# MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011

**New Approach and Representation is Needed**

1. I am this year stepping away from my role on the Committee in relation to this legislation.

   (As are the other two members of our subcommittee – whose comments are set out under paragraph 2 below.)

2. To the extent that the 2023 incoming Committee wants to maintain KIRRA's involvement in the High Court litigation, as an interested party, it is time for the involvement of a new face, or faces, from the Committee or outside the Committee. That person or persons will bring a fresh face, or faces, and fresh perspectives, to what I have considered is giving rise to some of the most important issues that our Island has ever faced, where KIRRA is presently doing no more than maintaining a monitoring role. It is looking on but it has no voice.

**Comment by Michael Marris on paragraphs 1 and 2**

**I will also resign from the subcommittee, in conjunction with your own notice**

**Comment by John Sinclair on paragraphs 1 and 2**

**I emailed my apology and comment to the (now postponed) KIRRA AGM as:**
***I am not a lawyer, and while I accept the serious implications for Kawau on this, I am unsure what KIRRA can do or what it should do. So my continuing membership on this matter is inappropriate. I believe it is important that KIRRA considers whether it wishes to continue in any way – and if anything is decided, determines how it can be done – the whole thing seems so complex, so politicalised and from my observation, so ethically problematic – it is beyond my understanding.***

**Background**

3. Having said what I have set out in paragraph 2, I also accept the position taken by previous Committees that KIRRA simply did not have the resources, or funding, to do more than endeavour to have placed on record that KIRRA was an interested party affected by the legislation and to endeavour to maintain a watching brief on the actions taken under legislation and their progress, where the interests of Kawau Islanders may be effected.

4. I am one of a three person sub-Committee who were initially involved in investigating the legislation and its background and its potential effect on Kawau Island. Those investigations have included investigations into the individual applications that had been made to the High Court of New Zealand seeking rights affecting the coastal and marine areas around our Island.

5. The applications that have been made to the High Court have been numerous. Each application was required to specify the area to which their application applied. That was usually supplied in the form of a map and a description of the area.

6. The initial investigation was of each one of the applications that had been lodged. Each application had to be researched, fairly thoroughly, in order to determine the full extent of the application and whether or not it might directly, or indirectly, affect Kawau.

7. Over time there were close to 200 separate applications made to the High Court (perhaps more). An unknown number, also within the specified time limits for bringing such proceedings, have entered into direct negotiations with the Crown. So that the High Court applications form only part of the picture.

**The KIRRA sub-committee**

8. The three person sub-Committee, that was set up by KIRRA, comprises myself, Michael Marris and John Sinclair. All of us have, over the years, had a close involvement with Kawau and Kawau affairs. Michael's involvement needs no repetition. John's may be lesser known but he was, for our Island, largely the driving force behind the Kawau Island Vision Statement.

9. John's work and his knowledge and expertise was largely responsible for the final form of that document.

10. The Kawau Island Vision Statement is a set of planning principles. That Vision Statement was adopted by the Rodney District Council in July 2009. The Vision Statement was to be taken into account in all planning processes when considering proposals for Kawau Island.

11. The Kawau Island Vision Statement was developed over a long period of time. It followed meetings between the residents and ratepayers and other interested parties. Meetings with local and regional Council representatives, (i.e. the Rodney District Council, the Auckland Regional Council). The Department of Conservation was also involved. A lot of time, effort and consultation took place before that Vision Statement was finalized.

12. As set out in paragraph 9, the driving force behind the adoption of that Vision Statement and the planning principles that it espouses was John Sinclair.

**KIRRA's Initial Involvement**

13. When the litigation first began over the legislation (i.e. The Marine and Coastal Area ( Takutai Moana) Act 2011) with various applicants seeking rights that could, or might, affect the coastal and marine areas around Kawau, the sub- Committee met regularly. A lot of research was undertaken to try to correctly establish the nature and extent of the various applications that could or might affect Kawau. Where such applications were found, notices were prepared and filed in the High Court in respect of each identified application. What was prepared and filed in the High Court set out how and why KIRRA considered itself to be an interested party to that particular application and why it sought to be recorded as an interested party.

