



Peace Movement Aotearoa

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Submissions due on the Marine and Coastal Area (Takutai Moana) Bill

Kia ora,

A reminder that the deadline for submissions on the Marine and Coastal Area (Takutai Moana) Bill 2010 (the Bill) and Supplementary Order Paper 167 is Friday, 19 November. If you have not already made a submission on the Bill, please consider doing so - it does not need to take much time, your submission can be as brief as you like and simply outline your general concerns about the legislation.

Some comments on the Bill are included below, as well as links to more information, and details of how you can make a submission online. This message is available on the Marine and Coastal Area (Takutai Moana) Bill page at <http://www.converge.org.nz/pma/macab.htm>

If you are making a submission on the Bill, please consider sending a copy of it to Peace Movement Aotearoa, email pma@xtra.co.nz or by post to PO Box 9314, Wellington 6141 - please indicate when you send the submission if it is for our files only or if you are happy to have it available online for others to read. If you are agreeable to that, it will be uploaded to the Marine and Coastal Area (Takutai Moana) Bill page, thank you.

* Some comments on the Bill

While the repeal of the Foreshore and Seabed Act (FSA) is of course welcome, and the Marine and Coastal Area (Takutai Moana) Bill 2010 (the Bill) may be considered an improvement on it at first glance, the Bill does not adequately address the fundamental problems with the FSA. As such, it will not provide either a just or a durable solution on the foreshore and seabed.

The Bill is based on the same monocultural thinking that underlies the FSA, it too has been developed within a Pakeha legal framework, and it does not substantially improve on the regime imposed by that legislation.

As with the FSA, the Bill discriminates against Maori when compared with others - both in terms of what it provides, and in terms of the processes hapu and iwi will have to go through to gain even the limited "rights" contained in its provisions, processes that others are not required to go through to prove that something belongs to them.

When introducing the Bill, the Attorney-General stated: "*This Bill, unlike the Foreshore and Seabed Act 2004 which it replaces, treats all New Zealanders including Maori without*

discrimination and recognises that we all have legitimate and longstanding interests in this part of our heritage.”¹ This is not only inaccurate because the Bill obviously does discriminate against Maori, but it also contradicts the Acting Attorney-General’s analysis of the Bill in terms of its consistency with the New Zealand Bill of Rights Act (NZBoRA): “... it remains that the rights to land that they would otherwise enjoy are materially diminished by the requirement to yield to a broad range of activities by others while comparable freehold titles are unaffected. This is an inherent disadvantage and, for that reason, a prima facie issue of discrimination on the basis of race in terms of s 19.”²

It should be noted that the issue of racial discrimination (along with breaches of the Treaty of Waitangi and of other human rights) was raised in the Waitangi Tribunal’s Report on the foreshore and seabed policy in 2004³, and that the FSA has been found to discriminate against Maori by the UN Committee on the Elimination of Racial Discrimination (CERD) in 2005⁴ and 2007⁵, by the UN Human Rights Committee in 2010⁶, and by the UN Special Rapporteur on the Rights of Indigenous Peoples in 2006⁷ and 2010⁸. The Bill does not correct the fundamental issue of discrimination.

Similarly, breaches of the Treaty, as outlined by the Waitangi Tribunal in relation to the foreshore and seabed policy in 2004 and in the Report of the Ministerial Review Panel in relation to the FSA in 2009⁹, are not addressed - the Bill is not consistent with either the guarantee of the continuation of ‘te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa’ in Article II, nor of the rights of all citizens to equal treatment under the law in Article III¹⁰.

The Bill appears to be based on a common law framework, which does not resolve either the Treaty or human rights breaches, and can itself be said to be discriminatory, in particular because it does not reflect tikanga Maori. Rather than being a solution, a common law approach is the problem because it does not provide for the full recognition of all Maori rights and interests in foreshore and seabed areas, but rather for a government defined and restricted version of what it thinks they should be.

The tests included in the Bill for “customary title” - that hapu or iwi hold the specified area in accordance with tikanga, and have exclusively used and occupied the specified area from 1840 to the present day without substantial interruption - and for a “customary right” - that it has been exercised since 1840 and continues to be exercised in a particular area in accordance with tikanga - further highlight the injustice inherent in this approach. There is no allowance for whether tikanga requires exclusive occupation and use, or whether such occupation or use was prevented by confiscation or other unjust measures taken by others, which comprises a double injustice.

