



The Foreshore and Seabed Act 2004

Submission to the Review Panel by
Te Ohu Kai Moana Trustee Ltd

19 May 2009

Foreshore and Seabed Act Review

Introduction

1. Te Ohu Kaimoana (Te Ohu) is established under the Maori Fisheries Act 2004 to advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities. Ultimately, the aim of our work is to:
 - a. benefit the members of iwi and Maori generally
 - b. further the agreements made in the [fisheries] Deed of Settlement
 - c. assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi; and
 - d. contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement.
2. Te Ohu is now the trustee for two settlements, the Fisheries Settlement entered into in 1992, and the Aquaculture Settlement, enacted in January 2005.
3. Te Ohu (and the former Treaty of Waitangi Fisheries Commission), has devoted significant advisory and technical services to enhancing the Treaty rights of Maori in relation to all aspects of fisheries and the marine environment. This has included working with iwi in Te Tau Ihu on the *Ngati Apa* case, and subsequently assisting iwi – through Te Ope Mana a Tai – to bring together information and options for the way forward.
4. This submission is based on our previous work, both in support of Te Ope Mana a Tai and consistent with our submission on the Foreshore and Seabed Bill. It also expands on comments we made to the Review Panel in April this year. It begins with some general comments about the nature of customary rights, and then moves to comment on the questions the Review Panel has raised in its discussion paper.

General comments

5. Te Ohu submits that the scope of iwi/hapu relationships, rights and obligations in the coastal marine area is greater than merely a right to use aspects of the coastal marine area. The relationship and rights and obligations in the coastal marine area of Maori generally and iwi in particular include, but are not limited to, the following elements:
 - self governance (the right to control, regulate, manage, and allocate)
 - development (the right to cultural and economic benefit), exclusivity (in accordance with tikanga),
 - use (in its many forms) and access (in accordance with tikanga).
6. This bundle of rights is much like the strands that make up a rope: each strand is a particular customary right that, when bound together with others, creates something that has strength. We make the following initial submissions:

- The legal framework that recognises customary rights within New Zealand is a product of western law. This framework establishes a system that, by virtue of its origin, does not adequately reflect the real nature of the relationship, rights and obligations between iwi/hapu and the environment.
 - There is a tension when considering how to accord greater recognition of customary rights that such a discussion inevitably seems to result in either a proprietary or usufructory interest without acknowledgement of self governance.
 - We have an opportunity to discuss and create a system that is a truer reflection of iwi/hapu customary rights.
7. We note *Amodu Tijani v Secretary, Southern Nigeria*¹ has particular application to the present review:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.

Principles (Questions 1 to 3)

8. When we appeared before the Committee we submitted that the Act should be repealed. Any new regime should reflect a more comprehensive set of principles than the four principles that underlie the Act. These principles fail to establish a proper foundation upon which to base the regime set out in the Act, and act to place the rights and interests of the public above the rights and interests of Maori. In our view the following alternative principles should be included in a new regime, to ensure that the right relationship between Maori rights and interests, and those of the public, is restored:

Self governance

Self governance comprises the ability to regulate and allocate resources that fall within the mana whenua of the Iwi. Regulation includes management and resource allocation, all of which are prescribed by tikanga. For example imposing a rahui or excluding people from a space because of a particular use that it is put to such as an urupa or wahi tapu. Management could include co-management with Regional Councils in managing the effects of using the coastal marine environment and could also include the ability to determine what the different uses of the environment are and allocate those uses. The ability to control access could be a sub-set of the management role.

Use and access

The right of iwi/hapu to use and access the coastal marine environment covers both customary commercial purposes and customary non commercial purposes. Iwi/hapu have a right to use and access the coastal marine environment in priority to other users.

