

NZCPR Briefing Paper

The key changes to the foreshore and seabed legislation

Dr Muriel Newman

Introduction

National's Marine and Coastal Area Bill will repeal Crown ownership of New Zealand's foreshore and seabed, in order to replace it with a regime that will enable Maori-only ownership and control.

The Maori Party has indicated that this Bill is only a first step and that they will not stop until the whole of New Zealand's coast is under Maori ownership and control.

Repealing Crown ownership is crucial if they are to achieve their goal.

I hope this briefing paper will assist you in better understanding the significance of this bill to the future direction and well being of New Zealand.

Section 1 - Overview

Our common heritage

The Crown owned foreshore and seabed is the common heritage of all New Zealanders as equal citizens. It is a priceless natural resource, consisting of 10 million hectares of beach and sea out to the 12 nautical mile limit, all harbours, estuaries, the airspace above and the non-nationalised minerals below. According to Crown Minerals, New Zealand's iron sands reserves alone are worth \$1 trillion.

Crown ownership of the foreshore and seabed guarantees free and unfettered public access, and ensures that all proceeds from leases and royalties from commercial coastal operations, go to local and central government for use in the national interest.

Labour's Foreshore and Seabed Act 2004

Until 2003, it was widely accepted that the foreshore and seabed was vested in the Crown in accordance with British common law. That's why Treaty of Waitangi claims did not include claims for the foreshore and seabed.

However, as a result of a controversial Court of Appeal decision in 2003, the Labour government reaffirmed Crown ownership through the Foreshore and Seabed Act 2004: "The object of this Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whānau, hapū, and iwi with areas of the public foreshore and seabed".

The Act enabled qualifying iwi to claim the equivalent of a customary title over the foreshore and seabed in the High Court and seek redress from the Crown. The test used, as indicated by the Court of Appeal, is high: iwi must prove in the High Court that they own the land abutting the foreshore and seabed being claimed and that they have "exclusively and continuously used the area since 1840".

National's new law

In spite of claims by the National Party that nothing much will change as a result of their new law, in reality their Bill will 'ready' the foreshore and seabed for "Maori-only" ownership.

The Bill will facilitate a vast confiscation of public property rights and wealth, as this priceless resource is transferred from ownership by the people of the New Zealand into a state of being owned by no-one, ahead of its ultimate transfer into private Maori hands.

In conjunction with this, the Bill significantly lowers the bar with regards to qualifying criteria - for those seeking to make a claim, by not only relaxing the 'ownership' test, but by also allowing claims to be negotiated in secret rather than having to be proved in an open court of law.

This latter point demonstrates the deliberate misrepresentations that are being made by proponents of the law change - that the Bill will give Maori 'their day in court'.

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Confidence and Supply Agreement:

After the 2008 general election the National Party agreed with the Maori Party that they would review the Foreshore and Seabed legislation. A review was the only firm obligation, and with the Emissions Trading Scheme Review, held as a result of their agreement with the ACT Party as a model for how to justify no further change to the law, the National Party only needed to consult widely with the New Zealand public as well as Maori to justify leaving the law as it stands.

Their Confidence and Supply Agreement states:

The National Party and the Maori Party will, in this term of Parliament, initiate as a priority a review of the application of the Foreshore and Seabed Act 2004 to ascertain whether it adequately maintains and enhances mana whenua. Ministers representing the two parties will work together to prepare agreed terms of reference for the review by 28 February. The review will be completed by 31 December 2009.

In the event that repeal of the legislation is necessary, the National-led Government will ensure that there is appropriate protection in place to ensure that all New Zealanders enjoy access to the foreshore and seabed, through existing and potentially new legislation.

Foreshore and Seabed Act Reviews:

Two reviews have been held, a Ministerial Review in 2009 and a Government Review this year.

Ministerial Review: On the basis of their flawed and biased review, the National Party decided to repeal Crown ownership of the foreshore and seabed. They justified their decision on the basis that “significant numbers” of New Zealanders had complained that the 2004 Act was “unfair and discriminatory”.

The government's decision was based entirely on the view of disaffected Maori canvassed as a result of 21 hui and 580 submissions.

Government Review: The day before Easter, the Attorney General released a consultation document outlining proposed changes to the foreshore and seabed legislation. The review was rushed, with just twenty working days given for responses to the radical changes being proposed. Requests for an extension to the closing date including from 5,527 NZCPR petition signatories was ignored.

