Foreshore and Seabed Bill

129-1

Report of the Fisheries and Other Sea-related Legislation Committee

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Foreshore and Seabed Bill

Recommendation
The Fisheries and Other Sea-related Legislation Committee has examined the Foreshore and Seabed Bill and is unable to reach agreement on whether the bill should be passed. The bill is being reported to the House with no amendments.

Report to the House
This report is in seven parts. The first part outlines issues that have arisen during consideration of the bill. The six remaining parts outline the views of New Zealand Labour and Progressive, New Zealand National, New Zealand First, ACT New Zealand, Green Party, and United Future.

Scope of the bill
The bill is intended to establish a framework for recognising rights and interests in the foreshore and seabed. The bill replaces all previous common law rights and interests in the foreshore and seabed. The bill does not deal with customary rights and interests relating to fishing that are created or regulated by the Fisheries Act 1996 and regulations made under that Act, and/or the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

Purpose and principles of the bill
The purpose of the bill is to clarify the status of the foreshore and seabed. The bill is intended to integrate all rights and interests in the public foreshore and seabed (those areas of the foreshore and seabed not subject to a freehold interest) within existing systems for regulating activities. It does so by creating a new legal scheme that:

- vests the full legal and beneficial ownership of the public foreshore and seabed in the Crown to ensure that the public foreshore and seabed of New Zealand is preserved in perpetuity for the people of New Zealand
- provides for general rights of public access, recreation, and navigation in, on, over, and across the public foreshore and seabed
- acknowledges kaitiakitanga by recognising the ancestral connection of Maori with the public foreshore and seabed
- provides for the recognition and protection of customary rights to undertake or engage in particular activities, uses, or practices in areas of the public foreshore and seabed
- enables application to be made to the High Court to investigate the full extent of the rights that may have been held at common law, and provides for formal discussions on redress if those rights cannot be fully expressed as a result of the bill.
Submissions received on the bill

We received 3,946 written submissions from a wide range of people and organisations. Two hundred and thirty-four of the submissions were presented to the committee verbally in public hearings held in Auckland, Wellington, and Christchurch.

Approximately 94 percent of the submissions oppose the bill in general terms. This opposition generally relates either to concerns about denying Maori the right to pursue claims under Te Ture Whenua Maori Act 1993 or under common law; or to the Crown’s power to alienate the public foreshore and seabed by passing subsequent legislation. Support for the bill centres on public ownership, on the access and navigation provisions, and on the protections in the bill for Maori customary interests.

Submissions generally provided comments on particular aspects of the bill. The main themes that emerged are discussed below.

Maori

Submissions from whanau, hapu, iwi, and Maori organisations generally expressed opposition to:

- loss of the right to due legal process in respect of determining property/customary interests
- Crown ownership
- the process for ascertaining territorial customary rights and the lack of guarantees on redress
- ancestral connection orders as having little effect, or alternatively as disrupting existing consultation processes
- the test for, and limits on, customary rights and orders.

Local authorities

Submissions from local authorities expressed concern mainly over:

- vesting of local authority land, particularly where that land is subject to leasehold interests
- lack of public consultation on customary rights orders
- amendments to the Resource Management Act 1991 to provide for customary rights as undermining sustainable management and frustrating development
- absence of criteria for restricting access rights
- the governance and cost implications of the bill.

Port companies

Port companies support Crown ownership of all foreshore and seabed for which there is no clear title, but oppose:

- the bill progressing until the appeal to the Privy Council is decided
• ancestral connection orders
• reclamation provisions—especially the effect on existing reclamation agreements, future reclamation, and dredging activities.

Network utility operators
Network utility operators generally expressed support for Crown ownership, public access, and navigation, although they:
• seek clarification on some aspects of the bill
• are concerned at proposed changes to the Resource Management Act, as potentially affecting significant infrastructure investments
• oppose reclamation provisions.

Recreational groups
Submissions from recreational groups expressed concern over:
• inclusion of air- and water-space in public foreshore and seabed
• ability to restrict access without public consultation
• alienation provision
• Resource Management Act amendments.

General issues raised in submissions
In addition to commenting on particular aspects of the bill, submissions also dealt with more general matters, in particular:
• alternatives to the bill, such as Crown trusteeship or amendment to Te Ture Whenua Maori Act 1993
• the process for the development of the bill
• the Treaty of Waitangi
• the bill defining and limiting rights not derived from the Crown
• human rights
• preferential treatment for Maori.

The process for the development of the bill
Submissions have been critical of the process by which the bill was developed, and the time available for its consideration. The main criticisms concern the speed of the process and the extent of genuine consultation.

meetings were held, including hui (attended by some 3,000 people with 180 oral submissions heard); meetings with interest and sector groups representing a wide range of interests including recreational, sports, fishing, and local government interests; and public meetings organised by Government Members of Parliament in areas where many people demonstrated an interest in the issue.

Two thousand, one hundred and seventy-one submissions were received on the Government proposals for consultation. During November and early December Ministers and senior officials undertook further consultations with Maori and other sector and interest groups. Having canvassed the various interests, the Government considered that it had a responsibility to develop reasonably quickly a comprehensive response to the ambiguity and uncertainty arising from the Court of Appeal decision. In December 2003, the Government released its policy framework and the drafting of the bill began.

The Treaty of Waitangi

In late January 2004 the Waitangi Tribunal held an urgent hearing as to whether or not the Government’s December policy framework was consistent with the principles of the Treaty of Waitangi. Its Report on the Crown’s Foreshore and Seabed Policy was released on 4 March 2004. The Government was, therefore, able to take into account those findings as it took final policy decisions and drafted the bill. In particular, the bill incorporates a codified High Court jurisdiction to consider applications for customary title/territorial customary rights (to replace the common law jurisdiction) that was not included in the Crown policy condemned by the Waitangi Tribunal.

A number of submissions support the Waitangi Tribunal’s report on the foreshore and seabed policy, which considers that the Government’s policy, announced in December 2003, is in breach of the treaty and its principles. Others specifically consider the bill to breach the treaty, particularly the tino rangatiratanga guaranteed under Article 2. The majority of such submissions considered the bill only in the context of the Treaty of Waitangi, which is not the full scope of the relevant matters covered by the bill.

Consideration has been given to the Treaty of Waitangi and its principles throughout the development of the foreshore and seabed policy and this legislation. The bill provides a framework for the recognition and protection of customary rights and interests that would be recognised at common law. The bill is, therefore, directed towards common law rights and interests rather than the treaty obligations of the Crown. The treaty is relevant, however, as the common law customary rights and interests of Maori are those affirmed and protected pursuant to Article 2 of the treaty.

Following the Ngati Apa judgment the Government concluded that it must move with expedition to clarify the law. The Waitangi Tribunal concluded that the December 2003 policy framework was not consistent with the treaty and its principles. The bill incorporates changes made in light of the tribunal’s recommendations, particularly with regard to the retention of a High Court jurisdiction.

The bill does not affect the validity of any agreements entered into by the Crown and Maori groups for the settlement of historical Treaty of Waitangi claims or the ability of the Crown to enter into agreements for the settlement of such claims. Historical settlements relate to Maori rights and interests, including customary rights, that have been lost, or
diminished, by Crown actions or omissions in the past that were in breach of the Treaty of Waitangi. The bill addresses those customary rights and interests in the public foreshore and seabed that have survived, and still exist today.

**Defining and limiting rights not derived from the Crown**

Several submissions challenge the bill as defining and limiting Maori customary rights in the foreshore and seabed.

In relation to customary rights the bill identifies a range of issues for the courts to consider, involving both common law and tikanga Maori. For the common law there are numerous precedents for its codification into statute, such as legislation on contracts or accident compensation. As for the bill defining Maori customary rights, this is a consequence of the bill providing a framework for the recognition of rights and interests in the foreshore and seabed.

**Human rights**

Submissions raised human rights issues in various degrees of detail, from brief references to extensive discussions. The specific issues raised include the following:

- the differential treatment in the bill of Maori customary title relative to other forms of title amounts to racial discrimination, contrary to section 19 of the New Zealand Bill of Rights Act 1990 (BORA), the Human Rights Act 1993, article 7 of the Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR)

- the bill breaches the rights of indigenous peoples recognised under the CERD, the Draft Declaration on the Rights of Indigenous Peoples, or otherwise

- the bill deprives Maori of property rights and the right to fair value compensation, contrary to article 17 of the UDHR, the CERD, or otherwise

- the bill breaches the right of self-determination as recognised by article 1 of the ICCPR or otherwise

- the bill breaches the right of access to, and equality before, the courts under article 10 of the UDHR and article 14 of the ICCPR

- the bill breaches the right of Maori as a minority group to enjoyment of their culture, contrary to section 20 of the BORA and article 27 of the ICCPR

- the bill breaches the right to development as asserted by International Labour Organisation (ILO) Convention 169 on the Rights of Indigenous Peoples, the Declaration on the Right to Development or otherwise.

Some submissions take issue with the Attorney-General’s assessment that while the bill arguably amounted to prima facie discrimination, contrary to section 19 of the New Zealand Bill of Rights Act 1990, it was justifiable in terms of section 5 of the Act.
The Attorney-General’s advice of 6 April 2004 on the consistency of the bill with the New Zealand Bill of Rights Act 1990, which has been released publicly, contains an analysis of human rights issues as they arise under that Act.

In relation to the issues raised in submissions, the advice deals with the right of access to the courts (paras 12–18), property rights (paras 19–23), the right of minorities to enjoy their culture (paras 24–36) and, at greatest length, discrimination (paras 37–103). The Attorney-General concluded that the bill was consistent with the rights of access to the courts, property, and culture under sections 27, 21, and 20 of the New Zealand Bill of Rights Act. There does not appear to be any contrary claim raised in the submissions in respect of these rights that is not addressed by the Attorney-General’s advice.

While the bill arguably raises a prima facie issue of discrimination under section 19 of that Act, the Attorney-General concluded that such discrimination would be justifiable on the grounds that the scheme of the bill provided for the recognition of rights relating to customary practices and negotiated redress for customary ownership and that there was an interest among all people, Maori and non-Maori, in clarifying these rights. The Attorney-General noted that others might dispute that assessment, as a number of submissions have now done. However, the contrary views as expressed in submissions follow from a factual dispute as to the purpose, basis, and effects of the bill rather than the legal analysis made in the Attorney-General’s advice.

A number of submissions raise issues in respect of international human rights standards that fall either wholly or partially outside the scope of the civil and political rights that are protected by the New Zealand Bill of Rights Act.

**Parliament’s intention for Te Ture Whenua Maori Act 1993**

We recognise that central to the question of whether the Foreshore and Seabed Bill was extinguishing rights, including rights of due process under Te Ture Whenua Maori Act 1993, was Parliament’s intention when passing that Act, particularly regarding the jurisdiction of the Maori Land Court. Very few submissions received by us were directed at that precise issue.

We necessarily considered carefully whether it was Parliament’s intention when passing the 1993 Te Ture Whenua Maori Act that the definition of “land” should extend to the land of the seabed, that is to say land seaward of the mean high water mark. This intention is important because the Maori Land Court has jurisdiction to make status and vesting orders only in respect of customary land as defined under Te Ture Whenua Maori Act 1993; this includes orders ultimately vesting title to such land in fee simple or freehold title. If Parliament did not intend that the definition of “land” should include the foreshore and seabed seaward of the mean high water mark, then it could not have intended that the Maori Land Court should have jurisdiction to vest such land, if customary land, in the owners of that land by way of freehold title.

We sought and received advice on this important point from our independent specialist adviser. Officials also provided advice. We considered it was within our responsibility to consider this issue in the light of, but also independently from, the view taken in the Court of Appeal in the Ngati Apa case on this issue. We recognise that the Foreshore and Seabed Bill allows the issue of Parliament’s intention in respect of the definition of ‘land’ under
the 1993 Act to be considered again by Parliament. This was especially important since the Court of Appeal in Ngati Apa had determined that if Parliament not had intended that it should extend thus far, the 1993 Act should have stated so more clearly.

**New Zealand Labour and Progressive view**

On the signing of the treaty and the assumption of sovereignty the British common law was received into New Zealand. With it came English concepts of property ownership. English land concepts differ from Maori customary concepts.

In the second edition of *Maori Land Law* published this year Andrew Erueti wrote:

It is important to stress from the outset that Maori customary concepts of relationships between people and land or water do not fall neatly into the British system of property rights received in New Zealand. English real property law had developed over the course of centuries from a set of fluid ‘custom laws’ to a body of clearly defined and simplified rules that facilitated the private use and enjoyment of land. Title to land provided the title-holder with virtually all rights in the land: exclusive, undisturbed possession for an indeterminate duration, and the right to encumber it, or sell it in perpetuity.

According to Maori land custom, no one individual or kinship group owned land in the sense that they held virtually all rights in land to the exclusion of other levels of kinship or adjacent groups. Rather, different levels of the hapu social order exercised different kinds of rights in the same area of land. The right to traverse a stretch of land could extend to the hapu as a whole, but the right to cultivate particular garden plots within the same area could be exercised by smaller entities: individuals, chiefs, ope of kin, nuclear families (mum, dad and the kids), and whanau (the extended family).

These rights were transferred by a number of customary means. Major transfers could occur through war or threat of war. However, the rights to specific resources, such as the right to fishing-stands, trees attractive to birds, or small garden plots, were commonly transferred from, by and to individuals, through gifting and inheritance. Specific rights were transferred in this way to other hapu members and also to members of adjacent groups without necessarily conferring with the hapu as a whole or its ruling chief or chiefs. As a result, ‘the rights of individuals of different hapu came to intersect on the ground’, resulting in a crazy patchwork of use-rights. These rights were ordered and prioritised according to well-recognised principles but with a marked emphasis on context so that the solution chosen best suited the demands of the moment.

The manner in which Maori used their resources is described by Angela Ballara and quoted by Mr Erueti in *Maori Land Law*:

The land or the waters of the lake, lagoon or harbour or open sea was not the taonga (property) owned; what was owned were the rights to certain resources within a particular territory: the right to gather certain crops first (berries, wild vegetables), the right to let down a seine at certain fishing places, the right to catch birds nesting on a
specific tree, or the rats (kiore) using a particular rat run; if the birds or rats moved to another tree or run, or the shoals swam elsewhere, they could be caught by others.

Government members believe that customary rights orders reflect the description by Angela Ballara. Government members support the concept of customary rights orders in the bill.

Territorial customary rights are effectively a form of title and following the Waitangi Tribunal report the role of the High Court in its inherent jurisdiction has been incorporated into the bill and should remain.

The vast majority of submitters expressed satisfaction with the Te Ture Whenua Maori Act 1953. Government members believe this Act facilitates the expression of the uniqueness of Maori customary concepts as described by Mr Erueti, above. Part 17 of the Te Ture Whenua Maori Act provides for land to be set aside as a reserve to be held for the use of Maori or for the common benefit for the people of New Zealand.

Any Maori freehold land or any general land can be set-aside as reserves. Crown land with historical, spiritual or emotional significance to Maori can also be set aside. It is possible to establish a Maori reservation on just part of a block of land.

A Maori reservation can be established and used for a variety of purposes. It may also be extended to wahi tapu—a place of special significance according to tikanga Maori.

The people who benefit from the reservation are usually named as members of a hapu, or several hapu, or can be any group of Maori.

The process of establishing a Maori Reservation under section 338 usually includes a meeting with owners and possibly other interested parties. The meeting decides to set the land aside as a Maori Reservation and identifies the people who will benefit.

The minutes of that meeting are filed with the application (and the Court’s filing fee) to the Maori Land Court but at the hearing the Court can only recommend that the Maori Reservation be established—the Court cannot make any Court Orders setting the land aside as a Maori Reservation.

On the recommendation of the Court the Chief Executive of Te Puni Kokiri creates a Maori Reservation by issuing a gazette notice in the New Zealand Gazette. Once gazetted, the Maori Reservation is formally established. The Court is then able to issue Orders appointing trustees to administer the Reservation.

