Pākia ki uta pākia ki tai

Summary Report of the Ministerial Review Panel

Ministerial Review of the Foreshore and Seabed Act 2004

He Taurere Takutai

Tērā tētahi whare i hanga
I te marae ātea o Hine Tuaoneone

Aurere ana te moana
Ngunguru ana te whenua
I te auētanga o te motu
Pākia ki uta, pākia ki tai

Tū kau noa te whare pūngāwerewere
Toro atu ana te kōrurutanga ki mamao
He rā kūtia mō te hunga o raro
Ko te hinapōuri, he pōuriuri
Tē hiki e

Tē kite atu i te pūāhurutanga
He mātao te takuahi
Ngā tara o te whare, pīrahirahi e
Whakairohia e te ringa naho
Torutoru noa i hinga
I ngā whakawai a tōna poho e

Ka nuku te one, oreore te kiri
Pānekeneke ana i raro wae
Pākia rawatia ana e te tai o riri
Ka timu, ka whawhati
Ka pari tonu mai
Ki tōna tūranga motuhake e

Tērā tētahi whare i hinga
I te marae ātea o Hine Tuaoneone e

Hana O'Regan

A Lament for the Sea Coast

There was a house built
Upon the swept dunes of Hine Tuaoneone

The sea groaned
The land growled
As the lament of the nation
Slapped upon shore and tide

It stood, this spider's house
Its shadow cast far
Eclipsing all it cloaked
Night and darkness did not recoil

No refuge could be found
Its hearth stone cold
Its walls paper thin
Its carvings etched in haste
It beckoned but few into its breast

The sand shifting, moving,
Sliding under its feet
Lashed by the angry tide,
Pushed away, and broken
Still the tide returned
To claim its place

There was a house that fell
on the swept dunes of Hine Tuaoneone

Overview

This is a summary report of the Ministerial Review Panel (the Panel) appointed by the Attorney-General on 4 March 2009 to undertake a review of the Foreshore and Seabed Act 2004 (the Act). This report is complementary to the main report, *Pākia ki Uta, Pākia ki Tai: Report of the Ministerial Review Panel*.

The National Party and the Māori Party agreed to review the Act in their Relationship and Confidence and Supply Agreement of 16 November 2008.

The Panel was comprised of Hon Taihākurei Edward Durie DCNZM (Panel Chair), Richard Boast and Hana O'Regan.

Our Terms of Reference

The Panel was asked to provide independent advice on four questions outlined in the following Terms of Reference:

a What were the nature and extent of the mana whenua and public interests in the coastal marine area prior to *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643;

b What options were available to the government to respond to the Court of Appeal decision in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643;

c Whether the Foreshore and Seabed Act 2004 effectively recognises and provides for customary or Aboriginal Title and public interests (including Māori, local government and business) in the coastal marine area and maintains and allows for the enhancement of mana whenua; and

d If the Panel has reservations that the Foreshore and Seabed 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 will also need to consider how these processes will integrate with legislation that regulates the coastal marine area.

In undertaking this work the Panel will:

- Consider the approaches in other Commonwealth jurisdictions to recognise and provide for customary and public interests in the coastal marine area;
- Consider the submissions by the public and other publicly available reports made to the Fisheries and Other Sea-related Legislation Select Committee in 2004 on the Foreshore and Seabed Bill and the Waitangi Tribunal's 2004 *Report on the Crown's Foreshore and Seabed Policy*; and
- Undertake consultation with Māori and the general public through a series of public meetings and hui.

The Panel is encouraged to invite key commentators to speak to it and will receive written submissions.[1]

The Ministry of Justice provided support to the Panel through a secretariat.

[1] Terms of Reference for the Ministerial Review of the Foreshore and Seabed Act 2004, 3 March 2009.

Background

Public interest in the issue of the foreshore and seabed was triggered by the June 2003 decision of the Court of Appeal in *Attorney-General v Ngāti Apa* (the *Ngāti Apa* case). In summary, the Court ruled that:

- the Crown was wrong to contend that certain statutes affecting the foreshore and seabed had had the effect of extinguishing such Māori customary title as might exist; and
- the Māori Land Court has jurisdiction, under Te Ture Whenua Māori/Māori Land Act 1993, to determine whether any part of the foreshore and seabed is still Māori customary land.