Furthermore, it is clear from a Ministry of Justice document on the transitional period between enactment of the Bill and the determination of customary title¹¹, that: “*Until the formal establishment of customary title over an area, the government’s intention is “business as usual” for the granting of resource consents and conservation permits over the foreshore and seabed.*”¹² This raises a further question around what exactly will be left for those hapu and iwi who are in a position to gain legal recognition of customary title over their foreshore and seabed areas.

Although in the NZBoRA analysis, and elsewhere, government politicians have maintained that “*the Bill follows an extensive process of consultation with Maori*”¹³, the Bill clearly does not reflect what hapu and iwi said in that process. For example, the Te Puni Kokiri briefing to the Minister of Maori Affairs on the key issues raised at the consultation hui held in April states: “*Participants generally supported the repeal of the 2004 Act*”, and “*While some hui attendees expressed their support of the government's proposals, most either did not support the proposals or expressed a desire for them to be modified.*”¹⁴ In addition, “*Many submitters articulated their preference that the Treaty of Waitangi form the basis of discussions, and that a working party should be formed to discuss the issues.*”¹⁵

Presentations to the consultation hui¹⁶ clearly rejected the government’s proposals on which the Bill is based, highlighting its similarities with the FSA, as have statements from hapu and iwi since the legislation was introduced¹⁷.

Furthermore, the obligations on states with regard to the particular measures required to ensure the human rights of indigenous peoples are protected, as articulated for example in the CERD’s General Recommendation No. 23, have not been met. The Bill clearly does not “*protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources*”¹⁸. Nor has the government in any way met the requirement of ensuring “*effective participation by indigenous communities*” in decision- and policy-making relating to their rights and interests¹⁹. Similarly, the government has not ensured “*that no decisions directly relating to [indigenous peoples] rights and interests are taken without their informed consent.*”²⁰

Instead, a footnote in the NZBoRA analysis states: “*Some of the comments by United Nations authorities have suggested that such consultation must pursue prior informed consent, which has not occurred here and that principle is not accepted as applicable*”.²¹ Incidentally, the footnote includes references to both CERD and the UN Human Rights Committee in connection with this - the Committees that respectively monitor compliance with the International Convention on the Elimination of Racial Discrimination and the International Covenant on Civil and Political Rights: human rights treaties to which New Zealand is a state party and which place legally binding obligations on the government.

Finally, much of the government hype around the Bill has been around the shift from Crown ownership in the Act, to the concept of “common marine and coastal area”. However, as the nature and extent of the “customary title” or “rights” available to hapu and iwi will be determined by the Crown, and regulatory responsibility will remain with central and local government, it is difficult to see the “common marine and coastal area” as anything other than de facto Crown ownership.

The recommendation that we are making in our submission on the Bill is that the FSA must be repealed, and that proper consultation with hapu and iwi must take place before any replacement legislation is enacted, especially as there is considerable doubt about the extent to which the Bill reflects the views of hapu and iwi. This essentially reflects the position of the Waitangi Tribunal in 2004 (“the longer conversation”, although given the government’s “business as usual” approach, it needs to be sooner rather than later), of the Ministerial Review Panel in 2009, and of the UN human rights bodies referred to above.

We are not convinced that a satisfactory resolution can be found within the confines of 'the law' as it currently exists, because it does not and cannot adequately represent or respect the collective rights of Maori. Our view therefore remains that the way forward lies in what the Waitangi Tribunal referred to as "*the full restoration of te tino rangatiratanga over the foreshore and seabed*"²². As stated in WAI 1071: "... a government whose intention was to give full expression to Maori rights under the Treaty [in 2004] would recognise that where Maori did not give up ownership of the foreshore and seabed, they should now be confirmed as its owners."²³

The full restoration of te tino rangatiratanga over the foreshore and seabed can only be achieved by full and proper consultation with hapu and iwi, because it can only be done within a tikanga Maori framework. In addition, as a matter of simple justice - because the foreshore and seabed areas were taken from hapu and iwi, not from other New Zealanders - it is imperative that it is hapu and iwi who determine the way to achieve such restoration in their respective rohe.

