A PRIMER ON THE GOVERNMENT CONSULTATION DOCUMENT

‘REVIEWING THE FORESHORE AND SEABED ACT 2004’.

‘The test of whether any rights regime for Indigenous Peoples is just or unjust is quite simple – does it recognise an equality of rights and restore what has been taken, or does it assert something else?’

- ***Kawaipuna Prejean, Hawaiian intervention at the 1991 sitting of the United Nations Working Group on the Rights of Indigenous Peoples.***

Introduction:

This Primer has been prepared as part of the ongoing discussion in Ngati Kahungunu about the foreshore and seabed issue, and in particular the Crown consultation document on the repeal of the 2004 Foreshore and Seabed Act.

It is hoped that it might be of value to others who wish to engage in the discussions and participate in the consultation process with the Crown.

It canvasses some of the main points in the Crown proposals and attempts to relate them to the issues Maori have raised on the subject since 2003.

The Iwi Leaders' Group has released a detailed commentary on the Crown document and this Primer necessarily addresses some similar issues. However it also focuses on others to determine whether they in fact recognise an equality of rights for Maori and restore what has been taken, or whether they assert something else.

It acknowledges that the document does have positive features in accepting that the current situation in regard to the foreshore and seabed has been both unacceptable and inequitable to Maori. However whether it is a 'sophisticated' or 'elegant' solution as the government claims is another question because 'elegance' is rarely the same as 'fair' or 'just'.

On that basis there are several areas in the Crown proposals which need some 'improvement' as the Iwi Leaders' Group has stated, and several which need to be elaborated upon further.

However of perhaps more importance is the fact that the Crown's preferred option for resolving the issue is conceptually flawed – it is based on certain presumptions, both political and legal, which limit the chance for substantive improvement and therefore also limit the possibility that any resolution will actually promote an equality of rights.

It is obvious that the issue is an intensely political one but politics or political expediency should never preclude justice. Neither should they damage the relationship between the Crown and Iwi and Hapu that was envisaged in Te Tiriti o Waitangi. The 2004 legislation did both.

This Primer is based on the belief that there is no need to repeat those mistakes.

- Moana Jackson.

What is positive about the Consultation Document?

It clearly commits to three main changes –

1. The repeal of the 2004 Foreshore and Seabed Act.
2. The restoration of rights which that Act tried to remove.
3. The restoration of due process. That is restoring the right of those who wish to go to court on this matter to do so.

Does it suggest anything to replace the 2004 Act once it is repealed?

Yes.

It suggests four possible options to regulate the use and protection of the Foreshore and Seabed.

It also suggests in some detail the sort of 'customary rights and title' Maori might be entitled to under its preferred option.

What are these options?

1. To fully vest the Foreshore and Seabed in the Crown.
2. To create a radical title for the Crown in the Foreshore and Seabed – that is, the right to regulate subject to Iwi and Hapu rights.
3. To vest full ownership of the Foreshore and Seabed in Maori.
4. To create a 'No ownership' regime based on a public domain or takiwa iwi whanui.

What is the Crown's preferred option?

The 'No ownership' regime.

What does this mean?

It is not clear what the notion of public domain would entail but the concept of 'No ownership' poses real conceptual difficulties, the most important of which are –

1. In tikanga terms whenua has to belong to somebody just as tangata whenua have to belong to the whenua. The notion of not belonging (or not being 'owned' in the document's language) is a diminishment of the relationship Iwi and Hapu have with the whenua and therefore of whakapapa itself.
2. In terms of Pakeha law it appears to revive the discredited colonising legal doctrine of terra nullius or 'the empty land' which once allowed colonisers to take indigenous lands simply by saying there were no people there.

The difficulties were recently highlighted when a leading barrister commented, not entirely jokingly, that if no-one owned the foreshore it was technically 'empty' and someone else could come along and take it, just as colonisers have always done.

Are there any other difficulties with the 'No ownership' regime?

The idea is also problematic if not deceitful because while the Crown suggests no owner it actually retains for itself a right to control and manage the Foreshore and Seabed that in reality amounts to ownership.

Indeed the document makes no reference to repealing the many statutes which have already been passed to vest ownership in the Crown.

The government has made it clear for example that it will continue to control whatever 'nationalised minerals' might exist in the Foreshore and Seabed. Those minerals are petroleum, gold, silver, and uranium. The document makes no clear reference to other 'non-nationalised' minerals.

The 'No ownership' concept is problematic in another way because it essentially gives the Crown the right to determine whatever Maori 'customary rights' might flow from the regime because they will necessarily be subject to, or have to be exercised in relation to existing statutory authorities. Indeed that right to define is akin to the right of an owner to decide what may or may not happen on a particular piece of land.

Are these 'customary rights' the rights Iwi and Hapu define according to tikanga?

No.

They are rights which Maori may have used since 'time immemorial' but they are actually constrained within the colonising doctrine of aboriginal rights or title. They are therefore a 'burden' on whatever authority the colonising power has assumed but they are also able to be extinguished or removed if the Crown decides to do so through legislation or some other means.

The document specifically retains this right of extinguishment. For example it notes that if a customary right has not been exercised because it has been extinguished by the Crown, even in breach of 'Treaty principles,' it stays extinguished unless the Waitangi Tribunal recommends otherwise.

The result is that the 'customary rights and title' are lesser rights than those enjoyed by others. They are not tikanga-defined or controlled but are rights that one famous Court case described as 'diminished' and 'necessarily dependent' on the whim of the Crown.

How then would the rights be established if the 'No ownership' proposal goes ahead?

The Consultation Document says there are different territorial or title rights and non-territorial or use rights.

They may be recognised either through a court case (the restoration of due process) or through direct negotiation between the Crown and a particular Iwi or Hapu.

As a general rule Iwi and Hapu will have to establish the rights by proving –

1. They have been continuously exercised without interruption since 1840
2. They apply to foreshore continuously occupied without interruption since 1840.
3. They have not been extinguished.

Are these requirements any different to the 2004 Act?

Not really.

They effectively retain what may be called a 'Crown wins' test because most Iwi and Hapu have been prevented from continuously exercising them by Crown actions since 1840.

The only possible difference is a suggestion that the Crown may decide it has to prove it extinguished the right rather than Iwi and Hapu having to prove it wasn't removed, but no firm commitment has been made in that regard.

What 'customary rights or title' are then available?

Very few.

They include such things as

- Protection of certain 'customary activities'.
- Ability to prepare a 'Planning document' to be considered by local bodies in their District Plans and applications under the Resource Management Act.
- Ability to grant or withhold permission under 'customary title' for activities requiring a resource consent from a local body.

Do Iwi or Hapu with these titles have to guarantee public access?

Yes, and Maori have always of course agreed to do so.

However there is a fundamental inequality in this requirement because others with freehold title to land on the foreshore do not need to grant access. It is only Maori with a 'diminished' title over a tiny piece of the foreshore who have to do so while those who control over 80% of it do not.

Can the other options be considered?

Technically yes, although the government is clear about its preferred option. Indeed it has said if Maori do not accept it the 2004 Act will remain in place.

That seems an unfair threat and hardly a good basis for a proper Treaty-based resolution.

Yet there are other possibilities that will address the concerns many people have while allowing a resolution for Maori that will recognise an equality of rights and restore what has been taken rather than assert something else as the current option does.
