TAKUTAI moana

mai rā ānō, mō ake tōnū

COMMENTARY ON THE CROWN CONSULTATION DOCUMENT

This document was prepared by the Iwi Leaders Group and is intended to assist Iwi and hapū to engage with the Crown consultation process.

E ngā mana, e ngā reo, e ngā karangatanga maha, huri noa i te motu o Aotearoa, Te Wai Pounamu me Rekohu, tēnā anō koutou. Ko tēnei te mihi kau atu ki a koutou katoa.

Tēnā rā koutou i ngā whakateitei ki a rātou ngā manu pīrau a Tāne, kua karangahia e Tahu Kumea ki te Whare o Poutereraki. Nō reira koutou rā, moe mai rā, okioki mai rā kia kore rawa e warewaretia. Ka tāhuri te ihu o tōku waka ki a tātou kā konohi o rātou, tātou kua pae mai nei i te taiao, tēnā koutou i runga anō i ō koutou āhuatanga maha. Koia nei te tono ki a koutou e hoe nei i tō tātou waka ki uta, kia mānu tonu ai, kai te mihi, kai te mihi.

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Whakatūwheratanga

The foreshore and seabed issue is one of Aotearoa New Zealands most significant issues of the 21st century, that brought both real injury and some real good for Iwi Māori. The bad, as Iwi and hapū well know, is the extinguishment of Māori property rights in the foreshore and seabed without consent or compensation, removing access to the courts and the right to due process, with little justification other than political expediency. The good is the kotahitanga that responding to the wrongs of the 2004 Act fostered amongst Iwi Māori, through the original court case by Te Tau Ihu, on the hīkoi, through the complaints to the United Nations supported by many Iwi, and the many ways we individually and collectively experienced the wider fall-out from the 2004 Act.

The issue is now at a place where a solution to the many hara of the Foreshore and Seabed Act 2004 (the Act) may be in sight. The Māori Party, formed in response to the foreshore and seabed issue, successfully negotiated with the National-led government for the Act to be reviewed. That review was conducted in the first half of 2009 and led to an announcement by the Prime Minister that the government intended to adopt the recommendation of the Review Panel that the Act should be repealed, subject to an appropriate replacement framework being developed. Iwi Leaders have been talking to the government about the principles that the new framework should be based on and the outcomes that it must deliver.

The Crown has now released a consultation document that describes this government's proposals for a replacement framework to the Act. The proposals appear to have some constructive elements, and be sourced in a principled intent.

However, the ILG are not convinced that the model the Crown has developed has taken on board the principles, rights, values and outcomes that Iwi and hapū hold, and that we have sought to encourage the Crown to respect and give effect to.

This document is therefore intended to assist Iwi and hapū to engage with the Crown consultation process, but more importantly, to contribute to Iwi and hapū forming our own solutions on what should go in the place of the 2004 Act. It comments on the Crown proposal identifies some ways that it could be improved, if that was what was desired, and also puts forward some initial ideas on alternatives to the Crown approach. This thinking is based on two fundamentals:

- **That no problem can be solved from within the consciousness that it was created – the replacement to the 2004 Act must be built from a different way of thinking about the relationship Iwi and hapū have with the foreshore and seabed; and**
- **That the new way of thinking about our rights and values with the takutai, must be rooted in tikanga, respectfully seek to give effect to tikanga as a body of law, and meaningfully give effect to Te Whakapūtanga and Te Tiriti o Waitangi.**

The Iwi Leaders Group think that if the Act is to be repealed, then now is the best time to do it and are committed to contributing to outcomes that satisfy the rights, values and expectations of Iwi and hapū.

Iwi Leaders Group

The Iwi leaders Group on the foreshore and seabed formed in response to a request from government to engage with Iwi leaders on the issue. The invitation was discussed at the Iwi Chairs' Forum at Hopuhopu in August 2009, with the result that a group of leaders were supported to engage with the Crown on framing the process to achieve repeal of the Act and development of a replacement regime.

The group is Chaired by Mark Solomon of Ngāi Tahu and includes among its core members Sonny Tau (Ngāpuhi), Naida Glavish (Ngāti Whatua), Harry Mikaere (Hauraki), Tukoroirangi Morgan (Waikato-Tainui), Rikirangi Gage (Te Whānau a Apanui), Ngahiwi Tomoana (Ngāti Kahungunu), Sir Archie Taiaroa (Whanganui) and Matiu Rei (Ngāti Toa Rangatira).

