

# TE OHU KAIMOANA



MĀORI FISHERIES TRUST

## Submission to

### The Local Government and Environment Select Committee on the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill*

## Introduction

This submission from Te Ohu Kaimoana Trustee Limited responds to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (the EEZ Bill).

The purpose of Te Ohu Kaimoana is to advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities in order to:

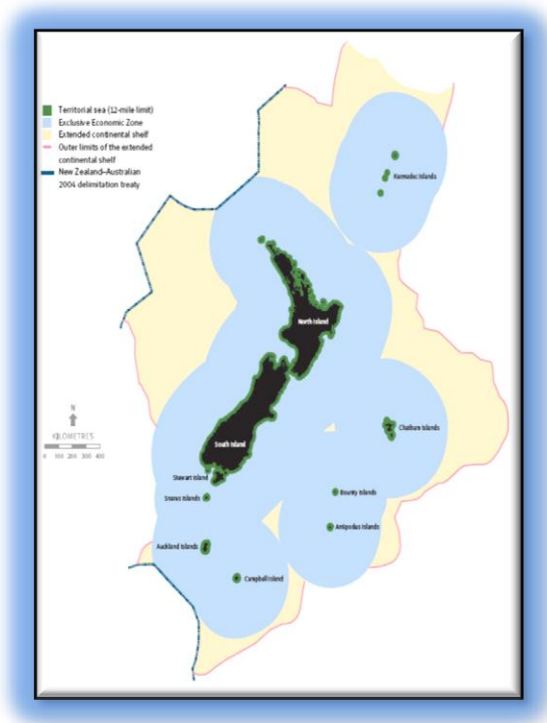
- ultimately benefit the members of iwi and Maori generally
- assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi
- contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement.

Te Ohu Kaimoana has an active interest in marine policy reform including the EEZ Bill because of the potential risks that such reforms pose to the substance and durability of the 1992 Fisheries Settlement.

## Summary of the EEZ Bill - What kind of regulation and where?

The EEZ Bill proposes to manage the environmental effects of certain activities that occur in the EEZ and Continental Shelf area (CS) (see Fig 1 below). The Bill provides that the policy to guide the management of these activities will be developed through regulations. These will be promulgated to classify activities as: permitted, discretionary or prohibited (similar to the Resource Management Act). Where an activity is deemed to be discretionary a marine consent will be required from the Government's new Environmental Protection Authority (EPA). Regulations will also be used to prescribe standards, methods or requirements, and in doing so can be used to classify areas within the EEZ or continental shelf. Regulations will be developed by the Minister for the Environment. Consent applications will be processed and determined by the Environmental Protection Agency (EPA). The application for consent will require an impact assessment so that the EPA can make a decision.

### Map of the EEZ and CS Area



**Figure 1.** The scope of the EEZ Bill includes both the blue and orange areas but not the green area.

### Crown Role

- The Minister for the Environment is responsible for legislation and regulations
- The Ministry for the Environment (MFE) administers the legislation and develops regulations and policy statements
- The Environmental Protection Authority (EPA) makes decisions on consents and is responsible for day-to-day operational functions including hearing appeals.

### Maori/Treaty Interests

- Independent expert Maori Advisory Committee to provide a Maori perspective to EPA on decisions
- Minister must provide adequate time and opportunity to comment on subject matter of proposed standards and regulations
- Decision makers must "have regard to existing interests to the extent that they are relevant"
- EPA to notify iwi authorities directly of consent applications that may affect them.

## Summary of Recommendations

Issues	Proposed recommendations
<b>Overall context</b>	That the Select Committee recommends the development of an Oceans Policy as a priority.
<b>Purpose and Decisions</b>	Amend clause 10 of the Bill so it is more consistent with the purpose of the Resource Management Act and the Fisheries Act.  Amend sections 61(1) and (2) to ensure they are consistent with the amended purpose of the Bill.
<b>Treaty Provisions</b>	Redraft the Treaty clause to require all persons performing functions and duties or exercising powers under the Act to act, in a manner consistent with the principles of the Treaty of Waitangi, including a duty to actively protect existing Treaty settlements.
<b>Scope and Effects on Fishing</b>	Amend the Bill to create certainty that activities regulated under the Fisheries Act are not regulated by this Bill.
<b>Effects on existing interests</b>	Add a requirement to avoid, remedy or mitigate the effects of activities on existing interests to the amended purpose of the Bill.  Add additional provisions to require agreements between new and existing users where a new activity would adversely affect an existing interest, with suitable provision for compensation where agreement cannot be reached.
<b>Appeal Provisions</b>	Improve the appeal process by enabling appeals to be taken to the Environment Court and to be considered on the facts presented.

