

## **SUBMISSION BY THE AUCKLAND REGIONAL CHAMBER OF COMMERCE ON THE REVIEW OF THE FORESHORE AND SEABED ACT 2004**

### **1. INTRODUCTION**

The Auckland Regional Chamber of Commerce welcomes the opportunity to comment on the consultation document reviewing the Foreshore and Seabed Act 2004.

The Auckland Regional Chamber has a corporate membership of more than 6000, including many businesses who expect their views to be forcefully represented in this submission.

The Auckland Chamber is dedicated to the strengthening of the Auckland region's status as New Zealand's pre-eminent commercial, industrial and communications region and to assisting the development of the region in creating a desirable environment for its 1.4 million citizens. To this end, the Chamber has sought to establish a partnership relationship with local government organisations in Auckland to help bring about a shared vision for the Auckland region.

### **2. OVERVIEW**

The Chamber supports the government's proposal to repeal the Foreshore and Seabed Act 2004 on the basis that the current legislation is unfair, unclear and has created an environment of uncertainty for business in respect of foreshore matters.

Accordingly, the Chamber strongly supports any new legislation that addresses these concerns, and in particular legislation that clearly provides for:

- Public access to the foreshore for all New Zealanders;
- Certainty to business and development interests in how the coastal marine area is controlled and regulated;
- Respect for property rights and customary (traditional) interests.

However, our review of the consultation document indicates that if the proposals contained in the document are enacted the outcome will be legislation that is far more complex, confusing, unfair and discriminatory than the existing Act.

As the document notes (page 19), the interests of New Zealanders in the foreshore and sea bed include:

- Recreation and conservation interests;
- Customary interests
- Business and development interests; and,
- Local government interests.

The Chamber is greatly concerned that the overwhelming focus of the document is on customary interests only.

There is no discussion of business and development interests, and only a brief mention that these interests include fishing, marine farming, marine transport, roading and airport infrastructure, mining and tourism industries (page 19). This is not an exhaustive list of business and development interests by any means, and fails totally to indicate the high importance to

New Zealand's wealth creation and economy that business and development in relation to the foreshore plays.

Instead, most the document is devoted to setting out a new approach for determining customary interests, including suggested criteria and tests to recognise customary interests drawing on Tikanga Maori and common law from both New Zealand and overseas, notably Canada (pages 33-34).

Based on these proposals, the document indicates that the government is proposing legislation that will create a new form of "customary title" not currently accommodated in our land law system giving entitled coastal hapu/iwi rights and powers to permit or not permit activities by other interests (i.e. recreation and conservation, business and development, and local government and also non coastal hapu/iwi), and to participate in conservation processes and planning (page 40). The activities would allow for commercial benefits and give the coastal hapu/iwi the right to decide whether an activity requiring a coastal permit could be progressed by the consent authority (eg, the regional council).

In plain language, a coastal hapu/iwi with an established customary title would have business and property development rights over the area of title for its exclusive use, the right to demand levies and royalties from other operators in the its hapu/iwi area, and the right of veto over other development and activities – with no right of appeal.

The Chamber objects to these proposals in the strongest possible terms. We elaborate our concerns in detail below.

Meanwhile we **strongly recommend** that before any of the proposals and recommendations in respect of customary interests are taken further by government in considering whether to repeal the existing foreshore and seabed legislation, the consultation document's contents should be expanded to include an equally well researched and considered assessment of the other three areas of interests New Zealanders have in the foreshore and sea bed, (i.e. recreation and conservation, local government and in particular business and development interests).

We agree with the statement in the document that these four areas of interest overlap and that the government has a role in balancing all these interests (see page 19). However, by focusing only on customary interests in any detail, the consultation document fails to set out a balanced review of foreshore matters. We submit that the job of government to take balanced decisions on foreshore matters is impossible without equally robust and insightful treatment to the other areas of interest that New Zealanders have in the foreshore and seabed as has been given to customary interests.

We submit that in the absence of a comprehensive review of all four areas of interest New Zealanders have in the foreshore, and especially business and development interests it will be impossible for Government to find "a just and enduring solution" or achieve its stated objective in undertaking the review to reconcile the various foreshore interests "for the benefit of all New Zealanders."<sup>1</sup>

We generally agree with the statement that any new legislation should be based on the principles set out in the consultation document (page 8). These include: Treaty of Waitangi,

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<sup>1</sup> See Foreword by Attorney-General, Hon Christopher Finlayson, p1.

good faith, recognition and protection of interests, equity, access to justice, certainty and efficiency.

We **strongly recommend** that once a comprehensive review has been undertaken of all four areas that New Zealanders have interests in the foreshore, any new legislative proposals that arise should be tested to determine whether they comply with these principles. As our submission makes clear in more detail below, it is apparent that some of the major proposals set out in the consultation document are in conflict with these principles

For all these reasons – the fact that the review fails to provide a balanced assessment of all areas of interest in foreshore matters and some of the major proposals affecting customary title and rights are in breach of the principles set out for guiding government’s decision-making on any new legislation - , the Auckland Chamber **strongly recommends** that government not proceed with new legislation based on the proposals contained in the consultation document.

