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OFFICE OF THE DEPUTY PRIME MINISTER

CABINET

FORESHORE AND SEABED: REPORT BY THE WAITANGI TRIBUNAL ON GOVERNMENT'S FRAMEWORK

Proposal

1 This paper reports on the findings in the Waitangi Tribunal's Report on the government's framework on the foreshore and seabed. It also outlines a proposed government response to the Tribunal's report.

Executive Summary

2 The Tribunal's report notes a number of points of common ground with the government's framework. It explicitly accepts the government's power and responsibility to determine policy on the foreshore and seabed. It largely endorses the government's understanding of the nature of customary rights that would be likely to be found at common law in New Zealand, if that jurisprudence were left to develop over time. It agrees that the tool kit available to the Maori Land Court to identify and recognise customary rights needs to be revised. It also notes a number of points of common ground between Maori and the government's framework on the foreshore and seabed (importance of public access, no alienation, the government as regulator, the need to improve the current regulatory regime for Maori, and the importance of protecting existing customary rights).

3 Despite this common ground, the issues in the Report demonstrate that the Tribunal and the government start at different points when considering the foreshore and seabed issues. The Tribunal is thus able to come to a different conclusion where it can see no real problem with allowing the issues to take their own course through the courts, considers that significant property rights will potentially be lost under the government's framework, and that there is no real benefit from the government's framework in return.

4 The government foresees untenable instability in the status quo, the likelihood of only moderate property rights at common law, and that the customary rights identified and recognised by the Maori Land Court will have strong protection. In addition the government will engage with renewed commitment to ensuring effective participation by Maori in decision-making processes over the coastal marine area.

5 Overall the Tribunal's report is a thoughtful contribution to consideration of the issues and it is appreciated that the Tribunal provided the Report with urgency in order for it to be an input into the final stages of development of the foreshore and seabed legislation.

6 My response to the Tribunal has been at a broad level thus far. Specific responses are being considered by the ad-hoc Ministers group and are reflected in a forthcoming paper to the Cabinet POL Committee on the details of foreshore and seabed policy. There will be further consideration of the Report in relation to foreshore and seabed policy as the legislation is developed.

Background

7 On 11 August 2003, Cabinet [CAB Min (03) 27/24 refers] agreed to a set of principles that would inform the preparation of a government paper for public consultation. The government released its proposals for consultation on 18 August 2003 and public submissions on the document closed on 3 October 2003.

8 Subsequent to the release of the government proposal for consultation, the Tribunal received an application for an urgent hearing into the government's policy. The Tribunal decided on 12 November 2003 to hold an urgent hearing into the government's proposals in late January 2004 to enable the report to be available to Ministers before the draft legislation to give effect to policy decisions on foreshore and seabed is introduced into the House.

9 Over six days (20-23 and 28-29 January) the Waitangi Tribunal heard evidence from a range of submitters including the Crown. On 8 March 2004, the Tribunal's report on the government's framework on foreshore and seabed was released.

Key Issues Raised in Waitangi Tribunal's Report

Common ground

10 The Tribunal considers that there are a number of points of common ground with the government's framework, namely:

10.1 The Tribunal explicitly accepts that Article 1 of the Treaty gives the government the power and responsibility to determine policy on the foreshore and seabed. The Tribunal does however note that obligations under articles 2 and 3 should be given due regard in the way the Government discharges its responsibility.

10.2 The Tribunal also largely accepts the evidence from Dr Paul McHugh on the likely evolution of the common law doctrine of aboriginal rights in the New Zealand context. That is, the Tribunal accepts that the doctrine is a protectionist one that seeks to preserve and protect any rights that have continued in existence since 1840, and that customary rights are collective and inalienable. The Tribunal also accepts that the courts in New Zealand would be likely to follow the "bundle of rights" approach to exploring customary rights in the foreshore and seabed, rather than using a starting point of some kind of "qualified ownership" . Implicit in this conclusion is an acceptance that the common law of New Zealand would not support an argument for full fee simple ownership of the foreshore and seabed.

10.3 The Tribunal also makes comments throughout the report on the extensive research and hearings that would be likely to be required for the Māori Land Court to work through the ownership claims. These comments support the Government's assumption that it would take many years to work through the claims as filed, and therefore to conclude the uncertainty about the extent of any private ownership;

10.4 the toolkit available to the Maori Land Court to identify and recognise customary rights needs to be revised.

11 The Tribunal also notes the common ground between Māori and the government's framework, namely:

11.1 the importance of public access to all New Zealanders;

11.2 the need to ensure that foreshore and seabed is not able to be alienated;

11.3 the ability of the Government to regulate the coastal marine area for the benefit of all;

11.4 the need to improve existing regulatory frameworks in terms of their effectiveness for Māori; and

11.5 the importance of recognising and protecting customary rights in the foreshore and seabed that do exist.

Key differences

12 The key differences between the government and the Tribunal are as follows:

Issue	Government View	Tribunal View
12.1 Assessment of the status quo	The potential for significant instability arises because widespread challenges to ownership would effectively prevent the ongoing operation of the Resource Management Act until they are resolved. This potential is already starting to eventuate (e.g. Pakiri sands injunction proceedings) and warrants action.	There is no significant instability. The consequences of a finding of customary ownership can be worked out over time. Does not discuss how the Resource Management Act operates in the meantime while ownership is determined.

12.2 The extent of likely customary rights and full ownership rights	The government considers it is only necessary to look at the common law, as the possibility of rights under Te Ture Whenua Māori Act is unexpected and does not represent what was widely understood to be the law of New Zealand. Under common law, there would be some customary use rights, but full ownership rights will be extremely rare if they still exist at all.	The Waitangi Tribunal report traverses rights that it considers existed in 1840, rights that may still exist in common law and rights that might now be able to be established under Te Ture Whenua Maori Act if the Ngati Apa decision on jurisdiction was left uncorrected. It does not clearly differentiate between this range of rights when it assesses the government's framework, but it seems as if it compares the policies with this full range of past and potential claims. There will be a reasonable number of rights found, and these will extend to full ownership. But hard to predict with any certainty at this stage.
12.3 The nature of the rights that the policy proposes	The customary (use) rights are property rights. Other activities that would have a significant impact on customary rights will not be able to be authorised. The rights, once formally recognised, will not be taken without due process and appropriate redress.	The nature of the rights to be created is uncertain, but the inference is that they are not property rights and that there will not be effective protection of them.
12.4 The credibility of the commitment to improved participation	Improved participation is the key to effective protection of Māori interests and recognition of mana. In this policy the Government recognises a responsibility to work to make that a reality at the local level, and has signaled an intention to put significant resource (time and money) into addressing these issues.	The Tribunal discounts the regional working groups as so difficult that they are unlikely to produce any meaningful improvement. It also sees any effort to improve existing RMA systems as a long overdue response to repeated past Tribunal criticisms, and therefore as no balance for what it sees as the expropriation in this policy.