A notice constituting a Maori reservation may, upon the express recommendation of the Maori Land Court, specify that the reservation shall be held for the common use and benefit for the people of New Zealand.

Before issuing this recommendation, the Court must be satisfied that this course is in accordance with the views of the owners, and that the local authority consents to it.

In appointing trustees the Court may, on the nomination of the local authority, appoint a person or persons to represent the local authority.
Maori reserves set aside for the purpose of wahi tapu may not be held for the common use and benefit for the people of New Zealand.

The Waitangi Tribunal made reference to the under utilisation of the section in the Okakou Ancillary Claims section of its Ngai Tahu Ancillary Claims Report 1995. With reference to the return of land and the opportunity that section 340 provides the Tribunal commented:

> With some respect, the Tribunal feels that there is a lack of knowledge and understanding by Maori and Pakeha alike of the existing law ... which enables suitable partnership management to be concluded with conservation in mind. In some cases local authorities and even Government departments are ignorant of the remedies provided under the present law.

The Government members believe Part 17 of the Te Ture Whenua Maori Act may provide a successful synthesis of common concern that land that has historically been used by Maori should continue to be available for a common good but should be inalienable.

Government members share the concern of the specialist adviser that the redress provisions should contain a set of criteria for the guidance of the general public as well as any court on review.

**Ancestral connection orders**

Government Members do not believe the ancestral order provisions in clauses 39 and 40 of the bill add anything to the present law in this regard and recommend that they be deleted.

**New Zealand National view**

**Introduction**

The New Zealand National party does not support this bill. We see the bill as a problem rather than a solution. Further, we contend that the bill enables and encourages court and government decisions to be made on a racially selective basis. The bill is divisive. In our opinion, practices of this sort caused the issue of foreshore and seabed ownership around the coastline of New Zealand to be contested in the first place, and have led to Parliament considering this legislation.

**History**

In the course of hearing evidence the select committee heard from representatives of Ngati Tama, who were applicants in the actions asking the Maori Land Court to issue title to seabed and foreshore in the Marlborough Sounds. They had been led to this position after having made some 35 applications for marine farming licences in the Marlborough Sounds. None were granted. No reasons, they told us, were provided as to why their applications had failed. To add insult to injury Maori applicants were approached by others for copies of their failed applications. These same applications were lodged in other names and licences were granted.

In our minds this raises some interesting questions. New Zealand National believes strongly in one law for all. What was the reason for Maori marine farm licence applications being denied 35 times?
In hearing the Maori Land Court claim made by Ngati Tama and other Iwi, Judge Hingston found that the Court could hear applications for the granting of title to seabed and foreshore. This position was upheld in June 2003 by the Court of Appeal.

One important question raised before the Court of Appeal was whether Parliament intended the issuing of title to seabed and foreshore to be excluded from Te Ture Whenua Maori Act 1993 or whether it was implicitly included. It is interesting to note that, in all the submissions to the select committee process for Te Ture Whenua Maori Act, no mention is made of the seabed and foreshore. Nor is the possibility of jurisdiction to issue seabed and foreshore titles mentioned in the Hansard record of report back, committee stages, second reading, and third reading debates on that bill.

It is our view that, at the time of passage of Te Ture Whenua Maori Act 1993, Parliament understood the status of the seabed and foreshore to be as stated in other enactments and otherwise in Crown ownership. As a result, the Court of Appeal’s finding to the contrary is both interesting and alarming.

The first of six questions put before the Court of Appeal was whether the Maori Land Court is able to issue title to seabed and foreshore. In answering this question in the affirmative, the Court of Appeal failed to give due weight to Parliament’s actual intention, a practice we do not find favour with.

The Court of Appeal decision also points clearly to the way Government should have dealt with the issue. That is, the Court of Appeal found that, under Te Ture Whenua Maori Act 1993, the Maori Land Court has jurisdiction to determine the status of foreshore and seabed. Given our belief that this is contrary to the actual intention of Te Ture Whenua Maori Act, Parliament needed simply to legislate to clarify its intent.

A reading of the Court of Appeal judgment with the hindsight of examining over 3,900 submissions on this bill makes that abundantly clear.

The bill

Ancestral connection orders

New Zealand National opposes the bill’s provision for ancestral connection orders on several grounds. First, under the bill, such orders are only available to Maori New Zealanders (clause 37). That is, the orders constitute a privilege granted on the basis of race and consequently contravene the principle that there should be one law for all.

Secondly, the bill amends the Resource Management Act 1991 to allow holders of ancestral connection orders certain rights which qualify Crown ownership of the foreshore and seabed. New Zealand National believes that all New Zealanders have a strong connection to the foreshore and seabed. As such, all New Zealanders should have equal ownership rights. The best way to ensure this is through unburdened Crown ownership of the foreshore and seabed, except in areas already subject to fee simple title.

Ancestral connection orders also allow their holders to exercise some governance powers over the foreshore and seabed. New Zealand National opposes this because vested interests in the governance of public property will inevitably lead to exclusive use and preference over other New Zealanders who are to be represented by elected people.
Finally, New Zealand National objects to the method the bill uses for recognition of ancestral connection. In the absence of objections, the Maori Land Court is not required to conduct a hearing over an application for an ancestral connection order (clause 54(2)(a)). Further, where a hearing is conducted, there is a right to be heard only by those who have "an interest in the proceeding that is different from an interest in common with the public generally" (Schedule 1, clause 13(c)). If the bill proceeds, New Zealand National believes that the New Zealand public’s interest in the foreshore and seabed is strong enough to warrant compulsory hearings and a more generous right for objectors to be heard.

**Customary rights orders**

New Zealand National supports the recognition of customary rights. However, such rights should not be allowed to impinge unduly on other rights and activities in the foreshore and seabed.

The bill makes special exceptions to resource management constraints and procedures in respect of customary rights (for example, clauses 75 and 89). Moreover, customary right holders will effectively have a veto power over applications for resource consent in the area in which they hold their customary rights (clause 93). This clause also places a rent-seeking incentive on customary right holders, which is undesirable and may impede resource management processes and constrain economic growth.

New Zealand National is unable to support these aspects of the bill.

**Territorial customary rights**

National opposes the provision in the bill for findings by the High Court that a group, but for the Foreshore and Seabed Bill, would have held territorial customary rights over an area. Such issues, if any, are more amenable to the Treaty of Waitangi claims settlement process.

**Crown–Maori agreements**

New Zealand National believes there is no justification for recognition of ancestral connection and territorial customary rights by agreement between the Crown and Maori, in addition to recognition by a Court (clauses 111-113). First, agreements between the Crown and Maori are not subject to the safeguards of process and proof that are required before a Court. Secondly, there is potential for the rights recognised by this method to be far greater than could be obtained by Court order. For example, rights of control or exclusive occupation could be granted. This may also lead to unfairness as between Maori groups. Finally, such agreements are unlikely to be negotiated publicly, thus disadvantaging those who wish to object.

**Reclamations**

New Zealand National opposes clause 100 of the bill, which relates to reclamations. New Zealand National considers that restricting the Minister to granting a 50-year leasehold interest in reclaimed land is unnecessary. In many cases it may be appropriate to grant fee simple ownership of reclaimed land. In any event, 50 years is too short to provide sufficient certainty to justify high capital expenditure in a reclamation and works on the reclamation.
Further, clause 100’s retrospective effect unjustifiably cuts across existing reclamation agreements with the Crown.

**Conclusion**

This bill does not achieve the outcomes claimed by those that support it.

Leaving aside all the many aspects of the bill which alone give reason to oppose it, we are particularly saddened that at the start of the 21st century we have a Government promoting legislation that is so openly divisive along racial lines.

Ancestral connection provisions tell non-Maori New Zealanders that they can never have the same feeling, love, care or connection to the coastline of this country as someone who is Maori. New Zealand National rejects that.

We are firmly of the view that within a short time, the inadequacies of this bill will see it back before the House.

**New Zealand First view**

New Zealand First is disappointed that the committee was unable to consider amendments to the bill, especially in the light of the immense amount of work done by those members of the committee who attended virtually all of the submissions and heard the departmental reports.

One of the overwhelming features of the submissions was the belief expressed by witnesses that they owned the foreshore and seabed. When it was drawn to their attention that Parliament had for over 100 years passed legislation dealing with the foreshore and seabed on the basis that the Crown owned the foreshore and seabed, there was disbelief on the part of these witnesses.

The Te Ture Whenua Maori Act 1993 is now the subject of 80 applications before the Maori Land Court covering almost the entire foreshore and seabed of the country. Sixty-two of these applications were lodged after the decision in the Ngati Apa case.

No applications have been lodged in terms of the common law rights referred to in the Ngati Apa case.

The bill provides for the granting of ancestral connection orders and customary rights orders. On many occasions New Zealand First asked submitters whether they could give us examples of customary rights exercised over the foreshore and seabed, and they had great difficulty in giving us any proper examples. Some submitters did not fully appreciate that only the “wet bits” of the New Zealand coastline were involved; some believed that fishing rights were still included in the bill (although this is not the case). Some believed that they had a right to the foreshore and seabed as a result of a spiritual, perhaps two-world view, extending back to Hawaiki and some believed, to put it colloquially, that as they had been living by the foreshore and the seabed for over a thousand years, then the foreshore and seabed belonged to them, and no one was going to take it from them.

There was a lack of understanding, in the New Zealand First member’s view, of the fact that the Court of Appeal decision in the Ngati Apa case was based on the cession of
sovereignty to the Crown and the exercise of common law rights, not any rights contained in the Treaty of Waitangi as such.

Again, there was a view that because the Waitangi Tribunal had issued a report then its recommendations must be right, whereas almost everyone knows the Waitangi Tribunal has only the powers of a Commission of Inquiry and a recommendatory role. It is not a judicial body; it does not operate in the same way as the Courts.

Even the role of the Crown does not appear to have been understood by some witnesses. In one submission a witness made some good points referring to the role of the Crown and New Zealand First asked the witness what she understood by the meaning of the word, “Crown” and was informed that she thought the word “Crown” meant “Jewels.”

Some of the submitters did not accept that Parliament was sovereign.

All these matters had to be taken into account when considering New Zealand First’s position with regard to the bill.

New Zealand First has made it clear that we would support any move to ensure that the Crown had legal title to the foreshore and seabed. We also required that Maori and non-Maori traditional rights of use must be protected.

New Zealand First believes that this bill does ensure the ownership of the public foreshore and seabed by the Crown and that Maori and non-Maori customary rights are protected.

Regrettably, despite New Zealand First’s many questions, the only concrete suggestions relating to customary rights which came forward, involved the use of sand and hangi stones, and also the protection of burial grounds.

Submissions were made with regard to the powers of the Minister of Conservation to prohibit access to the foreshore and seabed and a suggestion was made by the officials to ensure that this power was restricted to customary rights orders.

The Regulations Review Committee suggestions relating to the regulatory powers contained in the bill in clauses 21 and 114 were accepted by the committee.

Submissions were made with regard to the retrospective effect of the provision relating to reclaimed land administered by ports around the country and the officials have suggested amendments.

The local issue of the North Shore City Council, the Department of Conservation, and Bayswater Marina also arose in the context of marginal strips on reclaimed land, and officials suggested that the provision in the bill remained which has the effect of supporting the Bayswater Marina view of the matter.

This had a bearing not only on Bayswater Marina, but also on many other issues currently being dealt with by the Minister of Conservation.

The statutory common rights order which can be sought by all New Zealanders, would continue in the bill.
It was pleasing to note that under questioning by New Zealand National, the officials indicated that the Auckland Anniversary Regatta might meet all the requirements of clause 61 for the making of a customary rights order.

At a rough estimate, approximately 100 or more amendments have been suggested by the very hard-working team of officials who assisted us with this bill. Members of the committee also put forward various ideas. This is a good indication of the committee’s response to the many submissions which were made.

The principle contained in the bill of Crown ownership of the public foreshore and seabed with the granting of ancestral connection orders, customary rights orders and territorial customary rights orders still continues.

New Zealand First is concerned about the effect of clause 112 which enables Ministers to enter into an agreement outside of the Court process with regard to territorial customary rights. New Zealand First is of the view that any agreement entered into between the Crown and a Maori group should be the subject of a consent order in the High Court. An Originating Application and Affidavits in Support by the Maori group and the Crown should be filed and the Court should confirm that the requirements of the Act appear to have been met. A Sealed Order should be obtained.

It is interesting to note that the independent specialist adviser to the select committee, Timothy J. Castle, Barrister, has a similar view.

New Zealand First will be taking an active interest in any subsequent discussions for the preparation of the appropriate supplementary order paper, which will be required to improve the bill.

**ACT New Zealand view**

ACT New Zealand opposes the Government’s foreshore and seabed legislation in its entirety. We believe the Government’s response to the Court of Appeal decision last year in the Ngati Apa case has been precipitous, inconsistent and wrong.

It is our view that this bill insults the rule of law by failing to uphold the sanctity of property rights and denying the due process of law to resolve disputes. Retrospective changes to the law are wrong.

The Government has stated that the principles behind this bill are access, regulation, protection and certainty. If that is Government’s intention the bill has failed.

This bill will lead to massive uncertainty, confusion and conflict in the allocation and management of coastal and marine resources.

In essence the bill attempts to define the nature and extent of tikanga Maori as it might apply to the coastal environment (the domain of Tangaroa).

This is not the prerogative of government. It is deeply offensive for any government to define and enforce spiritual beliefs. The near universal outrage expressed by Iwi in opposition to this bill stems from this legislative incursion by government into tikanga
Maori. Furthermore, Maori submitters expressed the view that ancestral connection orders would disrupt existing consultation processes.

Having attempted to define this area of tikanga Maori the bill then attempts to impose Maori spiritual belief by a substantial amendment to the Resource Management Act.

The Resource Management Act is already burdened by inappropriate spiritual and metaphysical references when it should provide for the sustainable management of natural and physical resources. ACT New Zealand is resolutely opposed to increasing the use of state power to enforce religious belief.

The proposed customary rights over the foreshore and seabed provided in this bill are worse than useless. They fail to provide the holder with any meaningful or clear property right. They put Maori in the position of always opposing and blocking their neighbours. They invite application as instruments of leverage for obtaining blackmail payments at consent hearings based on spiritualism and nebulous law. This can only compound the existing problems of the Resource Management Act.

Local authorities, port companies, network utility companies and recreation groups all expressed grave concern with these provisions of the bill.

The uncertainties and deficiencies of the Te Ture Whenua Act 1993 are the precursor for the Court of Appeal’s Ngati A pa decision. The Te Ture Whenua Act extended the definition of land to include land seaward of mean high water.

The Maori Land Court has jurisdiction to declare the status of land and make vesting orders in respect of customary land as defined under the Te Ture Whenua Act 1993. This process leads directly to vesting title to such land in fee simple or freehold title. ACT New Zealand believes the extended jurisdiction of the Maori Land Court was not a considered intention of that legislation.

The logical first step would be to review the Te Ture Whenua Act rather than creating an elaborate new regime, which both perpetuates and accentuates the uncertainty. A key defect in the Te Ture Whenua Act is its erroneous assumption that non-exclusive use rights somehow equate with property ownership and title.

There are many specific details of the bill that the ACT Party strongly opposes.

For example, we see no reason why a new reclamation should not be able to receive fee simple title. Approved reclamations are generally undertaken for specific purposes where clear property titles are desirable e.g. port companies and marinas.

We note the bill’s requirement for public access around all reclamations, but again with reference to port companies such requirement is undesirable and impracticable. The requirement would also breach new international maritime safety requirements associated with the security of port facilities.

We strongly oppose clauses 20 and 21 of the bill granting the Minister of Conservation ownership functions over the foreshore and seabed. The Department of Conservation has
displayed its inability to balance the needs of development and enterprise with its single-minded conservation objectives.

With increasing focus on the foreshore and seabed a clear legislative framework is required. Unfortunately this bill fails to provide for clear property rights and compounds existing problems and difficulties already contained in the Resource Management Act.

