

Coastal Coalition's response to National's propaganda about our newspaper advertisement

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The following document provides a response to the half-truths and misrepresentations being spread by the National Party regarding the Coastal Coalition's newspaper advertisement on the Marine and Coastal Area Bill. As we pointed out in our ad (see [here>>>](#)) National's new Bill will repeal Crown ownership of the foreshore and seabed in order to appease Maori Party demands. It will result in coastal resources that are presently owned by every New Zealander as part of our birthright and common heritage being effectively privatised to corporate iwi.

The reality is that this whole process has been hijacked by the Maori sovereignty movement which wants to gain control of the resources of the coast. It is the biggest attempted resource grab in New Zealand history – and, unbelievably, it is being orchestrated by the National Party!

To put what is going on into perspective, it is important to realise that while the Court of Appeal decision in the Ngati Apa case - which created the whole fiasco back in 2003 - indicated that some pockets of unextinguished customary title might still exist in the foreshore and seabed area, they were of the view that the area would be small and that proof would be difficult. They would surely never have envisaged that any government would lower the bar to such an extent that vast tracts of coastline – the straight line distance from Cape Reinga to the Bluff to be exact (wrapped around the coast of course) – would be given over to the Maori tribal elite. And that is only a start – the Maori Party has been very clear that they will continue to push for the bar to be lowered further so that even more of the coast will be claimed by iwi. [To read a briefing paper on the Bill click [here>>>](#)]

As you will see in the following document, National's strategy is to add information to our advertisement comments to make it seem like the Coastal Coalition is not providing the whole story. However, as you will be well aware, space constraints limit the number of words that can be used in an ad.

As you read on, it is important to keep in mind that the Prime Minister promised at the launch of the government's review of the 2004 Foreshore and Seabed Act, in March 2010, that if the public did not support a law change, the current Act would remain in place. While the review took place in April, the government suppressed the results for 6 months until the Coastal Coalition's Official Information Act request finally forced their release. The results clearly showed that the public were strongly opposed to a law change: 77 percent of the 1,234 submitters who answered the question (almost 3 to 1) were opposed to the repeal of Crown ownership of the foreshore and seabed, and 91 percent (13 to 1) were opposed to National's proposed legislation. In addition, the Select Committee submission process has resulted in the overwhelming majority of the more than 4,100 submissions on the Bill, being opposed to it.

Meanwhile, the political landscape has changed with the Labour Party withdrawing its support for the Bill citing two of the key issues identified by the Coastal Coalition as their reason – that they do not agree that public coastal resources should be allocated to iwi through secret political negotiations, and nor do they believe the Bill will provide an enduring solution. As a result the fate of the Bill hangs on a knife edge with a 2-vote majority margin. Given that one of those votes is that of Peter Dunne, leader of the United Future Party, questions should be asked as to why he has changed his stance since 2003 when he led a protest march in Nelson against the introduction of race-based rights in foreshore and seabed legislation: "*If we create*

rights for some New Zealanders and not others, then we start down a very sure and slippery slope to anarchy". You can read more details [here>>>](#) and you can email Peter at peter.dunne@parliament.govt.nz.

Because of the strong opposition to the Bill and a growing backlash amongst ordinary New Zealanders who believe the coast should remain in public ownership and control - if he is a man of his word - John Key will need to find a way to withdraw the Bill.

Q&A ANALYSIS - Coastal Coalition's responses to National's spin:

1. What's at stake? Control of 100,000 square kilometres of foreshore and seabed - everything out to 22km, all the airspace above that, the sea and all the minerals below.

Our reply to National's spin: They agree with us.

National's spin: The common marine and coastal area covers the space that New Zealand has sovereignty over. This extends over to the edge of New Zealand's territorial sea (12 nautical miles). It includes the airspace for the same reason dry land does - to enable people using the land (say ports, for example) to build structures, stand up and move around rather than having to continuously lie down flat so as not to intrude upon the air space. For the same reason, while it includes the water space it does not include ownership of water.

When a group seeks recognition of customary title within that area it must prove exclusive use and occupation since 1840 of the whole part of the area it is seeking customary title to. This may or may not be as far as 12 nautical miles, depending on the facts of each case.

2. How big an area is that? More than one third of the land area of New Zealand.

Our reply to National's spin: They deliberately misrepresent the question.

New Zealand's land area is 268,000 sq km, and with the foreshore and seabed covering 100,000 sq km, that is 37 percent - well over a third.

National's spin: The only land covered by the marine and coastal area is the "wet" part of coastline covered and uncovered by the tide. It does not include any dry land.

3. What's it worth? Our ironsands alone are worth \$1 trillion. Our seabed minerals include titanium and rare earths. Then there's all future aquaculture. So it's many billions.

Our reply to National's spin: They deliberately misrepresent the question.

Crown Minerals has estimated that future iron sands reserves are worth \$1 trillion (see [here>>>](#)). This is part of the potential wealth that will be transferred from the Crown to Maori tribal groups who claim areas with iron sands reserves. The Bill does not affect fisheries legislation. Iwi owners would be able to engage in aquaculture projects but other new operators would need to ask their permission!

National's spin: All fishing rights and activities are unaffected by the Marine and Coastal Area Bill. Fishing is governed by its own, distinct legislation like the Fisheries Act 1996. Aquaculture is specifically provided for in the Bill and protected. Royalties to the Crown from ironsands and all other minerals except gold, silver, uranium and petroleum (which are not affected by the Bill) are worth about \$72,000 per annum.

4. But why shouldn't iwi get a share of it? They already do, as equal New Zealand citizens. Proceeds from our 'Crown jewels' should be used to buy medicines and education for all Kiwis, not just make the part-Maori tribal aristocracy richer.