While the decision gave rise to uncertainty regarding the "ownership" status of the foreshore and seabed, it also confirmed that this could be tested in the Māori Land Court. However, rather than let that process run its course, the government decided to legislate. The Act vested in the Crown title to all foreshore and seabed land not already in private ownership. It also made some provision for Māori customary interests to be recognised in limited circumstances.

There was considerable opposition to the government's decision to legislate, to the speed with which it did so, and to the provisions of the Foreshore and Seabed Bill.

Three key issues emerge from our review of submissions to the Select Committee which considered the Bill in 2004: public ownership, access and navigation, and protection of Māori customary interests in the foreshore and seabed. In our view, these issues remain at the very heart of ongoing concerns about the legislation.

Review process

As well as the 21 public hui and meetings held all over the country, the Panel heard from 30 nationally significant interest groups, and all the parties involved in applications under the Act. We also met with a number of key commentators, including academics, judges, and lawyers with specialist expertise in Waitangi Tribunal practice and in conducting negotiations and settlements with the Crown on behalf of iwi. We received 580 submissions, 236 oral and the rest in writing.

Eighty-five percent of those submissions that commented on what should happen, favoured repeal of the Act. Of the remaining 15 percent, many favoured substantial amendment but would be just as happy to have the Act repealed. Only 5 percent of submitters wanted to see the Act remain unchanged. The Act appears to be unpopular with most New Zealanders. Public opinion has remained remarkably consistent with submissions to the Fisheries and Other Sea-related Legislation Select Committee in 2004.

The Act discriminated against Māori. Supporters of the Act claimed there was a legal uncertainty that needed to be rectified. But we are of the view that it imposed extremely restrictive thresholds for the recognition of customary interests and severely reduced their nature and extent. It drew on legal tests that had developed in other countries whose statutory, constitutional and historical treatment of the issue was entirely different from our own. It was simply wrong in principle and approach. We note that the majority of submitters, whether Māori or non-Māori, sought a legislated outcome provided it is fair and principled.

The Act is strongly opposed by Māori and not strongly supported – indeed, often actively opposed – by non-Māori. Had there been powerful public support for the Act we would have expected to have encountered it, but we did not.

The Act should be repealed, and the process of balancing Māori property rights in the foreshore and seabed with public rights and public expectations must be started again.

Furthermore, we consider that by initiating this Review the government has indicated a willingness to revise processes of policy formation where significant Māori interests are concerned, in order to ensure that issues such as that which arose over the foreshore and seabed in 2003–04 do not recur.

Our response

Question 1

What were the nature and extent of mana whenua and public interests in the coastal marine area prior to the *Ngāti Apa* case?

Our advice on legal interests is:

The lawful customary interest. Prior to the *Ngāti Apa* case, the whole of the coastal marine area to the outer limits of the territorial sea, or to such outer limit as customarily could be controlled, was subject to Native or Aboriginal or customary Title unless it could clearly be shown that that Title to any specified part had been properly extinguished.

(Our advice here gives the legal position. Native or Aboriginal or customary Title remains unless it has been clearly and plainly extinguished. Any future statutory regime would need to show that the customary Title were also "fairly extinguished having regard to the principles of the Treaty of Waitangi".)

The lawful public interest. Prior to the *Ngāti Apa* case, and until the 2004 Act, the legal rights of the general public in the coastal marine area were confined to rights of navigation and fishery (where not in conflict with customary fishing rights not covered by the Māori fisheries settlements).

Our perception of customary and public interests – in the popular sense – is:

The cultural dimension of the customary interest. The (non-legal) interest of customary societies in the coastal marine area immediately prior to the *Ngāti Apa* case (and still today), is in the maintenance of customary usages, management and control in order to provide for personal sustenance, tribal culture, identity and autonomy and respect for and the health of the natural order.

The cultural dimension of the public interest. The (non-legal) public interest in the coastal marine area immediately prior to the *Ngāti Apa* case (and still today) is in maintaining it as a natural environment that is a public recreation ground, the birthright of every New Zealander. (That is in addition to the usual rights of navigation and fishery and, where not inconsistent with existing private property rights, free access for commercial purposes.) The popular perception is that there is free access for all.

