

Submission form

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The government welcomes your feedback on this consultation document, particularly on the specific questions set out in this submission form. This submission form can also be downloaded from www.justice.govt.nz. The direct link to this information is: www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004.

Submissions are due by **5.00pm on Friday 30 April 2010**. Late submissions will not be considered.

To make a submission fill in the submission form or write your submission in a separate document and either:

- send your submission as an attached document by email to foreshoreseabedreview@justice.govt.nz; or
- mail a hard copy to the following address:

FreePost Authority number 224164
Foreshore and Seabed Review
Ministry of Justice
c/- PO BOX 180
WELLINGTON 6140

All submissions will be publicly available.

The Ministry of Justice will publicly release your submission, a summary of submissions and a list of names of submitters on its website: www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004.

Your name will be made publicly available as part of your submission when it is released.

Your contact details will be removed from your submission before it is posted on the website, recorded in the summary of submissions or released under the Official Information Act 1982 (OIA).

If you do **not** wish your name in your submission to be released, please clearly state this in your submission or tick the option below:

- I request that my name be removed from my submission before it is released and that it is recorded as 'anonymous' in the summary of submissions.

If there is particular information in your submission that you wish to remain confidential, please clearly indicate this and explain your reasons for wanting the information kept confidential.

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The Privacy Act 1993 governs how the Ministry collects, holds, uses and discloses personal information about you which is contained in your submission. You have the right to access and correct this personal information.

I am responding as (please tick one):

An individual

Name

Email

Address

or

On behalf of a group or organisation

Name of group or organisation: Te Rūnanga o Ngāti Awa

Email jeremy@ngatiawa.iwi.nz

Address PO Box 76, Whakatāne

1. Should the Foreshore and Seabed Act 2004 be repealed?

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Ngāti Awa supports the repeal of the Act. The passing of the Act removed the ability of Māori to test their legal rights to customary title in the courts and is therefore contrary to the principles of the Treaty of Waitangi and the principles of natural justice. The Act itself contains discriminatory provisions that breach international Human Rights conventions and the Treaty of Waitangi. The Act has also been heavily criticised both nationally and internationally by a range of organisations including; the Waitangi Tribunal, the Ministerial Review Panel on the Foreshore and Seabed Act 2004, the Human Rights Commission, the UN Committee on the Elimination of Racial Discrimination and the UN's Special Rapporteur. Further, the Act only applies to land not already held in private ownership thereby creating an inequitable situation for Maori.

2. *The government proposes the following approach to ownership of the foreshore and seabed:*

- the 2004 Act would be repealed and Crown ownership removed;
- customary title extinguished by the 2004 Act would be restored;
- no one owns, or can own the foreshore and seabed (except land in existing private titles);
- instead of identifying an owner of the foreshore and seabed, legislation would specify roles and responsibilities;
- customary interests of hapū/iwi would be tested and, if proven, recognised through awards; and
- the Crown and local government would continue to have regulatory responsibility (subject to awards recognising customary interests).

Do you support this approach?

Please give the reasons for your response.

Yes No

I/We have no view or preference

Prior to the enactment of the Foreshore and Seabed Act 2004, Ngāti Awa hapū had the ability to test their claim to Customary Title to the foreshore and seabed within its rohe. It is Ngāti Awa's view that its customary title to the foreshore and seabed has never been extinguished either through confiscation, the application of title or other forms of legislation. It is Ngāti Awa's further view that given the lack of alienation since 1840 the onus of proof should be on the Crown to show customary title does not apply.

The authority to make decisions about the foreshore and seabed within the Ngāti Awa rohe lies with its iwi and hapū. It should be noted that permitting reasonable access and ensuring restrictions on alienation are core principles underpinning our customary practices.

Ngāti Awa as Treaty Partner, wishes to work with the Crown in balancing interests to the foreshore and seabed. These interests include property rights. Resolution of these complex issues needs to be by way of robust dialogue and negotiation between Treaty partners.

Ngāti Awa believes that the government's proposal is a step in the right direction but requires further improvements. Under the proposal, the restoration of iwi and hapu rights to access the courts is supported in principle. However, the Government's current preferred approach to ownership of the foreshore and seabed cannot be supported at this stage because:

- The proposal does not address the issue of whether property rights and therefore development rights, held by Ngāti Awa will be adequately recognised under the territorial rights proposal.
- It is unclear whether "public domain" actually represents Crown ownership and control by another name. There is insufficient reasoning as to why a form of "Māori Title" or joint ownership is not considered a valid option in the consultation document,
- The "no-ownership" approach does not identify whether the Crown intends to surrender ownership of "non-nationalised" minerals that were taken under the 2004 Act,
- Ngāti Awa has consistently asserted its customary interests in the foreshore and seabed and considers that the onus of proof for extinguishment of customary title should lie with the Crown,
- The proposed tests for awards may discriminate against hapū and iwi who suffered alienation of ancestral lands through historic confiscations,

- The proposal does not discuss whether resources will be available to assist Ngāti Awa in either negotiations or the Court process.

