

# Briefing Paper – Foreshore and Seabed Repeal and Replacement Framework

7<sup>th</sup> October 2009

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## Purpose

1. This paper presents a preliminary analysis of the key policy issues concerning the repeal and replacement of the Foreshore and Seabed Act 2004. It does not present definitive or indicative options for a replacement regime on the understanding that there will be further processes of engagement on policy design and that the Iwi Leaders do not speak on behalf of all Iwi and hapū.

## Executive Summary

2. This paper endeavours to identify the overarching set of policy issues that will need to be addressed in the repeal and replacement of the Foreshore and Seabed Act, and is set out as follows:
  - a. Background – contextualising the paramount policy issues;
  - b. Policy Design Issues – which discusses the broader political context and suggests underlying design principles that should guide the policy development;
  - c. Key Policy Issues for Replacement Regime – which discusses the suite of policy issues arising under five key areas for the replacement regime;
    - i. Vesting of the Foreshore and Seabed;
    - ii. Title and Role of the Courts;
    - iii. Provision for the Exercise of Mana;
    - iv. iv. Scheme of the Replacement Regime;
    - v. v. Policy Development Programme.
  - d. Appendix – which consists of a consolidated list of the policy issues identified for ease of reference.

## Background

2. The Foreshore and Seabed Act 2004 (the Act) was enacted in response to the *Marlborough Sounds* decision<sup>1</sup> and had the effect of;
  - a. Vesting the foreshore and seabed in the Crown;
  - b. Codifying new tests for aboriginal title and use rights to be recognised by the courts (Territorial Customary Rights Orders and Customary Rights Orders respectively);
  - c. Creating customary use rights recognition for non-indigenous people; and
  - d. Comprehensive amendments to integrate the Act with the pre-existing suite of statutes applying to the coastal marine area.
3. The Act was passed into law in a contested climate marked by pronounced racial tension and can fairly be attributed with the following watershed political consequences;
  - a. The formation of the Māori Party and its initial electoral success;
  - b. The largest protest action since the 1970's Land March; and
  - c. The first complaint against New Zealand to the United Nations treaty monitoring bodies being upheld.
4. From the announcement to legislation, the dominating legal and political issues were the nature, extent and extinguishment of Māori property rights in the foreshore and seabed. As a corollary,

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<sup>1</sup> *Ngāti Apa & Others v Attorney-General & Others* [2003] 3 NZLR 643

the Act principally sought to codify a regime for recognising rights substituted in place of property rights.

5. However, the preoccupation with property rights arguably obscured the underlying and actual policy issues that catalysed the *Marlborough Sounds* litigation. The litigation arose from Iwi frustrations with the statutory decision making framework for use and occupation of the marine environment, primarily in relation to aquaculture activities. Decision making was perceived to prejudice Iwi rights to, and values associated with, customary uses, as well as commercial development. The resulting application to the Māori Land Court for a declaration of customary land status over the foreshore and seabed was a novel, although not unanticipated, effort to use property rights instrumentally to intervene in, and force fundamental reform of, marine environment management and the allocation of rights to use and occupy marine space.
6. The Act did not substantively engage with the issue of decision making over the marine environment. The Act's reform of decision making is effectively confined to (1) creating an additional decision making entity – the guardians of a Foreshore and Seabed Reserve – that exercises delegated management powers for discrete areas under a TCR, subject to the overriding parameters of the coastal policy statement; and (2) permitting negotiated frameworks that could provide for further and stronger decision making powers and instruments, as has occurred under the Ngāti Porou agreement and was proposed in the draft Te Whānau a Apanui agreement.
7. Accordingly, we note that the Ministerial Review Panel Report (the Report) accurately identified the two paramount matters that must be addressed in a robust and effective replacement regime to the Act:
  - a. Property rights issues must be addressed to resolve the poignant grievance resulting from the Act; and
  - b. Management and decision making concerning the marine environment must be reformed to provide for effective roles for Iwi/hapū, so as to provide an enduring remedy to the Act by addressing the actual policy issues concerning the foreshore and seabed.
8. This paper seeks to set out preliminary analysis of the key policy issues pertaining to these and wider matters concerning the replacement regime.

### **Policy Design Principles**

9. The policy design principles considered in this paper are;
  - a. Responding to Iwi/hapū expectations;
  - b. Providing for the rights and values of Iwi/hapū in the foreshore and seabed; and
  - c. Responding to prevailing political factors.

