National Council of
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**Submission to the Ministerial Review Panel on the Foreshore and Seabed Act 2004**

The National Council of Women of New Zealand (NCWNZ) is an umbrella organisation representing 50 nationally organised societies and national members. NCWNZ has 26 branches throughout the country attended by representatives of those societies and some 150 other societies as well as individual members. The Council's function is to serve women, families and the community through research, study, discussion and action.

This submission has been prepared by the Public Issues Standing Committee after consultation with members by circulating the Discussion Paper on the Foreshore and Seabed Act to the members in the branches. The response is based on NCWNZ policy and replies from one Nationally Organised Society (NOS), four branches and three individual.

In 2006 NCWNZ agreed, at its Conference, to ask the Government to repeal the Foreshore and Seabed Act (and other legislation amended thereby) and to develop instead a way forward that meets New Zealand's domestic and international human rights obligations.

**Responses to questions in the discussion paper**

**Principles of the Act 1**.Guaranteeing public access now and in the future; 2 regulating the rights and interests of all New Zealanders; 3 protecting existing customary rights; 4 ensuring certainty in respect of rights and interests in the coastal marine area.

**Question 1**: Do you think these are the principles that should guide any legislation about the coastal marine area? Are there other principles that you think are important? If so what are they?

**Responses**

The Act vests the full legal and beneficial ownership of the public foreshore and seabed in the Crown as the way of guaranteeing public access. Sections 3 and 4 of the Act extinguish the Maori rights to the foreshore and seabed that are recognised in tikanga, in the Treaty of Waitangi and in common law. By referring to "public foreshore" the Act excludes areas that are already privately owned, most of which are in non-Maori hands which means that the rights of Maori are taken away, while the property rights of non-Maori are not. By protecting non-Maori but not Maori rights the Act also breaches international human rights norms such as the Convention on the Elimination of All Forms of Racial Discrimination. This is the reason for the request from NCWNZ to have the Act repealed, although support for this decision was by no means unanimous.
Other comments received in response to the questions reflect this.

For example “While the four principles of the Act are still relevant it is impossible to legislate to cover all circumstances. A case by case approach is required to protect the customary rights of Maori. The legal avenues which existed prior to 2004 should be revisited and in certain very specific circumstances (based on historical evidence) freehold title should be available to Maori”.
Four group responses and 1 individual response agreed with the 4 principles, one group stressed the importance of “taking environmental factors which are optimum for sustainability into consideration.”

**Question 2:** Are any principles more important than others?
One branch and one individual considered public access most important.
Another responded that some of the principles conflict. There would have to be some give and take on both sides.

**Question 3:** Should these principles be considered by the Panel in reviewing the Foreshore and Seabed Act?
One branch stated “Principle no.3 will make sure the status quo remains and the review will not make any changes to legal tests relating to the ownership of customary rights.”
Three branches responded that they should be considered.
One group does not agree that these principle should be considered but that the Act should be repealed and the whole issue discussed again.

**Question 4:** Do you agree with the Crown owning the coastal marine area? If not who should own it?
3 branches and one individual agreed
One branch and one Nationally Organised Society do not agree. Maori should have the opportunity to confirm whether they own any of the area before the Crown can claim any control.

**Question 5:** Do you agree the coastal marine area should only be sold through a special Act of Parliament? Do you agree that there should be more or fewer limitations?
Only one individual supported the Crown being able to sell the coastal marine area.
All other responses said very definitely no.
One branch made the comment that the government has signaled its intention to allow more foreign investment in New Zealand land and assets and the possible amendments to the Resource Management Act will further deregulate protection of the environment. This suggests more limitations rather than fewer.

**Question 6:** Do you agree with providing access and navigation rights within the coastal marine area?
Three responders agreed, but with limitations, one with the qualification that there should not be access across private land. One branch disagreed.

**Question 7:** Do you agree that the Act should not affect fishing rights as they are set out in other legislation?
All responses agreed.

**Question 8:** Are there other uses of the coastal marine area that you think should be protected?
One response “Privately owned commercial enterprises should not be given priority over rare eco-systems, endangered species or wetlands.

