FORESHORE AND SEABED
Government proposals for protecting' public access and customary rights - Frequently Asked Questions and Answers

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Embargoed until 2pm, Monday 18 August 2003

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A THE COURT OF APPEAL DECISION

A l How did the Court of Appeal case come about?

In 1997 some iwi from the top of the South Island were concerned about the way in which marine farming, or aquaculture, was developing in the Marlborough Sounds. They were troubled by its impact on their customary fishing rights and what they considered to be their general customary interests in the area. They were also concerned that they were not well represented in the aquaculture industry.

Those iwi took a "test" case to the Maori Land Court, asking the Court to determine that areas of the foreshore & seabed in the Sounds were Maori customary land. After a long and complex process, the issues came before the Court of Appeal.

A2 Did the Court of Appeal decide that the foreshore and seabed is Maori customary land and therefore 'owned' by Maori?

No. The Court of Appeal's decision is a narrow and technical one. That decision simply decided that the Maori Land Court had the jurisdiction to look into claims to the foreshore and seabed. There was no decision on any actual question of ownership.

A3 What did the Court of Appeal decide?

The Court of Appeal decided that the Maori Land Court had the jurisdiction to hear Maori claims of customary interests in the coastal area. The Court of Appeal did not make any decision about whether the particular claims would succeed in the Maori Land Court. In fact, the Court noted that the barriers to mounting a successful claim to something amounting to full title were considerable.

A4 When did the Court of Appeal give its decision?

The Court's decision was released on 19 June 2003. A copy can be viewed at: http://www.brookers.co.nz/legal/judgments/Default.asp?doc=2001/ca173.htm

A5 What does this mean now?

Although others are appealing the Court of Appeal's decision to the Privy Council, the government considers that it is no longer appropriate to continue arguing these issues through the courts.

The government now intends to develop new legislation that will provide clarity and certainty on how the various interests can be reconciled going forwards. It has released a paper that sets out the approach that the government is proposing to resolve these issues.

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B FORESHORE & SEABED

B1 What is the foreshore & the seabed?

Put simply:

- The foreshore is the area between the low and high water marks;
- The seabed is the soil underneath the sea beyond the low water mark.

For New Zealand, the seabed potentially includes:

- The soil and subsoil from the high tide line to the 12 nautical mile limit of New Zealand's territorial sea (generally described as the coastal marine area);
- The soil in New Zealand's exclusive economic zone (EEZ), which runs from 12 to 200 nautical miles from the low tide mark and in the continental shelf where it exceeds beyond 200 nautical miles.

B2 What is the Queen's Chain?

Inland of the mean high water mark there is sometimes a marginal strip, sometimes also known as the Queen's Chain, which is owned by the Crown. The history and current state of the Queen's Chain are discussed in detail in a report by the Land Access Ministerial Reference Group, Walking ***Access in the New Zealand Outdoors*** (August 2003).

B3 What are the 'blue water title" provisions?

Put simply, there are provisions in the Resource Management Act which provide that where land is subdivided, any privately owned foreshore & seabed will be transferred to public ownership with the creation of an esplanade reserve. This law has allowed a progressive reversal of the private titles that were created in the past, possibly from as long ago as the 1840s and 50s.

B4 How much of the foreshore and seabed is in private hands now?

It is hard to tell, but probably not that much. The government is working to get clearer information on this issue. Private titles have come about over the years in various ways.

- Parliament has put some parts of the foreshore and seabed into private title for public purposes, such as establishing a port or dockyard.
- For historical reasons, mostly in the 1840s and 1850s, some parts of the foreshore were put into private titles. It is possible that a small number of these still remain, and are held by individuals.
- In some areas, coastal erosion has resulted in the high tide line moving. This natural change can result in the area that is now foreshore being included in a private title. Legislative changes were made in 1990 to avoid this result occurring, at least in areas where new marginal strips were being created.
- There are also other types of rights that may on occasion give capacity to control or exclude access over parts of the foreshore or seabed, for example where marinas or other structures have been built, or where there is a permit to carry out marine farming or mining.
- There is a separate question about how much land immediately adjacent to the foreshore (ie right next to the high tide line) is privately owned. That figure is likely to be greater.