Our reply to National's spin: They deliberately misrepresent the Question

While the present Foreshore and Seabed Act affirms Crown ownership of the foreshore and seabed including non-nationalised minerals - the benefits of which are shared amongst all citizens equally - it also allows iwi who succeed in claims for the equivalent of a customary title to negotiate redress for such rights with the Crown ... subject to High Court scrutiny.

National's spin: If Maori can prove they have native property rights to minerals then they should benefit from their property right. Crown royalties from non-reserved minerals currently amount to \$72,000 per annum.

5. Who owns the foreshore and seabed now? We all do - and have since 1840.

Our reply to National's spin: Obfuscation.

Eight generations of New Zealanders have lived with the understanding that the Crown owned the foreshore and seabed. The surprising Court of Appeal decision in 2003 overturned settled law and an earlier decision by the Court of Appeal in 1963, which had confirmed Crown ownership. The decision indicated that while some pockets of unextinguished customary title might still exist in the foreshore and seabed, the test was high. In other words, if Maori customary title did exist it would be rare and very hard to prove. That is the basis of the 2004 Foreshore and Seabed Act - Crown ownership of the foreshore and seabed with the bar set high for claims of Maori customary title, which need to be proven in the High Court.

National's spin: Until June 2003 the Crown had proceeded on the assumption it owned the entire common marine and coastal area. In the Ngati Apa case the Court of Appeal stated this was not actually the legal situation, that native property title continued to exist wherever it had not been extinguished. The Crown has only had absolute ownership of the common marine and coastal area since 2004 when the Government of the day extinguished all extant native property rights.

6. Did we have a 22km limit in 1840? No, back then it was only 5.5km (3 nautical miles). It didn't become 22km (12 nautical miles) until 1977.

Our reply to National's spin: They agree with us.

National agrees that the Government has no ability to give title to the seabed outside of territorial waters. This is very relevant as such title could not have been given out to 12 nautical miles in 1840. That hasn't stopped Maori tribal groups trying to claim out to the 200 nautical mile limit. The Government may not even have the international right to give title in the Territorial Sea now.

National's spin: True. The extent of New Zealand's territorial waters has changed over time as international law on sovereignty has developed. This is unrelated to the extent of customary rights exercised by Maori before 1840.

7. So even if iwi had owned the seabed from 1840, Key is giving them four times that? Well spotted.

Our reply to National's spin: Obfuscation.

They are answering Q 6 again. It is also important to note that the Bill will reverse the burden of proof presumption in Clause 105 (2). This means the Crown has to prove that customary title has been extinguished, rather than the claimants having to prove that customary title exists. With most deals expected to be negotiated in secret in the Minister's office through Clause 93-95 disproving such claims does not seem at all likely! And anyway, how can anyone disprove a claim about the habits of ancestors? Through this Bill public rights are being handed to iwi on a plate.

National's spin: Under Common Law, native (customary) title exists wherever it has not been extinguished (see Attorney General v Ngati Apa [2003] 3 NZLR 643 at lines 27-29). It could well have covered an area beyond three nautical miles in 1840, but within 12 nautical miles of the shore. The Crown can only recognise native title in that area where the Crown has sovereignty.

Today, that includes to an outer limit of 12 nautical miles (the extent of New Zealand's territorial waters). However, when an iwi seeks recognition of customary title within that area it must prove its exclusive use and occupation since 1840 of the whole part of the area it is seeking title to. This may or may not be as far as 12 Nautical miles, depending on the facts of each case. It will obviously be harder to prove exclusive use and occupation the further out to sea a claimed area is. For example, if an iwi customarily only ventured 1km out to sea, that is as far as their customary title could extend.

Customary title is also not capable of recognition outside of the 12 nautical mile territorial sea under common law. No Court has, or has ever had, the jurisdiction to recognise common law native title further out than the 12 nautical mile limit of territorial waters.

8. Have Maori always thought they owned it? No. They must have agreed it was owned by the Crown. Otherwise iwi would have included the foreshore and seabed in Treaty claims to the Waitangi Tribunal. None of them did.

Our reply to National's spin: We disagree.

Out of the thousands of Treaty claims, one that includes general 'cover-all' clauses does not change the fact that Maori, like everyone else thought the foreshore and seabed was vested in the Crown under common law.

National's spin: Untrue. For example, Ngai Tahu did include the loss of their common law rights and coastal marine areas in their Treaty settlement. See section 10(1)(a)(i) and (ii) of the Ngai Tahu Claims Settlement Act 1998.

9. Why do iwi think they own it now? Because an activist judge in 2003 said they might have a chance.

Our reply to National's spin: We agree.

We should have said "**Because activist judges in 2003 said they might have a chance**".

Canterbury University law lecturer and Treaty expert David Round explains the situation (see [here>>>](#)), "Why are the foreshore and seabed an issue at all? Why are New Zealanders once again snarling at each other in a racial confrontation? Quite simply, five people are to blame. They are the Court of Appeal judges who overruled the 1963 Ninety Mile Beach case. That had been accepted as settled law for forty years. It was the basis on which all Acts of Parliament and legal arrangements had been made ever since. It was the well-considered decision of a

strong court. The 2003 Court of Appeal was under no obligation to overturn it. Indeed, every law student learns in his or her first year of study that the New Zealand Court of Appeal is very reluctant to overturn its own decisions, and is prepared to do so only in several carefully defined situations. Only a fool would be unaware of how immensely controversial and politically charged the whole matter of race and the treaty is. Only a fool would be unaware of how dearly all New Zealanders love their precious coastline. In such a highly-charged area, more than any other, it is not for unelected judges to throw over established law and embark on political adventures of their own. The only possible responsible and acceptable course of action ~ indeed, the only course consistent with common prudence and common sense ~ would be to say: 'This is the established law. It is not for us to alter it. That is for Parliament and people. We merely declare what is law now, satisfactory or unsatisfactory as that may be.' But this court wasted no time considering the propriety of overruling its 1963 decision. It leapt in where it need not have gone at all. Rumour had it that one or two of the judges were initially inclined to find for the Crown. They should have followed their instincts. As it is, the then judges of the Court of Appeal have caused this crisis, and the discredit they have brought upon themselves is entirely deserved."

