

Submission

By



to the

Ministry of Justice

on the

Review of the Foreshore and Seabed Act 2004 Consultation Document

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**REVIEW OF THE FORESHORE AND SEABED ACT 2004 CONSULTATION
DOCUMENT
SUBMISSION BY BUSINESS NEW ZEALAND¹**

1.0 INTRODUCTION

- 1.1 Business New Zealand welcomes the opportunity to comment on the Review of the Foreshore and Seabed Act 2004 Consultation Document ('The Consultation Document').
- 1.2 Business NZ did not make submissions on the various earlier discussion documents on the foreshore and seabed which led up to the enactment of the Foreshore and Seabed Act 2004. Notwithstanding this fact, Business New Zealand considers a number of issues need to be addressed before any decision is now made on what, for the future, will be the most appropriate action to take in respect to the foreshore and seabed. This necessarily requires time and consideration to be given to ensuring that any proposals by Government are soundly based, are broadly acceptable to the public and will be enduring. All options should be thoroughly canvassed and particularly issues surrounding possible unintended consequences; any proposals for reform need to be progressed with a degree of caution.
- 1.3 While Business NZ clearly appreciates that *"The Government's objective is to achieve an equitable balance of the interest of all New Zealanders in the foreshore and seabed"*, it remains concerned at the potential for unintended consequences the Government's preferred proposals might have. For example, negotiating settlements with the Crown rather than through the Courts might ultimately result in litigation down the track, while introducing new terms such as 'public domain/takiwā iwi whānui' without clear definition provides opportunities for argument as to the precise intent and meaning of both the English and the Māori words.
- 1.4 This brief submission is in two sections: Section 1 looks at broader issues which need to be considered as part of the review. Section 2 looks at specific issues as part of the review.

¹ Background information on Business New Zealand is attached as Appendix 1.

Section 1: Broader Issues requiring consideration

Protection of property rights

- 2.0 Property rights and enforcement of same are fundamental pillars of a market economy. Without reasonable security from confiscation by the state or others, the incentive on individuals and business to invest and build up productive assets is severely weakened.
- 2.1 The importance of investment in productive assets to a market economy means that property rights must be as clear and secure as possible. It should be noted that property rights do not necessarily confer ownership but that the bundle of rights which forms the basis of a property right can be clarified and enforced through the Courts if necessary.

Protection of existing use rights

- 2.2 Businesses have limited incentive to invest in expensive equipment and development if they have a strictly limited time frame in which to use a resource, with no reasonable guarantee that their right to access to that resource will be renewed. Therefore, while Business NZ generally supports the “Assurances and principles” outlined on pages 7-8 of the consultation document, it is of some concern that the **protection of existing use rights** will continue only until their term ends.
- 2.3 If it became evident that, for example, coastal permits were being transferred to other users on expiry, all existing users would have their legitimate expectations of continuing property rights eroded. This would constitute the Crown making spontaneous and ad hoc decisions about the developments it would promote and would drive at the heart of established property rights, seriously undermining the ability of many businesses to continue operating. This is particularly so given the high sunk costs investment can involve.

Compensation for loss of property rights

- 2.4 The Government’s preferred approach to the foreshore and seabed is to move away from the issue of ownership and adopt “...a more sophisticated way of balancing New Zealanders’ interests...” by proposing that no one should own the foreshore and seabed which would become ‘public domain’. Notwithstanding the Government’s clear assurance that this would exclude land currently in private title, there is concern that local government owned land, for example, would be “...incorporated into the public domain as it is currently treated as public land.” Issues in respect to compensation for such takings are not thoroughly canvassed in the consultation document although in some cases, local authorities may have significant land holdings funded over time by local rate payers.

Section 2: Specific Issues for consideration

- 3.0 Part Two of this submission raises a number of specific issues which it is considered important to address before any steps are taken to repeal the current foreshore and seabed legislation. The submission's chief concern is that the Government's preferred option raises more questions than it answers, leading, potentially, to many future difficulties. Some of these issues, which are substantial, are outlined below for consideration.

Undefined Terminology

- 3.1 A major (potential) problem with the Government's preferred fourth option follows from the introduction of new and undefined terminology – public domain/takiwā iwi whānui. Introducing new terminology of this kind opens up the words in question to judicial interpretation, the effects of which the current legislation was (perhaps mistakenly) introduced to counter. A concept open to interpretation is always going to be a source of difficulty owing to the inevitable uncertainty – including the potential for re-litigation - involved. Even if the words were defined the possibility of investigating their meaning remains. Paragraphs 3.2-3.4 of the Law Commission Summary of Issues raised in its Privacy Act review paper provides a good example of how a definition may be unpicked.

Uncertainty over control of resources

- 3.2 The consultation document also seeks to introduce (or more properly reintroduce) the concept of customary title which, if found to exist, would provide considerable powers to groups for whom it was recognised in the event that a proposed activity required a coastal permit (p.40 4.6.4). Groups with customary title would be able to refuse to allow the activity in question, raising the possibility of legal conflict if the activity were more generally considered to have value either for the country itself or for the local area. But the customary title concept could also lead to conflict among competing groups who considered it their right to lodge the same customary title claim.

Courts versus negotiating with the Crown

- 3.3 Other pressures would be felt if the proposal for coastal hapū/iwi to negotiate their customary interests directly with the Crown were accepted. While a decision-making process vested in the courts might be thought of as potentially, but not necessarily, time-consuming, decision-making by the courts is the only way that justice can clearly be seen to be done. Governments unhappy with a judicial decision are always able to reverse its effects by legislative means, signalling where their sympathies lie. This is in contrast to direct negotiation with the Crown, which unfortunately, runs too much risk of exposure to covert political influence.

- 3.4 On the above point, as earlier noted, coastal hapū/iwi unsuccessful in direct negotiations with the Crown would then be able to appeal to the courts. There is no mention, however, of a similar right of appeal for anyone *affected* by the negotiated recognition of customary interests.

Uncertainty over economic development

- 3.5 The consultation document raises a great many other issues. For example, the document addresses the situation of the port companies in respect to reclamations, proposing that they be able to obtain a permit based on the same concept as coastal permits, giving an interest for 50 years with a right of renewal. But if a permit of this sort is akin to a coastal permit, might not that allow the grant of the permit to be challenged by coastal hapū/iwi should they be able to prove a continuing territorial interest of some kind? It would seem that consent could be refused or contemplated activities limited, contrary to the interests of the affected applicant.
- 3.6 Existing use rights are protected until the end of their term but at that point, presumably, continuing use might also be open to challenge.

Complexities of a dual system

- 3.7 The difficulties likely to arise if local government owned land is incorporated into the proposed 'public domain' without compensation, have previously been referred to but there is also an inherent inconsistency in a system that would have some parts of the foreshore and seabed held in private ownership while other parts were essentially 'unowned'. The future implications of what is proposed need to be fully explored before this particular proposal is implemented.
- 3.8 Current public comment on the consultation document indicates considerable disagreement as to whether or not the favoured option provides a reasonable answer to the foreshore and seabed question. For that reason alone it is suggested that more time should be taken to consider a matter which is not well understood and, as with the Ngāti Apa decision, is open to misinterpretation. Also, the number of unrelated issues yet to be resolved - as outlined in the Review Consultation Document (p.40 para 5.6) - similarly demands the adoption of a cautious approach.

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 73 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.