¹ [1921] 2 AC 399 pp 401 to 402

Development

Development encompasses the ability of iwi/hapu to use and develop the environment for their benefit for commercial as well as non-commercial purposes. The development right is not a static right that is cemented in tradition although it is guided by tikanga. The Crown has already recognised a development right in respect of customary rights in the 1992 Fisheries Settlement and therefore a precedent exists for statutory recognition.

Compensation

Where areas of foreshore and seabed have been taken by legislative action or unfairly acquired by the Crown, any loss of customary rights that has resulted may be a Treaty grievance that the Crown should move to address as matter of urgency through the Treaty settlement process.

Ownership and Alienation (Questions 4,5 and 10)

9. We disagree that the Crown should own the coastal marine area. We do not believe that alienation of the foreshore and seabed should be permissible by special act of Parliament. Long term leases will provide the same level of tenured security to commercial business interests without requiring alienation.
10. Nor do we agree that these customary rights to the foreshore and seabed once affirmed – in whatever form - should be alienable. The rights should be held in perpetuity in recognition that they are taonga passed down from tupuna and should be held for the benefit of future generations.

Access, Navigation and Fishing (Questions 6, 7 & 8)

11. Te Ohu supports the point made by Te Ope Mana a Tai that access and navigation rights within the coastal marine area should be protected and that the law in relation to the foreshore and seabed should not generally affect fishing rights as set out in other legislation. The only exception is where any access is contrary to tikanga Maori, such as the need to exclude people from a space, for example, because it is wahi tapu.
12. A key issue to be considered in reviewing the Foreshore and Seabed Act is the relationship between any regime that affirms customary rights in the foreshore and seabed and rights already granted under the Fisheries and Aquaculture Settlements. As noted earlier, customary rights in the coastal marine area consist of a bundle of rights that include self governance (ownership, control, regulation, management, allocation) development, exclusivity (in accordance with tikanga), use and access. Maori claims to aspects of these customary rights – as they relate to fisheries and aquaculture - have been settled by agreement (the Fisheries Settlement) or by legislation (the Aquaculture Settlement).

Rights obtained by iwi under the Fisheries Settlement

13. The Fisheries Settlement settled claims to customary fisheries rights. These rights included all the elements set out in paragraph 10 above, as they relate to fisheries. As Justice Grieg said:

I am satisfied that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole of the coast of New Zealand, at least where they were living.

That was divided into zones under the control and authority of hapu and tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries.

Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of local dwellers²

14. The Fisheries Settlement recognises that customary fishing rights include:

- commercial and non-commercial aspects;
- a development option – customary fishing rights are not limited by the technology used at a given time; and
- perpetual rights.

Kaitiakitanga is common to all customary fishing and is the basis for management in customary terms. However, in recognising these elements, the Fisheries Settlement effectively split the management of the commercial and non-commercial aspects of customary fisheries rights into different management regimes, at times involving potentially conflicting processes (see figure 1). The result is that the ability for Maori to have a strong voice in the management of fisheries has to some degree been frustrated.