The proposal only applies to Maori as it does not intend to deal with foreshore and seabed already in private ownership.

The Way Forward:

Although the repeal of the 2004 Act is supported, Ngāti Awa asserts that further dialogue is required before the Select Committee process commences. As noted by the Waitangi Tribunal, “a longer conversation” is required to develop an enduring solution. The submission period of one month is considered totally inadequate to generate a durable solution due to the complexity of the foreshore and seabed issue.

Ngāti Awa intends to consult with other Mataatua Iwi to agree the way forward. It is the view of Ngāti Awa and Mataatua that a it wishes to approach the resolution of this issue on a regional/waka basis. This will allow for solutions to be developed according to varying regional circumstances.

Principles

- Hapū and iwi have legal title over the foreshore and seabed under tikanga Māori unless proved otherwise by the Crown.
- The terms of negotiations will be determined between the Crown and hapū/iwi and be settled before adoption of the new Act. The terms would comply with international human rights law, indigenous peoples’ rights law and the Treaty of Waitangi.
- The general public has rights of use and enjoyment in the coastal and marine area and entitled hapū and iwi have customary rights, both must be respected and compromises will need to be made in order to achieve a satisfactory balance.
- That the Crown holds the legal title in trust until respective rights have been resolved. This would provide some interim certainty until such time as an outcome is negotiated. Such an outcome could include legal title held by iwi/hapū, or mechanisms such as tipuna title or joint management.
- That adequate resources will be made available to support a robust process for dialogue between Treaty partners.

These principles would underpin the development of a framework for future legislation. In addition to the issues outlined above, the framework could also consider strategies for improved integrated management of the coastal marine area.

Clearly, there needs to a transformative solution if the new legislation is to be widely accepted. Ngāti Awa is confident that an enduring solution can be achieved but only if the Crown is prepared to properly explore all options alongside its Treaty Partner.

The complexity of the foreshore and seabed issue is such that the process employed will be viewed as being just as important as the outcomes themselves.

3. The government suggests the name ‘public domain/takiwā iwi whānui’ for its proposed new approach. Do you agree with the name, or do you suggest another name for the area?

Please give the reasons for your response.

Yes, I agree with the name ‘public domain/takiwā iwi whānui’

No, I don't agree with the name 'public domain/takiwā iwi whānui'

I suggest another name for the area:

I/We have no view or preference

Comment: The name is irrelevant as it is currently unclear how the pre-existing rights of Ngāti Awa are recognised under the proposed 'no-ownership' regime and cannot be supported at this stage. The notion of public domain is also misleading as significant tracts of the foreshore and parts of the seabed are already in private ownership. If this notion of general access is to be upheld then it must apply universally.

4. *Do you think coastal hapū/iwi should be able to negotiate with the Crown for recognition of their customary interests?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Direct negotiations are appropriate and reflect the Treaty based relationship between the Crown and hapū / iwi. The model for negotiations needs to be clearly set out and should strengthen the negotiating position of iwi and hapū over the existing proposal. There will also need to be sufficient flexibility within the model to allow for iwi and hapū to develop their own solutions at a regional and local level. As with all Crown-Maori negotiation processes the Crown holds the upper hand due its ability to access resources and expertise. Any durable solutions must ensure parties are negotiating as equals or at the very least the Crown is acting in accordance with its fiduciary duty to Maori.

5. *If customary interests are recognised through negotiation, should the awards be negotiated, or should the awards be the same as those the government proposes to set out in legislation?*

Please give the reasons for your response.

Awards should be negotiated

Awards should be as proposed to be set out in legislation

I/We have no view or preference

Comment: Awards should be negotiated. Ngāti Awa considers that the six types of suggested awards set out in the proposal do not adequately reflect its customary authority and need to be expanded upon. Awards should therefore be negotiated on a case by case basis and according to varying regional circumstances. It should be noted that the awards proposed equate to only a subset of those set out in agreements currently being negotiated with some iwi under the 2004 Act.

