SUBMISSION ON THE FORESHORE AND SEABED ACT 2004

To the Ministerial Review Panel

Introduction

1. This submission is made on behalf of the Treaty Relationships Group of The Religious Society of Friends in Aotearoa/New Zealand, *Te Hāhi Tūhauwiri* (Quakers). Quakers in New Zealand are a predominantly Pākehā group although we do have a few members who identify as Māori.
2. We believe that the process by which the Foreshore and Seabed Act was introduced and enacted by Parliament was fundamentally flawed and unjust. The Act that resulted from such a process cannot be good, just or fair legislation.
3. In this submission we do not analyse the problems with the Act in any detail. We strongly support the analysis, conclusions and recommendations of the Waitangi Tribunal report on the foreshore and seabed policy in 2004.[i]
4. We consider that the only right course of action at this stage is that the Act is wholly repealed and the situation initially reverts to the status quo that pertained after the Court of Appeal decision in the *Ngāti Apa and others v Attorney-General* case in 2003.

The original policy process

5. The policy development process that led to drafting of the Act was flawed from the outset as it was based on the inaccurate premise that the Crown owned the foreshore and seabed under the common law. This ignores the rights of Maori guaranteed by the Treaty of Waitangi to, 'full, exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and such other Properties as they may collectively possess, so long as it is their wish and desire to retain the same in their possession' (English version). These rights have never been relinquished by Māori.
6. Quakers are known as people of their word and in the past we conducted business without recourse to legal contracts as our word was regarded as our bond. The words of our forebears in the Treaty are crystal clear and unambiguous. It is our view that the honourable thing to do is to live by the words of our Treaty.
7. The other fundamental problem with the policy process was the lack of proper engagement with hapū and iwi. The haste with which the policy was developed and the legislation drafted precluded any proper consultation and negotiation. Negotiation on a matter with effects of such magnitude on Māori is not only an obligation under the Treaty of Waitangi but is a basic requirement of good government.
8. There is simply no way that legislation resulting from such a fundamentally flawed process that violated so many tenets of good government can be regarded as just and fair law. The flawed process alone is reason to repeal the Act and initially return to the regime that previously existed

The Foreshore and Seabed Act

9. As stated earlier we do not intend to itemise the many flaws, problems and injustices in this Act. In our view the most comprehensive and cogent analysis and critique was

provided by the Waitangi Tribunal in its 2004 report, which is as relevant 5 years after the Act came into force as it was then. In particular we highlight the following:

- In removing the means whereby property rights (including fee simple) can be determined through proper legal process, the Act in effect removes the rights themselves.
- The Act cancels the ability of the courts to "define, articulate, and award those rights" and thus violates the rule of law.
- The only property rights abolished by the Act are those of Māori and the Crown is therefore failing to treat Māori and non-Māori citizens equally. This discriminates against Māori and contributes yet again to a justified sense of grievance.
- The Act is prejudicial to Māori in three ways; Māori citizenship is devalued, powerlessness through uncertainty is imposed and mana and property rights are lost.
- The provisions of the Act are a serious breach of the letter, spirit and principles of the Treaty of Waitangi.

10. The Foreshore and Seabed Act is yet another example of successive governments changing the rules when the legitimate rights of Māori are recognised in our Courts. In our view, if the facts were properly put before New Zealanders they would not fail to see the basic unfairness of this process of rule changing. Apart from anything else we like to think of ourselves as a sporting nation and changing the rules to the advantage of one team does violate the code of sportship.
11. We are aware that some applications have been made by hapū under the Act. This does not influence our view that the Act is fundamentally flawed and should be repealed. These hapū will be able to use the process indicated in the Court of Appeal decision in the Ngāti Apa case.