Question 2

What options were available to the government to respond to the Court of Appeal decision in the Ngāti Apa case?

The realistic options available to the government to respond to the *Ngāti Apa* case were:

- **To appeal the decision to the Privy Council**. We think an appeal should have been prosecuted.
- **To do nothing, leaving the courts to decide**. This was appropriate insofar as the existence and scope of property rights is quintessentially a Court matter.
- **To amend the statute-based Māori land law**. It was feasible to restrict alienation of any foreshore and seabed converted to Māori individual ownership. That would be consistent with the customary ethic and also with a dominant policy in current Māori land law. However, since restrictions on alienation constrain development rights, any such new law required significant Māori support.
- **To include foreshore and seabed settlements in Treaty settlements, revisiting those settlements already completed**. Generally this would have been time consuming and expensive, with little or no room to engage with the general public notwithstanding their interests regarding access and resource exploitation. Also, rights in respect of the coast would have been uncertain until the completion of all settlements.
- **To negotiate a nationwide settlement with hapū and iwi**. This could perhaps have followed the precedents set by the Māori fisheries and aquaculture settlements. This may not have allowed for adequate public engagement.
- **To substitute a special statute to govern customary and public interests in the coastal marine area**. This was the option that was chosen. The main factors to justify such an approach, assuming hapū and iwi support, arise from the uncertainty about what the Māori Land Court might have done (to the possible detriment of either or both of Māori and the general public) and the likely time and cost to settle entitlements for the entire coast. A further factor was that legislation would have been necessary in any event to provide for public use consistent with the popular perception of the public interest. However, proceeding with legislation despite widespread Māori opposition, legislation that reduced Māori property rights dramatically and which was contrary to human rights and Treaty principles, was not a realistic option in ethical terms.

Question 3

Did the Act effectively recognise and provide for customary or Aboriginal Title and public interests (including Māori, local government and business) in the coastal marine area and maintain and allow for the enhancement of mana whenua?

The Act did not effectively recognise and provide for customary or Aboriginal Title because it took away the legal rights of Māori to have their interests determined by the Courts. It also failed to properly balance customary and public interests. More particularly, general public interests were advanced at the considerable expense of Māori interests.

For the same reason that the Act reduces the nature and extent of customary rights, and because it does not directly acknowledge the respective elements of use, management and control, the Act fails to enhance the status of the mana whenua (which we take to mean, in present context, that it failed to recognise the mana, or the authority and rights, of the hapū and iwi).

Question 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?

Overview of the options

We do not favour the status quo option. A solution is needed based upon our own historical experience and our own legal development, and not legal solutions from other jurisdictions whose experience and jurisprudence has not been the same as ours.

We believe that the Act should be repealed. Assuming repeal as a starting point, we have considered four broad options that could be adopted in order to replace the existing legislation.

Option 1 is a "judicial" model. This option has attracted some public support from submitters. It consists of returning to the status quo immediately after the Court of Appeal's *Ngāti Apa* decision in 2003. That would mean, in effect, that the Māori Land Court and the High Court could proceed to exercise powers (to make status orders and vesting orders relating to the foreshore and seabed) that the Court of Appeal concluded those Courts possessed.

Such a process is likely to be protracted, laborious and expensive and could result in an unmanageable patchwork of litigation. We do not see that having rights in the foreshore and seabed decided by the Common Law rules of Native or Aboriginal or customary Title or by the precedents and approaches of the Māori Land Court would facilitate our overall goal of seeking a reconciliation between competing approaches to the foreshore and seabed.

Option 2: The "staged settlement" model. A staged settlement model is based on negotiations between hapū and iwi and the Crown, as part of the settlement of historic Treaty claims or, as at present, independent of that process.

This model, too, has its attractions. The existing settlement system is already in place and could be easily adjusted to deal with foreshore and seabed issues. It could mean, however, that the period of uncertainty would last even longer than under the judicial model. While the negotiations process could be streamlined, settlement negotiations to date have been slow and expensive.