The Waitangi Tribunal's Findings and Recommendations

13 The following table summarises the Tribunal's conclusions and provides comment on each point.

Tribunal Finding	Comment
13.1 The Government has breached article 2 by assuming ownership without good reason	This is a finding of historical breach by the Government, unrelated to the current framework.
13.2 The Government has breached article 2 in this policy by not allowing the court to declare any rights according to law.	This finding effectively is about the ability to go to the Māori Land Court now. It effectively disagrees with the Government's view that the Te Ture Whenua Māori Act coverage of the foreshore is an accident that should be corrected. It assumes that if it would be possible to make a case under Te Ture Whenua Māori Act, then there are rights there that are being expropriated by this step (notwithstanding that there was no intention to create such rights under this Act).
13.3 There is no Treaty based justification for overriding the article 2 rights	This finding relates to the Tribunal's view that the level of uncertainty created by the Ngati Apa decision is manageable.
13.4 The policy breaches article 3 because it takes away the property rights of Māori only	This finding depends on a conclusion that there are property rights being taken away. The government contends that any common law customary rights will be effectively translated into the new system and that it is not appropriate to consider any rights that might eventuate under Te Ture Whenua Māori Act as vested rights, given that the coverage is accidental. The Government therefore maintains that it is not taking rights.
13.5 The policy breaches article 3 because it removes the protection of the rule of law from Māori, by taking away the ability to go to Court on issues of property rights.	The government maintains that removing the unintended Māori Land Court jurisdiction is an appropriate correction of an error, rather than a constitutional issue. Replacing the High Court common law jurisdiction with a specialist system in the Māori Land Court is also an appropriate step to enable more effective legal recognition and protection. Indigenous rights are a method of legal protection for indigenous people – in New Zealand, Māori. There is no equivalent legal issue for others in New Zealand.

13.6 The policy breaches the Treaty principles of partnership and reciprocity, active protection, equity and options, and redress	These criticisms all come down to an assessment of whether the Government's actions are reasonable in the circumstances. Given the fundamental differences in the Tribunal's view of the problem with the status quo and the protective effect of the policy, it is not surprising that they come to different conclusions on what is a reasonable and appropriate government response.
13.7 The policy creates prejudice, as Māori citizenship is devalued, the powerlessness of Māori will be heightened through ongoing legal uncertainty, and mana and property rights will be lost	These conclusions are again based on a fundamentally different assessment of the nature of the current problem and the protective effect of the policy.
13.8 Recommendation that the government revisit the question of whether its policy is the only or best means of ensuring that the values underlying the four principles are upheld	The government has considered a wide range of options in the course of developing its policy. It has not yet finalised the legislation and will give consideration to the Tribunal's comments.
13.9 Recommendation that the government consider any of the other options put forward, and in particular consider letting the legal process run.	The government has considered a wide range of options in the course of developing its policy. It has not yet finalised the legislation and will give consideration to the Tribunal's comments. It must be noted that the Tribunal has not understood the basic concern with the uncertainty of the legal status quo, and therefore it is more sanguine about the possibility of letting the legal process run for a time.
13.10 Recommendation that, if the government does proceed, then it should compensate for the removal of property rights	As already outlined, the government does not consider that the policy removes property rights.

Options for way forward suggested by the Waitangi Tribunal

14 The following table summarises the options put forward by the Tribunal and provides comment on each point.

Tribunal Option	Comment
14.1 *1. The longer conversation*: The Tribunal's preferred option is to begin again and work out a solution with Maori. The Tribunal indicates that if necessary a holding pattern could be legislated while the bigger picture is sorted out. It also suggests that this conversation might include settlement discussions, perhaps involving aquaculture and mineral rights.	The main drawback with this option is delay (although see the comment about the possibility of legislating a holding pattern) and about who the Crown should talk with. If the Tribunal considers that the regional working groups will fail because of the inability to determine representation, then it is hard to see how this option could be viable.
14.2 *2. Do nothing*: The Tribunal considers that the implications of this option are as set out in chapter 4 of the Tribunal's report . In summary, in their view the result over time would be Maori gaining a significant range of rights from the MLC, but few significant rights from the High Court.	The Tribunal has heavily discounted the effects of uncertainty while legal rights are worked out through the courts. This option leaves the possibility of fee simple title available, which is inconsistent with longstanding government policy. It also does not address the probable need for the Court to have a wider range of tools available to recognise the likely spectrum of rights.
14.3 *3. Provide for access and inalienability:* The Tribunal suggests that a least interventionist policy could be to allow the MLC jurisdiction to continue but limiting its remedies so that public access could only be limited in exceptional cases. It could also be made clear in law that titles could not be alienated.	This option in general raises the same problems as option 2. It does, however, illustrate that there is common ground on the government's basic principles in so far as they are concerned with access and inalienability.

Tribunal Option	Comment
14.4 *4. Improve the court's tool kit* The main example of a useful change is giving the MLC the ability to recognise rights other than by creating a fee simple title.	This option matches much of the thinking behind the customary rights register in the Crown's policy, but it would leave title as a possibility, therefore raising the same problems as option 2.
14.5 *5. Protect the mana:* This option is based on the mechanism used at Orakei Reserve, where title is vested in Ngati Whatua and both the Crown and Maori have representation on the administering body that controls and manages the area. There is also a legal right of public access and a legal limit on alienation.	This option depends on case by case negotiation to suit the circumstances, and is also resource intensive for the Crown. Achieving it by case by case negotiation would also take time, raising uncertainty problems again. The key benefit of this option from a Treaty perspective is that it is achieved by agreement rather than unilaterally imposed. Yet achieving it by negotiation would take a great deal of time, thus raising concerns about uncertainty and delay during the negotiations.
14.6 *6. Be consistent:* This option is based on the models used for Lake Taupo and Te Arawa lakes, which are similar to that used at Orakei.	See the comments on option 5. It should also be noted that the arrangements for Lake Taupo are significantly different from those that have been negotiated for the Te Arawa lakes and for Lake Ellesmere. This highlights that it is not a "one size fits all" model that can be readily adapted for the overall coastline.

Summary of the Waitangi Tribunal's Report

15 A summary of each chapter of the Tribunal's report is attached as Appendix 1.

Comment

16 The issues outlined in paragraphs 12-14 demonstrate that the Tribunal and the government start at different points when considering the foreshore and seabed issue. Therefore the Tribunal comes to a different conclusion where it can see no real problem with the status quo, considers that significant property rights are being lost under the government's framework, and that there is no real benefit from the government's framework in return. The Tribunal therefore concludes that the government's framework is a significant breach of the Treaty.

17 The government, however, sees untenable instability in the status quo, the likelihood of only moderate property rights, and that those customary rights identified and recognised by the Māori Land Court will have strong protection, with the government engaging with a renewed commitment to ensuring effective participation by Māori in decision-making processes concerning the coastal marine area. The government therefore considers the framework is an appropriate response, notwithstanding Māori concerns.

18 The fundamental point that the Tribunal misses is the effect of the uncertainty about ownership on the ongoing operation of the Resource Management Act processes for authorising activity in the coastal marine area. In sum,

18.1 The Resource Management Act is drafted on an assumption that the Government owns the vast majority of the coastal marine area and can therefore control all activity in it.