The Iwi Leaders Group does not purport to speak for all Iwi and hapū, and has sought to respect the mana of all Iwi/hapū and their direct Treaty relationship with the Crown by;

- Stating clearly to the Crown that the Group does not speak on behalf of all Iwi and hapū;
- Seeking to be a conduit for good information on the Crown process as well as the thinking of Iwi and hapū across the motu, to Iwi and hapū through reporting to the Iwi Chairs hui, the hui across the motu in 2009 (see below) and via the email network that we have access to; and
- Consistently representing positions to the Crown that we believe need to be understood by government for an enduring and principled framework to be developed. These positions do not replace the direct Treaty relationship between each Iwi and hapū and the Crown, rather they have tried to prepare the Crown for having this conversation with Iwi and hapū from a better starting place (even if the starting place in the Crown consultation document doesn't reflect what we tried for).

We heard at many of the hui in November-December 2009 that some representatives of Iwi and hapū were frustrated with the communication coming from the group, and some also had some reservations about the process for engagement with the Crown. Some representatives also stated that this work should be done and that the group should keep doing it, so long as it was remembered and respected that mana resides with Iwi and hapū, and that we continued to work hard for the kaupapa. We have tried to recognise and respect these messages through the way we have worked, and we have never lost sight of the kaupapa; te takutai moana me ngā mana o ngā hapū/Iwi, mai rā anō, ā, mō ake tonu.

Kōrero a Iwi

Iwi and hapū have been discussing foreshore and seabed issues for over a decade, since Te Tau Ihu lodged their court case, through the work on aquaculture, and following that, the six years since the Court of Appeal decision on the foreshore and seabed that has seen written submissions, hui with the Crown, hui amongst Iwi and hapū, complaints to the United Nations and the hīkoi. The hui that this group attended in November-December 2009 echoed the kōrero of the last decade.

We heard Iwi and hapū describe two distinct issues on this kaupapa;

- **The Cause** – that the reason Te Tau Ihu went to court was because of poor management of the marine environment. Their quest fo customary title was intended to create

more leverage for customary authority (including development rights) to be expressed and exercised by Te Tau Ihu over their rohe moana; and

- **The Hara** – that the Act injured Maori through the discriminatory extinguishment of Maori property rights, denial of due process and removal of access to the courts, all of which was worsened by the political climate at the time.

We heard Iwi and hapū describe the following expectations for the replacement framework;

- **Address the Cause –** the 2004 Act didn't deal with the reason why Te Tau Ihu went to court and the replacement framework should provide for better management of the marine environment, and the exercise of customary authority over rohe moana**;**
- **Address the Hara –** that the human rights breaches of the 2004 Act must be remedied by restoring the property rights extinguished and access to the courts**;** and
- **Redress the Relationship–** that the relationship between the Crown and Iwi was injured by the Act and the way it was passed, and to restore the honour of the Crown and the trust and confidence of Iwi and hapū, the replacement framework must be transformative – bringing about a new way of providing for the rights and values of Iwi and hapū that exceeds all the existing precedents.

We also heard Iwi and hapū state the following were the fundamentals that the replacement framework must be built on;

- **Mana** – that Iwi and hapū have inherited mana and the obligation to act as kaitiaki of their rohe moana, and that this customary authority should be respected and provided for as pre-existing the assertion of Crown sovereignty and enduring today with the following elements (that are expressed differently by Iwi and hapū); toitū te mana atua, toitū te mana whenua-mana moana, toitū te mana tangata, toitū te mana Tiriti;
- **Tikanga** – that mana, and the authorities and obligations that go with mana, should only be understood and defined as according to tikanga (not introduced common law standards) and that tikanga should be given effect as law;
- **Tiriti/ Te Whakapūtanga**– that the Treaty partnership between the Crown and Iwi/hapū must be provided for in a meaningful way that provides for the respective authorities and responsibilities of each partner, and that the authorities confirmed in Te Whakapūtanga must be respected and provided for.

Positions Represented to the Crown

The Iwi Leaders' Group has attempted to deliver those Iwi/hapū perspectives to the Crown throughout the six months of engagement that has occurred through the following statements.

In August 2009, the Iwi Leaders' Group advised the Prime Minister and senior Ministers that:

- Te Tiriti o Waitangi underpins the relationship between Iwi/hapū and the Crown and is the basis for all engagement;
- That the key principle underlying any replacement of the 2004 Act must be to recognise, and make provision for the full expression of, the enduring mana of Iwi and hapū,

including but not limited to providing for customary authority, customary use, the right to develop and customary title (or some form of sui generis title that allows Iwi/hapū to express their autonomy, rights and tikanga;

- The negotiations with Ngāti Porou, Te Whanau a Apanui, Ngāti Pahauwera and Te Rarawamust be respected, as must Treaty Settlement negotiations touching on foreshore and seabed matters. Any replacement framework must at a minimum uphold any agreements reached and should allow each Iwi free choice over the expression of their mana;
- Repeal of the 2004 Act and replacement of it with an effective and equitable regme should occur simultaneously; and
- Related issues beyond the immediate scope of the foreshore and seabed issue also require the attention of government, including constitutional change and improving the integrated management of the marine environment.