**Green Party view**

The Green Party member considers that this legislation is unnecessary and grossly unfair. The Green Party member recommends that the Government should:

- withdraw the legislation because it is unnecessary, it discriminates against Maori on the basis of race, fails to protect the ecological values of the coastal marine area, extinguishes common law customary title without consent and does not confirm rights guaranteed under Te Tiriti o Waitangi
- not inhibit legal rights to access the court system for Maori and
- initiate a process of full and proper consultation and negotiation with tangata whenua.

The Green Party member instead supports access to the courts for a declaration of customary land status and the development of collaborative management in the coastal marine area.

The Green Party member recommends that:

- there should be no saleable private and exclusive title granted over the foreshore and seabed to anyone, New Zealanders in general, tangata whenua, or overseas interests.
- Te Ture Whenua Maori Act 1993 be amended so that Maori customary foreshore and seabed land must remain in Maori ownership.
- collective customary title to the foreshore and seabed be upheld and not extinguished by legislation.
- public access protected, except for very special areas where environmental protection, historical, cultural, or spiritual significance makes this inappropriate.

Collective customary title includes kaitiakitanga responsibilities and rights to development subject to the normal environmental and planning framework.

**Trusteeship and other models**

Other models for addressing the Governments’ key concerns were suggested by submitters. The Brookfield model provided an option where the government holds the foreshore and seabed in trust, until the Courts determine any claims of customary title. Changes to the Te Ture Whenua Maori Act ensure that the Court can issue no saleable, freehold title. Once ownership is determined, the government enters into a negotiation over access issues and collective, non-saleable title is transferred to the customary owners. This is similar to the situation of Crown forest lands.
Alternatively, there are a number of successful co-management models on which to build. These include Orakei (Okahu Bay), Lake Taupo, Te Waihora Lake and the Te Arawa Lakes Settlement offer. These models provide positive examples where title to the lakebed may be vested in tangata whenua but there is joint management and the protection of public use rights.

What is most important is to build on good examples of collaborative management where both matauranga Maori and Western knowledge complement environmental sustainability.

The Green Party member considers that the broad range of alternatives should have been a primary concern of the select committee and given the benefit of detailed scrutiny. That was not possible within the Government’s timeframe and political imperatives. That this could not happen is a great tragedy for the nation.

**Public foreshore and seabed to be vested in the Crown**

The Green Party member considers the redefinition of potentially disputable areas of foreshore and seabed as ‘public’ foreshore and seabed is unjustifiably deceptive and has contributed to the growing confusion and concern by many New Zealanders. This land should not be vested in the Crown, as this takes away the right of Maori to pursue their claims for customary title in the Maori Land Court.

Further the member believes that Crown ownership provides no guarantee that it will not, in the future, be sold off, or leased long-term to private interests. Collective whanau, hapu or iwi title would provide greater security of New Zealand ownership given the legal impediments to disposing of Maori land under Te Ture Whenua Maori Act 1993. Appropriate amendments should be made to Te Ture Whenua to preclude any sale of customary foreshore and seabed to private interests.

The right of whanau, hapu and iwi to take claims of customary title to the Maori Land Court should be upheld. While we agree that this creates some uncertainty, we do not believe that this is sufficient to outweigh the rights of tangata whenua to prove their case in court before the foreshore and seabed is vested in the Crown. Changes could have been made to the Court to enable it to more effectively deal with the foreshore and seabed claims, or provide the High Court with the jurisdiction to hear common law claims (prior to any legislation). This has some consistency with the trusteeship model proposed and supported by some submitters.

Further, it is critical that the bill should include an entrenchment clause so that a significant majority of the House is needed to sell off any parts of the public foreshore and seabed. The Green Party member strongly supports New Zealand ownership. The member would, however, seek an exception to the entrenchment clause where the Crown agrees to transfer ownership of some parts of the foreshore and seabed as a part of the historical treaty settlement process.

**Extension of foreshore and seabed by acquisition of land in private title**

The Green Party member believes that, with the bill proceeding, where any areas of foreshore and seabed in private title are acquired by the Crown consideration should be given to banking those areas as potentially available for Treaty settlements, whether there is
an existing treaty settlement in that region or not. If the areas are not used for treaty settlement purposes then iwi, hapu, whanau could be entitled to a right of first refusal.

**Access to areas of public foreshore and seabed may be prohibited or restricted**

The Minister of Conservation should not have sole responsibility for restricting and prohibiting access to the public foreshore and seabed. This provision seriously fails to recognise and provide for kaitiakitanga rights and responsibilities. Kaitiaki who are mana whenua/mana moana should have better access to delegated authority provisions that would provide some ability to restrict or prohibit public access.

The Green Party member strongly believes that clause 21 should be extended so that holders of customary rights order may, at a later date apply to the Maori Land Court to restrict access that is affecting the exercise of their customary right. We believe that circumstances, such as population increases or destructive recreational activity may arise at a later date where public access may need to be restricted or controlled to maintain the integrity of the customary right.

**Fiduciary duty**

The Government recognises a fiduciary duty under Te Tiriti o Waitangi—a relationship that owes particular obligations of trust and confidence to a beneficiary. In relation to customary rights and title, the doctrine has been developed in Canada, where the courts have found that the Crown may hold land subject to obligations similar to these a trustee has to beneficiaries. The doctrine is usually concerned with past Crown actions, but remains relatively undeveloped here in New Zealand. The Green Party member considers that the Crown has a fiduciary duty to Maori in regard to the public foreshore and seabed and that this should be included in the bill.

**Treaty of Waitangi**

The Green Party member supports the inclusion of a high level statement and set of principles that recognise Te Tiriti in the context of the bill. While the Government reiterates that this is not a Tiriti issue, the common law rights and responsibilities are reinforced by Te Tiriti. A set of principles would provide the Courts with guidelines as to the intentions of the bill and the broader constitutional factors that need to be considered.

**Territorial customary rights and customary rights orders**

The test for customary rights and territorial customary rights is too stringent and will be very difficult for whanau, hapu and iwi to make a successful claim. Particularly, the adoption of the Australian-developed test of ‘substantially uninterrupted’ is too high a threshold. Moreover, there is no provision for the courts to consider actions of the Crown such as confiscation of land or deliberate Crown policies resulting in Maori losing their land, particularly contiguous land. Given the current recognition of the effects of historical wrongs, the effects of Crown action should be a mitigating factor in determining TCR’s and CRO’s.

Inadequate consideration was given to alternative (common law) tests, for example the Canadians who use ‘continual use’ or ‘reasonable degree of continuity’. Moreover, there is no provision for the special and unique circumstances that Te tiriti o Waitangi brings to the
development of New Zealand law. New Zealand law would be developed in accordance with Te Tiriti jurisprudence developed over the last 40 years and would not rely solely on international contexts, as government policy does.

The Green Party member strongly disagrees with the provision that any New Zealander may apply for territorial customary rights. This provision is a total abrogation of Maori as tangata whenua of Aotearoa New Zealand. This is also contrary to the common law. Other legislative frameworks could be developed to protect non-Maori use rights over such areas, subject to the customary rights of hapu, and iwi.

**Contiguous land ownership**

It was suggested that the tests for a TCR should also refer, as a consideration, whether the hapu or iwi have contiguous land ownership. The Green Party member disagrees and considers that any such move will simply reinstate the Ninety Mile Beach principle which the court in Ngati Apa held was wrongly decided.

**Judicial review where the Crown fails to provide reasonable and appropriate redress**

The Green Party member believes that there should be an explicit provision in the bill that on successful application for a TCR, the Crown must provide redress. This would ensure that at least judicial review action is available if the Crown fails to enter into and provide reasonable and appropriate redress. This clause should be strengthened to provide greater certainty and standards for the Crown to meet in negotiating with holders of TCR. The historical treaty settlement framework is inadequate in the members view because it is a framework in which the Crown has unilaterally designed and controls.

The much preferred approach is that the onus for negotiation and settlement be on the Crown in order to settle ownership issues with Maori.

**Cancellation and suspension of CRO**

The Green Party member is concerned that the bill allows the holder of a customary rights order to easily cancel or suspend that order. In order to uphold the purpose of the CRO, the right should never be alienable, especially as the tests to obtain the CRO’s are so difficult. There must be some protection for future generations from the duress of poverty that drives many short term financial decisions. Therefore, the same procedure for the alienation of land under Te Ture Whenua Maori Act 1993 should apply to CRO’s.

**Resource Management Act issues**

**Existing coastal permits will “as a matter of law” extinguish a customary right**

The Green Party member considers that the extinguishment of a customary right because a coastal permit or resource consent has been granted that may interfere with that activity is grossly unfair. This provision will make it impossible for whanau, hapu or iwi to exercise their rights, even as a matter of fact. We note that in the Government’s December framework, the proposal was to suspend the customary right until the expiry of the permit. This decision however was rescinded this year.

While we acknowledge that the common law seeks to protect extant customary rights, we do not support the de facto extinguishment of customary rights through coastal permits.
Particularly, the member is concerned that Maori have the opportunity to prove that a customary right can be exercised as a matter of fact with the existing coastal permit. It is entirely possible that many local authorities would have granted coastal permits with little or no consideration given to customary rights.

Further, at the expiry of the permit/consent, our preferred option is that whanau, hapu and iwi be given the opportunity to seek recognition of the full extent of their customary rights. Anything else would be a further extinguishment.

**Ancestral connection orders**

The bill states that ancestral connection (where proven) will be recognised and provided for. However, the bill does not give any of the rights associated with recognised ancestral connection—that is the responsibility to exercise kaitiakitanga and make decisions in the coastal marine area. Essentially it appears to be a mechanism by which local government and other people acting under the RMA can readily identify hapu/iwi with whom they must “consult”. This is an inadequate recognition of the hapu/iwi and whanau rangatiratanga and may lead to territorial local authorities severely restricting whom they consult with. In addition, there are no processes to ensure that that recognition will occur any more frequently or effectively than under the present mechanisms—it offers Maori nothing.

Further, ancestral connection is a new term to alleviate any distress or confusion on the part of non-Maori. This serves no purpose to Maori who are people seriously affected by this bill. The bill should use appropriate tikanga terms so that it is absolutely clear that the tipuna rights of tangata whenua are being extinguished.

**Amendments to the Resource Management Act 1991 (RMA)**

The bill makes limited changes to the RMA to incorporate tangata whenua in decision-making and to improve environmental management. In recognising Te Tiriti, the Green Party member believes that enhanced participation and decision making by whanau, hapu and iwi is a way forward to improve the management of our environment. The proposed amendments to the RMA do not provide for co-management but another form of consultation, which does not reflect the partnership of Te Tiriti. The bill purports to recognise customary rights but does not enable the exercise of the responsibilities that go with customary activities. This could, and should be reflected in the RMA as the main piece of legislation that administers the coastal marine area. It is only by encouraging and providing for collaborative management of the coastal marine area that real advances in restoration, protection and conservation will occur. This bill fails to provide that incentive.

**Transfer of powers**

The Green Party member is disappointed in the simple addition of “holder of an ancestral connection order” to be considered as another body to which powers under section 33 may be delegated is, in our opinion an inadequate recognition of the rights and responsibilities of hapu with mana whenua/mana moana. Further, to date, no local authorities have delegated any responsibilities or powers to tangata whenua. Nothing in this bill will ensure that provision is used.
**Imposition of coastal occupation charges**

While we support that customary rights holders will not be subject to these charges, territorial customary rights holders should also be entitled to a share of the coastal occupation charges.

**Forming an opinion as to who may be adversely affected**

The Green Party is under no illusion regarding the restricted notification provisions in the RMA. Public participation is limited. The Green Party member sought an amendment to notify holders of customary rights orders of any and all consents that may adversely affect their rights under the RMA. The key issue is that the decision on whether an activity has a significant adverse effect on a customary activity is at the discretion of the council. This is, in the view of the member, inadequate because some councils have a poor relationship with tangata whenua, or are still developing one. The lack of decision-making ability for tangata whenua or co-management arrangements is a significant issue in the bill. Without including tangata whenua we will not achieve better environmental outcomes, nor protect customary rights.

We propose a new clause to give effect where there is an application for a resource consent or coastal permit that may or will effect a customary right, that as stated for section 33 (clause 79), the application must be delegated to the relevant mana whenua/mana moana. In making its decision over that area, mana whenua/mana moana may establish a joint hearing and decision-making committee. The purpose of such a clause to delegate decision making authority to mana whenua/mana moana is to recognise and provide for the partnership agreed to under Te Tiriti o Waitangi. Decision-making capacity of Maori must be enhanced, as well as the meaningful and effective exercise of kaitiakitanga.

**Te Whaanga Lagoon**

The Green Party member strongly opposes the inclusion of Te Whaanga Lagoon in the public foreshore and seabed. Advice received by the committee shows that this lagoon is not within the boundary or definition of coastal marine area, nor is it included in the Chatham Island’s regional coastal plan. Its inclusion in the bill is more a political decision based on Crown control and public access, than allowing Maori to pursue their claims through the court. In our view, this is an unnecessary confiscation. We understand that there is a claim before the Maori Land Court seeking title to Te Whaanga Lagoon. Although there may be litigation over the ownership of the lagoon, this claim should be allowed to proceed.

**Legal aid**

Given that any group proceedings brought before the High Court (by iwi, hapu or whanau) are currently ineligible for legal aid, and given that the Minister for Courts has recently announced that court costs will increase again in the near future, legal aid to iwi, hapu and whanau for claims to territorial customary rights should be provided.
United Future view

Introduction
From the early stages surrounding the issues of the ownership of the foreshore and seabed that arose from the Court of Appeal decision in the Ngati Apa case, United Future’s position was that ‘doing nothing’ was not an option. Since July 2003 United Future has engaged constructively with the Government to attempt to get a resolution. The Government’s response in this legislation is however not supported by United Future in its current form.

Select committee process
The report of the Fisheries and Other Sea-related Legislation Committee on the Foreshore and Seabed Bill, being in eight parts is largely a result of the fact that the United Future could not give support on procedural matters to enable the bill to be reported back with amendments. That support was made conditional upon the committee agreeing to an interim report in November, with a final report back to the House in February or March 2005. This was intended to address the primary concern expressed by the majority of submitters concerning the speed of the process since the bill was introduced and the lack of time for meaningful consultation, primarily with Maori. It has been argued that the process has been a long one, since the initial announcement by the Government of its plans to introduce legislation in response to the Court of Appeal decision in the Ngati Apa case, up to the committee hearing of submissions. However, in our opinion, the changes in policy positions, the steadfast opposition to initial proposals, and rejection of the policy by the Waitangi Tribunal, and the Government-controlled hui and dialogue has meant that many had difficulty keeping up with developments, fully understanding their implications, or having any sense of ownership of the process. This was clearly also the view of the majority of submitters!

When the committee vote on United Future’s motion was tied 5-5 and therefore lost, the committee had little option but to agree to report back to the House on the basic facts and allow for a divergence of views on the bill.

I regret that this may ultimately deprive many from seeing any proposed amendments to the legislation until the Committee of the Whole House stage after the bill’s second reading, and may allow very little time for any consultation before it is voted on for its 3rd and final reading. This, however, is a consequence of the Government and New Zealand First position rather than ours. It could have been avoided.

Some potential changes to the bill will be at least signalled in the various reports and we hope they will be adopted by Parliament as it debates the matter further.

Clause 3. Purpose.

... preserved in perpetuity for the people of New Zealand.

The United Future member welcomed the discussion had by the committee, and referred to by our independent specialist adviser (ISA) in para 26 of his report, on changes to clause 11, that would better reflect the intent of the purpose clause 3(a) “that the public foreshore and seabed of New Zealand is preserved in perpetuity for the people of New Zealand.”
Adding the phrase “for and on behalf of the people of New Zealand” in clause 11 would be reassuring to the many submitters who were wary, and in some cases distrustful, of the Crown’s long-term intentions. United Future was comfortable with the term ‘public domain’ as a means of conveying those concepts, and withdrew support for the bill when that was replaced by sole Crown ownership.

