

TREATY LAW IN 2009

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Introduction

This paper will consider three areas of Treaty jurisprudence, namely:

1. Developments in the Waitangi Tribunal;
2. The Treaty of Waitangi in the Courts; and
3. The Foreshore and Seabed Act 2004 Review.

Developments in the Waitangi Tribunal

The Waitangi Tribunal has progressed a number of inquiry districts over the past 12 months, including the conclusion of the Whanganui Inquiry, the commencement of the Porirua ki Manawatu and Taihape: Rangitikei ki Rangipo inquiries, and the preparation of the Northland and Rohe Potae / King Country inquiries.

As the number of Treaty claims has risen a great deal over the past decade, claims are now heard together in regions, rather than on an individual basis as was the case up to the late 1990s.

WHANGANUI

The Whanganui Inquiry commenced in August 2007 and came to a conclusion in December 2009. Throughout the year, six hearing weeks took place in various locations around the Whanganui region, ending the 18 weeks of hearing that have been held over the last 2.5 years. The Whanganui Inquiry District encompasses the area from past Taumarunui in the North to Whanganui in the South.

The majority of the 2009 hearings consisted of Crown Evidence, Claimant Generic and Specific Closing Submissions and Crown Closing Submissions. The submissions presented to the Tribunal were sizeable documents: as just one example, the Native Land Court submissions prepared by Rainey Collins were 170 pages alone.

The Whanganui inquiry saw the introduction of two new processes for dealing with specific situations:

1. The Tribunal initiated the "Hot Tub" process whereby a collection of historians were grouped together to discuss and make conclusions regarding the Native Land Court in the Whanganui region.
2. The Tribunal developed a process for allowing for the settlement of "small discrete remedies" outside of the usual settlement negotiation. The process was advocated by the Tribunal as a way to settle small and discrete issues without having to wait to go through the process of complete settlement negotiations (inevitably years down the road). However, in reality this process has proved to be time consuming and the Crown cautious in its approach. The 1 example of its successful operation is the Putiki Rifle Range settlement.

Progress has been made regarding settlement negotiations however; Presiding Officer Judge Carrie Wainwright has indicated that a final report for the Inquiry will take a long time to be written. In this regard, the claimants have been asked to make a decision whether they wait for the report to be published, or to proceed to negotiations without it, or to make do with a partial or interim report. Of course there is then the perennial issue of what the Crown will accept as an adequate basis for negotiating a settlement.

The Tribunal has recently advised that it will take up to two years for a partial report to be published. Such a report will cover key generic issues as well as a series of local discrete issues, if there is time. The rest of the report may be published at a later date if there is still the time, money and desire to do so.

PORIRUA KI MANAWATU AND TAIHAPE: RANGITIKEI KI RANGIPO

The Porirua ki Manawatu (PKM) and Taihape: Rangitikei ki Rangipo (RKR) Inquiries initially commenced as a wider Taihape ki Kapiti (TKK) Inquiry, but this oversized area was divided into two at the end of August. The boundaries of the PKM and RKR Inquiries were set around the remainder left over from the other districts that have been heard or settled. This is a unique way of creating an Inquiry district but since tribal boundaries don't match administrative boundaries several boundary disputes with claimants in different Inquiry districts have developed.

These Inquiries are in the very initial stages, with the research programmes presently being developed. Meetings have been held over the past weeks to progress these. There is a process of consultation between claimants and their lawyers, the Crown Forestry Rental Trust ("CFRT") and sometimes Waitangi Tribunal staff. CFRT is a trust set up in the late 1980s, using rental income from Crown licensed forests, to fund Maori to prepare, present and negotiate claims against the Crown, which involve, or could involve, Crown forest licensed lands.

ROHE POTAE

The Rohe Potae Inquiry (King Country), which is in the interlocutory, preparatory phase, has been progressing over the last 12 months, with nine research reports being commissioned and published.

The Rohe Potae Tribunal has developed a new process for dealing with Oral and Traditional evidence: *Nga Korero Tuku Iho o Te Rohe Potae*. In previous inquiries, Oral and Traditional evidence has been heard as part of the normal hearing process, however in the Rohe Potae Inquiry the Tribunal will hear this evidence prior to the commencement of the hearings in informal settings such as marae throughout the district. The hearings for this oral and traditional korero commenced at the beginning of March 2010.

