

## INTRODUCTION

### THE PROCESS TO DATE

This report is the outcome of an urgent inquiry into the Crown's policy for the foreshore and seabed of Aotearoa–New Zealand. The many claimant groups represented in the inquiry comprised most of the coastal iwi.<sup>1</sup>

The urgent inquiry was sought after the Crown announced its response to the Court of Appeal's decision in the Marlborough Sounds case.<sup>2</sup> In that decision, the Court of Appeal departed from the previous understanding that the Crown owned the foreshore and seabed under the common law. This opened the way for the High Court to declare that Māori common law rights in the foreshore and seabed still exist, and for the Māori Land Court to declare land to be customary land under Te Ture Whenua Māori Act 1993.

The Crown supported the claimants' application for an urgent inquiry, and the timeframes were all tailored to the Crown's requests. The changing needs of the Crown meant that a proposed hearing in November 2003 was adjourned, and we made time available in January. We tried to balance the need on the one hand for claimants to have sufficient time to prepare for a very significant hearing, and the need on the other for our report to be available to Ministers before planned legislation is introduced. The result was that the hearing took place over six days at the end of January 2004, and we have had four weeks in which to produce our report.

### TERMINOLOGY

From the outset, it is essential to be clear what we are talking about when we refer to the foreshore and seabed. First, what is the foreshore? It is the intertidal zone, the land between the high- and low-water mark that is daily wet by the sea when the tide comes in. It does not refer to the beach above the high-water mark. The seabed is the land that extends from the low-water mark, and out to sea.

The need to distinguish the foreshore from the adjacent dry land and seabed arises from the English common law, which developed distinct rules for that zone. In Māori customary terms, no such distinction exists.

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1. A full list of the claimant groups is contained in the record of inquiry, which is appendix 11. Ngāti Porou and Ngāi Tahu withdrew late in the day, for reasons that were not disclosed.

2. *Ngāti Apa and others v Attorney-General* [2003] 3 NZLR 643. Although this case is now often referred to as simply 'Ngāti Apa', we prefer to call it the Marlborough Sounds case, because the appellants included not only Ngāti Apa but a number of iwi with mana in the Marlborough Sounds. Ngāti Kōata, Ngāti Kuia, Ngāti Rārua, Ngāti Tama, Ngāti Toa, and Rangitāne were also first appellants. Te Ātiawa Manawhenua ki te Tau Ihu Trust was the second appellant.

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We wanted to take our language out of the English legal paradigm. We raised with Sir Hugh Kawharu, a witness in our inquiry, whether there was a Māori term that clearly embraced the whole of the foreshore and seabed. Te takutai moana was a term that he felt may be variously understood by different groups in different situations. To some, it had more of an inshore connotation, whereas others might understand it as also connoting the high seas. The word papamoana, meaning simply the bed of the sea, did not seem to be as widely used.

We have therefore reluctantly resorted to the English terminology, foreshore and seabed. We recognise, and chapter 1, 'Tikanga', makes it very clear, that this terminology is culturally specific.

### **THE CONTEXT**

The Government's resolve to step in as soon as the Court of Appeal's decision was released to implement another regime very quickly, combined with the apparently widespread fear that Māori will control access to the beach, has led to an emotional response across the whole country. It is necessary to have an understanding of complex legal concepts to discuss foreshore and seabed in an informed way. Perhaps that is why the public discourse has generally been so unsatisfying, oversimplifying the issues and thereby distorting them. It appears to us that polarised positions (not necessarily underpinned by good information) have quickly been adopted, and real understanding and communication have been largely absent.

The Crown released the first version of its foreshore and seabed policy in August 2003. It elicited a storm of protest from Māori. In the following weeks, the Crown held a number of hui around the country to consult with Māori about the policy. We have heard a lot of criticism about the Government's consultation, but we decided early on that we would not inquire into the alleged deficiencies of that process. We felt that to do so would only be to confirm what everybody already knew: the consultation process was too short; and it was fairly clear that the Government had already made up its mind. The policy was further developed between August and December 2003, but was not changed in any of its essentials.

### **THE NATURE OF OUR TASK**

In embarking upon our report, we are conscious that while it is our job to consider the Crown's position on the policy, and the policy itself, in light of the Treaty, ultimately the Government is free to do what it wishes. Our jurisdiction is recommendatory only, and power to govern resides with the Government. We have no say in how much or how little regard is paid to our views. We hope that the Government will properly consider what we have to say and, if it is cogent, will be influenced by it.

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As a quasi-judicial body standing outside the political process, we proceed in the expectation that governments in New Zealand want to be good governments, whose actions although carried by power are mitigated by fairness. Fairness is the value that underlies the norms of conduct with which good governments conform – legal norms, international human rights norms, and, in the New Zealand context, Treaty norms. We think that even though governments are driven by the need to make decisions that (ultimately) are popular, New Zealand governments certainly want their decisions to be coloured by fairness. In fact, we think that New Zealanders generally have an instinct for fairness, and that a policy that is intrinsically fair will, when properly explained, ultimately find favour.

We see it as part of our role in the present situation to ensure that the Government has before it all the matters it needs to know in order that its decision-making is fair. In the Waitangi Tribunal, consideration of what is fair is always influenced by the agreements and understandings embodied in the Treaty, but fairness in Treaty terms is not the only relevant norm. There is a fairness that can be distilled independently of the Crown's commitments under the Treaty, and we think that wider fairness has relevance in the present situation. This is an important theme of our report.

