

19 November 2010

The Secretariat  
Maori Affairs Select Committee  
Parliament Buildings  
Wellington

## **Coastal Coalition submission on the Marine and Coastal Area Bill**

### ***The Coastal Coalition strongly opposes the Marine and Coastal Area Bill and asks that it be withdrawn.***

We wish to speak to our submission.

The Coastal Coalition is a broad-based independent grassroots organisation consisting of thousands of supporters from all over New Zealand - people of all races, from all walks of life, and of all political persuasions. The Coastal Coalition is united in a strong belief that the foreshore and seabed is the birthright and common heritage of all New Zealanders and should remain in Crown ownership.

The Coalition was formed in late April 2010 in response to the rushed consultation over the Review of the Foreshore and Seabed Act 2004. It became obvious during the review that while the Attorney General was bending over backwards to involve iwi fully in the consultation process, he was only paying lip service to other stakeholder groups including recreational and conservation interests, business and development interests, local government interests, and the wider public.

To this day, a large number of New Zealanders are still completely unaware that their public ownership right to the priceless resource that constitutes the foreshore and seabed is about to be confiscated by the Marine and Coastal Area Bill.

The Coastal Coalition believes that the National Party had a duty to fully inform all New Zealanders about the fact that they were intending to repeal Crown ownership of the foreshore and seabed. Repealing public ownership of the foreshore and seabed and effectively privatising it to iwi, is a huge constitutional change that should have been part of their election campaign so the public could have voted at the election on whether they wanted it to go ahead. Since National did not seek a public mandate on the issue, this Bill should be withdrawn and the repeal of crown ownership of the foreshore and seabed should be put to a public referendum at the next election.

The Coastal Coalition would like to raise the following matters in support of our submission that the Bill be withdrawn.

#### **1. The foreshore and seabed belongs to all New Zealanders**

***The Coastal Coalition believes that the coast has always belonged to all New Zealanders equally and that's how it should stay – turning Kiwis into second class citizens and visitors in their own land is totally unacceptable.***

##### *i) The Crucial Importance of Free and Unfettered Access to the Coast*

Being an island nation, most New Zealanders have a strong connection with the coast - it's where we go to relax and recharge our batteries. And for an increasing number of people - given the growth in coastal tourism and marine industries - it is also where they go to work.

The free and unfettered access to our beaches and the sea is what defines us as a nation. It is what keeps many Kiwis in New Zealand and it draws back those who travel and work overseas.

Public ownership of the foreshore and seabed is of crucial importance. It enables each and every citizen to regard the coastal area as theirs equally with all other citizens, to use and enjoy as they see fit.

Just like owning your own home is vastly different from visiting someone else's home, having a personal ownership right to the foreshore and seabed as a New Zealander, is vastly different from just having the right to visit an area that is owned and controlled by private tribal interests - who may only allow access grudgingly.

By repealing public ownership of the foreshore and seabed, and effectively privatising coastal areas to iwi, the Marine and Coastal Area Bill will turn New Zealanders into second class citizens – visitors in their own land.

#### *ii) Tribal Control*

Furthermore, because those private interests will be Maori tribal groups, some of whom have already indicated a strong disregard for the rule of law over the years, little confidence can be given to the assurances of the politicians that public access will be guaranteed.

#### *iii) Protest Action – a sign of things to come*

As a country we have recently witnessed tribal disregard for the rule of law over protest actions at Taipa in the Far North. Once a group begins intimidating locals over access to the beach, they essentially drive the public away. All the laughter and joy that once reverberated across this beautiful coastal community as families enjoyed their free and unfettered access to their beach and the sea has evaporated under the pall of tribal authority and protest.

A similar protest action went on at Papa Aroha in the Coromandel for four months, where protesters blocked access to public facilities and declared wahi tapu on public lands, before authorities stepped in to issue trespass notices. A day later protestors were back, saying that they wouldn't give up.

If the Marine and Coastal Area Bill goes through, this sort of protest action is likely to become commonplace. A country of escalating racial division and protest is not the sort of New Zealand that citizens aspire to.

## **2. There is no public mandate for the repeal of Crown ownership:**

***The Coastal Coalition believes the National Party has no public mandate at all for repealing Crown ownership of the foreshore and seabed, since the public supports the present law staying in place.***

#### *i) National's Election Promises*

The National Party did not campaign on repealing the Foreshore and Seabed Act 2004. Many people who voted for National feel betrayed. They would not have voted for them if they had known that they intended repealing Crown ownership of the foreshore and seabed.

#### *ii) Confidence and Supply Agreement*

The Marine and Coastal Area Bill arose as a response to the Confidence and Supply Agreement between the Maori Party and the National Party. That agreement specified that a review of the Foreshore and Seabed Act 2004 was to be held. The agreement did not specify that a law change was necessary.