The remainder of our submission **strongly recommends** the government also consider the specific matters of concern to business as outlined below.

### 3. SPECIFIC MATTERS OF CONCERN

#### 3.1 Customary interests

The Chamber notes that the government proposes two categories to recognise the customary rights of coastal hapu/iwi – *Non-territorial Interests* (i.e. customary rights to certain activities, uses and practices) and *Territorial Interests* (embracing entitlement to a customary title over a particular coastal area with authority to make decisions and control use of the area by others – including business as well as hapu/iwi with a customary right).

We also note that establishing which hapu/iwi have Territorial Interests and which have Non-territorial Interests will require a measure of proof requiring negotiation with the Crown and, presumably some form of judicial process (e.g. High Court, Maori Land Court, or some special arrangement through the Environment Court) but which the document makes no mention.

This new approach will confer on hapu/iwi who have established a customary title over a particular coastal area considerable powers and authority, including the power to determine which resource consent applications affecting any development proposal for the area may progress through the RMA process.

The Chamber believes this new approach will create a plethora of complex, time-consuming and potentially costly issues and problems, including:

- The document is silent on the process for determining rights to access foreshore areas under tikanga Maori held by inland iwi who have had a historical (seasonal) relationship with the coast, as some Waikato tribes have made traditional use of the Hauraki Gulf and Manukau Harbour.
- That is, there is potential for non-territorial and territorial interests to overlap, combine or result in conflict among the many hapu and iwi in the greater Auckland and northern Waikato areas who have a traditional coastal activity.

- Third parties such as recreation and conservation interests, business and development interests and local government interests face considerable uncertainty if not exclusion of access as of right to the foreshore in the likelihood that the scope and scale of territorial interest award or ‘titles’ could effectively embrace Auckland’s entire coastal marine area.
- The consultation document is silent on the administrative process for, firstly, determining rights and title over foreshore areas – what areas they will encompass, boundaries etc, and secondly who third parties will be required to have dealings with, and whether the setting up of and maintaining these arrangements will be part of the job of the new Auckland Council, and who will pay for these services.
- In a related point, the document is also silent on a process for how a hapu or iwi with a customary title will be expected to manage relationships and resolve likely issues arising between themselves and other groups with legitimate interests and/or activities in the foreshore.
- A further concern relates to liability and who or what authority will be responsible for monitoring and enforcing the conditions of consent, and who will pay.

### 3.2 Right to permit activities

The Chamber notes that the consultation document clearly states that “no one would own the foreshore and seabed” but at the same time proposes a system of customary ‘titles’ on coastal iwi and hapu that conveys considerable authority and powers, including to determine what activities take place.

We also note that such a hapu or iwi will be able to make exclusive determinations on use of the area, including whether or not a business development proposal should proceed through the RMA process. We suggest that these rights and powers of exclusive usage are in practical terms a form of ownership by the hapu or iwi of the particular area covered by the title.

However, our main concern is that no other organisation or group has the option of whether or not to comply with the RMA in respect of the management and development of natural resources. As others have noted, the raw truth is that under this proposed legislation defacto sovereign rights over the foreshore and seabed can be granted to coastal iwi and hapu through a negotiation with Government (Minister of Treaty Negotiations) and, it appears, no right of appeal or judicial process. Those rights will grant a coastal hapu an absolute and unfettered ability to use the foreshore and seabed up to 12 km offshore in whatever manner they wish, without being subject to the normal checks and balances that are imposed on others.

We have major concerns with this proposal, including:

- At a time that an aquaculture industry review is underway aimed at giving the industry increased certainty and encouragement to invest in new ventures, there is a strong possibility that coastal iwi could exclusively develop and/or prevent development of marine farming on the best areas of the coast. The two reviews are in conflict with each other – the foreshore review is providing for exclusive foreshore use to coastal iwi and hapu interests without any normal consent barriers; the industry review is seeking to widen interest in participating in the industry within existing consent processes.