In spite of claims that recreational and conservation interests, business interests, local government interests and Maori interest, would all be widely consulted, only Maori were.

Over 1,500 public submissions to the review were received by the Minister in April. These were to be posted on the Minister of Justice website. Five months later, the submissions remain suppressed by the Attorney General.

Section 3 Legislative Changes

Main Changes in the Bill

The Marine and Coastal Area (Takutai Moana) Bill:

- Repeals Crown ownership of the foreshore and seabed
- Sets up a regime for “Maori-only” 'ownership' and control
- Guarantees public access but removes the prohibition on charging for access
- Significantly lowers the qualifying tests for iwi to gain powerful coastal rights
- Substantially expands Maori rights over the whole of the New Zealand coastline
- Creates three levels of Maori rights with substantial governance powers:
 - Mana tuku iho co-management rights covering the whole coastline
 - Protected Customary Right powers outrank local authorities
 - Customary Marine Title powerful ownership and development rights
- Removes the need for Maori to “have their day in court” by making it optional
- Maori will own non-nationalised minerals in claimed areas. Royalties from existing mines will be transferred from the Crown to iwi as soon as claims are lodged (rather than when approved!)
- Ports and airports will be entitled to ownership of reclaimed land. Newly reclaimed land can be converted to fee simple title and sold
- Structures like boat ramps, marinas, pipelines will remain the property of the owner and consents will continue as at present
- Local authorities that lose title to land are eligible for compensation
- Specified existing activities that require resource consents - such as aquaculture and mining - are exempted from iwi powers (this time around!)
- The Crown will grant extensions to leases, licences and permits



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Key differences between the 2004 Act and the 2010 Bill:

2004 Foreshore and Seabed Act	2010 Marine and Coastal Area Bill
WHO OWNS THE FORESHORE & SEABED?	
Ownership of the foreshore and seabed vested in the Crown	Public ownership of the foreshore and seabed repealed and replaced with a system that allows for “Maori-only” ownership
QUALIFYING CRITERIA FOR CLAIMS?	
Rigorous qualifying criteria for iwi customary rights established	Qualifying criteria for customary rights substantially weakened
TESTING CLAIMS OPEN PROCESS OR SECRET DEALS	
Claims open to public scrutiny: tested in the High Court and finalised through an Act of Parliament	Court now optional: claims no longer need to be tested in court with full public scrutiny, but can instead be negotiated with Ministers in secret deals rubber stamped by an Order in Council
CUSTOMARY INTERESTS	
<p>Customary interests subjected to local and central government laws</p> <p>Customary Right</p> <ul style="list-style-type: none"> - to qualify, iwi must prove in court they have been using the same rights continuously and in substantially the same way since 1840 - once proved their rights are protected under the RMA <p>Customary Territorial Right</p> <ul style="list-style-type: none"> - to qualify, iwi must prove in court they have been using the area exclusively and without interruption since 1840 <u>and</u> that they have continuously owned the land <i>contiguous</i> to the claim (that is the land adjoining the claim) - once proved, redress from the Crown is available - a foreshore and seabed reserve can be established with a Board and a charter - rights are protected under the RMA 	<p>Customary interests can outrank local and central government laws</p> <p>Mana tuku iho</p> <ul style="list-style-type: none"> - gives co-management rights over whole coastline to all iwi that apply in their local area <p>Protected Customary Right</p> <ul style="list-style-type: none"> - to qualify, iwi must persuade a Minister they have used their rights in substantially the same way since 1840 even though the rights can now “evolve over time” and may have become quite different! - do not need RMA consents or coastal permits for activities - have the right of veto over RMA consents of others <p>Customary Marine Title</p> <ul style="list-style-type: none"> - to qualify, iwi must persuade a Minister they have “exclusively used and occupied the area from 1840 without substantial interruption”. But, the Bill introduces 'customary transfers' which will now enable the area being claimed to have been transferred to the claimant group from completely separate groups which owned it from 1840, making a mockery of the qualifying criteria and weakening them to the point that they are almost meaningless. In other words under this Bill iwi will no longer need to prove their claim in court, they will no longer need to own the land abutting their claim, and they will no longer need to have exclusively used and occupied the area claimed since 1840! - once granted by the Minister, claimants gain powerful rights of ownership, development and mining, full rights of veto over resource consents and conservation applications, and the ability to impose their coastal plans on local and central government