Given the concern by the overwhelming number of submitters about the potential for the Crown to alienate the foreshore and seabed in the future, it would be worthwhile to not only require that a special Act of Parliament referred to in clause 12(2)(a) be required to pass by a majority of 75 percent but also that clause 12 be entrenched itself. This clause could then only be amended by the same majority that passed it, which could range from 60 percent up to 100 percent depending on the number of parties that support that clause in the committee stage of the whole house. Since all parties have indicated no intention to sell the foreshore, a percentage sufficient to send a reassuring signal to the public of New Zealand that the 47th Parliament is serious about protecting their interests in perpetuity, should be obtainable.

**Clause 6. Right of access.**

The statutory recognition of the common law right of access in a broad sense is welcomed. The United Future member had concerns, however, and sought clarification from officials that this would not unintentionally create any need for local government to have to immediately create new by-laws to attend to specific issues of access in specific locations upon the passing of this bill. This would create additional costs for local government.

The issue of whether these rights of access would apply to foreshore and seabed in private title should have been addressed in this bill, to avoid confusion where the distinction between public and private foreshore and seabed is not easily apparent, nor understood.

We accept that restrictions should apply for safety reasons in areas such as ports and airports, but are concerned about these restrictions being applied by the Minister of Conservation in areas bordering on Department of Conservation estate without clear and publicly supported reasons.

**Clause 8 Certain common law rights in respect of foreshore and seabed replaced by enactments.**

It is acceptable that all common law rights of navigation are replaced by clause 7 but there is no such clause to justify clause 8(2) to remove common law rights to fishing. In any case the question must be asked; why mention fishing at all? Officials advised that they were recommending amendments to clause 8. It would seem the best thing would be to delete clause 8(2) altogether, or state that nothing in the Act affects fishing. ICA advise para 85-87

**Clause 14 and 100 Additions to public foreshore and seabed resulting from works; Vesting of reclaimed land.**

This is the beginning of a number of clauses which have little or no relationship to the Ngati Apa case. The Government is being rather opportunistic in altering policy that seems to have served well enough in the past decades. United Future does not see any need for the Crown to claim ownership of reclaimed land that is no longer foreshore and seabed. If anyone obtains consent for works under the Resource Management Act, pays for the cost
of those works, it would seem logical for the title of the newly formed ‘dry land’ to be given to them. It is after all no longer foreshore and seabed. This would deal with the concerns expressed by port companies about clause 100 which should be deleted. At the very least, if the Government is intent on this policy, it should allow long term leases with automatic right of renewal. Officials indicated amendments to provide 50 years with ‘priority rights’, which does not go far enough in our opinion.

The recommendation to allow works that have already obtained consent to continue under the current provisions of section 355 of the Resource Management Act will provide some relief, but does not address the underlying issue of title to ‘new dry land’ that is no longer foreshore and seabed and never will be foreshore and seabed again.

This will create situations where property owners with title to the MHWS that loose land to storm damage, then apply for consent to works to build a reclamation wall to restore the boundary and reclaim the land lost, will be unable to hold title to the piece reclaimed. They will have to negotiate some lease arrangement with the Crown. This could lead to a greater number of property owners with boundaries on the foreshore, seeking to undertake preventative works such as sea walls to stop erosion from storm damage. It is preferable to keep natural boundaries between land and foreshore.

**Clause 15 Extension of public foreshore and seabed by acquisition of land in private title.**

Many submitters expressed concern about their loss of right to a potential freehold title in the foreshore and seabed while those who have acquired titles already are left with the full exclusive title. There is insufficient clarity about how the Government will go about recovering ownership of foreshore titles in private hands and it would be more reassuring for those with questions about ‘one law for all New Zealanders’ if more was known about plans for addressing this issue. The right of access to all the foreshore and not just public foreshore has been left to be addressed by the proposals addressing access in general. More could have been addressed in this bill.

**Clause 19 Local Authorities may apply to Minister for relief for loss of divested areas.**

United Future certainly supports the concept that local authorities should be recompensed for any loss under section 11. Clause 19 should use the word redress rather than relief, and does need some guidelines for greater clarity of how this would be addressed by the Government.

**Clause 21 Access to areas of public foreshore and seabed may be prohibited or restricted.**

It has been reassuring to learn from officials that a major re-write of this clause is being undertaken in response to submitters’ and committee members’ concerns. We certainly understand the concerns expressed by submitters concerning giving powers to the Minister of Conservation particularly without greater degree of check and balance. Unfortunately without the interim report we are unable to comment on the revised clause.
Clause 28 Territorial customary rights (TCR) / Clause 37 Ancestral connection orders (ACO) and customary rights orders (CRO)

At this point the United Future believes the advice given to the committee by our independent specialist adviser Tim Castle covers many of the important points. His report, which has been attached to the committee’s report by agreement deals in detail with issues surrounding TCR’s, ACO’s and CRO’s. We do not want to repeat many of those remarks, as on many points I agree with his analysis and recommendations. Throughout the process the ICA’s input was invaluable. His assistance, introduction and summary of Dr Paul McHugh’s submission was very helpful, as was the summary in his report concerning positions outlined by the various judges of the Court of Appeal in the Ngati Apa Decision.

It is unfortunate that the Port of Marlborough’s appeal to the Privy Council has been withdrawn, and that the Crown has not seen the value of appealing to the Privy Council for a final ruling on the Court of Appeal’s decision, particularly in the light of the over-turning of the Ninety Mile Beach case which held sway over so many decisions for decades. The presumption in that case was certainly prevailing at the time of the TTWM act of 1993, and explains, at least in part in our opinion, why there was no debate in Parliament concerning the inclusion of any part of the foreshore in particular in the definition of ’land’ under that Act. (see Para 21.)

On other matters we agree that in relation to ACO’s there should be a high level statement concerning the fact that Maori do have that connection and should not need to prove it, except to define it’s boundaries. Para 4 & 55. Also the importance of clarifying the role of ACO’s in local government and Resource Management Act participation, para 58.

Similarly we hope the Government will take seriously the advice that TCR’s should be called rights para 46-47; how those rights might be expressed para 76; and how redress could be clarified without necessarily being exhaustively specified, para 65.

United Future believes that it is clear that much work needs to be done if this bill is to be amended to address the concerns of many submitters. This has become such a major issue with the potential to create tension and frustration. Even if the final Act becomes more acceptable there will remain an important task to communicate the amendments and implications of those changes to the New Zealand public on a broad scale. To rely only on the media for this process, and the politicising of the issue as parties attempt to make their various points to appeal to voters, is risky at best and irresponsible at worst. Our country’s progress over the last decades of addressing our bi-cultural past founded on the Treaty of Waitangi in the midst of a developing multi-cultural society in the 21st century, is in danger of taking a step backwards rather than forwards.
Petitions

2002/66 Petition of Daureen Shirley Way
2002/73 Petition of Bruce James Mason and 7,820 others
2002/87 Petition of Sharon Lynn Dearlove and 16 others
2002/98 Petition of Alice Kapea
2002/116 Petition of Nick Smith and 17,654 others

The above petitions regarding issues pertaining to the bill were presented to the committee. We will not be taking any further action in respect of these petitions.
Appendix A

Report from independent specialist adviser

Introduction

The committee has requested a report from me on what I consider to be some of the key issues of principle emerging from the submissions and consideration phases devoted to the Foreshore and Seabed Bill. I am to have particular regard to the recent unanimous resolution of the committee as to the manner in which it will report back to the House.

The issues I have selected for consideration in this report, and my presentations to the committee are:

• the land of the Foreshore and Seabed. I have considered this generic issue in some detail in the context of both what the Court of Appeal said in Ngati Apa in 2003 and what Parliament’s intentions might have been in 1993 in relation to “land”, and the Maori Land Court’s jurisdiction in respect of it, in the Te Ture Whenua Maori Act 1993. My discussion on that issue leads into Crown title issues.

• the McHugh thesis.

• territorial customary rights/customary title

• ancestral connection recognition

• customary rights orders

• redress

• some incidental matters: reclamations, marginal strips, common law rights of fishing.

The McHugh thesis

In the light of the committee’s resolution as to the manner in which it will report back on this bill, I have not approached the task of writing this report on the basis of a clause-by-clause examination of the bill, nor on the basis of an item-by-item overview of the analysis, commentary and recommendations of officials in the departmental reports. I comment that I have given continuing comprehensive advice to the committee on all issues during hearings and consideration of the bill. During the course of the presentations of departmental reports by officials I have provided advice and recommendations on the content of those reports and issues arising therein. I do not repeat all of that advice in this report. The absence of any comment in this report on any aspect of the bill and the issues arising simply means I have nothing additional to add to advice already given.

In light of the circumstances, as they have developed, of the committee’s consideration of this bill, I have focused on an overall question of how well the bill achieves its stated purpose (clause 3), that is, to integrate within existing systems for regulating activities in the public foreshore and seabed, all rights and interests therein. I agree with the submission(s) which encouraged the committee to include in the “Purpose” provision (clause 3) a “high level” statement of aspiration for this bill identifying that the foreshore and seabed are
taonga and of national importance in respect of which the exercise by Maori of kaitiakitanga (already referred to in clause 3) should be acknowledged.

I have considered how different concepts derived from Te Ao Maori and Te Ao Pakeha may be first recognised, thence reconciled and ultimately integrated in accordance with the purpose of the bill. In my opinion this bill is all about rights recognition— rights reconciliation— and rights integration— in a contemporary setting and for the way forward. Attached is a diagram designed to assist consideration of such concepts. I have also addressed the committee on this diagram.

I have then identified some of the common threads or themes which have emerged from the submissions and the debate during the course of their presentation as well as some of the issues arising out of the committee's consideration of the bill. Once again I have looked at how certain agreed— or relatively less controversial— themes have emerged in a way which can form a solid foundation for the way forward and the integration framework contemplated by the purpose of the bill. A second diagram summarises aspects of my analysis in this respect. I have also addressed the committee on this diagram.

I have then selected some key issues already identified for more discursive attention.

As to the Dr Paul McHugh thesis I do not thus far see the value of this report simply repeating key features of Dr McHugh’s submissions, which themselves were the subject in his submission of:

- a short summary
- a detailed summary
- a comprehensive submission
- short summaries in the comprehensive submission at the end of each section
- the production of a DVD and accompanying transcript of Dr McHugh’s presentation to the committee.

I have addressed the committee in detail on Dr McHugh’s presentation with specific reference to his written submission; and I have made a (visual) presentation of my analysis of Dr McHugh’s work.

I attach a third diagram representing, in essence and usually, the opening remarks I made to the committee in introducing Dr McHugh when I called him to present to the committee (as requested by the committee, in accordance with my advice) on 13 September 2004. In this diagram I attempt to depict how the relevant rights recognition regimen in New Zealand may interrelate.

At the request of the committee, I attach a copy of the executive summary of Dr McHugh’s submission as he presented it to the committee.

**Some brief preliminary observations**

A common theme of the submissions is that the guarantees/ promises and expectations to and of Maori under the Treaty of Waitangi are breached by the provisions of this bill. This,
to some extent, overlooks the fact that although such rights of “ownership” of Maori of the foreshore and seabed as may exist (and the extent of such rights is unclear) were confirmed by the treaty, they were not created by it. Such rights are a creation of the common law. So a central inquiry must be as to the nature and extent of these rights at common law. I have given comprehensive advice to the committee on those rights. This is not to downgrade the importance of the treaty; far from it. The provisions and principles of the treaty continue to have an important context for consideration of the bill. The rights at common law, however, are more central to the issues arising in respect of the bill. If necessary a saving clause in respect of treaty claims could be included in the bill.

The bill can be seen as representing an acknowledgment of certain rights of Maori across a spectrum. At one end of the spectrum are what might be described as use or occupation rights such as the gathering of kai moana. At the other end there may be the equivalent of freehold title. The bill provides for recognition in particular ways of all of these rights:

- customary rights
- ancestral connection
- territorial customary rights.

The first two of these rights recognition arrangements are not currently available under Te Ture Whenua Maori Act 1993. This bill provides, for the first time, for their recognition.

The bill provides for replacement jurisdiction in respect of the third of those rights recognition arrangements. The bill removes the jurisdiction of Te Ture Whenua Maori Act 1993 which, in respect of customary land, once so declared, presently provides for the prospect that such land can be vested in identified owners as freehold land and registered under the Land Transfer Act 1952. Whether and in respect of how many applications, how long it will take, at what cost and in respect of how much of the land of the foreshore and seabed, is very uncertain. A policy decision has been taken that the bill should be directed at, inter alia, overcoming such uncertainty and some of the attendant cost, anxieties, and potential friction.

The role of local authorities/territorial authorities will be vital to the orderly implementation of the provisions of the bill. Local government cannot, in my view, approach the bill on the basis, for instance, that nothing need be done until the Maori Land Court makes declarations or orders as to customary rights, etc. Local government should be, right now, in my view, reviewing their plans, policies and policy statements to ascertain whether there are impediments to giving proper recognition to such orders or declarations as to customary rights; and if so, doing something about that. Local government ought to be seeing this bill as facilitating, even enhancing, the ability to deliver on the imperatives of the Resource Management Act 1991 as they relate to protections of and for Maori (see sections 6(e), 7, and 8) in respect of which the track record of some local authorities is, according to submissions, less than satisfactory.

The land of the foreshore and seabed

In my view dealing with the land of the “foreshore” and the land of the “seabed” together is inherently confusing. In fact there is a distinction to be made between “foreshore” and “seabed”. The bill deals with them together for reasons no doubt, at least partly, of
convenience. However in both the Ngati Apa decision in the Court of Appeal and, for instance in Dr McHugh’s submission, they are dealt with, as they strictly should be, separately. Tikanga Maori does not necessarily apply in the same way to the foreshore as it does to seabed. These two are dealt with differently at common law. I have addressed the committee on the differences of treatment. Where necessary I have drawn the distinction in this report. Where certain issues of principle arise I have not found it necessary always to draw the distinction herein.

Because so many submitters advocated for a continuation of due process for applications before the Maori Land Court under Te Ture Whenua Maori Act 1993, an early examination of the definition of “land” under Te Ture Whenua Maori Act 1993 and the consequences of the Ngati Apa application of that statutory term is important.

“Land” under Te Ture Whenua Maori Act 1993

In the published Explanatory Note to the Foreshore and Seabed Bill, more particularly the Background section addressing aspects of the “General Policy Statement”, it is said:

... [the Ngati Apa] decision recognised the possibility that Te Ture Whenua Maori Act 1993 would lead to private ownership of the foreshore and seabed. This was not the intention when that Act was developed ...

In the Court of Appeal the Ngati Apa case, Elias CJ said:

[48] It is accepted by the Solicitor-General in his submissions that in New Zealand the Crown had no property in what was described in submissions as “ordinary land” (land above high water mark) until it first validly extinguished the proprietary interests of Maori. It was only when native proprietary interests were extinguished that the land became part of what Martin CJ in R v. Symonds at p.396 called “the heritage of the whole people”. It is argued, however, that the position is otherwise in relation to foreshore and seabed lands. The difference in approach to foreshore and seabed is said to arise both at common law and because of legislation vesting such lands in the Crown. In addition, it is argued that the statutory language of Te Ture Whenua Maori Act precludes its jurisdiction in relation to foreshore and seabed because those areas are not properly to be understood as “land”. Against the background described, I now address these arguments.

As to the argument that “land” in the Te Ture Whenua Maori Act 1993 excludes sea areas:

(i) Elias CJ expressed the view [55] that seabed and foreshore is “land” for the purposes of s.129(1) of the Act ... and that many dictionary definitions of “land” were “wholly consistent with foreshore and seabed being” “... the solid portion of the earth’s surface” when contrasted with “water” ... and was “... unable to draw a distinction between lake beds or river beds and seabed.”

The Chief Justice also observed [55] that:

I find it difficult to understand why seabed and foreshore should be separately treated for the purpose of the jurisdiction of the Maori Land Court ...
Finally, as to Parliamentary intentions in respect of Te Ture Whenua Maori Act, Elias CJ said:

[56] I query whether the question of jurisdiction is properly addressed by first asking whether parliament can have intended to permit recognition of or to create property in the seabed under the 1993 Act. The Maori lands legislation has never been constitutive of customary property. If the Maori Land Court does not have jurisdiction, the ascertainment of any property interest will have to be undertaken by the High Court (which may refer questions of tikanga for the opinion of the Maori Land Court). That does not seem a sensible or intended result.