18.2 A challenge to ownership calls into question whether the regional council can proceed to issue coastal permits, and whether the Minister of Conservation can authorise reclamations.

18.3 Over 50 applications for customary ownership have now been lodged, covering a wide area of coastline.

18.4 Already at least one group has filed proceedings seeking an injunction to restrain consent authorities from approving new coastal permits for sand extraction in Pakiri, on the grounds that the group holds customary and proprietary rights over the area. It is quite possible for similar challenges to be brought elsewhere.

18.5 The government's concern is that the process for resolving the ownership issue through the Māori Land Court will take many years. (The Tribunal's comments on the amount of detailed research that will be required effectively support this view.) While the questions are unresolved, it may not be possible to continue to authorise activities through the Resource Management Act.

18.6 It is the potential for instability while those ownership questions are worked through that is the primary concern. The questions that would arise about how private ownership would fit with the general Resource Management Act regime also create uncertainty, but this is a secondary concern.

18.7 The Tribunal has therefore fundamentally misunderstood the nature of the uncertainty that drives the Government's concern and the conclusion that legislative action must be taken.

19 The Tribunal also does not clearly distinguish between actions that might amount to a historical breach of the Treaty and rights that are likely to still be extant and therefore could be found to be a contemporary breach if removed.

20 Fundamentally, this distinction comes down to an assessment of whether the Government's past actions, that presumed no common law customary/aboriginal title existed and proceeded to control and manage the foreshore and seabed as if the Government owned it, resulted in an extinguishment of the common law customary/aboriginal title. Depending on the facts, there is a possibility that in some cases there might be found to be a historical breach of the Treaty. While the Tribunal identifies the importance of the question about what has or has not been extinguished in the past, it does not attempt to answer the question. The findings of the Tribunal about Treaty breaches therefore conflate the issues.

21 In addition, an underlying theme of the Tribunal's report relates to the process that has been followed with the development of the government's framework as well as its content. The Tribunal considers that the process that has been followed is fundamentally deficient and therefore relevant to the overall consistency with Treaty principles and the maintenance of the Treaty relationship.

22 The government considers however, that it has engaged in an extensive consultation process from 18 August – 3 October 2003 and entered into further engagement and dialogue with Māori and other sector/interest groups during November and early December 2003 [CBC Min (03) 10/1 refers]. The government also considers that there will be further opportunities for all New Zealanders to comment on the policy once a draft Bill is before a Select Committee for its consideration. It should be noted however, that the Waitangi Tribunal specifically did not inquire into the process of developing the policies. It has therefore made these comments without hearing argument or evidence from parties on the issues.

23 It is possible that the Tribunal's findings would carry some weight as to questions of fact in international fora such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. On issues of law, it is considered that the Tribunal's findings are less likely to be persuasive. However, these international fora may comment on any government action:

23.1 that is not seen to respect the independence and status of the Tribunal;

23.2 appears to reject the Tribunal's findings without reason.

The Government's Foreshore and Seabed Policy

24 The Ad Hoc Ministers Group will be reporting to Cabinet POL Committee on Wednesday on its decisions in relation to the foreshore and seabed proposal. The Waitangi Tribunal's finding and recommendations have been considered as an input into those decisions. There will be further consideration of the Report as the legislation is developed.

Proposed Government Response

25 It is recommended that the government response on the Waitangi Tribunal's report outline that:

25.1 the government and the Tribunal clearly have very different starting points about the nature of the problem:

25.1.1. the *Ngati Apa* decision that the Māori Land Court has the jurisdiction to determine whether foreshore and seabed land is Māori customary land has created the *unintended* possibility that Te Ture Whenua Māori Act might provide an additional route for private ownership of the foreshore and seabed. This form of ownership was not anticipated by, and is therefore not accommodated in, the other statutes that control activity in the coastal marine area, in particular the Resource Management Act. On that basis, as parliament is sovereign it is able to amend legislation and replace statutory rights with other statutory rights;

25.1.2. the Tribunal report does not identify and address the key uncertainty that the government considers drives the need for actions.

25.2 the Tribunal has not understood key aspects of the government's framework, and in particular the intention to give recognised customary rights the status and protection of "property rights";

25.3 the Tribunal effectively endorses the government's understanding of the nature of the customary rights that would be likely to be found at common law in New Zealand, if that jurisprudence were left to develop over time;

25.4 the Tribunal report is a thoughtful contribution to the overall process, and that Ministers appreciate that the Tribunal has provided a report with urgency in order to enable the report to be considered in the final stages of the development of the legislation;

25.5 it is heartening that the Waitangi Tribunal:

25.5.1. accepts that what it calls the toolkit available to the Maori Land Court is inadequate to recognise customary rights short of granting customary land status. The government's framework also recognises this;

25.5.2. has produced some important analysis on tikanga and the general theory of customary rights. The government considers that a more balanced view of its proposals would confirm that they are consistent with the Waitangi Tribunal's analysis;

25.6 it would not be useful to debate the many points of detail in the Tribunal's report, as it will be carefully considered in the course of the current ongoing work to complete the government's legislation.

Consultation

26 The Department of the Prime Minister and Cabinet consulted the following departments in the preparation of this paper: Te Puni Kōkiri, Ministry of Justice, Department of Conservation, Ministry of Fisheries, Ministry for the Environment, The Treasury, Department of Internal Affairs (Local Government Policy) and the Crown Law Office.

Financial Implications

27 Financial implications are noted in the forthcoming Cabinet paper to POL on the decision of Ad Hoc Ministers group on foreshore and seabed policy.

Human Rights / Bill of Rights

28 Human rights and other issues raised by the Waitangi Tribunal will be given further consideration as the legislation is finalized and while it is assessed for compliance with the Bill of Rights Act.

Legislative Implications

29 The government framework discussed in this paper is to be implemented in the Foreshore and Seabed Bill, which has priority 2 on the 2004 Legislation Programme.

Regulatory Impact and Compliance Cost Statement

30 This paper does not require a regulatory impact and compliance cost statement.

Treaty Implications

31 The government framework that is discussed in this paper is designed to provide an effective mechanism for the protection of Māori customary rights in the foreshore and seabed which are affirmed by the Treaty of Waitangi. The government's framework also integrates those rights with the more general regulatory framework for managing the foreshore and seabed which is an important national resource.

32 The government considers that the proposals set out in its framework will enable a reasonable balance to be struck between the need to clarify the law in this area whilst at the same time making provision for the recognition and protection of Māori customary rights.

Publicity

33 I have already made an initial response to the Waitangi Tribunal Report. Any additional response will be done in conjunction with further communications surrounding the Foreshore and Seabed legislation.

