

# FORESHORE AND SEABED REPLACEMENT FRAMEWORK

## POTENTIAL THRESHOLDS

Preliminary Advice prepared by the Technical Advisory Group for the Attorney General

18th December 2009

### Executive Summary

1. The Attorney General requested the Technical Advisory Group (TAG) to present advice on the prospective thresholds that could be instituted in the replacement regime to the Foreshore and Seabed Act 2004.
2. This paper identifies a number of alternative threshold constructions which are set out in two classes:
  - a. Thresholds pertaining to awards that reflect the attributes of mana; and
  - b. Thresholds pertaining to awards that reflect incidents of title (we note however that reference to 'title' is used for convenience and that we do not mean to invoke notions of 'title' according to English law).
3. The rationale is that the nature of the award should be the key determinant in construction of threshold including the rigour of the standard to be met and applicable body of jurisprudence. Our key findings for the construction of the awards are set out in the table below:

#### Thresholds for the Attributes of Mana

<b>Key Legal Question</b>	'who'
<b>Body of Jurisprudence</b>	Tikanga only
<b>Rigour</b>	Should there be an agreement to reserve certain mana instruments for distinct areas/circumstances, we suggest that tikanga Māori should govern any applicable inquiry, perhaps according to the principle of ahi kaaroa.
<b>Extinguishment</b>	No grounds of extinguishment
<b>Onus</b>	Presumptive recognition of any prior agreements as to boundaries of rohe moana and, in the case of inter-lwi dispute, establishment should be according to principles of tikanga Māori to the balance of probabilities

#### Thresholds for Incidents of Title

<b>Option A- Tūpuna Title</b>	
<b>Legal question</b>	Who/where
<b>Body of jurisprudence</b>	Tikanga only
<b>Rigour</b>	Requires further consideration

<b>Extinguishment</b>	Requires further consideration
<b>Onus</b>	Presumption is that title subsists
<b>Option B – Customary Title</b>	
<b>Legal question</b>	Who/where
<b>Body of jurisprudence</b>	Tikanga only
<b>Rigour</b>	We suggest that tikanga Māori could determine any intensity inquiry, should that be warranted. We also note that the extinguishment and onus limbs below have a de facto effect of narrowing the application of this form of title.
<b>Extinguishment</b>	Through investigation of land holding alternative status as land under Te Ture Whenua and/or where property rights have been granted to third parties (we note however this approach perpetuates historical injustices)
<b>Onus</b>	According to Te Ture Whenua currently or provide for shifting onus
<b>Option C- Aboriginal Title</b>	
<b>Legal question</b>	Who/where Type of right (title or use)
<b>Body of jurisprudence</b>	Hybrid (common law prevails)
<b>Rigour</b>	High as requires satisfaction of common law standards
<b>Extinguishment</b>	Express extinguishment by lawful means with consent and compensation
<b>Onus</b>	Amend current common law approach to provide for shifting onus

4. The paper concludes that further work may be beneficial on the following matters:
- a. Analysis of the status and operation of tikanga Māori within New Zealand, with particular consideration of the contemporary incorporation and application;
  - b. Analysis of the applicable principles of tikanga Māori, with guidance provided by appropriate experts in tikanga Māori;
  - c. Analysis of the potential reconciliation of awards and thresholds; and
  - d. Assessment of the prospective awards and thresholds according to domestic and international standards.

## Introduction

5. This paper responds to the Attorney General's request that the Technical Advisory Group (TAG) provide advice on the prospective thresholds that could be instituted in the replacement regime to the Foreshore and Seabed Act 2004. The paper is set out as follows:
  - a. Threshold Determinants – that contextualises the construction of thresholds according to the nature of the ensuing awards, and suggests that there are two base classes of threshold; (1) those pertaining to the attributes of mana and (2) those directed to inquiry into title;
  - b. Thresholds for Mana – that proposes a prospective threshold for establishing entitlements to the awards providing for the expression of mana, and identifies grounds on which certain awards could be reserved for distinct areas/circumstances;
  - c. Thresholds for Title – that proposes alternative thresholds for three different types of title; tūpuna, customary and aboriginal; and
  - d. Conclusions and Next Steps – that suggests some further work that could advance the policy development pertaining to thresholds.