(ii) Keith and Anderson JJ took the view that:

[178] ... Given the long history of Maori customary property and rights in areas covered by water, a much clearer indication would have had to appear in Te Ture Whenua Maori Act for it to be a measure preventing the Maori Land Court from investigating claims in those areas. It is convenient to mention here that given the particular history and context of Maori land legislation we do not find helpful the general definitions of “New Zealand” and the “territorial limits of New Zealand” in the Interpretation Act 1999.

(iii) And finally Tipping J said:

[187] ... I was initially attracted to the view that it was difficult to read the word “land” in Te Ture Whenua Maori Act as encompassing the seabed. The Crown and the other respondents accepted that the foreshore was land for present purposes; but they argued that the word “land” could not reasonably be construed as encompassing the seabed. Having reflected upon the matter I find myself unable to conclude that Parliament has indicated with sufficient clarity that if Maori customary title (with its own unique incidents) did extend in some respects to the seabed then such title must be taken as having been extinguished by the use of the word “land”. That would be an unduly literal approach. It is also an approach which would risk a constructional begging of the question. If one assumes for the moment that the facts may show that Maori customary title did exist in some way in relation to the seabed, I am not persuaded that by its use of the word “land” in Te Ture Whenua Maori Act, designed as that Act is to foster and protect Maori rights and values, Parliament has by necessary implication extinguished a species of Maori customary title and the associated land status. I note that in relevant statutes to be mentioned later (see paras. [198], [199], and [200] below), Parliament has used the word “land” in reference to the seabed.

[188] ... I am therefore unable to accept the Crown’s submissions that the word “land” in Te Ture Whenua Maori Act is incapable in law of referring to the seabed. All the Crown’s points in support of that proposition fail, in my view, because neither singly nor together do they establish that Parliament was in its use of the word “land” signalling with sufficient clarity that such Maori customary title as may have existed in relation to seabed was being extinguished.
So it is clear that these four of the Judges of the Court of Appeal in Ngati Apa expressed their opinions as to the term “land” extending to the land of the (foreshore and/or) seabed as, in effect, “default positions”. That is to say, Their Honours took the view that in the absence (or in default) of greater certainty or clarity that Parliament intended to exclude the land of the seabed from the definition of “land” for the purposes of Maori Land Court jurisdiction, seabed (at least) would be taken as having been included.

The Government has taken the view that this was an unintended result and points, inter alia, to the fact that there is no suggestion in the Hansard record of the debates for the 1993 Te Ture Whenua Maori Act that Parliament thought or intended the 1993 Act to extend to the land of the foreshore and seabed—that is to say land seaward of the mean high water mark.

The Hansard record of the Parliamentary debates on the Te Ture Whenua Maori Act does not (as I read it) contain any suggestion that the term “land” would extend to the land of the foreshore and seabed for the purposes of the Maori Land Court jurisdiction to declare the status of customary land and vest it in fee simple or freehold title. Perhaps this is not particularly surprising in view of the fact that up until the Ngati Apa decision last year Re the Ninety Mile Beach [1963] NZLR 461 CA held sway.

If Parliament reaches a conclusion that this is an unintended consequence, Parliament can amend the law to better accord with its intention whatever that is or was. The Foreshore and Seabed Bill provides Parliament with the opportunity to consider its intentions when passing the 1993 Te Ture Whenua Maori Act. The bill confronts the issue of definition and provides that “land” will be re-defined in the Te Ture Whenua Maori Act so as not to include land seaward of the high water mark.

It is relevant (perhaps) that in the Privy Council appeal by Port Marlborough Limited (set down for hearing in London 15 and 16 November 2004), the appellant will apparently not challenge the Court of Appeal’s conclusion that the Maori Land Court has jurisdiction in relation to parts of the foreshore (the extent to be defined as a matter of fact). However, the port company will argue that by virtue of section 7 of the Territorial Sea and Fishing Zone Act 1967 and section 7 of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, any aboriginal title to the seabed has been extinguished. If this proposition is correct the Maori Land Court will not have jurisdiction to declare the land of the seabed to be Maori customary land (a prerequisite status to vesting in freehold title).

The Foreshore and Seabed Bill forecloses on the continuing debate. The bill recognises that the assumption of Crown ownership having proved erroneous (by reason of the Ngati Apa decision and the overruling of Re Ninety Mile Beach), the position of ownership will be clarified and confirmed in the bill.

It is entirely arguable that the effect of clause 11(1) is to extinguish such customary property rights/title of Maori as may exist in the foreshore and seabed. This is the result of vesting full legal and beneficial ownership in the Crown as its absolute property. That is a deliberate policy decision.
The issues for my consideration have remained, however:

- What is the nature and extent of the customary rights/titles being extinguished? The answer to this question remains speculative so far as the common law is concerned. Dr McHugh’s thesis is to this effect—the common law does not, he says recognise the notion of exclusivity in the seabed. I have addressed that in discussion with the committee. The position is clear in relation to the statutory jurisdiction of the Maori Land Court under Te Ture Whenua Maori Act; and I have dealt with that issue.

- In the light of such extinguishments, what recognition does the bill provide—by way of substitution or replacement provisions—for the recognition of customary property rights/titles? The answer to this question is that the bill does set out to recognise non-territorial customary rights (usufructory rights) and territorial customary rights the nature, extent and effect of which are provided for in the bill. I have addressed particularly the central (in my opinion) rights recognition regime in the bill—namely territorial customary rights both in my discussions with the committee and, further, in this report.

Clause 11 provides that:

... full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property.

The inclusion of the phrase “... as its absolute property” is potentially problematic, in my opinion, for the committee’s recent unanimous resolution that, subject to drafting advice, clause 11(1) would better accord with the purposes of the bill, set out in clause 3, if it were amended to provide that the vesting would be a “... vesting in the Crown for the people of New Zealand” or “... for and on behalf of the people of New Zealand”.

This change in wording would provide a clear statement of Parliamentary intention in my opinion, namely, that the identity of the Crown is confirmed as owner for the people of New Zealand. The people of New Zealand may well, thereby, have the character of beneficiaries. Arguably this gives rise to the duties in the nature of fiduciary or trustee-type duties and responsibilities resting on the Crown. This consequence is not too dissimilar to propositions in the submissions, for instance, of Te Runanga O Ngai Tahu, and Professor Brookfield of Auckland University. In turn, this additional set of duties will provide an answer to those many submitters who criticised the bill’s provisions as to Crown ownership, not because they opposed Crown ownership per se, but because they consider that the legal character of the “Crown” as that term is used in the bill is unclear. I have interpreted the committee’s resolution as identifying the character of the Crown as necessarily more than the government of the day and responsible in a constitutional sense to and for all the people of New Zealand.

Furthermore some submitters emphasised, there is no definition of “the Crown” contained in the bill, whereby the Crown, admitting of no overarching responsibilities to the people of New Zealand, and exercising the powers of “absolute” owner can under the bill, alienate parts of the public foreshore and seabed with little constraint, which fiduciary or trustee type duties to the people of New Zealand might otherwise impose.
Ownership in the Crown on behalf of the people of New Zealand, does not result in my opinion, in a weakening of the obligations the Crown has as a party to the Treaty of Waitangi; nor should it. The treaty relationship of the Crown and Maori can be encompassed in the identification of the Crown’s ownership on behalf of all the people of New Zealand. If there is some doubt about this, it could be cured by an avoidance of doubt provision being included in the bill. Parliament’s intention could, thereby, be further clarified and confirmed.

I comment that at first sight the inclusion in clause 11(1) of the words “absolute property” with reference to the Crown holding of the public foreshore and seabed, appears to conflict with the concept of the Crown holding title for and on behalf of the people of New Zealand. It appears to me that the inclusion of the words “absolute property” in clause 11(1) is a response to the judgments particularly of Tipping, Keith and Anderson JJ in Ngati Apa in which Their Honours drew attention to the provisions of section 206 of the Coalmines Act 1975 which declared that the beds of navigable rivers, except where granted by the Crown:

... shall remain and shall be deemed to have always been vested with the Crown; and without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown ...

Those words are not found however in the 1977 Territorial Sea Acts. This was one of the three reasons upon the basis of which Keith and Anderson JJ determined that the Territorial Sea Acts were not clear or plain enough to extinguish customary title. Their Honours observed that the phrase “absolute property”

... recognised the co-existence of radical title of the Crown and other (beneficial) property ... in the particular case of minerals (including coal) ... the Crown had both and was the absolute owner...

If clause 11(1) is amended as resolved by the committee it should (and could in my opinion) be made clear that the co-existence of radical title and “other (beneficial) property” is provided for by the Crown, having both, yes, but for and on behalf of the people of New Zealand.

It follows in my view that the overriding responsibilities of the Crown which accompany the vesting for and on behalf of the Crown will inform the considerations which will apply to any proposed alienations by special Act of Parliament under clause 12. There is nothing particularly special about a “special Act” except that it is directed at a single issue of “special” importance. An amended clause 11(1) will also inform any statutory decisions made by responsible Minister(s) under clauses 20 and 21 (even after substantial amendments to the latter as has been signalled in the departmental report). An entrenchment threshold would provide additional restraint.

**Responsible Ministers**

I do not support the proposition that the Minister of Conservation exercise “ownership” functions as provided for in clause 20 (and in clause 21). Given the responsibilities and functions of that Minister under both the Conservation Act 1987 and the Resource Management Act I can envisage conflicts of interest and philosophy when considered
against the responsibilities upon the Crown as the owner of the foreshore and seabed. But the duties arising under the Foreshore and Seabed Bill are not particularly compatible with the duties and functions under the Conservation Act and Resource Management Acts in any event. The conflicts and incompatibility are best identified by reference to the “Purpose” provisions of the Foreshore and Seabed Bill. Clause 3 of the bill is dedicated to integration of rights and interests in the public foreshore and seabed by creating a new legal scheme therefore. Although clause 3 also refers to such integration “... within existing systems for regulating activities in the public foreshore and seabed ...” the primary imperatives of the bill are rights recognition and integration in a new legal framework—not resource regulation.

In my view the Attorney-General and Minister of Maori Affairs should, together, be responsible for exercising the ownership functions under the bill—including those under clauses 20 and 21. They could be required to consult as they considered necessary or desirable with other relevant Ministers.

Vesting in the Crown the full legal and beneficial ownership of the public foreshore and seabed is described as the first of the five interrelated components of the framework for recognising rights and interests in the foreshore and seabed in New Zealand. The general policy statement accompanying the bill describes the bill as establishing:

A comprehensive framework for recognising rights and interests in the foreshore and seabed.

Accordingly, it is my view that the starting point for examination of the framework of the bill—with particular regard to the first of the five components of that framework, namely Crown ownership—is that this bill is directed at recognising rights and interests in the foreshore and seabed. Having recognised those rights it is my opinion that the bill must then necessarily provide for the reconciliation of such rights where they may collide or conflict (or overlap), and further, for their integration.

**Consequences arising from Crown ownership**

**Customary rights orders**

I have addressed the committee on the issues arising in respect of customary rights orders, and add only that in my view the connections to and reliance on tikanga provided in Part 3 of the bill must be retained if the tests for customary rights orders are to retain integrity with the likely development of the common law doctrine of aboriginal title in New Zealand.

Customary rights orders will not and need not interfere with Crown ownership, in perpetuity, for and on behalf of all the people of New Zealand. And Crown ownership should not preclude meaningful recognition and effect of customary rights orders. Customary rights orders should give rise to enhanced protection for such rights in all resource management planning protocols and documents; and to increased opportunities for those who “hold” the rights to engage in co-management of natural and physical resources of the coastal marine area. Recognition of customary practices and management in the light of their historical and contemporary setting is an entirely legitimate objective for customary rights orders. The orders, as with recognised ancestral connection, should
enhance prospects of delivery of some of the imperatives and objectives of the Resource Management Act as they relate to Maori and in particular better provide for, in a practical way, the promises and expectations captured in sections 6(e), 7, and 8 of that Act.

A similar inquiry arises in respect of the implications for territorial customary rights of ownership of the public foreshore and seabed being vested in the Crown for and on behalf of the people of New Zealand in perpetuity. In my view the selection for the bill, of the words “territorial customary right”, although legitimately drawn from the doctrine of aboriginal title and perhaps most starkly identified in the Australian jurisprudence (distinguishing territorial from non-territorial rights for indigenous peoples) has caused confusion and some uncertainty as to both meaning and application. Many submitters seemed either unwilling or unable to appreciate how the language is derived from the doctrine of aboriginal title at common law, which goes to the very heart of the rights integration regime promoted by the bill. For understandable reasons many submitters compared the prospect of status and vesting orders under Te Ture Whenua Maori Act by way of freehold title with the codified common law right of a territorial customary right provided for in the bill, with the consequence that the latter is considered inferior to the freehold title available under Te Ture Whenua Maori Act. That, of course, is perfectly logical; and is legitimate as well.

The territorial customary right does not, under the bill, represent a vesting in freehold title. It is a less secure, less “bankable” and therefore a less valuable right than the potential freehold title issued pursuant to the provisions of Te Ture Whenua Maori Act. The comparison however, more than just identifying which of these two rights may be preferable in terms of absolute property rights, also crystallises the fundamental issue or problem which underpins the whole raison d’etre for the bill. The policy development process followed by the Government in respect of this bill stems from the position taken in relation to the intention of Parliament when passing Te Ture Whenua Maori Act in 1993, namely that the Maori Land Court jurisdiction was to extend only to dry land, that is to say land which is landward of the high water mark.

The debate as to what the intentions of Parliament were in respect of the extent of the jurisdiction of the Maori Land Court and whether it was intended by Parliament that that jurisdiction would extend to the land of the foreshore and seabed is brought into sharp focus by the bill (it appears from the judgments of the Court of Appeal in Ngati Apa that no party, including the Crown, insisted that the land of the foreshore was outside the jurisdiction of the Maori Land Court; but of course the Crown argued that the land of the seabed was certainly beyond the jurisdiction of the Maori Land Court). What might have been the intention of Parliament as expressed in Hansard at the time the status and vesting jurisdiction of the Maori Land Court was refined in the 1993 Act, was not the subject of discrete observation in the judgments of the Court of Appeal in Ngati Apa. No reference was made to the Hansard debates as I have already said. Instead, the Court of Appeal approached the issue of how precise (or otherwise) were the provisions of Te Ture Whenua Maori Act in its “prescription” of the “boundaries” of the Maori Land Court jurisdiction, on the basis that to amount to an effective exclusion of the land of the seabed from the jurisdiction of the Maori Land Court, the legislation had to be significantly more clear than it was (and is).
The Courts will not question a purely policy decision, legitimately the province of government, to rectify, by statute, something which that government considers to be an unintended interpretation of an earlier enactment. This is what the Foreshore and Seabed Bill is intended to do. Whether that is an appropriate policy, or a good policy is not the point for the purposes of my independent advice. The policy decision is one to which any government is entitled to come to and act upon. The more relevant inquiry must be, in my opinion, given the policy decision which has been made; and given also the additional policy decisions underpinning the "Purpose" provision of the bill: does the bill by its provisions achieve its purpose and objectives in a principled way with clarity and certainty.

**Territorial customary rights**

In my opinion it is the establishment of a judicial process to secure those rights— their recognition, reconciliation and integration— which is, under the bill, the potentially really substantive feature of the bill. I give territorial customary rights some prominence in this report accordingly. The codified High Court jurisdiction provided in the bill followed from the March 2004 Waitangi Tribunal report. The codified legal framework pays regard, in my opinion, to those key features of Dr Paul McHugh's evidence/submission to the Waitangi Tribunal which were accepted by it.