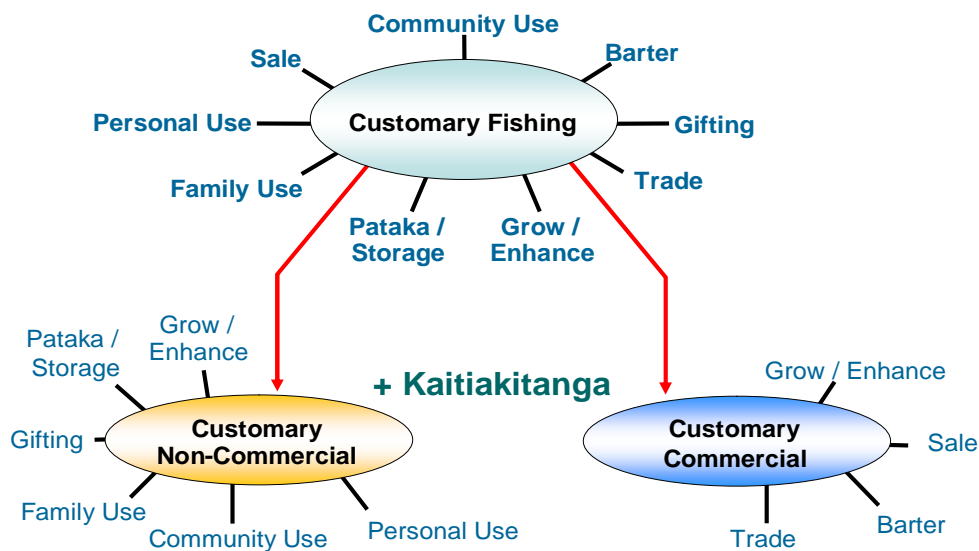


Fig. 1 Shows how the original customary fishing rights were separated into two distinct sets of commercial and non-commercial rights through the fisheries settlement. While these rights were separated in legislation the Minister also has an obligation to have regard to kaitiakitanga when making fisheries management decisions that affect both sets of rights.

² NZ Maori Council & Te Runanga o Muriwhenua v Att General (unrep Nov HC, Wgn)

Customary commercial fishing

15. The commercial aspect of the Fisheries Settlement is given effect through the allocation to iwi of shares in Aotearoa Fisheries Limited and 10 – 20% of quota shares in species managed under the Quota Management System (QMS)³. Once allocated to iwi, fisheries assets are held by Asset Holding Companies (AHCs) owned by Mandated Iwi Organisations (MIOs).
16. Under the settlement, quota shares in inshore species are allocated to iwi on the basis of the proportion of coastline each iwi shares within Quota Management Areas (QMAs), which are based on the biological characteristics of the species and stocks concerned. Deepwater species are generally allocated on the basis of 75% population, and 25% according to the coastline methodology outlined above.
17. Fisheries are managed within QMAs. In many cases QMAs are bordered by multiple iwi. Iwi who hold quota in the stock concerned can fish – or sell the right to fish – their quota anywhere within the QMA – not just directly off their own coastline.

Customary non-commercial fishing

18. The expression of the non-commercial aspects of the Settlement – implemented through the “customary regulations”⁴ – is based primarily on a territorial relationship between tangata whenua and their rohe moana. The regulations are intended to:

recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade...⁵

19. Under section 2 of the regulations, “tangata whenua, in relation to a particular area, means the whanau, hapu, or iwi, being Maori, that hold manawhenua manamoana over that area”.
20. Under the regulations, tangata tiaki, who are “members of the tangata whenua or a tangata whenua organisation or their notified representative”, are given the power to authorise fishing for customary non-commercial purposes anywhere within their rohe moana. The process of defining a rohe moana and appointing Tangata Kaitiaki is set out in the customary regulations and includes a public notification and objection process. Following the resolution of any disputes, rohe moana boundaries and tangata tiaki appointments are confirmed.
21. Once the above steps are completed, an additional tool available under the customary regulations is the setting aside of mataitai reserves as a means for tangata whenua/tangata tiaki to manage their non-commercial fisheries. The regulations prohibit commercial fishing within mataitai reserves, unless

³ Under the Interim Fisheries Settlement in 1987, it was agreed that iwi receive 10% of all species within the QMS at that time. Under the final settlement, iwi are to receive 20% of all new species introduced into the QMS from 1992 onwards.

⁴ consisting of the Fisheries (Kaimoana Customary Fishing) Regulations 1999 and the Fisheries (South Island Customary Fishing) Regulations 1999

⁵ S 10 (c) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

- once the mataitai has been established - the tangata tiaki recommend further regulations to reinstate it (either wholly or in part) within the mataitai.

22. Before the Minister of Fisheries declares a mataitai reserve, the customary regulations state that he/she must be satisfied of a number of things including that the mataitai reserve will not:

prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement (where applicable) within the quota management area for that species (section 23 (e) (ii) refers)

"Persons" who could be affected include iwi who hold fisheries settlement quota for the relevant QMA.