It is also necessary to consider how the public interest is safeguarded in iwi–Crown negotiations. One option might be to legislate negotiation parameters that include provision for public input.

Option 3: The "national settlement" model. Instead of linking foreshore and seabed redress to incremental settlements, there could instead be a single, nation-wide settlement of foreshore and seabed issues, similar perhaps to the existing fisheries or aquaculture settlement models, by which the affected hapū and iwi may share in income accruing from the bed of the sea and foreshore. This model could be implemented reasonably easily.

Such a model however, would not address foreshore and seabed management at the local level. Also, it could prejudice iwi who lack the resources to participate and, like the staged settlement model, may foreclose on access to the Courts. Again, consideration would need to be given to representation for the public interest in negotiations.

Option 4: The "mixed" model. We favour a "mixed" model. It combines 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 entitled Māori (i.e. those hapū and iwi with traditional interests in the coastal marine area) 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. A mixed model of this kind appears to be the preferred option of those who made submissions to the Panel.

Preferred options

We have two proposals, either of which, or a combination of the two, we believe would achieve an expeditious resolution. Our National Policy Proposal focuses on a national resolution effected through a bicultural body. Our Regional Iwi Proposal focuses on direct negotiations between Crown and iwi.

Both proposals assume repeal of the Act, and are based on a Treaty of Waitangi framework and a set of core principles.

Treaty of Waitangi framework

Our proposals are built upon the framework of the Treaty of Waitangi and its kindred spirit, international human rights. The important lesson in human rights law is that a balancing of competing rights is required. The same is implicit in the Treaty. Together they require that Māori rights and general public interests should both be respected and that each may need to be limited by whatever is reasonably necessary in order to accommodate the other.

Core principles

New legislation will be necessary. It should contain a core set of fundamental principles to govern the resolution of foreshore and seabed issues. These are:

- **The principle of recognition of customary rights**
  Customary interests in the foreshore and seabed represent property rights.
- **The principle that customary rights attach to hapū and iwi (as defined by hapū and iwi themselves) and not to Māori in general**
  Customary property rights are the property rights of specific hapū and iwi with traditional interests in the coastal marine area.
- **The principle of reasonable public access**
  "Reasonable" public access should be defined and provided for by statute.
- **The principle of equal treatment**
  There should be equal and consistent treatment for similar cases in respect of Māori and other property rights, and in hapū and iwi engagement and influence over policy making at the national level.

- **The principle of due process**
  Access to due process should not be removed or unduly constrained.
- **The principle of good faith**
  Negotiations substantially completed should be respected.
- **The principle of restricting alienation**
  Whether the foreshore and seabed is ultimately held by Māori, the Crown or non-Māori private interests, there should be restrictions on alienation.
- **The principle of compensation**
  Where private property rights, of any kind, are extinguished in the foreshore and seabed, such extinguishment should in principle be compensated.
- **The principle of the right to development**
  Customary rights and interests in the foreshore and seabed should not be frozen in time as at 1840 but have the right to develop.

National Policy Proposal

The National Policy Proposal focuses on a one-off national settlement. It would establish a bicultural body with oversight of the whole coastal marine area. Such a body would:

- develop proposals for a national settlement;
- develop proposals on the allocation of rights held by hapū and iwi in the foreshore and seabed, and the methods by which such rights might be implemented, recognised and enforced; and
- develop proposals for co-management at a local level, taking account of co-management programmes implemented in New Zealand and overseas.

Regional Iwi Proposal

The Regional Iwi Proposal focuses on achieving regional and national negotiations directly between Crown and hapū and/or iwi. In these negotiations, the Crown represents the public interest. However, the responsible Minister may arrange for public responses, although the public might well respond in any event once enabling legislation is introduced to Parliament. In addition, it is proposed that the Minister may refer matters to the Māori Land Court for an opinion and to hear both Māori and the public.

We do not suggest one of these proposals is superior to the other. There are advantages and disadvantages in each. It is entirely feasible to adjust the mix of national and regional elements, picking parts out of one and parts out of the other.

In addition, both models are predicated on repeal of the 2004 Act.