*iii) The Foreshore and Seabed Act Review*

When the government's Review of the 2004 Act was launched in March, the Prime Minister stated that if there was not wide support for a law change, then "the current law could remain in place". According to the Ministry of Justice, of the 1500 submissions to that review, 77% opposed the repeal of Crown ownership of the foreshore and seabed and 91% opposed the government's proposed new law.

*iv) The Public have been kept in the Dark*

It is unacceptable that the wider public have been largely kept in the dark about the contentious and profound changes being planned in the Marine and Coastal Area Bill. Since this Bill deals with the public's ownership rights to the foreshore and seabed, any change to the status of the foreshore and seabed should involve asking the public through a well-publicised public referendum.

## **2.The Marine and Coastal Area Bill will create a new grievance industry**

***The Coastal Coalition strongly objects to the passing into law of the Marine and Coastal Area Bill, since it will not only instigate a new grievance industry with disputes and on-going claims for compensation, but it is a step towards Maori control of the entire coast.***

*i) Treaty Settlements*

At a time when historic Treaty of Waitangi grievances are finally being settled, the passing into law of the Marine and Coastal Area Bill will create a whole new grievance industry. Not only will iwi and hapu groups compete over claimed areas, but other groups will seek compensation from the Crown on the basis that lucrative foreshore and seabed claims have been lost because of land alienation. In addition, it is likely that compensation will be sought for income lost since 1840!

*ii) The Goal is Maori Title of the Entire Coast*

The Prime Minister has justified the Marine and Coastal Area Bill on the basis that it will provide an "enduring" solution to Maori concerns over the foreshore and seabed. Yet that claim does not stand up to scrutiny. The Maori Party has indicated that their goal is Maori Title and that their campaign for "more concessions" will be ongoing. Further, iwi leaders, who have the ear of the Maori Party and now the National Party, have stated that they will not be satisfied until they have control of the whole coastal area - right out to the 200 mile Exclusive Economic Zone.

*iii) The 'weeping sore' will become an 'open wound'*

The Prime Minister has stated that the Marine and Coastal Area Bill will heal a "weeping sore". But by confiscating the public's ownership right to the foreshore and seabed against the public's will - through the repeal of Crown ownership - the National Party is creating an "open wound" for the majority of New Zealand citizens that will only get worse as more and more of the foreshore and seabed reverts to tribal ownership as a result of the on-going advocacy of the Maori Party.

### **3. The Marine and Coastal Area Bill gives Ministers unbridled powers**

***The Coastal Coalition totally opposes the denigration of the democratic process through the introduction of a law that allocates substantial powers to Ministers to settle claims for vast public assets at their total discretion, with no judicial, parliamentary or public oversight.***

*(i) Claims that the Bill will give iwi their "day in court" are a nonsense*

Claims used by the Maori Party and National Party to justify the Marine and Coastal Area Bill - that it will give Maori their day in court - are a nonsense. Under the Marine and Coastal Area Bill, Clauses 93-95 enable customary rights to be awarded by secret political negotiations with a Minister, giving them unbridled power. While a court process is specified in Clauses 96-113, the Attorney General indicated in Parliament that he expects very few claimants to choose that path.

*ii) Open court process replaced by secret political deal-making*

Under the present law, the equivalent of a customary title can only be awarded by the High Court. Once awarded by the Court, the right has to be passed by Parliament through a Bill which ensures the process is open, transparent and democratic.

In comparison deals done under the Marine and Coastal Area Bill do not need to be tested in a court of law, but can be negotiated in secret with a Minister, with the rights rubber stamped by Parliament through an Order in Council, instead of being passed in an open and democratic way through an Act of Parliament.

To have billions of dollars-worth of public assets essentially transferred to private iwi groups through a secret political regime instead of the legal open court process - with no judicial oversight, no Parliamentary oversight, and no public oversight - raises important questions: who will safeguard the public interest when such secret political deal-making occurs, for example, during an election year when winning votes is the major concern of all politicians? Who will ensure that the advocacy of powerful iwi leaders does not trample over the rights of other tribal groups, when deals are done behind closed doors with ministers who have strong connections with the iwi elite? What about the rights of the public and local authorities who believe that their democratic rights to have a say over what happens in their local communities is being trampled? What avenues are available for those concerned that customary title claims are bogus, when the deal-making process is secret - where are their rights to voice their opposition?

The reality is that hundreds of years of jurisprudence have gone into the creation and protection of property rights, yet this Bill overturns all of that in order to usher in a regime where Ministers are given unbridled power and property deals become the domain of politicians.

This is not a concept that New Zealanders would support and nor is it in the wider public interest.

