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SUBMISSION ON THE MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL 2010

1. We appreciate the opportunity to file this submission on the Marine and Coastal Area (Takutai Moana) Bill 2010 (the Bill), and thank you for your attention to our comments. For any clarification of the points below, or further information, please contact Aotearoa Indigenous Rights Charitable Trust, email aotearoaindigenousrightstrust@gmail.com

2. We do not support the Bill in its current form as it continues – albeit with a different name – the discrimination against Māori that the Foreshore and Seabed Act (FSA) created, it prescribes certain interests that fall far short of meaningful rights in the foreshore and seabed, and it is inconsistent with the rights set out in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) which NZ endorsed in May of this year.

3. This submission is made up of three parts, the first part provides information about ourselves, the second part addresses our view of the Bill and the third part provides an analysis of indigenous peoples' rights under international law.

Part 1 – Who we are

4. **Aotearoa Indigenous Rights Charitable Trust (AIR Trust)** is a non-governmental organisation made up of Māori individuals, all of who are active in their hapū and iwi and Māori politics more generally. We seek to support the indigenous peoples' rights movement internationally and domestically. AIR Trust representatives have consistently attended, and played a role in United Nations (UN) fora relevant to indigenous peoples including: in negotiations on the Declaration; before the UN Working Group on Indigenous Populations, the UN Expert Mechanism on the Rights of Indigenous Peoples; the UN Permanent Forum on Indigenous Issues; various expert UN meetings, the UN Committee on the Elimination of Racial Discrimination (CERD); the UN Human Rights Committee; the UN Special Rapporteur on the rights of indigenous peoples (Special Rapporteur on Indigenous Peoples) and the Human Rights Council.

5. We have also disseminated information to Māori about developments regarding indigenous peoples' rights at the international level.

6. Members have also represented a number of tribes, pan-Māori organisations and indigenous peoples' organisations in UN fora, such as before CERD and the Human Rights Council.

Part 2 – The Bill

7. The Bill breaches the guarantee of exclusive possession of lands and other properties set out in the Treaty of Waitangi and existing human rights standards. It does so because its fundamental premise is that no one owns the foreshore and seabed. Because of this premise, all rights prescribed in the Bill fall far short of the rights to which Māori are entitled. It is our view that any changes to amend or tweak the Bill, will not deliver better outcomes nor secure justice for Māori and may result in future claims against the Crown for new breaches of the Treaty of Waitangi.

8. Coupled with this premise, the Bill is also problematic because of the following:

- the statutory tests to have protected customary rights or customary marine title recognised are inconsistent with Māori customary law and are extremely difficult to meet;

- fee-simple titles in the foreshore and seabed are not extinguished, Māori titles are;

- a protected customary right does not give Māori any proprietary rights in the area over which they have proven their territorial rights;

- there is no ability for Māori to negotiate redress for the loss of their territorial customary rights, if these rights are extinguished there must be redress which the Bill does not provide for;

- Māori can apply to the High Court to have protected customary right and customary marine title orders made, or negotiate directly with the Crown. There will be no independent and impartial oversight of the negotiating process. Indeed, Māori will be in a very poor negotiating position (see, in particular, section 93);

- the Bill specifies a time frame of six years within which Māori must have given notice to the Crown of their intention to negotiate or file an application in the High Court; this is an arbitrary timeframe and places undue pressure on Māori ;

- the Bill legislatively overrides Māori access to the courts to prove their territorial and non-territorial interests in the foreshore and seabed under Te Ture Whenua Māori Act 1993 and common law aboriginal title.

9. The statutory tests to have protected customary rights or customary marine title recognised are inconsistent with Māori customary law, are expensive, unobtainable and provide nothing of substantive benefit to those holding customary rights. Whānau, hapū and iwi when exercising their rights in the

foreshore and seabed in accordance with tikanga Māori should not need to apply to a court first to have such rights acknowledged.

