

# **Waves of Discontent: An analysis of submissions on the Marine and Coastal Area (Takutai Moana) Bill**

## **Introduction**

Following the 2008 General Election, the National and Maori Parties agreed in their Confidence & Supply Agreement to review the Foreshore and Seabed Act 2004. This review resulted in the Marine and Coastal Area (Takutai Moana) Bill, which repeals the 2004 Act and restores the customary interests it extinguished.

While the Foreshore and Seabed Act 2004 asserted Crown ownership over the foreshore and seabed, the Marine and Coastal Area (Takutai Moana) Bill removes it from Crown ownership. It states that this area is not – and cannot be – owned by anyone. It provides a process by which iwi may claim legal recognition for a form of property right in the foreshore and seabed of New Zealand.

This Bill contains provisions of major and irreversible constitutional and economic significance and has potential far-reaching consequences on our economic wellbeing and way of life.

The Maori Affairs Select Committee received nearly 4,000 written submissions on the proposed Bill, and heard more than 500 oral submissions. If National and the Maori Party continue to support the Bill it is expected to pass in March 2011.

This report summarises the common concerns and key themes raised during the written and oral submission process. Not only did the majority of submitters emphatically oppose many aspects of this Bill, the concerns raised by submitters representing iwi were remarkably aligned – as were those raised by non-iwi individuals and organisations.

Both groups are opposed to the Bill for often very different reasons. Most non-iwi submitters find the Bill grants too many rights to iwi; the majority of iwi submitters argue that it discriminates against them.

What unites these submitters is the fact almost no one supports the Bill in its current form – most want it scrapped, either in favour of the 2004 Act, or replaced with something different.

The concerns summarised in this report have been categorised by the following common themes:

- Public access and wahi tapu
- Resource management and minerals
- Property rights
- The lack of an enduring solution

The ACT Party, which opposes this Bill, negotiated a seat on the Maori Affairs Select Committee for the purpose of hearing submissions. ACT Deputy Leader John Boscawen

and Maori Affairs Spokesman Hilary Calvert alternated in sitting at the oral hearings and listened closely to the submissions made.

## Public Access and Wāhi Tapu

*“The ability to go to the beach and enjoy either just sitting there or trying to catch a fish is what makes New Zealand so great and this right should be protected at all cost.”*

– Feilding Surfcasting Club

### Background

#### Free public access

When the Marine and Coastal Area (Takutai Moana) Bill was introduced there were conflicting reports from Attorney-General Chris Finlayson as to whether public access to the foreshore and seabed would remain free. Mr Finlayson claimed in Parliament several times that the Bill clearly guaranteed free access as set out in Sections 27-28. On September 9, however, he stated that charging for access “could be an offence. It depends on the circumstances...”

Section 40(2) of the Foreshore and Seabed Act 2004 explicitly states that no one can “charge or collect fees or other form of payment from any person or body for the use or occupation of the reserve.”

This section was not included in the Marine and Coastal Area (Takutai Moana) Bill, which could lead the courts to decide that Parliament intended something different – having chosen to make it different. At ACT’s insistence, National has promised a Supplementary Order Paper to guarantee that public access will be free and unfettered. Until we see the wording, however, we cannot say whether this will be satisfactory.

#### Wāhi tapu

Section 78 is the ‘wahi tapu clause’. While negotiating for customary marine title, iwi can seek permission for designated sites to be declared ‘wahi tapu’. Wahi tapu is defined in the Historic Places Act 1993 as “a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense.” No one knows what this means, although the Historic Places Trust has, in the past, considered a place mentioned in a song as wahi tapu.

Minister Finlayson has not been prepared to ban charging for access to wahi tapu sites.

The Bill also allows customary titleholders to appoint wardens to enforce the wahi tapu order. This ‘enforcement’ entails advising members of the public when they are in breach; warning them to leave; taking their name, contact details and date of birth; and then informing the police of the breach. The police are then expected to take the warden at their word, and people declared to be in breach of the wahi tapu conditions face a fine of up to \$5,000.

