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19 May 2009

Submission to the Ministerial Review Panel on the Foreshore and Seabed Act 2004

We appreciate this opportunity to contribute to the Ministerial Review on the Foreshore and Seabed Act, and thank you for your attention to our comments. For any clarification of the points below, or further information, please contact Aotearoa Indigenous Rights Charitable Trust, email aotearoaindigenousrightstrust@gmail.com

This submission is made up of five parts, the first part provides information about ourselves, the second part addresses our view of the Foreshore and Seabed Act (FSA) and Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill (Ngāti Porou Bill), the third part comments on the impact of the political environment on Māori, the fourth part provides an analysis of indigenous people's rights under international law and lastly, our views on the way forward.

Part 1 – Who we are

Aotearoa Indigenous Rights Charitable Trust (AIR Trust) is a non-governmental organisation made up of Māori individuals, all of who are active in their hapū and iwi and Māori politics more generally. We seek to support the indigenous peoples' rights movement internationally and domestically. AIR Trust representatives have consistently attended, and played a role in United Nations (UN) fora relevant to indigenous peoples including: in

negotiations on the UN Declaration on the Rights of Indigenous Peoples (the Declaration); before the UN Working Group on Indigenous Populations; the UN Expert Mechanism on the Rights of Indigenous Peoples; the UN Permanent Forum on Indigenous Issues; various expert UN meetings; the UN Committee on the Elimination of Racial Discrimination (CERD); the UN Human Rights Committee; the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur on Indigenous Peoples) and the Human Rights Council.

We have also disseminated information to Māori about developments regarding indigenous peoples' rights at the international level.

Members have also represented a number of tribes, pan-Māori organisations and indigenous peoples' organisations in UN fora, such as before CERD and the Human Rights Council.

Part 2 – The FSA

The FSA breaches the guarantee of exclusive possession of lands and other properties set out in the Treaty of Waitangi and existing human rights standards. It does so because its fundamental premise is that the Crown owns all the foreshore and seabed not currently "*subject to a specified freehold interest*". Because of this premise all rights prescribed in the FSA fall far short of the rights to which Māori are entitled. It is our view that any changes to amend or tweak the FSA, will not deliver better outcomes nor secure justice for Māori and may result in future claims against the Crown for new breaches of the Treaty of Waitangi. Coupled with this premise, the FSA is also problematic because of the following:

- the statutory tests to have customary rights or territorial customary rights recognised are inconsistent with Māori customary law and are extremely difficult to meet. Many academics consider them the most difficult tests in the Commonwealth;

- fee-simple titles in the foreshore and seabed were not extinguished, Māori titles were;

- a foreshore and seabed reserve, a possible option for redress, does not give Māori any proprietary rights in the area over which they have proven their territorial rights. Fore-

shore and seabed reserves remain "public foreshore and seabed" and are to be managed by a board to be agreed to by the Māori group concerned, the government and the relevant local government (see section 41). Public access to foreshore and seabed reserves cannot be restricted;

- if Māori choose to negotiate redress for the loss of their territorial customary rights, the Government is under no obligation to provide redress. There will be no independent and impartial oversight of the negotiating process. Indeed, Māori will be in a very poor negotiating position (see, in particular, section 38);

- the FSA legislatively overrides Māori access to the courts to prove their territorial and non-territorial interests in the foreshore and seabed under Te Ture Whenua Māori Act 1993 and common law aboriginal title.

The statutory tests to have customary rights or territorial customary rights recognised are inconsistent with Māori customary law, are expensive, unobtainable and provide nothing of substantive benefit to those holding customary rights. Whānau, hapū and iwi in exercising their rights in the foreshore and seabed in accordance with tikanga Māori should not need to apply to a court first to have such rights acknowledged.

Vesting the coastal marine area in the Crown discriminates against Māori on the basis of race because Māori interests in the foreshore and seabed are unable to be recognised except through the FSA. Such interests that can be recognised fall far short of a proprietary right whilst non Māori rights in the marine area remain unchanged.

It is worth noting the Ngāti Porou Bill as an example of what Māori can expect should they choose to negotiate directly with the Crown. A cursory analysis reveals the same concerns as those of the FSA, the outcome is that the Ngāti Porou Bill prescribes certain rights for Ngāti Porou that fall far below proprietary rights. The ability to participate more fully in existing decision making processes for example, the resource consent processes of the Gisborne District Council and being treated as persons directly affected by powers exercised by the Historic Places Trust, do provide greater recognition for certain hapū of Ngāti Porou but do

not address the fundamental customary rights of Ngāti Porou. Again, the barrier to securing rights with teeth is the vesting of the foreshore and seabed in the Crown.

The Ngāti Porou Bill also provides for protected customary activities and territorial customary rights areas. The former must be agreed to between Ngāti Porou, the Attorney-General and the Minister of Māori Affairs. The agreement must be written and gazetted; however, the Minster of Conservation can at any time determine whether a protected customary activity has an adverse effect on the environment.