10. The other glaring inconsistency with the test for customary marine title has been aptly argued by Carwyn Jones.[1] He states:

> *I find it strange that the new, statutory, "customary marine title" only exists where a particular part of the foreshore and seabed has been exclusively used and occupied, and yet the title itself does not provide for such exclusive rights. Surely, if the exercise of customary rights is demonstrated by exclusive use and occupation, then exclusive use and occupation ought to be able to be recognised under this new form of customary title. Alternatively, if exclusive use and occupation is not part of customary title, why would you need to prove exclusive use and occupation to have that title recognised?*

11. Saying that no one owns the foreshore and seabed discriminates against Māori on the basis of race because Māori interests in the foreshore and seabed are unable to be recognised except through the Bill. Such interests that can be recognised fall far short of a proprietary right whilst non-Māori rights in the marine area remain unchanged.

12. The discriminatory aspect of the Bill is expressed by the Acting Attorney-General in his analysis[2] of the Bill in terms of its consistency with the New Zealand Bill of Rights Act:

> *it remains that the rights to land that they would otherwise enjoy are materially diminished by the requirement to yield to a broad range of activities by others while comparable freehold titles are unaffected. This is an inherent disadvantage and, for that reason, a*

[1] http://ahi-ka-roa.blogspot.com/2010/09/marine-and-coastal-area-takutai-moana.html
[2] Marine and Coastal Area (Takutai Moana) Bill: Consistency with the New Zealand Bill of Rights Act 1990, Opinion of the Acting Attorney-General Hon Simon Power, 2 September 2010, paras 23 and 24.

prima facie issue of discrimination on the basis of race in terms of s 19.

13. It is worth noting that whilst Māori can apply to the High Court for a protected customary right or negotiate directly with the Crown, even after the granting of such a right, it is still potentially curtailed by controls the Minister of Conservation may choose to impose (clause 56). Not only that, but the Bill provides that *any* person may apply to the Minister of Conservation for controls to be imposed on the exercise of a protected customary right. This begs the question as to why Māori would go to the trouble and expense to obtain a protected customary right when it can be further limited by the Minister of Conservation, or by claims brought by any member of the public. This provides no certainty to Māori and fails to meet one of the purposes of the Bill – establishing a durable scheme to ensure the protection of interests.

14. Customary marine title, which is the only other option available to Māori, provides the ability to participate more fully in existing decision making processes, for example, resource consent processes – but it does not address the fundamental customary rights of Māori . Again, the barrier to securing rights with teeth is the premise that no one owns or is capable of owning the common marine and coastal area.

15. In prescribing the rights to which Māori are entitled to, the Bill continues in the same way as the FSA – it fails to restore the rights to which Māori are entitled and allows only for those prescribed in the Bill.

Part 3 – Indigenous peoples' rights under International law

16. The UN has taken a keen interest in the FSA and made consistent comments about its discriminatory aspects and the need for full consultation with Māori regarding its amendment or replacement.[3]

[3] See UN Committee on the Elimination of Racial Discrimination (CERD) in 2005, Decision 1 (66): New Zealand, Committee on the Elimination of Racial Discrimination, 11 March 2005, CERD/C/DEC/NZL/1 and 2007 Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand, 15 August 2007, CERD/C/NZL/CO/17, the UN Human Rights Committee in 2010, Concluding

17. The most recent comment was issued by the Human Rights Committee in March of this year. Their Concluding Observations[4] on NZ's Periodic Report specifically commented on the FSA:

> *The State party should increase its efforts for effective consultation of representatives of all Māori groups with regard to the current review of the Foreshore and Seabed Act 2004, with a view to amending or repealing it. In particular, the public consultation period should be sufficiently long so as to enable all Māori groups to have their views heard. Furthermore, in light of the Committee's general comment No. 23 (1994) on article 27 (the rights of minorities), special attention should be paid to the cultural and religious significance of access to the foreshore and seabed for the Māori.*

18. This view was earlier canvassed by CERD in its FSA Decision[5], where it found that the FSA contains "discriminatory aspects against Māori … in its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress"; and recommended that the government resume a dialogue with Māori "to seek ways of lessening its discriminatory effects, including where necessary through legislative enactment".

19. Whilst this government has indeed resumed a dialogue with Māori regarding the FSA, sadly discrimination against Māori remains the cornerstone of the Bill.