#### Submitters’ concerns

In the absence of explicit wording similar to Section 40(2) of the Foreshore and Seabed Act 2004, most non-iwi submitters are extremely concerned that the Kiwi tradition of free and unfettered beach access would be put at risk. Many described such access as “the birthright of all Kiwis”.

Many asked for the inclusion of a specific provision allowing free use and enjoyment for one and all.

Some were concerned that charges would be imposed for certain sorts of activities.

There was a strong feeling that New Zealanders should not be obliged to rely on the benevolence of any particular iwi at any particular time; the law should protect free use and enjoyment of the coastline. Some submitters gave examples of situations where Maori have overstepped their charging opportunities and were concerned that this Bill will enable many more such situations to arise.

The majority of non-iwi submitters were aligned in their concern that the ability of iwi to declare parts of the foreshore and seabed wahi tapu could be a way to circumvent any free access clause that may be inserted into the legislation. They fear this could result in areas previously accessible being blocked altogether, or for a price, and were apprehensive about the ease with which iwi can declare areas wahi tapu under the Bill.

Meanwhile, many iwi submitters objected to the inconsistencies between the rights of private owners and customary titleholders; they strongly believe that customary titleholders should have the same rights as those with freehold title.

### **What they said**

The **Council of Outdoor Recreation New Zealand** (CORANZ) noted the implied message that could be taken from the exclusion of section 40(2) of the Foreshore and Seabed Act 2004 from the new Bill:

The guarantee has been significantly weakened by not transferring s 40 (2), to the extent that a judge comparing the two Acts, would conclude that s 40 (2) had been left out purposely, and that free access had consequently been downgraded to the point of not being important. (CORANZ Submission, p. 4).

They query the absence of the word 'free' from section 27 of the Bill. They also note, as did the **Coromandel Marine Farmers Group**, that only individuals have the right to access under s27 of the Bill, yet s40(2) of the current Act includes "any person or body". The impact of this change on commercial and group activities is, like much of the Bill, yet to be made clear.

CORANZ are also "very concerned" by the wāhi tapu clauses in the Bill, which shut the public and government agencies out of the approval process. This process, they say, needs to be open and subject to challenge.

The **New Zealand Seafood Industry Council** makes a useful point regarding another recent law which guaranteed access without charge:

...the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 provides in relation to vested reserve sites that specified categories of fishers are "entitled to access and use the reserve sites... without requiring further permission from, or being liable for a charge by, the Trust". (p. 7).

The Council suggests a similar clause be inserted into section 27 of the Marine and Coastal Area Bill.

**The Federated Mountain Clubs of New Zealand** is the national body representing mountain recreation. Their members consist of tramping, climbing and walking groups. Their concern, above all else, is for “free and ready access to the foreshore and seabed” to be retained (p. 2). The Federation is particularly worried about the seemingly low threshold needed in deciding whether an area is wāhi tapu:

It seems that all that is needed to meet the legal criteria once a wahi tapu is identified is that a group decides there should be no access. There is nothing else. (p. 4)

**Farmers of New Zealand Inc.** supports free access as well as the protection of wāhi tapu areas. They suggest that “European pakeha wāhi tapu sites”, including shipwrecks from the early settler period, should also be protected (p. 3).

The **New Zealand Recreational Fishing Council** represents five other national bodies, including the New Zealand Underwater Association and Marine Transport Association, as well as over 76,000 recreational fishers. In their oral submission they stressed that the right to access the foreshore and seabed is the birth right of all New Zealanders. Any situation where one section of the community can deny access to another section is unacceptable.

Conversely, **Ngati Kahungunu Iwi** queried why private owners of the foreshore are allowed to restrict access while those with customary title will, in their view, be forbidden from doing so.

