Submission

By

to the

Māori Affairs Select Committee

on the

Marine and Coastal (Takutai Moana) Bill

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PO Box 1925
Wellington
Ph: 04 496 6555
Fax: 04 496 655

MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL
SUBMISSION BY BUSINESS NEW ZEALAND[1]

1.0 INTRODUCTION

1.1 BusinessNZ welcomes the opportunity to comment on the Review of the Marine and Coastal Area (Takutai Moana) Bill (“the Bill”) and wishes to appear before the Select Committee.

1.2 BusinessNZ did not submit on the discussion documents on the foreshore and seabed which led up to the enactment of the Foreshore and Seabed Act 2004 but did submit on the Discussion Document which reviewed the Foreshore and Seabed Act 2004 (April 2010).

1.3 In that submission BusinessNZ noted that it appreciated that the issues are complex. It accepted the Government’s overall objective is to balance the interest of all New Zealanders in the foreshore and seabed, but was concerned at the potential for unintended consequences.

1.4 BusinessNZ submits on this Bill as a representative of the business community because our members depend on the quality of our law. A respect for genuine property rights is one of New Zealand’s vital competitive advantages and law relating to this should be clearly stated and accepted by the majority of New Zealanders.

1.5 The business community also desires fairness, clarity, certainty, consistency with other law, consistency with the Treaty of Waitangi and the ability to facilitate economic development as outcomes of this proposed legislation.

1.6 Balancing the interests of all New Zealanders with regard to the issues connected with the marine and coastal area represents a major and difficult challenge. BusinessNZ recognises the effort and good faith demonstrated by the drafters of the Bill and submits the accompanying recommendations in the spirit of constructive engagement on one of New Zealand’s most sensitive and complex issues.

[1] Background information on BusinessNZ is attached as Appendix 1.

RECOMMENDATIONS

1.7 It is **recommended** that Parliament:

Retain the Foreshore and Seabed Act 2004 *or* repeal that Act and revert to the situation that existed before that Act was in place, with the qualification of allowing claims to be heard by the High Court and subsequent rights of appeal.

However, if the decision is made that the Bill should proceed, BusinessNZ recommends the following on a without prejudice basis:

(a) Restore the clarity and simplicity of underlying Crown ownership of the marine and coastal area, and local authority ownership where it exists, by omitting clauses 11(2) and 11(3) and simplifying the rest of the Bill accordingly;

(b) Amend clause 63 to ensure that customary marine title gives to its owners the full property owners' rights promised to them by the Treaty of Waitangi and amend clauses 64 to 91 accordingly;

(c) Protect the vital characteristic of the rule of law that people can know in advance what is lawful and what is not, by defining or removing terms that have no settled and readily discoverable meaning, including 'mana tuku iho', 'customary interests' and 'customary authority'.

(d) Ensure any customary rights made perpetual under the Bill - notwithstanding the essential characteristic under common law and custom (ahi kaa), that they expire if not used continuously in exclusion of others – meet the common law requirements adopted for all the people of this country under the Treaty of Waitangi. To this end require courts to be satisfied to the standard codified in the Seabed and Foreshore Act 2004, rather than the weakened forms found in clauses 53 and 54, and 60 to 64.

(e) In relation to the creation or amending of customary marine title and protected customary rights, omit clauses 93 to 95, or make any ministerial grants in terms of those clauses contestable applications for confirmation to the court under clauses 96 to 112.

(f) Provide for local authorities to apply to the court for the surrender of protected customary rights when there is no effective group remaining in the neighbourhood capable of exercising for their community the stewardship functions conferred by those rights.

2.0 DISCUSSION

2.1 In order to determine whether or not the Bill would achieve its stated aims, BusinessNZ established six criteria against which to measure its likelihood of success. The criteria are that the proposed legislation should:

1. Uphold and protect property rights
2. Be consistent with the Treaty of Waitangi and relevant common law
3. Bring legal clarity and certainty
4. Facilitate economic development for Māori and non-Māori
5. Integrate with other relevant legislation including the Resource Management Act
6. Satisfy overall justice and fairness including appeal rights and remedies

2.2 This submission focuses on those criteria, providing BusinessNZ's view of the extent to which it considers they have been addressed. From the nature of the proposed legislation this involves a considerable degree of overlap as the issues raised are inevitably entwined.

Would the proposed legislation uphold and protect property rights

2.3 BusinessNZ welcomes the Bill's recognition that Māori land rights are iwi-, hapū- and rohe-based, derived from property occupancy. This is consistent with both accepted orthodox property rights and the Treaty of Waitangi.

2.4 BusinessNZ also welcomes the Bill's recognition that many holders of the rights would find ways to generate commercial uses of benefit to the community generally under 'development rights'.