Recommendations

34 It is recommended that Cabinet:

1. **note** the government received the report entitled 'Report on the Crown's Foreshore and Seabed Policy' from the Waitangi Tribunal on Friday 5 March 2004

2. **note** the key findings and recommendations of the Waitangi Tribunal as summarised in this report

3. **note** that the Waitangi Tribunal considers that the government's framework significantly breaches the Treaty of Waitangi;

4. **agree** that the governments response at this stage be kept at a broad level and cover the following points:

   4.1 the government and the Tribunal clearly have very different starting points about the nature of the problem:

      4.1.1 the *Ngati Apa* decision has created the *unintended* possibility that the Te Ture Whenua Māori Act might provide an additional route for private ownership of the foreshore and seabed. Parliament is sovereign and it is able to amend legislation and replace statutory rights with other statutory rights;

      4.1.2 the Tribunal report does not identify and address the key uncertainty that the government considers drives the need for actions.

   4.2 the Tribunal has not understood key aspects of the government's framework, and in particular the intention to give recognised customary rights the status and protection of "property rights";

   4.3 the Tribunal effectively endorses the government's understanding of the nature of the customary rights that would be likely to be found at common law in New Zealand, if that jurisprudence were left to develop over time;

   4.4 the Tribunal report is a thoughtful contribution to the overall process, and that Ministers appreciate that the Tribunal has provided a report with urgency in order to enable the report to be considered in the final stages of the development of the legislation;

   4.5 it would not be useful to debate the many points of detail in the Tribunal's report, as it will be carefully considered in the course of the current ongoing work to complete the government's legislation.

5. **note** that the Waitangi Tribunal findings and recommendations have been taken into account in the decisions of Ad Hoc Ministers and reported in the forthcoming Cabinet POL Paper and will be taken into account in any further deliberations by Ministers prior to the Bill being introduced to the House.

6. **note** that the Deputy Prime Minister has already made an initial response to the Waitangi Tribunal Report and that any additional response will be done in conjunction with further communications surrounding the Foreshore and Seabed legislation.

Hon Dr Michael Cullen
Deputy Prime Minister

APPENDIX: CHAPTER BY CHAPTER ANALYSIS OF THE REPORT

Introduction

This chapter sets out the process and context for the Tribunal hearing and report. Points worth noting from the introduction are:

- The Tribunal acknowledges that its jurisdiction is recommendatory only, and that it is ultimately for the government to decide what course to follow.
- The difference between vesting in the Crown and vesting in the people of New Zealand is dismissed in a footnote, as being symbolic only and with no legal implications.
- The Tribunal goes beyond identifying what it considers are fundamental flaws in the policy from a Treaty perspective. It also comments that, in its view, the policy fails in terms of wider norms of domestic and international law, including the rule of law and the principles of fairness and non-discrimination.

Chapter 1: Tikanga

Summary

This chapter discusses the Māori world view and outlines that there is no matter that does not have tikanga attached to it. In particular it points out that:

- There is a indivisibility of the natural world, all elements flow together and are seen by Māori as one;
- There is a oneness of the spiritual world and physical world;
- There is a mutuality in relationship between the people and the land (from the mountain to the sea) and that mutuality imposes rights and obligations on Māori;
- The connection of the people with the land through whakapapa (reciting relationships with people and land), korero (discussing those relationships) and the process of naming those places is central to how Māori relate to each other and their world (and future generations);
- There is an endless cycle of reciprocity, particularly seen in the example of mana and manaakitanga (nurturing relationships, looking after people, and being very careful of how people are treated, and expecting the same care in return). This is seen as maintaining the balance between communities and between people and the natural world.

Comment

It appears that the underlying rationale for the inclusion of this chapter in the report is to demonstrate:

- the strong physical and spiritual connections that Māori have with the foreshore and seabed, and which are at stake in this policy debate;
- that the 'wet land' (foreshore and seabed) cannot, from a Māori perspective, be disassociated from the 'dry land' (land above mean high water springs).

- that the government's framework which separates rights associated with 'mana and ancestral connection' from rights associated with 'activities', from a Māori perspective, is inappropriate. The Māori perspective is that all rights associated with 'activities' derives from having a spiritual and physical connection to that place and that this connection imposes rights (ability to undertake activities) and obligations (ability to control use, access etc).

The chapter also demonstrates the depth of the Maori connection with the foreshore and seabed. It sets up the foundation for the Tribunal's later conclusion that, by applying a tikanga test, the Maori Land Court would find a significant range of rights in existence.

Chapter 2: From the Treaty to *Marlborough Sounds*

Summary

This chapter deals with an historical background of the situation. It outlines that:

- the Treaty guaranteed and protected that all 'land' in New Zealand at 1840 was generally owned by Māori and that the Crown agrees with this approach;
- the Crown policy for the last 160 years has been that the foreshore and seabed and navigable waterways were not owned by Māori but should and did belong to the Crown;
- Māori 'owned' the foreshore and seabed as they exercised the authority of tino rangatiratanga, under tikanga Māori which included:
  - A spiritual and physical dimension;
  - Guardianship of the resource;
  - A dimension relating to use, which is could be seen as equivalent to use-rights under English law;
  - Authority and, where appropriate, the sharing of the bounty from the sea;
  - Control of access and use.

The chapter indicates that this authority, protected by the Treaty, encompassed all of the aspects noted above and more; it was not merely a right to fish.

The chapter indicates that the Crown's assumption of ownership over the foreshore and seabed, came through the following ways:

- legislation (e.g. Harbours Act 1978, which the Tribunal describes as having been passed following the discovery of gold in the foreshore around Thames);
- assuming that it owned it under English common law;
- by issuing grants; and
- the introduction of regulatory regimes to manage the coastal marine area and the granting of private rights under those regimes.

As a result, the Tribunal creates a picture of a gradual infringement of Māori authority, which it concludes equates to a breach of the Treaty.

Comment

It appears that the underlying rationale for the inclusion of this chapter in the report is to demonstrate that:

- Māori exercised rangatiratanga over the foreshore and seabed at 1840 and that the use, management and authority was sourced in tikanga Māori;
- the Crown policy for the last 160 years that the foreshore and seabed and navigable waterways were not owned by Māori but should and did belong to the Crown is flawed, and did not adequately take account of Article 2 of the Treaty of Waitangi;
- for the past 160 years Māori have outlined their concerns about the gradual infringement of their authority over the coastal marine area through petitions, representations to Parliament and legal action, but that these have generally gone unnoticed or been ignored.

Other points to note

The report indicates that there is a higher onus on the Crown to give due regard to the Treaty relationship when Māori have lost almost all land and resources as a result of Crown policies. The report cites a Privy Council case that, "if the vulnerable state of a taonga can be attributed to past breaches of its obligations by the Crown, this would, 'far from reducing, increase the Crown's responsibility'". (See page 33)

Comment:
The above is included in the report to enable the Tribunal to conclude that the government's framework is untenable given that Māori have lost almost all land and resources and the framework has been developed to expropriate Māori 'property' rights. That analysis is based however, on the rationale that Māori 'property' rights automatically arise in the foreshore and seabed and continue to exist today. It is also used as a mechanism to demonstrate that the government has continually breached the Treaty of Waitangi, in relation to issues concerning the coastal marine area and that this provides a platform for suggesting that the government is not acting in good faith now as it develops its framework for the future.