Looking to the future

12. It is inconceivable in the present political circumstances that the Government would act unilaterally to remove property rights of citizens without Māori descent in the manner demonstrated by this Act (although the fear of the precedent-setting nature of this episode was no doubt what motivated some business and farming interests to oppose the legislation). The sole reason it is inconceivable at present is that the weight of numbers would not allow it in the peculiarly majoritarian constitutional arrangements we have in this country. But rightness and fairness do not depend on numbers. The majority is not always right which is why most democracies have inbuilt human rights safeguards.
13. The behaviour of the Government in this instance highlights the weakness of human rights protections in New Zealand compared with most modern Western nations. Even our Bill of Rights is relatively toothless as it allows for breaches of the provisions by Government, requiring only that reference to such breaches are tabled in Parliament. But protection of indigenous peoples' rights is almost non-existent and it is significant that we are one of only three nations in the world who continue to refuse to endorse the United Nations Declaration on the Rights of Indigenous Peoples.
14. It is the view of Quakers that until Māori rights as tāngata whenua are recognised and protected in our constitutional arrangements, we will continue to have injustices such as the Foreshore and Seabed Act perpetrated. Once the Act is repealed therefore, we

consider that a wide-ranging dialogue needs to take place about the constitutional arrangements in this country before any replacement legislation is considered. As we stated in a recently published pamphlet[ii] (copy attached):

> Māori are tāngata whenua, the peoples indigenous to Aotearoa/New Zealand. Throughout this nation's history of colonisation their inherent rights as tāngata whenua have not been recognised despite their generosity in agreeing to peaceful settlement by signing of the Treaty of Waitangi in 1840. That Treaty was designed to also protect their rights but initially by force of arms and subsequently by weight of numbers and the legislative process, the interests of the Pākeha majority have always prevailed. Māori have been marginalised in their own land.
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> For nearly 170 years Māori have attempted to address their concerns by using the legal systems and processes of the nation with tenacity and patience. Our observation is that the majority of these systems have failed to safeguard the basic rights of Māori as tāngata whenua. Majority decision making has continued to oppress and control.
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> Quakers in Aotearoa commit to advocating for a process of wide consultation and negotiation leading to change in our constitutional arrangements so that they give effect to the commitments made in the Treaty of Waitangi and provide for the sovereign rights of Māori as tāngata whenua in Aotearoa.

Conclusion

15. The flawed process that led to this piece of legislation is reason alone to repeal the Act and initially return to the regime that previously existed. As a nation that values justice, fairness and good government, we can then begin the process of dialogue designed to lead toward legislation that proceeds from the premise that Māori never relinquished their right to 'full, exclusive and undisturbed possession' of the foreshore and seabed of Aotearoa. This requires consideration of our constitutional arrangements as a prior step to any new legislation to regulate property rights, public access and compensation in relation to the foreshore and seabed.
16. Given the many positive aspects of relationships in Aotearoa we need to be confident of our ability as a nation to work through these complex issues in good faith and come up with solutions that genuinely do justice to all.
17. There has been high emotion surrounding this issue of our foreshore and seabed. Unfortunately we were not well served by our politicians who, instead of showing good leadership, used the issue for political advantage and for example fostered the false notion that access to our beaches was at issue.
18. The fact that there may have been a common misapprehension that the foreshore and seabed was owned by the Crown under common law is simply reason for better information about our history and constitutional arrangements to be more readily available and was not a reason for a Government to entrench such misapprehension in unjust legislation. It was a situation that required good, measured political leadership in the spirit of the consensus that had existed for some time with regard to the acknowledgement of Treaty breaches and the need for compensatory settlements. True democracy relies on the free and copious flow of information.

19. We conclude this submission with a quote from the Waitangi Tribunal report that we consider captures well the way in which Government needs to proceed:

> As a quasi-judicial body standing outside the political process, we proceed in the expectation that governments in New Zealand want to be good governments, whose actions although carried by power are mitigated by fairness. Fairness is the value that underlines the norms of conduct with which good governments conform – legal norms, international human rights norms, and, in the New Zealand context, Treaty norms. We think that even though governments are driven by the need to make decisions that (ultimately) are popular, New Zealand governments certainly want their decisions to be coloured by fairness. In fact, we think that New Zealanders generally have an instinct for fairness, and that a policy that is intrinsically fair will, when properly explained, ultimately find favour.[iii]

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[i] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy.* Wellington: Legislation Direct, 2004

[ii] The Religious Society of Friends Te Hāhi Tūhauwiri, *Tāngata Whenua Rights and Constitutional Arrangements in Aotearoa.* 2008

[iii] Waitangi Tribunal, ibid, p xiii