- Worse still, while coastal hapu will be able to develop marine farming without going through the normal consent process and third parties will be unable to object, other marine farm proposals will have to continue to go through the RMA process.
- The obvious implication is that commercial marine farming proposals will be able to avoid the consent process only by seeking to joint venture with a coastal iwi or hapu. This option has potential to be a pattern that develops in respect of all commercial activity on the foreshore – fishing, tourism, mining, marine transport and many other possible business activities. To get opportunities off the ground, businesses will have to compete to win a partnership with a coastal iwi.
- The potential for abuse of good business practise is obvious. Coastal iwi will in effect be able to charge sign up fees, rent or defacto development contributions, and dictate terms of association that may or may not comply with RMA and/or regional or local government regulation and good business practice.
- At a time when New Zealand is in sight of an end to historical Treaty of Waitangi claims, if the proposed legislation proceeds it will start a whole new frontier for claims and counter claims between coastal iwi with title and other iwi (eg inland iwi) having a traditional use of a particular area. In this case other interested groups such as marine farming (and potentially many others such as fishing, seabed mining and tourism operators) are also likely to become caught up in the claims for ‘compensation’ based on denial of the opportunity to develop a business opportunity.
- Given that if this proposal proceeds large tracts of New Zealand’s coastline will become subject to coastal iwi/hapu ‘control,’ the only practical way for business and development interests in the foreshore enterprises to proceed with any certainty will be in partnership with coastal iwi. The fairness to the wider community and the likely additional costs this arrangement is likely to impose on the country needs to be thoroughly assessed.
- For offshore investors with options, the prospect of having to cope with New Zealand’s RMA practice on the one hand or the coastal iwi expectations on the other may be too much. It is among the wider business and development matters that should be further risk assessed ahead of government agreeing to develop new legislation on the basis of the proposals in the consultation document.

### **3.3 Access to justice**

At the heart of the Chamber’s concern over the review proposals is that Maori and third party interests have no recourse to the Courts for settlement of concerns and dispute over foreshore interests and issues.

For Maori, these proposals do nothing to settle long-standing arguments over customary title by recourse to the Courts. For third parties, there is a lack of certainty in terms of groups such as businesses apparently being unable to make foreshore development applications in competition with, or with the potential to be in competition, with a coastal iwi or hapu with or seeking a customary title (i.e. establishment of a Territorial Interest claim).

The Chamber notes that the ‘principles’ that it is claimed in the document as having guided the development of the government’s proposals (page 20) are basically the same as those that the Foreshore and Seabed Act 2004 was drafted upon. The exception is that the 2004 Act principles establish a principle that the extinguishing on ‘uninvestigated’ customary title can only be remedied through the repeal of the Act.

Accordingly, given the increased complexity of the proposals in the Review for determining customary rights and title, and the unfair exclusive use, control and powers to be conferred on entitled coastal iwi and hapu – at the expense of other iwi and hapu and other groups with foreshore interests, and in particular business - the Chamber **strongly recommends** repeal of the Act on the basis of the principles proposed and the restoration of hapu and iwi rights to have their concerns in Court on customary title.

Following this recommendation would enable the Government to act in a way that is consistent with its own principle set out in the consultation document, namely:

- **Access to justice** – (the government decision) must provide an accessible framework for recognising and protecting rights and interests (of all New Zealanders) in the foreshore and seabed.

That is what the Courts are for.

### 3.4 Other matters - Reclamations

The Chamber notes that the document makes special note that Port companies have a particular need for certainty (page 45).

To provide this certainty, the government proposes that port companies would be able to obtain a permit that would provide for an interest akin to a leasehold interest in a reclamation for 50 year or more, renewable for a further 50 years or more.

The Chamber supports this proposal and recommends it be extended to other commercial reclamations with a particular need for certainty such as marinas, boat ramps serving Auckland’s multi-million dollar marine construction industry and other infrastructure “of National or Regional Importance.” That is, the provision for certainty that would include not only ports but other significant infrastructure providers would enshrine protection for specified infrastructure works and related operations.

## 4. CONCLUDING COMMENTS

The Auckland Chamber of Commerce generally supports Government’s intentions to address long-standing and deep seated issues facing New Zealand, including finding a just and enduring solution to the complex issues associated with the Foreshore and Seabed Act 2004.

We strong agree with the Minister in his comments that we need to avoid dogmatic responses in seeking to reconcile the various foreshore interests for the benefit of all New Zealanders (Page 1).

The Government has launched a reform process that correctly indentifies the four broad areas of interest New Zealanders have in the foreshore, and indicates an intention to find a solution

that balances these interests and provides 'public access for all' and 'respect for rights and interests' (page 19).

However, the proposed solution as currently proposed identifies and sets out to advance the interest of a particular group within communities above others (i.e. coastal iwi and hapu). This is like picking winners! The Chamber strongly believes that the interests of the other groups with equally justifiable interest in the foreshore also need to have their rights and entitlements thoroughly assessed and protected in balance and in consultation with coastal iwi and hapu.

In seeking a balanced solution to these matters, we respectfully suggest that a consultation process be established that brings together the leadership of the four interest areas – recreational and conservation, customary, business and development and local government – with an agenda or mission to provide a balanced viewpoint on which any new legislation can be based.

Our suggestions and recommendations on the Consultation Document are put forward in the positive spirit of achieving measurable improvement to resolve Auckland's foreshore concerns. We look forward to discussing them further and working collaboratively with Government to ultimately achieve an enduring outcome from this singularly important reform process.

Michael Barnett  
Chief Executive

29 April 2010