National's spin: Untrue. In Attorney General v Ngati Apa [2003] 3 NZLR 643 the Court of Appeal stated native property rights continued to exist until lawfully extinguished. This was a unanimous decision of a full bench of five judges. It was not the decision of a single "activist" judge.

Maori have never accepted they had no customary property rights in the coastal area. For example, see the answer to question 8 above.

10. Was that why Helen Clark re-affirmed Crown ownership? Yes. She thought Parliament (our highest Court) should secure the coastline for all Kiwis, not just coastal iwi.

Our reply to National's spin: Obfuscation.

To be precise, Parliament is the country's top 'law-making' body. And with regard to the Privy Council, since Labour had tabled a Bill in Parliament in December 2002 to abolish appeals to the Privy Council, an appeal of the Ngati Apa decision to the Privy Council was regarded by them to be out of the question.

National's spin: The Privy Council was New Zealand's highest court at the time. The government of the day legislated to bring the public foreshore and seabed into absolute Crown ownership in 2004.

11. And John Key wants to surrender Crown ownership? Yes, he wants no-one to own the foreshore and seabed.

Our reply to National's spin: Obfuscation.

Clause 11 establishes a new political construct - used no-where else in the world - a 'common marine and coastal area' that can be owned by no-one except Maori. Without a doubt, having no-one own the foreshore and seabed will make Maori claims easier.

National's spin: The Court of Appeal in Ngati Apa made it clear that from 1840 to 2004 the Crown did not have absolute ownership of the entire marine and coastal area, that the property interest of the Crown depended on any pre-existing customary interest (see Attorney General v Ngati Apa [2003] 3 NZLR 643 at lines 31-33). The Government wants to restore the Common Law of New Zealand and recognise property rights where they can be proven to exist.

12. Why does he want no-one to own it? So we'll all be powerless to object when iwi claim it (since we've just given it away!).

Our reply to National's spin: Obfuscation.

The reality is that National planned to call the foreshore and seabed "public domain", but the Maori Party objected. They thought it sounded like the public would still own it and they did not want that. They favoured "tupuna" or Maori ancestral title over all the foreshore and seabed – which is their long-term goal. To achieve Maori title they need Crown ownership removed. That is what the Marine and Coastal Area Bill does. In effect it is Maori Apartheid legislation masquerading as property rights since only Maori can gain customary title (ownership) to it. Not being able to sell is not an impediment, as titles can be passed between tribal groups and rights can be delegated according to tikanga, or leased. The area is not a "commons" in the usual sense of common responsibility for it by all citizens.

National's spin: Untrue. By placing the marine and coastal area into a common space for all New Zealanders the Government can ensure that free public access is guaranteed and that the area can never be sold off. The Government will continue to govern and regulate the common marine and coastal area.

13. Why is he so keen for iwi to get it? To appease his Maori Party allies and their clients the tribal aristocrats - who, as always, will pocket most of the money.

Our reply to National's spin: This is a gross exaggeration.

National's claim that the 2004 Act overturned 164 years of common law property right is a gross exaggeration. Until the Ngati Apa decision in 2003, Maori and everyone else believed the foreshore and seabed was owned by the Crown under common law. That had been confirmed by the 90 Mile Beach Court of Appeal decision in 1963. Maori sovereignty activists grossly misrepresented the decision of the Court of Appeal by claiming that Maori owned the foreshore and seabed resulting in a tsunami of claims for the area right out to the 200 mile limit. This was totally wrong since the judges had indicated that while Maori should have the right to test their claims in court, they warned the test was high and little if any customary title remained.

The 2004 Act reaffirmed Crown ownership giving Maori such a raft of rights that the National Party campaigned against it on the basis that it was too generous: "*This legislation will divide our country, not bring it together. This is not the way to build a better future for all of us.*"

National says the foreshore and seabed is Kiwi property. Not iwi property" (see [here>>>](#)).

National MP Nick Smith and United Future MP Peter Dunne even marched in Nelson protesting against plans to give Maori rights to the foreshore and seabed (see [here>>>](#)). Peter Dunne said: "If we create rights for some New Zealanders and not others, then we start down a very sure and slippery slope to anarchy". Nick Smith said that anyone who wants to divide up the shoreline for one exclusive group of citizenship must be stopped. How the worm has turned!

National's spin: Untrue. The Government is keen to address two important issues of principle:

1. The 2004 Act unilaterally overturned 164 years of common law property rights for one segment of the New Zealand population on the basis of ethnicity. Maori common law property rights were deliberately targeted and extinguished. There ceased to be universal protection of common law property rights in New Zealand (one law for all New Zealanders).
2. The 2004 Act cancelled the rights of one segment of the New Zealand population to access justice through the courts on the basis of ethnicity. The right of Maori to seek or protect common law property rights in New Zealand's courts was extinguished.

The Marine and Coastal Area Bill guarantees the rights of all New Zealanders in the common marine and coastal area - free public access, fishing rights, navigation rights, and all over existing uses and use rights. It preserves, and in some cases extends, the rights of vital infrastructure providers such as ports, airports and electricity companies.

