



SUMMARY OF THE IWI LEADERS' GROUP COMMENTARY ON THE CROWN'S FORESHORE AND SEABED CONSULTATION DOCUMENT

This document has been prepared by the Iwi Leaders Group on the Foreshore and Seabed (ILG) as the summary version of the document that provides a commentary on the Crown's preferred framework for replacing the Foreshore and Seabed Act 2004. The content of these documents does not represent the view of any one Iwi/hapū or the ILG, rather the ILG has prepared these materials to provoke discussion and debate amongst Iwi and hapū on the proposed replacement framework.

The ILG has reviewed the Crown's preferred replacement for the Foreshore and Seabed Act 2004 (the Act) and considers that the proposal may not satisfy the rights, expectations and values of Iwi and hapū.

Over the last 10 years, we have heard Iwi and hapū state the following were the fundamentals that the replacement framework must be built on;

- **Mana** – that Iwi and hapū have inherited mana and the obligation to act as kaitiaki of their rohe moana. That this customary authority should be respected and provided for as pre-existing the assertion of Crown sovereignty and enduring today with the following elements (that are expressed differently by Iwi and hapū); toitū te mana atua, toitū te mana whenua mana moana, toitū te mana tangata, toitū te mana Tiriti;
- **Tikanga** – that mana, and the authorities and obligations that go with mana, should only be understood and defined as according to tikanga (not introduced common law standards) and that tikanga should be given effect as law;
- **Tiriti/ Te Whakapūtanga**– that the Treaty partnership between the Crown and Iwi/hapū must be provided for in a meaningful way that provides for the respective authorities and responsibilities of each partner, and that the authorities confirmed in Te Whakapūtanga must be respected and provided for.

We are concerned that the Crown proposal doesn't respond to the issues, expectations and fundamentals that Iwi and hapū have expressed over the last six years in the following ways:

- **Address the Cause** – that the proposal focuses on responding to the Court of Appeal decision rather than the reason why Te Tau Ihu went to court—the exercise of customary authority over rohe moana. The expression of mana is proposed to happen through the awards that come from having territorial and non-territorial rights recognised. We are concerned that this way of recognising rights cannot satisfy the expectations of Iwi and hapū to express customary authority over the foreshore and seabed and act as kaitiaki, because the awards are limited and may not be of the type that Iwi and hapū think are appropriate.
- **Redress the Relationship**– the Crown proposal focuses on responding to the direct injuries caused by the 2004 Act, and uses the aboriginal title model for recognising the rights of Iwi and hapū that was the basis of the 2004 Act. We are concerned that this approach will not satisfy

the expectations of Iwi and hapū for a transformational approach to restoring the relationship between the Crown and Iwi and hapū;

- **Mana** – the proposal provides for the rights of Iwi and hapū to be recognised, and that Iwi and hapū will need to prove that those rights exist. We are concerned that this approach is inconsistent with the expectation of Iwi and hapū, that the inherent and pre-existing nature of mana will be recognised, and doesn't respond to the sense of frustration Iwi and hapū have with repeatedly proving their rights before courts at high financial and time cost;
- **Tikanga** – the Crown proposal blends common law and tikanga into tests that are an improvement on the 2004 Act, but we are concerned that Iwi and hapū have clearly articulated an expectation that relationships founded by mana will be judged within the legal tradition that creates those relationships; tikanga.

We also consider that there are elements of the Crown proposal that require further work and clarification;

- **Public Domain Definition**—further clarity around the public domain/takiwā iwi whānui will be important, because that will determine whether the proposal remedies the human rights breaches from the 2004 Act;
- **Who holds rights** – the question of who has the right to go to the courts and/or negotiate with the Crown (legally, this is described as the question of who has standing). It could be all or any of Iwi, hapū, whānau or individuals;
- **Development right** – the scope of the right to development, including the right to share in the benefits of commercial developments is not clear from the consultation document;
- **Non-nationalised minerals** – the status of non-nationalised minerals (all minerals other than petroleum, gold, silver and uranium) and the rights of Iwi and hapū to those resources are not clear in the document;
- **Resourcing the processes** – it is not clear whether Legal Aid would be available to those Iwi or hapū who seek recognition of their rights through the courts, or how any negotiations processes would be resourced.