The Waitangi Tribunal explicitly draws this reasoning from its earlier report on Petroleum. The government has already decided, when it considered its response to that report, that it did not agree with this reasoning.

Chapter 3: The Courts

Overall summary and comment

In this chapter the Tribunal sets out its assessment of how the jurisdiction of the High Court and the Maori Land Court would each operate if the law was not changed. It does so in order to assess the impact of the Crown's policy. The following comment is significant:

> Only by making an assessment of what the [Maori Land] Court might or might not– and also, can and cannot – deliver to Maori in terms of rights to the foreshore and seabed, can we make a comparison with what the Government's policy will deliver. We must make that comparison in order to determine whether the policy breaches the Treaty, and prejudices Maori. (p 61)

This comment shows a fundamental difference from the Crown's approach.

- The Tribunal , as a result of the analysis in this chapter, sets up the status quo as including potentially significant rights obtained under Te Ture Whenua Maori Act (TTWMA). It then assesses the policy against that view of the status quo and finds it wanting.
- The Crown maintains that the sudden appearance of the TTWMA jurisdiction is no more than a legal mistake that must be corrected. The rights that might be available under this route should be discounted as no more than a 'windfall' gain. The Crown compares the proposed policy with the common law rights that might be obtained in the High Court and concludes that the rights able to be obtained under the policy are the same if not better.

The different comparison, and the focus on what the policy delivers to Maori, also illustrates the Tribunal's merging of the historical context and the current policy. Fundamentally, the Tribunal finds 164 years of Treaty breach in relation to the foreshore and seabed and finds that this policy is an inadequate Crown response to that history. The Crown however does not seek in this policy to redress historical grievances. It seeks only to preserve and protect what rights might still exist at common law – that is, in the High Court.

From that standpoint, the Tribunal's analysis in this chapter supports parts of the Crown's reasoning, as it endorses the view that only relatively limited rights would be likely to be declared through the High Court. These might sometimes include an element of exclusive occupancy, but they would never amount to full ownership.

Detailed summary and comment on findings

Tribunal conclusion	Comment
High Court jurisdiction	
The circumstances in which the Court would exercise its discretionary jurisdiction are unknown but might be limited by the availability of an alternative remedy in the Maori Land Court.	This comment merely notes that if both jurisdictions were left to run, the High Court might defer to the specialist jurisdiction.
A High Court declaration, of itself, is not legally enforceable but it could well provide the declared customary right-holders with leverage for their position in a range of disputes.	The conclusion may understate the effect of a High Court declaration of existence of legal rights. Once declared to exist, it could be expected that these rights would have significance under the RMA, for example.
A declaration coupled with a trust of the customary land could be a convenient means of implementing the right-holders' obligation to protect the land.	In the text, the Tribunal notes that a trust would often render the rights incapable of being alienated.
It is more likely that the New Zealand High Court, and the courts above it, would adopt the 'bundle of rights' approach of the High Court of Australia in *Yarmirr* than hold that customary rights in the foreshore and seabed can amount to 'qualified ownership', that is, full ownership qualified only by the public rights of navigation and fishing.	In this conclusion, the Tribunal accepts the Crown argument and McHugh evidence that it is a fundamental principle of the common law that full ownership of the seabed is not possible. That principle is a limit on the sovereignty of the Crown itself. It follows that the Crown cannot grant more than it has, and so it is not in general possible for there to be a grant of full ownership in the seabed.
While the New Zealand High Court, when determining the evidence that is needed to prove customary rights, would be influenced by the Treaty of Waitangi, it would not depart from the need for continuity of connection between the applicants and the land to such an extent that the preservationist rationale of the doctrine was compromised.	In this conclusion and the supporting text, the Tribunal largely accepts the Crown argument and McHugh evidence on the tests for determining customary rights. The full text of the relevant paragraphs is set out below, as it will be significant when the test for recognition in the legislation is being considered.
How the High Court would deal with competing Maori claims to the same area is not able to be estimated.	The Tribunal notes the likelihood of cross-claims, and uncertainty about how they would be dealt with. This signals the potential for complex and time-consuming argument between competing claimants.

Tribunal conclusion	Comment
In each case where customary rights are asserted, the High Court would need to consider whether they had been extinguished and this could entail lengthy and complex examinations of historical evidence and legal argument.	In this conclusion, the Tribunal effectively supports the Crown's view that resolving these questions on a case by case basis through the courts will be a long and expensive process.
It is possible that the High Court could determine that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 precludes customary fishing rights from being included in the 'bundle' of customary rights that can be owned by Maori in relation to the foreshore and seabed, thereby reducing the strength of the rights that can now be established under the doctrine of aboriginal title.	This is a legal question about the effect of the provision in the 1992 Act that no claims based on these rights can be brought before courts any more. Given the likelihood that the High Court would be looking at the specific rights, rather than an overall relationship, the Tribunal's conclusion is that the 1992 Act might be a limitation. The Crown's policy is more generous on this issue and specifically states that evidence of customary fishing would be able to be used to support applications for the recognition of other rights.
Maori Land Court's jurisdiction	
A status order, on its own, might be sought by some applicants, where they perceive there to be value in the land remaining customary land rather than being converted to Maori freehold land.	The Tribunal indicates that it would be possible for the Maori Land Court to stop the process at a status order, and not proceed to convert the land into freehold title.
A status order accompanied by a trust of the customary land might be an effective means, in some situations, of ensuring the right-holders' interests are protected.	The Tribunal promotes this option as a way of managing the difficulty of a status order not identifying those who can deal with the land.
With regard to the foreshore and seabed, whenever the court might make an order vesting customary land in its owners, as Maori freehold land for an estate in fee simple, it would be likely that a trust of the land would also be appropriate, the creation of which would make it most unlikely that the land could be sold.	The Tribunal promotes this option for land that might be vested in a fee simple title, as a way of ensuring that it nonetheless cannot be alienated.

Tribunal conclusion	Comment
Each of the three categories of approach that, collectively, counsel argued were open for the Maori Land Court to take with regard to Maori interests in the foreshore and seabed ('most permissive', 'middle ground' and 'most restrictive') is plausible, and so none can be discounted.	This conclusion effectively supports the view that there is a great deal of uncertainty at present on what kind of Maori interests might be found. The options range from most of the coastline being covered by MLC orders, to virtually none.
The most likely approach is a variant of the 'middle ground', where some – perhaps most – applications to the court would result in rights being declared that do not amount to a fee simple title.	The Tribunal ventures a view, drawing on its consideration of the tikanga tests that the Court has developed, that a middle ground would eventuate where a lot of rights were declared through status orders or similar. The Tribunal is not particularly clear on the instrument by which those declarations of lesser rights would be made.
On that approach, there would be situations in which particular areas of foreshore and seabed land would be vested in fee simple title in identified Maori owners.	It makes clear that this middle ground would include some areas ending up in fee simple title.
Even on the Crown's 'most restrictive' approach, there would be situations where Maori rights in the foreshore and seabed were extensive and, by their nature, exclusive.	It notes that even on the most restrictive view put forward by the Crown, it would expect some areas to be covered by rights that were exclusive in nature.
The test to be applied by the Maori Land Court (of the land being 'held according to tikanga Maori') could not be applied in too reductive a manner for this would undermine the purpose of Te Ture Whenua Maori Act and contravene Maori understandings of tikanga.	The Tribunal notes that the purpose of TTWMA is to promote the retention, use, development and control of Maori land by Maori owners, and that the preamble refers to the protection of rangatiratanga. This conclusion effectively signals that it would not be reasonable to expect the Court to take a narrow view.