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C WHAT THE GOVERNMENT IS DOING

C1 *What has the government announced?*

The government has issued a paper that sets out its proposals for resolving these issues. It is now inviting comment on the proposals. The paper sets out a range of useful background information, identifies and discusses the separate issues that need to be considered and sets out the approach that the government is proposing to resolve the issues.

The government's approach is based on the following four principles:

Principle of access
The foreshore and seabed should be public domain, with open access and use for all New Zealanders.

Principle of regulation
The Crown is responsible for regulating the use of the foreshore and the seabed, on behalf of all present and future generations of New Zealanders.

Principle of protection
Processes should exist to enable the customary interests of whanau, hapu and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected.

Principle of certainty
There should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.

C2 *Why did the government take two months to outline a proposed way forward?*

The foreshore and seabed issue itself is factually and legally complex. It also relates to many other issues, including the general question of public access and how customary interests are recognised, which are in themselves complex.

The government did not want to rush out a knee-jerk reaction. It took the time needed to understand the issues properly and develop some clear principles and proposals.

The arguments about what the law is now have been before the courts for 6 years. The government has produced proposals on the broader questions of the appropriate policy going forward in a little less than two months.

c3 *When will the legislation to give effect to the principles outlined in the paper be enacted?*

There are still a lot of things that need to occur. The government is currently consulting on its proposed way forward and submissions close on Friday 3 October. Subsequently analysis of those submissions will need to be completed. Policy work will need to be undertaken to develop the proposals, in light of the feedback, into fully detailed proposals for legislation. Once Cabinet has considered the report on the consultation process and the further policy issues that have arisen, drafting of

legislation will need to be completed. Legislation will be introduced into Parliament as soon as reasonably practicable. The government is committed to moving forward on this issue in a timely and consultative way.

c4 Why has the government only issued this paper rather than introduce legislation into Parliament to secure the beaches for all New Zealanders?

There is obviously high public interest in the issues, and quite a lot of concern. There are several different by overlapping issues - public access to the beach, the commercial use of the seabed and coastal space, the protection of customary rights, and the way in which regulatory decisions are taken - which need to be considered. And the issues are highly relevant to a lot of practical activity, by individuals and communities, by government and by business.

People want to know how the government is going to untangle all of the different issues, and how the various interests are going to be balanced. The government has therefore published the proposals it has developed, so that people can see and discuss the overall direction, the principles that underpin it, and the detail of what might be involved in implementing that direction.

The government is clear that legislation is needed, and it is also clear on the principles that must guide that legislation. Nothing is going to change overnight as a result of the Court of Appeal decision – there is time to do the thinking and talking needed to make sure that we get the legislation right.

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D PUBLIC ACCESS

D1 Who will have fit/e to the foreshore and seabed?

No one. Under the proposals outlined in the paper, the government proposes to legislate that, as a matter of general principle, the foreshore and the seabed are in the public domain, with the consequence that all New Zealanders are able to enjoy open access and use.

There are some areas at present that are inconsistent with this. The government has put forward some options for how these inconsistencies could be addressed over time. The proposals also make clear that the Maori Land Court's capacity to recognise and protect customary rights in the foreshore and seabed would not extend to creating new private titles.

D2 What is happening about public access to the beaches?

The general question of whether the public can or should have rights of access over private land to reach public spaces has been considered by the Land Access Reference Group that has recently reported to the Minister of Rural Affairs. That report can be accessed from (www.maf.govt.nz/mafnet/rural-nz/).

This issue is separate from the issue about the legal right of a person or persons to control the foreshore to exclude the public, however they get there.

D3 Do the proposals mean people have a right to cross my land to get to the beach?

No. The government is proposing to confirm in legislation a general principle that the foreshore and seabed are a public domain, with open access and use by all New Zealanders. That privilege of open access and use by all must still be used with care and courtesy, and with respect for the interests that others have in surrounding areas.

D4 Will I have to pay to go to the beach?

No. The government is proposing to confirm in legislation a general principle that the foreshore and seabed are public domain, with open access and use by all New Zealanders.

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E CUSTOMARY INTERESTS / RIGHTS

E1 What are Maori customary interests?