In October 2009, the Iwi Leaders advised the Attorney General that there were a number of issues that needed to be addressed in any replacement to the Act, including;

- That the Foreshore and Seabed Act must be repealed and the rights the Act purportedly extinguished restored as a matter of law;
- That the overriding objective should be adopting a transformative approach to how mana is expressed and given effect to;
- That there are three key issues that must be dealt with;
  - Addressing the human rights and Treaty breaches from the 2004 Act;
  - Responding to the original reasons why Te Tau Ihu went to court; and
  - Addressing the wider issues that contributed to the Act; constitutional change and Oceans Policy.
- That responding to these issues must provide flexibility for Iwi and hapū differences, in terms of traditions, histories and circumstances that create different priorities and preferences;
- That the ownership of the foreshore and seabed will be politically contentious but there are a number of ways of providing for ownership and that should all be explored;
- That Iwi/hapū title to the foreshore and seabed is an important issue, but that the value of title will depend on the form of the title (customary, tūpuna or another form of title), how it is obtained (which court and what tests) and the outcomes from having it;
- That the new Act could be detailed or more open in its terms and the preferred approach will depend on the content of the new Act; and
- That there needs to be a real process for developing the policy framework in partnership with Iwi and hapū.

In December 2009, the Iwi Leaders Group reported on the hui that had been held across the motu, and emphasised the following themes;

- Carrying over any form of Crown ownership or vesting from the 2004 Act will be viewed as an effective continuation of that Act, no matter what follows;
- The new regime should recognize the mana of iwi/hapū over their rohe moana, both in principle and through practical mechanisms;

- More effective input by Iwi and hapū into the management of all aspects of the marine environment and marine resources is sought (as a minimum);
- In some cases, Iwi/hapū should be recognized as decision makers in the management and allocation of resources;
- Where thresholds/tests are required, these should be derived from tikanga, rather than colonial law; and
- Going to court to establish mana or rights is generally seen as a least preferred option.

In January 2010, the Iwi Leaders Group expressed concern that the policy framework the Crown was working on may not be acceptable to Iwi and hapū, and have continued to maintain that position across February and March, culminating in this document commenting on the Crown proposal and some potential improvements and alternatives to it.

Summary of the Crown Proposal

The Crown consultation document provides a detailed commentary on the Attorney General's preferred options for the replacement framework, and it also identifies some alternatives that have been considered in the policy development process. The key points are as below:

Repeal 2004 Act

The consultation document recommends that the Foreshore and Seabed Act is repealed and the rights it purported to extinguish restored as a matter of law.

Crown Ownership

The preferred model for ownership is described as a 'no ownership regime', which results in the foreshore and seabed legally not being owned by anyone, and the new Act it as the "public domain/ takiwā iwi whānui". The details around this 'no ownership' approach are not quite clear in the document. In particular, the document does not identify whether the Crown proposes to give up the ownership of 'non-nationalised' minerals (minerals other than petroleum, gold, silver and uranium) which it took by virtue of the 2004 Act.

The alternatives that have been considered are; full vesting in the Crown, vesting of radical title (the right to regulate subject to Iwi and hapū rights) and full Māori ownership.

Nature of Iwi/Hapū Rights

The replacement framework uses an aboriginal title based framework to defined the nature of Iwi and hapū rights as being of two key types:

- Title/Territorial Rights – which are the rights that amount to property rights akin to customary or aboriginal title in the foreshore and seabed (like a freehold title to land); and
- Use/Non-Territorial Rights – which are the customary practices of Iwi and hapū – the customary uses of the foreshore and seabed (which are like, but don't include, customary

fisheries practices).

How Iwi/Hapū Rights are Recognised

The document identifies two ways that the rights (territorial and non-territorial) can be recognised;

- Negotiations – through direct negotiations between the Crown and Iwi and hapū;
- Courts – through litigation in the courts, with a preference expressed for the High Court over the Māori Land Court.

The Attorney General expresses his preference for direct negotiation being the main way that rights are recognised. It is unclear whether the tests set out below for the court processes will also be applied to negotiations and it appears as though the outcomes for court processes (as below) will also guide the outcomes for negotiations.

Tests for Iwi/Hapū Rights

There are tests set out for both non-territorial and territorial rights.