#### *a. Responding to Iwi/hapū Expectations*

10. Iwi and hapū have high expectations for the replacement regime that anticipate a seminal and transformative approach to the recognition and accommodation of the rights and values of Iwi/hapū in relation to natural resources. These expectations arise from the convergence of political climate, egregious factors associated with the passage of the Act and growing body of precedents in negotiated agreements between the Crown and Iwi.
11. The political climate founds high expectations due to the tangible commitment of this government to work with Iwi Leaders, the presence of persons respected by Iwi Māori in senior Ministerial positions and the agreement with the Māori Party concerning the foreshore and seabed. The

combined effect is an expectation that this government will adopt a considered and courageous approach to enacting a fair and principled replacement regime. It is almost inevitable that some Iwi/hapū will use the replacement regime as the litmus test for their perception of character of this government and the place of the Māori Party within Parliament.

12. The egregious factors associated with the Act concern the perceived disenfranchisement of Iwi Māori through the; deliberate breach of fundamental human rights protections; disregard of constitutionally important institutions such as the Waitangi Tribunal and UN Committee on the Elimination of Racial Discrimination; and conduct of political figures in inflaming racial tension, such as the Prime Ministers reference to protestors as ‘haters and wreckers’ and the content of the Orewa Speech. Iwi Māori continue to hold a pronounced grievance in relation to these factors, which founds an expectation that a generous and purposive approach will be taken to the replacement regime to remedy these injuries.
13. The body of precedent founds an assumption that there will be continued improvement on the models developed over the last 15 years including;
  - a. Treaty Settlement instruments – the last 15 years of Settlements has produced a broad spectrum of instruments that each iteratively give greater effect to Iwi/hapū rights and values pertaining to natural resources, including instruments specifically designed for the marine environment;
  - b. Waikato River agreement – which is perceived to precipitate a new approach to comprehensive and effective co-governance of natural resources; and
  - c. Foreshore and Seabed agreements – the agreements negotiated between the Crown and Ngāti Porou and Te Whānau a Apanui are perceived as a comprehensive approach to co-governance of the foreshore and seabed.
14. Iwi/hapū expect, and are cautiously confident, that this government will show strong leadership to build on the existing body of precedent to enact a principled regime that comprehensively remedies the grievance resulting from the Act.

*b. Providing for Iwi/hapū Rights and Values*

15. Providing for Iwi/hapū rights and values attaching to the foreshore and seabed is the overriding imperative for Iwi /hapū, and as stated above, there is an expectation that the replacement regime will construct a new model for doing so. It is also hoped that the Government will commit to not only providing for, but exceeding, the rights protections confirmed in the Treaty of Waitangi, Declaration on the Rights of Indigenous Peoples and other applicable standards.
16. The key design principle for the replacement regime should be to provide for the expression of Iwi/hapū mana over the foreshore and seabed. While all Iwi/hapū understand and articulate their mana over the foreshore and seabed in distinct ways, common elements are likely to include;
  - a. Exercise of Customary Authority – premised on the autonomy of Iwi/hapū and rights to exercise authority over use and management of the foreshore and seabed, and for that authority to be exercised according to tikanga Māori (Māori law);
  - b. Continuation of Customary Uses – premised on the right of Iwi/hapū to maintain tradition based practices and for those practices to evolve over time;
  - c. The Right to Development – premised on the right of Iwi/hapū to share in technological and commercial advancement.
17. Policy development must also be premised on respecting the agreements and negotiations between the Crown and Iwi through Treaty Settlements, including historical land, Fisheries and

Aquaculture Settlements and specifically the foreshore and seabed agreements/negotiations with Ngāti Porou, Te Whānau a Apanui, Te Rarawa, and Ngāti Pahauwera.

18. Providing for the exercise of mana is likely to require consideration of a different set of assumptions to those underpinning the Act and the adoption of a more expansive suite of mechanisms than bare property rights recognition through a statutory title, as discussed further below.

*c. Responding to Prevailing Political Factors*

19. The prevailing political factors informing the design principles include;
  - a. Electoral cycle – that it is important for the repeal and replacement of the Act to be concluded within the government’s second year of office;
  - b. Mitigating/avoiding Racial Tension – that it is deeply important for a number of reasons to manage the lingering racial tensions caused by the passage of the Act to avoid re-polarisation and division of the country;
  - c. Capital constraints – that the economic climate imposes unavoidable constraints.

