



Amnesty International Aotearoa New Zealand:

Submission on the Foreshore and Seabed Act
2004 to the Ministerial Foreshore and Seabed
Review Panel.

19 May 2009

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Amnesty International, recognising that human rights are indivisible and interdependent, also works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards, through human rights education programs and campaigning for ratification of human rights treaties.

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INTRODUCTION

- 1.0 Amnesty International Aotearoa New Zealand (AIANZ) welcomes the opportunity to make a submission and attend consultations on the Foreshore and Seabed Act 2004 (“the Act”) to the Ministerial Foreshore and Seabed Review. Noting the scale of opposition to the Act we believe the Review is vital in promoting a stronger relationship between the Government, tangata whenua¹ and the wider public in Aotearoa New Zealand.
- 2.0 Amnesty International believes that the Act breaches both domestic and international human rights law by extinguishing customary Māori property rights to the coastal areas and providing a burdensome statutory process for the recognition of customary or aboriginal title.
- 3.0 Amnesty International therefore recommends the Act is repealed in whole and the Government enter into re-negotiations, in particular with Māori on their customary rights and claims to the foreshore and seabed, in line with the March 2006 report of the Special Rapporteur on the Human Rights of Indigenous Peoples.²

HUMAN RIGHTS CONCERNS

- 4.0 The Act raises the following human rights concerns:
 1. The Act effectively expropriated all Māori customary interests in the foreshore and seabed and replaced them with a statutory framework that provides for the recognition of non-exclusive Māori interests in the New Zealand foreshore and seabed.
 2. There is no guaranteed right of a remedy for removal of property rights.
 3. To obtain legal recognition of the non-exclusive interests under the Act, Māori need to meet very high evidential standards.
- 5.0 These concerns pertain to the following bodies of rights:
 1. Right to freedom from discrimination
 2. Right not to be arbitrarily deprived of property; and the right to a remedy
 3. Right to culture
 4. Right to development
 5. Right to free, prior and informed consent

¹ The CERD Committee noted the ‘scale of opposition to the legislation amongst the group most directly affected by its provisions – the Māori...’ at [Para 4].

² Special Rapporteur Rudolfo Stavenhagen highlighted that government cannot unilaterally extinguish indigenous rights through any means without the free, prior and informed consent of Māori. He saw the Foreshore and Seabed Act as a backward step for Māori in relation to the progressive recognition of their rights through the Treaty (of Waitangi) settlement process over recent years. The Special Rapporteur recommended that Parliament repeal the Act and that government enter into re-negotiations with Māori on their customary rights and claims on the foreshore and seabed.

RIGHT TO FREEDOM FROM DISCRIMINATION

6.0 The right to be free from discrimination is one of the fundamental human rights protecting every human being. This right is enshrined in Article 2 of the Universal Declaration of Human Rights (UDHR), the founding document of human rights, which provides:

‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

7.0 Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which New Zealand has ratified in good faith, provides that:

‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

Giving effect to Article 26, Section 19(1) of the New Zealand Bill of Rights Act 1990 (BORA) provides everyone in New Zealand with the right to freedom from discrimination on certain grounds which include race.

8.0 Article 2(1)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which New Zealand ratified in 1972 requires :

‘Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.’

9.0 Furthermore Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) - which New Zealand (acting in the minority) has regrettably not supported, provides that:

‘Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.’

Violation of the Right to freedom from discrimination

10.0 Giving effect to the object of the Act which is to ‘preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders’ (Section 3), Section 4 (a) vests the ‘full legal and beneficial ownership of the public foreshore and seabed in the Crown’ and at (c) enables ‘applications to be made to the High Court to investigate the full extent of the rights that may have been held at common law.’

- 11.0 The reference to “public foreshore” as defined in Section 5 of the Act excludes areas that are already privately owned, of which most are in non-Māori hands. Protecting non-Māori, but not Māori, rights in the Act constitutes prima facie discrimination. It fails to recognise the status of Māori in Aotearoa New Zealand, and Iwi connection to tangible or future benefits.³ This discrimination breaches international law and is in violation of the ICCPR and CERD.
- 12.0 Further, this discrimination is neither reasonable nor proportionate and therefore fails to be justifiable under Section 5 of the BORA. For example, to obtain legal recognition of these non-exclusive interests under the Act, Māori need to meet very high evidential thresholds (Section 32); much higher than those set out in other common law countries such as Canada and Australia. The Act also includes elements that form a disproportionate barrier to Māori establishing a customary interest, such as the requirement for continuous ownership of contiguous land.
- 13.0 Indeed, the Committee on the Elimination of Racial Discrimination (CERD Committee) considered the Act to contain ‘discriminatory elements’ in particular in its extinguishment of Māori customary title over the foreshore and seabed.⁴ The Committee asked the New Zealand Government to enter into a discussion with Māori tribes to address these deficiencies.
- 14.0 Recently in New Zealand’s Universal Periodic Review (UPR), the Netherlands, Pakistan and Jordan respectively recommended New Zealand consider implementing the observations and recommendations of human rights treaty bodies and special procedures on indigenous people.⁵ Moreover, Switzerland and the United Kingdom recommended that New Zealand pursue efforts to combat forms of discrimination, in particular those based on ethnic origin.⁶
- 15.0 It is of deep concern to Amnesty International that the Act impedes the full realisation of the rights of Māori, and their ability to exercise those rights based on their indigenous identity in the foreshore and seabed. We suggest that this is in contravention of the UNDRIP, CERD, ICCPR and BORA.

