



Kaupapa Update – FORESHORE AND SEABED

IWI CHAIRS FORUM

8th- 9th May 2010
Ōnuku Marae, Akaroa

Overview

- Current situation:
 - Crown proposal
 - Iwi/hapū responses
 - Timeline for Crown policy development
- Iwi Leaders' Group role:
 - August 2009 mandate
 - Next phase?
- Future decision points

Crown proposal

1. Repeal 2004 Act

- The Act to be repealed and rights it extinguished restored

2. Crown Ownership

- Preferred model is ‘no ownership’ – public domain
- Details not clear, e.g. re: ‘non-nationalised’ minerals

3. Nature of Iwi/Hapū Rights:

- Territorial Rights – property rights akin to customary/aboriginal title
- Non-Territorial Rights – customary practices/uses like, but excluding, customary fishing

Crown Proposal (cont.)

4. How Iwi/Hapū Rights are Recognised:

- Negotiations – NB: Court tests and outcomes relevant
- Litigation (AG preference for High Court over MLC)

5. Tests for Iwi/Hapū Rights:

- **Non-territorial rights test:**
 - Common law and tikanga
 - Iwi/hapū must prove continuity of use/practices since 1840
 - If proven, then establish whether rights have been extinguished (probably to be proven by the Crown)

Crown Proposal (cont.)

– Territorial rights test:

- Common law and tikanga
 - Iwi/hapū prove they held fssb according to tikanga at 1840 and have had exclusive use and occupation since then
 - Ownership of abutting/contiguous land a relevant factor
 - If proven, then establish whether rights have been extinguished (probably to be proven by the Crown)
- Despite saying tests should be in line with ToW where, continuous use/occupation is interrupted by Treaty breaches, customary title/rights still extinguished

Crown Proposal (cont.)

6. Outcomes from Iwi/Hapū Rights:

– Non-territorial rights:

- RMA protection of customary activities
- Rāhui over wāhi tapu
- Planning document (enhanced Iwi Plan) under the RMA and other legislation

– Territorial rights/“Customary title”:

- Permission right – Iwi/hapū able to give/withhold permission for activities requiring a resource consent
- Conservation mechanism – input to conservation processes, e.g. marine reserves
- Planning document (further enhanced)

– Development rights – Iwi/hapū can obtain commercial benefit from use of an area over which rights recognised, though not clear how

Iwi/Hapū Responses

- 1. Repeal of the 2004 Act and restoration of the rights it extinguished**
 - Universally supported
- 2. Revocation of all assertions of Crown ownership of foreshore and seabed**
 - Universally supported
 - Crown should give up ownership of non-nationalised minerals
 - Little/no support for a ‘no ownership’/public domain regime
- 3. The nature of iwi/hapū rights over foreshore and seabed**
 - Calls for a more holistic approach
 - Rights unchanged from those that pre-existed the Treaty and were guaranteed in Article Two

Iwi/Hapū Responses (cont.)

4. Processes for recognising iwi/hapū rights

- Dual court/negotiation process generally supported
- Iwi/hapū should not have to prove anything to courts or the Crown

5. Tests for iwi/hapū rights

- No support for the tests of customary rights as proposed
- Iwi/hapū relationship with fssb should be tested only by tikanga
- Crown Treaty breaches should not extinguish rights of iwi/hapū

6. Outcomes/mechanisms for expressing iwi/hapū rights

- Outcomes should empower mana/rangatiratanga/customary authority
- Effective roles in environmental decision-making
- Sharing in the benefits of all commercial developments

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Timeline for Crown Policy Development

- June-July:
 - AG reports back on consultation
 - Final Cabinet decisions
- August:
 - 1st Reading of Bill
 - Referral to Select Committee
- September-November:
 - Select Committee process
- December:
 - 3rd Reading

Iwi Leaders' Group Role

- First discussed at Iwi Chairs Forum, Hopuhopu August 26th 2009:
 - Mandate for ILG to engage with the Crown on framing process to achieve repeal and develop replacement regime
- Iwi Leaders' Group has:
 - Listened to Iwi/hapū (incl. hui in Nov-Dec 2009)
 - Had several meetings with AG and other Ministers
 - Overseen some technical level engagement
 - Influenced programme for recent hui
 - Advised the Attorney-General that the April proposal was unlikely to be supported by Iwi/hapū

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Iwi Leaders' Group Role (cont.)

- Direction to the ILG for the next phase?
- Continue engaging with the Crown to try to close the gap between the April proposal and the Iwi/hapū positions summarised above?
- Anything else?

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Coming Decision Points

- The PM has said his government has no interest in introducing a replacement to the 2004 Act that does not have the substantial support of Iwi
- Government will not bring in a replacement that is not broadly acceptable to all NZers
- So:
 - How will we decide if the replacement is acceptable to Iwi/hapū?
 - What will we do if it is not?