*d. Summary of Design Principles*

20. In summary, the applied design principles that should inform the replacement regime are;
  - a. **Commitment to pioneer an innovative and principled framework that materially improves upon the existing body of precedent;**
  - b. **Commitment to the Treaty of Waitangi being the basis of engagement between the Crown and Iwi/hapū;**
  - c. **Provision for the exercise of mana to recognise customary authority, customary use and the right to development in a way that allows for the Iwi/hapū to express their autonomy, rights and tikanga;**
  - d. **Protection of existing Settlements, agreements and negotiations between the Crown and Iwi/hapū, including the Fisheries and Aquaculture Settlements, the foreshore and seabed agreements/negotiations with Ngāti Porou, Te Whānau a Apanui, Te Rarawa, and Ngāti Pahauwera and ongoing historical Treaty Settlement negotiations;**
  - e. **Accommodation of Iwi/hapū having distinct expressions of mana within their territories; and**
  - f. **Commitment to expeditious policy development that involves careful management of the national political and fiscal imperatives.**

**Overview of Key Issues for Replacement Regime**

21. The key issues pertaining to the replacement regime are;
  - a. Vesting of Foreshore and Seabed –the presumptive and/or statutorily effected ownership of the foreshore and seabed;
  - b. Title and the Role of the Courts – the nature of title provided by statute and the various issues of proof, process and outcome;
  - c. Provision for the Exercise of Mana – the nature of mechanisms to give effect to Iwi/hapū mana;

- d. Scheme of Replacement Regime – the balancing of permissive, prescriptive, judicial and negotiated approaches; and
- e. Policy Development Programme – the process for developing the policy framework and enacting the replacement regime.

### **Issue One – Vesting of Foreshore and Seabed**

22. The vesting of the foreshore and seabed is significant because the extinguishment of Iwi/hapū property rights that was effected under the Act by vesting the foreshore and seabed in the Crown. As the extinguishment of property rights was the most politically charged element of the Act, it is likely that the vesting arrangements will be a pivotal issue in any replacement regime that are perceived as representative of the government’s commitment and approach to principled reform.
23. The key policy issue will be to bridge the likely difference between Iwi/hapū and wider public positions on vesting of the foreshore and seabed;
- a. Iwi/hapū are likely to strongly object to vesting the foreshore and seabed in the Crown as it perpetuates the extinguishment and disenfranchisement effected under the Act and assert that the legal presumption is that, but-for the Act, the foreshore and seabed was held under tikanga Māori by Iwi/hapū; whereas
  - b. The wider public is likely to demand vesting in the Crown as necessary for certainty and stability in the management and use of the foreshore and seabed.
24. It is suggested that there are a number of alternative vesting options and that further engagement between the Crown and Iwi Leaders should occur to consider and assess the full range of options available against the design principles above.

### **Issue Two – Title to Foreshore and Seabed and Role of the Courts**

25. Title to the foreshore and seabed is important for three principal reasons;
- a. That title is directly connected to the extinguishment of property rights effected by the Act;
  - b. Iwi/hapū perceive some forms of title to represent the continuity of their whakapapa and relationships with the foreshore and seabed; and
  - c. Title can found and/or support the exercise of decision making rights over management and use of the foreshore and seabed.
26. However, not all title is good title. The key policy issues that should be addressed are the nature and process for obtaining recognition of title, as these aspects of title can either uphold or fundamentally undermine the matters of importance and design principles referred to above. Specifically, it is suggested that the key policy issues pertaining to title include the following;
- a. That the nature of the title accommodates;
    - i. That whakapapa relationships are holistic and assume the integration of foreshore, seabed, water column and subsoil;
    - ii. That Iwi/hapū customary authority encompasses both ‘negative’ (i.e. the ability to exclude access) and ‘positive’ decision making (i.e. active management, regulation and decision making over use of the marine environment);
  - b. That the process for obtaining the title accommodates;

