



## BACKGROUND PAPER ONE – FORESHORE AND SEABED

### Introduction

The Foreshore and Seabed Act 2004 (the Act) is one of the most significant pieces of legislation in recent history, for both Māori and New Zealand. It extinguished the rights of Iwi and hapū to the foreshore and seabed, in a way that was all too reminiscent of colonial confiscations that breached the Treaty of Waitangi and the human rights of Māori. It also catalysed momentous political change; both a dark period of high racial tensions and a positive unification of Iwi and Māori through the hīkoi, formation of the Māori Party and advocacy with the United Nations.

The Māori Party secured the commitment of the government to review the Act in their confidence and supply agreement. The review was completed in 2009 by a Ministerial Review Panel made up of; Justice Eddie Durie, Professor Richard Boast and Hana O'Regan. The Panel released a compelling and comprehensive report recommending that the Act be repealed and setting out some principles and options that could be considered in developing the replacement framework to the Act.

The Prime Minister announced in November 2009 that the government would repeal the Act providing that a suitable replacement regime could be developed.

An Iwi Leaders Group formed in August 2009 to engage with the Crown, and work collaboratively with the Māori Party, on shaping the nature of the replacement regime.

This paper provides an overview of the work to date and further background material on the foreshore and seabed issue. It is set out in the following parts:

- The original context;
- The Act;
- The challenge of developing an alternative framework;
- The work of the Iwi Leaders to date;
- The themes from the regional hui in November and December 2009;
- Next Steps; and
- A questions and answers summary.

## The original context

The Foreshore and Seabed Act 2004 (the Act) was enacted in response to the *Marlborough Sounds* decision<sup>1</sup>, which was a case initiated by the Iwi of Te Tau Ihu in a strategy to intervene in poor decision making over the foreshore and seabed. The context was that Te Tau Ihu iwi sought to engage with marine farming, submitting a number of applications to conduct mussel farming, all of which were rejected. During the same period a number of non-Māori organisations were granted licenses to conduct similar activities, despite Te Tau Ihu iwi lodging objections to the applications on the basis of customary associations with the areas subject to the farming operations. The subsequent Crown decision to impose a moratorium on marine farming applications as a precursor to a coastal tendering regime raised the prospect of complete privatisation of the industry and the cementing of the poor practices Te Tau Ihu were experiencing. The strategy adopted by Te Tau Ihu was a novel, although not unanticipated, application to the Māori Land Court seeking a declaration of customary title over the foreshore and seabed. Property rights recognition was intended to be used instrumentally as a means to obtain a meaningful participatory role in managing marine farming and to remedy the prejudicial patterns in the operative framework solidifying.

The application was lodged in the Māori Land Court (MLC) in 1997 claiming that land below the mean high water mark in the Marlborough Sounds was Māori customary land under Te Ture Whenua Māori Act 1993. The actual case was however, never actually heard because the court got stuck on the technical issue of whether the MLC had the jurisdiction to hear the application. The reason the court got stuck on the issue of jurisdiction was because in the 1950's the *Ninety Mile Beach Case* had decided, amongst other things, that the MLC did not have jurisdiction over foreshore and seabed because historically the Native Land Court had investigated dry land, and in doing so, any rights to the foreshore and seabed were lost. Te Tau Ihu made the argument that the *Ninety Mile Beach* decision didn't apply to them because the Native Land Court had not investigated their dry land. The argument about whether or not *Ninety Mile* stopped the MLC having jurisdiction went to the High Court and the Court of Appeal with lots of legal points being raised about the effect of *Ninety Mile Beach*, whether specific Acts had extinguished Māori property rights and the rules of the common law doctrine of aboriginal title. The Court of Appeal decided that the MLC did have the jurisdiction to hear the Te Tau Ihu application because the *Ninety Mile Beach* decision was wrong at law. The Court of Appeal also made some very significant comments on the state of New Zealand's law which are positive for Iwi and hapū. The Court did not however say that Iwi and hapū had rights in the foreshore and seabed, and while they decided the MLC could hear the case, they cautioned against optimism saying that it would require some tough legal issues to be proved and sorted out.

