



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 the 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This year, the Act was reviewed by an independent panel who recommended that the Act should be repealed.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 Mamae 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.