23. Implementation of the regulations has raised some issues that need to be addressed. The regulations have been implemented in such a way that hapu and iwi have been treated separately by MFish – reflecting MFish's failure to recognise the mutual interests of iwi and hapu in both their commercial and non-commercial fishing rights. This means that iwi and hapu have come into conflict over the potential effects of mataitai reserves on iwi commercial fishing interests. Better processes for iwi and hapu to resolve these issues early, and to integrate their interests are needed.

24. We also consider there are questions about the ability of the system for mataitai reserves to meet the aspirations of all iwi and hapu. Given the number of hapu along the coastline – and the potential for all to wish to designate areas as mataitai reserves, it is probable that cumulative exclusions of commercial fishing will "trigger" the above test – preventing further mataitai from being approved. As MFish's guidelines suggest:

The Minister will take into account other mataitai reserves within the quota or fisheries management area when the potential effects of any new application are assessed. So while the first applications for reserves within a particular area may be approved, later applications may not because of the cumulative impact of all the reserves on commercial or recreational fishing.⁶

The situation highlights a failure to think more broadly about the different approaches that might have been taken to address the customary non-commercial rights and interests of iwi and hapu.

25. Negotiations with the Crown under the Foreshore and Seabed Act signal that the customary regulations are not meeting the aspirations of iwi and hapu. For example, the Crown has entered into negotiations with iwi in respect of territorial customary rights and the settlement of Treaty claims. Some of Deeds of Settlement make specific provision for the management of customary non-commercial fishing in ways that differ from the approach taken in the customary regulations.

26. We submit that in the interests of an integrated Fisheries Settlement, it would be desirable to focus on reviewing and enhancing the customary regulations as part of the fisheries management regime, rather than

⁶ www.fishin.govt.nz/en-nz/Maori/Kaimoana/default.htm

endeavour to make improvements on an adhoc basis through other means. In that way, the customary regulations should be able to be enhanced so that they can meet the aspirations of all iwi and hapu in the longer term.

27. We believe the problems of integration within the Fisheries Settlement signal the need for caution in designing a related regime for affirming related customary rights in the coastal marine area. We believe it is important for the strands of the customary rights "rope" are woven together in a way that creates a strong set of complementary rights and enduring outcomes for iwi/hapu and the Crown. If you consider fisheries management issues as outside the scope of your review, it may be useful for you to raise the present problems of integration with the Government.

Customary Rights – how recognised? (Questions 9 & 11)

28. We would record that customary rights to the foreshore and seabed were extant prior to the Foreshore and Seabed Act. We also record that the passage of the Act seeking to extinguish those rights was repugnant to iwi/hapu. Nevertheless in our view the Court processes that existed prior to the Act would not have appropriately provided for customary rights. However we do not agree that the legal processes set out in the Act should be the only avenue available to iwi/hapu. We submit the process set out below should be followed in order to create a more workable solution if a statutory approach is followed.

- Revival – customary rights should be revived by way of legislation.
- Presumption – customary rights should be presumed to continue with the onus placed upon the applicant party to establish clear and plain extinguishment by the Crown.⁷ If no agreement between the rights holder and the applicant can be reached and extinguishment cannot be shown the application must be withdrawn unless the rights are transferred or voided, following negotiation and appropriate agreed compensation, to or by the Crown.
- Affirmation – customary rights may be affirmed (as distinct from recognised) either under the Act or through direct negotiation with the Crown however neither process prevents the continuing existence of customary rights to exist in the coastal marine area under the common law.

29. While the rights could be affirmed through a process set out in a statute we do not believe that such an affirmation need only be carried out through a legislative process. The common law should continue to allow these rights to manifest themselves in ways which are capable of adaptation and evolution over time.