**Te Roopu Whakamana's** submission pointed to the example of Ngāti Whatua o Orakei's cooperation model with the Crown as a blueprint for future deals. Ngāti Whatua o Orakei has held fee simple title over the foreshore at Orakei Bay since 1991; a 2003 report described this model as:

“[a] benign but efficient regime; and here at least the mana of Ngati Whātua stands tall, intact and protected. In light of the current debate, I can confirm that public access to the foreshore of Okahu Bay has been unrestricted from the day title returned to Ngati Whātua.” (p. 3).

## Resource management and minerals: one nation, two sets of rules

*"I oppose this legislation as it creates a deep race-based chasm between us as citizens, bestowing very unequal rights and powers on different groups."*

– Dr John Robinson, scientist and former advisor to Te Puni Kokiri

### Background

#### Resource Management

The Marine and Coastal Area Bill will give customary marine titleholders the right to grant (or withhold) permission – without appeal – for anyone seeking to obtain resource consent for an activity in that area. This right to exercise undue influence in the resource consent process is not extended to any other landowner under the Resource Management Act (RMA).

This right effectively provides titleholders with licence to hold sectors of the population to ransom, and veto development without the need to give a reason for their decision (section 65).

Customary titleholders are also given unique powers to influence the decision making process at local and regional levels. Section 84 lets titleholders write a planning document that sets out their objectives according to 'tikanga' – a term that's barely defined, yet provides the foundation for many of the privileges granted to iwi in this Bill. This planning document can extend to areas outside the areas under customary marine title "to the part of the common marine and coastal area where the group exercises customary authority" (section 84(3)(b)) – a point reiterated in section 91(7).

Local authorities must take this planning document into account "when exercising its decision-making functions" (section 84(2)). These include regional plans and policy statements.

Other bodies that must take heed of this document include the Historic Places Trust, the Department of Conservation and the Ministry of Fisheries. No other landowners have such influence.

Whilst the ACT Party believes the Resource Management Act can infringe the rights of property owners, it is imperative in a democracy that all are treated equally before the law.

#### Mineral Wealth

Section 82 provides a clear (and understandable) incentive for iwi to apply for customary marine title. While (at this stage) the Bill continues to keep nationalised minerals under Crown ownership, those with customary marine title gain ownership of any non-nationalised minerals in their area. New Zealand's vast supply of iron ore and any other undiscovered minerals that lie under the seabed will, if found in the right area, benefit a few customary marine titleholders rather than the nation as a whole.

#### Submitters' concerns

The overwhelming sentiment expressed regarding these two issues can be summarised as "why should customary titleholders get special legal privileges denied to other New

Zealanders?” In other words, there is great concern at the obvious breach of the principle of “One Law for All”. (ACT shares these concerns; indeed, it is a breach of one of our core principles).

Most submitters who are uneasy about the Resource Management permission rights also believe there is a strong likelihood that titleholders will charge for granting these rights. This could make many possible commercial activities too expensive to undertake. When an otherwise economic activity becomes uneconomic, everybody is worse off.

There is also uncertainty over what will happen to existing commercial activities, such as aquaculture, when their current permits expire. While the Bill promises these will be protected (section 8(2)), a number of people felt uneasy enough about this issue to highlight it in their submissions.

### What they said

Local Government submitters had a particular concern in this area. The **Bay of Plenty Regional Council** summed up the problems in this area most succinctly on the first page of their submission:

- Current Resource Management Act policies, plans and consents will not apply to the exercise of customary rights.
- The development of a separate planning document may effectively create a separate set of laws governing resource use and development in customary marine title areas.

The Council suggests – quite reasonably – that sections 9-17 of the Resource Management Act should apply to customary titleholders, as they do to everyone else.

The conflict between this Bill and the RMA was also highlighted by the **Auckland District Law Society** in their oral submission. They consider this a difficult privilege to justify legally, especially as Maori who already own land freehold do not (and will not) have the right to ignore the RMA, nor do they have permission rights.