Territorial customary rights areas can be created but they require an application to the High Court. Once established, resource consent applications are still decided by the Gisborne District Council. Ngāti Porou hapū must agree to activities that require a resource consent but there are exceptions.

In prescribing the rights to which Māori are entitled to in the FSA and removing the ability of Māori to access the courts to have such rights accepted and defined is a breach of the right to a fair trial. The FSA effectively removes the rights and allows only for those prescribed in the FSA.

Part 3 – Political environment

The dismissal by politicians and the mainstream media of the issues involved in the foreshore and seabed and the almost manic focus on public beach access has done little to educate the general public about the rights that are at stake. This has allowed the recognition of Māori rights in the foreshore and seabed to be traded off by Parliament. By making public beach access comparable in status to Māori rights in the foreshore and seabed, the government was able to prioritise beach access and portray the foreshore and seabed policy as a reasonable offer that Māori should accept. When Māori continually rejected the policy, the government and the media could portray Māori as being unreasonable, radical and divisive. It is difficult to articulate the feelings that the FSA created for Māori but we are all aware that they existed and continue to cause tension.

The portrayal of Māori foreshore and seabed rights sadly showed the thinly veiled racism that continues to feed fear and which allows non-Māori to assume they have a right to be impatient with Māori calls for substantive legal recognition as distinct peoples within Aotearoa. New Zealanders collective desire to "put Māori issues behind them" including Māori rights in the foreshore and seabed has an enormously negative impact on Māori because it leads to a sense of "impatience" with Māori claims and a "fatigue" that undermines New Zealand's ability to face up to its history and acknowledge that the impact of historical and ongoing injustice cannot simply "go away".

The government focus on public beach access continues to cause affront to Māori– it was included as one of the four principles in the FSA – "Guaranteeing public access now and in the future". Beach access was never going to be withheld by Māori and is not a right that exists in law. Sadly, its inclusion in the FSA as one of the guiding principles of the Act and its use of narrowly framing public discussion exasperates the situation of finding a truly just and legal answer to Māori rights in the foreshore and seabed. With the release of the Ngāti Porou Bill, this obsession with the public right to beach access has again raised its ugly head[1]. The Review Panel must address this negative framing of Māori foreshore and seabed rights.

Part 4 – Indigenous people's rights under International law

The use of UN international fora by Māori to highlight the FSA and the policy upon which it was based are unprecedented. Māori made and continue to make excellent use of many UN fora for example the UN Permanent Forum on Indigenous Issues, the Special Rapporteur on Indigenous Peoples, CERD and most recently the Universal Periodic Review conducted by the Human Rights Council.

In May 2004, Ngai Tahu with the support of Treaty Tribes coalition addressed the UN Permanent Forum on Indigenous Issues. Whilst this forum does not have a mandate to hold governments to account, Ngai Tahu gained the support of other indigenous peoples attending the forum and brought Māori rights in the foreshore and seabed to the attention of the international community.

[1] Fisher, D. (January 18, 2009) Māori deal with 'close access to public beaches' *New Zealand Herald* .

In November 2005, Māori raised their concerns about the FSA with the Special Rapporteur on Indigenous Peoples when he visited Aotearoa.

In his report[2] on NZ the Special Rapporteur on Indigenous Peoples stated "the (foreshore and seabed) Act can be seen as a backward step for Māori." The report concludes that the Crown has "extinguished all Māori extant rights to the foreshore and seabed." The Special Rapporteur on Indigenous Peoples recommended that the FSA "should be repealed or amended".

Another avenue that Māori used was an urgent communication to CERD . In its FSA Decision[3], CERD found that the FSA contains "discriminatory aspects against Māori, … in its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress"; and recommended that the government resume a dialogue with Māori "to seek ways of lessening its discriminatory effects, including where necessary through legislative enactment".

CERD began its analysis by considering the land rights Māori might have been able to establish under Māori customary law but for the FSA, it is our view that the Review Panel should also start from the same premise.

Whilst this Ministerial Review goes some way to address the call from CERD to resume a dialogue, it is the content and outcome of that dialogue that will determine whether the discriminatory aspects of the FSA remain.

The most recent report by the UN regarding the FSA arises out of the Universal Periodic Review of New Zealand conducted by the Human Rights Council. This review considered and reported upon New Zealand's compliance with human rights. In relation to the FSA the report recommended:

> *Consistent with the observations of the Committee on the Elimination of Racial Discrimination and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, continue the new dialogue between the*

[2] See UN report E/CN.4/2006/78/Add.3

[3] Decision 1 (66) New Zealand Foreshore and Seabed Act 2004, CERD/C/66/NZL/Dec.1 (March 2005).

State and the Māori regarding the Foreshore and Seabed Act of 2004, in order to find a way of mitigating its discriminatory effects through a mechanism involving prior informed consent of those affected.