THE RIGHT NOT TO BE ARBITRARILY DEPRIVED OF PROPERTY

- 16.0 The right to be immune from the arbitrary deprivation of property is enshrined in Article 17(2) of the UDHR which declares that:

‘Everyone has the right to own property alone as well as in association with others. No-one shall be arbitrarily deprived of his property.’

³ See Court decisions pertaining to the identification of discrimination under the Bill of Rights Act, *Quilter v Attorney-General* [1998] 1 NZLR 523; *Egan v Canada* (1995) 124 DLR (4th) 609; *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; *M v H* [1999] 2 SCR 577; *Lovelace v Ontario* [2000] SCC 37.

⁴ Committee on the Elimination of Racial Discrimination, Decision 1 (66) New Zealand Foreshore and Seabed Act 2004, CERD/C/66/NZL/Dec.1, 21 February – 11 March 2005, Paragraph 6

⁵ Draft Report of the Working Group on The Universal Periodic Review, New Zealand, A/HRC/WG.6/5/L.7, 11 May 2009; Recommendations 19, 23, 24

⁶ *Ibid*, Recommendations 32, 25

It is noted that Article 2 of the UDHR provides that any rights in the UDHR are not to be applied with distinction, including that which is based on race.

17.0 Whilst New Zealand's domestic human rights legislation is silent in relation to arbitrary deprivation of property, the right exists in international law. New Zealand is obliged to observe the provisions of the UDHR by virtue of its membership of the United Nations.

18.0 Furthermore Article 26 of the UNDRIP states:

'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.'

19.0 The historical right against arbitrary deprivation of property has been discussed by Australian courts which suggest the right stems from the Magna Carta. In *Newcrest Mining* (1997)⁷, Kirby J described the roots of Article 17 in the following terms 'whilst this article contains propositions which are unremarkable to those familiar with the Australian legal system, the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems. Historically, its roots may be traced as far back as the Magna Carta 1215, Article 52 of which provided: 'to any man whom we have deprived or dispossessed of lands, castles, liberties or rights, without the lawful judgement of his equals, we will at once restore these''. Similarly, this reasoning was adopted in *Malika Holdings Pty Ltd v Stretton* (2001).⁸

20.0 In *Mabo v Queensland [No 2]* (1992), Brennan J held that '... international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal and fundamental rights.'⁹

21.0 It is of deep concern to Amnesty International that the Act neglects international human rights law and the 'wise counsel' of caselaw from jurisdictions similar to our own.

The right to remedy

22.0 There is a general acceptance that no one shall be arbitrarily deprived of their property, and if so there should be a right to an effective remedy (just compensation). From a broad human rights perspective, the ICCPR to which New Zealand is a State party, sets out in Article 2(3):

'Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

⁷ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 658-659

⁸ *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290

⁹ *Mabo v Queensland [No 2]* (1992) 175 CLR 290 at 328

- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.'

The American Convention on Human Rights also provides, in Article 21(2), that “no one shall be deprived of his property except upon payment of just compensation”.¹⁰

23.0 The Act provides no guaranteed compensation for Māori groups for loss of customary title. Section 37(1) of the Act provides that if the High Court finds that but for the vesting of the foreshore and seabed in the Crown, a group would have held territorial customary rights to a particular area under Section 33 then the Attorney-General and Minister of Māori Affairs ‘must enter into discussions with the applicant group for the purpose of *negotiating* an agreement’ (emphasis added) under Section 37(1). The absence of a statutory criterion to guide negotiation with Ministers about compensation fails to provide a possible safeguard against arbitrariness. The failure to provide guaranteed compensation is in breach of international human rights standards, including Article 6 of CERD.

24.0 The CERD Committee noted with concern that the Act failed to provide a guaranteed “right of redress”¹¹ in breach of Article 6 of CERD which provides:

‘States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.’