That is the only resolution that would be consistent with the Treaty, with domestic human rights legislation, and beyond that, with the government's obligations under international law.

* Where you can get more information

i) Marine and Coastal Area (Takutai Moana) Bill: The Bill Digest is available at <http://www.converge.org.nz/pma/fsbd1804.pdf>, the html version of the Bill is at <http://www.legislation.govt.nz/bill/government/2010/0201/latest/whole.html#d1m3213131> and the pdf version is at <http://www.legislation.govt.nz/bill/government/2010/0201/latest/096be8ed805f8a67.pdf> Supplementary Order Paper 167 is available at <http://www.legislation.govt.nz/sop/government/2010/0167/latest/whole.html#d1m3257801> The Hansard record of the debate during the first reading of the Bill is available at http://www.parliament.nz/en-NZ/PB/Debates/Debates/7/1/7/49HansD_20100915_00000778-Marine-and-Coastal-Area-Takutai-Moana-Bill.htm

ii) Analysis of the Bill

- Moana Jackson: 'A further primer on the foreshore and seabed', 9 September 2010, at <http://www.converge.org.nz/pma/mj080910.htm> See also, 'A primer on the government consultation document 'Reviewing the Foreshore and Seabed Act 2004'', 7 April 2010, at <http://www.converge.org.nz/pma/mjfsa0410.htm> and 'Tipuna title as a tikanga construct re the foreshore and seabed', March 2010, at <http://www.converge.org.nz/pma/mjtipuna.htm>
- Carwyn Jones: 'Marine and Coastal Area (Takutai Moana) Bill', 13 September 2010, at <http://ahi-ka-roa.blogspot.com/2010/09/marine-and-coastal-area-takutai-moana.html> See also, 'Foreshore and Seabed: Can the symbolism of repeal lead to real change?', 16 June 2010, at <http://ahi-ka-roa.blogspot.com/2010/06/foreshore-and-seabed-can-symbolism-of.html> and 'Foreshore and Seabed Proposals', 3 April 2010, at <http://ahi-ka-roa.blogspot.com/2010/04/foreshore-and-seabed-proposals.html>

- The Letdown, Te Karaka, October 2010, at http://www.tekaraka.co.nz/Blog/?page_id=1585

- The statement by Ngati Kahungunu on the government consultation document 'Reviewing the Foreshore and Seabed Act 2004', April 2010, at <http://www.converge.org.nz/pma/nkfsa042010.pdf>

iii) Resources and submissions on the Foreshore and Seabed Act 2010 Review and Repeal page at <http://www.converge.org.nz/pma/fsarev.htm> and resources and submissions to the 2009 Ministerial Review Panel page at <http://www.converge.org.nz/pma/fsarev09.htm> may also be useful.

* How you can make a submission on the Bill

At the time of the first reading of the Bill on 15 September, it was referred to the Maori Affairs Select Committee. On 22 September, the Committee called for submissions - the closing date is **Friday, 19 November 2010**. The Committee has stated that it "... intends to travel widely to hear submissions on the bill, to locations including Invercargill, Christchurch, Blenheim, Wellington, Bay of Plenty, Hamilton, Auckland and Whangarei". The Committee is due to report back to parliament by 25 February 2011.

Submissions can be made electronically at http://www.parliament.nz/en-NZ/PB/SC/MakeSub/2/1/3/49SCMA_SCF_00DBHOH_BILL10309_1-Marine-and-Coastal-Area-Takutai-Moana.htm - scroll down to the end of the page, enter the verification code in the space provided, then click on the 'Make an online submission' tab. There are two options for making a submission: you can either fill in your details and upload your own document, or you can use the space provided to paste or type in a submission of 4,000 characters (approximately one A4 page). There is an option further down the page for you to indicate whether you wish to appear before the Committee to speak about your submission; and below that, a space to communicate with the Clerk of the Committee.

If your submission contains any information of a private or personal nature you should discuss this with the Clerk of the Committee because submissions are usually made public - you can contact the Clerk on 04 817 9047, or by email via the submissions page (see link above).