Soon after the Court of Appeal decision, the government of the day announced that they would legislate to 'confirm' Crown ownership. The stated rationale at the time was that the government had always assumed it owned the foreshore and seabed, and therefore the intended legislation would simply confirm that long held assumption. As is common knowledge, the policy development process from that point on was fast, adversarial, contested and progressed within a climate of escalating racial tension.

One of the notable points of that policy development is that original issue that had motivate Te Tau Ihu to go to the MLC was seemingly lost. The preoccupation with property rights and Crown ownership arguably obscured the underlying and actual issues that catalysed the litigation i.e.- Iwi frustrations with the statutory decision making framework concerning use and occupation of the marine environment, primarily in relation to aquaculture activities.

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

## **The Act**

1. The nature and consequences of the Act are well understood, therefore in brief, the Act had the effect of;
  - Vesting the foreshore and seabed in the Crown;
  - Codifying new tests for aboriginal title and use rights to be recognised by the courts (Territorial Customary Rights Orders and Customary Rights Orders respectively);
  - Creating legal outcomes for obtaining Territorial Customary Rights and Customary Rights;
  - Creating customary use rights recognition for non-indigenous people; and
  - Comprehensive amendments to integrate the Act with the pre-existing suite of statutes applying to the coastal marine area.

As is well known, the tests for the various orders in the Act were framed oppressively as they are effectively impossible to meet, meaning that very few Iwi or hapū would be able to secure any form of protection from the Act, although there didn't seem to be much benefit from securing those protections in any event.

A number of Iwi initiated negotiations with the Crown pertaining to the foreshore and seabed within their rohe, including Ngāti Porou, Te Whānau a Apanui, Te Rarawa and Ngāti Pahauwera.

The Act was taken to the United Nations and it was successively found that it breached fundamental human rights standards in that it discriminated against Māori and the government was requested to engage in substantive dialogue with Māori to remedy its discriminatory effects. While the former government did not act on these recommendations, the Māori Party secured the commitment of the government to review the Act. The executive summary of the Review is attached in the appendices.

## **Challenges of Designing the Replacement Regime**

There are a number of challenges in designing an appropriate replacement regime. One of the key challenges will be ensuring that the new framework addresses both the injury caused by the Act as well as the real cause that led to Te Tau Ihu going to the MLC, namely that:

- Property rights issues must be addressed to resolve the poignant grievance resulting from the Act; and
- Management and decision making concerning the marine environment must be reformed to provide for Iwi and hapū so as to provide an enduring remedy to the Act by addressing the actual policy issues concerning the foreshore and seabed.

It will also be difficult for the government to satisfy the expectations of Iwi and hapū. Across the motu, Iwi and hapū have high expectations of the new framework being 'transformative', on the basis that the injury caused by the Act was so deep that the government now has to do something really meaningful to restore the relationship between the Crown and Iwi.

It will also be important for Iwi and hapū to talk together about shared expectations and areas of difference. To support Iwi and hapū engagement with the replacement framework, a group of Iwi Leaders came together to engage with the Crown on shaping the new policy.

## **Work of the Iwi Leaders Group**

The Iwi Leaders Group was formed in August 2009. At the Hopuhopu Iwi Leaders Forum on 20<sup>th</sup> August, it was agreed that Iwi Leaders would attend a meeting with the Prime Minister and other senior Ministers on 26<sup>th</sup> August to discuss the government's response to the Ministerial Review Report on the Foreshore and Seabed. At the meeting on the 26<sup>th</sup> August, Iwi Leaders requested the following commitments from the government:

1. Confirm that the Treaty of Waitangi underpins the relationship between Iwi and the Crown and is the basis for all engagement concerning the foreshore and seabed;
2. Acknowledge that the key principle underlying the government's response to the Ministerial Panel Review Report is recognising and giving effect to the mana of iwi and hapū over the foreshore and seabed;
3. Structured and principled governance engagement between Iwi Leaders and Ministers;
4. Agreement as to reasonable access to information and resources to support collaborative engagement with the Crown and consensus building amongst iwi and hapū. .

Since that time, there has been a commitment by the Attorney General to the following;

- Regular engagement with Iwi Leaders during the policy development to provide a good flow of information and try to work together on a replacement framework that meets both the rights and expectations of Iwi and hapū and the policy of the Crown;
- A commitment from the Attorney General to talk through any differences of opinion that arise;
- Agreement that there will be technicians level involvement between Crown officials and Iwi advisors on the details of the policy development.