We wish to appear before the Select Committee to speak to our submission. We can be contacted through:

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## 1. Overview

Te Ohu Kaimoana supports the overall intent of this Bill which is to manage the environmental effects of certain activities in the EEZ and Continental Shelf that have to now “fallen through the gap”. Te Ohu Kaimoana participated in the early development of policy for the EEZ and is pleased to see that a number of the issues we raised at the time are reflected in the Bill. These include provision for adaptive management and recognition of the rights and interests of existing users: particularly those rights granted under the Fisheries Settlement. However, we consider that the way a number of these matters is treated is inadequate and need to be subject to stronger obligations on applicants and decision-makers.

One of the key concerns is to protect the value iwi obtain from the Fisheries Settlement, which provides for the allocation of fisheries assets, including inshore and deepwater quota to fifty seven mandated iwi organisations. Of particular significance is the allocation of deepwater quota to all 57 iwi organisations. Much of this quota is fished in the EEZ: it provides a significant proportion of the income that MIOs obtain from their fisheries assets.

Our concerns about the Bill can be summarised as follows:

- the purpose of the Bill is inadequate and inconsistent with related legislation
- the Treaty provisions are insufficient
- Processes for developing regulations and applying for consents require clearer and more robust consultation provisions
- The exclusion of fishing from regulation under EEZ Bill needs to be made absolutely clear
- The effects on existing interests of activities granted under the Bill need to be avoided, remedied and mitigated, rather than simply “considered”.
- Appeal provisions should be extended to enable matters of substance to be reviewed.

In addition, the EEZ and CS (Environmental Effects) Bill has been developed as an interim measure to ensure that the effects of activities that do not currently fall within a management regime can be managed, until such time as a comprehensive Oceans Policy is developed. That policy would provide high level goals, objectives and principles that would provide guidance on how activities managed under present range of marine related regimes might be managed in an integrated way.

In addition we note that as this Bill is being considered, calls are being made for the Marine Reserves Bill to be reported back to Parliament. That Bill, if enacted, would enable the creation of marine reserves within the EEZ. We have a concern that without some kind of overarching framework that applies to the management of our oceans, environmental protection measures will be implemented in an adhoc fashion, with:

- little assessment of the overall risk to the marine environmental from the full range of activities granted under different Acts
- no recognition of the cumulative effects on existing users (including those that benefit from a full and final Treaty settlement) of measures implemented under different Acts.

The task of developing an Oceans Policy needs to be revisited in order to provide a consistent approach to management of the marine environment.

### **Recommendation**

That the Select Committee recommend the development of an Oceans Policy as a priority.

## **2. The Purpose of the Bill is inadequate**

The purpose of the Bill is to:

*“...achieve a balance between the protection of the environment and economic development in relation to activities in the exclusive economic zone and on the continental shelf by:*

- (a) Requiring decision makers to take the matters in section 12 into account in making decisions under sections 27, 30 and 61*
- (b) Requiring them to take a cautious approach in decision making if information available is uncertain or inadequate; and*
- (c) Requiring the adverse effects of activities on the environment to be avoided, remedied or mitigated (s 10).”*

While the wording of this purpose has some similarities to other aligned legislation, its key difference is in the notion of “balancing” environmental protection and development, without providing any guidance on the long term outcomes that should be achieved.

The Bill is intended to provide a regime to fill gaps in our current law relating to the EEZ, and to then exempt the regulation of activities covered by other legislation. This Bill, taken together with existing marine legislation, should endeavor to provide a consistent system of laws that govern our marine environment.

In our view, it does not make sense to create a purpose in this Bill that is inconsistent with other relevant legislation – most relevant being the Resource Management Act and the Fisheries Act, and which will require the development of new case law. While the purpose of each of these Acts is not worded in an identical way, they both contain a duty to ensure that certain environmental values are sustained or safeguarded.

While the purpose of the Bill contains a similar requirement to existing legislation in respect of avoiding, remedying or mitigating adverse effects on the environment, the notion of balancing economic development and protection of the environment introduces a different set of concepts. In our view, the use of the word “protect” has come to have a particular meaning in the New Zealand context, being taken to mean that resources should be locked up and prevented from being used. The concept of “balance” makes sense if what is being balanced are values relating to use and non-use of environmental resources. However we do not consider this approach to be helpful.