## Threshold Determinants

6. It is understood that thresholds are considered necessary in the replacement framework for both political and legal reasons so as to provide for clear, certain, stable and smooth implementation of the new Act.
7. In preparing this advice, we have formed the view that the nature and effect of the threshold(s) should turn on the nature/outcome of the award(s) arising from satisfying the test. We have formed this opinion because it is customary for tests to be particularised to certain awards. For example, the different tests for damages as opposed to exemplary damages and the like. We also note that your officials have previously advised that a nexus should be drawn between thresholds and awards.
8. In this context, we consider there is a distinction to be drawn between two classes of award, that correspond to two classes of threshold:
  - a. Awards that seek to express attributes of mana—creating a 'mana threshold'; and
  - b. Awards that seek to give effect to the incidents of title – creating a class of 'title thresholds'.
9. This distinction turns on mana being distinct from, albeit related to, proprietary and usufructory rights (including those expressed in the form of title). It is our understanding that mana is the pre-existing source of Iwi and hapū authority over and within their territories, whereas proprietary interests are more in the nature of a derivative and partial translation of mana that arose at the time English common law was introduced to New Zealand to enable transactions in land that were not conceivable in terms of mana. It is our view that mana has a different source, character and mode of subsistence from title, and therefore propose alternative threshold constructions.
10. We consider that the distinction between class of award/threshold materially impacts on the following elements of the construction of the thresholds:
  - a. The key legal question the threshold is seeking to test;
  - b. The body of jurisprudence applied through the test;

- c. The rigour of the test;
  - d. The potential grounds of extinguishment; and
  - e. The onus of proof.
11. The paper considers each class of threshold in turn according to the elements above.
  12. We also recognise that the nature of the thresholds will contribute to determining the appropriate jurisdiction, but do not provide comment on that matter at this stage.

### Thresholds for Attributes of Mana

13. As you are intimately familiar with, mana is an ancestral inheritance that is constituted in spiritual terms by tikanga Māori to found an enduring and inalienable suite of authorities and responsibilities. It should be stressed that this mana is seen by Iwi and hapū as something *more than* title and proprietary or usufructory rights, not something *less than* as they perceive it has been treated by the Crown in some contexts.
14. The expression of mana or customary authority is widely considered by Iwi and hapū to be the primary object sought from the replacement regime and the TAG has also received extensive feedback on the nature and effect of any thresholds instituted in respect of any awards that seek to provide for the expression of mana.
15. The table below sets out a construction of a potential threshold for awards seeking to support the expression of mana:

Element: Legal Question	Recommendation
(the legal question that the threshold directs the inquiry to)	<p><b>‘Who/Where’</b></p> <p>We recommend that the legal question be directed to which Iwi/hapū holds mana moana over areas of the foreshore and seabed.</p>

#### Rationale:

This recommendation is based on the following assumptions;

- That because mana is enduring and inalienable (except in accordance with tikanga), we consider that mana will continue to subsist irrespective of the treatment of other legal rights over time i.e. even where property rights may have been transferred/extinguished etc, mana endures;
- The ‘who’ question is consistent with extant precedent, such as the inquiry into customary land status under Te Ture Whenua Māori Act;
- The ‘who’ question will apply principles of tikanga Māori that are known, including the jurisprudence recorded through the Native/Māori Land Court and Waitangi Tribunal. At a generic level, these principles are likely to draw on the *take* that have been the subject of extensive writings (scholarly and judicial). We would welcome the opportunity to provide further advice on the applicable principles with guidance from appropriate tikanga experts.

- The key issue that will arise is likely to be the point in time assessment, including consideration of the relevance of the 1840 rule.

<b>Element: Body of Jurisprudence</b> (tikanga/common law/hybrid)	<b>Recommendation</b> <b>Tikanga Māori as the sole body of jurisprudence</b>
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**Comment:**

This recommendation is based on the following assumptions;

- That mana is constituted exclusively by tikanga Māori and therefore should be provided for solely in that body of law;
- That tikanga Māori has identifiable principles that are readily capable of application and ensuring certainty and stability of outcome;
- That the content of the applicable tikanga may vary across Iwi and hapū, and the tikanga applied should be that of the applicant ( we also note that this approach is comparable to some principles of private international law);
- That international law, including the recommendations of UN organs in relation to the Foreshore and Seabed Act, supports the tikanga Māori being the body of jurisprudence;
- We also note the position of many Iwi and hapū that mana predates and exists independently of the operation of common and statutory law; and
- Accordingly, that incorporating common and/or statutory law would fundamentally alter the nature of mana in a way that could be seen to debase the spiritual and ancestral constitutive limbs of mana.