6. *Do you think coastal hapū/iwi should be able to claim recognition of their customary interests through the courts?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Ngāti Awa asserts that as a matter of principle, pre-existing customary interests should not have to be proved through the courts. A judicial process is considered as a last resort in any process that seeks to recognise and provide for Ngāti Awa rights in the foreshore and seabed. However, access to the courts should be retained as an option where negotiations cannot be reached.

7. *Should the Māori Land Court hear and determine claims?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Ngāti Awa customary rights are intrinsically linked to tikanga Māori. The Māori Land Court has specialist expertise in dealing with issues of tikanga. Ngāti Awa is of the view that that the jurisdiction of the Māori Land Court should be enhanced in order to enable the further develop our country's own unique common law arising from tikanga and customary rights. Ngāti Awa is concerned that the current proposal places too much emphasis on overseas jurisprudence that may be inappropriate within a Treaty based context. The findings contained within both the Ministerial Review Panel's report and the Waitangi Tribunal's Foreshore and Seabed Report clearly state the importance of understanding the range of complex legal issues as a starting point for further dialogue. Ngāti Awa asserts that "longer conversations" are required between Treaty Partners - such conversations will need to be informed by those who have legal expertise.

8. *Should the High Court hear and determine claims?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Unlike the Māori Land Court, the High Court is not experienced in tikanga Māori. As previously suggested, it is our view that the Māori Land Court jurisdiction should be enhanced.

9. *Should the applicant alone be responsible in court for proving a test for customary interests is met?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: The Crown should be responsible in terms of proving fair and lawful extinguishment of customary title in preference to Ngāti Awa disproving extinguishment. It is unclear how the proposed tests will apply to Ngāti Awa in terms of the raupatu and the subsequent 2005 settlement. Ngāti Awa contends that regional circumstances will need to be considered upon a case by case basis and iwi who have suffered confiscations should not be unfairly disadvantaged by the process.

10. *Should the applicant and the Crown share the responsibility in court for proving a test for customary interests is met?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Yes, provided that the tests are fair and equitable. The current tests do not adequately provide for the customary rights of Ngāti Awa and further dialogue is required.

11. *Should any new legislation set out the tests and awards or should these be left to the courts to develop?*

Please give the reasons for your response.

Legislation should set out the tests and awards

The courts should be left to develop the tests and awards

I/We have no view or preference

Comment: The legislation should set out the the types of customary rights, the tests and alternatives for awards in order to provide a level of certainty to claimants, however there needs to be sufficient flexibility to allow for differing regional circumstances. Tests and awards need to be developed alongside hapū and iwi as part of the development of a new framework for managing the foreshore and seabed prior to the Select Committee process. The Act must also set standards for the Crown's level of proof of extinguishment of title.

12. *Do you agree that any new legislation should recognise two types of customary interests (non-territorial and territorial)?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: It is too early in the process to determine whether the customary interests of Ngāti Awa should be defined in this way. The Crown proposes an approach that is founded on the concept of aboriginal title which does not adequately provide for customary rights arising from tikanga Māori. There is also considerable uncertainty as to how the tests could be met by Ngāti Awa due to the historic confiscations of the 1860's and therefore inability to use evidence relating to ownership of adjoining land. The types of interests proposed are also limited in their discussion of development rights.

13. *Do you agree with each of the elements of the test for determining **non-territorial** interests proposed by the government?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: The current approach is too limited and does not provide adequate recognition for Ngāti Awa customary rights arising from tikanga. A transformative solution is required and could include the ability to draw upon standards beyond common law. The elements of the test should be derived from tikanga Māori as a starting point. Tests should also be considered in the context of Treaty of Waitangi jurisprudence and the Declaration of Rights of Indigenous Peoples. Further dialogue is required.

14. *Do you agree with each of the elements of the test for determining **territorial** interests proposed by the government?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: The current approach is too limited and does not provide adequate recognition for Ngāti Awa customary rights arising from tikanga. While the move to lessen the threshold in terms of making the "continuous title to contiguous land" requirement relevant rather than mandatory, the approach does not provide for historical Treaty breaches including raupatu.

15. *Do you agree that the awards to recognise proven customary interests should be a combination of property rights and input to environmental management processes?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: The RMA 1991 contains some provisions for Māori that should be expanded upon to include the foreshore and seabed. Entitled hapū and iwi should also be recognised as having affected party status in any applications for resource consent and or coastal permits affecting foreshore and seabed within their respective rohe.