In our view it is more appropriate to develop a purpose that contains a duty on decision-makers to provide for economic development while ensuring that natural and physical resources are sustained, and the life-supporting capacity of the aquatic environment is safeguarded. This language is far more consistent with existing law, has the benefit of being able to draw on many years of case law, and provides for a more consistent regime.

### Recommendation

Amend clause 10 of the Bill along the following lines, so it is more consistent with the purpose of the Resource Management Act and the Fisheries Act:

*The purpose of this Act is to promote sustainable economic development in relation to activities in the exclusive economic zone and on the continental shelf, while safeguarding the life-supporting capacity of the environment by:*

- (a) Requiring decision makers to take the matters in section 12 into account in making decisions under sections 27, 30 and 61*
- (b) Requiring them to take a cautious approach in decision making if information available is uncertain or inadequate; and*
- (c) Requiring the adverse effects of activities on the environment to be avoided, remedied or mitigated."*

Note that later in our submission, we recommend an additional sub-clause be included to address the effects of activities on existing interests (see section 5.2).

### 3. Decisions on applications need to be consistent with the purpose

Beyond the purpose of the Bill, the ultimate test to make a determination on a marine consent is set out in section 61(2) as follows:

- “... the EPA may –*
- (a) grant an application for marine consent, in whole or in part, and issue a consent if the activity's contribution to New Zealand's economic development outweighs the activity's adverse effects on the environment; or*
  - (b) refuse the application if the adverse effects of the activity on the environment outweigh the activity's contribution to New Zealand's economic development”*

Essentially the “balancing” requirement in the purpose statement together with the need to weigh-up positive economic effects against adverse environmental effects is unworkable and unhelpful. It is unworkable because the positive and negative variables in the test are too disparate to make a valid and reliable comparisons and subsequent decisions.

The weighing up requirement in clause 61(2) appears to add an exception to the need for decisions to be consistent with the purpose and principles of the Act. Clause 10(1) (c) requires the adverse effects of activities on the environment to be avoided, remedied, or mitigated. Clause 61(1) provides for this to be achieved through conditions on activities for which the consent is sought. However, because sections 61(1) uses the term “might avoid, remedy, or mitigate...” instead of “will avoid, remedy, or mitigate...” clause 61(2) appears to provide an exception that allows activities of considerable economic benefit to go ahead, even if their effects can't be avoided, remedied or mitigated.

#### **Recommendation**

To ensure that all decisions are consistent with the purpose of the Bill (as recommended above), amend section 61(1) and (2) as follows:

- (1) Before the Environmental Protection Authority decides whether to grant or refuse an application for marine consent the EPA must consider the extent to which imposing conditions under section 62 will avoid, remedy, or mitigate the adverse effects of the activity for which the consent is sought.*
- (2) After complying with subsection (1) and sections 59 and 60, the EPA may grant an application for a marine consent, in whole or in part and issue a consent.*

## 4. The Treaty Provisions are insufficient

We consider that the Crown's obligations under the Treaty need to be provided for through a stronger overarching statement about the Crown's Treaty obligations, a duty to protect Treaty settlements, and stronger processes for consulting with iwi. Processes for managing the effects of new activities on existing interests are also relevant, and are further explored in sections 5.2 and 5.3.

### 4.1 Need for an overarching duty

The Treaty provisions as they currently stand in the EEZ Bill state:

*"14 Treaty of Waitangi*

*In order to recognize the Crown's responsibility to take appropriate account of the Treaty of Waitangi –*

- (a) section 26 (which relates to the functions of the Maori Advisory Committee) provides for the Maori Advisory Committee to advise the Environmental Protection Authority so that decisions made under this Act may be informed by a Maori Perspective; and*
- (b) section 32 requires the Minister to establish and use a process that gives Iwi adequate time and opportunity to comment on the subject matter of proposed standards and regulations; and*
- (c) section 33 and 59 require all persons performing functions and duties or exercising powers under this Act to have regard to existing interests to the extent that they are relevant; and*
- (d) section 46 requires the Environmental Protection Authority to notify Iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them."*

Te Ohu Kaimoana considers that the rights of Maori secured and guaranteed by the Treaty of Waitangi should be protected and enhanced. The Treaty recognises the rights and duties of the Crown, Maori and citizens and provides the framework within which these rights and duties can be negotiated.