A territorial customary right is the bill's equivalent of customary title at common law which, absent the bill, would theoretically be capable of:

- recognition
- identification as to nature and extent
- proof
- demonstration of survival from extinguishment.

These are the four "building blocks" for the inherent jurisdiction of the High Court in considering and developing the doctrine of aboriginal title at common law referred to by Dr McHugh in his submissions to the committee. In fact it was Dr McHugh's thesis that the bill in providing for territorial customary rights, provided for the first of the four "building blocks" which otherwise (in the absence of the bill) would be required to be established as a matter of law before the High Court in its inherent jurisdiction. By territorial customary rights the bill recognises the existence of customary title in the land of the foreshore and seabed, prospectively, subject to proof of its actual existence, in a particular instance; identification as to its nature and extent; and establishing that such customary title has not otherwise been extinguished. So the bill still requires the other three "building blocks" to be put in place. The bill sets out the tests that are required to be applied. The criteria provided in the bill for those tests follow the likely development of the common law in New Zealand had it been allowed to develop without codification—according to the submission of Dr McHugh. However, Dr McHugh emphasised that tikanga would undoubtedly play a part in the development of the common law in New Zealand. Accordingly tikanga Maori should, in my view, be introduced into the test(s) provided for in clause 28 of the bill. To this extent the bill in its codification of how the equivalent of customary title might be secured, reduces the four necessary steps to three and provides that the rights embraced by the term territorial customary right:
would have been recognised at common law as customary rights, customary title, aboriginal rights, aboriginal title, or as rights or title of a similar kind, and

would have amounted at common law to a right to exclusive occupation and possession of a particular area, that is included in the public foreshore and seabed.

It is clear from the language used in clause 28 that a territorial customary right represents a form of aboriginal title or customary title. In Te Ao Maori “title” in relation to the land of the seabed does not necessarily carry with it all the incidents of title usually associated with that word (“title”) in Te Ao Pakeha. But the bill uses the word “title” specifically in clause 28, and rightly so, in my opinion. So much the better would it be in my opinion if the bill adopted that language, consistently throughout, when referring to what findings the High Court may be able to make pursuant to the jurisdiction established under the bill for territorial customary rights.

If Maori can establish the existence of rights which would have amounted at common law to exclusive use and occupation of a particular area in the foreshore and seabed, then in my opinion it would be entirely consistent with the purpose and principles of the bill to provide that that finding would be expressed as a finding of an existence of a customary title rather than the term “territorial customary right”. But the “customary title” would be conditioned in such a way as would keep faith with the legitimate expectations of what the common law, absent the bill, could deliver; and at the same time capture the common threads which emerged from submissions and discussions before the committee. I have identified these in the accompanying diagrams.

These conditions, as limits to “title”, emerging as relatively common themes or threads from the submissions, include:

- preservation of public access with reasonable recreational user rights
- preservation of public navigation
- inalienability.

The result is, prospectively, a form of modified exclusivity attaching to the customary title. As such it is entirely consistent with the McHugh thesis and the dissenting judgment of Kirby J in the Yarramirr case in Australia. Perpetual ownership of the Crown as a fundamental tenant of the bill need not be threatened by such a finding.

My concern with clause 28 remains, that if the threshold for establishment of a customary title under clause 28 (allowing for a change in language brought about by abandoning the phrase “territorial customary right”) is that the title:

would have amounted at common law to a right to exclusive use/occupation/possession ...

then by reason of the insistence on an “exclusive” criterion, there will be very few instances of findings by the High Court on the existence of customary title in the future. Some of the Ngati Porou lands; the Ngati Maru (Hauraki) Native Land Court Titles; and the Ngati Tama claim to Whakapuaka in Te Tau Ihu might well meet the test. There will be others too. See for instance the submissions on behalf of the tipuna, and uri, of Papatea Island.
The McHugh thesis confirms that exclusivity is not generally recognised at common law. However, in my view, that the common law might well have recognised a form of modified exclusive customary title reserving nonetheless those other principles protected by the common law, namely public access, public navigation and so on, provides a sustainable justification for the way the bill codifies that likely common law prescription.

If a modified exclusive customary title is an accurate description of the kind of customary title for a finding of which the bill is designed to allow then unless there are valid law drafting reasons not to use such language, I would encourage its use in order to better describe precisely the nature of the title available by recourse to the High Court’s jurisdiction established under the bill. If a territorial customary right is really a form of customary title it should be so called. Put another way, the first inquiry is what is the nature and extent of the right or title which the bill contemplates will be available subject to the threshold tests being met. If the answer is a form of customary title but modified as to its nature and extent, and in particular modified by the protections for public access, public navigation, recreational use and inalienability, then that should be the language which is used expressly in the bill.

Of course as many submissions declared, even a title as this kind may be seen as of lesser value than the vesting under the Land Transfer Act by way of freehold title of land which the Maori Land Court has under Te Ture Whenua Maori Act declared to have the status of customary land. But that comparison simply means our analysis returns to the point at which it began, namely whether in fact it was the intention of Parliament in the 1993 Te Ture Whenua Maori Act that by the definition of “land” in respect of which the Maori Land Court was to have jurisdiction to make status and vesting orders, said jurisdiction was intended to extend to the land seaward of the high water mark. A policy decision has been made that that was not the intention of Parliament. On that basis government would be entitled to make a policy decision to amend the definition of land to achieve what was considered to be the intention from the outset, but which the Court in Ngati Apa has determined was not actually achieved. That would require a Te Ture Whenua Maori Act Amendment Bill simpliciter. But it is a sound argument to say that the bill deliberately goes further than making that amendment, (although it does indeed make that amendment) to clarify what land does not fall within the jurisdiction of the Maori Land Court for status and vesting orders.

The bill openly proceeds to do much more. In the face of uncertainty not only as to ownership of the land of the foreshore and seabed, or at least seaward of the high water mark, brought about by the Ngati Apa decision identifying that the Crown assumption of ownership was flawed; and given also that there are currently before the Maori Land Court some 80 applications seeking status and vesting orders under Te Ture Whenua Maori Act with the consequence of great uncertainty over a very long time whilst those applications proceed through the Courts for determination as to freehold title entitlements around the coastline of Aotearoa New Zealand, the bill confines the jurisdiction of the Maori Land Court in respect of the land of the foreshore and seabed to declaring customary rights orders and ancestral connection orders.

In this way the Maori Land Court is given additional (new) jurisdiction to that which it has currently. Although it currently has jurisdiction to make status and vesting orders by way of freehold title, it currently has no other jurisdiction to make declarations recognising
customary rights not extending to freehold title. The bill provides new jurisdiction in that regard whilst foreclosing on extant jurisdiction as the Court in Ngati Apa found it to have.

That there exists at common law the doctrine of aboriginal title which would offer Maori the opportunity of proceeding to the High Court seeking declarations as to entitlement, rights and interests is also, by implication, recognised by the bill. Rather than leave that option open, as indeed it has been to date (albeit with no recourse to it), the bill codifies by statute the way and process in which such customary title can be recognised in the land of the foreshore and seabed.

I note that officials, drawing on concepts arising out of the Canadian jurisprudence for exclusive occupation and use for land above mean high water and Kirby J in Yarmirr consider that “exclusivity” of occupation and use applicable to territorial customary rights should include three elements:

- exclusivity demonstrated by physical occupation and uses (not merely intangible relationships) (but which, I contemplate, would often be at least in part demonstrated by such relationships) by the applicant iwi, hapu or whanau without regular or intensive use of the area being required
- exclusivity which can be consistent with persons who are not members of the group using a part of the area at the invitation or licence, whether explicitly or impliedly, of the members of the group
- exclusivity subject nevertheless to the public rights of navigation in accordance with the concept of “qualified exclusivity” developed by Kirby J in Yarmirr.

I agree. I also agree that the Courts ought to be able to consider evidence of contiguous land ownership for the purposes of clause 31. Dr McHugh suggested that contiguous ownership is likely to be necessary but may not be sufficient. That is not a matter, in my opinion, which should be prejudged. I am of the view the New Zealand Courts will, and should, follow the Kirby J approach as better according with the Treaty of Waitangi overlay in New Zealand which Dr McHugh acknowledged. The bill can properly allow for evidence of contiguous ownership to be presented in support of an application for a territorial customary right (or its renamed equivalent) but it is not appropriate in my opinion to provide in the bill that such evidence is necessary or whether it will or will not be sufficient. Evidence demonstrating contiguous land ownership ought to be specifically included as a classification of evidence which can be considered under clause 31, but the bill should remain neutral as to whether its presence or absence is to be telling or compelling, or fatal, as the case may be.

Before moving to redress, which, for reasons already provided to the committee, I consider with particular reference to territorial customary rights, I refer briefly to ancestral connection orders under the bill.

**Ancestral connection**

In passing, I comment and confirm my opinion previously expressed that it is wrong in principle for Maori to be required to prove ancestral connection to the land of the foreshore and seabed; in my opinion this should be a “given” and be specifically recognised by the bill. In Maori hands ancestral connection orders, either directly through the
processes of the Resource Management Act or upon the formalisation of the ancestral connection recognition through the Maori Land Court, Maori ought to be able to participate in planning processes in the way the bill contemplates.

Many Maori who made submissions and expressed strong objection to the ancestral connection provisions of the bill did so particularly because those provisions call for Maori to prove such a connection. Many Maori find that requirement demeaning. I agree. The bill should record recognition of such connection without proof being required.

I also consider it appropriate to divorce the recognised ancestral connection from kaitiakitanga in the "Purpose" provision of the bill. As was pointed out to the committee, Maori may have an ancestral connection with some part of the foreshore and seabed without, for that part, corresponding rights and responsibilities as kaitiaki for that particular area.

It is also important in my view to ensure Maori rights, recognition and protection regimen, whether under this bill or upon an inclusion of ancestral connection orders in the Resource Management Act (which is another option for consideration), that the extant rights of Maori to participate in planning processes under the Resource Management Act are not made dependent upon the issue of an ancestral connection order. Giving full effect to sections 6, 7, and 8 of the Resource Management Act is still to be required in the absence of an ancestral connection order, but Maori could, at their option, secure enhanced participation opportunities in respect of the coastal marine area by obtaining an ancestral connection order in respect of particular parts of the foreshore and seabed.

**Redress**

It is acknowledged that the purpose of clause 33 according to Government policy, is to make it clear that there is a positive obligation on the Crown to enter into discussions with the relevant group once a finding has been made. I understand the rationale for not prescribing with great particularity what form redress might take. The nature and extent of the customary title, the subject of findings from the High Court and the particular circumstances applying will need to be considered and are probably best considered not in the abstract but in the light of the findings and all matters relevant.

Of course the Crown will undertake such discussions in good faith and whilst a number of submissions suggested that somebody independent of the Crown should be given the responsibility for determining the nature and extent of the redress, it is my opinion that the final nature and extent of the redress is not best left with the Courts nor best left with an independent body but is appropriately left with the Crown. The relationship which will govern the nature of the discussions and deliberations between the Crown and the party in whose favour findings have been made, will be partly informed and coloured by the relationship which the bill establishes between the Crown, as owner of the foreshore and seabed, and on behalf of all the people of New Zealand, which will include Maori, and will therefore in my opinion embrace the treaty relationship between Maori and the Crown.

Just as the Waitangi Tribunal determined in relation to consideration of the doctrine of aboriginal title at common law and its application in New Zealand that the Treaty of Waitangi would provide a context to such consideration, so also will it (and should it) provide a context to discussions between the Crown and those parties who have the
benefit of a customary title/territorial customary right finding by the High Court. Whilst it is recognised that what the High Court will consider is the codification of the common law rather than an extension or application of the treaty, it is my opinion that the treaty context will play a part in these considerations and so it should. Dr McHugh concluded that a treaty overlay would influence what might have been available at common law in absence of the bill.

I also agree that the High Court’s finding should be referred to the Attorney-General and to the Minister of Maori Affairs. I agree that they must enter into discussions with the group in whose favour the finding is made, and of course it should not be assumed, let alone thought, that the Crown would approach such discussions or negotiations in bad faith. The New Zealand Bill of Rights Act 1990 and the Treaty of Waitangi demand a good faith approach.

Nevertheless there is a discernible thread of scepticism in submissions which challenge the lack of prescription or guidelines or principles contained in clause 33 for the purposes of redress. In my opinion clause 33 is too widely drawn in respect of redress and although I do not advocate that it provide either particularised criteria for redress or in any way limit redress, the bill is capable of refinement to provide comfort, security and certainty that redress will be meaningful. Dr McHugh addressed the issue of redress under clause 33 and in particular drew the committee’s attention to the fact that administrative law review or “judicial review” as it is colloquially known, would be available to aggrieved recipients of findings by the High Court of customary title (territorial customary right) in the event the Crown did not provide meaningful redress thereafter. But despite the attraction to that argument as an undoubtedly correct proposition in an academic legal sense, the practical position is to be measured against long experience of administrative law litigation in this country. Declarations by way of judicial review of government/Crown action are often difficult to secure on tightly defined grounds which do not include second guessing government or Crown policy, especially where a wide discretion is reserved to the Crown. Judicial review proceedings in the Courts are often clumsy or blunt instruments for redress which do not (and nor should they) include the Court simply substituting its decision for that of the Minister or Ministers or other statutory decision-maker. The traditional grounds for judicial review proceedings are:

- that the decision under review is clearly wrong in law, and or principle
- that the decision is unreasonable in the sense that no reasonable Minister(s) would have come to that decision
- that the Ministers have taken into account irrelevant matters
- that Ministers have not taken into account relevant matters
- that Ministers have applied too much weight or too little weight to relevant factors.

These thresholds are quite constrained in their application. Even if the Court, upon judicial review, in circumstances where Ministers had determined no redress, or redress of a kind not satisfactory to the recipients of the High Court findings declared the process followed by the Crown offended against one or more of the grounds stated above, the Court would not necessarily or even likely direct the Crown to consider other redress, if the Court considered the redress contemplated by the Crown, or lack of it, generally to be within the
purview of its policy decision-making power. If the Courts took the view that the Ministers had not taken into account relevant matters or had taken into account irrelevant matters declarations could be made accordingly and the issue of redress would be sent back to the Ministers for further consideration. Not even such a process would necessarily result in meaningful redress.

To suggest that the redress provisions be elaborated upon so that there is not an open-ended discretion left to the Crown, is not to suggest that the Crown will approach the discussions contemplated by clause 33 in other than a good faith manner. On the contrary, that is, as it should be, a given. What would be better, in my opinion, would be for clause 33 to:

- stipulate that Ministers should proceed on the basis that redress will take the form of recognition of a qualified or modified exclusive customary title
- to be enjoyed by Maori recipients subject to certain conditions.

So that there would be a legitimate expectation, and a reasonable one at that, that the bill affirmatively directs Ministers to design appropriate redress to recognise the customary title/territorial customary right so found in a way which gives maximum force and effect to such modified exclusive customary title; and to the maximum extent possible in all the circumstances.

To ensure this approach is taken by the responsible Ministers, on behalf of the Crown, the bill should say more, in my opinion, as to how the High Court findings are to be expressed upon a successful customary title/territorial customary rights application. The bill would, in this way, codify more precisely, the nature of the High Court’s statutory jurisdiction. The findings could properly record for instance:

- the applicants are entitled to a finding that they have established a case for recognition of their modified exclusive customary title under this Act
- the land, nature and extent of the incidents of title are here set out
- the title will be integrated with and conditioned by continuing rights of public access, public navigation, inalienability, and such other rights/conditions as appropriate.

It would accordingly be “findings” expressed in these terms by the High Court which would then be referred to Ministers.

Judicial review is a Court proceeding which considers the process by which statutory powers of decision are exercised, rather than the outcome. Only if the process is so flawed that the outcome cannot stand, will the Courts intervene. If there is an imperative under clause 33 that determines a base position that as far as may be possible the finding has to be given effect to by the Crown whilst nevertheless leaving to the Crown a reasonable discretion as to the ultimate way in which the finding would be given effect, the Courts will be slow to intervene, but could intervene in appropriate circumstances without being labelled “activist”.

