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19 May 2009

A Submission on the Foreshore and Seabed Act 2004 to the Ministerial Foreshore and Seabed Review Panel

As a Barrister and Solicitor of the High Court of New Zealand I wish to state my opposition to the Foreshore and Seabed Act 2004, and request that it be repealed. This piece of legislation should never have been enacted, as it removes the fundamental rights of Maori to have the courts adjudicate on legal claims that were made under common law that was valid at the time that the claims were filed. The effect of the Act is a declaration to Maori that, if their legal interests do not accord with the interests of the state, then their legal interests will be removed via legislation. To me this is the antithesis of the partnership envisaged by the Treaty of Waitangi.

Moreover, this legislation has a distinctly discriminatory flavour. The removal of rights to claim customary title to areas of the foreshore and seabed was only specifically extinguished in regard to Maori claimants. The Act still preserved any private interests that might exist in areas of the foreshore and seabed.

I am, however, concerned that, even if this legislation is repealed, Maori will still be prevented from advancing claims to customary title in the foreshore and seabed as a result of the very fact that this legislation has been in existence. The argument for customary title is an historical argument based on the continuous use of the land, and the failure of the Crown to in any way alter the title to the land (from a customary title) during that period of time. Unfortunately arguments for customary title will now be very difficult to advance, as the land in question has been the subject of a title change during the intervening period. Thus, a priori, it will not be possible to claim a customary title under the common law, as the customary title will have been extinguished in relation to that land by the existence of the Act (even if the Act is subsequently repealed). It would be very unfortunate were Maori to discover that there was now no possibility of claiming customary title under the common law, as the very fact that the Act existed had destroyed the underlying basis of any common-law claims.

Indeed section 17(2) of the Interpretation Act 1999 states:

"(2) The repeal of an enactment does not revive—
(a) An enactment that has been repealed or a rule of law that has been abolished:
(b) Any other thing that is not in force or existing at the time the repeal takes effect."

To this end I would suggest that the repeal of the Act must be carefully undertaken, and worded in such a manner that Act is repealed on the basis that it is completely void, and has never had any legal effect on the common law with regard to customary title. The Act must contain a clear statement that, with its repeal, the law as existing in New Zealand before the Act was passed is restored in its entirety, and that nothing may be inferred from the period of the Act's existence that would otherwise reduce

any prior legal rights. It is evident that more that an ordinary repeal of the Act is required if the status quo of the common law is to actually be restored. The existence of the Act must not, under the common law, be able to form a basis for the future rejection of a claim for customary title.

I would also note that any preservation of the recognition of customary rights (as opposed to customary title) provided for under the Act must likewise be repealed. While I strongly support the recognition of such customary rights, and the provision of mechanisms whereby Maori are able to exercise them in a meaningful way, the continued recognition of such rights on the basis of the Act will legally count against the possible recognition of customary title. This is because the recognition of such rights under the Act is predicated on the basis that the Crown is the beneficial owner of the foreshore and seabed, and hence, as owner, is able to provide mechanisms for the exercise of customary rights by Maori. Thus any attempt at continued recognition of such rights by virtue of the Act contains the implication that the Crown still retains the beneficial title to the land in question. Thus any attempt to partially repeal the legislation (for example by attempting to retain the provisions regarding customary rights) would be a wrong move, as it would still enshrine the notion of the Crown having title to the land (in order that the crown can grant recognition of such customary rights).

While it is most desirable that mechanisms be provided for the recognition and exercise of customary rights by Maori in regard to the foreshore and seabed, it must not be done in a manner that otherwise allows any association between the recognition of such rights and the Foreshore and Seabed Act, less the recognition of such customary rights is seen to negate possible claim to customary title (on the grounds that the Crown's ability to recognise customary rights is predicated on an existing proprietary interest in the land).

To this end the Foreshore and Seabed Act needs to be repealed in its entirety, with a clear proviso that states that, with the repeal of the Act, the full range of common-law claims that existed prior to the Act are now restored.

Regards

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