It is not likely that the formal hearings will begin prior to 2011.

NORTHLAND / TE PAPAHAHI O TE RAKI

Progress has been made over the last 12 months regarding the Northland Inquiry. The hearing was initially set down for October 2009, but it was clear that the claimants were not ready to proceed at that stage. The Northland Inquiry involves over 700 claims strewn across 5 sub-districts and comprising everything still unheard north of the Harbour Bridge, making it very difficult to work together and ensure all claimants are well prepared and ready to commence the hearings. Adding to the difficulty is that many Northland claimants do not have legal representation.

Again, this Inquiry has departed from usual format, the hearings process having been split into two distinct hearing stages:

1. He Whakaputanga (the Declaration of Independence) and Te Tiriti (the Treaty) issues; and
2. Other general issues.

Many reports were commissioned and published throughout 2009 in relation to the Stage One issues, which strangely will be the first time the Declaration and Treaty themselves and their context will have been considered in detail within the Waitangi Tribunal process. Other reports and cases over the years have touched on these two major issues, but never have these two documents been the focused target of detailed investigation.

At this point it is likely that the Stage One hearings will commence in May 2010, depending on claimant readiness and Tribunal availability. Initially the hearings were set down for October 2009, but the commencement date has been continually moved back.

REPORTS PUBLISHED

After the completion of hearings, the Tribunal eventually publishes a report of its findings and recommendations. Such a report typically takes years to complete, slowing down the settlement process significantly. In 2009 only a handful of partial reports were published:

- **9 April 2009:** the Urewera Tribunal (which concluded hearings in June 2005) released part 1 of its report. This section, mostly dealing with identity of the iwi and hapu of Te Urewera district was released at the request of the Crown and claimants, to assist them in settlement negotiations. The balance of the report remains uncompleted.
- **27 July 2009:** the Whanganui Tribunal released a special short report on aspects of the Wai 655 (Nga Wairiki) claim at the request of the Wai 655 claimants. The Ngati Apa Settlement Bill will settle the Wai 655 claim, so the claimants, who oppose the Bill, wanted the Tribunal to express its views on their evidence prior to its introduction.
- **31 July 2009:** the Wairarapa ki Tararua Tribunal (which also concluded hearings in June 2005) released the Public Works chapter of its report to assist claimants and the Crown in negotiations concerning the return of the former Ōkautete School buildings. The balance of this report also remains unreleased.

Reports may be structured chronologically or thematically, depending on the situation. However, many issues relate to a particular era so the reports are generally a mix of the two. Reports generally contain an analysis of historical events, Tribunal findings, and Tribunal recommendations.

URGENCY APPLICATIONS

Over the last 12 months there have been several applications to the Waitangi Tribunal to hold an urgent hearing into a pressing issue. In considering whether to hear these, the Tribunal considers a number of criteria, including whether:

- the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- the claim or claims challenge an important, current or pending Crown action or policy;
- an injunction has been issued by the courts on the basis that the claim or claims for which urgency has been sought has been submitted to the Tribunal;
- there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise (such as action in the general courts); and
- the claimants are ready to proceed urgently to a hearing.

Urgency Applications in 2009 included:

- In September 2008, Nga Wairiki (Wai 655) claimants filed an Urgency Application opposing the inclusion in Ngati Apa's settlement negotiations of Nga Wairiki's historic claims. In May 2009, the Tribunal declined this application, leading Wairiki to seek the partial Tribunal report discussed above, and Judicial Review of this decision (which will be discussed below).
- Te Runanga o Ngati Porou has been in settlement negotiations with the Crown for several years to settle all historic claims on the East Coast, after choosing to go to direct negotiations rather than a Tribunal hearing. Throughout 2009 groups opposed to their claims being included in the settlement filed Urgency Applications in the Waitangi Tribunal. An urgent hearing was held in December 2009, but the Tribunal's decision has yet to be released.
- Te Runanga o Ngati Porou also reached an agreement with the Crown regarding Ngati Porou Foreshore and Seabed interests. The Nga Rohe Moana o Nga Hapū o Ngati Porou Bill gives effect to the agreement and seeks to recognise and protect the mana of the hapu of Ngati Porou over the foreshore and seabed of Ngati Porou. An Urgency Application has been filed in the Waitangi Tribunal by groups who reject Ngati Porou entering into the agreement with the Crown on their behalf.