### THE POLICY

The Crown told us that:

In brief, the Government's policy seeks to establish a comprehensive, clear and integrated framework which provides enhanced recognition of customary interests of whanau, hapu and iwi in foreshore and seabed, while at the same time confirming that foreshore and seabed belongs to, and is in principle accessible by, all New Zealanders.<sup>3</sup>

We have closely examined the policy, and the Crown's claims for it. We have been unable to agree with any of the Crown's assertions about the benefits that will accrue to Māori. On the other hand, it does seem to us that the policy will deliver significant benefits to others – reinstatement of (effectively) Crown ownership,<sup>4</sup> elimination of the risk that Māori may have competing rights, and the ability of the Crown to regulate everything.

As we see it, this is what the policy does:

- ▶ It removes the ability of Māori to go to the High Court and the Māori Land Court for definition and declaration of their legal rights in the foreshore and seabed.
- ▶ In removing the means by which the rights would be declared, it effectively removes the rights themselves, whatever their number and quality.

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3. Document A24 (Crown), para 2

4. We note that we do not attach any importance to the distinction drawn in the policy between ownership of the foreshore and seabed by the people of New Zealand and ownership by the Crown. The difference is symbolic only, and is most unlikely to have any significant legal implications.

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- ▶ It removes property rights. Whether the rights are few or many, big or small, taking them away amounts to expropriation.
- ▶ It does not guarantee compensation. This contradicts the presumption at law that there shall be no expropriation without compensation.
- ▶ It understates the number and quality of the rights that we think are likely to be declared by, in particular, the Māori Land Court under its Act. We think that the Māori Land Court would declare that customary property rights exist, and at least sometimes these would be vested as a fee simple title.
- ▶ In place of the property rights that would be declared by the courts, the policy will enact a regime that recognises lesser and fewer Māori rights.
- ▶ It creates a situation of extreme uncertainty about what the legal effect of the recognition of Māori rights under the policy will be. They will certainly not be ownership rights. They will not even be property rights, in the sense that they will not give rise to an ability to sue. They may confer priority in competing applications to use a resource in respect of which a use right is held, but it is not clear whether this would amount to a power of veto.
- ▶ It is therefore not clear (particularly as to outcomes), not comprehensive (many important areas remain incomplete), and gives rise to at least as many uncertainties as the process for recognition of customary rights in the courts.
- ▶ It describes a process that is supposed to deliver enhanced participation of Māori in decision-making affecting the coastal marine area, but which we think will fail. This is because it proceeds on a naïve view of the (we think extreme) difficulties of obtaining agreement as between Māori and other stakeholders on the changes necessary to achieve the required level of Māori participation.
- ▶ It exchanges property rights for the opportunity to participate in an administrative process: if, as we fear, the process does not deliver for Māori, they will get very little (and possibly nothing) in return for the lost property rights.

### **TREATY BREACHES AND PREJUDICE**

These are fundamental flaws. The policy clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and non-discrimination.

The serious breaches give rise to serious prejudice:

- (a) The rule of law is a fundamental tenet of the citizenship guaranteed by article 3. Removing its protection from Māori only, cutting off their access to the courts and

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effectively expropriating their property rights, puts them in a class different from and inferior to all other citizens.

- (b) Shifting the burden of uncertainty about Māori property rights in the foreshore and seabed from the Crown to Māori, so that Māori are delivered for an unknown period to a position of complete uncertainty about where they stand, undermines their bargaining power and leaves them without recourse.
- (c) In cutting off the path for Māori to obtain property rights in the foreshore and seabed, the policy takes away opportunity and mana, and in their place offers fewer and lesser rights. There is no guarantee to pay compensation for the rights lost.

## RECOMMENDATIONS

When considering what recommendations to make, we were mindful that many of the claimants accepted that, realistically, there was no prospect of a regime for achieving te tino rangatiratanga over the foreshore and seabed. On the whole, their aspirations were more modest. Most agreed that they would live with the status quo, post-*Marlborough Sounds*. All, however, said that their most preferred option was for the Government to agree to go back to the drawing board, and engage with Māori in proper negotiations about the way forward. We agree that this would be the best next step, and that is our strong recommendation to the Government.

However, like the claimants, we have sought to be pragmatic. We recognise that the Government may not wish to follow our recommendation. So we offer for consideration further options that we think would ameliorate the Crown's position in Treaty terms, and at the same time achieve the essential policy objectives of public access and inalienability. Our suggestions are premised on our view that (1) in terms of the legal status quo, the least intervention is the best intervention; and (2) it is critical that the path forward is determined by consensus.

## OUR REPORT

In many ways, the Marlborough Sounds case and the Government's response to it has proved to be a catalyst for new thinking about race relations in our country. Some of that thinking has been positive, but much of it seems to us to have been negative. We recognise that the Government, in coming now to finalise its approach to the foreshore and seabed, has some very difficult decisions ahead.

We have had the opportunity to analyse the issues closely and dispassionately. We sit outside the political arena, so we can test the arguments for their cogency, and probe the legal

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concepts underlying them, in a way that is neutral but, we hope, rigorous. We were grateful that from the outset, the Crown was keen to have our input, recognising we think that the time for consultation had been short, and that the temperature of public debate militated against genuine exchange of ideas.

We come to these issues with a desire to make a positive contribution. We hope that our report will be of interest and assistance both to Ministers and to the wider public, and that it is not too late for more informed discourse.