The non-territorial rights test incorporates both tikanga and common law, and is described as having the following elements:

- Iwi and hapū must prove continuity of use/practices since 1840 and that that use/practice continues to be carried out by iwi/hapū; and
- If Iwi/hapū prove the first step above, it must then be proven whether or not the relevant use rights have been extinguished. The document signals that the government is considering whether it should be the Crown that has to prove extinguishment (rather than Iwi/hapū having to disprove it).

The territorial rights test incorporates both tikanga and common law, and is described as having the following elements:

- Iwi/hapū must prove they held an area of foreshore and seabed according to tikanga at 1840 and have maintained exclusive use (other than in the case of fishing and navigation by third parties) and occupation of it in a substantially uninterrupted way since that time, for which ownership of abutting land will be a relevant factor; and
- If Iwi/hapū prove the first step above, it must then be proven whether or not the relevant rights have been extinguished. As noted above, the government is considering whether it should be the Crown that has to prove extinguishment.

The document notes that the tests should combine both tikanga and the common law "in line with the Treaty of Waitangi, its principles and associated jurisprudence". In respect of both tests, however, where – for example – continuity of use and/or occupation had been interrupted by virtue of Crown actions in breach of the Treaty, that use/occupation would still be regarded as extinguished and Iwi/hapū complaints in respect of the Crown actions would fall to be dealt with in the historical Treaty settlements process.

Outcomes from Iwi/Hapū Rights

The outcomes that come from having non-territorial and territorial rights recognised are described in the document as awards and include:

- Non- territorial – there are three types of awards described:
    - Protection of customary activities – uses and practices that are recognised will be legally protected under the Resource Management Act, so that people applying for consents will not be able to adversely affect customary practices;
    - Rāhui over wāhi tapu – Iwi and hapū will be able to impose rāhui over wāhi tapu, that will be given effect by the issue of a Gazette notice under the authority of the Minister of Māori Affairs or Minister of Conservation;
    - Planning document – Iwi and hapū will have the right to create a planning document which will be taken into account under the Resource Managment Act and considered under other legislation, such as the Local Government Act and Fisheries Act.

- Territorial— would be recognized through a "customary title", which would be inalienable and from which three awards would flow;
    - Permission right – Iwi and hapū will be able to give or withold permission for activities requiring a resource consent in the area that they have title over;
    - Participation in conservation processes – Iwi and hapū will have certain rights over conservation activities including marine reserves and concessions;
    - Planning document – this would be the same as for the non-territorial rights award, but would have a higher status in decision-making under the Resource Management Act.

While development rights are not explicitly discussed in the document, it is noted that coastal hapū/iwi would have a right to obtain commercial benefit from use of an area over which non-territorial or territorial rights had been recognized, though how that would occur is not discussed.

Commentary on the Crown Proposal

The Iwi Leaders Group considers that the Crown proposal does improve on the 2004 Act, and is a positive and principled response to the hara that the Act caused because it;

- Repeals the 2004 Act;
- Restores the rights the Act purported to extinguish; and
- Restores the right of Māori to access the courts.

However, the Iwi Leaders Group is concerned that the proposal does not respond to a number of the key issues, expectations and fundamentals that Iwi and hapū have expressed over the last six years.

The Iwi Leaders Group has never spoken for Iwi and hapū, and we do not intend this document to express any positions on behalf of Iwi and hapū , rather, this document provides some comments and thoughts on the Crown proposals to inform Iwi/hapū discussions on the subject.

Evaluation of the Proposal

The Iwi Leaders Group is concerned that the Crown proposal doesn't respond to the issues, expectations and fundamentals that Iwi and hapū have expressed over the last six years in the following ways:

- **Address the Cause** –the proposal focuses on responding to the Court of Appeal decision rather than the reason why Te Tau Ihu went to court in support of their customary authority over rohe moana. The expression of mana is proposed to happen through the awards that come from having territorial and non-territorial rights recognised. We are concerned that this way of providing for rights recognition cannot satisfy the expectations of Iwi and hapū to express customary authority over the foreshore and seabed and act as kaitiaki because the awards are limited and may not be of the type that Iwi and hapū think are appropriate.
- **Redress the Relationship–** the Crown proposal focuses on responding to the direct injuries caused by the 2004 Act, and uses the aboriginal title model for recognising the rights of Iwi and hapū that was the basis of the 2004 Act. We are concerned that this approach will not satisfy the expectations of Iwi and hapū for a transformational approach to restoring the relationship between the Crown and Iwi and hapū;
- **Mana** – the proposal provides for the rights of Iwi and hapū to be recognised, and that Iwi and hapū will need to prove that those rights exist. We are concerned that this approach is inconsistent with the expectation of Iwi and hapū that the inherent and pre-existing nature of mana will be recognised, and doesn't respond to the sense of frustration Iwi and hapū have with repeatedly proving their rights before courts or in negotiations with the Crown at high financial and time cost;
- **Tikanga** – the Crown proposal blends common law and tikanga into tests that are an improvement on the 2004 Act, but we are concerned that Iwi and hapū have clearly articulated an expectation that relationships founded by mana will be judged within the legal tradition that creates those relationships; tikanga.