14. Those notifications to the High Court were prepared, signed off and lodged. KIRRA has been recorded in the Court records, for those applications as being an interested party who is entitled to be heard. (i.e. To the extent that interested parties have an entitlement to be heard).

15. The notifications as an interested party have been made and lodged in regard to 18 different applications.

**KIRRA's Subsequent Involvement**

16. Following that earlier and pretty intensive involvement in the various applications made under the Takutai Moana Act, KIRRA and the sub-committee's subsequent involvement has been modest. Our role has pretty well entirely been one of monitoring the High Court processes and otherwise non-participation. We have not participated as an interested party in any of the High

Court case management hearings. We have not filed any further material in the High Court in support of the original notices filed. The sub-committee has continued to communicate (largely by email) on a fairly regular basis, but it has met infrequently.

**Comment by Michael Marris on paragraph 16**

**We have been enabled to have small foot in a large door by the modest funding from our limited KIRRA resources, but which has necessarily severely limited our participation.**

17. The sub-committee has observed and considered with concern the early decisions that have been delivered by the High Court (which do not relate to the coastal and marine areas around Kawau). Those decisions have, largely, been delivered by Justice Churchman. We have also considered and discussed how the approach of Justice Churchman appears to have been endorsed and indirectly confirmed by New Zealand's Highest court, the Supreme Court, in the recent decision in relation to the successful appeal heard by the Supreme Court that overturned the conviction of the late Peter Ellis.

18. The decisions delivered to date, and the indirect endorsement of that approach by our Supreme Court, also indirectly endorses the approach of our association (KIRRA) which has been that it does not have the funding or resources to do anymore than maintain the monitoring role that it has had up to now.

19. I say that KIRRA's approach up to now appears to have been indirectly endorsed, because it seems that whatever the extent of the involvement we might have had, and whatever the extent of the costs we may have incurred, our impact on the approach by the Court is likely to have been pretty limited.

**Comment by Michael Marris on paragraph 19**

**For me "pretty limited" means "negligible" with the inevitable outcome that as a small but significant community we have been effectively marginalised in proceedings that could well affect many Island ratepayers and families for generations to come.**

**KIRRA's Future Involvement**

20. The government provides no funding help or assistance to organisations such as our association, to present our position and views as an interested party, but the various applicants have a substantial part of their costs met by the Crown. In situations where the approach by both local authorities and the attorney general (for the Crown) appears to be largely one of standing aside and not intervening in the process, and where the applicants seem to be all very ably represented, by law practices with a high level of skill and expertise in the areas of law involved, and where the applicants cases are well presented and supported by affidavit evidence, and evidence provided by historians, if there are matters in relation to Kawau and its history, that should be put before the Court, before decisions are made on the various applications that may affect our Island, then new people and new faces should be appointed by the incoming committee to undertake whatever investigation and evaluation may be appropriate and to decide what other approach or approaches KIRRA should consider, whilst I step aside to allow such a new approach to be undertaken.

**Comment by Michael Marris on paragraph 20**

**I am keen to push this as a critical and urgent approach for the many new faces who are now remobilising the Committee.**

**Comment by John Sinclair on paragraph 20**

**I suspect the appropriate role would be to identify any action that affects Kawau – determine the extent of potential risk to Kawau people or environment and advise KIRRA on appropriate and hopefully responses they should consider. And yes, given the cost and resource barriers to both maintaining vigilance and/or mount an action, a targeted approach with some new enthusiastic faces with the will, may be the way to go.**

**One point I would make – is that given the unique character of Kawau – which was largely the product of often insensitive works by occupants in a regulatory free environment – new works seeking Iwi approval may be unlikely to align with current Maori concepts (at least at his time) of appropriate works. Getting Iwi consent in the future should not be assumed so establishing a KIRRA voice and reference like the Lin's did on AUP could be valuable. KIRRA does not need to get involved in underlying legal principles or ideologies – just focus on possible impacts on Kawau.**

21. Myself and the present sub-committee will of course help in this process by providing copies of the notices that have been filed in the High Court in the name of our organisation together with any and all subsequent material documents that have come to our knowledge and that any incoming person or persons may need to consider. We will help to make that material available including, in particular, the most recent Whakatohea decision.

