NZCPR Briefing Paper

The key changes to the foreshore and seabed legislation

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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'.

The key changes to the foreshore and seabed legislation

By significantly relaxing the criteria for qualifying for a customary title claim and by enabling such claims to be negotiated in secret, this Bill will open the floodgates for Maori claims to the foreshore and seabed.

The government has predicted that if their Bill becomes law, 10 percent of the coastline will end up in private Maori hands. That's a massive 2,000 km the distance from Cape Reinga to the Bluff, wrapped around the coast and stretched out to the 12 mile limit!

If John Key is successful in repealing Crown ownership of the foreshore and seabed, he will put the country onto a slippery slide - the Maori Party has already indicated it will not stop re-litigating this issue with future governments until the bar is lowered to the point where the entire New Zealand coast is owned and controlled by Maori. They also want the whole area out to the edge of the 200 mile exclusive economic zone including all of the oil and gas reserves as well. This Bill is the first step.

National's Marine and Coastal Area (Takutai Moana) Bill

National's Bill will open the floodgates for claims by:

- Repealing Crown ownership of the foreshore and seabed and establishing a new regime to enable "Maori-only" ownership of the foreshore and seabed

- Lowering the bar on the current high test for customary title by:

    1. Dropping the need for iwi to <u>own</u> the land adjoining their claim
    2. Relaxing the need for iwi to prove "continuous and exclusive use of the area since 1840" by allowing for <u>transfers</u> from third parties - just so long they are done in accordance with "tikanga". This effectively means that if different iwi own and use an area since 1840 then pass it on to the claimant group, then for the purposes of gaining a customary title as prescribed in this Bill, that is exactly the same as if the claimant group had held it exclusively and continuously since 1840!
    3. Dropping the requirement for open scrutiny and the rigorous proof of claims in the High Court and through an Act of Parliament, by instead allowing the public's foreshore and seabed to be given away to corporate iwi through secret deals negotiated with friendly Ministers and rubber stamped through an Order in Council, with court available as a last option.

These and other specific changes in the bill will be examined in more detail in the sections that follow.

Section 2 - Background

Common View

Until 2003, New Zealanders believed the ownership of the foreshore and seabed had been vested in the Crown when New Zealand adopted British Common Law. This was settled law, affirmed by a Court of Appeal ruling in 1963 in the Ninety Mile Beach case. It is the reason that historic Treaty claims to the Waitangi Tribunal did not include claims for the foreshore and seabed.

Ngati Apa Case:

In 1997 South Island Maori lodged a foreshore and seabed claim with the Maori Land Court over a marine farming dispute with their council. The Crown argued that the Maori Land Court had no jurisdiction over the foreshore and seabed, but the case went ahead and was found in favour of the Maori claimants. The Crown appealed to the High Court and won, with the Judge ruling that the foreshore and seabed were beneficially owned by the Crown and that the Maori Land Court had no jurisdiction in this area.

However, the case was appealed to the Court of Appeal, which, in a bombshell decision, overturned settled law and an earlier 1963 Appeal Court decision in the Ninety Mile Beach case, to rule that the Maori Land Court could hear customary title claims to the foreshore and seabed.

The proper course of action for the Labour government would have been to have the controversial decision challenged by the independent Justices of the Privy Council, but since they had just cut off access to the Privy Council that course of action was no longer available.

To add to Labour's woes, Maori activists were busy fuelling discontent within Maoridom by spreading the word that the Court of Appeal had ruled that Maori owned the foreshore and seabed. Although there was no truth in the rumour, with claims covering the entire foreshore and seabed - including the whole 200 mile Exclusive Economic Zone - flooding in to the biased Maori Land Court, which Labour feared might well have found in favour of private title, they rushed to legislate.

Foreshore and Seabed Act 2004:

The 2004 Foreshore and Seabed Act reaffirmed Crown ownership of the foreshore and seabed, and provided iwi that could prove their entitlement in a court of law with Customary Territorial Rights and Customary Rights. While no claims have been completed since the law was passed, one Customary Territorial Rights claim and seven Customary Rights claims are in the pipeline.