We also consider there is value in working with appropriate experts in tikanga Māori to further consider the principles of tikanga Māori.

<b>Element: Extinguishment</b> (conditions)	<b>Recommendation</b> <b>No grounds of extinguishment</b>
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**Comment:**

This recommendation is based on the following assumption;

- Mana is enduring and in our opinion subsists irrespective of the status of property rights, therefore, while property rights might be susceptible to extinguishment, mana is not.

<b>Element: Onus</b> (onus of proof)	<b>Recommendation</b> <b>Presumption that mana exists replaces burden unless inter-Iwi/hapū dispute arises</b>
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**Comment:**

This recommendation is based on the following assumptions;

- That it should be presumed that mana subsists nation wide;
- That the rohe of Iwi and hapū have been considered/determined/agreed on a number of occasions, albeit not without dispute and litigation, and where possible we consider there should be a presumptive adoption of prior agreements between Iwi/hapū as to their respective rohe.
- In the case of dispute, we consider the onus should be met through proof of principles of tenure under tikanga Māori (the *take* referred to above).

We also note that should a existing judicial body apply these thresholds, that further work is done on the respective status accorded to oral and written evidence of tikanga.

Element: Rigour	Recommendation
(the rigour/threshold of the test)	<b>Consideration of ‘levels of intensity’ to be determined according to the principles of tikanga Māori</b>

**Comment:**

We recognise that there has been some consideration of certain ‘mana instruments’ being reserved as ‘special awards’ that apply over distinct areas. While we reserve our position on this approach, we consider that principles of tikanga Māori could govern such assessments. For indicative purposes, and without having considered the body of tikanga in fitting depth, we note the potential relevance of the following principles:

- a. Ahi kaaroa – the active presence of communities within a region. However, we note the following matters that would need to be addressed:
  - i. That ‘active presence’ should not be interpreted so as to mean continuous occupation as that would misconstrue the principle;
  - ii. Where ‘active presence’ has been precluded by the acts of the Crown (direct and indirect), it would could amount to ‘double jeopardy’ for Iwi/hapū to be deprived of certain entitlements as a result of acts considered to be historical injustices
- b. Tuku whenua/tuku aroha – the conditional gifting of sites which results in the rights of the recipient being of a different and lesser character than the grantor and may have some application in this context.

We also emphasise that Iwi and hapū have strongly and consistently stated that there are no differential degrees of mana, and that it is unacceptable to suggest that the mana of some Iwi/hapū is greater or stronger than others (except in the context of tuku whenua/tuku aroha and otherwise according to tikanga Māori).

**Thresholds for Incidents of Title**

16. Title is readily perceived as the central issue that ought to be addressed in the replacement regime, on the basis that the removal of jurisdiction breached constitutional conventions and human rights, as well as being tantamount to the extinguishment of the rights underlying title (due to the inchoate nature of aboriginal title prior to judicial declaration).
17. However, we reiterate our understanding that the effective expression of mana is the actual issue that ought to be addressed, on the basis that the original cause that compelled Te Tau Ihu to

initiate their claim in the Māori Land Court were deep concerns with decision making over the marine environment and disregard of their cultural imperatives.

18. We are also convinced that the significance of title within the replacement regime will turn on the nature of, and the awards attaching to, any title that is constructed under the legislation.
19. In this context, we emphasise that 'title' is perhaps an inappropriate term, as we do not necessarily mean to invoke the standard incidents of title that exist under English law and that the incidents associated with the different forms of title below will need to be further considered when the inter-dependency between the awards and thresholds pieces of work is addressed.
20. We consider that there are three potential types of title that are alternatives for inclusion in the replacement framework:
  - a. Tūpuna title;
  - b. Customary title; and
  - c. Aboriginal title.
21. It is acknowledged that a fourth, *sui generis* form of title could be developed, having its own distinct characteristics and components. In our assessment, the thresholds for each of the forms of title should be constructed in distinct terms, consistent with the nature and incidents of the particular form of title. We discuss below each of the forms of title in turn.