There is no one definitive answer. For Maori the rights are a way in which the law can protect their interests in and associations with particular places of historic, cultural or spiritual significance. Those interests might include:

- the exercise of mana over an area, which embraces the exercise of customary authority, as well as kaitiakitanga or guardianship responsibilities, which often contributed to the sustainable management of a resource.
- practices, customs and traditions integral to a distinctive Maori culture and way of living (for example, the practice of fishing, gathering and hunting for food and other uses).
- specific activities that are connected to a particular place, for example, the custom of visiting and protecting places of cultural and spiritual importance due to the location of taonga (treasures), urupa (burial grounds) or waahi tapu (sites of significance).

E2 How are Maori customary interests recognised today?

A very important Maori customary right has been acknowledged in legislation since the 1870s. That is the right to engage in customary fishing. All legal claims arising out of the customary fishing right were addressed in the 1992 Fisheries Settlement and the subsequent law giving effect to that settlement. New systems were established to recognise and protect the ability of Maori to engage in customary non-commercial fishing, and to enable Maori to exercise customary authority over traditional fishing grounds and other places of cultural significance.

Various other legal and administrative mechanisms recognise and protect Maori customary interests:

- the Resource Management Act includes a number of provisions to ensure consideration of Maori interests and Maori participation in the Acts decision-making processes;

- the Department of Conservation has developed, in partnership with Maori, a range of tools to recognise customary interests and to enable tangata whenua to be involved in conservation management; and

- settlements of historical Treaty of Waitangi claims can include statutory acknowledgements of cultural, historical, spiritual and traditional association with an area, as well as protocols outlining how government agencies will interact with the claimant group and actions to protect sites of significance.

E3 Why use the term "Maori customary interests" rather than "Maori customary rights" throughout the paper?

-The term 'Maori customary interests' covers the wide range of interests that Maori might have in the foreshore and seabed. Sometimes those interests will be significant enough that the law protects them, by recognising a customary right. Once those interests have been recognised by the Courts or by Parliament as a specific legal right, others then have legal obligations to respect those rights.

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E4 Under the proposals outlined in the paper, does it mean that Maori will be able to exclude others from the beach?

No. The government is proposing to confirm a general principle that the foreshore and seabed are public domain, with open access and use by all New Zealanders.

E5 Are customary rights recognised in other countries?

Yes. Customary rights are recognised in international law and in the domestic law of some countries. The rights are a way in which the law can protect, for indigenous people, their interests in and associations with particular places of historic, cultural or spiritual significance.

E6 Will these proposals mean that Maori customary rights are being extinguished?

That is not the intention. One of the basic principles is to identify and protect customary rights. The government is proposing creating a new division of the Maori Land Court that would have the specific task of identifying Maori customary rights in the foreshore and seabed, and would have a much wider range of tools at its disposal to allow it to do this task properly. This new division would give more systematic protection to customary rights in the foreshore and seabed than they have ever had before.

E7 But didn't the Court of Appeal say that Maori customary rights gave them title to the foreshore and seabed?

The Court of Appeal did not say that. It simply said that the possibility was there, and that the law allowed the Maori Land Court to look at the claims. In fact, the Court of Appeal noted that there were significant barriers for Maori trying to demonstrate that their customary rights amounted to title.

The Court expected more of the interests to amount to rights of use and association. The governments proposals will give the Court the tools to recognise and protect these rights.

If the Court does find, in some cases, that there was a customary interest that it cannot give full recognition to, because the right amounted to something close to full title, the government will talk to the claimants about what steps might need to be taken to acknowledge the customary interest. In short, the government will deal with the issue in direct discussion with those concerned, when or if it arises.

Under these proposals, therefore, the government is giving the Court the tools it needs to start to investigate the practical issues systematically. We can then have discussions that are about real situations, not about abstract possibilities.

E8 Could Maori go to the Waitangi Tribunal if they believe that rights have been extinguished?

The Waitangi Tribunal is there to look at claims that the Crown has acted inconsistently with the Treaty of Waitangi.

Most of its work at present is about claims of historical breaches of the Treaty. The government has a policy for making settlements with claimants for historical breaches. These settlements are generally comprehensive, and deal with all claims of Treaty breaches for that group up until 1992.