The key changes to the foreshore and seabed legislation

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

The key changes to the foreshore and seabed legislation

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	
Customary interests subjected to local and central government laws ***Customary Right*** - 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 ***Customary Territorial Right*** - to qualify, iwi must prove in court they have been using the area exclusively and without interruption since 1840 and that they have continuously owned the land *contiguous* 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	Customary interests can outrank local and central government laws ***Mana tuku iho*** - gives co-management rights over whole coastline to all iwi that apply in their local area ***Protected Customary Right*** - 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 ***Customary Marine Title*** - 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

The key changes to the foreshore and seabed legislation

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 <u>FREE</u>?	
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.

<u>Customary Rights</u> 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.

<u>Territorial Customary Rights</u> 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

by the government and the establishment of a foreshore and seabed reserve administered by a Board in accordance with a Charter that must comply with the RMA and must not be inconsistent with a national coastal policy statement.

2010 Marine and Coastal Area Bill: Three customary interests are specified in the Bill, a new universal Mana tuku iho that applies all around the coast, a lower level Protected Customary Right and a higher level Customary Marine Title.

Mana tuku iho is a customary interest on the whole of the New Zealand coastline that is conferred on iwi on application, and enables participation in conservation processes involving marine reserves, marine mammal sanctuaries, and conservation protected areas, as well as applications for concessions operating in the area including marine mammal watching.

Protected Customary Rights can be awarded through negotiation with a Minister - or by the High Court - for rights that have been exercised since 1840 and continue 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, protected customary rights can be conferred to groups that have changed their so-called 'customary' activity as long as they claim it has been changed in accordance with tikanga with holders of the right being given the power to veto RMA consent applications, while their own commercial activities are not regulated by the RMA and can be delegated or transferred to others.

Customary Marine Title can be awarded through secret negotiation with a Minister - or by the High Court - to an applicant group if it *has exclusively used and occupied the specified area from 1840 to the present day without substantial interruption*. However, not only has the requirement for the group to own the land abutting the area been dropped, but the meaning of "*without substantial interruption"* has been re-defined to allow the applicant group to claim they have used an area since 1840 without substantial interruption even though a different group has historically used it - just so long as that different group says they transferred it to the claimants according to tikanga: *A customary transfer is not, of itself, evidence of substantial interruption of the exclusive use and occupation by the applicant group of the specified area, where a customary transfer means a transfer of a customary interest in a specified part of the common marine and coastal area after 1840 if the transfer was between or among members of the applicant group; or 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; and the transfer was in accordance with tikanga; and the group or members of the group making the transfer had exercised exclusive use and occupation of the specified area from 1840 to the time of the transfer; and the group or some of its members to whom the transfer was made have exercised exclusive use and occupation of the specified area from the time of the transfer to the present day*.

The powers and commercial benefits associated with a customary marine title, which may be delegated or transferred to other groups, are substantial. They include the right to develop the area and set up commercial operations, the right of veto over applications for coastal permits, RMA consents, conservation permissions, and marine mammal watching permits. Tile holders will become the prima facie owners of new taonga found in the area, they will have the ability to create planning documents that impact on national coastal policy statements and over-ride local government, the RMA, the Historic Places Trust, and other government agencies, they will gain ownership of all non-nationalised minerals found in the area along with all royalties due to the Crown from any such existing mining operations from the time the customary title application is lodged.

Free Public Access

2004 Foreshore & Seabed Act: Free public access to the foreshore and seabed is guaranteed, with Clause 40 (2) of the Act stating: *Neither the guardians of a foreshore and seabed reserve nor the applicant group nor the board is entitled to charge or collect fees or other form of payment from any person or body for the use or occupation of the reserve*.

2010 Marine and Coastal Area Bill: The Bill guarantees public access except for areas where wahi tapu are registered but the provision in the present law that ensures access is free has been dropped.

Burden of Proof

2010 Marine and Coastal Area Bill: Instead of the groups applying for a customary interest having to prove that a customary interest exists, the Bill reverses the presumption by stating in Clause 105: *It is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished.*

Other Matters in the 2010 Bill

Existing rights and interests

A number of activities that already have resource consents (such as aquaculture and mining), along with operations that are a necessary part of the country's

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.

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.

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