Observations of the Human Rights Committee: New Zealand, 25 March 2010, CCPR/C/NZL/CO/5, the UN Special Rapporteur on the Rights of Indigenous Peoples in 2006, 'Mission to New Zealand' - Report of Rodolfo Stavenhagen, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 13 March 2006, E/CN.4/2006/78/Add.3 - and 2010 and the Preliminary note on the mission to New Zealand (18 to 24 July 2010), James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 26 August 2010, A/HRC/15/37/Add.9 .

[4] UN Human Rights Committee, Concluding Observations of the Human Rights Committee: New Zealand, 25 March 2010, CCPR/C/NZL/CO/5.

[5] Decision 1 (66) New Zealand Foreshore and Seabed Act 2004, CERD/C/66/NZL/Dec.1 (March 2005).

20. Coupled with these findings by the UN, there is a growing body of international customary law[6] that, at the very minimum, obliges states to respect and protect indigenous peoples' rights to their lands. This includes the foreshore and seabed.

21. In May of this year NZ endorsed the Declaration. Having endorsed the Declaration, it is imperative that NZ ensures that the rights contained in the Declaration are upheld especially in light of new legislation as it affects Māori rights.

22. Our analysis of the Bill reveals that the Bill falls short of the rights in the Declaration. Articles 2 and 3 of the Declaration are relevant. These articles relate to indigenous peoples' right to be free from discrimination in the exercise of their rights and the right of self determination. Both sets of rights go to the core of the foreshore and seabed.

23. Articles 25 - 30 of the Declaration and especially article 26(1) must also be considered. These Articles relate to lands, air, waters, coastal seas, flora and fauna and other resources and provide for indigenous peoples' distinct spiritual and material relationship with these, the right to development, to have customary law recognised, the right to restitution or compensation if restitution is not available, the right to conservation and restoration of the environment and their lands, territories and resources, the protection of cultural and intellectual property, and the right to determine development including the right that states must obtain the free prior and informed consent of indigenous peoples in relation to such development of their lands and other resources. If any resources are taken from indigenous peoples, the Declaration also elaborates how redress is to occur - agreement must be reached, just and fair compensation provided, and measures must be taken to mitigate adverse environmental, economic, social, cultural or spiritual impacts. These Articles all have a direct bearing on Māori rights in the foreshore and seabed and provide a robust and effective framework for protecting

[6] "Developments in Indigenous Peoples' Land Rights under International Law and their Domestic Implications" [2005] 21 NZULR.

indigenous peoples' rights. The Bill fails to address these rights and is inconsistent with the minimum standards set out in the Declaration.

24. Furthermore, the Universal Periodic Review of NZ conducted by the Human Rights Council recommended[7]:

> *Consistent with the observations of the Committee on the Elimination of Racial Discrimination and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, continue the new dialogue between the State and the Māori regarding the Foreshore and Seabed Act of 2004, in order to find a way of mitigating its discriminatory effects through a mechanism involving prior informed consent of those affected.*

25. The right of free, prior and informed consent can be found in the Declaration and elsewhere for example General Comment 23 of CERD. The Bill does not provide for this right to be implemented, instead requiring Māori to prove their interests in the foreshore and seabed, and then curtailing such rights in the form of two statutory based alternatives.

26. In failing to seriously consider the Declaration and minimising the rights it contains, NZ is not complying with its own obligations under international law and is in breach of the rights set out in the Declaration.

27. The Bill fails to meet additional core objectives of the Declaration such as a strengthened partnership between Māori and the Crown; nor does it promote or allow Māori to maintain control, nor protect and develop cultural heritage or the use of resources in pursuit of self-determination. The Declaration also provides that the Crown must take effective measures to combat prejudice and eliminate discrimination, promote tolerance, understanding, and good relations among indigenous peoples and all other

[7] See UN document A/HRC/12/8.

segments of society – we are very concerned that the Bill will have the complete opposite effect.

28. It is our view that the Bill is fundamentally flawed, that its premise is incorrect and that it will perpetuate the discrimination against Māori that the FSA began. There have been ample suggestions both nationally and internationally as to how this matter can be resolved. Such a resolution at the very least must incorporate the Treaty of Waitangi and international indigenous peoples' rights as set out in the Declaration and international jurisprudence. We urge the Committee to seriously consider the flaws that exist in the Bill and to take steps to ensure its current form does not continue.