The next factor informing creative redress options is the fact that the codification by the bill of the processes of the common law to deliver customary title/territorial customary rights is a codification which provides for recognition of property rights. The codification
provided for by the bill represents a property rights recognition regime. In economic theory, it is accepted that there are six characteristics of an efficient property right:

- flexibility
- duration
- divisibility
- transferability
- exclusivity
- quality of title.

The 6 inherent characteristics of an efficient property right are best demonstrated in this way:

At the outer limits of the hexagon the property right is at its most efficient. Modification or qualification of any one of its inherent characteristics weakens the property right. It is at its weakest in the centre. An example of a strong property right is an ITQ right which in the fisheries regime in New Zealand can be described as a right representing private harvesting and management rights accompanied by treaty rights.

In providing meaningful redress therefore for property rights which are recognised as customary title/territorial customary rights under the bill the property right should be retained at its most efficient unless other factors demand its modification. Hence modification as to exclusivity; and modification as to transferability/alienability.

The characteristic of flexibility inherent in a property right can, however, still be maintained at its strongest. This would maximise freedom for the recipients of customary title/territorial customary right findings to so structure operations or arrangements (including co-management) as best gives effect to the exercise of the rights (or incidents) attaching to the customary title. Easements over land, right of ways to certain areas, use of leasehold arrangements, rights of the public to pass and repass, rights of public navigation, recreational user rights within a co-management user framework whilst retaining Crown
ownership remain able to be accommodated upon recognition of customary title/territorial customary rights.

A very important mechanism for securing recognition and redress in respect of customary title/territorial customary rights is already contained in the bill. This is clause 112. This clause enables Ministers to enter into an agreement outside of the Court processes. For the purposes of giving effect to such an agreement as is contemplated under clause 112 however, I am of the view that it should be perfected by a consent order through the High Court, as if an application for customary title/territorial customary rights had been made. In this regard it is conceivable that some of those applications which have been made to the Maori Land Court under the extant provisions of Te Ture Whenua Maori Act and which under the bill are required to proceed to the Maori Land Court as if they were applications for customary rights orders under the bill, could form the basis of a discrete and succinct application to the High Court, to be followed, assuming agreement under clause 112, with a consent order. It is my understanding that there are already some early negotiations underway between the Crown and Maori groups (iwi, hapu or whanau) directed at these or similar objectives.

So what additional options might there be for meaningful redress in the event of customary title/territorial customary right declarations/findings?

First I support the proposition that the bill should include a provision in relation to redress, whereby not only will redress ordinarily be made available and effectual in a manner which provides for the most effective recognition of the customary title within its modified or qualified exclusivity context, but also it be coupled with a McHugh proposition requiring the Crown to express demonstrate (ultimately to the Court’s satisfaction on judicial review) a “supervening public interest” beyond that already protected by the bill (navigation, access, recreation etc) as being the only basis upon which redress might be refused to the fullest extent practicable.

Secondly, the issue of a form of “title” could be contemplated, conditioned again as required to meet the qualified or modified exclusivity context/concept.

There could be other mechanisms of customary title recognition available—some examples of which are not unknown in tikanga Maori and certainly not unknown to the jurisdiction of the Maori Land Court. For instance under the (now repealed) Maori Affairs Act 1953:

- Pursuant to section 438 the Maori Land Court could, on application, make an order vesting any customary land in any trustee or trustees to be held upon and subject to such trusts as the Courts may declare for the benefit of Maori or the descendants of Maori so connected with the land. I do not advocate that this mechanism be by way of the additional jurisdiction for the Maori Land Court provided in the bill to facilitate redress upon findings by the High Court of customary title/territorial customary rights. Rather, I contemplate the bill specifically making reference to the option of, for instance, perpetual lease of land the subject of a customary title/territorial customary right finding in the High Court, to Maori, with the appointment of trustees in consultation with the iwi, hapu or whanau in whose favour the finding has been made, to be held subject to such trusts as the Court may declare for the benefit of that group. This kind of trust may also have application to customary rights orders.
Then again, the bill might allow for a contemporary equivalent of the old section 439 Maori Reservations for Communal Purposes. Under that section of the 1953 Act (not carried through in that form to the 1993 Act) by Order in Council, the Governor-General could set apart Maori freehold land or European land owned by Maori as a Maori reservation for a variety of purposes, including among others, a village site, meeting place, recreation ground, church site, building site, burial ground, landing place, fishing ground, spring, well, catchment area or other source of water supply, timber reserve or place of historical or scientific interest ... or for any other specified purpose whatsoever. I am not advocating inclusion of a provision for Maori reservations for communal purposes to be reinserted into Te Ture Whenua Maori Act, to which recourse could be had in the event of a finding of customary title/territorial customary rights. I do, however, suggest that (with modifications to suit the contemporary context), this kind of reservation, that is for the land to be set apart placed in the hands of trustees without the Crown losing ownership per se; with the establishment of a trust pursuant to the terms of which the land remains available for the particular purposes likely to be identified in the process of establishing entitlement to the finding of customary title, could provide a useful redress option.

Further, in this context, I observe that under section 340 of Te Ture Whenua Maori Act Maori reservations may be held for common use and benefit of the people of New Zealand. That provision provides for a recommendation of the Maori Land Court so long as the owners and the local authority agree, wherein land is set apart as a Maori reservation for the purposes of a village site, marae, meeting place, recreation ground and so on, in terms which mirror the old section 439. Trustees can be drawn from Maori connected with the land and from the local authority thereby facilitating co-management of the natural and physical resources encompassed by the customary title whilst still retaining provision that it be held for the common use and benefit of all the people of Aotearoa New Zealand.

In passing I note that under the bill there are definitions apply to “holder” and “legal entity” for the purposes of holding (and enjoying the benefit of) either a customary rights order or a formal ancestral connection declaration or a finding as to territorial customary rights/customary title. It is proposed to better identify in the bill that for the purposes of a “holder” or “legal entity” the concept of “group of Maori” will be altered to embrace iwi, hapu and whanau. With respect I agree with that refinement and make two additional observations:

Care should be taken to avoid iwi, hapu and whanau being precluded from accessing already existing mandated bodies, for instance the mandated iwi organisations established for Maori fisheries allocation purposes, for the “holding” of foreshore and seabed rights orders. Recognition arrangements of the kind incorporated into the Maori Fisheries Act 2003 could usefully be replicated.
• With reference to the future conduct of the iwi, hapu and whanau holding the rights provided for under the bill—and in this case particularly a customary rights order—there must be adequate protection for all of the beneficiaries on whose behalf the iwi, hapu and whanau have obtained the declaration/order/determination/finding, particularly if the authorised representatives of that group are called upon to approve, no doubt on terms, some conflicting resource consent activity within the “boundaries” of the rights order. In these circumstances it will be essential to incorporate into the arrangements made for iwi, hapu and whanau, when being granted a customary rights order, that the protections of beneficial “owners” provided by Te Ture Whenua Maori Act are brought across and will remain applicable under the Foreshore and Seabed Bill. My advice to the committee is that although understandably following the change of definition of the term “land” in Te Ture Whenua Maori Act by this bill, there may be reluctance to incorporate too much of Te Ture Whenua Maori Act into the Foreshore and Seabed Bill (which after all is dealing with different land than that dealt with under Te Ture Whenua Maori Act), protection of beneficial owners, particularly in respect of customary rights orders dictates in my opinion that those protection provisions of Te Ture Whenua Maori Act be carried over into the Foreshore and Seabed Bill with all such necessary modifications given the different context.

Other incidental matters: vesting of reclaimed land

Not arising from a Ngati Apa decision is an issue dealt with under clause 100 in respect of the vesting of reclaimed land which, absent the bill, is dealt with under the provisions of the Resource Management Act, and in particular section 355 thereof. The committee received numerous submissions from port companies, both collectively and individually, regional councils, city councils, local authorities, and private interests, all of which were directed at ensuring the bill did not undermine security of tenure, economic efficiency of business plans and a legitimate expectations in dealings with the Crown (Minister of Conservation in particular) which accompanied and characterised their operations to date.

To some extent, that the committee should have received such strong and unanimous submissions directed at these economic imperatives in the face of some uncertainty, having regard to the bill provisions, is not surprising given that assumptions as to ownership around the coastal marine area, including ports for that matter, upon which most affected parties had based their conduct were demonstrated as having been wrong by the Court in Ngati Apa. The bill now sets to restore the position as it was assumed to be prior to the Ngati Apa decision.

The bill of course will not interfere with already issued or perfected private titles, including private titles in respect of the land of the foreshore and seabed. The port companies and local authority submissions identified that there are a number of cases around New Zealand where the vesting of land absolutely in the Crown will cut across arrangements in the course of being perfected or intended to be perfected, pursuant to the prevailing statutory framework, particularly that under the Resource Management Act, but not yet concluded.

The purpose of the bill does refer specifically to the creation of a new legal scheme for the purposes set out in clause 3. The overall purpose of the Act is still to integrate “within
existing systems for regulating activities” and part of the existing system includes an expectation that title will issue under certain circumstances, particularly to port companies. Port companies already own, lease and occupy parts of the seabed and foreshore; there are a number of reclamations which have been commenced, but for which no title is currently issued. There is in my opinion a good case for withdrawing clause 100 because once a reclamation has been completed it is effectively new land and not part of the old foreshore or seabed. In those circumstances it should not fall within the definition of “public foreshore and seabed” for the purposes of the bill and its exclusion on that basis would be entirely justified.

If it was considered that for consistency purposes (i.e. because the land over which the reclamation has taken place was originally land of the public foreshore and seabed) clause 100 should be retained some additional regulation must be included in the bill addressing reclamations. The proposals in the departmental report do, in my opinion, go some way to addressing the legitimate concerns put forward in submissions to the committee, particularly by the port companies and local authorities. First, if a resource consent has been secured the Minister of Conservation can apply the existing Resource Management Act provisions and vest title. Secondly a special exemption from the provisions in clause 100 to parties who have a special statutory protection or legal agreement concerning vesting of reclaimed land, will be provided. This will meet as I understand it strong objections such as those from Lambton Harbour and Wellington City Council as well as Timaru Port Authority.

It is then proposed that the holder of a lease which is due to expire will be given a right and priority over every other person to have an application for a new lease considered first. This in my submission is a clumsy mechanism and not sound from an economic development point of view. If the bill is to provide for a maximum 50-year lease arrangement there should be an automatic right of renewal for a further 50 years. The “right of priority” remains uncertain to such an extent that necessary investment capital and certainty requirements for the effective and efficient plans of these organisations could well be compromised in my view. Even a 100-year effective lease arrangement encounters these problems towards the end of its term. An infinitely preferable refinement in my opinion is to maintain extended vesting options in the exercise of the relevant Minister’s discretion, even in circumstances or cases that fall outside the resource consent or exemption provisions as contemplated.

**Marginal strips**

The bill amends the Conservation Act 1987 (section 24) with the effect that marginal strips which are required on the disposition of any land by the Crown abutting the foreshore will not be required on the vesting of reclamations. This proposal is supported by a number of submitters including the New Zealand Law Society. I agree with the reasons for the proposed amendment.

**Common law rights of fishing**

Under the bill (clause 8), no rights of fishing are in the future to be recognised other than rights created or regulated by or under:

(a) the Fisheries Act 1996
FORESHORE AND SEABED BILL

(b) the regulations made thereunder

(c) the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

In my view, the bill should not interfere with any rights to fish at common law or otherwise or any statutorily provided for or regulated rights of fishing. A number of submissions took the same view.

I understand that this is accepted by the committee. The bill should, in my view, expressly state it does not affect such rights to and of fishing. I agree that the list of legislative enactments when included in the bill, reversing the effect of clause 8 as originally drafted, should not be an exhaustive list.

**Conclusion**

For reasons already provided at the beginning of this report, it does not deal with all matters already the subject of my advice. It addresses some outstanding key issues. I anticipate that other matters arising out of those dealt with in this report will be raised with me during my presentation of this report.

Tim Castle 19 October 2004

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<tr>
<th>THE LAND OF THE FORESHORE AND SEABED IN AOTEAROA NEW ZEALAND</th>
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<tr>
<td><strong>RIGHTS RECOGNITION – RIGHTS RECONCILIATION – RIGHTS INTEGRATION</strong></td>
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<tr>
<td><strong>Purpose and Principles</strong></td>
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<td>Of the Foreshore and Seabed Bill 2004</td>
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<tr>
<td><strong>Purpose</strong></td>
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<tr>
<td>The purpose of this Act is to integrate, within existing systems for regulating activities in the public foreshore and seabed, all rights and interests in the public foreshore and seabed by creating a new legal scheme that –</td>
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<tr>
<td>(a) vests the full legal and beneficial ownership of the public foreshore and seabed in the Crown to ensure that the public foreshore and seabed of New Zealand is preserved in perpetuity for the people of New Zealand, and</td>
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<tr>
<td>(b) provides for general rights of public access, recreation, and navigation in, on, over, and across the public foreshore and seabed, and</td>
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<td>(c) acknowledges the expression of kaitiakitanga by recognising the ancestral connection of Maori with the public foreshore and seabed, and</td>
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<td>(d) provides for the recognition and protection of ongoing customary rights to undertake or engage in particular activities, uses, or practices in areas of the public foreshore and seabed; and</td>
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<td>(e) enables applications to be made to the High Court to investigate the full extent of the rights that may have been held at common law, and provides for formal discussions on redress if those rights are not able to be fully expressed as a result of this Act.</td>
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Inalienable

Beneficiaries are all

The people of NZ

See s.11(1) as amended by resolution of Committee

Better if a.c. is divorced from kaitiakitanga, with recognition, without proof, that all Maori have ancestral connection to f & s.

Public access, public navigation (and, therefore, reasonable recreational user rights) accepted by Maori

A form of customary title, the nature and extent of which requires investigation by due process with meaningful redress to be available and likely

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Inalienable

Beneficiaries are all

The people of NZ

Indigenous peoples ancestral connection is a given

Customary rights recognised

Customary title recognition should hold no terror if public rights preserved i.e. not exclusive.

Tim Castle 18 October 2004
# THE LAND OF THE FORESHORE AND SEABED IN AOTEAROA

**NEW ZEALAND**

**RIGHTS RECOGNITION – RIGHTS RECONCILIATION – RIGHTS INTEGRATION**

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<th>TE AO MAORI</th>
<th>BRIDGING THE DIVIDE</th>
<th>TE AO PAKEHA</th>
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### Property right recognition by application of tikanga Maori allowing for Crown ownership, but facilitating:
- rangatiratanga
- kaitiakitanga
- manaakitanga
- te mea, te mea

and affording Crown co-regulation


### Common threads emerging from submissions on Foreshore and Seabed Bill
- Public rights of access
- Public rights of navigation
- Inalienability
- Recognition of ancestral connection
- Recognition of customary rights
- Crown ownership for the benefit of all people of New Zealand; in perpetuity

### Government guiding principles in developing the Bill
- principle of access
- principle of regulation
- principle of protection
- principle of certainty

### Property right recognition at common law – potentially a form of modified exclusivity of title affording:
- Crown ownership and Crown regulation, but allowing for
  - Co-management
  - Trustee responsibilities
  - Custodial title
  - kaitiakitanga

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Tim Castle  
18 October 2004
## Rights Recognition – Reconciliation – Integration

### 4 Streams – Related but Separate

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<tr>
<th>Treaty</th>
<th>Statute</th>
<th>Common Law</th>
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<tr>
<td>Waitangi Tribunal or OTS</td>
<td>MLC</td>
<td>Inherent jurisdiction of High Court</td>
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### Treaty of Waitangi Act 1975

- **inter alia**
  - setting the historical narrative right
  - historical and contemporary grievances
  - freehold title a prospective outcome, after investigation, in respect of customary land
  - no other customary rights recognised

### Te Ture Whenua Maori Act 1993

### Fiduciary Duty

- focuses on Crown conduct
  - declaratory relief
  - damages (?)
  - compensation for extinguishment

### Aboriginal Title

- protects extant property rights
- 4 stages:
  1. recognition
  2. proof
  3. nature and extent
  4. extinguishment declaratory relief

### What redress for loss is available and/or appropriate?

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T J Castle
13 September 2004
He Korunga o Nga Tikanga—Maori customary obligations, rights and interests

The cardinal tikanga that underpin Maori customary obligations, rights and interests.