**Comment by Michael Marris on paragraph 21**

**Yes. Absolutely.**

22. The most recent "Whakatohea" decision set out in some depth, the judge's reasoning for the application to this legislation of consideration through the lens of Tikanga, and from there the evolution of the application to the legislation of such principles as "shared exclusivity". Through the "shared exclusivity concept" several iwi, hapu and whanau may establish what are overlapping claims to the same Customary Marine Title and or similar Protected Customary Rights over the same areas, or overlapping areas.

**The Pathways to recognition of Customary Rights**

23. There are two different pathways that iwi, hapu and whanau can follow, through the Marine and Coastal Area (Takutaki Moana) Act 2011, to get recognition of their customary rights. The first is through negotiations directly with the crown/ government. The second is by applying to the High Court for recognition of their customary rights.

24. The time limit for commencing such proceedings under the Marine and Coastal Area (Takutai Moana) Act 2011 has now passed. Prior to the passing of that time limit the number of applicants who had taken steps to get recognition agreements about their rights to the coastal and marine area was in excess of 200. Some have sought to do so by direct negotiations with the Crown. Some through the High Court process. Some have done both.

**What are the customary interests ?**

**Comment by Michael Marris on the following paragraphs 25 to 29**

**" Your Paras 25-29 go to the heart of Kawau Island interests. Especially para 29 "**

25. The applications cover interests that come under two main headings.

26. The first is an application for Customary Marine Title. Included in the rights conferred by those who obtain Customary Marine Title is the right to say "yes" or "no" to activities that need resource consents or permits. That is resource consents for Jetties or SeaWalls and/or any other resource consent, or permit, that may be required, that does, or may, affect the areas covered by the legislation.

27. The second heading is Protected Customary Rights or activities. These are customary rights or activities recognising customary activities, uses and practises that iwi, hapu and whanau have exercised since 1840. (Seen through the lens of Tikanga).

28. Once the applicants for Protected Customary Rights have had their rights recognized, there is no need for the applicants, from then on, to have a resource consent to carry out a recognised protected customary right, or activity, AND Local Authorities, from that point, cannot grant resource consent for any activity that would have an adverse effect on the Protected Customary Rights or activity. ( There are some exceptions).

29. The rights sought under those two broad headings described in the preceding paragraphs, will affect Kawau. When you consider the various applications that have been made, bearing in mind the fact that most existing resource consents have a finite life, after which they will require a new application to be made and a new consent obtained, the potential effect on our island seems almost certain to be greater than the effect on other islands or harbour areas in the Hauraki Golf.

**What is the marine and coastal area to which the applications relate**

30. The marine and coastal area is the area starting from the mean(average) high-tide mark, and ending 12 nautical miles out to sea. In other words, it includes the wet part of the beach, and the seabed up to 12 nautical miles out. It also include the beds of rivers, going upstream from the river mouth for a distance that is five times the width of the river mouth, but not more than 1 kilometre upstream.

    (Te Takutai Moana does not include the seawater and river water itself. It includes the land under and the air above it, but it does not include the water).

**Re Edwards ( Whakatohea stage 2) number 7 [2022] NZHC 2644 (13 October 2022)**

31. The above is the case reference to the stage 2 decision on the Whakatohea proceedings that has been referred to earlier. This is not the final court ruling and decision on that proceeding. Even so, leaving aside appendices, that decision, of Justice Churchman covers some 551 paragraphs and it is a closely reasoned and carefully analysed decision, the principles and findings of that decision, in my view, will, almost certainly, form a precedent for the subsequent applications under this legislation.

32. That decision, in my view, provides the backdrop against which the further applications will be considered by our courts.