

NEW ZEALAND BUSINESS ROUNDTABLE

Submission on the
Foreshore and Seabed Bill

JULY 2004

Executive summary

- This submission on the Foreshore and Seabed Bill (the Bill) is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand business firms.
- The foreshore and seabed should generally be publicly owned with open access and use. This rule should be modified, however, by upholding existing private rights to the foreshore and seabed, including legitimate Maori customary rights to title (if any) and lesser common law rights, and by the issue of new rights for fishing, marine farming, mining and other activities where the overall welfare of the community can be improved.
- The government should allow the court process to run. It is the proper role of the courts to establish the nature and extent of Maori customary rights. There is considerable uncertainty as to whether customary title to the foreshore and seabed would be granted. That uncertainty cannot be resolved and justice cannot be done unless the courts address the substantive claims before them.
- The government has advanced no compelling argument to curtail the right of Maori to pursue their claims through the courts and, in any event, the threshold for doing so should be a high one
- The Business Roundtable recommends that the Bill not proceed.

1. Introduction

- 1.1. This submission on the Foreshore and Seabed Bill (the Bill) is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand business firms. The purpose of the Business Roundtable is to contribute to the development of sound public policies that reflect overall New Zealand interests.
- 1.2. The decision of the Court of Appeal in *Ngati Apa and others v Attorney-General and others (Ngati Apa)* led to the proposals contained in the Bill. They relate to the ownership of the foreshore and seabed, which is a significant public policy issue. Property rights, including Maori customary rights, are at the heart of the issue. Its resolution has important implications for prosperity and social harmony.

- 1.3. The business community has a vital interest in the Bill. *Ngati Apa* rendered the ownership and control of the foreshore and seabed uncertain. The proposals contained in the Bill entail a substantial erosion of private property rights, including Maori customary rights to ownership (or title), without an automatic right to compensation on a comparable basis to land taken for public works. Insecurity of property rights is detrimental to prosperity. The future development of seabed industries is directly affected. The government's consultative processes have largely ignored the interests of the business community.
- 1.4. This submission focuses on the thrust of the Bill and the public policy issues raised by *Ngati Apa*. We do not claim expertise on the intricacies of the relevant law and have not examined the detailed provisions of the Bill.
- 1.5. The scope of the Bill is breathtaking. According to the explanatory note, the Bill would "establish a comprehensive framework for recognising rights and interests in the foreshore and seabed" that would replace "all previous common law rights and interests in the foreshore and seabed."
- 1.6. The main provisions of the Bill include the following:
 - The ownership of the seabed and foreshore (other than that privately owned) would be vested in the Crown. Customary rights to title would be abrogated.
 - A new right of "ancestral connection" would be introduced. Criteria for establishing ancestral connection appear to be significantly less rigorous than those that might apply in establishing customary rights according to common law. An ancestral connection order would be obtained through the Maori Land Court or by negotiation with the Crown. There has been speculation that almost all of the foreshore and seabed will be subject to ancestral connection rights with potentially adverse effects on economic development.
 - New statutory customary rights would be introduced in place of those recognised by common law. Maori and non-Maori would be able to apply to the Maori Land Court and the High Court respectively for a customary rights order. It is, however, extremely unlikely that people other than Maori would be able to obtain such an order. Nonetheless, the extension of the right of non-Maori to claim customary rights,

being unrelated to the acknowledgement by the common law of the rights of Maori on the adoption of British common law, is unprincipled and may well have unintended consequences if it is adopted.

- A new statutory territorial customary right would be established. Where the High Court establishes that a group would, in the absence of the Bill, be entitled to customary title, the Crown is required to enter into discussions with the affected group to consider the nature and extent of redress.

- 1.7. The proposals contained in the Bill are, for the most part, not substantially different from those contained in the government's consultation document, *Foreshore and Seabed of New Zealand: Protecting Public Access and Customary Rights* (the Document). The foreshore and seabed would be vested in the Crown rather than the public domain, as previously proposed, and a limited territorial customary right is to be introduced to establish a basis for negotiating redress for the taking of the right to ownership of customary land. The Document did not address the issue of compensation.
- 1.8. The Business Roundtable made a detailed submission on the Document. A copy of our submission on the Document is contained in the appendix. Most of the submission is relevant to the Bill. The main exception is the discussion on the government's former proposal to vest the foreshore and seabed in the public domain rather than Crown ownership.
- 1.9. The balance of this submission is presented in two sections. Section 2 summarises the main policy issues that are relevant to the Bill and were discussed in our submission on the Document. Section 3 presents our conclusions and recommendations.