- i. The position of some Iwi/hapū that superimposing English law over tikanga Māori to recognise rights constituted by tikanga Māori is inconsistent with te Tiriti and international law standards;
    - ii. That the burden of proof should not rest on Iwi/hapū given the legal presumption that as at 1840 all land in New Zealand was held by Iwi/hapū under tikanga Māori; and
    - iii. That judicial processes may not be the best suited mechanism for resolving title.
27. The use of existing forms of title, including common law aboriginal title and customary land status under Te Ture Whenua Māori Act, are likely to be incapable of addressing these policy issues because;
- a. The nature of the titles is unsuited because;
    - i. Each of these forms of title provide for a narrow suite of rights to use and alienate the foreshore and seabed;
    - ii. Rights are subject to overriding statutes, such as the RMA;
    - iii. Decision making is confined to ‘negative’ decisions to exclude/control access to the foreshore and seabed which are only capable of being enforced through trespass actions.
  - b. The process for obtaining each of these titles is unsuited because;
    - i. It provides for common law or other judicial criteria<sup>2</sup> to be applied to determine whether title exists, thereby superimposing English law over tikanga Māori; and
    - ii. Applicants must supply extensive evidence in support of proving their claim.
28. The TCRs provided under the Act are fundamentally incapable of addressing these policy issues because;
- a. The nature of the title is unsuited because it shares the weaknesses with the forms of title above and also;
    - i. Is a substitution of extinguished property rights;
    - ii. The attending rights are very narrow as they are confined to producing management plans for a discrete area of the foreshore and seabed, with those plans being subject to overriding statutes (such as the RMA) which exaggerate the subordinate positioning of the rights of Iwi/hapū; and
    - iii. It could be perceived as the product of a statutory effort to sever the continuity of relationships between Iwi/hapū and the foreshore and seabed.
  - b. The process for obtaining the title shares the weaknesses of aboriginal title referred to above, and also;
    - i. Is compounded upon by the insertion of the statutory requirement to prove continuous ownership of contiguous land, despite this being overruled as a matter of law by the Court of Appeal<sup>3</sup> and serving to further penalise Iwi/hapū for the colonial taking of dry land.

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<sup>2</sup> See for example, the comments of Tipping J on the judicial discretion in converting customary title into Māori freehold title in *Marlborough Sounds* at paras 193-196.

<sup>3</sup> *Marlborough Sounds*, per Elias CJ at para 13.

29. It is suggested that there are alternative forms of title, such as customary title as negotiated by Ngāti Porou, tūpuna title as proposed by Ngāti Kahungunu and other forms of sui generis title that could address the policy issues and that further engagement should occur between the Crown and Iwi Leaders to further explore these potential title mechanisms.

### **Issue Three – Provision for the Exercise of Mana**

30. Providing for the effective exercise of mana is important because this is the fundamental policy issue that was the catalyst for the Act, as discussed above. The key policy issues that should be considered in the replacement regime are;

- a. The nature of customary authority – involving consideration of mechanisms to provide for positive and negative decision making power over management, regulation and use of the marine environment, and ensuring that those mechanisms enhance the traditional values that underpin mana;
- b. The entity exercising customary authority – involving consideration of the independence of Iwi/hapū, and aversion to regional approaches except where entered into voluntarily;
- c. The scope of customary authority – involving consideration of the users of the marine environment who are subject to customary authority, involving both members of the Iwi/hapū and other users of the marine environment;
- d. The construction of mechanisms to give effect to customary authority – involving consideration of the importance of an integrated and comprehensive framework that delivers quality environmental outcomes;
- e. The integration of customary authority mechanisms with the wider statutory framework – involving consideration of integrating and harmonising the numerous decision makers with powers over the marine environment;
- f. The continuation of customary practices – involving consideration of the legal and practical matters to ensure that tradition based practices can be maintained and evolve over time; and
- g. The right to development – involving consideration of provision for this internationally and domestically recognised right.

31. These policy issues were not addressed by the Act, and it is important that any replacement regime substantively engages with them to ensure that it is capable of enduring over time, addressing the actual policy issue that was sidestepped during development of the Act and meeting the expectations of Iwi/hapū.

32. It is suggested that a comprehensive approach to addressing these policy issues should be adopted, recognising their interdependencies and the primacy of improving environmental and national interest outcomes for the marine environment. While there have been a range of instruments developed in other contexts that have some relevance to these policy issues, it is emphasised that a comprehensive approach may require a more incisive and innovative approach than has been employed to date and that further engagement should occur between the Crown and Iwi Leaders to explore appropriate provision for the exercise of mana within the marine environment.