The CERD Committee further requested the Government monitor closely the implementation of the Act, and particularly requested ‘broadening the scope of redress available to the Māori.’

25.0 The Attorney-General, in her advice on the Foreshore and Seabed Bill acknowledged that “the absence of a guaranteed right of redress” in the Bill gives rise to prima facie discrimination.¹²

26.0 Amnesty International also notes that in New Zealand’s UPR, Angola submitted the recommendation to “*find appropriate ways to provide adequate compensation to Māori, in particular for their loss of land.*”¹³

¹⁰ A similar right is also provided the African Charter on Human and Peoples’ Rights, and the South African Constitution. Note that New Zealand’s UN membership obliges respect for the Articles of the Universal Declaration, and that this property right has been described as emerging international customary law.

¹¹ Committee on the Elimination of Racial Discrimination, Decision 1 (66) New Zealand Foreshore and Seabed Act 2004, CERD/C/66/NZL/Dec.1, 21 February – 11 March 2005, paragraph 6

¹² Attorney-General *Foreshore and Seabed Bill* 6 May 2004, at paragraph 79.

27.0 These voices lend weight to Amnesty International's view that the Act is in contravention of New Zealand's obligations as a State party to CERD and the ICCPR through arbitrarily depriving Māori of customary property rights, and failing to provide a guaranteed right to a remedy for this loss.

RIGHT TO CULTURE

28.0 Article 15 of the International Covenant on Economic, Social and Cultural Rights obliges States to progressively provide the right "of everyone to take part in cultural life". This is echoed by Article 27 of the ICCPR, which protects the rights of minorities, including the right to 'enjoy their own culture.' It provides:

'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

The right to culture is also reflected in Article 8 of the UNDRIP, which sets out (in Article 8(2)) that States shall provide effective mechanisms for prevention of, and redress for:

- (a) Any action which has the aim or effect of depriving them of... their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them, of their lands, territories or resources.

In addition, the UNESCO Universal Declaration on Cultural Diversity provides, in Article 4, that:

[t]he defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities on those of indigenous peoples.

These international obligations are given effect in New Zealand domestic law. Section 20 of BORA, for example, states that:

'A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.'

Violation of the Right to Culture

29.0 The effect of the Act places cultural constraints on Māori; the foreshore and seabed has been alienated from its related ancestral connection and territorial customary

¹³ Draft Report of the Working Group on the Universal Periodic Review, New Zealand A/HRC/WG.6/5/L.7, 11 May 2009, Recommendation 60

right. As noted by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, the foreshore and seabed have 'long been a part of Māori environment, culture, economic activity and way of life...'¹⁴ In Amnesty International's view this right to enjoy the culture has been limited, in breach of New Zealand's international obligations and Section 20 of the BORA.

THE RIGHT TO DEVELOPMENT

30.0 By extinguishing customary property rights to the foreshore and seabed, the right to development is also extinguished. The right to development can be found in international law and New Zealand common law.¹⁵

31.0 The United Nations General Assembly's Declaration on the Right to Development,¹⁶ adopted in 1986, provides in Article 1:

'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.' The primary responsibility for implementing the right to development rests with the Government (Article 3), and requires the Government to formulate appropriate conditions for realising the right through policies and the national levels (Articles 2, 4 and 8) including the eradication of 'all social injustices.'

The Declaration on the Right to Development¹⁷ states that:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The Declaration calls on governments to assist with the full realisation of these rights.

32.0 Article 26 (2) and (3) of the UNDRIP states:

¹⁴ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, 13 March 2006, E/CN.4/2006/78/Add.3, para.45

¹⁵ *Tainui Māori Trust Board v A-G* (1989). 2 NZLR 513 (CA), *Te Runanganui o Te Ika Whenua Inc Society v A-G* (1994). 2 NZLR 20 (CA) and the Waitangi Radio Spectrum Report, 1999. (Wai 776)

¹⁶ UN General Assembly *Declaration on the Right to Development* 4 December 1986 Resolution 41/128.

¹⁷ UN General Assembly *Declaration on the Right to Development* 4 December 1986 Resolution 41/128, at Article 1(1) & (2).

'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.'

- 33.0 The United Nation's Second Working Group on the Right to Development recommended that "States should take measures to ensure that poor and vulnerable groups, including . . . indigenous people . . . have access to productive assets such as land, credit, and means for self-employment."
- 34.0 The United Nations Development Group Guidelines on Indigenous Peoples' Issues asserts that as part of the right to development indigenous peoples have the right to define and decide on their own development priorities. This includes the right to participate in the formulation, implementation and evaluation of programmes for national development that may affect them, and that the development goals of indigenous peoples are closely linked to their ability to exercise decision-making in their communities.¹⁸ Interconnected to the said rights is the right to free, prior and informed consent, discussed below at Paragraph 38.0.