14. How else is he making it easier to claim the coast? He's radically lowered the qualifying bar, so the floodgates will open.

Our reply to National's spin: We disagree.

This is a complicated but crucial issue - National and the Maori Party are trying to claim the test for customary title is far too high and should be lowered. But it has already been lowered to the point where the floodgates for claims will be opened.

The test for customary title in the 2004 Foreshore and Seabed Act was based on the Court of Appeal's Ngati Apa decision which indicated Maori *might* have customary title to the foreshore and seabed. The 2004 Act required that in order for iwi to gain customary title, they had to prove in the High Court they had used and occupied the area continuously and exclusively since 1840, *and* that they owned the land contiguous (abutting) to the area under claim.

Clause 32 (2) of the 2004 Act states:

*"...a group may be regarded as having had **exclusive use and occupation** of an area of the public foreshore and seabed only if—*

*(a) that area was used and occupied, **to the exclusion of all persons** who did not belong to the group, by members of the group **without substantial interruption** in the period that commenced in 1840 and ended with the commencement of this Part; and*
*(b) the group had **continuous title to contiguous land.**"*

In comparison, the new Bill, in Clauses 60-62:

1. Drops the *requirement* for iwi to **own** the land contiguous to their claim.
2. Drops the need for iwi to have used the area continuously since 1840 by allowing it to have been *transferred* from people not associated with the iwi - [Clause 62 (3)(a)(ii) of the Bill states: *the transfer was... from a group or members of a group **who were not part** of the applicant group to the applicant group or some of its members*]
3. Drops the need for iwi to have used it exclusively since 1840 by allowing others to have used it continuously for fishing and navigation - see Supplementary Order Paper 167.

In addition, clause 105 reverses the current presumption that iwi must prove their customary title has not been extinguished: "It is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished". In light of the fact that there is no-one to argue against all claims negotiated in secret in the Minister's office, this is tantamount to handing the right to the coast to iwi on a plate.

There are also two subsidiary supposedly customary awards, protected customary rights, and mana tuku iho (a claimed purpose of the Bill) that are not mentioned in the Ngati Apa case nor the 2004 Act. There is no legal justification for these subsidiary awards.

National's spin: Untrue. Claimants have to prove exclusive use and occupation of an area since 1840 without substantial interruption. That is a difficult test to meet. Think about the areas

you or your family frequent – could one group prove they have exclusively used and occupied those areas since 1840?

15. How has he lowered the bar? Under the present law, only iwi who own land next to the foreshore and seabed can make a claim for title. But John Key is waiving that requirement.

Our reply to National's spin: They deliberately misrepresent the issue.

National is deliberately misrepresenting the issue – see our detailed answer to 14 above. Also the claimed "land" is unallocated common marine and coastal land, not a freehold title with a house on it. The point is that under the present law, the only iwi who can claim that they have the equivalent of a customary title to the foreshore and seabed are those who have land adjoining the claim. With the foreshore and seabed being made up of the 'wet' part of the beach and the sea, claimants have to show that they have customarily used this area in an 'exclusive and uninterrupted fashion since 1840'. Yet in the proposed Bill, the need for iwi to own land next to the area being claimed has been dropped. But how on earth can an iwi possibly 'own' the wet part of the beach and the sea when they don't live next to it? Where do they go when the tide comes in? Where do they sleep at night? The new definitions in the Bill render the whole customary title concept a joke.

National's spin: The Bill amends the 2004 Act by making title to adjacent land a relevant factor, not a requirement in determining the existence of customary marine title. This is because a requirement to own adjacent land in proving property rights has no basis in New Zealand common law. There is no requirement in New Zealand law, for instance, that someone required to prove they own their house must first prove they own the neighbouring section or house.

Ownership of contiguous land remains a factor to consider as evidence of whether the claimants had exclusive use and occupation of the marine and coastal area. However, there may be instances where ownership of abutting dry land is irrelevant to whether a group has had exclusive use and occupation of the adjoining marine and coastal area, for example where it is not accessible from the adjoining dry land due to a high cliff that drops directly to the sea.

16. Don't iwi have to test their claims in Court? They do under the present law, but Key is waiving that requirement too.

Our reply to National's spin: Obfuscation.

Under the present law, iwi have to prove their customary rights claims in the High Court. But in their new Bill, National has created an alternative mechanism for settling claims: through Clauses 93-95 National has introduced the right for iwi to negotiate deals for the foreshore and seabed and the massive mineral resources therein in secret with a Minister, with no Parliamentary, judicial or public oversight or scrutiny. This secret deal-making regime, which banishes all other interested parties from being heard, or questioning evidence, is open to political corruption and has been strongly opposed by the Law Society and many other submitters.

In comparison, the 2004 Act requires that in the event of an agreement being reached between claimants and the Crown, the customary title claim must be tested in the High Court.

National's spin: Iwi had the right to negotiate with the Crown prior to the 2004 Act. Section 96 of the Foreshore and Seabed Act 2004 explicitly provided for negotiations between the Crown

and iwi. The Marine and Coastal Area Bill continues to provide for negotiations between the Crown and iwi.

17. Why doesn't Key want iwi to go to Court? Because he knows in an open Court most of them won't win.

Our reply to National's spin: They deliberately misrepresent the issue.

As confirmed in the response by the Attorney General to an Oral Question in Parliament on whether *"iwi whose claims for customary title of the foreshore and seabed are turned down by the courts [will] be able subsequently to gain ownership or customary title of the foreshore and seabed through negotiations with the Crown?"* – Court action will only be used as a last resort because it will be harder to win: *"I would have thought that in most cases it would be the other way round: iwi or hapū would seek to negotiate with the Crown and if they were dissatisfied they would commence proceedings"*.