#### **Issue Four – Scheme of Replacement Regime**

33. The scheme of the replacement regime will need to engage with a range of policy issues including;
- a. The appropriate balance between a prescriptive as opposed to permissive framework in terms of identifying, recognising and providing for the rights and values of Iwi/hapū, which will need to engage with the importance of statutory certainty and the risk of suffocating tikanga Māori;
  - b. The appropriate balance between a national framework and allowing for regional/ Iwi/hapū specific differences, which may properly be a subset of the prescriptive-permissive balance, and will need to similarly engage with issues of certainty and flexibility; and
  - c. The appropriate balance between negotiation and judicial processes, which is dependent on a number of factors including; the mechanisms to give effect to customary authority and uses, the nature of title under the replacement regime; and the depth of engagement with Iwi/hapū in developing the replacement regime.
34. It is likely that the scheme of the regime will be perceived by Iwi/hapū as important as the components of the replacement regime.

#### **Issue Five – Policy Design and Development Programme**

35. The policy design and development programme will occur amidst the following contextual issues;
- a. Expectations of Iwi/hapū that a principled and comprehensive engagement programme will occur as part of the remedy for the Act;
  - b. Expectations of Iwi/hapū that the replacement regime will build and materially advance upon the frameworks developed over the last 15 years to give effect to the rights and values of Iwi/hapū;
  - c. Widespread lack of clarity as to the perceived and actual issues created by the Act, principally concerning the relationship between property rights and provision for the expression of mana;
  - d. The political risk of racial tensions re-emerging; and
  - e. The importance of an expeditious policy development programme that ensures the replacement regime is concluded before the end of the second year of office.
36. It is requested that the Crown and Iwi Leaders agree to a structured programme of work to progress the policy issues identified in this paper that allows for the following;
- a. Direct engagement between Senior Ministers and Iwi Leaders at notable junctures in the process to provide governance oversight of the policy design and architecture, including prior to and/or after Cabinet decisions are made;
  - b. Direct engagement between Crown officials and Iwi technicians, subject to abiding the protection of legal privilege;
  - c. Protocols for information sharing, specifically allowing for Cabinet Papers to be reviewed by Iwi technicians prior to being submitted to Cabinet committee(s);
  - d. Scheduled engagement with Iwi /hapū that, on the basis of the Crown's time constraints, allows for Iwi Leaders to engage with Iwi/hapū this calendar year and subsequently in the policy development process, and agreement as to reasonable resourcing to enable this to occur.

## Appendix One – Summary of Policy Issues

For ease of reference, this appendix sets out the consolidated list of policy issues identified in this paper.

1. Vesting Foreshore and Seabed – bridging the likely difference between Iwi/hapū and wider public positions on vesting of the foreshore and seabed;
2. Title Issues –
  - a. That the nature of the title accommodates;
    - i. That whakapapa relationships are holistic and assume the integration of foreshore, seabed, water column and subsoil;
    - ii. That Iwi/hapū customary authority encompasses both ‘negative’ (i.e. the ability to exclude access) and ‘positive’ decision making (i.e. active management, regulation and decision making over use of the marine environment);
  - b. That the process for obtaining the title accommodates;
    - i. The position of some Iwi/hapū that superimposing English law over tikanga Māori to recognise rights constituted by tikanga Māori is inconsistent with the Treaty of Waitangi and international law standards;
    - ii. That the burden of proof should not rest on Iwi/hapū given the legal presumption that as at 1840 all land in New Zealand was held by Iwi/hapū under tikanga Māori; and
    - iii. That judicial processes may not be the best suited mechanism for resolving title.
3. Provision for the exercise of mana –
  - a. The nature of customary authority – involving consideration of mechanisms to provide for positive and negative decision making power over management, regulation and use of the marine environment, and ensuring that those mechanisms enhance the traditional values that underpin mana;
  - b. The entity exercising customary authority – involving consideration of the independence of Iwi/hapū, and aversion to regional approaches except where entered into voluntarily;
  - c. The scope of customary authority – involving consideration of the users of the marine environment who are subject to customary authority, involving both members of the Iwi/hapū and other users of the marine environment;
  - d. The construction of mechanisms to give effect to customary authority – involving consideration of the importance of an integrated and comprehensive framework that delivers quality environmental outcomes;
  - e. The integration of customary authority mechanisms with the wider statutory framework – involving consideration of integrating and harmonising the numerous decision makers with powers over the marine environment;
  - f. The continuation of customary practices – involving consideration of the legal and practical matters to ensure that tradition based practices can be maintained and evolve over time; and