Tribunal conclusion	Comment
The evidence of tikanga with which we were presented indicates that many claimant groups in the Waitangi Tribunal would be able to prove connections (ancestral and spiritual and, in many cases, physical) with the foreshore and sea that are governed by tikanga, as well as the continuing operation of tikanga and exclusive aspects of their relationship with the foreshore and seabed.	The Tribunal here and elsewhere emphasises the overall connection between Maori and the coast. Applying a tikanga test, it considers that that connection would in many cases be sufficient to support the Court finding a right.
The Maori Land Court's assessment of customary land in terms of tikanga Maori makes it unlikely that the Treaty of Waitangi (Fisheries Claims) Settlement Act would be interpreted to preclude applicants relying on customary fishing rights as evidence of the intensity of their use of particular areas of the foreshore and seabed but, even if that interpretation was adopted, it would be unlikely to diminish applicants' ability to demonstrate the necessary links through tikanga by other means.	The Tribunal notes that, from a tikanga perspective, the bar in the Settlement Act may not operate and in any event would have less impact.

Other points to note:

Set out below is the full text of the Tribunal's comment on the nature of aboriginal rights at common law. It is relevant to the development of the statutory test for recognition of such rights. The Tribunal's comment accepts that there may be a wide range of rights at common law – this is not an all or nothing ownership debate. It also supports the continuity test. Implicit in this description is that the rights have little if any development component in them, both because of the continuity test and the limitation on alienability. (So a customarily owned space could not be used as collateral to develop a business.)

> *"Aboriginal title" is a general term that describes various 'sets' of customary rights, ranging from particular use rights (for example, to use a particular area of foreshore as a pathway) through to the fullest possible set of rights, equivalent to land ownership. Important among the features of the common law doctrine of aboriginal title are that:*
>
> - *It recognises customary rights that pre-dated the Crown's acquisition of sovereignty and that have remained in existence, making it, in essence, a 'preservationist' doctrine and not, for example, one that remedies the loss of customary rights.*

- *It appreciates that customary rights may be held collectively, are unique (sui generis) and are identified in accordance with the traditions and usages of the people who hold the rights.*
- *Customary rights are inalienable except to the Crown, with the result that such rights cannot be the subject of commercial transactions with third parties: they must first be transformed by lawful means into another kind of right. (p 45-46)*

References in chapter 1, 2 and 3 of the report to the nature and extent of customary rights and interests in the foreshore and seabed include:

Tribunal report	*Government framework*
• ancestral connection with the foreshore and sea, giving rights and authority and imposing responsibilities and obligations under tikanga (Pgs 25-26, 75)	• Customary title to enable 'mana and ancestral connection' to be recognised and protected.
• spiritual (in all cases) and physical (in some cases) relationship with the foreshore and seabed governed by tikanga (Pgs 25-26, 75)	• Framework does not cover spiritual matters, as section 6(e) of the RMA deals with this issue explicitly. In relation to physical relationship (i.e. rocks as markers etc), these types of rights will be able to be protected under the framework, if can demonstrate based on "use"
• right of fishery (which could be exclusive), including collecting kaimoana, traditional fishing grounds, sustaining fishing breeding grounds, placing rahui over spots were fishing shouldn't occur for sustainable management reasons, the right to fish for cultural reasons (eg hui or funerals) (Pgs 7, 8, 10, 12, 26)	• This right is excluded as covered by the Treaty of Waitangi (Fisheries Settlement) Act
• right of development in relation to fish, minerals, marine farming and aquaculture (Pgs 27-28)	• This right is excluded as it is unlikely generally to exist under common law, given that the common law approach to the seabed begins with a bundle of individual rights, rather than a notion of full and exclusive possession and control (similar to fee simple title).
• the operation of tikanga in today's world, regulating their own activities, and those of manuhiri (guest tribes and, to some extent, Pākehā) (Pg 75)	• The customary fishing regulations provide some avenue for self regulation. In addition, the customary title will enable Maori to participate in decision-making processes concerning the management of the coastal marine area.

Tribunal report	*Government framework*
• Right to take seaweed, to use sands, stone, and bitumen, to travel by waka	• These types of rights will be able to be protected under the framework, if can demonstrate based on "use"
• tauranga waka (traditional canoe landing sites) in important strategic sites (Pg 94)	• These types of rights will be able to be protected under the framework, if can demonstrate based on "use"
• specific tauranga waka (Pg 94)	• These types of rights will be able to be protected under the framework, if can demonstrate based on "use"
• tapu (sacred) areas (Pg 94)	• These types of rights will be able to be protected under the framework, if can demonstrate based on "use". They can also be protected through other regimes, including the Historic Places Act and arrangements with local authorities as they administer the RMA.
• areas which because of their significance in important tribal kōrero need to be specially preserved (Pg 95)	• These types of rights will be able to be protected under the framework, if can demonstrate based on "use". They can also be protected through other regimes, including the Historic Places Act and arrangements with local authorities as they administer the RMA.
• areas which because of their environmental sensitivity, or for other cultural reasons need to be protected from certain kinds of activity (Pg 95)	• These types of rights will be able to be protected under the framework, if can demonstrate based on "use". They can also be protected through other regimes, including the Historic Places Act and arrangements with local authorities as they administer the RMA.

Comment:
The report outlines a number of customary rights and interests that Māori consider they have in the foreshore and seabed area. On the face of it, it would seem that most of the rights and interests discussed are, to some extent, provided for in the government's framework or in regimes that will sit alongside the framework.

Chapter 4: The Crown's Policy

Overall summary and comment

In this chapter the Tribunal assesses the Crown's policy. It makes a number of findings on key points that differ from the Crown's view of these points. These differences in starting points combine to take the Tribunal to a very different conclusion:

- The Tribunal sees: no real problem with the status quo, significant property rights being lost, and no real benefit from the policy in return. It therefore concludes that the policy is a significant breach of the Treaty.
- The Crown sees untenable instability in the status quo, the likelihood of only moderate property rights being found to exist at common law, and a policy that provides those with strong protection as well as renewed commitment to effective participation in decision making. It therefore considers the policy an appropriate response, notwithstanding Maori concerns.