Secret negotiations with the Minister are a part of an orchestrated strategy being enacted by National and the Maori party to significantly lower the bar for claims. It is interesting to note that Ngati Porou is the only iwi to have significantly progressed a customary title claim under the current 2004 legislation – which does require claims to be tested in Court – and while they have finalised their negotiation with the Crown over their deal they have yet to prove their case in the High Court. They have delayed their Court appearance several times.

National's spin: The test of exclusive use and occupation since 1840 is high and most claimants will find it difficult to meet. If the Government did not want claimants to go to court it would not have provided the ability for claimants to take claims to the High Court as specified in clauses 92 and 96-112 of the Marine and Coastal Area Bill

18. So where will iwi have to prove their claims now? In Chris Finlayson's office. Non-iwi Kiwis will be shut out of this secret "negotiation".

Our reply to National's spin: Obfuscation.

The real truth is that the Bill contains no detail of the secret negotiation process, nor does it require any involvement with stakeholders until after an agreement has been reached.

Further, the Bill does not specify that a judicial review can be carried out – and in any case, such a review would only look at the process at huge cost (in the region of \$100,000+) and not the substantive matter of the content of the agreement.

In other words, once a customary title is negotiated by the Minister there is no oversight or appeal process. This was affirmed in the following Oral Question, *"Does the Minister accept that when we have Treaty settlements that shift property and titles to iwi groups, those settlements are brought before the House and select committees for public scrutiny and ratification by Parliament, yet when it comes to the foreshore and seabed a Minister, by private treaty in his or her office, can sign the deal, with no public scrutiny and no oversight by Parliament?"* The Minister answered "Yes".

This, of course confirms our worst fears that the foreshore and seabed is destined to become a political bargaining chip before and after elections with Maori Party members such as Hone Harawira potentially eligible for the role of negotiating Minister in the future! Notifying other interested parties only AFTER the decision is made is a travesty of justice. They are banned by this Bill of any right of participation.

National's spin: Claimants can test their claims either in the High Court or in negotiations with the Crown. The Bill does not state which Minister will lead negotiations (unlike the 2004 Act which specified the Attorney General). Any negotiation with the Crown will be subject to full Cabinet Committee and Cabinet scrutiny, and under clause 95(2) of the Bill any proposed agreement needs to be publicly notified before being signed off by the Governor General.

Clause 93(4) of the Bill prevents the Crown entering into any agreement unless an applicant group can prove it meets the same test that will be used by the High Court (exclusive use and occupation since 1840 without substantial interruption).

If any member of the public thinks the Government has not followed the proper process or not applied the test for customary title specified in the bill, that member of the public could apply to the High Court for judicial review.

The Government has already given firm undertakings that regional government and key stakeholders will be engaged early on and throughout any negotiations.

19. But wasn't Chris Finlayson Ngai Tahu's lawyer? Yes. And now he's both the Minister for Treaty Settlements and the Attorney-General who approves those settlements!

Our reply to National's spin: Obfuscation.

From Chris Finlayson's maiden speech in Parliament: *"For many years I was involved in Treaty litigation. In particular I acted for Ngai Tahu in its claim against the Crown. The proudest moment of my professional career was being at Kaikoura on 21 November 1997 when the former Prime Minister, Jim Bolger, and Sir Tipene O'Regan for Ngai Tahu signed the Deed of Settlement."* Old allegiances and loyalties often drive decisions. It's called conflict of interest. No other Treaty Minister had this sort of conflict.

National's spin: The current Attorney General was a lawyer in private practice for 24 years. During that period he had a many clients ranging from the British Government to numerous commercial entities to the Catholic Church.

It is not unusual for the Attorney General to also be the Minister for Treaty Negotiations. The Rt Hon Sir Douglas Graham held both offices, as did Hon Dr Michael Cullen and Hon Margaret Wilson. Hon Mark Burton is the only Treaty negotiations minister in New Zealand's history to not have also been Attorney General.

21. What do iwi want? Customary title to the whole foreshore and seabed. (For starters.)

Our reply to National's spin: They deliberately misrepresent the issue.

Under the present Foreshore and Seabed Act 2004 iwi are required to go to court to test their claims for customary rights. Under the new Bill the secret settlement process will ensure that iwi will not need to go to Court at all – claims the new bill will enable iwi to have "their day in court" are a misnomer.

Iwi have been clear that this Bill is simply the first step to Maori Title to the whole coast. The Maori Party have openly indicated that they will re-litigate until they get what their supporters – the Maori sovereignty movement - wants.

National's spin: Iwi know many will not get customary title as the test is hard to meet. Iwi want (1) their right to access justice through the courts to seek or protect common law property rights restored, and (2) the ability to obtain common law property rights that have not been extinguished.

22. And what is customary title? Effectively it's privatising the coast to iwi.

Our reply to National's spin: They deliberately misrepresent the issue.

The agenda of the Maori Party is clear – Maori Title of the entire coastline. And as we have seen, weak politicians are quite happy to trade away the public's rights to the coast for Maori Party votes. That means over time, as the Maori Party negotiates for easier tests, more and more of coast will fall under iwi ownership and control.

While customary title cannot be sold, the rights identified in the Bill, which include the ability to influence RMA decisions and impose coastal plans, are very strong. In fact, the inability to sell the title is relatively meaningless, as the property right can be leased out without qualification – apparently for hundreds of years. And there is a commercial imperative in Clause 63 (2) (c), whereby iwi customary title owners are encouraged to exploit the coast for commercial gain. Notions of free public access are badly flawed where customary title exists – see # 27.

National's spin: Untrue. Firstly, given how hard the test of exclusive use and occupation since 1840, customary title is unlikely to exist in areas with built up populations or which are frequently used by the general public. It is misleading to talk of the entire New Zealand coastline.