**Fonterra Cooperative Group’s** submission expressed concerns about the ability for their existing activities to be renewed:

Fonterra is concerned that the above provisions in the Bill do not provide for its significant existing infrastructure to be re-consented or minor upgrades undertaken in areas where customary protected rights or customary marine title are granted and where Fonterra cannot obtain the approval of the relevant holder of the right (or where such approval would only be granted subject to onerous or unreasonable conditions). (p. 3)

The **Whangamata Marina Society** and mining company **Straterra** echoed these concerns. The latter, in their oral submission, referred to the hypothetical example of a company spending millions on a resource consent only to have it vetoed by a customary titleholder.

The Whangamata Marina Society also questions the lack of natural justice, transparency and due process in allowing customary titleholders to be able to veto permission rights “on any grounds” – as stated in section 65(2). Should they be allowed these permission rights, the Society argue, they should exercise them in accordance with the Resource Management and

Conservation Acts. Those who have their applications vetoed should also have the right of appeal.

**The Petroleum Exploration and Production Association of New Zealand**, despite representing an industry whose resources (namely oil) are nationalised, harbour many concerns over the Bill's possible consequences for their industry. These primarily focus on veto rights and the ability for planning documents to potentially override the wishes of regional councils.

**Talley's Group** query the fairness behind customary titleholders gaining control over – and the profits from – any non-nationalised minerals. This is on the basis that mining was never a 'customary right' practiced by Māori historically. This is also, says Talley's, "a benefit which goes far beyond the rights attaching to non-Maori freehold title which abuts or includes the foreshore" (submission, p. 7). They highlight another scenario where Māori could gain a monopolistic advantage:

This clause [65] would also enable Maori aquaculture interests to be unfairly advantaged, by providing a blocking mechanism which could be used to obstruct non-Maori interests applying for consent on new aquaculture permits or the re-consenting of existing permits. Given the significant existing Māori interests in the aquaculture sector and the prospective increase under the Maori Commercial Aquaculture Claims Settlement Act 2004, such activity, were it to occur, would be anti-competitive in nature and contrary to public policy. (Ibid)

The **Environmental Defence Society** oppose the Bill's plan to give iwi the right to veto the establishment of new – and extension of current – marine reserves, described in section 70 as a "conservation permission right". This veto right, they argue, "is providing a much stronger right than landowners currently have and is inappropriate" (p. 5). They also express disquiet about customary titleholders' ability to veto marine reserves when they have such strong financial involvement in aquaculture and commercial fishing.

## Property rights

*“While the present Foreshore and Seabed Act is unsatisfactory in that it does not balance competing rights in the marine and coastal area correctly, the Bill will result in the creation of an even greater imbalance between those rights and will therefore put in place legislation that is more unsatisfactory.”*

– Federated Farmers

## Background

The Marine and Coastal Area Bill takes the foreshore and seabed out of Crown ownership and places it in a sort of ‘no man’s land’ where nobody owns it.

It also creates three different types of property rights: customary title and customary rights, with all the privileges that go with them, and mana tuku iho. The latter, according to the Bill’s Explanatory Notes, recognises the ‘special relationship’ iwi and hapū have with the foreshore and seabed and allows them to “take part in the statutory conservation processes within their relevant common marine and coastal area.” Some argue this is a first step toward co-governance of the entire foreshore and seabed.

## Process for gaining title

The Bill allows iwi the option of attempting to negotiate customary title with the Minister responsible for the Bill, which means negotiations for these property rights could (and likely will) be conducted in private and without public scrutiny. In fact, the first anyone will likely know about the granting of customary marine title is through an announcement, *after* the deal has been signed, via an Order-in-Council. Unlike Treaty of Waitangi settlements, these deals will be ratified not by Parliament but by Cabinet on the recommendation of the Attorney General.

Taking the process away from the transparent court system – throughout history the most frequent and effective forum for solving property rights disputes – means deals reached could be based less on centuries of common law, and more on what is politically advantageous for both parties to the settlement.

Justice will take a back seat to politics. Smaller iwi, with a legitimate claim but less to offer politically, might be pushed aside by larger iwi. Even if the deals reached are exactly how they would have been settled in the Courts, the perception of unscrupulous backroom manoeuvring will always linger.