Urgency applications appear to be becoming more common, especially as the pace of the settlement negotiation process picks up. We understand that the Waitangi Tribunal dealt with eight late last year. While they can provide a valuable safety check to an objectionable Crown policy or activity, an undesirable side effect is the diversion of already limited Tribunal time and resources away from its core business into additional litigation that seems often to have more to do with internal claimant issues than with facilitating settlement and expediting negotiations. Indeed, their application to the settlement process seems somewhat removed from their original purpose and may well have a chilling effect on the Crown's willingness to engage in negotiations, or at least negotiations that deliver outcomes in a timely and efficient manner.

SETTLEMENT NEGOTIATIONS

Nonetheless, settlement negotiations have continued this year despite the change in Minister from Cullen to Finlayson. Several Agreements in Principle have been signed between the Crown and negotiating bodies:

- The Crown and Tainui Taranaki ki Te Tonga signed a Letter of Agreement at Parliament on 11 February 2009
- The Crown and Ngati Toa Rangatira signed a Letter of Agreement at Parliament on 11 February 2009
- The Crown and Kurahaupo Ki Te Waipounamu signed a Letter of Agreement at Parliament on 11 February 2009 – all of these three related to Te Tau Ihu, the top of the South Island.
- The Crown and Ngati Whare signed an Agreement in Principle on 19 June 2009
- The Crown and Ngati Porou signed a "High Level" Agreement on 8 December 2009
- The Crown and Ngati Whatua o Kaipara signed an Agreement on 22 December 2009
- The Crown and Te Hiku Forum, a group of Far North iwi, signed an Agreement in Principle on 16 January 2010 to cover all five of the Muriwhenua iwi.

In 2009 several Deeds of Settlement were signed, and require legislation to give them effect:

- The Ngati Manawa Deed of Settlement was signed on 12 December 2009
- The Ngati Whare Deed of Settlement was signed on 8 December 2009
- The Whanganui Deed of On Account Settlement was signed on 31 July 2009 in relation to the Whanganui Kaitoke Prison and Part of the Whanganui Forest. This is a spinoff from Whanganui concerns regarding the Ngati Apa settlement.
- The Waikato River Deed of Settlement was signed on 17 December 2009, creating a special co-management regime for the river.

On 30 July 2009 the Port Nicholson Block (Taranaki Whanui ki Te Upoko o Te Ika) Claims Settlement Bill was enacted.

The Treaty in the Courts

Beyond the Waitangi Tribunal and settlement negotiations, in 2009 there were several relevant court cases, including two Judicial Review cases of Tribunal decisions. They are "Treaty jurisprudence" in that they affect how these other Treaty processes operate.

Te Runanga o Ngai Tahu v Attorney General

This was a Judicial Review case considering the Te Tau Ihu (top of the South Island) Tribunal's decision to inquire into two areas included in the Ngai Tahu takiwa (i.e. the boundary dividing Ngai Tahu from the Northern South Island tribes) as determined by the Maori Appellate Court in 1990 under section 6A of the Treaty of Waitangi Act 1975.

Essentially, ever since 1990, Ngai Tahu have rejected and rigorously litigated any investigation or discussion of activities or claimed interests of the northern groups south of that takiwa line. The final Te Tau Ihu Report was released in November 2008, parts of which dealt with Te Tau Ihu customary

rights within the statutory Ngai Tahu takiwa. Ngai Tahu therefore sought judicial review of aspects of the report on the following grounds:

- (a) Section 6A(6) of the Treaty of Waitangi Act 1975 provides that the Tribunal is bound by the 1990 Maori Appellate Court decision;
- (b) The Tribunal is also bound not to make findings inconsistent with its own earlier Ngai Tahu report which dealt with the same subject matter and parties; and
- (c) The Maori Appellate Court considered the same question subsequently determined by the Tribunal and therefore any party is estopped from having that question considered again.

