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Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill 2024

Submission from The Law Association Environment and Resource Management Law Committee

INTRODUCTION

The Law Association of New Zealand (TLANZ) is an independent membership organisation for the NZ legal profession with around 6,750 members. TLANZ maintains expert committees that support legal review and policy advocacy on legal issues. We appreciate the opportunity to submit on the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill 2024 (the Bill).

The submission is prepared by the Environment and Resource Management Law Committee of the Law Association (the Committee). The Committee monitors legal developments in the fields of resource management, local government and environment law. It assists the profession by way of regular updates, articles and training on the practical implications for the profession of the many developments in environment and resource management legislation and policy. The Committee has a national membership that encompasses a range of lawyers who specialise in environment and resource management law. The intention is to provide objective feedback on the workability of the amendments proposed in the Bill, and to illuminate where the aims of the Bill may not be sufficiently captured by the proposed text and the implications of framing the legislation in the manner proposed.

SUBMISSIONS ON PARTICULAR CLAUSES

Clause 6 New sections 9A to 9C inserted

9A Customary marine title amendments: purposes, application, and overriding effect

Clause 9A states that the Bill's provisions override 'other law', including a list of judgments specified in section 59B. The Committee is concerned by the proposal to override specified findings of the Court by legislative amendment. This is a very unusual approach. These amendments also appear to attempt to override tikanga, which has been recognised by the Supreme Court as being law in New Zealand (see *Ellis v R* [2022] NZSC 114).

There are also interpretative challenges with referring to specific judgments or parts thereof. The meaning of words within judgments can be open to interpretation. *Rationes decidendi* are not always expressed unambiguously. There may also be (and may always be) other decisions that form part of the relevant case law matrix for s 59B, such as *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

Finally, by listing page numbers in the various judgments, an inference might be made that other paragraphs are not disputed or likely to be affected. This may become a further interpretive issue.

9B Customary marine title amendment: interpretation

Clause 9B imposes a duty on a decision maker to interpret the principal Act's provisions in a way that promotes the purposes, application, and effect (as amended by the Bill and stated in new section 9A). The s 9A duty to promote the purposes of the amendments attempts to override the provisions in s 4 purpose, s 6 customary interests restored and s 7 Treaty of Waitangi / Te Tiriti o Waitangi. This promotes conflict within the fundamental purpose of the legislation. In addition, the s 9B requirements are, with respect, complex and may compound the likelihood of continuing interpretation issues and appeals before the Courts.

9C Transitional, savings and related provisions

The provisions set out in Schedule 1AA create a complicated transitional regime for the Bill's provisions according to a sliding scale of retrospectivity. With respect, the provisions in Schedule 1AA may continue the costs and uncertainty of the transition.

Extinguishment of customary title

Section 58(4) restates: "Customary marine title does not exist if that title is extinguished as a matter of law."

Section 58(5) provides that CMT is extinguished in certain circumstances, in particular where legal title to the area was vested in another body before 17 January 2005, by Crown grants, the common law, statutory vesting, or administrative action. In essence, an enquiry will need to clarify whether any of these ownership or vestings existed before the Foreshore and Seabed Act 2004 took effect, and the burden of proof will be on other parties.

This enquiry is fundamental to the amendment Bill having any significant effect in qualifying the number of claims and outcomes which is the implicit purpose of the Bill. The Crown or local authorities must be enabled and tasked with joining each application on behalf of the wider public.

The question of extinguishment was central to the decision in *Re Reeder (on behalf of Ngā Pōtiki)* [2021] NZHC 2726 regarding a successful claim by seven groups for customary title over the eastern arm of Tauranga harbour. No other party actively opposed the claims. The Court noted (at [22]):

> *Establishing the components of s 58(1) is not in itself sufficient, as s 58(4) provides that "customary marine title does not exist if that title is extinguished as a matter of law". However, s 106(3) provides that, "in the absence of proof to the contrary", a customary interest has not been extinguished. This effectively puts the burden of proof of any extinguishment on the party seeking to rely upon it.*

The Court noted a Crown submission that the extinguishment of customary rights arose upon vesting the area in the harbour board under the Tauranga Foreshore Vesting and Endowment Act 1915, but the customary rights were statutorily resurrected by the Foreshore and Seabed Endowment Revesting Act 1991. Following the *Ngāti Apa* reasoning, the Court agreed that customary interests were restored and not extinguished. The Court made CMT orders covering the eastern arm of the Tauranga harbour.

If it is the intention of Parliament to clarify that CMT does not exist if title is extinguished as a matter of law, the amendments advanced in cl 8 of the MACA Bill should be clearer, as the amendments may not be interpreted by the Courts to change the status quo. Namely, previous vesting of the marine title in the Crown or local authorities or harbour boards does not extinguish claims for customary title. Also the reference in s 58(5), to extinguishment by the "common law", is unlikely to have any consequence, as tikanga is now held to be part of the formerly exclusive English common law (as conferred under the English Laws Act 1858). As held in *Ngāti Apa*, customary interests embraced by tikanga remain in place despite the vesting of proprietary interests or radical title of the Crown. To change this outcome, specific words would be required in legislation.

The Bill could be made more certain by adding a non-exclusive list in a schedule of the commonly known Crown grants, statutory vesting or administrative actions that would restrict or exclude a claim, or, that would allow or not disturb a claim. For example, the effect of the former vesting of foreshore and seabed administration in harbour boards prior to abolition could be clarified.

Clause 9 Section 59 amended (matters relevant to whether CMT exists)

An implicit assumption in *Ngāi Tūmapūhai-a-Rangi Hapū Inc and others* [2024] NZHC 309, is that the claims for CMT extend without further question relying on past fisheries activities to the 12 mile territorial sea boundary. The amendments proposed to section 59 would benefit from clarifying the expected depth or area of a CMT.

Clause 11 New Schedule 1AA inserted

Schedule 1AA is inserted, which includes 1 Definitions, "announcement time means midnight on 25 July 2024". Another definition "old law" refers to parts of MACA in force before the announcement time. A further definition "interim period" refers to the start of the announcement time and commencement of the Bill.

Part 2 states a general rule that the CMT amendments do not apply before the announcement time of 25 July 2024. Subject to various qualifications, the CMT changes are retrospective to that date, but do not affect decisions made before that date. Under parts 3 and 4, CMT decisions based on the old law and made in the interim period must be taken to have no legal effect, and never to have had legal effect.

The Committee notes that this transition provisions appear to pre-emptively invalidate any forthcoming decisions, including the substantive decision of the Supreme Court on appeal in *Edwards*. Pre-emptively invalidating a decision of the Court in this way is highly unusual and raises questions about the constitutional separation of powers.

Opportunity for further parties to join claims

Other groups or persons with significant interests may not have become parties to an application, as under MACA s 104, interested persons were required to file a notice of appearance within 40 days of the cutoff date for claims, and that opportunity (1 April 2017) has long expired. Given the gravity of the changes proposed in the Bill, an additional amendment could provide a further opportunity for parties to join existing proceedings.

CONCLUSION

Thank you for the opportunity to make submissions in respect of the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill 2024.

We are available to discuss the submissions via Teams if required. Should clarification be required with regards to any matters raised, please contact Gandhya Senanayake, the TLANZ Committee Executive at gandhya.senanayake@thelawassociation.nz if you have any questions.

Ngā mihi

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