The centre of the spiral symbolises, te kore and mauri—meaning the beginning and end of life itself. It further links the outlined ethics and virtues below which constitute a unity, a holism and a way of linking humanity, nature and cosmos in relationships of reciprocity and respect. The following group of powerful generative supreme values constitutes a coherent philosophy, metaphysics and religion in which cardinal ethics and virtues explain motivation for Maori agency in the 19th century and 21st century. They are as follows:

(a) Tikanga te ao marama (ethic of wholeness, evolving, cosmos)
(b) Tikanga te ao hurihuri (ethic of change and tradition)
(c) Tikanga tapu (ethic of existence, a being with potentiality, power, the sacred)
(d) Tikanga mauri (ethic of life essences, vitalism, reverence for life)
(e) Tikanga mana (ethic of power, authority and common good, actualisation of tapu)
(f) Tikanga hau (ethic of the spiritual power of obligatory reciprocity in relationships with nature, life force, breathe of life)
(g) Tikanga wairua—wairuatanga (ethic of the spirit and spirituality)
(h) Tikanga tika—tikanga (ethic of the distinctive nature of things, of the right way, of the quest for justice)
(i) Tikanga whanau—whanaungatanga (ethic of belonging, reverence for the human person)
(j) Tikanga tiaki—tiakitanga (ethic of guardianship of creation, land, seas, forests, environment)
(k) Tikanga hohou rongo (ethic of peace and reconciliation, restoration)
(l) Tikanga kotahitanga (solidarity with people and the natural world and common good)
(m) Tikanga manaaki (love and honour, solidarity, reciprocity).

The above are cardinal ethics that inform Maori agency and are the matrix of ethical pluralism. They inform Maori relationships between Maori, Maori with Pakeha and the world at large, and specifically in terms of this thesis, relations with British kings and queens and other officials such as Busby, Hobson, Grey and even the current Crown and Government. They have application to economic and political events in the early 19th century as they do in the new millennium.
Submissions By Dr Paul McHugh To The Select Committee Hearing Of The Foreshore And Seabed Bill

August 2004

Executive Summary

Under present law, the statutory jurisdiction of the Maori Land Court and the inherent jurisdiction of the High Court provide separate means for the recognition of Maori property rights in the seabed and foreshore. The Court of Appeal did not examine the interrelationship of the two. It clarified the former and acknowledged without exploring the latter. My submissions are particularly concerned with the nature of the common law aboriginal title (or inherent jurisdiction) and its incorporation into the Bill. The scope of Maori rights under the inherent jurisdiction is unresolved and speculative. In my view, it is very unlikely that this jurisdiction alone will produce exclusive ownership rights. In Ngati Apa, however, the Court of Appeal acknowledged that subject to a very high and difficult-to-meet threshold of factual evidence the Maori Land Court’s statutory jurisdiction might produce such a result.

Under present law and in developing the inherent jurisdiction, a New Zealand court will need to address the fundamental questions of recognition, proof, nature and extinguishment. The Treaty of Waitangi will guide that task of developing the New Zealand common law. Exclusive Maori ownership (territorial title) would probably be regarded as inconsistent with the nature of Crown sovereignty and incapable of recognition by the common law inherent jurisdiction in itself, although a bundle of discrete, specific rights (non-territorial title) would certainly be recognised as arising. For policy reasons apparently tied in to the long and protracted history of Maori invocation of the statutory jurisdiction for sea-covered land, the Bill shows the Crown has decided that the High Court will be able to determine the existence of territorial title over the foreshore and seabed by issuing TCR orders (clause 29). Once legislation to that effect is in place, any restraint on the common law will have been superseded and the preliminary question of ‘recognition’ answered in the affirmative. In that respect the Bill delivers Maori more than the common law of itself could have provided.

Under the Bill, it is proposed that the High Court will determine those TCRs according to the ‘common law’. The key test will be one of ‘exclusivity’, which will always be qualified by the public rights recognised in the Bill (including navigation and reasonable recreational user). The test of ‘exclusivity’ will distinguish the territorial (TCR) jurisdiction of the High Court from the non-territorial (CRO) jurisdiction of the Maori Land Court. In clarifying that, the High Court will have to develop a legal test and in doing so it will probably combine factual use and occupation (the Canadian factual-basis test) and the continuity of Maori custom (the Australian normative-basis test). Under both tests the crucial date is that of Crown sovereignty (1840). This overseas case-law will be informative and its applicability flavoured by the Treaty of Waitangi. The High Court will consider including in the test an element of continuity of ‘traditional’ association with much riding on the view it takes of ‘tradition’. That continuity will have to have been ‘substantially uninterrupted.’ The continuous ownership and control of land fronting the sea would likely be a necessary but not sufficient condition for a TCR. The High Court may (or may not) set a standard for ‘exclusivity’ over and beyond that, bearing in mind the need to ensure that the TCR and CRO provisions have as much operative scope as possible.
The Maori Land Court, meanwhile, will determine non-territorial title by issuing CROs. Unlike the TCR jurisdiction (the ‘common law’), the Maori Land Court will determine the non-territorial bundle through a new highly-specific statutory jurisdiction that plainly blends the factual-basis and normative-basis tests of the other common law countries.

Just how the territorial (TCR) and non-territorial (CRO) aboriginal titles over the foreshore and seabed will co-habit remains to be seen. Much will depend upon the scope the High Court gives the territorial title provisions under the ‘common law’ and the interpretation of its non-territorial title inquiries by the Maori Land Court under the new statutory jurisdiction. In any event, clarification will require detailed forensic inquiries into each stretch of the coastline. It may also be that at law the various aboriginal titles have been extinguished. This will generate an historical redress claim outside the scope of the Bill, which is concerned with extant property rights. What the practical effect of a TCR or CRO will be remains unclear, particularly given that redress for the former is at the discretion of the Crown but probably subject to an exacting level of judicial review and high level of interim protection in the courts. This intervention would require courts to read the legislation as a property-rights mechanism and is not assured by the Bill as presently worded. It would come at the end of an arduous process of High Court finding and protracted but abortive ‘discussions’.

The inherent jurisdiction also includes actions against the Crown on its fiduciary duty to Maori. This is a separate aspect of the jurisdiction, a cause of action apart from aboriginal title. Aboriginal title protects extant rights whilst the fiduciary duty establishes standards of Crown accountability for its treatment of those rights. The Foreshore and Seabed Bill also puts that aspect of the inherent jurisdiction inside a statutory compass.

The Bill would establish complex machinery for the identification of what are at present highly inchoate Maori property rights over the foreshore and seabed, covering the full range from exclusive ownership to the stand-alone site-specific right. It pre-empts the process of legal development through the haphazard nature of litigation by substituting a statutory framework. The High Court will identify TCRs under a new jurisdiction that weaves ‘common law’ into a statutory framework leaving room for judicial interpretation of ‘exclusivity’. It gives a new and highly specific jurisdiction to the Maori Land Court (of a type noted as absent by the Court of Appeal in Ngati Apa).

**Detailed summary**

Common law aboriginal title operates to protect extant tribal property rights within an ever-refining set of principles defining the character and nature of Crown sovereignty. The Court of Appeal turned to those principles in Ngati Apa when (collectively) it held that the Crown’s sovereignty over the foreshore and seabed gave it an imperium (governance) that in principle did not preclude the continuance of the property interest (dominium) of Maori. Crown ownership of the foreshore and seabed was of a constitutional order attached to its sovereignty, but was still notionally ‘burdened’ by any unextinguished aboriginal title. The Court of Appeal indicated that that continuity could be recognised by the High Court applying those common law rules of aboriginal title (the ‘inherent jurisdiction’), or through the Maori Land Court applying its statutory jurisdiction to declare the status of land. It had not been extinguished by general or specific legislation declaring the Crown’s sovereign title over the foreshore and seabed and providing for its management. The Court warned that any such continuity was also subject to Maori establishing the appropriate factual basis
to sustain a property interest. Since the case involved the claim to customary title under the statutory regime of Te Ture Whenua Maori Act 1993, the establishment of that factual basis was a matter for the Maori Land Court.

Common law aboriginal title recognises the enforceability in the courts of the extant traditional property rights of tribal peoples that have not been extinguished at law. Those extant rights are a ‘burden’ upon the Crown’s paramount title to land as sovereign. In keeping with the wider development of public law in the last quarter-century, the doctrine replaces the old ‘moral’ trust with a ‘legal’ one. The continuity of tribal property rights is modified by the rule that those property rights can only be extinguished by the Crown (by sale, cession, prerogative or statutory process).

The Foreshore and Seabed Bill recognises the possibility of exclusive Maori ownership of certain stretches of the coast. This goes beyond what the inherent jurisdiction of itself would probably have delivered (looking at the overseas case-law) and resolves the preliminary recognition question in the affirmative. This seems to me more a response to the history of the statutory jurisdiction and the longstanding and ongoing attempts by Maori to have such rights recognised by the Maori Land Court than the outcome of the inherent jurisdiction itself.

Inevitably and as things stand at present, under both the inherent and statutory jurisdictions, there will be set a legal basis and standard of proof for Maori property rights over the foreshore and seabed. At present the standard for the Maori Land Court under its statutory jurisdiction in Te Ture Whenua Maori Act 1993 is tikanga Maori. Under the inherent jurisdiction New Zealand courts would be unlikely to countenance an approach that distinguished (territorial) title from (non-territorial) rights in the Canadian manner. They could take a factual-basis (Canadian) or normative-basis (Australian) approach. The aboriginal title would be treated as having arisen at the time of Crown sovereignty (i.e. 1840). The Australian normative-basis approach requires a continuous ‘traditional’ association from sovereignty to the present-day through customary law and in the identity of the group. Similarly the Canadian jurisprudence has acted upon a requirement of continuous occupation, although this element has yet to be authoritatively set by the Supreme Court. The Foreshore and Seabed Bill expressly sets out such requirements in the specification of the CRO jurisdiction of the Maori Land Court. Subject to the Canadian or Australian option, it is probable the High Court would also apply such requirements in elaborating the inherent jurisdiction outside of any statutory framework. The prospective statutory framework of the Foreshore and Seabed Bill for TCRs will probably result in the High Court adopting a standard of proof that (like the CRO jurisdiction) blends the Canadian and Australian.

Common law aboriginal title encompasses the full property-rights spectrum from exclusive ownership (or territorial title) through non-exclusive use rights (or non-territorial title) which may comprise a large bundle of discrete rights through to the stand-alone, site-specific right. The dividing line between the two forms of title, territorial and non-territorial, is the key notion of ‘exclusivity’, that is the right to exclude others and control access. At present New Zealand courts elaborating the inherent jurisdiction would probably take the ‘bundle of rights’ approach to Maori property interests in the foreshore and seabed, although it is clear from Ngati Apa that they would also see the Maori Land Court’s statutory jurisdiction as permitting exclusive ownership (that is, vesting orders)
where a high threshold of suitable evidence is crossed. To repeat, the Foreshore and Seabed Bill’s recognition of possible exclusive ownership rights (TCRs) is a response to the history of the statutory jurisdiction and Maori claims upon it, rather than an outcome pressed by the common law itself.

The notion of ‘exclusivity’ is key and brings one back to the Canadian and Australian approaches towards aboriginal title. Even if a ‘bold’ New Zealand court allowed exclusive ownership of the foreshore and seabed under the inherent jurisdiction, this notion would have to be clarified. The same applies to the TCR jurisdiction under the Foreshore and Seabed Bill, in that it is the concept of ‘exclusivity’ that separates the High Court’s TCR jurisdiction from the Maori Land Court’s CRO jurisdiction. Under the Bill, ‘exclusivity’ could be determined by the High Court according to either the Canadian factual-basis title test or the Australian normative-basis one. It is more likely that the words used in clauses 28 and 31 (“exclusive occupation and possession”) will result in an approach that blends both. This would bring consistency between the respective TCR and CRO jurisdictions, ensuring that the High Court and Maori Land Court operate to harmonious criteria.

Under both the Canadian and Australian approaches as well as a synthesised approach, continuous and continued ownership of contiguous land would surely be set by the High Court as a necessary though perhaps not a sufficient condition for a TCR. The Committee should consider making this aspect clearer, not least to give a consistent bottom-line for court-set standards (clause 29) and negotiations (clause 112). The High Court may set a higher probative threshold beyond contiguous ownership.

At present and as the Court of Appeal noted in Ngati Apa, the Maori Land Court cannot (and has been unable since 1909 to) make an appropriate order for non-territorial title such as that made by Chief Judge Fenton in the Kuwaeranga case (1870). The Foreshore and Seabed Bill addresses that shortcoming by establishing the CRO jurisdiction. From 1909 to 1993, the Maori Land Court was obliged to issue a freehold or vesting order where customary title was found; however, after 1993, a vesting order was no longer an automatic outcome of a status declaration. The disconnection of the vesting order and status declaration was an unwitting consequence of the 1993 reform. This means that under the present law the only way in which non-territorial Maori rights over the foreshore and seabed can be accommodated is as ‘bundles of right’ under the inherent jurisdiction of the High Court.

Extinguishment is a question of law not fact. Though exercised in point of fact, it is possible Maori rights over the foreshore and seabed have been extinguished at law by cession, statute or executive act. As with matters of proof, the legal regimes affecting each stretch of coastline will need exploration to see if the ‘clear and plain intention’ to extinguish is evident. The High Court of Australia has developed an ‘inconsistency of incidents’ test that New Zealand courts will need to consider in relation to the TCR jurisdiction. The Bill sets out a highly specific statutory test for extinguishment of non-territorial aboriginal title, that is, for those situations where the Maori Land Court is operating under the CRO jurisdiction.

The regulation of an aboriginal title is not extinguishment. There comes an obligation for those managing land subject to a subsisting aboriginal title to consult with the right-holders. This obligation is additional to any procedures established by environmental
management statutes. It stems from the fiduciary duty of the Crown to those holding under aboriginal title. This duty is a separate though closely connected cause of action - aboriginal title protects extant use rights, whilst the fiduciary duty sets standards for the Crown’s treatment of those rights. The obligation to compensate upon extinguishment comes from the fiduciary duty rather than the title itself. The conversion of the common law aboriginal title into a statutory and notated form would probably not be regarded as obliging compensation.

Although there is no automatic redress for a TCR finding, judicial review will still lie where the Crown refuses relief. Mere invocation of supervening public interest will not avail the Crown, given that the legislation is dealing with property rights. The Crown will have to demonstrate some public interest beyond that already protected by the Bill (navigation, recreation) as to justify refusal of relief. Judicial review may well have bite here, although it will come at a late stage. The Committee should consider strengthening the redress provision and lessening the interpretive onus on the courts by expressly requiring the Crown to demonstrate a ‘supervening public interest’ in considering redress.
Appendix B

Committee procedure
The Foreshore and Seabed Bill was introduced to the House on 8 April 2004 and referred to the committee on 6 May 2004. The closing date for submissions was 12 July 2004. We received and considered 3,946 submissions from interested groups and individuals. We heard 244 submissions in meetings held in Auckland, Wellington, and Christchurch.

We received advice from the Department of the Prime Minister and Cabinet, the Ministry of Justice, and an independent specialist adviser, Timothy Castle.

We also received assistance from Professor Paul McHugh, in his submission and briefing to the committee.

Committee members
Russell Fairbrother (Chairperson)
Hon Georgina te Heuheu (Deputy Chairperson) (replaced by Gerry Brownlee)
Larry Baldock
Phil Heatley (replaced by Dr Wayne Mapp)
Dail Jones
Nanaia Mahuta (replaced by Mita Ririnui)
Mahara Okeroa
Hon Dover Samuels
Hon Ken Shirley
Metiria Turei

Non-voting members
Hon Matt Robson
Tariana Turia