



Foreshore / Coastal Marine Takutai Moana Discussion

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Summary

Introduction

The new Coastal Marine (Takutai Moana) Bill is to replace the Foreshore and Seabed Act of 2004. This is to withdraw the confiscation and to restore the right of Iwi to have claims to customary titles heard in the court.

The heart of the matter is that in law, customary titles for any area continue unless Iwi willingly consent to have them extinguished. The High Court said that customary titles to the Foreshore and Seabed continue, and have not been extinguished. The information here is to give an opportunity to discuss the issues and show our concern about the beaches, the sea, the resources of the coastal marine area, and to give us a chance to respond.

REMINDER of the HISTORY

The Court of Appeal decision on the **Ngati Apa case in 2003** said that customary titles have not been extinguished and that Iwi are entitled to proceed to the Māori Land Court to clarify these titles – the Māori Land Court was the approved forum for these ‘Aboriginal title’ investigations. Customary titles are not like private property rights; they are normally for communal land and for the continuation of indigenous customary practices, obligations and responsibilities. Aboriginal title is a Common law land right for **customary** tenure to continue under Crown sovereignty.

The Government raised concerns about access to the beaches, and also about providing ‘certainty’. Certainty is a legal issue where titles have to be clear for contracts, permits or sales. The Government assumed that customary titles would interfere with access and certainty and to stop these concerns the Foreshore and Seabed Act was passed in 2004. This put the Foreshore and Seabed in Crown ownership to give clarity of ownership and public access.

This meant that Iwi were not able to go to the Māori Land Court about their customary titles because Crown ownership extinguished these titles. The Foreshore and Seabed Act removed the process that was supposed to be available for Iwi to go to the High Court to determine customary titles.

This confiscation led to MP Tariana Turia resigning from the Labour party. She and Pita Sharples became co-leaders of the Māori party. The first platform of the party is that Māori, or Iwi, own the Foreshore and Seabed and their policy is to have the Foreshore and Seabed legislation repealed.

In the 2008 election the Māori Party supported the National party to form a minority government and the National Party set up a **review of the Foreshore and Seabed Act**. This was part of the Confidence and Supply agreement.

In June 2009 The Ministerial Review Panel advised that the Foreshore and Seabed Act should be repealed. They also said that there should be more input from Māori as the most affected group as well as the general public. They said any new arrangements for the foreshore and seabed must include public access for all, and that rights and permits already in place, such as private property (hotels, boat houses) and permits for fishing and aquaculture will be respected. These are important conditions for economic development.

The National Party have agreed to repeal the 2004 Foreshore and Seabed Act, and have proposed a new Coastal Marine (Takutai Moana) Bill.

The Coastal Marine (Takutai Moana) Bill proposes that:

Coastal Marine Title

The Foreshore and Seabed will become a 'non-ownership' area called 'Common Marine Coastal Area'.

This is to replace Crown ownership of the Foreshore, or Coastal Marine area that was put in place in 2004. The Common Marine Coastal Area will be under the Minister of Conservation and other Ministers as provided for in legislation.

Customary Marine Titles

Provisions for **customary title** within the common marine area can exist where

1. An applicant group holds the area in accordance with tikanga
2. An applicant group has used and occupied the area continuously, or without significant interruption, since 1840.

Customary titles have to be applied for within **6 years** of the Act coming in to force.

Customary Marine Titles can be negotiated with the Crown, or through the High Court.

Public Access

The Bill continues rights of public access in, on, over, and across the common marine and coastal area. Existing commercial, recreational, and customary fishing rights and rights of navigation will be retained.

Questions for Discussion:

Nau mai, haere mai ki ngā tātahi. Welcome to the beaches.

- **What do you love about our beaches? Could you share something about a beach that you and your family care about?**
- **Have you noticed any changes at your favourite beach? What is happening? Is your beach being looked after? What do you hope your grandchildren will be able to enjoy at the beach?**

WHAT CAN WE DO?

PQ Network/Parishes

- Host a **study group** or **forum** on the Coastal Marine Takutai Moana proposals.
- Invite tangata whenua to comment and reflect on the implications for them.
- Do some **theological reflection** on this aspect of public life in Aotearoa-NZ and share with the PQ Network.

Submissions

- Prepare a submission with members of your parish, family, and community.
- Contact Betsan for support or information
betsan@publicquestions.org.nz
04 473 2627
- Send final submissions to:

Committee Secretariat, Māori Affairs, Parliament Buildings, Wellington

Or submit on line by following the directions on [this link](#)

Please

Send any activities, thoughts, submissions to

Contact: Betsan Martin

Email: betsan@publicquestions.org.nz

Ph. 04 473-2627/021-388-337

Further Questions for Discussion

- **How can we be sure that our love for the beaches and concern to protect the coastal area are ensured through government policy?**
- **Is there anything you would you like to know about the Foreshore and Seabed? Are there questions you could ask in your parish? What information would you like from the Public Questions network?**
- **For the Methodist church the Treaty is a covenant. How does it work for us? Could this work for the Foreshore?**

BACKGROUND

Review of the Foreshore and Seabed Act 2004

The National Party set up a review of the Foreshore and Seabed Act 2004, in fulfillment of the Confidence and Supply agreement. The Ministerial Review Panel advised, in June 2009, that the 2004 Foreshore and Seabed Act be repealed, and that there should be provision for further input from Māori as the most affected group, as well as the general public.