2. Policy issues

- 2.1. As discussed in our submission (paragraphs 3.2 to 3.4), the government could have adopted one of the following options:
 - The government could have taken no action at least until the Maori Land Court rules on the substantive claims before it. It is unusual for parliament to overturn a court decision during legal proceedings, as in *Ngati Apa* where the substantive claims have not been decided. Furthermore, the Ports of Marlborough appeal to the Privy Council is to be heard in November 2004. The public pressure for urgent action

arose at least in part from inadequate political management of the issue by the government. The proposal to apply the provisions in the Bill to the claimants in the *Ngati Apa* case is inconsistent with the rule of law. While legislation overturning a court decision on the issue of jurisdiction and the application of that legislation retrospectively might be justified in some situations, *Ngati Apa* does not warrant such action.

- The government could appeal to the Privy Council if it has sufficiently strong grounds to challenge the decision. The government does not agree with the Court of Appeal's decision. Deputy prime minister Michael Cullen made this clear as recently as 24 June 2004. In speech notes for an address to the Dairy Workers Union he wrote, "The tentative wording of the court's judgement perhaps illustrates a realisation on their part that although on balance the law does allow claims regarding the seabed and foreshore to be heard by the Maori Land Court (*a view which the government clearly does not share*) the Maori Land Court is not the appropriate forum for addressing the need to protect Maori customary rights" (emphasis added). It is the function of the courts to interpret the law. If the government believes that the Court of Appeal erred, it should appeal the decision.
- The government could legislate to reinstate the *Ninety Mile Beach* ruling (perhaps by amending section 9A of the Foreshore and Seabed Endowment Revesting Act 1991 to remove the deficiency noted by the Court of Appeal). The reinstatement of *Ninety Mile Beach* would maintain the *status quo* as policy and new legislation has been based on that decision for many years. The government would be required to explicitly extinguish Maori customary rights to title to the foreshore and the seabed. Compensation for the taking of customary rights to title could be required. Common law customary rights, other than to title, would not need to be extinguished as proposed in the Bill.

2.2. A proper analysis and assessment of the above options was not included in the Document and, as far as we are aware, has not been undertaken. The onus is on the government to explain why the proposed course of action is the best possible option available and is better than allowing the court process to continue. We think the Committee should examine thoroughly the options available to the government in deciding whether the Bill should proceed.

- 2.3. The explanatory note to the Bill contains the principles that have guided the development of the Bill. They are the same principles that were included in the Document. For the reasons discussed in our submission on the Document (at paragraphs 3.6 and 3.7), we think the principles provide a most unsatisfactory basis for the development of public policy. Standard public policy criteria should be applied.
- 2.4. Property rights are central to the proposals contained in the Bill. They are discussed in section 4 of our submission. The main points are summarised below:
- The most important protection afforded to the individual by the law is the protection of his or her property.
 - Property rights arise from scarcity. Where resources are scarce, the price system should generally be used to allocate new rights among competing uses and users.
 - Well-defined and appropriately enforced property rights encourage individuals and firms to undertake wealth-generating activities with confidence. The vital importance of secure private property rights for prosperity is emphasised in contemporary economic literature.
 - Although private property rights are essential for individual autonomy and prosperity, it is inappropriate for all resources to be held privately. The question of whether property should be held in some form of common or private ownership involves a tradeoff between exclusion and coordination costs.
 - The foreshore and seabed that is not privately owned should generally be retained in public ownership rather than vested in the public domain. The question of marginal adjustments to improve overall social outcomes then arises. They could involve rights for marine farming, commercial fishing, tourism and recreational activities. Each case should be considered on its merits.
 - Customary rights should be upheld. Such rights are recognised by the common law. They should generally be left to the courts to determine. There is no need to confer such rights by statute and establish a separate branch of the Maori Land Court to address them as proposed in the Bill. That approach risks igniting a new round of

claims that would be difficult to sustain at common law and could take decades to settle.

- The provisions contained in the Bill would apply to existing claims before the Maori Land Court. Retrospective legislation is generally to be avoided because it is inconsistent with the rule of law. Claims that have been lodged at least up to the date of the Court of Appeal's decision should be permitted to proceed based on the law at that time.
- Customary rights recognised by common law are likely to be limited.