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2004 Foreshore and Seabed Act	2010 Marine and Coastal Area Bill
MINING	
All mining proceeds go to the Crown to be used for the public good	Non-nationalised mining proceeds go to iwi from the date of registration of a claim not the date of settlement!
IS ACCESS TO THE FORESHORE & SEABED FREE?	
Charging for access prohibited	No ban on charging for access
CUSTOMARY INTEREST	
Applicants must prove a customary interest exists	The Bill reverses the presumption by assuming that a customary interest exists and has not been extinguished “in the absence of proof to the contrary”!
WAHI TAPU	
No change. Customary interest owners have the right to declare any area of the foreshore and seabed as “wahi tapu” or sacred to Maori, with no right of public appeal. Wardens can be appointed and fines of up to \$5,000 for breaches can be imposed. Once customary interests cover the whole coastline, which is the intent of the 2010 Bill, this will become a serious issue, especially as the public have no ability to protect popular beaches or fishing spots from wahi tapu.	

Comment:

The key difference between the 2004 Foreshore and Seabed Act and the 2010 Marine and Coastal Area Bill is that the 2004 Act vests ownership and control of the foreshore and seabed in the Crown, while the 2010 Bill repeals Crown ownership and opens New Zealand's coastline up for *Maori-only* ownership and control.

In other words, while the 2004 Act was strongly focussed on the historic presumption that foreshore and seabed should be preserved and protected in perpetuity as the common heritage of all New Zealanders - with all commercial benefits from the area flowing into the public purse for the benefit of all citizens - the 2010 Bill is strongly focussed on enabling Maori to gain power, control and commercial benefit from the foreshore and seabed - all at the expense of the New Zealand public.

More Details

Purpose:

2004 Foreshore & Seabed Act: Vests ownership of the foreshore and seabed in the Crown, provides for recognition and protection of ongoing customary rights through the High Court enabling redress or participation in the administration of a foreshore and seabed, and provides for the right of public access and recreation in, on, over, and across the public foreshore and seabed, and general rights of fishing and navigation.

2010 Marine and Coastal Area Bill: Repeals the Foreshore and Seabed Act 2004 and creates a new regime for the establishment of widespread private Maori ownership and control, as well as protecting the public rights of access, navigation, and fishing in the common marine and coastal area.

Customary Interests and Rights:

2004 Foreshore & Seabed Act: Two customary interests are specified in the Act, a lower level Customary Right and a higher level Territorial Customary Right.

Customary Rights can be awarded to groups by the Maori Land Court or the High Court for an activity, use, or practice that can be proven to have been in operation since 1840 in a substantially uninterrupted manner. Customary rights can be protected under the RMA and they bring and entitlement to commercial benefits.

Territorial Customary Rights can be awarded by the High Court to a group that has used and occupied an area of the public foreshore and seabed if *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 the group had continuous title to contiguous land.* If the area was used by others, not associated with the group, their right would be terminated. A territorial customary right enables redress



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infrastructure (such as pipelines and cables) are exempted from the veto powers granted to customary title holders.

Roads

Roads in the coastal marine area will continue to be owned by the Crown, local authorities or whoever commissioned them.

Minerals

Nationalised minerals - petroleum, gold, silver, and uranium will continue to be owned by the Crown, and Pounamu will continue to be owned by Ngai Tahu. All other minerals are reserved in favour of the Crown, but where a customary marine title is established, these minerals will be owned by the title holder and any royalties presently being paid to the Crown as a result of existing mining operations will be transferred to the title holder from the date of application for the title.

Structures

Structures such as boat ramps, marinas, cables, and pipelines will remain the personal property of the owner and resource consents will continue to be paid as at present. All abandoned structures are deemed to be owned by the Crown.

Resource consents

Resource consents granted before the Bill is passed will continue as normal.

Proprietary interests

Proprietary interests such as leases, licences and permits that do not require a resource consent but include a right of renewal or a right of extension, will be deemed to have been granted by the Crown, and renewals and extensions may be granted.

Titles rearranged

The computer freehold register of titles over the common marine area will be cancelled and a new replacement lodged.

Compensation

Local authorities that lose title to land as a result of the enactment of the new bill can apply for compensation.