Violation of the Right to development

- 35.0 Section 12 of the Act removes the jurisdiction of the Māori Land Court to consider existing applications relating to the foreshore and seabed, removing the ability of Māori to seek recognition of their customary land rights. Any path to seek freehold title for a part of foreshore and seabed is removed. Thus the ability to undertake commercial activities, raise a mortgage, and any other form of economic development in the area has been extinguished under the Act.¹⁹
- 36.0 Socio-economic disadvantages faced by Māori are therefore amplified by this limitation on their right to development on the foreshore and seabed. There have been concerns raised internationally about the socio-economic disparities in New Zealand. In 2002 the Committee on the Elimination of Racial Discrimination said it remained concerned about the continuing disadvantages that Māori face in their enjoyment of social and economic rights. The Committee urged New Zealand to devote priority attention to this issue and to continue to encourage active and effective participation by Māori in the search for solutions to reduce these disadvantages.²⁰ Furthermore, during New Zealand's recent UPR examination Turkey, Morocco, the Netherlands, Bangladesh and Jordan respectively made recommendations with regard to eliminating the socio-economic discrimination and inequalities affecting Māori.

¹⁸ The United Nations Development Group Guidelines on Indigenous Peoples' Issues February 2008, <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>

¹⁹ See Human Rights Commission Submission on the Foreshore and Seabed Bill, 12 July 2004 for greater discussion.

²⁰ Committee on the Elimination of Racial Discrimination *Concluding Observations: New Zealand* A/57/18 paragraph 424, 1 November 2002.

37.0 Amnesty International believes that the Act further disadvantages Māori in respect of their right to development.

RIGHT TO FREE, PRIOR AND INFORMED CONSENT

38.0 The right to free, prior and informed consent is recognised in various international instruments including the General Recommendation XXIII of the United Nations (UN) Committee on the Elimination of Racial Discrimination, the UN General Assembly's Plan of Action for the 2nd International Decade of the World's Indigenous Peoples, the International Labor Organization Convention 169 and UNDRIP.

39.0 The UNDRIP explicitly affirms the right to free, prior and informed consent:

Article 10

'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.'

Articles 19

'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources...

40.0 Amnesty International believes that the government did not obtain the right to free, prior and informed consent from Māori. The Act was enacted without adequate consultation and there was no consent given by Māori to the government.

RECOMMENDATIONS

41.0 Amnesty International urges the government to repeal the Act in whole and restore the rights extinguished as a matter of law. To avoid what the CERD Committee described as an enactment made in 'haste' and with 'insufficient consideration', there needs to be a longer conversation, a constructive dialogue. This process, with the Government entering into a re-negotiation with Māori,²¹ needs to be undertaken 'in a spirit of good will' as recommended by the CERD Committee.²²

²¹ The March 2006 report of the Special Rapporteur on the Human Rights of Indigenous People, Rodolfo Stavenhagen highlighted that government cannot unilaterally extinguish indigenous rights

- 42.0 The United Nations Development Group Guidelines on Indigenous Peoples' Issues²³ recommends that any natural resource management questions may be resolved through 'dialogue and negotiation where national laws are in line with the individual and collective human rights of indigenous peoples.'
- 43.0 Such an approach would be a positive step along the path toward the realisation of all human rights for Māori, as indigenous peoples. The process must acknowledge the distinct rights, values and customs of Māori as well as their continuing vulnerable status (particularly in socio-economic terms) within New Zealand.
- 44.0 Consultation and cooperation with Māori must be undertaken in good faith in order to obtain free, prior and informed consent. Article 19 of the UNDRIP provides:
- 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'
- 45.0 In this process Amnesty International strongly recommends the government fulfil their obligations under international law to obtain the 'free, prior and informed consent' from Māori.
- 46.0 Amnesty International believes the New Zealand Government should use this review as an opportunity to redress the human rights breaches found in the Act. It is an opportunity to build a stronger relationship between tangata whenua, the Government and the wider public. One that is built on understanding, respect and dignity and made possible through recognising the human rights we are all afforded.

through any means without the free, prior and informed consent of Māori. He saw the Foreshore and Seabed Act as a backward step for Māori in relation to the progressive recognition of their rights through the Treaty (of Waitangi) settlement process over recent years. The Special Rapporteur recommended that Parliament repeal the Act and that government enter into re-negotiations with Māori on their customary rights and claims on the foreshore and seabed.

²² CERD Committee [para 7] [expand]

²³ February 2008, <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>