One of the main purposes of further consultation was to fulfill the government's interest in achieving an equitable balance of interests of all New Zealanders in the foreshore and seabed. These include recreation and conservation, customary rights, business and development interests and local government responsibilities (under the RMA). Along with reflecting the Treaty of Waitangi a new framework should include:

- Assurance of Public Access
- Customary rights and interests will be recognized
- Fishing and navigation rights will be protected
- Existing use rights such as coastal permits and marine reserves, will be protected including rights of renewal
- Recognize rights and interests of all New Zealanders, be fair, and provide certainty for investment and economic development.

The Review said that any new legislation should reflect good faith principles of a fair, reasonable and honorable process, and lead to policy that is consistent with other resource management regulations.

The Review Panel recommended:

- A National Policy one-off Settlement
- Establish a bicultural body to oversee development of legislation
- Establish a process for regional and national negotiations between the Crown and iwi/hapu
- Under each of these options customary use, authority and ownership need to be settled.

The Review Panel confirmed that before the Ngati Apa case the whole of the coastal marine area was under native or aboriginal title except where title to any specific parts was clearly extinguished. Legal rights for general use were generally confined to navigation and fishery rights. It acknowledged an important national culture of enjoying the coast for recreation.

Amongst a range of possibilities the panel recommended a Treaty of Waitangi framework and a set of core principles (including public access, good faith negotiations).

Questions

- **Is there any need to hurry to get legislation for the Coastal Marine Area?**
- **Are there any benefits in a slower process?**
- **What are some aspects of the Treaty Covenant that are relevant to the Foreshore and Coastal Marine area?**

The Proposed Marine and Coastal (Takutai Moana) Bill

Common Marine and Coastal Area

The coastal marine area will come under a new non-ownership status called 'Common Marine and Coastal Area'.

This is to replace the 2004 vesting of the Foreshore and Seabed in the Crown.

One of the complex issues is the meaning of ownership. Customary titles are a form of collective ownership which can be alienated (sold) with agreement of all owners, or they can be inalienable. Private, fee simple titles can be sold. To avoid the issue of ownership the government has proposed a non-ownership framework except for parts that are already in private title.

This is to be called 'public domain/takiwā iwi whānui.

The Common Marine and Coastal Area will be under the Minister of Conservation.

Customary Marine Titles

Provisions for customary title within the common marine area can exist where:

1. An applicant group holds the area in accordance with tikanga.
2. An applicant group has used and occupied the area continuously, or without significant interruption, since 1840.

There is a list of rights which iwi are entitled to apply for, such as protection of waahi tapu.

Once customary titles are established, the title holders will own minerals in the title area except for the nationalized minerals – gold, silver, uranium and petroleum.

The title holders may prepare a planning document for sustainable management of natural and physical resources. This is to work within the regulations of Local Authorities and Historic Places and Conservation authorities. These authorities will recognize customary titles.

The rights under customary marine titles can be over-ridden by 'accommodated activities' – meaning existing structure or infrastructure (such as lawful activities that don't need a resource consent, or consented activities, a marine reserve, mammal sanctuary, conservation protected area, electricity generators).

Customary titles have to be applied for within **6 years** of the Act coming in to force.

They can be recognised by agreement with the Crown, or through the High Court, which will have special jurisdiction to recognise a customary right or marine title.

Public Access

The Bill explicitly continues rights of public access across the common marine and coastal area. It also provides that nothing in the Bill affects existing commercial, recreational, and customary fishing rights, and rights of navigation in the area. Public access will not be allowed for protected areas such as wāhi tapu and burial caves.

Reclaimed Land

Reclaimed land from the common coastal marine area is to be owned by the Crown, to encourage development.

Discussion

The **Review Panel** recommended a process with time to take into account the interests of Iwi and of all New Zealanders. This could be done through legislation to enable the **Foreshore and Seabed to be held *in trust*** by the Crown, so that titles could be gradually established. They said that there should be provisions for compensation for extinguishment of customary property rights. These recommendations have not been included in the Bill.

The requirement for Iwi to apply for **Customary Marine Titles** puts the onus of proof upon Iwi. From a **Treaty of Waitangi** perspective the Customary Marine Titles impose restricted concepts of traditional responsibilities for care of the foreshore. The Treaty agreement for Tino Rangatiratanga, or tribal control to continue over all taonga, is the frame of reference for Customary Titles. One proposal for the Foreshore and Seabed was to have the Foreshore and Seabed vested in a newly created **Treaty of Waitangi title**.

The **rights of access** are much more than just going to the beach. With fisheries, navigational and commercial access protected, the customary titles will have very reduced and minimal authority. The provisions for access mean a further reduction of customary authority.