#### *Tūpuna Title*

22. Tūpuna Title, as you are aware, is a proposition that has attracted strong support from Iwi and hapū across the country and has been variously articulated as Tūpuna Title, Tikanga Title, Whakapapa Title and Māori Title.
23. We consider that Tūpuna Title articulates the legal relationship that Iwi and hapū have with the foreshore and seabed according to tikanga Māori. While it may have some commonalities with aspects of freehold title in practical respects, we consider that it is a *sui generis* form of title that is premised on, and seeks to articulate, the inherent authority of Iwi and hapū.
24. As noted in our previous paper, we consider there is a high degree of interconnection between mana and Tūpuna Title. While we are not comfortable speaking in conclusive terms, we consider that the relationship could be that mana is the underlying legal principle and Tūpuna Title is the legal embodiment of that principle. A comparative example could be the fundamental right to own property, alone or in association with others, and not to be arbitrarily deprived of it (articulated, for example, in Article 17 of the Universal Declaration of Human Rights), which is given effect, in New Zealand in respect of individual parcels of land through the indefeasibility principles of the Torrens System by virtue of the Property Law Act 1952 Land Transfer Act 1952
25. We also consider that further work is required on articulating the incidents of Tūpuna Title, but do not address that matter in this paper.
26. The table below provides a summary of our construction of a potential threshold for Tūpuna Title. We emphasise that this is preliminary advice that seeks to convey the sentiment and insights from the recent hui, but that still requires further advice from tikanga experts.

<b>Element: Legal Question</b> (the legal question that the threshold directs the inquiry to)	<b>Recommendation</b> <b>'Who/Where'</b> We understand that the legal question be directed to which Iwi/hapū holds Tūpuna Title over areas of the foreshore and seabed.
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**Rationale:**

This recommendation is based on the following assumptions;

- We understand from Iwi and hapū that Tūpuna Title is constituted by tikanga Māori and is an outgrowth of the inherent authority vested in Iwi and hapū, prior to and independent of the acquisition of Crown sovereignty.
- Tūpuna Title is articulated as applying nationwide, in the form of an underlying/pre-existing legal relationship between Iwi and hapū and the foreshore and seabed, that is not affected in legal terms by the creation of subsequent statutory rights and interests;
- Tūpuna Title is also widely described as enduring and inalienable.

<b>Element: Body of Jurisprudence</b> (tikanga/common law/hybrid)	<b>Recommendation</b> <b>Tikanga Māori as the sole body of jurisprudence</b>
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**Comment:**

This recommendation is based on the following assumptions;

- That Tūpuna Title is understood to be constituted by tikanga Māori and the pre-existing authority of Iwi and hapū;
- That this form of title is designed to provide for the expression and maintenance of the tikanga/kawa of Iwi and hapū;
- That the incorporation of common law elements would fundamentally alter the nature and expression of tikanga.

<b>Element: Extinguishment</b> (conditions)	<b>Recommendation</b> <i>Requires further discussion with Iwi and hapū</i>
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**Comment:**

This recommendation is based on the following assumption;

- It is our understanding that Tūpuna Title is not capable of extinguishment (or alienation) because it exists independently of common and statutory law. However, this matter has not been substantively discussed during recent hui, and we consider it prudent to engage in further discussions before providing a recommendation.

<b>Element: Onus</b> (onus of proof)	<b>Recommendation</b> <b>Presumption that Tūpuna Title exists replaces burden unless inter-Iwi dispute arises</b>
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**Comment:**

This recommendation is based on the following assumptions;

- Because Tūpuna Title is presumed to exist in the same manner as mana (as discussed above) it is recommended that the same onus of proof apply as with mana.

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<b>Element: Rigour</b>	<b>Recommendation</b>
(the rigour/threshold of the test)	<i>Requires further discussion with Iwi and hapū</i>

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**Comment:**

This recommendation is based on the following assumptions;

- This matter has not been substantively discussed during recent hui, and we consider it prudent to engage in further discussions before providing a recommendation.
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### *Customary Title*

27. Customary title appears to have been adopted to refer to two different but potentially equivalent matters:

- a. Declaration of customary land status under Te Ture Whenua Māori Act; and
- b. Title constituted by tikanga Māori (that may or may not be equivalent to Aboriginal Title).

28. There has been limited reference to customary title in recent discussions pertaining to the foreshore and seabed, however there does seem to be a tangible lack of clarity as to whether customary title is more like Tūpuna Title or Aboriginal Title. Accordingly for the purposes of this paper, we treat customary title as meaning ‘customary land status’ under Te Ture Whenua Māori Act.

29. We note that this form of customary title is unlikely to correspond to the outlook of Iwi and hapū, particularly should the limbs pertaining to extinguishment (derived from Te Ture Whenua Māori) be applied as set out below.

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<b>Element: Legal Question</b>	<b>Recommendation</b>
(the legal question that the threshold directs the inquiry to)	<b>‘Who/Where’</b> We understand that the legal question be directed to which Iwi/hapū holds Customary Title over areas of the foreshore and seabed.