Interim Act

We propose a new interim Act that would:

- repeal the Act;
- recognise as the primary norm of the Act, made in accordance with the Treaty of Waitangi, that entitled hapū and iwi have customary rights in the coastal marine area, the general public have rights of use and enjoyment, both must be respected and provided for within the limits necessary to accommodate the other. All decisions must be taken on the principle of that balance;
- provide for principles to govern the settlement of customary interests in the coastal marine area, and the administration of the area;
- provide for necessary mechanisms to implement the proposals we have made above and Māori and public responses to them;
- provide that, until the question of who would hold title to specific areas of the foreshore and seabed is resolved, the legal title be held by the Crown in trust for those later determined as entitled. (As we see it, once the respective rights have been resolved in any particular area of the foreshore and seabed, the beneficial and perhaps the legal title for the area would be held by the entitled hapū or iwi, or the Crown, or both jointly, depending on the outcome);
- promote the expeditious determination of customary rights in the coastal marine area and provide for them to be given practical effect; and
- contain transitional provisions.

Matters requiring settlement

There are a number of matters requiring settlement under either proposal:

Customary usages can be provided for by exclusive reserves under hapū control, for example, or by provisions prescribing general harvesting rights by regulations, Orders in Council or Māori Land Court orders.

Customary authority may be supported by the full right to manage reserves and regulate customary activities; and the right to be fully engaged in the management of coastal marine areas in partnership with other controlling authorities. The full engagement of hapū and iwi in co-management and other arrangements was a matter stressed in many submissions and is a matter which we consider deserves priority attention.

Ownership of the foreshore and seabed requires a national negotiated solution, specifically to the seabed, foreshore and substratum and with that, the income streams resulting from resource exploitation and use licences.

There remains an open question of whether the customary interests in the foreshore and seabed should be treated as amounting to exclusive ownership rights. We consider this matter can only be dealt with by negotiation at a national level. Negotiations should be with the representatives appointed by the hapū and iwi entities for those with major interests in the seabed substratum.

Fundamentally, a political solution is required based upon Treaty principles of good faith.

Matters for separate treatment

Coastal marine law

The point has been made repeatedly to us in submissions that the existing law relating to the coastal marine area is too complex. We believe that coastal marine law needs to be reconsidered as a whole, and that the development of final legislation on the foreshore and seabed should be integrated into such a review process.

Access *to* the coast

The real concern in many submissions, and in many popular articles and media statements, is not in fact about access over the foreshore and seabed but the difficulties experienced in getting access *to* the coast.

Many urged strongly that government should embark on a concerted effort to improve and secure public access to and along the coast. We are sympathetic to that view.