Secondly, customary title is a very different form of title to fee simple (freehold or private) title. Customary title, unlike private title, cannot restrict free public access and, unlike private title, can never be sold off.

Where customary title can be proved, it sits alongside the guaranteed public rights of free access, fishing and navigation, and the protection of all existing uses and use rights. That is, all these rights are not affected by customary title.

23. What rights will customary title give iwi? The right to by-pass the Resource Management Act and veto and extract payment for everything that happens on their stretch of coast. The right to develop an area and mine its mineral wealth. The right to all new aquaculture developments. The right to impose iwi plans on central and local government.

Our reply to National's spin: They deliberately misrepresent the issue.

Clause 54 of the Bill states that a "*protected customary right may be exercised under ...an agreement **without a resource consent**, despite any prohibition, restriction, or imposition that would otherwise apply in or under sections 9 to 17 of the Resource Management Act 1991.*" Since a protected customary right is a lesser right than a customary title, Bell Gully and other legal experts have argued that the same right would apply to customary titles. In addition, under Clauses 65 to 69 customary title holders are granted the absolute right of veto, which will out-rank local authorities, as well as confer powers that are over and above those of private property owners.

For instance it is ludicrous to try to claim that private landowners with properties abutting the foreshore could commandeer royalties from iron sand mining on the seabed. However, the Bill

sets it up so that iwi not only have the right to mine minerals but they can also receive royalties from existing operations from the day they **lodge** a claim!

Under Clause 83 "A customary marine title group **is entitled to receive from the Crown any royalties due to the Crown** under the Crown Minerals Act 1991 in respect of minerals [(other than petroleum, gold, silver, and uranium existing in their natural condition) that are within the customary marine title area] ... **on and after the date on which the applicant group first lodges an application** under section 98 for recognition of a customary marine title order or notifies the responsible Minister of its intention to seek an agreement."

National's spin: This claim is misleading. The Resource Management Act applies to customary title holders and to areas where customary title exists. Customary title holders who will have had to prove they have been exclusively using and occupying an area since 1840 will have the right to permit or deny third parties the right to come in and build structures or undertake activities with significant environmental effects that require a resource consent within that area the title holder has been exclusively using and occupying since 1840. This is similar to the same right an owner of private property has. Existing resource consents, permits and licences are unaffected.

The permission right does not apply to existing aquaculture re-consenting, or certain categories of infrastructure, petroleum or existing mining privileges under the Crown Minerals Act. In addition there are a number of other accommodated activities which are not subject to the permission right including emergency activities, scientific research and activities necessary for the ongoing operations of ports (e.g., dredging) and important infrastructure

24. Will iwi get any other kind of title? Yes. Mana tuku iho (universal recognition) will be given to all coastal iwi and cover the whole foreshore and seabed.

Our reply to National's spin: Obfuscation.

The explanatory note to the Bill states: "*The Bill recognises the mana tuku iho of iwi and hapū, as tangata whenua, over the foreshore and seabed of New Zealand and it contributes to the continuing exercise of that mana **by giving legal recognition, protection, and expression to the customary interests of Māori in the area.***"

And from the government's website: "*What is universal recognition/mana tuku iho? The mana tuku iho ('universal award') recognises the relationship that iwi have with the foreshore and seabed in their respective areas, and will apply without the need for negotiation or court applications.*"

National's spin: Partially true. Mana tuku iho does not mean universal recognition, though it does apply to the common marine and coastal area. It is not a property right or a title.

25. What rights will mana tuku iho give iwi? The right to priority treatment by the Department of Conservation in such matters as marine reserves, whale watching and ferry concessions.

Our reply to National's spin: Obfuscation. But they agree with us.

Mana tuku iho automatically covers the whole of the New Zealand coastline and any iwi with an interest in the coast will be able to apply and be granted the significant rights conferred in Clauses 48-52 of the Bill. It is not a customary right and appears to have been created and introduced at the behest of the Maori Party – almost as a 'consolation prize' for those groups who will not qualify for a customary title. In addition, since it provides 'official recognition' of mana over the whole coast, it may be used to strengthen a later claim for Maori Title.

National's spin: Mana tuku iho formalises existing best practice in consultation by the Department of Conservation for some environmental issues such as marine reserves, provided for in existing legislation. It is not a property right or a title. It is not co-management nor does it bestow priority treatment.

It does not affect the guaranteed public rights of free access, fishing and navigation, or existing use rights. These are all guaranteed in the Bill.

26. What sorts of activities could iwi charge for? Just about everything from boat ramps, moorings, wharves and marinas, to aquaculture, mining, oilwells, tourism, pipelines and cables.

Our reply to National's spin: They agree with us.

They agree with us but take much longer to say so. Titleholders can charge rentals on new facilities such as wharves and slipways and, as the Bill stands at present, it appears they can charge recreational users directly or indirectly (see #27). While National has said it will propose an amendment to make it absolutely clear that charging for public access is prohibited, until that wording is seen, we reserve our judgement!

National's spin: Groups can gain a commercial benefit within a customary title area. That is, within an area the group has exclusively used and occupied since 1840. This encompasses mining activity for non-reserved minerals (excludes gold, silver, uranium and petroleum) and activities that require resource consents (that is, which have a significant environmental impact).

A customary title holder cannot charge for public access, any recreational activity, or for any existing use.

27. Are we still guaranteed free access to the beach and sea? No. First Finlayson ducked the question. When pressured, he said public access would be free. But he couldn't show where his bill says that. Why? Because he'd sneakily left out of it the current ban on charging!

Our reply to National's spin: They deliberately misrepresent the issue.

