5d4.10c), the Bill provides that certain activities in the marine and coastal area be accommodated activities⁹ and are therefore not subject to the CMT restrictions. Clause 8(1)(f) provides that "an existing structure or existing infrastructure that is nationally or regionally significant, and its associated operations" are accommodated activities. "Associated operations" are set out in clause 8(2) and include renewal of an existing

⁶ Clause 60.

⁷ Clause 8.

⁸ Clause 8(2) which includes the ability to renew and upgrade.

⁹ Clause 8.

recourse consent¹⁰ and upgrading the existing infrastructure.¹¹ As currently drafted there is room for disputes to arise as to what constitutes an "associated operation" under clause 8(2) (for example, what would count as a minor upgrade, who/what body decides if the effects on the environment of the upgrade are the "same or similar in character, intensity, and scale" as the current infrastructure).

THRMOA suggests:

- i. an independent body (such as the Environment Court, the Māori Land Court or the High Court) have jurisdiction to determine any disputes that may arise under clause 8(2); and
 - ii. that there are rights of appeal from any preliminary decision.
- e. The rights afforded to those groups that obtain CMT should remain. As above, THRMOA does not support the exception for accommodated activities. The iwi planning document, wāhi tapu, and resource management permission rights especially should not be made dependent on the rights of infrastructure providers. These legislative rights have implications for a reason. To maintain their effect, which appears to have been a deliberate policy choice, they cannot be further encroached.
- f. The Bill provides a 6 year time limit for coastal WHI to either, provide notice to enter into an agreement with the Crown¹² or to file an application to the Court for a recognition order.¹³ THRMOA submits that applying a statutory time bar to the recognition of customary rights is inappropriate. The 6 year benchmark appears to come from the Limitation Act 1950 (recently replaced by the Limitation Act 2010, but still in force for the purposes of certain acts and omissions). Again, THRMOA does not support placing statutory time bars on the recognition of customary rights.

THRMOA suggests:

- i. deleting clauses 93(2) and 98(2) which provide for the 6 year time limits; or
 - ii. If the Select Committee decides not to remove the statutory time bar to the recognition of customary rights, then the Bill should provide for a longer time limit e.g. 10 years.
- g. The Bill provides that freehold title may be obtained for reclaimed land in the CMCA. This changes the position under the FSA (under the FSA freehold vesting for new reclamation consented post-2004 cannot be obtained, an applicant can only attain a leasehold interest of up to 50 years). The ability for certain interests to obtain freehold interest in the CMCA through reclamations is contrary to the position that no one is to own the CMCA. Further, it is clear in the Bill that if a WHI establishes CMT this does not entitle them to freehold title (and the associated benefits that go with this). The ability to obtain freehold vesting for reclaimed land creates a disconnect between those (largely infrastructure) providers and CMT holders.

¹⁰ Clause 8(2)(a)

¹¹ Clause 8(2)(c)

¹² Clause 93(2)

¹³ Clause 98(2)

THRMOA acknowledges that the nature of reclamations are slightly different to the CMCA (in that they have been formed as land) but THRMOA submits that does not change the base position that a disconnect is created.

- h. The Bill provides that except in the exercise of its jurisdiction under the legislation to make a recognition order, no court may hear and determine an aboriginal rights claim relating to the common marine and coastal area.¹⁴

THRMOA notes that this is a significant incursion on the current rights of Māori to seek common law recognition of Māori rights in relation to the coastal and marine area, and considers that the clause reinforces the contention that all Māori rights for the takutai moana are now proposed to be either sourced in or mandated by legislation. It is apparent that the quid pro quo of the legislation is just this.

THRMOA **suggests** reconsideration of and confirmation by the Select Committee of clauses 96(3-4).

- i. The Bill provides at clause 97 that the Court may, on an application for a recognition order that raises a question of tikanga, refer that matter to the Māori Appellate Court for its opinion or obtain the advice of a court expert (pūkenga). The clause further provides that the opinion of the Māori Appellate Court is binding on the Court but the advice of a pūkenga is not. THRMOA acknowledges the effort by legislators to involve experts in assisting the Court to ensure appropriate recognition of tikanga.

THRMOA **suggests** that the Court should be required to refer these matters to either the Māori Appellate Court for opinion or a pūkenga for advice.

