Submission

Northland REGIONAL COUNCIL
Te Kaunihera ā rohe o Te Taitokerau

To: **Committee Secretariat**
Justice Committee
Parliament Buildings
Wellington
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By: **Northland Regional Council**

On: **Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill**

1. Introduction

1.1. Northland Regional Council (NRC) appreciates the opportunity to submit on the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill (the Bill). NRC's submission is made in the interest of promoting the sustainable management of Northland's natural and physical resources and the wellbeing of its people and communities.

1.2. NRC's key submission points are summarised below:

- NRC is concerned that the Bill if enacted in its current form risks undermining relationships between tangata whenua and the Crown and the broader community with potential flow on effects for local government relationships.
- Te Taitokerau Māori have not been adequately engaged in respect of the changes proposed through the Bill.
- There appears to be limited consideration that the Act already exempts a range of 'accommodated activities' from the permissions required from CMT holders.
- The Bill would severely limit the CMT regime in the Marine and Coastal Area Act as a result of the amended tests for exclusive use and occupation and the definition of substantial interruption – these in combination set an unfeasible bar for most applications to succeed.

1.3. The relief NRC seeks is that the Crown undertakes meaningful engagement with Māori and the broader community before proceeding with the Bill further. A particular focus of engagement should be on the perceived issues / problems the Crown sees with outcomes under current settings. If (as it appears) the government's main concerns relate to permissions from CMT holders for some resource consents, then a potential solution is to examine options to address this rather than effectively removing the likelihood of successful CMT applications altogether.

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2. **Damage to Māori Crown relations**

NRC sees significant risk that the Bill, if enacted, will damage relations between Māori and the Crown to the detriment of Aotearoa NZ as a whole, with potential flow on impacts for relationships between local government and tangata whenua. NRC is committed to working in partnership with Māori through giving effect to our obligations under Te Tiriti o Waitangi. We have worked with tangata whenua to develop 'Tāiki ē'. Tāiki ē provides a strategic intent 2021-2040 priorities and an implementation plan that demonstrates Te Tiriti o Waitangi within the Te Taitokerau context and reflects the council's long-term commitment to Te Tiriti partnerships and collaborative progress in Te Taitokerau.

2.1. We note the findings of the Waitangi Tribunal[1]:

- Te Takutai moana is a significant taonga and changes to its legislative regime requires the Crown to demonstrate the highest standard of consultation, which it failed to meet at every step of the policy development process
- Māori have not been given the opportunity to engage as Te Tiriti partners, and to exercise their tino rangatiratanga, on such a significant issue (as per Article 2 of Te Tiriti o Waitangi)
- that the Crown breached the principle of partnership in various ways. First, by failing to consult with Māori during the development of the proposed amendments. Secondly, by only offering to consult with Māori after decisions were made.

We agree with those findings.

2.2. We note that new sections 9A and 9B in the Bill effectively re-writes the purpose of the Act as it relates to CMT - the purpose of the CMT amendments as set out in section 9A of the Bill would therefore prevail over the overall purpose of the MACA Act (in section 4) and te Tiriti o Waitangi clause (section 7). This appears to make recognition of Te Tiriti subservient to new section 9A – again we believe this will damage relations between Māori and the Crown.

2.3. We urge the government to halt progress with the Bill to create time to undertake meaningful engagement with Māori. Doing so would enable a more detailed consideration of perceived issues / problems with the current legislation. The limited engagement with Māori to date, in our view, undermines confidence in Crown process and its commitment to upholding Te Tiriti o Waitangi. As a council, we have taken our Te Tiriti commitment seriously and we urge central government to lead by example.

3. **Accommodated Activities**

3.1. We note CMT permissions relating to resource consents are already limited by the MACA Act. For example, permission is not required in relation to:

- existing infrastructure – this is exempted from the CMT permission regime being an accommodated activity in section 64 of the Act;

[1] Takutai Moana Act 2011: Urgent Inquiry Stage 1 report 2024 (pre-publication version); Page 67

- new infrastructure – the Act provides an avenue for new infrastructure to become deemed accommodated activities and waiver with a compensation system under Ministerial control.
- existing resource consents – defined as accommodated activities which cover a very broad range of activities and structures;
- existing aquaculture consents are exempt.
- In particular we note that accommodated infrastructure includes infrastructure owned or operated by the Crown, local government, a network utility operator, port companies and port operators.

3.2. If the government is concerned at the potential for CMT holders to 'veto' the exercise of resource consents for activities not already exempt from the permission regime, there are other potential solutions. For example, the Act could be amended to provide one or more of the following:

i. criteria that must be met for a CMT holder to refuse permission.
ii. Refusal of a CMT permission to be subject to a right of appeal / objection process
iii. Arbitration / mediation avenues where a CMT holder declines permission.

3.3. The changes to the Act proposed in the Bill would significantly reduce the likelihood of CMT applications being successful. NRC sees benefit in further engagement with both Maori and the broader community to better understand the problem and consider alternative options to provide greater process around CMT holder veto rights on resource consent applications.

4. The CMT 'tests' in the Bill

4.1. The Bill's proposed changes to the tests for exclusive use and occupation (new section 57A), the definition of substantial interruption (new section 57B) and burden of proof (amended section 106) in combination set a near unachievable bar for CMT applications to be successful and in doing so the CMT regime in the Act would be severely undermined. To include navigation or fishing in the meaning of 'substantial interruption' constrains the ability for CMT applicants to be successful given these are common and widespread activities. We consider it worthwhile to note at this point that a CMT cannot constrain these activities (under section 27 and 28 respectively), but these activities can be grounds to decline an application for CMT. We also note that new Section 57B states that a substantial interruption can be caused by an activity 'with or without any authorisation under legislation'. As worded, this would suggest that activities in breach of legislation can be grounds to decline a CMT application. Finally, the effect of amended section 106 (Burden of proof) will mean CMT applicants will be required to prove activities such as navigation and fishing have <u>not occurred</u> within the subject area over the start to the end of the applicable period. Doing so will be extremely challenging for the majority of applicants.

4.2. Amended section 58 (new Clause 1A) also increases the tests for CMT in that it requires applicants to demonstrate that the exclusivity of a group's use and occupation is based on 'evidence of a physical activity, or of a use, related to natural and physical resources' and 'is not based on a spiritual or cultural association with all or part of the area unless that association is manifested in a physical activity, or in a use, related to natural and physical resources'. Given that CMT is specifically to recognise customary rights, it seems at odds to then ignore Te Ao Māori customs, where the

particular importance of an area can often be for spiritual or cultural reasons rather than physical resource use. In some cases, such values can limit use of / access to the natural resources in the area, as demonstrated by the use of rahui and other management practices. We do not see the case for such constraints on the issue of CMT.

5. Relief sought

5.1. NRC seeks the following relief:

i. Halt all progress on the Bill / amendments to the MACA Act until meaningful engagement with Māori and the broader community on the issue has been undertaken with a particular focus on the perceived issues / problems the Crown sees with outcomes under current settings.

ii. If the government decides to proceed with amendments to the Act we recommend these focus on the CMT permissions regime itself rather than seeking to effectively remove the chances of successful CMT applications altogether (i.e. do not progress with the amendments proposed for new sections 57A and 57B or amended section 58 or section 106).

Signed on behalf of Northland Regional Council
Jonathan Gibbard (Chief Executive)

Dated: 14 October 2024