2.5 However the Bill also proposes novel forms of 'property rights', unknown in other legislation or jurisdictions, and not consistent with accepted orthodox property rights. These substitute rights cannot be directly compared to the known forms of property right that have evolved over centuries of legal development.

2.6 A property right is commonly understood as the exclusive authority to determine how a resource is used and includes several broad elements:

- the right to use the property;
- the right to improve, develop or make other changes to it;
- the right to exclude others from it;
- the right to earn income from it;
- the right to transfer it to others;
- the ability to have the above rights enforced; and
- the responsibility for consequences arising from the use of it.

2.7 At least some of the above elements are absent, diminished or uncertain in the 'customary marine title' proposed in the Bill. Customary marine title as outlined in the proposed legislation would contain elements contrary to the characteristics of known property rights. For example, for most of the areas concerned the substitute rights would tend to prevent improvement and would remove clarity about who has the right to control and benefit from development.

2.8 Known property rights are upheld in parts of the Bill, for example Clause 7 excludes specified freehold land from the definition of 'common marine and coastal area', as it does certain areas in Crown ownership, such as a conservation area under the Conservation Act. It appears that clause 12 will allow the creation, by Order in Council on the recommendation of the Minister of Conservation, of similar property rights.

2.9 However, other rights are less secure. Persons with an interest in a fixed structure located in any part of the marine and coastal area would retain their interest in the structure as personal property but only until this was changed by a disposition or by operation of law. Whether the interest would be retained where protected customary rights and customary marine title was granted is unclear.

2.10 It is likewise unclear whether certain proprietary interests, which (clause 22) would continue in spite of the divesting of ownership pursuant to clause 11, would similarly survive a grant of customary title rights and customary marine title.

2.11 There is also uncertainty regarding rights of access and rights of navigation. These rights would apply to the common marine coastal area (with a wahi tapu restriction in respect to the access right) but would not necessarily apply where protected customary rights and customary marine title had been granted.

2.12 There is a presumption that certain persons (e.g. port companies) would be granted a freehold interest in reclaimed land (clause 40) but the responsible Minister could also grant a distinct interest in the land to several eligible applicants (clause 39(3)), raising the possibility of future disputes over management and the like. The Minister would also be entitled not to grant a freehold interest if satisfied that there was a good reason not to do so, such as the land's cultural value to tangata whenua.

2.13 Local authorities would have 12 months from the time the Act came into force to apply to the Minister of Conservation for compensation for the loss of any of their land in the common marine coastal area (clause 26). Compensation payable would be the full market value of any land bought by the local authority but if the land was not bought at full market value, compensation would be limited to direct financial loss, including the loss of any income the local authority would otherwise have derived. Since the loss of income would probably be a continuing loss, it is unlikely that compensation paid would equate to total income foregone, but there would be no redress to any court.

2.14 Property rights are fundamental pillars of a market economy. Without reasonable security from confiscation or diminution of property rights by the state or others, the incentive for individuals and business to invest and build up productive assets is reduced.

2.15 The importance of investment in productive assets to a market economy means that property rights must be as clear and secure as possible. Property rights do not necessarily involve ownership; lesser interests can deliver many of the benefits of property rights but these can be negated by uncertainty, as when multiple claimants contest the same right, or it is not clear what the rights are, or who has the final say when 'rights' compete. To deliver their benefits, property rights must be able to be clarified and enforced and made certain through the courts.

2.16 This is not to derogate the position of tikanga. BusinessNZ welcomes the power for iwi to dispose of their interests in accordance with tikanga. The well-established tikanga around trade should enable transfers with the substantive legal nature of lease or sale. The creation of a useful market in parts of the marine and coastal area could facilitate beneficial development.

2.17 BusinessNZ also supports the intention to allow iwi and hapū to exploit minerals and carry out reclamations in relevant areas.

2.18 However, the substitute rights that the proposed legislation would create bear no comparison to the property rights assured by the Treaty of Waitangi. Even the highest category proposed, customary marine title, would restrict iwi and hapū to blocking the proposals of others (clauses 64, 65-67, 70-72) as the main way to extract tangible returns, rather than allowing them to gain full benefit of recognised orthodox property rights as upheld in the Treaty of Waitangi.

Would the proposed legislation be consistent with the Treaty of Waitangi and relevant common law

2.19 The Treaty in Article 2 promises classical property rights – '*the full, exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession but [with the right to sell at an agreed price, subject to Crown pre-emption]'*. However the Bill does not offer the exclusive use, possession and right to sell promised by that affirmation of property rights.

2.20 The Bill does not respect the promise in Article 3 to provide Māori with the same rights of citizenship as British subjects. As the Court of Appeal confirmed in *Ngati Apa*, rights protected include the right to have customary rights claims determined under the common law of England. Though claiming to respect the Treaty of Waitangi, the Bill in fact negates its express promise of equality before the law.