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**Rationale:**

This recommendation is based on the following assumptions;

- That customary land status under Te Ture Whenua is based on the presumption that all land was held under tikanga Māori as at the acquisition of Crown sovereignty, and therefore, unless it has been extinguished, the only legal question to answer is ‘who’ holds the benefit of the customary land status.
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<b>Element: Body of Jurisprudence</b> (tikanga/common law/hybrid)	<b>Recommendation</b> <b>Tikanga Māori as the sole body of jurisprudence</b>
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**Comment:**

This recommendation is based on the following assumptions;

- That section 129 of Te Ture Whenua Māori Act sets out the legal test as “according to tikanga Māori”.
- That test is strongly supported by Iwi and hapū, although there appears to be little appreciation of how section 129(2) of Te Ture Whenua works, by effectively making Māori customary land a residual category, that only exists where no the land holds no other status, as described below.

<b>Element: Extinguishment</b> (conditions)	<b>Recommendation</b> <b>Specified grounds of extinguishment including: prior investigation by the MLC and granting of property rights to a third party</b>
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**Comment:**

This recommendation is based on the following assumptions;

- Customary land status under Te Ture Whenua Māori Act is treated as defeasible. While we do not necessarily agree with this position, we consider that this treatment could result in the above grounds of extinguishment being deemed consistent with the current state of the law;
- Prior investigation by the Māori Land Court (or Native Land Court) is consistent with purpose and history of this court, given that it was always anticipated that inquiries would result in the transmutation of customary land into freehold title. We note that as a matter of fact, there are likely to be few if any parcels in this situation;
- Granting of property rights to a third party is based on the current operation of Te Ture Whenua. While we do not necessarily agree with this position, our understanding is that the inquiry in Te Ture Whenua is a two part process that:
  1. Determines whether the land subject to the claim holds any other status (the classes of land under Te Ture Whenua); and
  2. If the land is not subject to a status, then the Court considers who holds the customary land.
- We also emphasise that where land holds an alternative status (ousting Māori customary status) as a result of historical breaches of the Treaty of Waitangi, Iwi and hapū view that as , in effect, putting them in a double jeopardy situation, where the breach of the Treaty rights defeats their ability to establish Maori customary land status.

<b>Element: Onus</b> (onus of proof)	<b>Recommendation</b> <b>Te Ture Whenua burden or a shifting burden with a presumption that the Iwi/hapū holding mana moana also holds title</b>
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**Comment:**

This recommendation is based on the following assumptions;

- Under Te Ture Whenua now, we understand that the burden rests of the applicant to first prove that the land does not have any other land status and secondly, establish their entitlements under tikanga Māori to that land.
- We consider that this burden could be changed so that the Crown is obligated to establish that the land has a status other than Māori customary land, and that where that onus is not met, the land holders should be those agreed to hold mana moana over the rohe, unless there is a dispute. [sorry, I might have misconstrued what you are trying to say here]

<b>Element: Rigour</b> (the rigour/threshold of the test)	<b>Recommendation</b> <b>Application of tikanga Māori and note the de facto operation of the grounds of extinguishment and onus of proof</b>
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**Comment:**

This recommendation is based on the following assumptions;

- Te Ture Whenua Māori does not provide for an intensity based assessment, except to the extent that it is consistent with tikanga Māori, for example to assess the respective merits in the case of disputes as to who is entitled to hold the customary land. We do not see any legal basis to argue for an amendment to this approach.
- We also note that the effect of the extinguishment and onus is to reduce the nature and scope of the title recognised.

*Aboriginal Title*

30. Aboriginal Title, as you are intimately familiar with, is a common law doctrine that provides for the treatment of pre-existing property rights held by Indigenous peoples on the acquisition of sovereignty by a colonial power. This doctrine operates by:

- a. Recognising that the property rights are created by Indigenous law;
- b. Providing for the common law to further test the nature and extent of those rights according to grounds that assess whether the rights are tantamount to fee simple title or the lesser species of usufructory rights;
- c. Instituting grounds that constitute extinguishment of those rights; and
- d. Empowering the courts to declare the legal character of those two species of right.

31. Iwi and hapū have strongly signalled their aversion to aboriginal title and aboriginal rights forming a component of the replacement regime. We understand from the recent hui that these forms of

rights are considered to interfere with the operation of tikanga, and also tread in contested constitutional matters as to the status of Iwi and hapū autonomy and the legal effect of tikanga Māori. We therefore present the advice below for completeness sake, and do not suggest that it is likely to be considered acceptable by Iwi and hapū.