Detailed summary and comment on findings

Tribunal View	Comment
The policy is expropriatory of legal property rights.	The Crown does not consider that it is taking rights. • Rights lost in the past will continue to be dealt with through the historical settlement process. • Rights that might be able to be established under TTWMA do not need to be considered as they arise only as a result of an unexpected and unintended interpretation of the Act. • The proposed policy maps and potentially enhances the customary rights that might be established at common law.
The policy is not strictly required to meet the exigencies of uncertainty, risk to public access, and risk that Maori will sell the foreshore and seabed.	The Crown considers that the uncertainty that results from having ownership questioned on a widespread basis, and the time that would be involved in resolving those questions through the courts, does require action. The Tribunal largely assessed the separate question of the uncertainty that might result if customary titles were found to exist and needed to be meshed with existing regulatory regimes.

Tribunal View	Comment
The policy is no less uncertain for Maori than if the law were to run its course.	The outcome for Maori is uncertain, in any legal framework, while the nature and extent of the rights that might remain is uncharted. The Crown is assessing uncertainty on a much broader canvass, looking at the effective administration of activity in the coastal marine area. From this perspective, the proposed policy provides significantly more certainty than the status quo as it stabilises the fundamental question of where ownership lies, and provides clear guidance on how the transition to recognition of any customary rights should be managed.
The policy is lacking in necessary detail and clarity on how it affects key things like aquaculture, minerals, reclaimed land, and regulatory regimes.	Any detail missing in the December framework will be completed by the time the legislation is introduced. This is therefore more of a process criticism, than one that goes to the merits of the policy.
The policy is lacking in adequate safeguards and processes for its proposed regional working bodies and commission.	Any detail missing in the December framework will be completed by the time the legislation is introduced. This is therefore more of a process criticism, than one that goes to the merits of the policy.
The policy is lacking in certainty, protection, and due process for rights judged greater by the Maori Land Court than those allowed for in the policy.	The intention was to leave a free hand for direct discussion between the Crown and any right holders found to be in this situation. The Crown has signalled that its intention would be to find ways of recognising the right adequately. This would include redress if that was the only solution possible, but the preference would be to find a positive way to ensure that the right was recognised in practice. The basic policy intention was to leave the parties free to deal with the situation based on established facts.
The policy is in violation of the rule of law, because it takes away the right of only one class of citizens to have their property rights defined by the courts, without consent or a guarantee of compensation.	The Crown view is that it is not taking away this right, but is instead providing a specialist tailored and more accessible jurisdiction for enabling indigenous rights to be explored.

Tribunal View	Comment
The policy is doubly unfair to Maori because it: • Takes a reductive view of what property rights the current law might recognise, but is justified on the basis that the courts might wrongly take an expansive approach; but • If the Crown is right then the policy is either unnecessary, or the rights are sufficient to require compensation, yet this logic is not recognised.	The Crown's policy is based on an assessment of the rights likely to be available at common law. The Tribunal largely confirms the Crown's assessment of the likely evolution of the common law. The Crown does not consider it appropriate to evaluate the policy by reference to what might eventuate in the Maori Land Court.
The policy is unfair to Maori because it is inconsistent with how other Maori have been treated in the recent past with regards to analogous rights, such as to lakebeds and commercial fishing.	The commercial fishing settlement is not directly analogous, as the rights are very different in nature and the settlement was in large part a settlement of an historical grievance. The various lakebed agreements that have been reached also result from case by case negotiation for settlement of historical grievances, rather than from overall policy responses to contemporary issues.
The policy is unfair to Maori because it expropriates their customary property rights but leaves all other classes of rights intact, with the proviso that private rights amounting to ownership will be either purchased or taken with compensation in the future.	As already noted, the Crown does not consider that the policy expropriates customary rights.
The policy is unfair to Maori because it is imposed after inadequate consultation, and in the face of their vociferous opposition.	The extent of consultation required is a matter of judgment. The Crown's view of the need for speedy action is informed by its assessment of the problems cause by the current uncertainty. The Tribunal makes a different assessment. This finding is a criticism of the process rather than the content of the policy.
The policy is unfair to Maori because the process has been carried out in such haste that many details are missing and many of its effects are uncertain.	This finding is a criticism of the process rather than the content of the policy.
The policy is unfair to Maori because it denies them the right to choose their own path, and make their own assessment of its advantages and disadvantages.	This conclusion does not sit easily with the orthodox view on the role of government, and with the responsibility of government recognised under article 1 of the Treaty. This finding is also a criticism of the process rather than the content of the policy.

Other points to note

Tribunal finding	Comment
The proposed customary title, with use-rights recorded on it, is not a property right.	The customary right is a property right. It will be registered with the Maori Land Court and will be protected as a use right under the RMA.
There would only be a limited number of Maori property rights that would involve excluding others. Any conflict should be dealt with as it arises.	The Tribunal does not explain how this result would be achieved within the existing TTWMA framework.
Customary title" is called a "misnomer".	This issue has also been raised by others at various points.
The regional working groups and the statutory commission will be a huge time commitment for Maori over a long period without a guaranteed outcome. The risks of failure here and increasing uncertainty are great.	Further consideration is being given to these aspects of the policy.

Chapter 5: Findings and recommendations

Overall summary and comment

This chapter sets out the Tribunals findings and recommendations. It is explicit in places that its assessment is of the history of the Crown's conduct in relation to the foreshore and seabed, rather than of this policy on its own. The differences between the Tribunal's reasoning and that of the Crown, which lead to these conclusions, have been canvassed in other chapters.

The findings and recommendations do relate to the process that has been followed with this policy as well as its content, as the Tribunal considers that the process is fundamentally deficient and therefore relevant to the overall consistency with Treaty principles and the maintenance of the Treaty relationship.

The chapter concludes with a summary of points of common ground:

- the importance of public access;
- the need to ensure that foreshore and seabed is not able to be alienated;
- the ability of the Crown to regulate the coastal marine area for the benefit of all;
- the need to improve existing regulatory frameworks in terms of their effectiveness for Maori; and
- the importance of recognising and protecting customary rights in the foreshore and seabed that do exist.

Detailed summary and comment on findings

Tribunal finding	Comment
The Crown has breached article 2 by assuming ownership without good reason.	This is really a finding of historical breach by the Crown, unrelated to the current policy. The Crown now considers that it owns the vast majority of the foreshore and seabed.
The Crown has breached article 2 in this policy by not allowing the court to declare any rights according to law.	This finding appears to be primarily about the ability to go to the Maori Land Court, although the Tribunal does not clearly distinguish between rights that may have existed and been lost in the past, rights that might be established in the High Court, and rights that might now be able to be obtained under TTWMA. On rights lost in the past, the Crown's view is that those are dealt with through the policy of comprehensive historical settlemetns. On rights that might be established in the High Court, the Crown's view is that the proposed jurisdiction effectively maps those, and includes a referral mechanism to government if gaps are identified. On rights that might be established under TTWMA, the Tribunal appears to disagree with the Crown's view that the TTWMA coverage of the foreshore is an accident that should be corrected. It assumes that if it would be possible to make a case under TTWMA, then there are rights there that are being expropriated by this step (notwithstanding that there was no intention to create such rights