2.21 While the Bill claims to recognise or restore customary rights and privileges, it does not apply the well-developed common law tests for customary title or customary rights. Instead it omits vital elements of continuity and adverse possession shared both by common law and Māori custom (ahi kaa).

2.22 The Bill is inconsistent with common law in promoting a special status of common marine and coastal area that is contrary to the common law doctrine of eminent domain under which the absolute ownership of all land lies with the Crown.

2.23 Giving away the common law doctrine of eminent domain in relation to the marine and coastal area would leave nowhere for any currently freehold land to revert to should it not be possible to find someone to whom private ownership could pass. That could result in neglected, decaying and dangerous structures for which there would be no-one to take responsibility.

2.24 The Bill expressly denies exclusivity of use of areas under the interests created for iwi, except where reclamations are completed. This would provide an undue incentive for reclamation, likely to be an unintended consequence of the Bill.

Would the proposed legislation bring legal clarity and certainty

2.25 The kind of provisions referred to above reveal a degree of uncertainty that could mean both Māori and non-Māori business people having limited incentive to invest in the development of productive assets. Such investment is essential to a market economy; for investment to occur property rights must be as clear and secure as possible.

2.26 This submission has noted the uncertainty arising from the establishment of the special status common marine and coastal area. It is of some interest that one definition of the word ‘common’ is ‘land belonging to the community’ (Concise Oxford dictionary), indicating ownership by everybody rather than ownership by nobody. The consequence of the non-ownership concept is legislation dealing in exceptions and exemptions, creating anomalies and complexity. A government may argue that it frequently regulates things it does not own. But it is difficult to see how government could purport to control all uses of something that no-one owns if it is not itself the ultimate owner. Under common law some form of underlying ownership has been considered necessary if only to determine where ultimate responsibility lies. The Bill in essence renounces ownership then reasserts, in a less than coherent way, nearly all the control powers that define ownership.

2.27 Uncertainty would arise from the limited right of veto over resource consent applications for holders of protected customary rights (clause 57), and the stronger right of veto over activities planned for a customary marine title area which would operate even in the presence of a Resource Management Act permission right (clause 67). There is no presumption of reasonableness and no right of appeal from whatever the customary title group decides.

2.28 Uncertainty could also result from any planning document a customary marine title group might develop. For example it is unclear from clause 75 whether an application for a marine mammal permit would be refused if the holders of a customary marine title (whom the Director General of Conservation would be required to notify) decided against the application.

2.29 Clause 47 would govern the disposal of a freehold interest in reclaimed land in an area where any iwi or hapū exercise ‘customary authority’. However ‘customary authority’ is not defined. It is not clear whether it means restored customary interests – following the repeal of the current legislation – or customary marine title or protected customary rights, or all three, or is simply an assertion of an historical connection.

2.30 Uncertainty is also inherent in the exceptions referred to below:

2.31 The exclusion of freehold land and defined areas (such as a conservation area within the meaning of s2(1) of the Conservation Act) have previously been mentioned but land can become part of the common area by, for example, erosion, unless someone other than the Crown owns it. By contrast, land that moves beyond the line of mean high-water springs reverts to Crown ownership.

2.32 Roads in the common marine and coastal area remain in Crown ownership, and local authority, personal ownership and roads formed after the Act is in force are likewise ‘owned’ (clause 16). Structures such as bridges and culverts, are owned as separate property unless the owner is someone other than the Crown or local authority, in which case they are owned as part of the road.

2.33 Crown ownership of minerals (other than those designated as the property of the Crown) continues until any such are found within a customary marine title group area. At that point Crown ownership ceases and ownership moves to the relevant iwi group.

2.34 Rather than promoting legal clarity and certainty, the exceptions cited above demonstrate the uncertainty and complexity contained in the proposed legislation.

Would the proposed legislation facilitate economic development for Maori and non-Maori

2.35 The examples above, where legal clarity and certainty would be diminished resulting from the provisions of the Bill indicate difficulties that would be placed in the way of economic development for both Māori and non-Māori. Legal clarity and certainty are essential for investment and for economic development since without them, investors are reluctant to invest.

2.36 An example of how the proposed legislation could hinder rather than facilitate economic development for Māori and non-Māori is clause 47 governing the disposal of a freehold interest in reclaimed land. First, the proprietor of the

freehold interest must notify the relevant Minister of the Crown, then, if the Crown does not want to acquire the freehold interest, must give notice to a representative of any iwi or hapū exercising ‘customary authority’ over the area, of the terms on which the freehold interest may be acquired. The consideration and terms must not be less favourable than those stated in the in the notice to the Crown, nor may any other terms and conditions be more favourable. Only if the iwi or hapū does not want to acquire the freehold interest can the proprietor, via a public notice, invite tenders for its acquisition, but only on the terms and for the consideration previously offered to the iwi or hapū. This complex ‘right of first refusal’ approach would not facilitate economic development.