Under the well-established rule of statutory interpretation, when one statute replaces another and provisions are deliberately left out, then there is a presumption that Parliament no longer wanted that provision to apply. In the present Foreshore and Seabed Act 2004, Section 40 prohibits the charging for access in Maori-controlled areas. By leaving this provision out of the Bill, the government obviously intended to allow Maori the right to charge for access, a point that is reinforced by the clear commercial imperative of Clause 63 (2) (c) which states "A customary marine title group may use, benefit from, or develop (including deriving commercial benefit) from exercising the rights conferred by a customary marine title order or an agreement". This flies in the face of assurances that have been made to the New Zealand public.

Until an amendment has been tabled and scrutinised, the jury is out on whether free access is guaranteed. What we do know is that on dry land where the Trespass Act allows charging, some Maori owners who indicated that they would not charge for access to former public assets are now charging – for example to Mt Tarawera, the Eastern Kaimanawas, and for some activities on Lake Taupo and Lake Ellesmere.

National's spin: Untrue. The Bill guarantees free public access. Customary title holders do not receive any ability to charge for public access (see clause 63). The Government has also already stated it will amend to the Bill to remove any and all doubt that free public access is guaranteed.

There is no prohibition on charging for public access in the Foreshore and Seabed Act 2004. Under section 40 of the 2004 Act groups possessing a foreshore and seabed reserve are prohibited from charging for use and occupation of that reserve. There is no explicit prohibition on charging members of the public from accessing the reserve.

28. Can iwi deny beach access? Yes. The bill says iwi can bar you from any area the iwi says is wahi tapu (sacred). Maori wardens can fine you up to \$5000 for going there.

Our reply to National's spin: They deliberately misrepresent the issue.

Regarding safety matters, it should be government agencies or councils that temporarily prevent public access, not iwi. The Bill does not limit the size of wahi tapu. Most will be determined in secret negotiations with the Minister. The 2004 Act requires two ministers to investigate all other avenues before denying public access. This at least airs the issue publicly.

There are no burial grounds on the foreshore and seabed as bodies would decay and be washed away. Declaring a wahi tapu would prohibit public access to areas where the public has had unrestricted access for the last 170 years. Beach battlegrounds overseas such as Gallipoli, the Normandy landings and so on are not off-limits to the public. Wahi tapu are not needed on the foreshore and seabed – their provisions should be removed from this Bill.

National's spin: Misleading. Access can be restricted for reasons of public safety (e.g. no one expects unrestricted access to operational ports or navy bases) or for areas declared wahi tapu.

Wahi tapu are small discrete areas of particular significance to Maori groups for cultural or spiritual reasons such as burial grounds. There is scope for conditions or restrictions if these are necessary to protect a wahi tapu in customary marine title areas and in some cases these may restrict access, for example by designating a path through a wahi tapu area or not allowing domestic animals.

Wahi tapu conditions are set at the time the customary marine title is granted. This means the boundaries of any wahi tapu area and any conditions or restrictions must be approved by the High Court, or agreed by the Government following full Cabinet scrutiny before being signed off by the Governor General. A customary title holder has no ability to just declare a wahi tapu exists.

Wahi tapu areas already receive protection under the Resource Management Act, the Historic Places Act, and the Foreshore and Seabed Act, and in some cases that means restrictions on public access. The same applies to many areas of culture and historical significance for other New Zealanders.

Customary title-holders may appoint wardens who have the authority to inform people of any conditions relating to wahi tapu sites, and report people whom they believe have intentionally breached conditions relating to the wahi tapu. The wardens do not have any other powers.

Only the courts can fine people.

29. Would iwi really do that? It happens now on beaches they don't even own.

Our reply to National's spin: Obfuscation.

According to Auckland University head of Maori Studies Margaret Mutu: *wherever bodies were buried, the New Zealand Government's proposed replacement for the controversial Foreshore and Seabed Act lets presiding iwi restrict access. "It makes that beach tapu because you don't want people there digging them up accidentally. Where it's known, it will be," Dr Mutu said. "The legislation allows it, that wahi tapu must be protected." No one should be fossicking around a beach where bodies had been buried - just like any other cemetery, she said. "This is actually very, very common all around the coast. We bury our dead in sand dunes as a defence mechanism."*

At present wahi tapu can be registered through the Historic Places Trust, which has a few hundred registered – many of which, as Margaret Mutu has indicated will be on the coast. In addition, wahi tapu can be registered on District Plans through provisions in the Resource Management Act - like those at Wainui Beach - although many iwi will not indicate the exact location of wahi tapu areas on District Plans. One case where a blanket ban was proposed by Maori but a compromise reached after community consultation was at Kaiaua Beach north of Tolaga Bay. Wahi tapu presently being declared on land owned by others – and that have become public knowledge – can be found at Tinopai, Karikari Beach, Taipa and Matapouri Bay.

National's spin: Groups have no legal ability to restrict public access. Any restrictions on public access must be approved by the High Court or the Government.

Unlike the existing Foreshore and Seabed Act, the Marine and Coastal Area Bill creates a specific offence of interfering with the public's right of access. It also contains provisions for removing people who attempt to restrict public access.

30. Can we challenge a wahi tapu we don't think is fair? No. Iwi have the sole right to decide what is sacred. You have no right to object.

Our reply to National's spin: Obfuscation.

Since very few applications will go to the High Court, the safeguards outlined in the Bill mean very little. Most title will be awarded by secret negotiation with a Minister, but the Bill has no mechanism for hearing the views of other stakeholders. Talk of judicial reviews is a red herring – judicial reviews could not contest the substantive issue of the content of an agreement, only whether due process has been followed.