We also consider that there are elements of the Crown proposal that require further work and clarification;

- **Public Domain Definition**—further clarity around the public domain/takiwā iwi whānui will be important, because that will determine whether the proposal remedies the human rights breaches from the 2004 Act;
- **Who holds rights** – the question of who has the right to go to the courts and/or negotiate with the Crown (legally, this is described as the question of who has standing). It could be all or any of Iwi, hapū, whānau or individuals;
- **Development right** – the scope of the right to development, including the right to share in the benefits of commercial developments is not clear from the consultation document;
- **Non-nationalised minerals** – the status of non-nationalised minerals (all minerals other than petroleum, gold, silver and uranium) and the rights of Iwi and hapū to those resources are not clear in the document;
- **Resourcing the processes** – it is not clear with Legal Aid would be available to those Iwi or hapū who seek recognition of their rights through the courts or how any negotiations processes would be resourced.

Detailed Commentary on the Proposal

We have based our commentary on two key aspects of the fundamentals and expectations expressed by Iwi and hapū:

- **Mana framework** – the extent to which the proposal provides for Toitu Te Mana Atua, Toitu Te Mana Whenua/Moana, Toitu Te Mana Tangata, Toitu Te Mana Tiriti, as well as upholding Te Whakaputanga; and
- **Human Rights framework** – the extent to which the Crown proposal satisfies international human rights standards and the Declaration on the Rights of Indigenous Peoples.

We also recognise that the full set of criteria that Iwi and hapū assess the proposals against will be wider that these two frameworks.

Aspect of Proposal – Crown Ownership:

Change to 2004 Act: The 2004 Act vested the foreshore and seabed in the Crown in the public trust. The Crown proposal is based on there being no ownership of the foreshore and seabed, which is described as the public domain/takiwā iwi whānui, though it is not clear whether that 'no ownership' regime will extend to non-nationalised minerals.

Mana framework	Human Rights Test
It is unclear how the public domain and the pre-existing mana of Iwi and hapū intersect, and this important matter is not discussed in the document. Depending on how the details are worked through, the 'public domain' concept could be seen as Crown ownership under another name, if so, it will not sit comfortably with inherent mana.	It is unclear how the public domain concept would be treated by the United Nations. If the 'public domain' does not allow Iwi and hapū to have full property rights, the United Nations may well find that the replacement framework discriminates against Māori in the same way that the 2004 Act does.

Aspect of Proposal –Nature of Iwi/Hapū Rights:

Change to 2004 Act: The Crown proposal retains the 2004 Act approach of recognising territorial and non-territorial rights that are based on aboriginal title.

Mana framework	Human Rights Test
Iwi and hapū have criticised the aboriginal title approach to recognising rights as a model that artificially reduces and fragments the holistic relationship Iwi and hapū have with natural resources under tikanga.	International human rights standards would likely accept aboriginal title as a possible model, subject to the tests and awards. The Declaration on the Rights of Indigenous Peoples (DRIP) however, arguably anticipates greater recognition of Indigenous legal traditions than is provided for under an aboriginal title approach.

Aspect of Proposal – How Iwi/Hapū Rights are Recognised

Change to 2004 Act: The Crown proposal retains largely the same approach as the 2004 Act because it provides for negotiation and litigation. The key and important difference is that negotiated outcomes do not need to be judicially confirmed.

Mana framework	Human Rights Test
Direct negotiations are a positive reflection of the relationship between the Crown and Iwi and the mana of all Iwi and hapū. Many Iwi and hapū assert that they should not have to prove pre-existing rights in the courts, particularly where those rights have been extensively proved previously.	Human rights standards would consider both negotiation and judicial processes as proper, particularly given the importance of access to the courts under international standards.

Aspect of Proposal – Tests for Iwi/Hapū Rights

Change to 2004 Act: The Crown proposal has a similar framework to the 2004 Act, however it does lessen the threshold in a positive way through; (1) incorporating tikanga into the tests and (2) making the continuous title to continguous land requirement a relevant rather than mandatory criteria for the recognition of territorial rights.

