

Consultation Document:

Reviewing the Foreshore and Seabed Act 2004

Comments

1. The notion of 'public domain' is appealing but is undefined save in the negative aspect that 'nobody owns' the foreshore and seabed. However, it is later apparent that designated groups are to possess significant property rights, which amounts to a constructive notion of ownership. In that sense, there is therefore a back door to reestablishment of private ownership through the institution of 'territorial rights', which are indeed also referred to as a territorial customary 'title'.
2. The notion of 'public access' is also undefined. Does this mean that as a general member of the public I can continue to gather pipi or mussels wherever I choose, as my family has for the past 160 years, subject only to conservation restrictions applicable to all? The document seems at times to suggest that this facility could be circumscribed, or even proscribed, by a 'territorial interest' granted to an iwi, hapu or whanau, notwithstanding the undertaking given by bullet point 3 p24. What 'public access' means therefore needs to be spelled out more explicitly, in terms of activities and uses.
3. Doubts under point 2 are possibly my misreading of section 4.6.4 of the document. This refers to a 'right to permit activities' (p 40 line 6) in contrast with a more limited notion of an implicit veto right over 'activities requiring coastal permits' (line 10). It needs to be spelled out more clearly just what is entailed here, which seems to amount to a veto over activities that require a formalised consent process.
4. The use of 'customary title' seems unnecessary in the context of 'territorial rights'. It is likely to provide friction in the future, if only because the notion of 'title' is a construct of ownership – and becomes the only such, under the proposed legislation.
5. The veto exercise envisaged in section 4.6.4 would endow an ability to hold to ransom proposals by third parties for such activities and derive an income stream that is in no way historically related to customary use.
 - (i) Is the implied veto to be absolute, as the document suggests, or should the veto be restricted to activities that might abrogate, impede or interfere with the traditional uses that form the basis of the territorial right?
 - (ii) If the veto is to be absolute, what safeguards might be put in place to stop the unreasonable economic exploitation of the power of veto?
6. Criteria for 'territorial interest' are contradictory at times. It must be at 'a level that accords ... with exclusive use and occupation' (p 36 bullet point 2); but later is 'notwithstanding use for fishing and navigation by third parties' (bullet point 7), and

(presumably) also swimming, walking and other activities associated with public access. So what is left?

7. It is a reasonable conjecture that applications for recognition of territorial rights and/or customary use rights will be forthcoming from every iwi, hapu and whanau in the land, especially since contiguous land ownership is no longer to be a criterion. If this were Canada, or even Australia, it would be less of a concern. But this is a small country, and the prospect arises of every inch of the coastline being adjudged relevant to some indigenous customary use or territorial right. Could local authorities ever cope under such a regime, not to mention residual public opinion?
8. The precise scope of sovereign power is unclear in the document. This may be partly a result of a tacit interpretation of the Treaty of Waitangi as a partnership between Crown and the Maori as equal partners. This view does not (to my knowledge) have general acceptance, though it has been promoted by some as received doctrine. The Crown has always stood, and should stand, for all New Zealanders.
9. In establishing territorial rights, a formalised body of precedent would be desirable, and of course, an absence of pressures from logrolling, pork barrelling and coalition politics. For this reason, recourse to the High Court would be better than the alternative path of direct negotiation with the government of the day, at least while MMP exists. On the other hand, judicial activism does exist and even if overturned can create moral outrage. On such an emotive issue for both sides, it is important that the legislation identifies and prescribes for as many downstream contingencies as possible.
10. I have personally no strong commitment to the existing regime (the 2004 Act), though it does provide certainty as to the ownership issue that the current proposal does not. But it is hardly legitimate on p16 of the present Consultation Document to use the responses to the 2009 Ministerial Review Panel to evidence a claim of widespread opposition. Given the aegis under which the Review Panel was established, far too much self selection response bias is entailed. Likewise, one could draw attention to another hikoi, a silent one of the able departing New Zealand, as much over alienation created by preferential race related policies and rhetoric as for personal economic opportunity. Spin doctoring can go both ways and is best avoided.

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