## The test for title

The tests for granting customary title contained in the 2004 Act have been substantially lessened in the new Bill. A claimant’s requirement to show they and their predecessors had exclusively and continuously possessed a claimed area since 1840 without substantial interruption has been amended to allow for transfers in accordance with ‘tikanga’. Thus, claimants need not meet the continuous and exclusive test. They will also need not own adjoining “dry” land to qualify. Both amendments substantially weaken the test and mean the area opened up for customary title is significantly larger than before.

## Submitters' concerns

Of all the issues raised by submitters at the written and oral submission stages, the negotiation of customary marine title and rights behind closed doors is the most controversial. The vast majority of non-iwi submitters are profoundly opposed to this.

The question of tests for title was raised more often by iwi than non-iwi. The 'possession without interruption' test, although substantially watered down, was overwhelmingly opposed by iwi submitters who argue it will be very difficult for them to prove. Many state that the land confiscations that have occurred since 1840 has damaged their chances of ever securing title under the tests in the Bill.

Conversely some non-Māori feel that the uncertainty surrounding the tests for granting of rights, especially behind closed doors, could lead to many more successful claims than are justified.

Many Māori believe that customary title is not enough and ask why iwi should have to settle for less than freehold title of the coastline. They also see the Government's gesture of taking the foreshore and seabed out of Crown ownership as tokenistic and making very little difference.

Many on both sides said that non-Crown ownership is a nonsense – all land in a country not owned by others is owned by the crown.

## What they said

**Federated Farmers** is one group who see little difference between Crown ownership and the no-ownership concept. The key outcome for them "is that the area is, and remains, under the control of the public" (submission, p. 4). They see the Bill's proposed model as a precursor to uncertainty and prefer that the area stays under Crown ownership as in the 2004 Act.

Federated Farmers is known for its staunch defence of property rights and are, as such, a reliable and useful source of information on this matter. They steadfastly believe that any law must protect all property and customary rights in the foreshore and seabed. Their footnote on page two mentions a case that likely explains the qualifications to the adjacent land clause in section 61:

In *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364 the Court of Appeal considered whether physical access to and from the sea was negated by the fact that the property was separated from the sea by the Crown's coastal marginal strip. The Court found that one of the purposes of a marginal strip is "To enable public access to any adjacent watercourses or bodies of water", a provision broad enough to include the use of the marginal strip as a means of access between the sea and the property. The presence of the marginal strip was found to have never constituted an impediment to use of the sea as a means of access to the property in practice, and nor was there any suggestion that it could do so in the future.

**Fonterra** sees private negotiations as a denial of the opportunity for other potentially affected parties to be heard. They suggest amendments to require the Attorney General to provide reasons for any decisions made, and for affected parties to receive a copy of any applications for customary title and interests in advance of the decision.

**Golden Bay Cement** echoed this suggestion and also advocated that affected parties should have the right of appeal. They called on the Government to find a balance between economic interests and Māori property rights.

**Auckland International Airport Limited** has an interest in how the Bill turns out due to their coastal location. They too expressed concern at the lack of public scrutiny that results from entering private negotiations rather than having cases heard in the High Court.

The **Mt Maunganui Environmental Group** believes customary title should be established through the Supreme Court only, and the rights associated with title watered down substantially. The Crown should be able to veto title, or revoke it should there be any abuses or breaches of terms (which one assumed would be outlined at the time customary title is granted).

At the other end of the spectrum, most Māori submitters see little difference between this Bill and the 2004 Act. If anything, according to some iwi, this Bill is a step backwards.

The **Treaty Tribes Coalition**, for instance, saw only cosmetic differences between the two.

**Te Rūnanga A Iwi O Ngāpuhi** sees customary title as “clearly inferior to the privately held titles in the Marine and Coastal Area” (p. 3) and thus amounts to racial discrimination.