### **4. The Marine and Coastal Area Bill will open the floodgates to claims**

***The Coastal Coalition strongly objects not only to the lowering of qualifying criteria for customary rights - which will open the floodgates to claims - but also the establishment of a brand new right that covers the entire New Zealand coastline, elevating the demands of local Maori over the rights of all other citizens with regard to local coastal management.***

*i) The Court of Appeal indicated the bar is high for customary title*

The Court of Appeal judgement which led to the enactment of the current Foreshore and Seabed Act, indicated that there may be little if any customary title left in New Zealand because the bar for the test is set at a high level. The present law, which is based on that, requires that a group that has used and occupied an area of the public foreshore and seabed can qualify if they can prove in the High Court that the area was *used and occupied, to the exclusion of all persons who did not belong to the group, by members of the group without substantial interruption in the period that commenced in 1840.. and the group had continuous title to contiguous land.*

If the area was used by others, not associated with the group, their right would be terminated.

*ii) The Marine and Coastal Area Bill significantly lowers the bar for claims*

a) Customary Title

While the current law requires that iwi can only claim that they have the equivalent of a customary title to the foreshore and seabed if they 'own' the land adjoining the claim, the Marine and Coastal Area Bill drops that requirement, opening the floodgates for claims.

With the foreshore and seabed being made up of the 'wet' part of the beach and the sea, how on earth can an iwi possibly 'own' the wet part of the beach and the sea when they don't live next to it? Where do they go when the tide comes in? Where do they sleep at night?

Similarly, under the present Foreshore and Seabed Act, claimants have to show that they have used this area in an 'exclusive and uninterrupted fashion since 1840'. However, the Marine and Coastal Area Bill, allows the claimed area to have been transferred to other people outside of the claimant group, so that 'uninterrupted' no longer means what it says.

Further, the Supplementary Order Paper 167 from the Attorney General allows that claims for 'exclusive occupation' can still go ahead even if other groups regularly use the area for fishing and navigation purposes!

In other words the new definitions in the Bill significantly lower the bar on the test for a customary title opening the floodgates for claims.

b) Customary Right

The same weakening of the criteria can be found with regards to a Protected Customary Right. Under the present law, such rights are awarded by the High Court to claimant groups that can prove they have been using the same rights continuously and in substantially the same way since 1840.

However, under Clause 53 of the Marine and Coastal Area Bill iwi only have to persuade a Minister that they have a claim for a right - that can have "*evolved over time*" - since 1840. That means that the powerful rights being claimed under the new Bill may bear little resemblance to the original customary rights that were used in 1840.

c) Mana tuku iho

Clauses 48-52 of the Marine and Coastal Area Bill create Mana tuku iho, **an entirely new property right that covers the entire New Zealand coastline.** Under this right,

the whole coastline is available to be allocated to any iwi that applies - with different iwi able to make claims for the same area. This right will give iwi superior rights over other citizens to influence conservation processes involving marine reserves, marine mammal sanctuaries, and conservation protected areas, as well as applications for concessions operating in the area including marine mammal watching.

This right has nothing to do with customary title but since it elevates the demands of Maori above all other citizens it could be interpreted as the first step towards 'Maori Title' over the entire coast.

## **5) The Bill confiscates valuable public resources without authority**

***The repeal of Crown ownership and the allocation of the coast to iwi mean that essentially all decision-making with regards to New Zealand's coastline will be in the hands of one racial group - Maori. In a modern democratic society elevating the rights of one racial group above all others and transferring to them priceless public assets and powers that outrank central and local government is totally unacceptable.***

*i) A Priceless Public Asset will be transferred to iwi*

At present the massive 10 million hectare resource that comprises New Zealand's foreshore and seabed is owned by all New Zealanders equally. It is vested in the Crown on our behalf. It is a very large area, more than 35 percent of New Zealand's dry land area of 270,000 sq km. Horizontally it is the distance between the average spring high tide waterline and the 12 nautical mile territorial limit, including estuaries and the beds of rivers that belong to the coastal marine area. Vertically it is the airspace above this zone and the water, subsoil, bedrock and most of the mineral wealth below.

Clause 14 of the Marine and Coastal Area Bill, which repeals Crown ownership of the Foreshore and Seabed Act 2004, essentially confiscates this priceless resource from public ownership so it can be transferred to iwi. This amounts to a massive confiscation of public assets without the authority of the public.