Mana framework	Human Rights Test
Incorporating common law into the tests could be seen as philosophically unacceptable, as a redefining of the nature of the mana based relationship with foreshore and seabed. The tests will not address historical Treaty breaches which had the effect of interrupting the continuity of expression of rights.	These tests may be acceptable under international standards, subject to the details and awards that flow from having the rights recognised. These tests are less likely to satisfy DRIP standards due to the greater levels of autonomy and provision for Indigenous legal traditions provided for in the Declaration.

Aspect of Proposal –Outcomes from Iwi/Hapū Rights

Change to 2004 Act: The awards have changed notably from the 2004 Act, and have arguably become more relevant to Iwi and hapū.

Mana framework	Human Rights Test
The real issue is whether the awards provide for the full expression of mana, which they do not appear to do at present. This is largely because they are a narrow set of instruments that provide for limited ways to express authority and it is unclear whether they will contribute to improving the environmental health and well-being of the foreshore and seabed. It is noted that the proposed awards equate to only a small subset of the mechanisms provided for in the Ngāti Porou foreshore and seabed agreement.	International human rights standards will only be satisfied if there is provision for Iwi and hapū property rights to be treated equally with the property rights of other persons in the foreshore and seabed. The DRIP provides for territorial authority that is arguably not satisfied by the suite of awards provided.

Responses to the Crown Proposal

The Iwi Leaders Group considers that there are three possible responses to the Crown proposal:

- **Accept the Crown proposal** in its current form – however, we don't consider this is a satisfactory way of providing for the expectations and fundamentals expressed by Iwi and hapū;
- **Improve the Crown proposal** – which could be achieved through a range of alternative/cumulative changes to the proposal, but that may be seen as not being sufficiently transformative by Iwi and hapū;
- **Substitute an alternative approach** – which could amount to creating an alternative framework, however, this may be politically challenging and would require Iwi and hapū to have some degree of consensus on the preferred approach. The possible alternative approaches we have identified include:
    - Māori title;
    - Tīpuna title;
    - Treaty-based mana expression model; and
    - Co-governance model.

We set out below some ideas on both improving the Crown proposal and possible alternative approaches for discussion amongst Iwi and hapū. We recognise that there will be further alternatives that can and should be explored.

Improvements to the Crown Proposal

The Iwi Leaders Group recognise that improving the Crown proposal may be seen as philosophically vexed by Iwi and hapū. However, we also think it is important to explore all options and have therefore identified ways in which the Crown model could be improved below. The improvements suggested below consciously try to work within the framework developed by the Crown, and are in no

way a complete set of options that could be considered.

The possible improvements to the Crown proposal include:

- **Universal recognition of mana;**
- **Improved negotiations model to strengthen the negotiating position of Iwi and hapū;**
- **Creating a specialist court/tribunal in place of the High Court;**
- **Framing the tests for rights recognition according to standards other than the common law, potentially drawing on the Declaration on the Rights of Indigenous Peoples, Treaty of Waitangi jurisprudence and/or tikanga;**
- **Strengthening Iwi/hapū property rights and/or strengthening and widening the range of awards available, particularly those that provide management powers; and**
- **Ensuring greater flexibility for Iwi/hapu to design their own solutions.**

These options are explored in more detail in the tables below.

Aspect of Proposal – Crown Ownership:

Crown Proposal: The Crown proposal is that the foreshore and seabed is not subject to any form of ownership and is described the public domain/takiwā iwi whānui.

Option A: Title/Property Rights	Option B: Treaty Title
A key issue with the model is whether the property rights held by Iwi and hapū will be reflected in the title obtained under the model. An improvement could therefore be clearly and appropriately provide for Iwi and hapū property rights to be recognised.	A further alternative is that the foreshore and seabed could be vested in a way that recognises the Treaty partnership – a form of joint vesting that recognises the pre-existing mana of Iwi and hapū and the regulatory power of the Crown (under Article 1) to the extent that it is exercised consistent with the tino rangatiratanga of Iwi/hapū (under Article 2).
Option C: Non-nationalised minerals	
The model could expressly reverse the ownership of non-nationalised minerals taken by the Crown through the 2004 Act and reconfirm that such minerals are subject to the pre-existing rights of Iwi and hapū.	

Aspect of Proposal –Nature of Iwi/Hapū Rights:

Crown Proposal: The Crown proposal is based on a traditional aboriginal title model that recognises title and use rights.

Option A: Universal Recognition	Option B: Mana Basis
The simplest improvement would be for there to be clear and more developed universal recognition of mana, available to Iwi/hapū without having to go to Court or negotiate with the Crown.	In a similar vein, the model could be reframed so that the title and use rights are expressly connected to universal mana recognition. In principle, this would seek to recognise that title and use rights are derivatives of mana, and enjoying the benefits of these rights should be subject to the authority of the mana whenua hapū.