**Te Runanga o Ngai Te Rangī** argue that confiscations by the Crown make it difficult to prove uninterrupted use, and suggested easing the test of occupation without substantial interruption, as well as compensating those whose land had been taken and was unable to have returned.

**Te Runanga o Te Rarawa** considers the test impossible to fulfil and incompatible with Māori values:

...anthropologists and ethnographers for centuries have described the Maori people as transient, moving with seasons and natural events and yet the customary interest test relies on principles of permanent occupation that are consistent with industrialisation and the property ethos of modern day capitalism. (p. 5).

**Ngāti Kahu** are also concerned with this aspect, and object to the possibility that past resource consents can amount to ‘substantial interruption’. They also criticise the Bill for being vague on the role in proceedings of other iwi or hapū who may have competing interests in the same area.

The **Whanganui River Māori Trust Board** supports some parts of the Bill, particularly the onus of proof of extinguished coastal property rights moving from iwi to the Crown. They too, however, see the no-ownership regime as a fiction, owing to the fact the Minister of Conservation will have significant administrative powers. Their proposed solution:

... if Maori ownership is unpalatable, then at the very least the common marine and coastal area should be held jointly on trust by both the Crown and iwi as Treaty partners, with both parties involved in co-governance and co-management decision-making. (p. 4).

## This 'solution' will not endure

*"Maori rights are discriminated against in this Bill. It will not bring a durable resolution nor a just one. It must be withdrawn immediately."*

– Māori Party Te Upoko o Te Ika Branch, p. 2.

## Background

This Bill means that property rights attached to customary title of the seabed and foreshore may be negotiated and re-negotiated for generations - far from settling Treaty claims by 2014, as the Government desires, claims to the foreshore and seabed may well be debated in perpetuity.

That this Bill is not the end of the matter is most evident from the tone of many submissions. Rather than paraphrase them, it is more worthwhile to reproduce some of the more notable quotes in full.

## What they said

If it takes another generation or more to rectify the injustice of the 2004 Act, we would rather our mokopuna took up the journey following in the million footsteps we all took to Parliament in 2004, rather than shouldering the burden of a history that alleges Māori support for a 2011 Act that is equally as unjust. – **Te Runanga o Ngāi Tahu**, p. 1.

The proposed legislation does not meet BusinessNZ's six criteria for success. BusinessNZ submits that if the Bill cannot be made more consistent with the rule of law and the Treaty of Waitangi, a better course of action would be to retain the Foreshore and Seabed Act 2004 or repeal that Act and revert to the situation that existed before the 2004 Act was in place, with the qualification of allowing claims to be heard by the High Court and subsequent rights of appeal. – **BusinessNZ**, p. 11.

We are disturbed at the proposed replacement legislation and submit that while the universal recognition of mana tuku iho is a step in the right direction we **wish to submit** that there needs to be a new legal instrument developed to apply to the foreshore and seabed in toto. – **Network Waitangi Ōtautahi**, p. 1.

It is pointless endeavouring to address the special provisions continued in the proposed new Bill until the general framework can be agreed upon. The Bill is not something that should be pushed through by a small Parliamentary majority against what appears to be the wishes of most New Zealanders to oppose it. – **Mt Maunganui Environmental Group**, p. 2.

Our ancestor Hori Ngatai said in the 1880's that everything below the waterline is an extension of his own garden, his expression of mana and rangatiratanga. We still hold to that today, and furthermore we have never given up that ownership. – **Te Rūnanga o Ngāi Te Rangi Iwi Trust**, p. 1.

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. – **Coastal Coalition**, p. 7.

These proposals do not form the basis of an enduring society... Albert Einstein is quoted as stating, 'the quality of any society is best measured by the ways in which the most marginalised members of society are supported'. Te Runanga a Iwi o Ngāpuhi applaud the Crown but in the case of the largest and most continuously marginalised sector of New Zealand, Iwi Maori, with all of the attendant statistics to confirm our position, are once again asked to forego our rights, in this case the Crown recognised 'Native Title' for the betterment of all others. – **Te Rūnanga A Iwi O Ngāpuhi**, p. 7.