In many cases, customary rights in the foreshore and seabed will have been lost long ago. If so, those issues are dealt with as part of the historical settlements.

E9 Maori claim that customary rights include a right to develop commercial activities. Do the proposals recognise that?

The customary rights that the Court will recognise will be awarded collectively to whanau, hapu and iwi, and will not be able to be alienated.

That last limitation matches that in the legislation that records and protects customary non-commercial fishing rights, and reflects the fact that the core of the interest that the customary right recognises is the relationship between a people and a place. This restriction reflects a view that the legal protection of that relationship cannot be separated from the people or the place, for example by selling that protection of the customary relationship to someone else.

This limitation on the customary right does not restrict those who hold that right from embarking on commercial ventures, which might build on the customary practices protected by the right, through the normal regulatory processes that govern the use of coastal and marine space. For example, an iwi might build a tourism venture around sites of cultural significance and activity. The general laws on resource consents, permits, health and safety regulation and employment law, for example, would all apply to the business activity in the normal way.

E10 What if the Maori Land Court finds that there was effectively a right to a full title?

Then the government will talk directly to those with the customary interest, about how that might best be recognised, without compromising the principle of access.

F RELATIONSHIP WITH TREATY SETTLEMENTS

F1 How do Treaty settlements recognise customary interests?

When historical Treaty of Waitangi claims are settled, redress can include statutory acknowledgements of cultural, historical, spiritual and traditional association with an area, protocols outlining how government agencies will interact with the claimant group, and action to protect sites of significance on the foreshore. These acknowledgements and protocols can give the claimant group clear recognition of their customary interest in an area, which then strengthens their participation in decision making processes about those areas.

F2 How does the Fisheries Settlement recognise Maori customary interests?

All rights- arising from customary fishing were settled in the fisheries settlement that led to the Treaty of Waitangi (Fisheries Settlement) Act 1992. There were three elements to the settlement and the law and administrative arrangements that followed from it.

The first was the transfer of substantial assets and commercial fishing rights to Maori, in order to settle the commercial fishing claims. The second was the development of regulations to provide for Maori to continue to undertake customary non-commercial food gathering activities, to exercise rangatiratanga or authority over traditional fisheries, and to recognise the special relationship between tangata whenua and places of importance for customary food gathering. The third was the introduction of procedural requirements that gave a higher level of input and participation for tangata whenua into decision making on fisheries administration.

F3 Wasn't this all settled with the 1992 Fisheries Settlement?

No. That settlement was about settling the claims of Maori to all of their customary and commercial fishing rights. There may be other customary interests that relate to parts of the foreshore and seabed, that have not yet been recognised. The new Maori Land Court process will let us find out what other rights there are.

F4 Don't historical Treaty settlements extinguish Maori customary rights?

No. When historical claims are settled with an iwi, the Deed of Settlement, and the legislation that implements it, will record that the settlement has no effect on any customary rights that the claimant group may still have. Iwi are still able to pursue claims based on customary rights, and the Crown preserves the right to dispute them.

G TREATY OF WAITANGI

G1 *What does the Treaty of Waitangi say, if anything, in relation to rights concerning the foreshore and seabed?*

The Treaty of Waitangi was a political agreement between Maori and the Crown which, in broad terms, exchanged the right to govern for the ongoing protection of the ability of Maori to live as Maori. Article 2 of the Treaty could be seen as a broad promise to safeguard Maori customary interests. It could overlap with the legal protection that the courts might give to customary interests through the recognition of formal customary rights.

G2 *Do customary rights exist because of the Treaty of Waitangi?*

No. Customary rights exist in law quite independent of the Treaty of Waitangi.

G3 *Why are we only hearing about customary rights now? Why has most debate so far been all about the Treaty?*

In New Zealand, the Treaty of Waitangi has had a big impact on the way in which this country has thought about Maori customary interests. The Treaty placed a broad moral or political obligation on the government to protect Maori interests. Most debate has been about whether the government is doing that effectively or appropriately.

Customary rights are a much narrower legal tool for protecting the same interests. In general Maori and the government have discussed these issues directly, from a Treaty perspective, rather than arguing about them in the courts from a legal rights perspective.