Aspect of Proposal – How Iwi/Hapū Rights are Recognised

Crown Proposal: The Crown proposal provides two routes for rights recognition; negotiation and litigation through the High Court. The negotiation route will not be described or regulated by statute (because the right to negotiate is an inherent right of both the Crown and Iwi/hapū)

Option A: Negotiation Position	Option B: Specialist Jurisdiction
This approach could be improved by strengthening the negotiating position of Iwi and hapū, and providing greater certainty on outcomes and the like.	In addition to increasing the negotiating position of Iwi and hapū, consideration could be given to a substitute for the High Court, either through the Māori Land Court or a specialist tribunal which adopts a more administrative approach to confirming the presence of pre-existing rights.

Aspect of Proposal – Tests for Iwi/Hapū Rights

Crown Proposal: The Crown proposal uses aboriginal title principles drawn from Australia and Canada because the law in NZ is under-developed (largely because we had the Native Land Courts historically and the Waitangi Tribunal in the contemporary era which has resulted in few aboriginal title cases being taken)

Option A: DRIP Test	Option B: Treaty Jurisprudence
In place of common law from other countries, it is possible to use international law standards from the DRIP. This would be justified because this declaration expresses the minimum rights enjoyed by Indigenous Peoples. If this was done, the tests could be expressed as: · The rights are created by tikanga; and · Those rights continue to exist unless they have been extinguished/surrendered with the free, prior and informed consent of the holders.	Alternatively, drawing on Treaty jurisprudence would be appropriate for New Zealand and could result in a test similar to: · The rights are created by tikanga; and · Historical Crown misconduct (such as raupatu) would not have the effect of extinguishing the rights of Iwi and hapū.
Option C: Tikanga Test	
This option would result in tikanga being the only source of law for assessing the nature and extent of rights and could be similar to; · The rights are created by tikanga; · The nature and extent of those rights are determined by principles of tikanga, such as the exercise of kaitiakitanga.	

Aspect of Proposal –Outcomes from Iwi/Hapū Rights

Crown Proposal: The Crown proposal has a suite of six awards that are available to Iwi and hapū if rights are recognised, including:

- Territorial – permission right, conservation activities, and a planning document;
- Non-territorial – rahui over wāhi tapu, planning document and the legal protection of customary practices.

Option A: Property Rights	Option B: Regulatory Powers
A conservative option would provide for greater clarity of the way property rights to the foreshore and seabed are given effect to, to ensure that Iwi and hapū have the same rights as other property rights holders.	A wider improvement could be to increase the suite of outcomes that are available to Iwi and hapū, and to increase the extent of regulatory powers that are available so that there is more meaningful provision for the expression of customary authority. For example, stronger approaches could empower Iwi and hapū to pass by-laws, self-consent the activities of hapū/Iwi activities and the like.
Option C: Flexibility	
A further option that should arguably be provided for in any framework, is the right and ability of Iwi and hapū to create their own mechanisms to express their mana according to their regional circumstances.	

The Iwi Leaders Group recognises that there are further improvements that could and should be explored if Iwi and hapū wish to work on improving the Crown proposal, and that there needs to be dialogue on which options are more suitable for each Iwi and hapū individually and/or in combination.

Alternatives to the Crown Proposal

There are also a number of alternatives to the Crown proposal, we describe four possible alternatives below, however there will be both further options and improvements that could be made to the thinking below. These alternatives do not take the same starting place as the Crown proposal, and in varying ways , seek to give effect to the expectations, fundamentals, rights and values held by Iwi and hapū. We do not have a position on which of the models may be more desirable, as our intention is simply to contribute to discussion amongst Iwi and hapū.

The four options described are:

- Māori title;
- Tīpuna title;
- Treaty-based mana expression model; and
- Co-governance model.

Māori Title

The Māori Title model has been promoted by Hone Harawira as an alternative framework that has the following elements;

- The foreshore and seabed is vested in Māori title (resulting in ownership being held by Māori);
- Māori title is explicitly made inalienable (unable to be sold); and
- There is a statutory right created for public access.

The additional points that would need to be considered if this model was supported by Iwi and hapū include:

- What the outcomes are of holding Māori title, and whether these outcomes are the same as other property rights holders or whether they are different;
- Who the title is vested in and how that responds to the principle of mana whenua mana moana.

Tīpuna Title

Tīpuna Title was first presented by Ngāti Kahungunu and is different from vesting the foreshore and seabed in Māori title because it concentrates more on recognising the inherent mana and authority of Iwi and hapū rather than the property rights/ownership concept recognised by English law.