National's spin: Untrue. Iwi do not decide where wahi tapu exist. Under the Marine and Coastal Area Bill wahi tapu boundaries are set by the High Court or by the Government. Decisions of the High Court can be appealed and judicial review can be sought of Government decisions.

31. How much of the foreshore and seabed will iwi get customary title to? Finlayson says 2000km of coastline. Maori MPs say much more. Key says "no one really knows" - scary.

Our reply to National's spin: They deliberately misrepresent the truth.

An Interview between Guyon Espiner and Chris Finlayson on Q+A on TV1 in June:

*GUYON How widespread is customary title going to be? You said in parliament this week that

- I quote you – 'I believe we're not talking about very much at all, at the end of the day I do not believe it is going to result in very much more of the Foreshore and Seabed being subject to customary title'. New Zealand has something like 20,000 kilometres of coast line, how much is not very much at all?

***CHRIS** In the round I think, based on the sort of information I have, based on my talking around the place, **I'd say about 10%**, but I wouldn't want to be specific and say that bay's in and that bay's out, because we're going to have to look at this issue of exclusive use and occupation, and the other tests that go to determine it. I wouldn't want to fetter any government's negotiating position, or position in court, if I started to say well that bay's in. Any representation I make will be held against the government, or a future government.

***GUYON** **So something like 2000 kilometres of coastline under your guesstimates would be under customary title?**

***CHRIS** **Yes**, and that in the round guesstimate Guyon.

National's spin: Untrue. The Attorney-General said in one interview that up to 10 percent of the coast may potentially be subject to applications for customary title (based mainly on areas where coastal land was owned by Maori). This is very different from an estimate of how much title will actually be granted.

32. Will this satisfy iwi desires? No. Any iwi victory just spawns more claims. The Maori Party say they won't stop until the whole of our 200-mile economic zone is in Maori title.

Our reply to National's spin: They deliberately misrepresent the issue.

The Maori Party represent iwi who want sovereignty. That's why they are pushing for Maori Title. Iwi leaders have been open in stating that they want title to the whole coast including control of the fisheries and the exclusive economic zone. The Maori Party has already said they intend re-negotiating the foreshore and seabed in the future. National's Bill is not an enduring solution.

The Government decided to replace the 2004 Act because a small group of Maori considered they should own the foreshore and seabed. Their unsatisfactory solution is already causing deep divisions between Maori tribal groups and the other 90 percent of our society. This can be seen from the massive unpopularity of National's proposals in the April 2010 public consultations: 77 percent opposed repealing the 2004 Act, and 91 percent opposed National's Bill to privatise parts of the foreshore and seabed to Maori tribal groups.

When the April public consultation on the foreshore and seabed was announced, Prime Minister John Key said that if broad agreement could not be achieved, then he would withdraw the Bill and leave the 2004 Act in place. This is now the only honourable thing to do.

National's spin: The Marine and Coastal Area Bill represents the Government's solution to the foreshore and seabed issue, which has been like a weeping sore for the nation since controversial legislation was passed in 2004 removing access to justice and common law property rights for Maori. The Prime Minister has made it clear this government will not re-visit the issue.

33. Why is the Maori Affairs Select Committee hearing submissions on this Bill when in 2004, Helen Clark thought the issue was of such importance to all New Zealanders

that she established a special independent Select Committee of Parliament to deal with it? Good question!

Our reply to National's spin: They deliberately misrepresent the facts.

More than 2 years after National was elected, its main goal still seems to be to blame Helen Clark for everything. National is desperate not to admit the massive conflict of interest raised by the Committee's Maori members who have a strong desire to deliver for iwi groups.

Talk of other members being appointed to the Committee is a smoke screen. Only regular Maori Affairs Committee members have a vote on the Committee - new members cannot vote, whereas all members of the 2004 Special Committee had a vote. Avoiding a massive conflict of interest was managed far better by the Labour government.

National's spin: Helen Clark did not send the Foreshore and Seabed Bill to the Maori Affairs Select Committee in 2004 because she could not trust her own MPs on that committee to support extinguishing access to justice through the courts and removing the common law property rights of Maori. Instead she created a special Select Committee and stacked the membership to ensure she could extinguish access to the courts and common law property rights.

The Government decided to send the Marine and Coastal Area Bill to the Maori Affairs Select Committee because the bill's main effect is to restore rights basic access to justice and common law property rights stripped from Maori in 2004. The Bill guarantees public rights of free access, fishing, navigation and all existing uses and use rights.

The Select Committee has been joined by Act MP John Boscawen and Green Party co-leader Metiria Turei. Former Attorney General Hon David Parker is also sitting on the Committee. Since UnitedFuture leader Hon Peter Dunne was involved in a group of ministers looking at the Marine and Coastal Area Bill, all political parties except the Progressives (Jim Anderton) will have been closely involved in scrutinising this bill.

34 What mandate does John Key have to surrender our coast? None at all. His mandate was to abolish the Maori seats, not champion Maori sovereignty. It's a massive betrayal.

Our reply to National's spin: They deliberately misrepresent the issue.

The National Party did not campaign on privatising the foreshore and seabed to Maori tribal groups in 2008. If they had campaigned on it, they would have lost the election. This is an issue that affects every New Zealander now and into the future. National has no electoral mandate to pass this law.

John Key has promised that if there is not widespread support for his new Bill, he will leave the present law in place. He will should honour his promise and withdraw the Bill now.

National's spin: Untrue. National campaigned in 2008 on a policy that said a simple repeal of the 2004 Act was no longer possible.

The Marine and Coastal Area Bill guarantees the rights of all New Zealanders in the common marine and coastal area. It restores access to justice through the Courts and long established common law property rights. These are two core principles the National Party stands for.