The Iwi Leaders also undertook to convene hui across the motu to support discussions amongst Iwi and hapū on their expectations for the replacement regime.

## **Regional Hui**

Recognising the importance of this issue to all Iwi and Hapū and the need to identify solutions that provide for each and every Iwi and Hapū to express their own mana over their rohe moana, the Iwi Leaders' Group convened hui in November and December 2009 so that Iwi and hapū could come together to discuss the options available to us collectively and that provide for our respective differences as well.

The hui were held in; Whangarei, Hauraki, Napier, Hawera, Whanganui and Waikawa (Picton) to canvas the views of iwi and hapu on what they would like to see in a replacement regime to the Foreshore and Seabed Act 2004 (a planned hui in Murihiku (Southland) was cancelled due to inclement weather). These hui were attended by more than 200 people.

The discussion at the hui had a number of common themes:

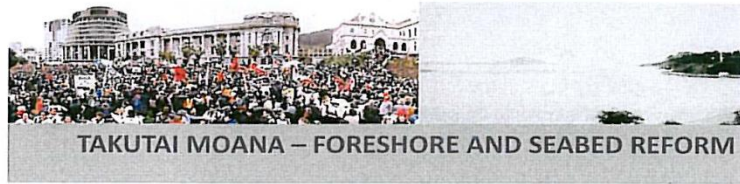
- The continuing, deep and abiding mamae and offense caused by the 2004 Act;
- The valuable work Iwi and hapū have done on alternatives to the 2004 Act, as evidenced in submissions presented in 2003/04 and to the Ministerial review panel this year;
- The need for a replacement to the 2004 Act to fully reflect the rights of Iwi and hapū as set out in Te Whakaputanga, Te Tiriti, the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights standards;
- The challenge that any replacement to the 2004 Act should not only undo the wrongs that it did, but be transformative and replace the Act with something better than what existed before it – given that Te Ihu Ihu Iwi only went to the Māori Land Court seeking title because of the failure of the pre-existing regime to adequately protect their rights and interests;
- That carrying over any form of Crown ownership from the 2004 Act will be viewed as an continuation of the raupatu effected by that Act, no matter what else the replacement regime might contain;
- That no replacement to the 2004 Act will be acceptable unless it results from meaningful engagement between the Crown and Iwi/hapū;
- That a replacement regime must have a number of key characteristics. It should:
  - Recognise the mana of Iwi/hapū over their rohe moana in principle and give effect to that recognition in practice;
  - Provide for effective input of Iwi and hapū into all aspects of the management of the marine environment and marine resources;
  - In some cases, recognise Iwi/hapū as decision-makers in the management and allocation of resources;
  - Where it is necessary to apply thresholds or tests to the level of Iwi/hapū involvement in decision-making, source these in tikanga, rather than colonial law; and
  - Recognise that going to court to establish Iwi/hapū mana or rights in respect of their takutai moana is the least preferred option.
- The need for the Iwi Leaders' Group to communicate well with Iwi and hapū, faithfully represent the views of Iwi and hapū to the government and be accountable.

### **Next Steps**

It is likely that the following steps will occur:

- Further update on work to date at the national hui on the 4<sup>th</sup> February; and
- Crown consultation may occur in the first half of this year.

If Crown consultation does occur within the coming months, Iwi leadership may wish to convene further hui to discuss a collective response to the policy.



## Context Questions + Answers

November 2009

### INTRODUCTION

The Foreshore and Seabed Act 2004 (the Act) is arguably the most significant piece of legislation affecting Māori in recent history. It led to:

- Over 25,000 people marching on Parliament opposing the Act;
- The United Nations repeatedly finding that the Act discriminated against Māori because it extinguished property rights without consent or compensation; and
- The Government ignoring both the strong opposition of Māori and the United Nations.

This year, the Act was reviewed by an independent panel who recommended that the Act should be repealed. Ultimately, this recommendation occurred because Māori successfully mobilized and strongly advocated for change.

But getting rid of the Act only fixes part of the problem. It needs to be replaced with something that fully recognizes our mana and our rights. Our advocacy needs to continue, and we need have clear messages about what is, and what is not, acceptable to iwi, and to encourage the Government to make honourable decisions.