	under this Act).
Tribunal finding	**Comment**
There is no Treaty based justification for overriding the article 2 rights	This finding relates to the Tribunal's view that the level of uncertainty created by the Ngati Apa decision is manageable. In this regard the Tribunal refers primarily to uncertainty that may be created about how any additional customary rights might be meshed with the existing regulatory regimes. It does not give attention to the Crown's primary concern, namely the uncertainty that exists while the fundamental question of ownership is in contention. Other comments in the Tribunal's report support the Crown's view that working out this question through the courts would be a long and complex process.
The policy breaches article 3 because it takes away the property rights of Maori only	This finding depends on a conclusion that there are property rights being taken away. The Crown contends that any common law customary rights will be effectively translated into the new system and that it is not appropriate to consider any rights that might eventuate under TTWMA as vested rights, given that the coverage is accidental. The Crown therefore maintains that it is not taking rights with this policy.
The policy breaches article 3 because it removes the protection of the rule of law from Maori, by taking away the ability to go to Court on issues of property rights.	The Crown maintains that removing the unintended TTWMA jurisdiction is appropriate correction of an error, rather than a constitutional issue. Changes of this kind are regularly made to legislation, when court decisions reveal a perverse or unintended interpretation of statutes (eg validating legislation for the Commerce Amendment Act). Replacing the High Court common law jurisdiction with a specialist system in the Maori Land Court is also an appropriate step to enable more effective legal recognition and protection. Again, Parliament regularly passes legislation codifying aspects of the common law, in order to improve the effectiveness of the law (eg evidence law reform). Indigenous rights are a method of legal protection for indigenous people – in New Zealand, Maori. There is no equivalent legal issue for others in New Zealand.
The policy breaches the Treaty principles of partnership and reciprocity, active protection, equity and options, and redress.	These criticisms all come down to an assessment of whether the Crown's actions are reasonable in the circumstances. Given the fundamental differences in the Tribunal's view of the problem with the status quo and the protective effect of the policy, it is not surprising that they come to different conclusions on what is a reasonable and appropriate government response.

Tribunal finding	Comment
The Tribunal makes the point that unilateral action, in the face of clear Maori disagreement, is not able to be reconciled with the principle of partnership. (This point is also relevant to its findings about lack of compliance with international norms on the treatment of indigenous people.) It comments on the "extreme haste of the Crown's consultation, and its apparent unwillingness to make real or significant changes to its policy in response to Maori concerns" (p 133).	The Tribunal also makes explicit that it is assessing "whether the Crown's past and proposed actions in connection with the foreshore and seabed are contrary to the principles of the Treaty of Waitangi" (p 129). These findings therefore relate to an overall assessment of the Crown's conduct since 1840, not just to the current policy. In relation to the process criticisms, the Crown's view is that it has already lengthened its process to one much longer than the usual process for legislating to correct an error in legislation. Given the divisive nature of the issue, and its importance for ongoing economic and social activity, it is not appropriate to delay further.
The policy creates prejudice, as Maori citizenship is devalued, the powerlessness of Maori will be heightened through ongoing legal uncertainty, and mana and property rights will be lost.	These conclusions are again based on a fundamentally different assessment of the nature of the current problem and the protective effect of the policy.
Recommendation that the government revisit the question of whether its policy is the only or best means of ensuring that the values underlying the four principles are upheld	The government has considered a wide range of options in the course of developing its policy. It has not yet finalised the legislation and has undertaken to give consideration to the Tribunal's comments.

Tribunal finding	Comment
Recommendation that the government consider any of the other options put forward, and in particular consider letting the legal process run.	The government has considered a wide range of options in the course of developing its policy. It has not yet finalised the legislation and will give consideration to the Tribunal's comments. The options are considered separately, in the following table. It must be noted that the Tribunal has not understood the basic concern with the uncertainty of the legal status quo, and therefore it is more sanguine about the possibility of letting the legal process run for a time. Most of its options do not stabilise immediately the basic legal question about where ownership lies, and therefore do not resolve the uncertainties that have driven the government to act.
Recommendation that, if the government does proceed, then it should compensate for the removal of property rights	As already outlined, the government does not consider that the policy removes property rights. The policy includes a mechanism for referral to government of any situation where the policy may not enable rights to be adequately recognised, to enable direct discussion on the steps needed to recognise the right appropriately. The process for the settlement of historical Treaty grievances continues alongside this policy.

Summary and comment on options suggested by the Tribunal

Tribunal option	Comment
1. The longer conversation: The Tribunal's preferred option is to begin again and work out a solution with Maori. The Tribunal indicates that if necessary a holding pattern could be legislated while the bigger picture is sorted out. It also suggests that this conversation might include settlement discussions, perhaps involving aquaculture and mineral rights.	The main drawback with this option is delay (although see the comment about the possibility of legislating a holding pattern) and about who the Crown should talk with. If the Tribunal considers that the regional working groups will fail because of the inability to determine representation, then it is hard to see how this option could be viable.
2. Do nothing: The Tribunal considers that the implications of this option are as set out in chapter 4 of the Tribunal's report . In summary, in their view the result over time would be Maori gaining a significant range of rights from the MLC, but few significant rights from the High Court.	The Tribunal has heavily discounted the effects of uncertainty while legal rights are worked out through the courts. This option leaves the possibility of fee simple title available, which is inconsistent with longstanding government policy. It also does not address the probable need for the Court to have a wider range of tools available to recognise the likely spectrum of rights.

Tribunal option	Comment
3. *Provide for access and inalienability:* The Tribunal suggests that a least interventionist policy could be to allow the MLC jurisdiction to continue but limiting its remedies so that public access could only be limited in exceptional cases. It could also be made clear in law that titles could not be alienated.	This option in general raises the same problems as option 2. It does, however, illustrate that there is common ground on the government's basic principles in so far as they are concerned with access and inalienability.
4. *Improve the courts' tool kit* The main example of a useful change is giving the MLC the ability to recognise rights other than by creating a fee simple title.	This option matches much of the thinking behind the customary rights register in the Crown's policy, but it would leave title as a possibility, therefore raising the same problems as option 2.
5. *Protect the mana:* This option is based on the mechanism used at Orakei Reserve, where title is vested in Ngati Whatua and both the Crown and Maori have representation on the administering body that controls and manages the area. There is also a legal right of public access and a legal limit on alienation.	This option depends on case by case negotiation to suit the circumstances, and is also resource intensive for the Crown. Achieving it by case by case negotiation would also take time, raising uncertainty problems again. The key benefit of this option from a Treaty perspective is that it is achieved by agreement rather than unilaterally imposed. Yet achieving it by negotiation would take a great deal of time, thus raising concerns about uncertainty and delay during the negotiations.
6. *Be consistent:* This option is based on the models used for Lake Taupo and Te Arawa lakes, which are similar to that used at Orakei.	See the comments on option 5. It should also be noted that the arrangements for Lake Taupo are significantly different from those that have been negotiated for the Te Arawa lakes and for Lake Ellesmere. This highlights that it is not a "one size fits all" model that can be readily adapted for the overall coastline.