In response, the High Court held that:

- (a) The Tribunal did not err in law in dealing with the Te Tau Ihu iwi grievances, or fail to give proper effect to s 6A(6).
- (b) The claims of Te Tau Ihu iwi to rights and interests within the Ngai Tahu takiwa were not dealt with by the Ngai Tahu Tribunal, leaving only claims outside the Ngai Tahu takiwa to be dealt with in due course.
- (c) The question answered by the Maori Appellate Court was not the same question as that before the Te Tau Ihu Tribunal, and so the reasoning and conclusions of that Court were not determinative of the issues before the Tribunal.

Ngai Tahu's application therefore failed on all grounds.

***R v Saxton* [2009] NZCA 498**

The appellants in this case were convicted in the District Court for stealing pounamu (greenstone) belonging to Te Runanga o Ngai Tahu ("TRONT"). Their defence was that:

- (1) they had customary rights over the pounamu, which included a right to take pounamu as they did; or
- (2) alternatively, they honestly believed that they had such a right.

The appellants claimed customary rights based on the following: Mr Cain was a member of the local hapu and as such had customary rights himself and so therefore did his daughter, Debbie, who was the long-term partner of one appellant and the step-mother of the other. The first appellant acquired rights by assignment from Mr Cain, and the other acquired rights because he was the whangai of Debbie (adopted by her in accordance with Maori custom).

In 1996 and 1997 legislation was enacted to give effect to the Waitangi Tribunal's recommendation that the conveyance of pounamu to the Crown in 1860 was a breach of the Treaty and as such should be returned to Ngai Tahu (through the body corporate TRONT).

The appellants argued:

- (1) That the Crown never acquired rights to the pounamu, and that therefore customary title remained; or
- (2) That even if the Crown acquired ownership the pounamu customary rights to take and exploit pounamu remained.

The Court of Appeal dismissed the appeal, holding that:

1. the Crown had acquired the rights to the pounamu, either through the purchase of the land in 1860, or through subsequent mining legislation;
2. once extinguished, customary rights cannot be revived, which removed the appellants' ability to argue that customary rights may have revived once the pounamu was vested in TRONT. This rule also applies to other resources and particularly land, and therefore has implications for the status of Maori land;
3. the relevant statutes, the 1997 conveyance of the pounamu back to Ngai Tahu in 1997, and the lack of authorisation to take pounamu all barred the appellants from any entitlement to take pounamu; and

4. the appellants had no honest belief that they were authorised by TRONT or customary right to take pounamu.

This case raises various issues about assignment of customary rights and whether such rights can be passed outside the kin group.

***Paki v Attorney General* [2009] NZCA 584**

The Pouakani Settlement Act 2000 gave effect to the Pouakani Deed of Settlement, providing commercial redress of \$2.6m. This settlement largely related to land, especially 20,000 acres taken for surveys which were never done.

The Pouakani hapu, based west of Lake Taupo, claimed that the Crown wrongfully dispossessed them of a common law interest in the length of the Waikato riverbed abutting their lands to the midpoint of the river, especially by using legislation relating to navigable rivers. They contended that the Waikato was not, in fact, navigable either in 1903 or now in the stretch that runs through their lands. They maintained that the Crown was in a fiduciary relationship with the original Maori owners of their lands when acquiring their lands between 1887 and 1899. This duty arose from the Treaty; the right of pre-emption in favour of the Crown; and/or the disability of the owners of the Pouakani lands at the time of the taking and sales. The claimants alleged that, as part of that duty, the Crown owed an obligation to gain the owners' informed consent before acquiring their land by means of *usque ad medium filum aquae* (an "arcane" principle, "not known to most persons who are not lawyers", that legal title to the land ran to the riverbed's midpoint). It was said that the Crown's failure to obtain informed consent to the transactions resulted in a breach of fiduciary duty. This is essentially the argument that property rights cannot be disposed of by a side wind.

The Crown argued against this claim in four respects:

- (1) The claim was not justiciable as the Settlement Act settles all Pouakani historical claims.
- (2) Section 14 of the Coal Mines Amendment Act 1903 provided that the entire beds of all navigable rivers in New Zealand "shall be deemed to have always been vested in the Crown".
- (3) There is no such fiduciary relationship between the Crown and Maori.
- (4) The representatives had no standing to pursue the claim, or it was too late for them to do so.

Harrison J in the High Court heard and rejected the Pouakani representatives' claims, upholding all the grounds advanced by the Crown.