This paper is intended to provide some background, and answer some frequently asked questions regarding the matter.

### WHERE DID THE FORESHORE AND SEABED ACT COME FROM?

The issue started in the 1990s with an application by the iwi of Te Tau Ihu to the Māori Land Court, asking for a finding that the iwi held customary title over the foreshore and seabed in their rohe moana, the Marlborough Sounds. One of main reasons the iwi took the case was because they were dissatisfied with poor management of the marine environment, particularly decisions on the allocation of space for marine farming. It was thought that a finding of customary title would give the iwi more say over management and decision making over the marine environment.

The case made its way to the Court of Appeal, by which time, only a technical legal point was being considered: whether the Māori Land Court could actually hear the case. The Court of Appeal found that the Māori Land Court could hear cases on whether Māori have property rights in the foreshore and seabed, but it did **not** find that Māori actually have property rights in the foreshore and seabed.

The government responded to the Court of Appeal decision by enacting the Foreshore and Seabed Act.

## WHAT DID THE FORESHORE AND SEABED ACT DO?

The Foreshore and Seabed Act effectively overruled the Court of Appeal decision, and created a new framework for property and customary rights in the foreshore and seabed. The key changes the Act made were to:

- Vest absolute ownership of the foreshore and seabed in the government;
- Extinguish any Māori property rights in the foreshore and seabed that existed before the Act became law;
- Create restrictive rules and processes for recognising Māori (and non-Māori) customary rights in the foreshore and seabed;

## WHY DID MĀORI OPPOSE THE FORESHORE AND SEABED ACT?

Māori strongly opposed the Act for a number of reasons including that:

- The Act extinguished Māori property rights in the foreshore and seabed without the consent of Māori or compensation for the loss;
- That the extinguishment was discriminatory because non-Māori property rights were not affected by the Act;
- The government should not have created an Act before the full court process had finished because there are constitutional principles which say that the due process of the courts should be seen to completion. For this reason, the Māori Land Court should have been allowed to hear the Te Tau Ihu case, and make a decision on whether or not they did, in fact, have customary title over the foreshore and seabed;
- The rules and processes for obtaining orders under the Act (called Territorial Customary Rights Orders – TCRs – and Customary Rights Orders – CROs) undermine mana whenua mana moana because they reduce and restrict the relationship iwi, hapū and whānau have with the foreshore and seabed;
- The rules for TCRs and CROs are unfairly strict, and will mean that few iwi, hapū and whānau can obtain the orders;
- The protections and rights that holders of TCRs and CROs get are inadequate because they do not give iwi, hapū and whānau any greater protection than what is already available under the RMA and through Treaty Settlements.

## WHAT WAS THE FORESHORE AND SEABED REVIEW?

The Foreshore and Seabed Review was an independent process carried out by a panel appointed by the Government and comprising Hon Justice Taihakurei Edwad (Eddie) Durie,

Richard Boast and Hana O'Regan. The review occurred as a consequence of the confidence and supply agreement between the National Party and the Maori Party.

The review considered the following questions:

- What are the nature of the relationship, rights and responsibilities that iwi, hapū and whānau have with the foreshore and seabed?
- How could the government have provided for these relationships, rights and responsibilities (instead of passing the Foreshore and Seabed Act)?
- Does the Foreshore and Seabed Act appropriately recognise and protect these relationships, rights and responsibilities?
- If the Foreshore and Seabed Act doesn't appropriately recognise and protect these relationships, what alternatives could be put in place?

## WHAT WERE THE RECOMMENDATIONS OF THE REVIEW?

The primary recommendation of the review panel was to repeal the Act.

The second, and important, recommendation was to work with Maori to have a "long conversation" to reach a resolution to the issue. As a minimum the review recommended that a new regime be based on a "Treaty framework" that recognises, respects and provides for the rights and entitlements of the Crown and Maori as stated in the Treaty of Waitangi.

The review also made some comments about alternative options that could be explored in designing a new framework. They were the potential of a national settlement (much like fisheries), the potential for regional settlements, the restoration of court proceedings, and the maintenance of direct negotiation options.

