

**NZEI Te Riu Roa
SUBMISSION**

TO THE

**FISHERIES AND OTHER SEA-RELATED LEGISLATION
SELECT COMMITTEE**

ON THE

FORESHORE AND SEABED BILL

INTRODUCTION

- 1 NZEI Te Riu Roa (“NZEI”) is the professional organisation and industrial union that represents the interests and issues of its 42,500 members. Our members are employed as teachers in the early childhood and primary sectors (including Kura Kaupapa Maori and Wharekura), support staff in the primary, intermediate, and secondary sectors, advisers employed by the Colleges of Education, and Special Education staff employed by the Ministry of Education.
- 2 The main objective of NZEI is to advance the cause of education generally while upholding and maintaining the just claims of its members individually and collectively.
- 3 NZEI is one of the largest unions and professional bodies in the country and has a long history of playing a positive role in the education sector in particular, and on wider social issues that might affect our members. The national structures of NZEI include an elected National Executive, and Te Reo Areare (the elected executive of NZEI’s Māori strand). Te Reo Areare has considered the Bill and at its Hui 14 – 16 Haratua 2004 resolved as follows:

“That NZEI Te Riu Roa drafts a submission on the Government’s Foreshore and Seabed legislation that defends the rights of tangata whenua as a Human Right, and a matter of social justice and due legal process.”
- 4 NZEI is an affiliate of the New Zealand Council of Trade Unions (“NZCTU”). NZEI had some involvement in the formulation of the NZCTU submission to this select committee and is generally supportive of it.

THE NGATI APA DECISION

- 5 NZEI records, with considerable regret, the fact that much of the uninformed debate about foreshore and seabed matters (emanating from certain political parties and irresponsible media) is based on either a misunderstanding of, or a wilful failure to read and understand, the Court of Appeal’s decision in *Attorney General v Ngati Apa*¹ (“Ngati Apa”).

¹ Court of Appeal, Wellington [2003] 3NZLR 643.

- 6 NZEI has considered the Court of Appeal decision in *Ngati Apa*, the Waitangi Tribunal Report on the Government's proposals, and the Attorney General's Report on the Bill. NZEI has also had regard to the views of Te Reo Areare (see paragraph 3 above), and the opinions expressed at NZEI's annual Maori strand Annual Conference Hui A Tau. NZEI also notes and respects the views of, amongst others, David Williams, Moana Jackson, Andrew Erueti, Jock Brookfield and Jim Evans.
- 7 NZEI understands the Court of Appeal's decision to be based in the common law, and based upon te Tiriti o Waitangi only insofar as that was the particular basis of Crown sovereignty in New Zealand. As things stood in 1840, with or without a treaty, even by conquest or some other form of imposition, once the sovereignty of Queen Victoria was established, then the existing inhabitants automatically became British subjects, subject to English law and entitled to its rights. To quote Jim Farmer:

*"The terms of the English version of the Treaty make quite clear how this particular part of the common law was understood by the British Colonial Office in 1838-39 when it formed a plan for the colonisation of New Zealand."*²

*"The law is that when the Crown acquires its fundamental title in a new territory in which native titles apply the Crown holds its fundamental title subject to the limitation of the native titles ...In Ngati Apa the Court of Appeal held that a native title might exist in the foreshore or the seabed if no Crown grant or statutory grant has ever been made of a title covering those areas. ...The effect of the decision is that in other situations a claim to native title is currently possible. [...to prove such a title, a claimant must establish] enjoyment in 1840 of effective control held as of right under customary understandings."*³

- 8 NZEI therefore understands that the *Ngati Apa* decision did not create an "open slather" situation as many alarmists have argued. According to the respectable jurists NZEI has had regard to, the limitations on the situation are:
- The need to establish effective control in 1840;
 - The need to prove that alienation to the Crown since 1840 has not occurred;
 - The common law public rights of access for navigation and fishing.

Accordingly, NZEI contends that it is regrettable that in the face of public hysteria, encouraged by some political parties for unworthy motives, the Government has not been prepared to let this matter run its course in the Courts.

- 9 NZEI contends that the consequences of the current situation are profound. The editor of *Maori Law Review* has pointed out that although there are many obstacles for claimants in the Maori Land Court for recognition of interests in the foreshore and seabed, there is also the possibility that some interests may have the status of "Maori customary land" and be convertible to freehold title⁴. To proceed by way of legislation at this stage of the debate therefore means

² Jim Evans, Professor of Law, Auckland University in Public Address, guest web log, <http://publicaddress.net/>

³ *ibid*

⁴ Tom Bennion, *Maori Law Review*, May 2003, p2 ff.

that the legislation must be judged in the following words of the Waitangi Tribunal

“...the extent of the property rights that are to be overridden must be assessed in the light of what the High Court and the Maori Land Court might realistically find them to be, rather than in terms of the Crown’s view of what they ought to be.”⁵

THE FORESHORE AND SEABED BILL

10 The Explanatory Note to the Bill states (page 2) that the Bill has four “Guiding Principals”:

- Access for all New Zealanders;
- Regulation on behalf of all present and future New Zealanders;
- Protection to enable customary interests to be acknowledged, identified and, protected;
- Certainty about the range of rights available to individuals.

NZEI will make submissions in terms of these principals.

