

KAUPAPA UPDATE—FORESHORE AND SEABED

Summary of Paper

The foreshore and seabed issue is now at a significant point; the Crown has consulted on its preferred replacement framework to the Foreshore and Seabed Act 2004 and most Iwi have indicated that they do not support the framework in its current form. This paper provides an overview of the Crown's preferred replacement framework, the responses of Iwi and hapū during the Crown consultation hui, and some of the policy options available.

The commentary paper distributed by the ILG to provide an analysis of the Crown proposal and identify some prospective alternatives is also attached as an appendix to this paper.

Recommendations

It is suggested that the hui consider the policy options available for the replacement framework and particularly discuss strategic responses over the coming months, including political engagement and media strategies.

Introduction

The Foreshore and Seabed Act 2004 (the 2004 Act) was one of the most significant pieces of legislation in contemporary history that was responsible for; repeating colonial type expropriation of Māori property rights; mobilizing Māori in a way not seen for decades, polarizing the nation on issues pertaining to race and securing United Nations scrutiny in a way unknown to New Zealand previously. The Māori Party, through their confidence and supply agreement, negotiated for the 2004 Act to be reviewed, which was completed in 2009. The review was damning of the 2004 Act and strongly recommended repeal and replacement of the 2004 Act, however the Panel thought it proper to only offer principles and broad options for the replacement framework rather than a specific model. The Crown has been developing its policy thinking on the nature and shape of the replacement framework since August 2009 and released their preferred model on 31st March 2010. An Iwi Leaders Group (ILG) has been engaged on this issue since August 2009, and produced a shadow document providing a commentary and some alternatives to the Crown proposal on 31st March as well.

The Crown proposal is a comprehensive replacement of the 2004 Act, that has both constructive and less than acceptable elements. The positive elements are that the Crown has committed to repeal the 2004 Act and undo the Crown vesting of the foreshore and seabed. The less than acceptable elements are the notion of 'public domain' that will render the foreshore and seabed a 'non-ownership' space, and that the tests to prove Iwi/hapū/whānau rights to the foreshore and seabed will result in most Iwi/hapū/whānau not being able to prove that rights exist because colonial injustices will mean that the tests cannot be satisfied.

The ILG clearly advised the Attorney General, prior to the release of the consultation document, that the preferred Crown model was unlikely to be accepted by Iwi and hapū, primarily because the model was too similar to the 2004 Act, and did not respond to the expectations Iwi Māori had expressed over the last 10 years, including in the regional hui held in November-December 2009.

As of writing this paper, it was unclear how government was intending to respond to the feedback from the consultation hui.

It would appear that a priority for the Iwi Chairs Forum is to consider the strategic responses to the Crown's preferred model at this time, and particularly evaluate the nature of political and media workstreams over the coming months.

Summary of Crown Preferred Replacement Framework

The Crown's preferred model for the replacement framework is summarized below. Please note, a more comprehensive commentary is provided in the attached ILG paper on the

consultation document. The Crown proposal is based on the following key elements:

- **Repeal 2004 Act** - The consultation document recommends that the Foreshore and Seabed Act is repealed and the rights it purported to extinguish restored as a matter of law.
- **Crown Ownership**- The preferred model for ownership is described as a 'no ownership regime', which results in the foreshore and seabed legally not being owned by anyone, and the new Act it as the "public domain/ takiwā iwi whānui". The details around this 'no ownership' approach are not quite clear in the document. In particular, the document does not identify whether the Crown proposes to give up the ownership of 'non-nationalised' minerals (minerals other than petroleum, gold, silver and uranium) which it took by virtue of the 2004 Act. The alternatives that have been considered are; full vesting in the Crown, vesting of radical title (the right to regulate subject to Iwi and hapū rights) and full Māori ownership.
- **Nature of Iwi/Hapū Rights**- The replacement framework uses an aboriginal title based framework to defined the nature of Iwi and hapū rights as being of two key types:
 - Title/Territorial Rights - which are the rights that amount to property rights akin to customary or aboriginal title in the foreshore and seabed (like a freehold title to land); and
 - Use/Non-Territorial Rights - which are the customary practices of Iwi and hapū - the customary uses of the foreshore and seabed (which are like, but don't include, customary fisheries practices).
- **How Iwi/Hapū Rights are Recognised** - the document identifies two ways that the rights (territorial and non-territorial) can be recognised;
 - Negotiations - through direct negotiations between the Crown and Iwi and hapū
 - Courts - through litigation in the courts, with a preference expressed for the High Court over the Māori Land Court.

The Attorney General expresses his preference for direct negotiation being the main way that rights are recognised. It is unclear whether the tests set out below for the court processes will also be applied to negotiations and it appears as though the outcomes for court processes (as below) will also guide the outcomes for negotiations.

- **Tests for Iwi/Hapū Rights** - There are tests set out for both non-territorial and territorial rights.
- The **non-territorial rights test** incorporates both tikanga and common law, and is described as having the following elements
 - Iwi and hapū must prove continuity of use/practices since 1840 and that that use/practice continues to be carried out by iwi/hapū; and
 - If Iwi/hapū prove the first step above, it must then be proven whether or not the relevant use rights have been extinguished. The document signals that the government is considering whether it should be the Crown that has to prove extinguishment (rather than Iwi/hapū having to disprove it).
- The **territorial rights test** incorporates both tikanga and common law, and is described as having the following elements:
 - Iwi/hapū must prove they held an area of foreshore and seabed according to tikanga at 1840 and have maintained exclusive use (other than in the case of fishing and navigation by third parties) and occupation of it in a substantially uninterrupted way since that time, for which ownership of abutting land will be a relevant factor; and
 - If Iwi/hapū prove the first step above, it must then be proven whether or not the relevant rights have been extinguished. As noted above, the government is considering whether it should be the Crown that has to prove extinguishment.