Local authority interests

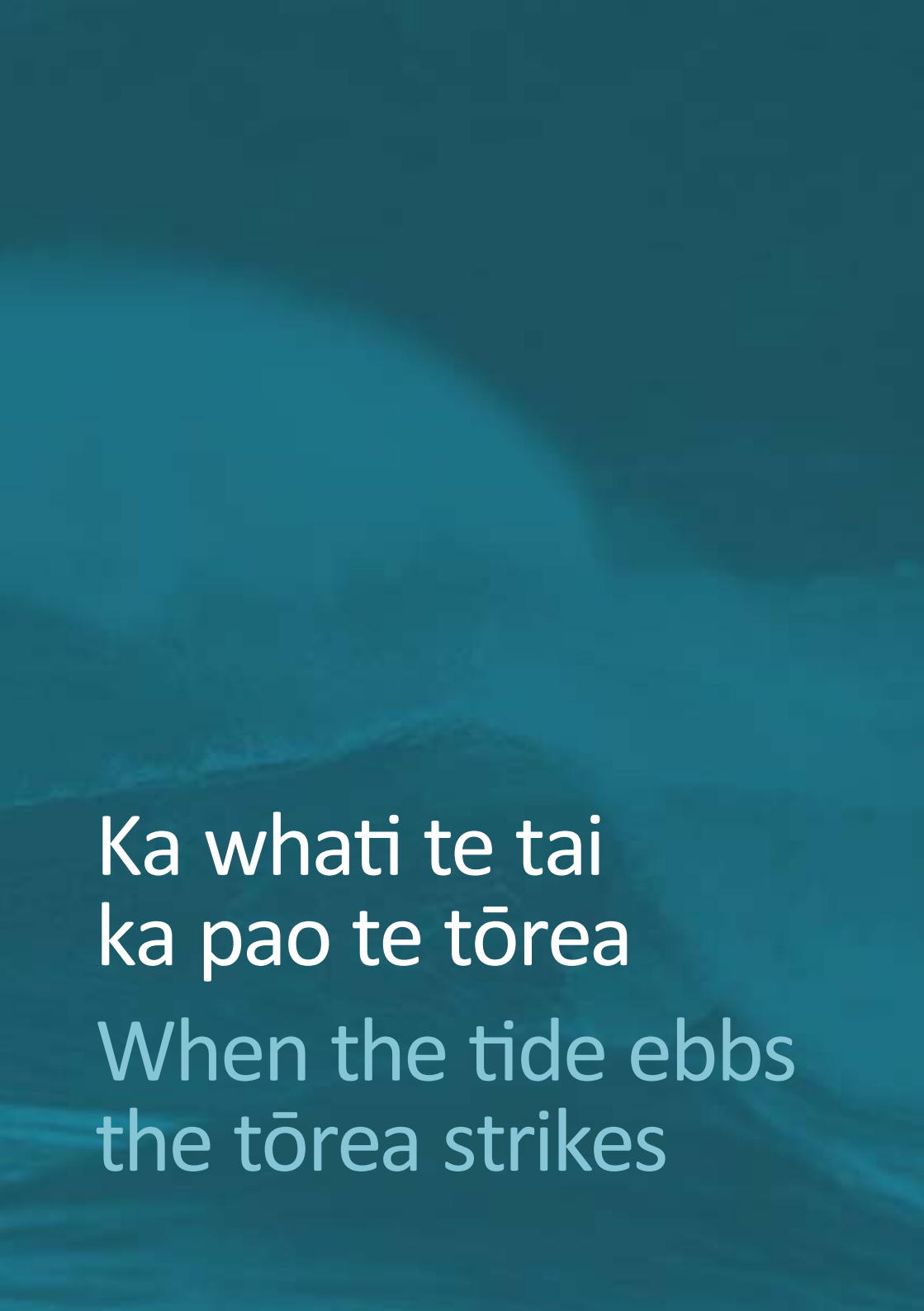
One effect of the Act was to vest all "foreshore and seabed" formerly belonging to local authorities in the Crown. The Act made provision for local authorities to apply to the Minister for redress for loss of divested areas.

We have not been able to analyse the complex legal issues that have arisen between the Crown and local authorities over the effects of the Act. In particular there are issues as to who is now liable for jetties, wharves, harbour works and other such structures which are now located on land which has been vested in the Crown. Questions of title and liability now involve difficult problems of interpreting the combined effect of the Common Law, earlier legislation relating to Harbour Boards, the Foreshore and Seabed Endowment Revesting Acts of 1991 and 1994 and the Act itself. One outcome of a repeal of the Act and the implementation of new legislation could be the revesting of the areas taken in 2004 back to local authorities, but we are not sure if this is necessarily the most desirable course or whether it would be an outcome that local authorities would particularly desire.

We did not have the benefit of a great deal of input from local authorities during our review process. For this reason we do not feel confident about recommending a particular path forward as to how the Crown and local authorities should now deal with the owner and management of structures attached to the foreshore and seabed. But we are aware that this is an important issue in some areas. It is our view that it would certainly be desirable for the Crown and local authorities to enter into discussions as soon as possible as to how this problem should best be dealt with in the public interest, free from complex legal technicalities.

In conclusion

As the Waitangi Tribunal noted in 2004, the issues underlying the Act required "a longer conversation" than that which had previously occurred. That necessary conversation did not fully occur during our inquiry. For the most part the consultation rounds did not move beyond "what was wrong". As a result our proposals have not been properly discussed with the people who will be affected by them. Accordingly, what we propose should not be seen as an end but as a beginning; a catalyst to further dialogue before the optimum design is settled and final decisions are made.



Ka whati te tai
ka pao te tōrea

When the tide ebbs
the tōrea strikes