The Court of Appeal dismissed the resulting Pouakani appeal; however it addressed the first three of the four issues:

- (1) The representatives' claim was not barred at the outset by the Settlement Act as s 10(2) stated: "In this Act, Pouakani historical claims does not include any claim by a Pouakani claimant to the Waikato River."
- (2) The Court agreed with the High Court that occasional natural obstacles do not preclude the river being classified as navigable. In both 1903 and today, the Waikato River was navigable within the meaning of the Coal Mines Amendment Act 1903. Navigability encompasses the bed of the entire river, not just segments. The claimants therefore failed at this point. This has major and potentially expropriatory implications in respect of all landowners adjoining "navigable" rivers, and not Maori alone. It also potentially takes navigability back to the springs at a river's headwaters.
- (3) Nevertheless, the Court in obiter addressed the issue of the existence of a fiduciary duty, discussing its difficulties and inappropriateness, and preferring some concept of a relational duty of good faith. Such a duty of good faith would rest not solely on the Treaty which would form but one element of a broader Crown obligation to act reasonably and in good faith towards Maori. Until such jurisprudence is developed, the Courts languish in a no man's land.

***Attorney General v Mair* [2009] NZCA 625**

This is a third aspect of the Ngai Apa vs Nga Wairiki struggle.

On 8 October 2008, a Deed of Settlement was signed between Ngati Apa and the Crown to settle all Ngati Apa historic Treaty claims in Rangitikei through Te Runanga o Ngati Apa. This was challenged by some representatives of Nga Wairiki, who challenged Ngati Apa's 97% mandate and claimed not to be part of Ngati Apa, while other objectors were southern Whanganui Maori who said their interests in Lismore Forest were wrongly being passed to Ngati Apa. The settlement would therefore substantially prejudice some in terms of tribal identity, and also because they would be unable to pursue their claims through a Tribunal inquiry, others would lose redress available for their own claims. They also challenged the Crown's large natural groupings policy.

The objectors filed an Urgency Application in the Waitangi Tribunal in September 2008 which was finally decided in May 2009. The Presiding Officer declined their application on the papers on the basis that although Nga Wairiki could suffer prejudice it would not be significant or irreversible enough, especially since redress was available through the Ngati Apa settlement. The Whanganui group were debating only 15% of the forest and top-up monetary redress would always be available.

The objectors filed for judicial review in the High Court, which was heard in late September, after the Settlement Bill had been introduced to Parliament. In the High Court MacKenzie J found that the Tribunal had erred in law, especially by limiting itself to tangible financial prejudice rather than the intangible prejudice of loss of mana and mana whenua and extinguishment of claim. He said relief was still available prior to the passage of legislation but ordered no relief. He therefore ordered the Tribunal to reconsider the application.

The Crown appealed the High Court judgment to the Court of Appeal. The reconsideration by a different Tribunal panel reached the same conclusions as the Court of Appeal

The issues in the Court of Appeal were:

- (1) whether the High Court Judge was correct to find the Tribunal had acted unlawfully in refusing urgency; and
- (2) if so, whether the High Court Judge ought to have declined relief to the appellants because the Settlement Bill had since been introduced to the House of Representatives because section 6(6) of the Treaty of Waitangi Act precluded the Tribunal from considering the appellants' claims.

On the first issue Chambers, O'Reagan and Baragwanath JJ found inter alia that:

- it was unlikely the Presiding Officer had confined her consideration of urgency of claims to financial detriment, and it could not be said she failed to take into account relevant considerations set out in the Tribunal's practice notes, or took into account irrelevant considerations;
- the Presiding Officer was entitled to conclude Ngati Apa should not be prejudiced in bringing negotiations to settlement as could occur if urgency were granted, while evidence showed the overwhelming majority of Nga Wairiki supported the settlement indicating little weight should be given to alleged loss of mana whenua;
- the Presiding Officer's decision – that the benefits of the urgency hearing were outweighed by the likely prejudice to Ngati Apa in delaying their settlement – was "unimpeachable".

As the Attorney General succeeded on the first issue, Chambers and O'Reagan JJ did not consider issue two. Baragwanath J did, concluding for a range of reasons that section 6(6) of the Treaty of Waitangi Act would not inhibit the Tribunal from pursuing an urgency hearing. Amongst those reasons, he found it inconceivable that Parliament could have intended that legislation to impede the settlement of Treaty claims.