The public have never been asked if they agree to this asset stripping. It should be the subject of a public referendum at the 2011 election

*ii) Powerful Rights including Mining, wahi tapu and veto powers*

If the Marine and Coastal Area Bill passes into law, iwi successfully claiming customary title will gain powerful new rights in some cases to outrank central and local government including commercial development rights, exemptions from some consent processes, ownership and mining rights to all non-nationalised mineral, the right to mining royalties from the date a claim is lodged [see clause 83 (2)], veto rights over all coastal operators with no right of appeal, absolute power to exclude the public from all areas deemed wahi tapu with the right to impose fines and have wardens patrol the area, and the right to influence local and national coastal plans & policy statements through iwi plans.

## **6) The Bill scraps the fundamental guarantee of free public access to the coast**

***The Coastal Coalition believes that a prohibition on charging is a mandatory provision that should be contained in any legislation governing New Zealand's foreshore and seabed.***

*i) No Prohibition on Charging*

Clause 40 (2) of the Foreshore and Seabed Act 2004 guarantees that public access will be free: "Neither the guardians of a foreshore and seabed reserve nor the applicant group nor the board is entitled to charge or collect fees or other form of payment from any person or body for the use or occupation of the reserve".

This provision has been left out of the Marine and Coastal Area Bill.

Under the well-established rule of statutory interpretation, when one statute replaces another and provisions are deliberately left out, there is a presumption that Parliament no longer wanted that provision to apply.

This means that the government obviously intends to allow Maori the right to charge for access. This flies in the face of the assurances that have been made to the New Zealand public and will have a profound impact on coast-loving Kiwis.

#### *ii) Wahi Tapu*

When Maori claimants obtain their customary title, they will be able to designate areas as 'wahi tapu', and the public may be wholly or partly excluded from these areas, or allowed entry only on conditions. Clauses 77-80 describe the unilateral powers of 'prohibitions or restrictions on access', the appointing of wardens to police such areas and impose trespass fines of up to \$5,000 - with no right of public input.

Essentially this means that the public could be prohibited from visiting large areas of the coastline that are controlled by iwi, potentially rendering promises of 'guaranteed free public access' to the coast meaningless.

### **7) The Bill will have effectively privatise the New Zealand coastline and open it up to exploitation**

***The Coastal Coalition is totally opposed to the effective privatisation of the coast to iwi and the opening up of the marine environment to exploitation through the granting of special powers that give them superior rights over other citizens including powers of veto over other coastal operators.***

The Prime Minister claims that the Marine and Coastal Area Bill will have little impact on New Zealanders, yet the Attorney General has estimated that 2,000 km or 10 percent of our coastline will be effectively privatised to iwi - in the first instance. That is a massive area - the distance from Cape Reinga to the Bluff wrapped around the coast and stretched out to the 12-nautical mile limit. Calling this an *insignificant* change is totally misleading, especially as this will only be the start - especially if, as a result of the repeal of Crown ownership, the coast is eventually transferred to Maori Title.

The Bill is likely to lead to the widespread exploitation of the marine environment, as profit-taking by customary title holders becomes a major driving force in coastal areas through the unilateral powers given to iwi to establish mining operations, marine farms, tourist developments and other commercial business - without the normal safeguards that exist under the Resource Management Act and local body consent processes.

### **Conclusion**

The Marine and Coastal Area Bill is a complex piece of legislation and the matters raised in this submission are only some of the many concerns expressed by Coastal Coalition supporters.

### **Coastal Coalition Recommendations:**

## **(1) Withdraw the Bill:**

Rather than embark on this very divisive and destructive exercise, the Coastal Coalition urges your Select Committee, for the sake of New Zealand's future as a multicultural nation, to recommend the Bill be withdrawn. There are so many things wrong with this Bill and it so favours one small segment of the community, Maori tribal groups, that withdrawal seems the only sane decision, given the overwhelming opposition to the Bill by the general public.

## **(2) Retain the 2004 Foreshore and Seabed Act:**

The 2004 Foreshore and Seabed Act is satisfactory in that it is settled law supported by the vast majority of New Zealanders, it retains the foreshore and seabed as the common heritage of all citizens equally, and it allows recognition of tribal customary rights - allowing tribes to "have their day in court" to test their claims.

## **Final words**

This Marine and Coastal Area Bill is an affront to the New Zealand public.

The underhand way that the Bill has been introduced, with assurances given that the changes being proposed are only minor, when they will have a profound and radical affect on the future of all New Zealanders and how they feel about our country, is contemptible. The unacceptable haste over the Review Foreshore and Seabed Act, allowing only 20 working days for such a complex issue, then, the withholding the submissions for almost six months, because they showed an overwhelming rejection of the government proposals, was shameful.

By elevating the demands of tribal groups above the democratic rights of all New Zealanders, if passed into law, the Marine and Coastal Area Bill will immensely damage race relations in this country.

The Coastal Coalition, on behalf of the New Zealand public asks that this Bill be withdrawn on the basis that the harm it will inflict on the country will far outweigh any potential benefits.

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