The document notes that the tests should combine both tikanga and the common law “in line with the Treaty of Waitangi, its principles and associated jurisprudence”. In respect of both tests, however, where - for example - continuity of use and/or

occupation had been interrupted by virtue of Crown actions in breach of the Treaty, that use/occupation would still be regarded as extinguished and Iwi/hapū complaints in respect of the Crown actions would fall to be dealt with in the historical Treaty settlements process.

- **Outcomes from Iwi/Hapū Rights**– The outcomes that come from having non-territorial and territorial rights recognised are described in the document as awards and include:
 - **Non- territorial** – there are three types of awards described:
 - Protection of customary activities – uses and practices that are recognised will be legally protected under the Resource Management Act, so that people applying for consents will not be able to adversely affect customary practices;
 - Rāhui over wāhi tapu – Iwi and hapū will be able to impose rāhui over wāhi tapu, that will be given effect by the issue of a Gazette notice under the authority of the Minister of Māori Affairs or Minister of Conservation;
 - Planning document – Iwi and hapū will have the right to create a planning document which will be taken into account under the Resource Management Act and considered under other legislation, such as the Local Government Act and Fisheries Act.
- **Territorial**— would be recognized through a “customary title”, which would be inalienable and from which three awards would flow;
 - Permission right – Iwi and hapū will be able to give or withhold permission for activities requiring a resource consent in the area that they have title over;
 - Participation in conservation processes – Iwi and hapū will have certain rights over conservation activities including marine reserves and concessions;
 - Planning document – this would be the same as for the non-territorial rights award, but would have a higher status in decision-making under the Resource Management Act.
- While **development rights** are not explicitly discussed in the document, it is noted that coastal hapū/iwi would have a right to obtain commercial benefit from use of an

area over which non-territorial or territorial rights had been recognized, though how that would occur is not discussed.

Iwi and Hapū Responses

The positions that we understand Iwi and hapū represented during the consultation hui included:

- **Repeal of the 2004 Act and restoration of the rights it extinguished-** this point was universally supported by all hui.
- **Revocation of all assertions of Crown ownership of foreshore and seabed-** This point was also universally supported by all hui, with some speakers noting the need for the Crown to also give up its claims to ownership of non-nationalised minerals in order to give full effect to this objective.

Little or no support was expressed for the transfer of foreshore and seabed to a 'no ownership'/public domain regime, with some speakers referring to the idea as a cultural insult with echoes of the offensive terra nullius concept of the 19th century. Of the four ownership options presented in the Crown discussion document, only the Māori ownership model attracted support. Alternative models were proposed, including the Tūpuna Title model presented by Ngāti Kahungunu and the Treaty Title (shared Crown/iwi title) offered by Ngāi Tahu.

- **The nature of iwi/hapū rights over foreshore and seabed-** The proposal that two categories of iwi/hapū rights (territorial and non-territorial) be provided for was not expressly discussed by many speakers at the hui, but a lack of support for this categorisation was implicit in the kōrero of speakers who called for a more holistic approach. A more unified approach to recognition of rights was also implicit in assertions that rights had not changed from those that pre-existed the Treaty and were guaranteed in Article Two.
- **Processes for recognising iwi/hapū rights -** The concept of dual court and negotiation routes for recognising rights were generally supported, with some caveats. The strongest concern expressed in relation to this point, however, was that iwi and hapū should not have to prove anything to either the courts or the Crown. Your response, at several hui, was that proof was required simply so that the Crown and other agencies could be

assured that they were dealing with the right group, which appeared to be viewed as broadly acceptable.

A number of concerns were expressed in relation to both judicial and negotiated route for recognition of rights, with a common theme being that processes should not foster divisiveness as has been the case in the past.

- **Tests for iwi/hapū rights-** There was no discernable support for the proposed tests of customary rights. The two points that came through the most strongly were that:
 - The relationship between iwi/hapū and their takutai moana should be tested solely in terms of their own tikanga, with imported common law concepts such as exclusivity having no place in the jurisprudence of Aotearoa/New Zealand; and
 - Actions of the Crown carried out breach of the Treaty of Waitangi, such as raupatu, improper land dealings and Public Works Act takings should not be treated as extinguishing the rights of iwi/hapū. Put another way, extinguishment should only occur with the free, prior and informed consent of the indigenous rights-holders.

- **Outcomes/awards/mechanisms for expressing iwi/hapū rights -** While there was little detailed commentary on the proposed awards at the hui, the clearly expressed view was that the ultimate outcome of any replacement regime should be mechanisms that fully empower iwi/hapū in the exercise of their mana, rangatiratanga or customary authority. This would require mechanisms for more effective roles in all environmental decision-making, including in respect of fisheries management, marine mammals and minerals, and was also expressed as including pragmatic means of sharing in the benefits of the full range of commercial development.

Situational Analysis

It is clear that there is are significant differences of opinion between he Crown and Iwi/hapū as to the nature and outcomes of a durable, principled replacement framework. Given the short timeframes for enacting any replacement framework, it is timely for the Iwi Chairs to consider how they wish to respond to the current situation. As discussed above, and further in the attached paper, there are a range of technical options that could provide a durable outcome that respond to the expectations of Iwi and hapū. It is particularly important for the Forum to consider how it wishes to engage with government and the media in the coming months as decisions are taken as to whether a replacement to the 2004 Act will proceed, and if so, its nature and outcomes. A more comprehensive verbal presentation will be given to the hui on the strategic options available.