DAVID V WILLIAMS
BA-LLB, BCL, PhD, DipTheol.

Independent Researcher
(Legal History/Treaty Claims in Aotearoa)
& Professor of Law

Home address:
Unit 19 'Earthsong'
457 Swanson Road, Ranui
Waitakere City 0612
Telephone: 09 832 8181
Facsimile: 09 832 8182
e-mail:
bagend@clear.net.nz

30th April 2010

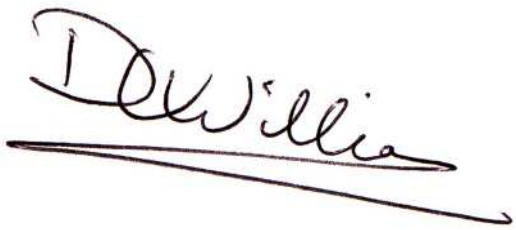
Reviewing the Foreshore and Seabed Act 2004 – Consultation Document, 2010.

Personal submission from Professor David V Williams, Faculty of Law, University of Auckland.

This is a brief bullet point document stating my personal viewpoints, without providing justifications for the positions taken. I seek to have my views made known at this stage, and I will comment in more detail on any Bill that is referred to a Select Committee at a later point in time.

- Public access as the norm must be guaranteed, including rights of navigation
- Regardless of how the underlying title is dealt with, inalienability by sale must be guaranteed
- I would reject Options one and two on Crown notional title and Crown absolute title
- I would like to see more work done on Option three. The notion of Maori title deserves serious consideration. The term 'Maori absolute title' makes no sense. Tikanga Maori as the source would point to some form of control and management that does not sit easily with the notions of 'title' or 'absolute title'.
- The Treaty of Waitangi as understood in modern times requires an acceptance of both rangatiratanga and kawantanga providing inputs into management and control.
- I would favour a form of rangatiratanga/kawanatanga title that is reflected in co-governance mechanisms for control and management. For all major issues, the rangatiratanga entity and the Crown entity relevant to particular areas of foreshore and seabed would be required to follow a consensus mode of decision-making and at the end of the day both would have a right of veto.
- I understand the political imperatives – fudging the issue – for suggesting the Option four 'no ownership' approach. Yet the power to manage and control, to prevent sales and to maintain public access must be based on some legal substructure bestowing power to regulate. As presented, the new approach stipulates that "The Crown and local government would continue to have regulatory responsibility." That is <u>not</u> a "new" approach. That is the old approach of Crown absolute title.
- In declaring that existing private ownership rights will not be affected, I trust that 19th century Crown grants to Maori over foreshore and seabed areas such as Whatapaka on the Manukau harbour and Wakapuaka in Nelson Bay will be respected, and not just those whose private title rights that derive from European grantees.
- Customary rights specific to hapu must be respected regardless of the decision on overall title.

- In the event of intra-Maori disputes as to customary rights and areas of coverage, the Maori Land Court will need to have an ongoing jurisdiction to ascertain and adjudicate on those rights in accordance with evidence based on tikanga.
- When officials consider what is meant by customary rights, it is imperative that tikanga is the source for the elaboration of those rights. It is not necessary to pay any regard to the so-called common law doctrine of aboriginal title in assessing customary rights. Aboriginal title is based on the Crown's radical title. Historically it has primarily been an instrument for the extinguishment of Maori customary rights, rather than for their enhancement. In that respect it is time to move on from the *Ngati Apa* reasoning and, by statute, to seek ways and means to genuinely enhance Maori customary rights and values and to honour the Treaty of Waitangi.



(Prof David V Williams)