Reclamations

Any reclaimed land will vest in the Crown and the

reclaimer of the land can apply to the Minister for a fee simple or lesser title. Anyone planning to sell a fee simple title in reclaimed land will be required, to first offer it to the Crown, then to any Maori group with a customary authority in the area, then to any third party. Ports and Airports will be entitled to ownership of their reclaimed land. The bill appears to enable customary title holders the right to reclaim land, then convert it to fee simple title so that it can be sold (this is in spite of the Bill stating that a customary title gives holders the right of ownership to the land without the right of sale).

Detailed summary of specific powers associated with customary interests:

Mana Tuku Iho

This is a universal right which applies around the whole coast and is open to local iwi to participate without the need for proof and with the ability for more than one iwi group to apply for rights to the same area.

Clauses 49-52 Powers include the right to participate in conservation processes: to declare or extend a marine reserve; to define and declare or extend a marine mammal sanctuary; to consider applications for permits for marine mammal watching; to declare or extend conservation protected areas; to consider applications for the granting of all concessions.

The Director-General of Conservation must involve iwi as “affected” persons - in all processes, taking “particular regard” of those views when granting or declining applications.

In addition, the views of “affected” iwi must be taken into account in the management of stranded marine mammals.

Protected Customary Right

To qualify, iwi must be able to satisfy the Minister that they have exercised the “right” since 1840, and that it continues to be exercised in accordance with tikanga by the applicant group, “whether it continues to be exercised in exactly the same or a similar way, or evolves over time”. In other words, the right being claimed can now be quite different from the original right.

Clauses 53-59 Protected Customary Right Order: enables the rights holder to establish commercial coastal practices without needing resource consents (although the Minister retains the power to impose controls) or having to pay coastal occupation charges. These rights may be delegated or transferred for commercial benefit. The group has the right of veto over any other RMA consent application in the area with no right of appeal.



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Customary Marine Title

This powerful title, which is akin to ownership without the right to sell the land, can be gained if iwi can persuade a Minister that they have “exclusively used and occupied the area from 1840 without substantial interruption”. However, since the Bill introduces 'customary transfers' to allow the area being claimed to have been transferred to the claimants from a completely separate group, the qualifying criteria becomes virtually meaningless and the process a sham: compared to the current law, iwi no longer need to prove their claim in court, they no longer need to own the land abutting their claim, and they no longer need to have exclusively used and occupied the area since 1840! It is no wonder the government wants Ministers to be able to award these sham titles in secret, rather than expose them to full public view in an open court of law!

Clauses 64-91 Customary Marine Title Rights: The following rights are conferred on title holders: the right to develop the area for commercial benefit and the right to delegate or transfer those rights; the absolute right of veto over RMA applications with a fine of up to \$600,000 or 2 years in prison for violations (with iwi receiving most of the restitution), the right of veto over marine reserves and conservation protected areas; the right to decide marine mammal watching permits; the right to prepare coastal plans that can extend to areas outside that covered by their title, that must be taken into account in the New Zealand coastal policy statement and that can impose obligations on government agencies local government, Historic places, conservation and fisheries; the prima facie ownership of any newly found taonga tuturu; and the ownership of minerals other than nationalised minerals and pounamu with royalties from existing operations being redirected from the Crown to iwi from the date of application of the claim.



Speak now or forever lose your beach

Section 4 - What happens next?

Submissions

The Maori Affairs Select Committee has called for submissions on the Marine and Coastal Area Bill. Submissions, which can be made in writing or on-line, close on Friday 19th November 2010. Further details can be found on the Coastal Coalition website; www.CoastalCoalition.co.nz.

Once submissions close, the Select Committee will travel around the country to hear evidence at locations that include Invercargill, Christchurch, Blenheim, Wellington, Bay of Plenty, Hamilton, Auckland and Whangarei.

The Select Committee's report to Parliament, which will contain their suggested amendments to the Bill, is due by 25 February 2011.

The Process

Once the Select Committee's reports on the Bill has been tabled in Parliament, a 2-hour second reading debate can be called, followed by the Committee Stages of the House, where further amendments to the Bill can be made. Finally, after a two-hour third reading debate, the Bill will be passed into law if a majority of the House supports the Bill.

What can you do?

If you want to have a say on the bill, then you must put in a submission and state very clearly whether you support or oppose the bill and whether you want to speak to your submission.

Full guidance on how to put in a submission can be found on the Coastal Coalition website at www.CoastalCoalition.co.nz.

Prepared by:
Dr Muriel Newman
New Zealand Centre for Political Research
www.nzcpr.com