- j. The Bill in its current form does not provide for a disputes resolution mechanism to resolve overlapping WHI claims to the Takutai Moana.

THRMOA **suggests** that further consideration be given to the possibility of those overlapping claims and mechanisms to resolve these. Possible resolution mechanisms include private discussions, mediation and/or determination by the Māori Land Court.

5 Additional Submission

- 5.1 Although THRMOA acknowledges the work that has gone into the discussions and drafting resulting in this Bill, THRMOA observes that there are other options to recognise customary relationships, rights and responsibilities within the marine and coastal area. The foreshore and seabed issue started with objections to poor management of the marine environment. Given that, any solution must improve management of the marine environment including restoration and rehabilitation of the spiritual relationships of Māori, and non-Māori, with Tangaroa/Hinemoana and the marine environment. This could amount to a comprehensive review of the management of the same.
- 5.2 Any alternative design must have input from the Treaty partners and both must be committed to the alternative approach. As THRMOA has put forward in its earlier submissions, 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 and the process by which those rights are recognised and upheld (or not).

¹⁴ See Clause 96(3-4).

- 5.3 In its previous submissions on the FSA, THRMOA asserted that any alternative system established to replace the FSA needed to:
- a. appropriately recognise mana whenua and mana moana;
 - b. 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; and
 - c. recognise that WHI are therefore entitled to assert how that mana is to be exercised and reflected within the Treaty partnership.
- 5.4 The Bill has attempted to provide for the above. However, as it is currently drafted, it does not do so effectively.

6 Concluding Remarks

- 6.1 Although this Bill repeals the FSA, THRMOA considers that the Bill does not adequately optimise the expression of Māori rights. In some ways, the Bill in its current form appears to contravene the common law, the Treaty, and international law. At this stage, and in the absence of free, prior and informed consent of Māori, it does not appear that the Bill if enacted as currently drafted will constitute an enduring solution between WHI and the Crown in relation to the takutai moana.
- 6.2 THRMOA is also concerned, again, at how particular members of the House of Representatives (and media/public commentators) have chosen to portray the issues underpinning this Bill. This is not a debate about asking for more, nor is a debate about who should get what. Characterising the issues that way does nothing to inform the public of New Zealand about the real issue/s concerning this Bill. If anything, the Government could do more to raise awareness of these and related Māori issues through better marketing and education at multiple-levels of Aotearoa New Zealand society.
- 6.3 The real issue is about Parliament facilitating and giving the optimal expression of and empowerment for tikanga and Māori rights. The primary focus of this Bill could be recalibrated to ensure that the legislative regime allows for more optimal expression of Māori rights. This recalibration does not need a wholesale review, but rather more consideration around the thresholds for the tests for customary rights and CMT. Its final form should do more than what it currently provides.

THRMOA **encourages** the Select Committee to revisit the areas highlighted in this submission.

- 6.4 Lastly, THRMOA suggests that it is important for the government to recognise that the FSA was symptomatic of the dysfunctional state of the Treaty relationship. The ongoing failure of successive governments to respect the common law, honour the Treaty, and give effect to international law, along with the associated need for constitutional change gave rise to the political environment in which the FSA was passed.

Ultimately there is no other way to ensure that the rights of WHI are fully respected and protected from the changing personnel within government than to review and ensure the nation's constitutional arrangements appropriately implement Treaty promises. It takes courage to put forward new ideas to strengthen the Treaty relationship and uphold the responsibilities of a modern nation state.

THRMOA **encourages** the Government to always try harder and be thinking about new ways to strengthen relationships into the future. Kia kaha kōutou, tātou.

6.5 The words of a now deceased rangatira Rangitakuku Metekingi resonate for these important kaupapa:

“He ao āpōpō, he ao-tea.

There is a new day tomorrow, and that day will bring us clarity.”

THRMOA looks forward to clarity from legislators and WHI alike.

6.6 THRMOA wishes to be heard in support of this submission.

CONTACT PERSON REGARDING THIS SUBMISSION

Willow-Jean Prime

Submissions Officer

Te Hunga Roia Māori o Aotearoa

C/o NZLS

PO Box 5041

Wellington

Phone: 027 404 1375

Email: maorilawsociety@lawsociety.org.nz Attention: Willow-Jean Prime