These judicial review cases have no doubt led to a more formal legal approach being taken within the Tribunal but have to date also given it comfort in the robustness of its process. The downside is of course movement away from marae / informal hearings, and the slowing down of the process in order to "dot the i's and cross the t's".

Foreshore and Seabed Review

The Foreshore and Seabed Act 2004 review is arguably more of a natural property rights issue, rather than directly a Treaty issue. However, many Tribunal claims do contain foreshore and seabed elements that will be affected by the outcome.

In the *Ngati Apa* case, the Court ruled that property rights cannot be disposed of by a side wind and that it is possible that some area of the foreshore and seabed was still Maori land, which could be tested in the Maori Land Court. The Foreshore and Seabed Act gazumped that Maori right of a Court determination and nationalised everything up to spring tides of rivers and minerals. It is important to note that not only Maori property rights were affected.

On 4 March 2009 the Attorney General appointed a Ministerial Review Panel ("the Panel") to undertake a review of the Foreshore and Seabed Act 2004 ("the Act"). The Panel was asked to provide independent advice on four questions:

- (1) What were the nature and extent of the mana whenua and public interests in the coastal marine area prior to *Attorney General v Ngati Apa* [2003] 3 NZLR 643.
- (2) What options were available to the public to respond to the Court of Appeal to respond to the Court of Appeal decision in *Attorney General v Ngati Apa* [2003] 3 NZLR 643.
- (3) Whether the Act effectively recognises and provides for customary or Aboriginal Title and public interests (including Maori, local government and business) in the coastal marine area and maintains and allows for the enhancement of mana whenua.
- (4) If the panel has reservations that the Act does not provide for the above, outline options on what could be the most workable and efficient methods by which both customary and public interests in the coastal marine area could be recognised and provided for; and in particular, how processes of recognising and providing for such interests could be streamlined.

The Panel was also asked to consult with Maori and the general public, and consider:

- the approaches in other Commonwealth jurisdictions; and
- public submissions and other reports on the Act other Sea-related legislation.

The report *Pakia ki Uta, Pakia ki Tai: Report of the Ministerial Review Panel* ("the report") was released on 1 July 2009. The report includes the Panel's advice and sets out options on how to best recognise both customary and public interests in the coastal marine area.

THE ISSUE

The Act declares as its object "to preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders". However, the Panel concluded that the Act abrogates Maori customary rights to the foreshore and seabed, discriminates against Maori and denies Maori the human rights guaranteed to all New Zealanders under international conventions.

According to the Panel the **fundamental issue** is essentially **whether the Government confiscated Maori customary interests in the foreshore and seabed** through the Act, and by imposing restrictive rules on the circumstances in which a customary interest in the foreshore or seabed might now be recognised.

THE PROCESS

The Panel held 21 public hui, heard from 30 nationally significant interest groups, met with key commentators, and received 580 submissions. Eighty-five percent of those submissions that commented on what should happen, favoured repeal of the Act. Only 5 percent of submitters wanted to see the Act remain unchanged. The Act appears to be unpopular with most New Zealanders.

The Panel recommended that the Act be repealed, and a re-balancing Maori property rights in the foreshore and seabed with public rights and public expectations be undertaken.

1. OPTIONS AVAILABLE TO THE GOVERNMENT TO RESPOND TO THE *NGATI APA* CASE

The Panel concluded that the realistic – but untried – options available to the Government to respond to the *Ngati Apa* decision had been:

- to appeal the decision to the Privy Council;
- to do nothing, leaving the courts to decide;
- to amend the statute-based Maori land law;
- to include foreshore and seabed settlements in Treaty settlements, revisiting settlements already completed;
- to negotiate a nationwide settlement with hapu and iwi; and
- to substitute a special statute to govern customary and public interests in the coastal marine area.

2. DID THE ACT EFFECTIVELY RECOGNISE AND PROVIDE FOR CUSTOMARY OR ABORIGINAL TITLE AND PUBLIC INTERESTS IN THE COASTAL MARINE AREA AND MAINTAIN AND ALLOW FOR THE ENHANCEMENT OF MANA WHENUA?