Customary Rights Orders (Questions 12, 13 & 14)

30. We accept that some level of enquiry is necessary in order to affirm whether the rights do exist and we support the involvement of the Maori Land Court. However applicants seeking affirmation should be provided some level of

⁷ The Court of Appeal in the *Ngati Apa* decision held that the radical title acquired by the Crown on cession of sovereignty was not inconsistent with common law recognition of native property rights, which continued until lawfully extinguished. The onus of proof of extinguishment lay on the Crown and the purpose had to be clear and plain.

resourcing. In our view such applications should not be capable of being made by whanau but by hapu or iwi only.

31. We do not agree that people who are not indigenous to New Zealand can possess customary rights to the coastal marine area. Section 68 of the Act appears to conflate the notion of customary rights beyond rights particular to indigenous people - a notion which is at odds with the accepted common law legal position.

Customary Rights Orders – legal tests (Question 15)

32. We agree that ascertaining whether an activity, use or practise has been integral to the tikanga or distinctive cultural practices of the hapu or iwi is the right test. However we note that the addition of section 51 lowers the bar below a clear and plain extinguishment by the Crown which previously was the test at common law⁸ to also include administrative action (section 51(2)(iv) refers) and/or the existence of an *interest* that is legally inconsistent with the activity, use or practise (section 51(2)(c) refers).
33. We note the ability of customary rights holders to develop and use their customary rights for pecuniary gain has not been excluded and therefore some form of development right could be envisaged as being within the ambit of the legislation. However it is not appropriate to freeze recognition of customary rights to only those matters filed before 31 December 2015 (section 48(2) refers). This wholly removes any ability to develop these rights in a manner consistent with tikanga.

Customary Rights Orders – results (Question 16, 17, 18 & 19)

34. We do not agree that the customary rights order adequately reflects the nature of customary rights because it leaves aside the ability of the holder to allocate and manage the customary right. In our view reducing the customary right to essentially a use right has the same inherent problems that present in under the Te Ture Whenua Maori Act as it was before this Act was introduced.
35. The potential for customary activities to have an adverse effect on the environment should not be an issue in light of kaitiakitanga. If Maori were given a more effective role in management (for example through co-management arrangements with local authorities), questions about such matters could be openly discussed and public concern allayed.

Territorial Customary Rights (Questions 20, 21 & 22)

36. In our opinion the requirement within the Act that a hapu or iwi must have their negotiated settlement on territorial customary rights approved by the court blurs the relationship established under the Treaty of Waitangi between the Crown and hapu and iwi.
37. Furthermore it raises the prospect of other parties filing in opposition to the territorial customary rights order.

Territorial customary rights – legal tests (Question 23)

⁸ Refer footnote 7

38. There should be no requirement that contiguous land need be owned by the hapu or iwi in order for the customary rights to continue to exist. There was no authority put forward during the Court of Appeal *Ngati Apa* hearing that contiguous ownership of land was a common law doctrine that should be applied in determining whether customary rights exist.

Territorial customary rights – results (Questions 24 to 26)

39. Some iwi have commenced a negotiation process with the Crown under the Foreshore and Seabed Act. Where those iwi wish, we support their right to continue with those negotiations. Our comments above highlight the fact that where agreement is reached with the Crown, it should not be necessary to go to Court to have the agreement given effect.

Final Comments

40. We believe there is much work to do to develop the detail of a new regime for affirming Maori customary rights in the foreshore and seabed. Given recommendations of the Waitangi Tribunal that the Government hold a “longer conversation” with Maori on these matters – we recommend that the panel consider such a conversation as a recommendation going forward. Such a conversation could be held in a number of ways – including through the establishment of a working group that includes iwi representatives – to explore further options for consultation with iwi. As noted earlier, we submit that it will be important to ensure that such a process investigates effective ways of integrating – rather than tangling – all the strands of customary rights in the coastal marine area to create a strong, complementary and comprehensive set of rights. Te Ohu Kaimoana would be happy to provide support to such a process.