The Iwi Leaders Group considers that there are three possible responses to the Crown proposal:

- **Accept the Crown proposal** in its current form – however, we don't consider this is a satisfactory way of providing for the expectations and fundamentals expressed by Iwi and hapū;
- **Improve the Crown proposal** – which could be achieved through a range of alternative/cumulative changes to the proposal, but that may be seen by Iwi and hapū as being sufficiently transformative;
- **Substitute an alternative approach** – which could amount to creating an alternative framework, however, this may be politically challenging and would require Iwi and hapū to have some degree of consensus on the preferred approach.

The possible improvements to the Crown proposal include:

- Universal recognition of mana (without having to go to court or negotiate);
- Improved negotiations model to strengthen the negotiating position of Iwi and hapū;

- Creating a specialist court/tribunal in place of the High Court;
- Framing the tests for rights recognition according to standards other than the common law, potentially drawing on the Declaration on the Rights of Indigenous Peoples, Treaty of Waitangi jurisprudence and/or tikanga;
- Strengthening Iwi/hapū property rights and/or strengthening and widening the range of awards available, particularly those that provide management powers; and
- Ensuring greater flexibility for Iwi/hapu to design their own solutions.

There are also a number of alternatives to the Crown proposal. We describe four possible alternatives below, however there will be further options and improvements that could be made to this thinking. These alternatives do not take the same starting place as the Crown proposal, and in varying ways, seek to give effect to the expectations, fundamentals, rights and values held by Iwi and hapū. We do not have a position on which of the models may be more desirable, as our intention is simply to provide a platform for discussion amongst Iwi and hapū.

Māori Title

The Māori Title model has been promoted by Hone Harawira as an alternative framework that has the following elements;

- The foreshore and seabed is vested in Māori title (resulting in ownership being held by Māori);
- Māori title is explicitly made inalienable (unable to be sold); and
- There is a statutory right created for public access.

The additional points that would need to be considered if this model was supported by Iwi and hapū include:

- What the outcomes are of holding Māori title, and whether these outcomes are the same as other property rights holders or whether they are different;
- Who the title is vested in and how that responds to the principle of mana whenua mana moana.

Tipuna Title

Tipuna Title was first presented by Ngāti Kahungunu and is different from vesting the foreshore and seabed in Māori title, because it concentrates more on recognising the inherent mana and authority of Iwi and hapū, rather than the property rights/ownership concept recognised by English law.

The way Tipuna title has been expressed to date is as an eloquent expression of a mātauranga sourced description of the relationship between Iwi and hapū and the foreshore and seabed under tikanga. The mechanical aspects of how tipuna title would be given practical effect, have not been worked through in a detailed way in any publicly available document.

Treaty-Based Mana Expression Model

This approach would respond to the inherent limitations of the common law aboriginal/customary title approach and move away from issues of ownership, rights and title. It would focus instead on building practical ways in which Iwi and hapū might express their mana and rangatiratanga over their rohe moana. It would start from the sort of jurisprudence on the Treaty that has been under development in the courts and the Waitangi Tribunal over the last 20+ years.

Some of the mechanisms contained in the Crown approach could have a place in this approach, as might others used in Treaty settlement, and a number of others could be devised, either generically for the whole country, or by individual Iwi/hapū. Attention would move from requiring Iwi/hapū rights to be tested and proved, to empowering the exercise of kaitiakitanga in accordance with tikanga.

Co-Governance Model

A Co-Governance Model would be similar to the Treaty-Based Mana Expression Model described above, but would have an emphasis on mechanisms for Iwi/hapū and the Crown (and/or local authorities) to work together and make joint decisions on matters affecting the takutai moana.

Next Steps

The Crown consultation document is available at: <http://www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004> and there is also a submissions template that can be used with specific questions in it that is also available at that web address. Hui are being hosted by Iwi/hapū around the country throughout April, and will involve a pre-hui with just hapū/Iwi members to discuss a response to the Crown proposal, with the Attorney General arriving later in the day to discuss the Crown proposal. Representatives of the Iwi Leaders Group are available to attend and share information at hui, if Iwi and hapū would find that useful. The programme for these hui is available at http://www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004/copy_of_how-can-i-have-a-say

The Iwi Leaders Group is committed to contributing to an outcome that satisfies the rights, expectations and values of Iwi and hapū and that respects the aspirations of people on the hīkoi in 2004 and the many people who participated in the United Nations processes. To this end, its intentions are:

- If invited by mana whenua, we will attend any of the pre-hui for Iwi and hapū;
- Complete a more detailed analysis of the Crown proposal and distribute it to Iwi and hapū;
- Report on the work of the ILG and status of the foreshore and seabed issue at the next Iwi Chairs Forum; and
- Continue providing information updates to Iwi and hapū.

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