The Panel concluded that the Act did not effectively recognise and provide for customary or Aboriginal Title because it took away the legal rights of Maori to have their interests determined by the Courts. The Act did not properly balance customary and public interests – on the other hand, public interests were advanced at the considerable expense of Maori interests. The Act failed to enhance the status of the mana whenua, in that it failed to recognise the mana, or the authority and rights, of the hapu and iwi (i.e. groups who under Maori custom had mana/standing/rights in respect of whenua).

3. OPTIONS AND METHODS BY WHICH BOTH CUSTOMARY AND PUBLIC INTERESTS IN THE COASTAL MARINE AREA COULD NOW BE RECOGNISED AND PROVIDED FOR

The Panel believed that the Act should be repealed, and set out four broad options that could be adopted in order to replace the existing legislation:

- (1) "Judicial" Model: return to the status quo immediately after the *Ngati Apa* decision.
- (2) "Staged settlement" model: based on the negotiations between hapu and iwi and the Crown as part of the settlement of historic Treaty claims, or, as at present, independent of that process.
- (3) "National settlement" model: a single, nation-wide settlement of foreshore and seabed issues.
- (4) "Mixed" model: combining a number of discrete components: a national settlement, allocation of rights and interests, local co-management, and an ability to gain more specific access and use rights. This model takes as its starting point that entitle Maori have some form of customary or tikanga title to all of the foreshore and seabed and that the public also have interests in access and navigation over this key area.

The mixed model is the option favoured by the Panel.

PREFERRED OPTIONS

The Panel made two proposals, either of which, or a combination of the two, it believed would achieve an expeditious resolution.

- (1) National Policy Proposal: focuses on a one-off national settlement and the development of a bicultural body with oversight of the whole coastal marine area.
- (2) Regional Iwi Proposal: focuses on achieving regional and national negotiations directly between the Crown and hapu and/or iwi.

The Panel also proposed a new interim statute that would:

- repeal the Act;
- recognise the balance between Maori customary rights and the general rights of the public of use and enjoyment;
- provide for principles to govern the settlement of customary interests in the coastal marine area, and the administration of the area;
- provide for mechanisms to implement the above proposals and Maori and public responses;
- provide that, until the question of who would hold title to specific area of the foreshore and seabed is resolved, the legal title be held by the Crown in trust for those later found entitled;
- promote the expeditious determination of customary rights; and
- contain transitional provisions.

OUTSTANDING MATTERS

- How customary usages can be provided for;
- What the customary authority to manage and regulate customary activities will be; and
- The question of ownership and whether the customary interests should be treated to amounting as exclusive ownership rights.

SEPARATE MATTERS

- review of the general coastal marine law;
- access to the coast, rather than access over the foreshore and seabed; and
- complex legal issues between the Crown and local authorities.

NEGOTIATIONS

Under section 96 of the Act, the Attorney-General and the Minister of Maori Affairs may enter into an agreement with a group to recognise that, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown, that group, or members of that group, would have had a claim for territorial customary rights over a specific area of the public foreshore and seabed.

Ngati Porou Foreshore and Seabed Agreement

Nga Hapu o Ngati Porou (being 50 of the 52 hapu of Ngati Porou) is the only negotiating group to have signed a Deed of Agreement with the Crown in accordance with section 96. The Deed contains nine instruments that provide legal recognition and protection of the mana of Nga Hapu o Ngati Porou and also provides an additional level of protection and authority in areas where territorial customary rights are recognised. No application has yet been made to the High Court for confirmation.

The Nga Rohe Moana o Nga Hapu Ngati Porou Bill was introduced on 20 September 2008 and is still awaiting its first reading. The Crown agreed to await the outcome of the Review, while dissent on the East Coast regarding this Bill led to applications in the Tribunal for urgent hearings (as above).

IMPENDING PROGRESS

The Government has not remained idle in this area, although its development of options has remained unpublicised. At this year's Waitangi celebrations, the Prime Minister indicated that the Act would be repealed during 2010, while the Attorney-General has stated that he intends to have a "blueprint" of replacement legislation ready by March 2010 for consultation in a national series of hui.

There are developments in this area on almost a daily basis as various interests seek to jostle for their position; for example Hone Harawira has made several proposed alternatives. As with so many of these matters, the devil is in the details and any resolution will not be to the complete liking of some of perhaps all of the interest groups. For a development of substance, however, we probably need to wait a few weeks to see what Attorney-General Finalyson proposes.