2.37 This approach would also take no account of the time effect of transactions and the ongoing refinement of terms and conditions to suit particular prospective buyers and sellers. For example, a falling market might mean the owner had to start afresh when a price moved above market, to ensure a sale was not ‘more favourable’; on a rising market the opposite would prevail. This level of complexity for what should be a straightforward transaction illustrates the difficulties for economic development that could result from the proposed legislation.

Would the proposed legislation integrate with other relevant legislation including the Resource Management Act 1991

2.38 It is BusinessNZ’s view that the Bill should integrate with other relevant legislation but an important statute with which it fails to integrate is the Resource Management Act. It has been suggested[2] that the Bill is not intended to result in claims in highly populated areas but only in remote coastal areas. However, such an outcome may not be certain.

2.39 A protected customary rights order (allowing such rights to be exercised on part of the common marine and coastal area - clause 53 et seq) would entitle a protected customary rights group to exercise those rights without resource consent, notwithstanding any restrictions otherwise applicable under sections 9 to 17 of the Resource Management Act. No payment of coastal occupation charges (section 64A of that Act) would be required and rights could be delegated or transferred. Rights holders would be able to derive a commercial benefit from exercising their right, possibly facilitating a representative of any iwi or hapū exercising ‘customary authority’ over the area’s economic development, but at the same time raising the possibility of conflict with Resource Management Act restrictions.

2.40 On the other hand, no-one else could be granted a resource consent if that would, or would be likely to, have an adverse effect on the exercise of a protected customary right, thereby diminishing the scope of application of the Resource Management Act. The failure to integrate with the Resource Management Act and the adverse implications for business are evident.

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[2] Controversial Marine and Coastal Area (Takutai Moana) Bill causes concern - an RMA perspective, Bell Gully, October 2010

Would the proposed legislation satisfy overall justice and fairness, including appeal rights and remedies

2.41 BusinessNZ recognises that with legislation of this kind, balancing competing needs inevitably involves trade-offs and it is understood that the Bill is focused on achieving an acceptable balance. But there must be concern about the differences of interpretation the Bill has received, doubtless fostering public confusion. For that reason, if it became law, many people could perceive the legislation as unfair, particularly in light of the kind of issues raised in this submission.

2.42 Establishing a dual system where current freehold land is owned but non-freehold land is not owned is in itself confusing but more than that, the inability of others to test whether or not they too have ownership rights could also create problems for the future. This is particularly so as current owners, as they should, retain the right of alienation. It was an issue of this kind that led to the introduction of the current Act and it is not clear that it is an issue the present Bill would resolve.

2.43 On the question of appeal rights, the relationship between applications for recognition by agreement and for recognition by order of the High Court is unclear. With the responsible Minister able to enter into an agreement recognising a protected customary right or customary marine title (clause 93), it is not apparent why any group would apply to the High Court for a recognition order (clause 96). The only reason would seem to be uncertainty whether the Minister would be prepared to grant recognition. And although there can be little concern that favouritism would be a feature of ministerial decision-making, grants of recognition left to the Minister’s discretion would inevitably invite accusations of this sort, given that no other interested party appears able to challenge a ministerial decision.

2.44 If recognition was not granted, the further question would arise whether the group involved might then apply to the High Court for a recognition order. There is nothing to indicate this could not happen, so provided the application was within the six year timeframe, a group would presumably have a second route to recognition should its first attempt meet an impasse. If this were so, the criterion of justice and fairness would be hard to satisfy.

3.0 CONCLUSION

3.1 In conclusion, BusinessNZ repeats its comment made on the Review of the Foreshore and Seabed Act 2004 Consultation Document (April 2010):

> *"….BusinessNZ considers a number of issues need to be addressed before any decision is now made on what, for the future, will be the most appropriate action to take in respect to the foreshore and seabed. This necessarily requires time and consideration to be given to ensuring that any proposals by Government are soundly based, are broadly acceptable to the public and will be enduring. All options should be thoroughly canvassed and particularly issues surrounding possible unintended consequences; any proposals for reform need to be progressed with a degree of caution.*

3.2 There is little to be gained from introducing legislation directed to a perceived problem that creates new problems of its own. The concerns raised in this submission and the very different interpretations the Bill has received, suggest that the Bill should be substantially amended or not proceed. A constitutional change of such significance should not be lightly undertaken.

3.3 The proposed legislation does not meet BusinessNZ's six criteria for success. BusinessNZ submits that if the Bill cannot be made more consistent with the rule of law and the Treaty of Waitangi, a better course of action would be to retain the Foreshore and Seabed Act 2004 or repeal that Act and revert to the situation that existed before the 2004 Act was in place, with the qualification of allowing claims to be heard by the High Court and subsequent rights of appeal.

<u>APPENDIX 1</u>

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

BusinessNZ is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 73 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.