Access

11 NZEI endorses the NZCTU position in relation to the issue of Access. NZEI notes that the Bill restores a view of access rights shared by all New Zealanders as embedded in *Re the Ninety-Mile Beach*⁶ which the *Ngati Apa* decision overturns. In such circumstances, NZEI contends that the Government should, as an alternative to reinforcing the hysterical and inaccurate political clamour that has developed, be using its best endeavours to resolve the issues by way of dialogue with Maori.⁷

12 NZEI has further concerns about the scope of the expression “specified freehold interest”: this would appear to be a wide ranging exclusion to the principal of public access, and although freehold land under the *Ture Whenua Maori Act 1993* is included in the definition, it appears likely that the exclusions are more likely to benefit the private ownership of non Maori interests.

Regulation

13 NZEI notes with regard to this principal that the Government has exercised its power to regulate in a variety of fishing and resource management contexts. However, regulation is subject to te Tiriti o Waitangi and the Waitangi Tribunal has criticised Government proposals as being in breach of Article 2.

14 NZEI further notes that the Bill proposes the vesting of legal ownership of the public foreshore and seabed in the Crown to the exclusion of any customary rights that might have been (consequentially) established as a consequence of the *Ngati Apa* decision. This would appear to be discriminatory because the Bill exempts foreshore and seabed already in private ownership (something that would appear to benefit mainly non Maori interests – see 12 above) but Maori ownership that might be established under the *Ngati Apa* decision is yet to be decided. Further in regard to this matter, NZEI notes with approval, the following statement of the NZCTU to this select committee.

⁵ Wai 1071, *Report on the Crown’s Foreshore and Seabed Policy*, March 2004, p.138.

⁶ [1963] NZLR 461 (CA)

⁷ As recommended by the Waitangi Tribunal, Wai 1071, p.127.

“While not purporting to fully understand the complexities of this matter, it does seem that the protection of public rights of access to the foreshore and seabed, and the public interest, can be safeguarded without going so far as to exclude any customary ownership rights being established when the Crown has historically allowed the transfer of ownership rights to private interests.”⁸

- 15 Further to the point just made, NZEI notes that the Waitangi Tribunal’s Report states

“...if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest.”⁹

The Tribunal concluded that there were no “exceptional circumstances ...in the national interest”.

Protection

- 16 NZEI notes that although the Bill replaces “territorial customary rights” (where they exist) with access to a “customary rights order”, the Waitangi Tribunal has stated that

“...the only private property rights abolished are those of Maori.”¹⁰

This is the basis for the Tribunal’s contention (mentioned earlier in this submission) that Government policy is in breach of te Tiriti o Waitangi: Maori are entitled to equal treatment and the protection of the rule of law.

- 17 NZEI notes that the Attorney General, as required by section 7 *NZ Bill of Rights Act 1990*, has reported to Parliament about this Bill. This report finds that while there is a *prime facie* breach of section 19, which states

“(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.”

the breach of the *Human Rights Act 1993* (section 21(1)(f) – discrimination on the grounds of race) is justified in terms of section 5 *NZ Bill of Rights Act 1990* which provides that Human Rights Act “rights and freedoms”

“...may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

and that the Bill’s “replacement regime” of Customary Rights Orders and Territorial Rights Orders coupled with other considerations (including the time it would take to develop a jurisprudence around the *Ngati Apa* decision, and the imprecise nature of current customary interests) justify any *prime facie* breach of section 19.

- 18 Further to 17 above, and the question of the human rights of Maori, NZEI notes Andrew Eruiti’s response to the Attorney General’s report:

⁸ NZCTU submission, para 5.2.

⁹ Wai 1071, p. 128.

¹⁰ Ibid at p. 179.

“...the wholesale extinguishment of potential Maori property rights in the foreshore-seabed and their replacement with statutory rights of use, might suggest to tribes with interests in the foreshore that the Bill sees them as less worthy or valuable as other members of New Zealand society.”¹¹

Certainty

- 19 NZEI acknowledges that removal of uncertainty is a useful outcome but also notes the comments of Andrew Eruiti who has observed

“There is no doubt, then, that the Ngati Apa decision created a climate of legal uncertainty. And it is clear that the Bill’s objectives are important. But I think the Bill and the Report do tend to overstate the problem. The Waitangi tribunal in its urgent foreshore-seabed report, noted that the uncertainty was not so dire as to require immediate legislative intervention”¹²

- 20 NZEI notes that whilst Eruiti argues (above) that the lack of certainty does not justify immediate legal intervention, the Waitangi Tribunal goes further and states that the Bill will create

“...a whole raft of new uncertainties...”¹³

CONCLUSION

- 21 NZEI contends as follows.

- (a) There has been an overreaction to the *Ngati Apa* decision: the scope of the Court of Appeal’s decision is limited as described in paragraph 8 of this submission.
- (b) The four “Guiding Principals” set out in the Explanatory Note to the Bill are not achieved.
- (c) There is an arguable breach of te Tiriti o Waitangi
- (d) There are arguable breaches of section 19 *NZ Bill of Rights Act 1990* and section 21 *Human Rights Act 1993*.

- 22 NZEI urges the Select Committee, for the reasons stated in this submission, and for the reasons stated in the NZCTU submission, to recommend to the Parliament that this Bill not proceed and that Parliament (to use the words of the NZCTU submission)

“...ask Government to take all possible steps to resolve this difficult issue through dialogue.”¹⁴

¹¹ Unpublished paper to Victoria University of Wellington seminar, p.10.

¹² Ibid, p. 12.

¹³ Wai 1071, p. 137.

¹⁴ NZCTU submission, para 7.6.