**Question 9:** Do you think customary interests in the coastal marine area should be recognised through the Court processes that existed prior to 2004?
Two group responses said yes. Three groups said no

**Question 10:** Should these Court processes include being able to recognise customary or aboriginal title?
One group said yes. One group stated " consultation between Maori and the Crown about appropriate means of protecting the coastal marine area should be entered into to."
Two groups said no

**Question 11:** Do you think customary interests should be recognised through a process set out in legislation?
Two groups said yes
Two groups said no "because legislation could provide Maori customary rights with a tightly defined set of 'rights' which could prove a burden of proving these new 'rights' for whanau, hapu and iwi in terms of energy, time and expense."

**Question 12:** If there is a law setting out how customary rights are recognised do you agree that whanau, hapu and iwi should be able to apply to the Maori Land Court for recognition of activities, uses or practices in the coastal marine area?
One group agreed. One group said the applications should go to the High Court.

**Question 13:** Do you agree any other group of New Zealanders should be able to apply to the High Court for recognition of activities, uses or practices in the coastal marine area?
Three groups responded yes

**Question 15:** Do you agree with the legal test tests for a customary rights order?
Two groups and one individual agreed. One group questioned how difficult it is to show that the activity has taken place since 1840.
Two groups said no "The legal tests are restrictive, demeaning and an inappropriate measure of customary rights. Tikanga, tradition and cultural practice are largely ignored and replaced by a narrow definition of what constitutes customary rights making them difficult to prove in Court."

**Question 17:** Do you consider that the Minister of Conservation and the Minister of Maori Affairs should be able to limit access to wahi tapu or sites of significance?
Yes

**Question 18:** Should the intentional breach of an access limit be an offence?
Yes, but the penalty $5,000 is not a sufficient deterrent.

**Question 19:** Do you think controls should be placed on a customary activity if it has a significant adverse effect on the environment?
Yes. There is potential for significant adverse effect. Controls may be needed to ensure future generations are taken into account. There must be controls for a sustainable environment.

**Question 20:** If there is a law setting out how former territorial customary rights in the coastal marine area are recognized, do you agree a group should be able to either negotiate directly with the Crown or apply to the High Court?
One response favoured negotiation with the Crown.
Three responses favoured negotiation with the Court.

**Question 22:** If a group reaches agreement through negotiating directly with the Crown should that group also have to go to court for the agreement to be effective?
One group said yes
One group said no, negotiations with the Crown should be sufficient.

**Question 23:** Do you agree with the legal tests for former territorial customary rights?
One group said yes
Two groups said no, the criteria for territorial customary rights are too narrow and largely unrelated to ancestral lands, tikanga and traditional practices and difficult to prove in court. If Maori do get a customary right they are limited to a partnership in decision-making under the RMA. They do not have control over their rights.

**Questions 24:** Do you think the result of a section 33 former territorial customary rights order reflects the nature of former territorial customary rights?
Question 25 Do you think the foreshore and seabed reserve and the management plan should be more prescribed in the Act or remain flexible?

**Question 26:** Do you think the result of negotiations should be set out in the Act? Or do you think it should depend on the individual circumstances?
One group queried how the result of negotiations can be set out in an Act. They also made the comment that "It is vital that this legislation moves towards healing the divide between Maori and other New Zealanders. It is the opportunity to leave future generations with legislation that gives the best environmental and social outcomes for our grandchildren and great grandchildren.

**Concluding Comments**

The questions in this discussion paper, based on the present Act seem to indicate that the Act is far too complicated and prescriptive. The responses we have had from branches and members reflect the very different points of view in the community as to who should have control of the foreshore and seabed.
One group that responded strongly recommends that the Act be repealed and that there needs to be a lot more discussion of this issue, as recommended by the Waitangi Tribunal which was very critical of the 2004 Bill, as were many other organisations and individuals. In fact even the recommendations from the Select Committee which heard the submissions on the Bill could not come to a decision. Bills that are rushed through often end up having to be reconsidered very soon afterwards and that is certainly the case with this Act.

The Act has certainly created a lot of ill-feeling for both Maori and non-Maori and there is no doubt that Maori feel that their right to take issues of ownership to the Court is being denied. This is a human rights issue and the reason that NCWNZ has asked for the Act to be repealed.

NCWNZ members supported the review of the Foreshore and Seabed Act 2004 as shown by the 2006 resolution. However, as this submission shows NCWNZ members were divided in suggesting a good outcome for all concerned.

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Joan Macdonald
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