Ngaitai do not consider contending for ancestral rights within a judicial process was necessary however it has been done and in principle it is still Raupatu under the previous act and within this new Bill... We urge you to find a way forward that does not diminish or undermine our mana motuhake and to find a remedy in law which recognises our mana motuhake over our foreshore and seabed. – **Ngaitai Iwi**, p. 2.

There has been extensive expert commentary on options for durable reform, particularly from the Waitangi Tribunal in 2004 and the Ministerial Review Panel in 2009. We are surprised that the framework codified by the Bill does not appear to have been shaped by the preceding comments and recommendations, and consider it regrettable that expert advice has not been adopted. – **Treaty Tribes Coalition**, pp. 1-2.

It is a racist vision New Zealanders are unlikely to tolerate. But it is likely to create much conflict in our society, much greater than the 1981 Springbok tour, a conflict again that National, the government at the time, helped create. – **Council of Outdoor Recreation New Zealand**, p. 12.

We are the progeny of our ancestors who have occupied these shores for nearly two thousand years and we will not die, nor will we remain silent upon this injustice. We will continue to cling to the legitimacy of our indigenous status and the absolute independence of our Maori world view... And while circumstances have conspired to defeat us in this instance, we are compelled to face the charging bull of colonialism while considering all options before us. – **Te Rūnanga o Te Rarawa**, p. 6.

## Conclusion

It is obvious from the divisions highlighted in this report that, should this Bill pass, it will do so with no discernible support from the New Zealand public. This includes, critically, those stakeholders directly affected by the Bill's contents.

Without the support of these stakeholders, and others like them, an enduring solution will never be found. The Foreshore and Seabed Act 2004 did not prove to be the end of the matter; like that law, this Bill will come and go – destined to be replaced by something quite different again.

The majority of iwi and non-iwi submitters are opposed to this Bill, albeit for different reasons.

The common concerns amongst non-iwi are the retention of free and unfettered public access, the ease with which iwi could declare areas as wāhi tapu and thus off-limits, rights holders being given special legal privileges other Kiwis don't have and finally the ability of iwi to negotiate their claims with the Crown behind closed doors.

The common concerns amongst iwi submitters are that the threshold tests are too high, and that as a result of past land confiscations it will be impossible to meet the test of "exclusive use and occupation".

Many submissions suggested substantial changes to the Bill. Many more want the Bill scrapped altogether, either in favour of the 2004 Foreshore and Seabed Act or with something entirely different.

### ACT's proposed solution

ACT has been arguing for changes to the Bill on a number of fronts. The Attorney General has now agreed to support an amendment guaranteeing free use of the foreshore (although he would not extend this to wāhi tapu areas).

The reality, however, is that this Bill is fatally flawed. To try to tweak it to suit the needs of all New Zealanders is impossible. **The Marine and Coastal Area (Takutai Moana) Bill needs to be scrapped.**

Article 3 of the Treaty of Waitangi provides that "Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects".

This means that since 1840 Maori have been entitled to call on the common law - sometimes called judge-made law as compared to statute - and the protection of the courts.

For generations these common laws, including potential customary rights claims, have walked hand-in-hand with statute law. We think that is the best way forward for the argument over the foreshore and seabed.

We urge the National Party to move away from the brink of creating race-based law. **The best course is to repeal the 2004 Act and put the parties back in the position they were before its passage.**

This would return – not ‘give’ – to Maori - the right to have their grievances heard in open court where proceedings are open to public scrutiny and subject to judicial reasoning. This Article 3 right was taken away from them by the 2004 act and should be recognised as a breach of Treaty rights.

ACT strongly believes in the principle of one law for all New Zealanders, regardless of race, creed, colour or gender. The vast majority of submitters on the Bill support this principle too. Many of the provisions of the Marine and Coastal Area (Takutai Moana) Bill breach this principle.

National and the Māori Party will pass this Bill at their, and our, peril.