16. *Do you agree with each of the elements of the awards for **non-territorial** interests proposed by the government?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Ngāti Awa hapū and iwi seek further input into the process as the current proposal seems to offer substantially less powers than what could reasonably be expected. It should be noted that Ngāti Awa already exercises customary rights in terms of rahui and has planning mechanisms in place that provide for kaitiakitanga. Further dialogue is required.

17. *Do you agree with the customary title award for **territorial** interests proposed by the government?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: The current awards proposed fall far short of proving for the full expression of Ngāti Awa tikanga and mana and greater flexibility is required to enable regional solutions to be developed. It is not known why that the awards proposed are far more limited than the mechanisms provided for in the Ngāti Porou foreshore and seabed agreement.

18. *Do you agree with the government's proposals for the allocation of coastal space? These are:*

- the existing processes for the allocation of space would be retained on the basis that it is the Crown's role to regulate and manage resources in the foreshore and seabed;
- the Crown would continue to delegate the role of allocating space to regional councils; and
- this would be done in conjunction with those coastal hapū/iwi whose customary interests in the area have been recognised.

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: The "no-owner" proposal does not provide sufficient certainty for the allocation of coastal space and or any income arising from Coastal permits. While the rights of so called "private" property rights holders are secured, the rights of Ngāti Awa are at this stage unclear. Ngāti Awa would expect at the very least, co-management of the coastal allocation process together with Regional Councils for areas within their rohe.

19. *Do you agree with the government's proposals regarding structures? These are:*

- ownership of existing structures will remain with existing owners;
- new structures will be owned by those who own the material in the structures; and
- coastal hapū/iwi whose customary interests have been recognised will have an enhanced role in decision-making processes in relation to new structures (through the planning document described).

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Ngāti Awa customary rights go beyond the scope of participation in planning decision making processes via planning documents. The proposal fails to address how the Crown intends to manage income arising from licences and leases. Customary rights have been shown to equate to property rights in the past. For example, Ngāti Tuwharetoa have the ability to licence commercial structures that are sited on the bed of Lake Taupo. Further dialogue is required.

20. *Do you agree with the government's proposals regarding reclamations?*

These are:

- existing decision-making processes would continue in respect of reclamations although the nature of the interest granted may change;
- existing applications would continue to be dealt with as though the Crown were the owner of the underlying land; and
- for new applications, local authorities would continue to perform their current role of considering the environmental effects of a proposed reclamation.

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Further dialogue is required to determine the role that Ngāti Awa will play in considering applications for reclamations.

21. *Do you agree with the length of time proposed for the new form of coastal permit for port companies (50 years or more, renewable)?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: There is insufficient justification as to why the term should be extended from 35 years under the current RMA regime to 50 years for Port Companies in particular. The time frame is considered too long in terms of being able to adequately avoid remedy or mitigate adverse environmental effects. The time frame also fails to consider the potentially significant ramifications arising from global warming and associated issues. No details are provided as to the mechanisms for licences and leases under the new regime. This appears to favour the rights of current users over pre-existing customary ownership rights which is inequitable.

22. *Do you agree with the government’s proposals regarding local authority-owned land? These are:*

- any existing local authority-owned land within the foreshore and seabed would be incorporated into the ‘public domain/takiwā iwi whānui’; and
- the Crown would pay compensation for that land (if there is any) to the local authority.

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Further dialogue is required with local authorities. Compensation, if any, should take into account the regional circumstances that apply to the land in question. Management structures also need to be clarified.

23. *Do you agree with the government’s proposals that any new law on the foreshore and seabed would contain provisions on adverse possession and prescriptive title similar to those in the 2004 Act?*

Please give the reasons for your response.

Yes No

I/We have no view or preference

Comment: Further clarification is required as to the circumstances where adverse possession may currently exist.

24. *What are your views on leases and licences within the foreshore and seabed in view of the government’s proposals?*

Comment: Commercial activities should be licenced and income allocated on a fair and equitable basis.

25. What are your views on coastal occupation charges within the foreshore and seabed in view of the government's proposals?

Comment: Charges should be imposed and income should be distributed on a fair and equitable basis.

26. What are your views on roads within the foreshore and seabed in view of the government's proposals?

Comment: Roads are just one example where the "no-owner" status will be unworkable. Further information is required to properly explore this issue. For example it is unclear as to whether "roads" include Māori roadways.

27. What are your views on local Acts in relation to the foreshore and seabed in view of the government's proposals?

Comment: There should be sufficient time allowed for local authorities to participate in the development of proposals that directly impact upon their roles and responsibilities.