Section 14 of the Bill, headed "Treaty of Waitangi", refers to sections 26, 32, 33, 59 and 46 of the Bill. These sections, which are included "in order to recognise the Crown's responsibility to take appropriate account of the Treaty of Waitangi", set out processes for decision-makers to gain a Maori perspective, consult with Maori, have regard to relevant existing interests Maori might have and notify relevant Maori parties of consent applications that may affect them. While these processes may be useful they are insufficient to convey any of the duties that arise from the Treaty that ensure active protection of existing Treaty settlements. In that regard, section 14 does not add anything that is not already provided for elsewhere in the Bill – and indeed could almost be read as a disclaimer: "this is the extent of the Crown's obligations."

Rather than refer to processes provided elsewhere in the Bill, we consider that the Bill should contain a stronger overarching provision that requires the Minister for the Environment or the EPA

to act in a manner that is consistent with the principles of the Treaty of Waitangi. This should include a duty to actively protect existing Treaty settlements. Such a provision would act to guide decision-makers as they consider the information they obtain through the various processes set out in the Bill.

### **Recommendation**

Redraft clause 14(c) as follows:

*This section requires all persons performing functions and duties or exercising powers under this Act to act, in a manner consistent with the Principles of the Treaty of Waitangi, including the active protection of existing Treaty settlements.*

## **4.2 Need for stronger duties to consult**

The Crowns' Treaty obligations should be supported by much stronger obligations on decision-makers to consult with iwi, rather than provide them with an opportunity to "comment" (see clause 32). Without derogating from obligations to iwi under the Treaty, we consider these should also be strengthened in relation to other existing interests and rights holders and the public generally.

The provisions of the Bill as they currently stand are too open: on the one hand the Minister could develop processes that are detailed and robust. On the other, they may be inadequate for identifying the full implications of his or her proposals.

The process of developing regulations should more closely mirror processes for developing policies and plans under the Resource Management Act. These require public submissions on a draft policy or plan, public hearings and a requirement to consider all information generated from the process against the principles of the Act before making final decisions. In making this recommendation we note that the process of developing and implementing policy through regulations (unlike policies and plans under the Resource Management Act) is not subject to a process of appeal on substantive matters. Our understanding is that the only avenues for challenge would involve judicial review (which we consider is inadequate) or a request for a review by the Regulations Review Committee. Thus in our view it is crucial to provide processes that ensure that the full implications of proposed policies, rules, standards and so on, are thought through and addressed.

### **Recommendation**

Provide more robust processes, consistent with the Resource Management Act, that provide for consultation with iwi, other interested parties (including the seafood sector) and the public, to ensure that the implications of proposed regulations are fully identified and addressed.

## 5. The Scope of the EEZ Bill in relation to fishing activity

There are two ways in which this Bill could have an effect on fishing. The first is through the regulation of fishing activity. The second is by allocating rights to new users to carry out activities that will have an adverse effect on fisheries rights holders.

### 5.1 Regulation of fishing activity

As already noted, we agree with the intention of the Bill which is to fill the gap in the environmental management regime in the EEZ. We also agree that the new legislation should not duplicate or override any of the functions and duties performed under the Fisheries Act 1996. Thus we are encouraged to see that the Bill contains provisions that show it does not intend to regulate fishing activity. This is provided for through:

- the definition of “activity” – as set out in clause 4 - which is an activity restricted by section 15
- Clause 15 sets out the restrictions on activities in the EEZ and ECS. While clause 15 (2) (e) and (g) include “disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on the seabed or subsoil” or “the destruction, damage, or disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on marine life or its habitat”, clause 15 (5) states that:

*“Despite subsection (2) (e) and (g), this section does not apply to lawful fishing for wild fish under the Fisheries Act 1996.”*

We note that clause 28, which provides for regulations classifying areas of the EEZ or ECS can be made to close an area of the EEZ or ECS to “all or any activities”. In addition, clause 31 (1) provides that regulations “may apply to all or any part of the EEZ or ECS and to any or all activities carried out in the EEZ or ECS”. We assume that the definition of “activity” in clause 4 means these provisions are not intended to apply to fishing. However the wording of this clause, that states they can apply to all or any part of the EEZ or ECS is stated in general terms and leaves us in some doubt.

We are aware that SeaFIC and the Deepwater Group have made recommendations on amendments to the Bill that would provide greater clarity on the relationship between this Bill and the Fisheries Act. We support these recommendations, which are inserted in our recommendation below.