2.5. The question of compensation is discussed in section 5 of the submission. The key points are listed below:

- There are compelling grounds for the government to compensate individuals and firms if private property rights are appropriated.
- The Court of Appeal's decision determines the law as it now stands and acceptance of the rule of law requires the government to recognise that decision until it is overturned by the courts or statute.
- The abolition of any customary property rights that are found by proper process to have existed since British common law first applied in New Zealand requires just compensation in the same way that the taking of land for public works warrants compensation.
- The payment of compensation in cash or kind for the losses imposed on affected whanau, whanui and hapu would require the government to value the gain to society as a whole against the related cost.
- The proposals contained in the Bill are different from the settlement of Treaty of Waitangi claims for land confiscated in the distant past. The former relate to the proposed expropriation of private property rights that Maori are currently entitled to. A new Treaty breach would arise if the Bill proceeds.
- If compensation is to be paid, it should be in cash or limited to a fraction of the net proceeds from the sale of rights and not confer on Maori preferential participation in commercial projects or preferential rights to determine the nature of any such projects.

2.6. Other issues are discussed in section 6 of the submission. They include the following:

- Judicial activism is arguably the underlying cause of the predicament that the government now finds itself in. There are grounds for arguing that the Court of Appeal should have given greater weight to precedent and the fact that much legislation and investment had been based on the decision in *Ninety Mile Beach*. Parliament had ample time to overrule that decision if it had judged it socially unjust.
- Over recent years, the Business Roundtable has highlighted the costs of uncertainty and, in some cases, bad law that judicial activism has caused. We fear that they may increase now that appeals to the Privy Council have been abolished. Unless this underlying problem is addressed, similar problems will continue to arise in the future. This requires a change of emphasis in the appointment of judges and parliament needs to refrain from passing legislation that invites judicial activism, such as the inclusion of ill-defined Treaty clauses in bills. In this context, Mr Doug Bailey, a public law specialist at Kensington Swan, stated recently that phrases such as "ancestral connection" and "principles of the Treaty" in Bills were difficult to define in practice.
- The Business Roundtable is, in general, opposed the use of specialist courts such as the Maori Land Court and the Employment Court because of their tendency over time to reflect special interests, their unwillingness to apply general legal principles to resolve disputes, and their vulnerability to political interference. The general courts can decide cases based on evidence and argument, including expert evidence on tikanga. An expanded role for the Maori Land Court and the removal of some of the High Court's powers in respect of Maori land issues, as proposed in the Bill, would be a step in the wrong direction.
- There is overwhelming evidence that the possession of natural or inherited resources is not a reliable basis for economic success, and can even be a handicap. The lesson to be drawn from the experiences of different countries is that economic success depends far more on how intelligently countries manage their own affairs, and on cultural attitudes to work, saving and enterprise, than it does to an initial resource base.

- Maori customary rights, properly investigated and proved, should be upheld. They are property rights that pre-date the introduction of British common law.
- Treaty of Waitangi claims are best regarded as issues of justice rather than as matters that will have a material bearing on the overall economic position of Maori in the future. In economic terms they involve redistribution, and cutting the cake in a different way has strict limits as a route to economic advancement compared with the route of making the cake larger. The administration of justice also has limits. Not all wrongs can be remedied and there are weak moral grounds for exacting restitution from living people for the deeds of those who died many decades ago. For very sound reasons, most legal systems have a statute of limitations and at a certain point bygones are best left as bygones. Such a pragmatic approach has been taken in Eastern Europe, where expropriation and injustice occurred on a grand scale.
- This is not in any way to call in question the case for addressing valid claims. They should be dealt with as best they can through patience, imagination and generosity on both sides. But the outcome will be of fairly limited importance to the economic well-being of most Maori. The best policy is to work as carefully and rapidly as possible to resolve the major cases of injustice, and then to move on. Otherwise we risk being stuck in grievance mode, which is likely to be no more beneficial to Maori than it has been to other ethnic groups around the world.

3. Conclusions

- 3.1. The foreshore and seabed should generally be publicly owned with open access and use. This rule should be modified, however, by upholding existing private rights to the foreshore and seabed, including legitimate Maori customary rights to title (if any) and lesser common law rights, and by the issue of new rights for fishing, marine farming, mining and other activities where the overall welfare of the community can be improved. Where resources are scarce, the price system should be used if practicable to allocate new rights among competing uses and users.

- 3.2. The government should allow the court process to run. It is the proper role of the courts to establish the nature and extent of Maori customary rights. There is considerable uncertainty as to whether customary title to the foreshore and seabed would be granted. That uncertainty cannot be resolved and justice cannot be done unless the courts address the substantive claims before them.
- 3.3. The government has advanced no compelling argument to curtail the right of Maori to pursue their claims through the courts and, in any event, the threshold for doing so should be a high one.
- 3.4. If Maori can secure customary title to the foreshore and seabed, just compensation would be required for the abrogation of such rights in the same way that the taking of land for public works warrants compensation.
- 3.5. We recommend that the Bill not proceed.