The focus on the free prior and informed consent of Māori can be found in the Declaration which NZ rejected at its adoption by the UN General Assembly. The Declaration is now the internationally recognised minimum sets of rights that indigenous peoples as distinct peoples and collectives should enjoy. Whilst it is not binding on States, it is described as an aspirational and unique declaration that is capable of being implemented. Articles 26 – 30 of the Declaration have a direct bearing on Māori rights in the foreshore and seabed and are discussed in more detail in part 5.

Whilst NZ has yet to undertake a review of its position on the Declaration, the international community considers NZ to be subject to the rights it contains. NZ itself has also on many occasions in UN fora noted that they are already implementing many of the rights set out in the Declaration.

Coupled with these findings by the UN, there is a growing body of international customary law[4] that at the very minimum acknowledges a states duty to respect and protect indigenous people's rights to their lands. This includes the foreshore and seabed.

Part 5 – Where to from here

The FSA was found to discriminate against Māori by the Waitangi Tribunal, CERD and the Special Rapporteur on Indigenous Peoples. The current review of the FSA is constrained by the terms of reference such as a six week consultation period, which does not allow for full consultation with hapū and iwi Māori. This is particularly important because hapū and iwi views on the Act were ignored in 2003 and 2004. The outcome must comply with human rights and the Treaty of Waitangi.

NZ should take the time necessary to fully consult with Māori in order to obtain their free, prior and informed consent to proposed measures dealing with their rights in the foreshore

[4] "Developments in Indigenous Peoples' Land Rights under International Law and their Domestic Implications" [2005] 21 NZULR.

and seabed (consistently with the Declaration, the recommendations of CERD and the Special Rapporteur on Indigenous Peoples).

The process by which the FSA was enacted caused much grief and concern for Māori. This must be acknowledged not only by the government but also by the media who played such a negative role. The premise upon which the FSA is based is also fundamentally flawed and must be changed. If, in accordance with Māori custom and tikanga, Māori foreshore and seabed rights exist, then they must be legally recognised and protected. The irony of the situation is that the initial and continuing waves of colonisation have alienated many Māori from their foreshore and seabed. Those who are able to lay claim to the foreshore and seabed in accordance with tikanga will be far less than those who cannot. Māori are acutely aware of this which makes the confiscation of these rights so much more painful.

What should replace the FSA? The FSA should be wholly repealed and at the minimum the status quo post *Ngāti Apa* reverted to.

Māori customary mechanisms should determine whether there is entitlement in law or not. What would Māori be entitled to under Māori customary law? This remains to be seen. It is likely that a range of rights could be recognised from wahi tapu protection, seasonal use and practices of certain areas through to exclusive proprietary rights.

We are of the view that the *Ngati Apa* decision should be the minimum standard from which Māori rights in the foreshore and seabed are considered. Coupled with this is our belief that the underlying assumption, based on "adverse possession" should be that Māori own the foreshore and seabed *unless* there is clear evidence that the title was taken away legally and justly by the Crown. That means that Māori shouldn't even have to prove their interests (in the Māori Land Court or elsewhere) as the assumption should be that it's ours. The Crown, on the other hand, would have to prove a legitimate and just taking. Property interests would be regulated by iwi and hapū according to customary law.

The issue of access could be legislatively provided for - in a way that doesn't undermine Māori ownership of the foreshore and seabed.

The legal framework for considering Māori rights in the foreshore and seabed must as a minimum include the Treaty of Waitangi and the rights guaranteed therein and Māori customary law. International law as it pertains to indigenous peoples rights should also be considered for the example the Declaration, general comments by CERD and the Human Rights Committee and the recent Universal Periodic Review report of the Human Rights Council.

In relation to the Declaration, articles 25 - 30 especially article 26(1) must be considered. These articles relate to lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources and provide for indigenous peoples distinct spiritual and material relationship, the right to development, to have customary law recognised, the right to restituion or compensation if restitution is not available, the right to conservation and restoration, the protection of cultural and intellectual property, and the right to determine development including the right that states must obtain the free prior and informed consent of indigenous peoples to exploitative developments. If these resources are taken from indigenous peoples, the Declaration also provides standards as to how redress is to occur, agreement must be reached, just and fair compensation provided as well as measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impacts. These articles all have a direct bearing on Māori rights in the foreshore and seabed and provide a robust and effective framework for protecting indigenous peoples rights.

The Review Panel should also consider the wider constitutional arrangements of New Zealand. Māori ability to protect rights is hampered by the lack of constitutional protections afforded to Māori. The FSA was unable to be stopped even though Māori consistently rejected it. In order to ensure that such legislation is never passed again, a constitutional review considering the place of the Treaty of Waitangi as well as the growing international body of law in relation to indigenous people's rights must be addressed.

The Review Panel should consider the resolutions of the numerous national Māori hui that were held when the foreshore and seabed policy was announced. These resolutions give an excellent view into initial Māori views of the foreshore and seabed policy and should be considered as part of the new framework.

Given the previous governments rejection of international oversight, this Ministerial Review Panel must consider the review of the FSA consistently with international law. The government cannot continue to decide upon Māori rights without any regard to evolving international law in relation to indigenous peoples rights, nor outstanding international censure.