The Minister of Conservation is to have authority over the 'Common Space' or Coastal Marine Area; what about a proposal for joint responsibility of the Common Area by the Minister of Conservation and a Minister from the Māori party, or Iwi representative for each area?

Proof of *continuous use or occupation since 1840* will be difficult to meet. This requirement does not account for earlier incentives for Māori to leave their home territory for work in urban areas.

There is popular perception that the coastal marine area is an important for recreation, yet this is a very important and valuable resource for mining. Mining licenses are currently widespread - especially on the east coasts. These include sand and petroleum mining.

Other views so far...

Some have said that the new proposal is another confiscation because the 'common title' means that existing customary titles and interests are taken from Iwi. Iwi will have to apply for recognition, yet existing *private titles* will continue.

It is also said that the Bill is discriminatory because customary titles become 'common space' while private titles are protected. The idea of 'common space' within which no-one can have private title is not legally manageable. There is a lot of detail in the Bill providing for Crown regulation of activities in the Coastal Marine area.

The Coastal Coalition is mounting a campaign against the proposed Bill, with slogans such as 'Save the Coasts for Kiwi's and 'the National and Māori parties plan to take the Foreshore and Seabed out of Crown ownership so corporate iwi can get control and title. Interpretations by the Coastal Coalition include:

- The provision for Iwi to negotiate directly with the Crown is interpreted as 'Māori can negotiate back room deals with a Minister'.
- 'Māori have rights of veto over coastal businesses; payoffs may be needed to get approvals'
- Public funds will suffer as government privatises billions of dollars in coastal assets for Iwi

The Coastal Coalition says: 'You can help save the Coast for Future Generations'

Reminder of Foreshore and Seabed Process Since 2004

In 1997, Te Tau Ihi, an alliance of eight Marlborough iwi, applied to the Māori Land Court for customary rights to the Foreshore and Seabed because of a history of being refused aquaculture permits for mussel farming, by the Marlborough District Council. This alliance joined with other groups as Te Ope Mana a Tai to pursue customary rights to the coastal marine areas, and these included the right to development.

According to the doctrine of Aboriginal title, customary tenure continues even when sovereignty is assumed by a colonial power. Customary tenure can only be extinguished by free consent of the occupiers as holders of the titles.

It has been a clear position of Te Ope Mana a Tai and all other Iwi that consent has never been given to alienation of the Foreshore and Seabed.

In 2003 the Court of Appeal decision confirmed that Iwi are entitled to proceed to the Māori Land Court to clarify and establish customary titles.

The Foreshore and Seabed Act in 2004 vested ownership of the Foreshore and Seabed in the Crown and prevented Iwi from proceeding to the Māori Land Court to have applications for customary titles clarified and confirmed. Titles which were already in private ownership were not included in this assertion of Crown ownership. The vesting in the Crown extinguished customary titles and removed the power of the Court to determine customary titles.

The Act set up new processes for recognizing customary interests in the Foreshore and Seabed:

1. Territorial customary rights: a new form of customary title created by the 2004 law.
2. Customary use for activities and practices that do not require land ownership.

Do you know...

- The Foreshore and Seabed is the beach from the high tide mark, on the seaward side, includes beds of rivers that are part of the coastal marine area. The seabed is out to 12 nautical miles. - -
- The Foreshore and Seabed includes air space and water space above the land, the subsoil, bedrock and other matter below the land.
- Crown ownership was explained as the need to provide certainty of title to the Foreshore and Seabed, to provide protection, regulation (legal control) and access.
- The first platform of the Māori party is that Māori own the Foreshore and Seabed and their policy is to have the Foreshore and Seabed legislation repealed.
- **In the 2005** election four Māori seats were won by Tariana Turia, Pita Sharples, Hone Harawira and Te Ururoa Flavell.
- **In 2008** an additional seat was won by the Māori Party and they supported the National Party to form a minority government. The Confidence and Supply agreement included review and repeal of the Foreshore and Seabed Act.

Further Questions

- **Do the arrangements for customary titles offer fairness to Iwi as well as all New Zealanders?**
(Comment- Iwi will need to go into a process of claim and proof for entitlements and permits. How will the costs of this be met?)
- **Does the proposed legislation remove the confiscation of the 2004 Foreshore and Seabed Act?**
- **The Coastal Coalition is funding a campaign which is based on a 'Save the Coasts for Kiwi's' slogan, and the idea that '\$billions of coastal assets will be privatised 'What is the intention of this campaign? What should we do about it?**
- **How can the Methodist church and Public Questions network be involved?**
- **How can we contribute to this national issue?**

All-in-all...

Clearly decisions about the Coastal Marine Area are going to be challenging. People might not support the Bill for very different reasons. Public Questions groups may or may not agree with the Bill. This is an opportunity for us to bring out our concerns and talk about what we want protected.

What is clear is that we all love our coasts and want these areas looked after.

Once again, be in touch with your local Public Questions groups, and also with me about your thoughts, questions and activities.

Ngā mihi mahana, warm greetings

Betsan.