

A FURTHER PRIMER ON THE FORESHORE AND SEABED.

'I once spoke of our people who have their mana attacked being like a beached whale struggling to live...what I say now is to remember how often the sea casts the whale on the shore'.

- Te Ataria, 1889.

'The question that must always be asked of legislation is not whether it is a legislative compromise or even whether it is practical, but whether it is just'.

- Justice Thurgood Marshall, U.S. Supreme Court, 1970.

ABSTRACT.

This Primer is part of material produced for hui within Ngāti Kahungunu on the foreshore and seabed that began with the original proposals put forward on the issue by the last government in 2003.

It addresses some of the main parts of the new Marine and Coastal Area (Takutai Moana) Bill and asks questions about the new regime it establishes for the foreshore and seabed.

It tries to provide some context for the Bill by considering the grounds that have compelled Māori to so forcefully and consistently voice concern about the issue over the last several years - it considers the attempts the people have made to avoid being 'beached' by the various Crown proposals since 2003.

It also tries to apply the test for legislative legitimacy outlined by Justice Marshall and assesses whether the Bill is just.

It regrettably concludes that it is not.

It further concludes that the proposed Bill simply consolidates the main inequities of the 2004 Seabed and Foreshore Act that the Waitangi Tribunal found to be problematic in terms of Te Tiriti o Waitangi and the United Nations Committee on the Elimination of Racial Discrimination held to be racially discriminatory.

In that context the Prime Minister's statement that the Bill will be a full and final settlement of the issue is simply inaccurate because rather than removing the injustice it actually compounds it.

- Moana Jackson.

What was the context of Maori opposition to the 2004 Foreshore and Seabed Act?

There were three main grounds of opposition.

1. The Act was a confiscation of Iwi and Hapū rights to the foreshore and seabed because it removed title and vested it in the Crown on behalf of 'all New Zealanders'.
2. The act was discriminatory because it required Iwi and Hapū to allow access over areas of foreshore they had an interest in but did not place the same responsibility on Pākehā. It created a basic inequality of obligation.
3. The Act was also discriminatory because it denied Māori access to the Courts to seek clarification of rights. It created a basic inequality of legal opportunity.

What did Iwi and Hapū seek?

Repeal of the Act and a replacement piece of legislation that

- (a) removed the possibility of confiscation and
- (b) was non-discriminatory.

Does the Marine and Coastal Area (Takutai Moana) Bill Repeal the 2004 Act?

Yes.

There has been a lot of work done by the Māori Party and others, including the Ministerial Review Panel chaired by Justice Edward Durie and countless submissions by Iwi and Hapū to ensure its repeal.

Does the new Bill remove the inequities in the 2004 Act?

No.

Indeed in many ways it simply enshrines them in new language.

How does the new Bill address the issue of confiscation?

The Bill does remove the idea of vesting the foreshore and seabed in the Crown.

However it still takes Iwi and Hapū interests off Māori and vests them in a new construct called a 'common space' in the marine and coastal area.

It remains a confiscation because it is still a taking from Iwi and Hapū. The only difference is that the final destination of the confiscated land is given a new name.

What does the 'common space' mean?

It is a legal fiction denoting an area that nobody owns and within which no-one is allowed to have new private title.

Does the ‘common space’ apply to all the foreshore and seabed around the coast?

No.

It effectively only applies to area in which Māori might have an interest and specifically excludes the large majority of foreshore currently held by others under private title.

Does the new Bill have rules around the ‘common space’?

Yes, which is why it is a legal fiction.

For example on one hand it says it is a common space no-one owns and on the other it outlines in great detail the authority and control the Crown has over it.

It thus has specific provisions for absolute Crown ownership of certain minerals in the ‘common space’ with the associated power to grant licenses for those minerals. It asserts Crown ownership rights over an area that no-one is supposed to own.

How does it address the issues of discrimination?

It doesn’t really.

The continued confiscation is itself discriminatory because areas held by others are not subject to the same taking and subsequent vesting in the ‘common space’. Only Māori are discriminated against in this way.

The Attorney General Chris Finlayson has nevertheless stated that ‘the Bill, unlike the Foreshore and Seabed Act 2004 which it replaces, treats all New Zealanders, including Māori, without discrimination’.

Yet the Bill clearly discriminates between Māori and other New Zealanders in all sorts of other quite specific ways.

For example while our people have always been willing to allow access we have always asked that Pākehā in similar situations be required to do the same. Under the Bill they do not have to do so, which thus maintains the basic inequality of obligation.

Does the Bill restore the right of access to the Courts?

Yes.

It establishes a new ‘customary title’ in the ‘common space’ that Iwi and Hapū may seek to have recognised in court.

However to establish the title Iwi and Hapū have to prove continuous use of the relevant area since 1840. Because the ability of most of our people to use the foreshore since 1840 has been taken away or limited by actions of the Crown it is going to be almost impossible for most Iwi and Hapū to meet the test.

Indeed research conducted into the previous regime suggested that at least 98% of Iwi and Hapū have been denied undisturbed possession since 1840.

The acceptance by the Prime Minister that the threshold was so high most wouldn't meet it is both an accurate assessment of the test and a perhaps unwitting acknowledgement of its basic discriminatory nature.

Due process is restored but in a way that maintains the basic inequality of access.

Are there other provisions regarding due process?

Yes.

The newest provision sets a time frame of six years for Māori to lodge their so-called 'customary title' or 'right'.

This is a particularly odious provision as it introduces something new into the whole discourse of civil and human rights, namely that a right or interest can only exist if people can establish it within a certain time limit.

It is rather like saying for example that the basic right to freedom of speech can only exist if you can prove you have it in six years. Rights are meant to be universal and their universality depends upon them being free of time constraints.

It simply introduces another discriminatory process applicable only to Māori.

Can Iwi and Hapū negotiate 'customary title' in the 'common space'?

Yes, direct negotiations can be held with the Crown but will in practice only be available those few Iwi and Hapū that can meet the relevant test.

It excludes most Māori and will therefore be divisive and create further inequalities.

What is the nature of the 'customary title'?

It is a new form of title that is neither the customary title recognised in Māori law nor even that recognised in the Pākehā law of aboriginal title.

It is also quite specifically defined as being less than freehold title.

It is therefore a discriminatory title in that others may have freehold in their land contiguous to the moana but Iwi and Hapū can't – it is a subordinate title predicated on a notion of essentially subordinate Māori rights.

These few issues alone make the Bill discriminatory, unjust, and in continuing breach of Te Tiriti and other relevant international Human Rights Conventions.

Is there a period for submissions?

Yes, although the dates and times have yet to be announced.

This primer is available online at <http://www.converge.org.nz/pma/moana.htm>