* References

¹ 'Marine and Coastal Area Bill introduced - guarantees public access', Christopher Finlayson, 6 September 2010 - <http://www.beehive.govt.nz/release/marine+and+coastal+area+bill+introduced++guarantees+public+access>

² Marine and Coastal Area (Takutai Moana) Bill: Consistency with the New Zealand Bill of Rights Act 1990, Opinion of the Acting Attorney-General Hon Simon Power, 2 September 2010, paras 23 and 24 - <http://www.converge.org.nz/pma/fsbora10.htm>

³ WAI 1071: Report on the Crown's Foreshore and Seabed Policy, Waitangi Tribunal, March 2004 - <http://www.waitangi-tribunal.govt.nz/reports/view.asp?ReportID=838C5579-36C3-4CE2-A444-E6CFB1D4FA01>

⁴ Decision 1 (66): New Zealand, Committee on the Elimination of Racial Discrimination, 11 March 2005, CERD/C/DEC/NZL/1 - <http://www.converge.org.nz/pma/fs110305.htm>

⁵ Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand, 15 August 2007, CERD/C/NZL/CO/17 - <http://www.converge.org.nz/pma/CERD71-Obs.pdf>

⁶ Concluding Observations of the Human Rights Committee: New Zealand, 25 March 2010, CCPR/C/NZL/CO/5 - <http://www.converge.org.nz/pma/CCPR-C-NZL-CO-5.pdf>

⁷ 'Mission to New Zealand' - Report of Rodolfo Stavenhagen, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 13 March 2006, E/CN.4/2006/78/Add.3 - <http://www.converge.org.nz/pma/srnzmarch06.pdf>

⁸ Preliminary note on the mission to New Zealand (18 to 24 July 2010), James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 26 August 2010, A/HRC/15/37/Add.9 - <http://www.converge.org.nz/pma/unsrpre10.pdf>

⁹ The Report of the Ministerial Review Panel is available at <http://www.converge.org.nz/pma/fsarev09.htm>

¹⁰ As at note 3, Chapter 5: Findings and recommendations - <http://www.waitangi-tribunal.govt.nz/reports/viewchapter.asp?reportID=838C5579-36C3-4CE2-A444-E6CFB1D4FA01&chapter=7>

¹¹ 'Review of the Foreshore and Seabed Act 2004: Providing certainty during the transitional period of enactment and customary title determination', Ministry of Justice, 13 July 2010, signed by the Attorney-General on 16 July 2010 (obtained under the Official Information Act)

¹² As at note above, para 12

¹³ As at note 2, para 30.3

¹⁴ Briefing to the Minister of Maori Affairs, Te Puni Kokiri, 4 May 2010 (obtained under the Official Information Act), paras 8 and 9

¹⁵ As at note above, para 18

¹⁶ See, for example, 'A statement by Ngati Kahungunu on the government consultation document 'Reviewing the Foreshore and Seabed Act 2004'', April 2010 - <http://www.converge.org.nz/pma/nkfsa042010.pdf>

¹⁷ See, for example, the recent interview with Mark Solomon and Anake Goodall at http://www.tekaraka.co.nz/Blog/?page_id=1585 'Foreshore and seabed caution to Maori Party leaders', Ngati Kahungunu Iwi Inc, 29 October 2010 at <http://www.kahungunu.iwi.nz/sections/homepage/documents/FORESHOREANDSEABEDmediarelease.pdf> 'Foreshore bill slammed', Wairarapa Times-Age, 5 November 2010 at <http://www.times-age.co.nz/local/news/foreshore-bill-slammed/3928926> and 'Iwi Leaders confirm reservations about Marine Bill', Waatea News, 15 November 2010 at <http://www.waatea603am.co.nz/News/2010/November/Iwi-leaders-confirm-reservations-ab/default.aspx>

¹⁸ Committee on the Elimination of Racial Discrimination General Recommendation No. 23 on Indigenous Peoples, para 5 -

[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument)

¹⁹ See, for example, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia, 14 April 2005, CERD/C/AUS/CO/14 - <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/410/73/PDF/G0541073.pdf?OpenElement>

²⁰ As at note 18, para 4.d

²¹ As at note 2, footnote 14

²² As at note 3, p 139

²³ As at note 3, p 138