The way Tīpuna title has been expressed to date is as an eloquent expression of a mātauranga sourced description of the relationship between Iwi and hapū and the foreshore and seabed under tikanga. The mechanical aspects of how tīpuna title would be given practical effect have not been worked through in a detailed way in any publicly available document.

Treaty-Based Mana Expression Model

This approach would respond to the inherent limitations of the common law aboriginal/customary title approach and move away from issues of ownership, rights and title and focus instead on building practical ways in which Iwi and hapū might express their mana and rangatiratanga over their rohe moana. It would start from the sort of jurisprudence on the Treaty that has been development in the courts and the Waitangi Tribunal over the last 20+ years.

Some of the mechanisms contained in the Crown approach could have a place in this approach, as might others used in Treaty settlement, and a number of others could be devised, either generically for the whole country or by individual Iwi/hapū. Attention would move from requiring Iwi/hapū rights to be tested and proved, to empowering the exercise of kaitiakitanga in accordance with tikanga.

Co-Governance Model

A Co-Governance model would be similar to the Treaty-Based Mana Expression Model described above, but would have an emphasis on mechanisms for Iwi/hapū and the Crown (and/or local authorities) to work together and make joint decisions on matters affecting the takutai moana.

Possible Discussion Points

The Iwi Leaders Group recognises that each Iwi and hapū will have their own priorities, issues and expectations of the replacement regime that will be sourced in your traditions, histories and circumstances.The way of deciding what solution works best for your rohe might be to take a site of significance and assess the outcomes for the Iwi/hapū from each model. However, there are also some common questions that may help in framing discussion.

Crown Proposal

- Do you think that the Crown model is a reasonable starting point for the replacement framework?
- What aspects of the Crown model do you think are positive?
- What aspects of the Crown proposal are most troubling for your Iwi/hapū?
- What practical outcomes will your whānau/hapū/Iwi obtain from the Crown model?

Possible Improvements on the Crown Proposal

- Do you think that the Crown proposal can satisfy the expectations, rights and values of Iwi and hapū if it is improved?
- What aspects of the Crown proposal do you think are the most important areas to improve?
- Do any of the identified improvements increase the likelihood that the model could satisfy the expectations, rights and values of Iwi and hapū, if yes, which options and what further improvements could be made?

Alternatives to the Crown Proposal

- Do you think that any of the alternative models identified are reasonable starting points for the replacement framework, and if yes, which ones?
- What practical outcomes will your whānau/hapū/Iwi obtain from any of alternative models?
- What improvements need to be made to any of the alternative models for it to work/ work better for your whānau/hapū/Iwi?
- What are the further alternative models that could be developed?

Next Steps – Participating in the Crown Consultation

There are two main ways to participate in the Crown consultation on the foreshore and seabed replacement framework;

- Attending the hui; and/or
- Written submissions.

Hui Programme

The hui are being hosted by Iwi/hapū around the country, and will involve a pre-hui with just hapū/wi members to discuss a response to the Crown proposal, with the Attorney General arriving later in the day to discuss the Crown proposal. Representatives of the Iwi Leaders Group are available to attend and share information at hui, if Iwi and hapū would find that useful. The programme for these hui is available at http://www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004/copy_of_how-can-i-have-a-say

Written Submissions

Written submissions are due by **30th April 2010.** The Crown consultation document is available at: http://www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004 and there is also a submissions template that can be used with specific questions in it that is also available at that web address.

Submissions should be emailed to: foreshoreseabedreview@justice.govt.nz or sent to:

FreePost Authority number 224164
Foreshore and Seabed Review
Ministry of Justice
c/- PO Box 180
WELLINGTON 6140

After the Crown has completed the consultation programme the following steps are likely:

- The Crown will draft a Bill to give effect to their intended replacement framework; and
- Iwi and hapū will be able to participate in that process by presenting written and oral submissions to the Select Committee that the Bill is referred to.

The Iwi Leaders Group are committed to contributing to an outcome that satisfies the rights, expectations and values of Iwi and hapū and that respects the aspirations of people on the hīkoi in 2004 and the many people who participated in the United Nations processes. The way intend to do so includes:

- If invited by mana whenua, we will attend any of the pre-hui for Iwi and hapū;
- Complete a more detailed analysis of the Crown proposal and distribute it to Iwi and hapū;
- Report on the work of the ILG and status of the foreshore and seabed issue at the next Iwi Chairs Forum; and
- Continue providing information updates to Iwi and hapū.

For further information on the work of the Iwi Leaders Group please contact sacha.mcmeeking@ngaitahu.iwi.nz