H THE MAORI LAND COURT

H I What does the Maori Land Court do now?

The Maori Land Court is established under Te Ture Whenua Maori Act 1993. It deals mostly with questions about the administration of Maori freehold land. Where the status is unclear, the Court can decide whether the land is Maori customary land (which has no formal title over it), Maori land held in freehold title, Crown land, or general land in freehold title.

H2 What role does the Maori Land Court have in the government's proposals?

The government's initial preference, as outlined in the paper, is to design a dedicated jurisdiction to investigate and record Maori customary rights in the foreshore and seabed. It is proposed the Maori Land Court is the logical place for this new jurisdiction.

H3 What can the Maori Land Court do now in relation to recognising Maori customary interests?

If land is Maori customary land, the Court can investigate who is entitled to that land as a matter of history and tikanga (custom), and create a title vesting the land in those people. The title that the Court creates is in most respects an ordinary freehold title under the Land Transfer Act, and gives owners the same rights as other owners of land.

It is not at all clear under Te Ture Whenua Maori Act whether the Court has the ability to recognise rights other than by proceeding to issue a full certificate of title.

H4 Who will be able to apply to the Maori Land Court?

Under the government's proposals, whanau, hapu and iwi would be able to apply to the Court to have claims to customary rights investigated.

H5 What happens to applications before the Maori Land Court now, while the legislation is sorted out?

The Court of Appeal decision is being appealed to the Privy Council by the Marlborough District Council, which means that the basic question of whether the current law enables the Maori Land Court to look at the foreshore and seabed is once again being tested. Until that appeal is decided, it is unlikely that the Maori Land Court will progress the current applications before it in any significant way.

The proposed legislation would make clear that the new procedures would apply to all current and future applications to the Court.

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I CONSULTATION

I1 Who will the government be talking to now?

All New Zealanders are invited to comment and make written submissions on the paper. The government will be hosting a number of hui across New Zealand, and will also be available to meet with other sector interests groups. Government Members of Parliament may also be hosting meetings in communities.

I2 What will be happening to the notes taken at the consultation sessions?

Written notes on the hui and other meetings will be included in the submissions analysis.

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J NEXT STEPS / FURTHER INFORMATION

J1 What are the next steps after *this consultation process?*

All submissions received will be analysed. Then policy papers, taking into account the results of the consultation process, will be prepared and considered by Cabinet in the normal way.

J2 What type of interests will the government need to balance *when considering the development of the new legislation?*

As the government looks across the multitude of issues that impact on the foreshore and seabed, the range of interests that need to be considered include:

- All New Zealanders, concerned about the basic ability to access, use and enjoy the coastline and marine environment.
- Maori, concerned about the modern recognition of customary interests significant to Maori culture.
- Business sectors which have a significant interest in how the coastal marine area is controlled and regulated, such as the fishing, marine farming, marine transport, mining and tourism industries.
- Local government, as local authorities administer much of the law which regulates use of the coastal marine area.

As outlined in the paper, the government intends to develop new legislation that will provide some clarity and certainty on how the various interests can be reconciled going forwards.

J3 Where can I access further information on this issue?

A website has been set-up with key material for your information. You can visit www.beehive.govt.nz/foreshore. If you do not have access to the intemet, you can telephone the Department of the Prime Minister and Cabinet on 0508 FORESHORE, or 0508 367 374 on a business day from 9am-5pm, or write to Foreshore and Seabed Consultation, P 0 Box 55, Wellington, for further information.

K OTHER POLICY PROCESSES

K1 When will the government be announcing its proposed way forward on the aquaculture *reform?*

This is an important area of policy that requires careful analysis and consideration. Once this policy work has been completed and Cabinet has considered the proposals, the government will announce the proposed way forward for the aquaculture reform. At this stage, the government is not in a position to be able to announce a timeframe.

K2 What's happening with the development of the Oceans policy?

Work continues on this important piece of policy. The government is aiming to consult all New Zealanders on this work early next year.

K3 What's happening with the Marine Reserves Bill?

The Bill is currently before the Local Government and Environment Select Committee for its consideration and report back to Parliament by the end of the year. That work will be progressed along with work on this issue.