<b>Element: Legal Question</b> (the legal question that the threshold directs the inquiry to)	<b>Recommendation</b> <b>'Who/Where';</b> <b>How much/what type of right (title or use)</b>
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**Rationale:**

Due to your personal familiarity with this body of law and previous advice provided by Crown officials on comparative approaches to aboriginal title, we provide a brief summary of the assumptions we have adopted;

- This amounts to a generic and accepted approach in respect of aboriginal title. The inquiry first assesses whether rights existed under Indigenous legal traditions. It then tests the strength of those rights against common law standards pertaining to demonstration of control of the area. The grounds/elements of control are distinct to jurisdictions, and span matters such as; exclusivity or occupation at the point sovereignty was acquired; the nature of associations demonstrating exclusivity; maintenance of traditions (tangible vs intangible) and the like.

<b>Element: Body of Jurisprudence</b> (tikanga/common law/hybrid)	<b>Recommendation</b> <b>Hybrid (common law prevails)</b>
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**Comment:**

This recommendation is based on the following assumptions;

- That aboriginal title is premised on a hybrid approach to assessing the nature and extent of rights, recognising that the rights are constituted by Indigenous law and then determining whether they are recognisable to the common law according to particularised application of the doctrine.

<b>Element: Extinguishment</b> (conditions)	<b>Recommendation</b> <b>Express extinguishment by lawful means with consent and compensation</b>
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**Comment:**

This recommendation is based on the following assumption;

- That aboriginal title has accepted since early colonial times to permit extinguishment only where it is explicit. More recently, the doctrine has evolved by judicial and cross fertilisation within international human rights standards means to accept only express extinguishment that has occurred with the consent of the Indigenous peoples and that compensation has been provided for.
- If this standard for extinguishment were adopted, the aversion of iwi/hapū to the concept

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of aboriginal title is likely to be ameliorated to some extent.

<b>Element: Onus</b> (onus of proof)	<b>Recommendation</b> <b>Shifting burden</b>
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**Comment:**

This recommendation is based on the following assumptions;

- You have proposed a variation on the typical operation of the doctrine of aboriginal title, whereby once Iwi/hapū had established their interest in a particular rohe moana, the onus of demonstrating that their title to that rohe had been extinguished in accordance with the norms described above, would shift to the Crown;
- We view that approach as having merit and being appropriate to New Zealand circumstances;
- The initial step of establishing an Iwi/hapū interest would appear to overlap significantly (or wholly) with the establishment of mana moana, as discussed above.

<b>Element: Rigour</b> (the rigour/threshold of the test)	<b>Recommendation</b> <b>Achieved through the incorporation of common law and the differentiation between proprietary and usufructory rights (through such standards as occupation, exclusivity, nature of associations, maintenance of connection and the like)</b>
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**Comment:**

This recommendation is based on the following assumptions;

- The doctrine of aboriginal title is premised on rigorous standards so as to distinguish between proprietary and usufructory rights.
- The common law limbs that assess whether the rights are 'recognisable' also create tiers of rights;
- It is noted that there is now a body of scholarly commentary that suggests that in New Zealand, aboriginal title should be interpreted in light of Treaty jurisprudence which would result in a more restorative and permissive application of the doctrine.

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## Conclusions and Next Steps

32. This paper has sought to identify alternative constructions of potential thresholds in the replacement framework to the Foreshore and Seabed Act. As preliminary advice, we are aware that the paper does not address a number of matters that are legally and politically important. We anticipate that a paramount area of concern may attach to the certainty, stability and transparency of relying on tikanga Māori as the sole body of jurisprudence. We also foresee that the paper will raise questions as to the reconciliation of awards with thresholds, and a number of ancillary matters such as determining the appropriate jurisdiction. Accordingly, we would welcome the opportunity to discuss the contents of this paper with you and provide any further advice that

would be of assistance. In our assessment the following further work may be of particular relevance:

- a. Analysis of the status and operation of tikanga Māori within New Zealand, with particular consideration of the contemporary incorporation and application;
- b. Analysis of the applicable principles of tikanga Māori, with guidance provided by appropriate experts in tikanga Māori;
- c. Analysis of the potential reconciliation of awards and thresholds; and
- d. Assessment of the prospective awards and thresholds according to domestic and international standards.