## ISN'T IT ENOUGH TO JUST HAVE ACT REPEALED?

If the Act was just repealed, and the law put back the way it was before the 2004 Act was passed. Iwi and hapū would have the right to go to the Māori Land Court to attempt to prove that they have 'customary title' to their takutai moana. Although Te Ture Whenua Māori says that land is customary land if it is held "in accordance with tikanga Māori", it is likely that the Court would be swayed by elements of the common law tests for 'aboriginal title' and outcomes would be hard to predict. Whatever the outcome, going to court would be expensive and take a long time. Even for Iwi/hapū recognized to have customary title, it is unclear what rights that would give them in relation to their rohe moana. For example, it would not necessarily improve their ability to influence some decisions under the Resource Management Act or the Fisheries Act.

## SO WHAT SHOULD COME AFTER REPEAL?

**Some principles we might like to see guide the development of a replacement to the 2004 Act**

- a. *Recognising Mana*

- The replacement framework must genuinely reflect the Treaty of Waitangi relationship;
- The replacement must be designed to recognise mana whenua mana moana, which means exploring ways to ensure that Iwi and hapū can exercise authority and have decision-making roles over the marine environment;
- The decision-making role of Iwi and hapū should not be confined to just the foreshore and seabed – it should extend to ensuring the environmental sustainability of the marine environment. This includes decision making over the use and allocation of marine space, as well as protecting the quality of sea water from discharges and other pollutants;
- Providing a decision making role for Iwi and hapū will require exploration of co-management models and improving the current mechanisms we use for involving Iwi and hapū in decision-making and regulatory processes;
- It is not enough just to amend the Act, a broader solution is needed that addresses the cause of the foreshore and seabed issue. The foreshore and seabed issue started with objections to poor management of the marine environment and therefore, any solution must improve management of the marine environment and the role of Iwi and hapū in that management.

*b. Customary Rights Recognition*

- The recognition of customary rights, including property rights, should be determined solely according to tikanga Māori;
- customary rights include rights to develop as a people—they are not confined to subsistence activities and include commercial development and access to new resources as they are discovered;
- Recognising customary rights should reverse the approach used in the current Act. The Act requires Māori to prove that their customary rights exist. The proper alternative is that the government should have to disprove that customary rights exist.
- Iwi, hapū and whānau should not have to go through costly and time consuming court processes to have their customary rights recognised.

*c. Addressing the Māmae of the Foreshore and Seabed Act*

- The Foreshore and Seabed Act must be repealed to remedy the injustice that Māori experienced;
- In doing so, the customary and property rights that the Act sought to extinguish, must be restored as a matter of law;
- The New Zealand constitution should be amended so that nothing like the Foreshore and Seabed Act can ever happen again – this will require proper recognition of the Treaty of Waitangi and full protection of human rights standards.

## **WHAT'S HAPPENING NOW?**

Cabinet confirmed on 2 November 2009 that they would repeal the Act. The Government are in the process of exploring ideas for an alternative framework. There is engagement between iwi leaders, on behalf of iwi, and the Government.

## **WHO IS DESIGNING THE NEW FRAMEWORK?**

Various Ministers, including those from the Māori Party, and their departments are involved, led by Hon Chris Finlayson, Attorney-General and Minister in Charge of Treaty of Waitangi Negotiations. Iwi leaders are working with a core group of technicians and will engage with the Crown as the new framework is being designed. Neither the Iwi Leaders involved nor the technicians claim to speak for all Māori, but they seek to influence the new framework so that it better accounts for the rights and entitlements of Iwi/hapū. It is therefore essential that they hear the whakaaro or Iwi and hapū on the question of what should replace the current Foreshore and Seabed Act.

## **WHEN WILL A NEW ACT BECOME LAW?**

We estimate that the Government will try to get the new legislation passed prior to the next election year, 2011.

## **WILL MAORI GET A SAY ON THE NEW FRAMEWORK?**

Iwi leaders and technicians are holding a series of hui in November and December to collect the ideas of Iwi and hapū on what a replacement to the 2004 Act should look like.

Further consultation and discussion will occur in January, February and March 2010, at regional and national hui, with the Crown likely to be engaging directly with Iwi and hapū around March. As much information as possible will be distributed to the regions so that Iwi/hapū can engage in the process and make informed decisions.