## Recommendation

Amend clause 15 (5) of the Bill to read:

*This section does not apply to the activity of fishing under:*

- (a) The Fisheries Act 1996; or*
- (b) International Conservation Management Measures identified in section 113c of the Fisheries Act 1996.*

Insert the following subsection in clause 27:

*Regulations prescribing standards, methods or requirements*

- (3) In accordance with section 15 (5), regulations under this section shall not apply to the activity of fishing under:
  - (a) The Fisheries Act 1996; or*
  - (b) International Conservation Management Measures identified in section 113c of the Fisheries Act 1996.**

## 5.2 Managing the effects of new activities on existing users, including fisheries rights holders.

We support the recognition the Bill gives to the effects of new activities on “existing interests” These include the interest a person has in “the settlement of a contemporary or historic claim under the Treaty of Waitangi as defined in section 4. These provisions are important to ensure that the integrity of Treaty Settlements, such as the Fisheries Settlement, is maintained.

However, when viewed alongside other measures in the Bill that provide for existing interests, (including provisions relating to the Treaty of Waitangi: see above), we do not consider the provisions go far enough. While section 12 requires the effect of activities on existing users to be taken into account, it is not clear from the Bill what outcome is sought. In our view it should be made clear that the rights of existing interests should be protected – that is the reason for taking them into account. As the Bill is currently worded – and particularly with the inclusion of section 61 (2) (see above), there is some danger that after having taken existing interests into account and having regard to any adverse effects on those interests (s 59 (4) (c) and s 60), they will be overridden by proposals that are assessed as contributing more to the New Zealand economy.

There are a number of changes we recommend are made to the Bill to strengthen the protection of existing interests, including Maori fishing interests under the Fisheries Settlement. At a minimum, existing interests would be better protected with the insertion in the Bill of a requirement that the adverse effects that activities granted under this Bill have on existing interests (in addition to the environment) must also be avoided, remedied or mitigated. As the Bill stands – there is little incentive to actually address adverse effects on existing interests – especially if the proposed activity is seen to have greater economic benefits for the country. We would consider it a breach of the Treaty principle of good faith if a new use were allowed to

proceed at the expense of Maori interests established in a “full and final settlement” such as those in the fisheries settlement.

## Recommendation

Add a clause to our recommended purpose so that it reads:

*The purpose of this Act is to promote sustainable economic development in relation to activities in the exclusive economic zone and on the continental shelf, while safeguarding the life-supporting capacity of the environment by:*

- (a) Requiring decision makers to take the matters in section 12 into account in making decisions under sections 27, 30 and 61*
- (b) Requiring them to take a cautious approach in decision making if information available is uncertain or inadequate; and*
- (c) Requiring the adverse effects of activities on the environment to be avoided, remedied or mitigated*
- (d) Avoiding, remedying or mitigating any adverse effects of activities on existing interests.”**

### 5.3 Additional measures to avoid, remedy or mitigate adverse effects of activities on existing interests.

Te Ohu Kaimoana recognizes the importance for New Zealand, of economic development, particularly given the current economic climate. However we do not consider that such development should be at the expense of, or substitute for existing economic activities. We consider that the Bill should provide more specific measures to require applicants to consult with and endeavor to reach agreement with existing interests they may adversely affect.

The new Aquaculture Legislation, including amendments to the Fisheries Act, specifies that aquaculture cannot have an “undue adverse effect” on fishing. This provides an example of a much stronger requirement on aquaculture proponents to reach agreement with fishing interests they affect in an unduly adverse manner. The regime provides that where the aquaculture activity will provide materially greater benefits to New Zealand than the affected fishing activity, a process for determining appropriate compensation is provided for.

We see no reason why similar obligations, including provision for compensation, should not be placed on proponents for new activities in the EEZ or ECS where they may adversely affect existing interests, including fishing interests.

### **Recommendation**

Amend the Bill to require:

- A process for negotiation and agreement between applicants and existing interests adversely affected by their proposal
- a suitable compensation regime where agreement cannot be reached.

## **6. Appeal process is insufficient**

We note with some concern that the Bill lacks sufficient provision (consistent with Resource Management Act process) for appeals to be taken to the Environment Court and to be considered on the basis of the facts presented rather than simply on points of law in the High Court.

### **Recommendation**

Improve the appeal process by enabling appeals to be taken to the Environment Court and to be considered on the facts presented, not just on points of law.