Foreshore & Seabed - Major Privatisations in the Offing

By Hugh Barr

National appears to be putting public access and use of the foreshore and seabed at risk if it repeals the controversial 2004 Foreshore and Seabed Act. That is the likely outcome from the recommendations of the Ministerial Review Panel on the foreshore and seabed.

Iwi see the problem with the 2004 Act is that it is too hard for them to prove customary iwi title. Title requires continuing iwi use since before 1840. Hence the Maori Party wants to get rid of the Act. But doing so will open a Pandora's Box of risks for the rest of us.

The Ministerial Review Panel was stacked with long-standing Treaty advocates - former Maori Land Court judge and Waitangi Tribunal chairman Eddie Durie, Treaty lawyer Richard Boast, and daughter of Sir Tipene O'Regan, Hana O'Regan.

They recommend repealing the 2004 Act. They also propose, as their preferred option, assuming iwi customary title exists, and that it can be converted to significant private property rights. This would clearly be a massive advantage to iwi in negotiating with the Crown for enforceable property rights or compensation.

Does customary title to the foreshore and seabed exist?
This change would almost certainly lead to major compensation claims to all coastal iwi. It is child-like in its simplicity. Inland iwi and unaffiliated Maori will pay for it, as will the rest of us. What is unclear is why any New Zealand government would be silly enough to agree to it.

Sale of customary dry land title created endless argument between iwi, settlers and government from the signing of the Treaty of Waitangi in 1840. But for nearly 160 years no sales of foreshore and seabed (the area tidally or permanently covered by the sea out to twelve nautical miles) were raised.

Any customary title to the foreshore and seabed, if it existed at all, was considered far less important than freehold title to dry land. Nor did anyone question the rights of the public to cross and use the foreshore and seabed for activities such as swimming, sailing, diving, fishing, navigation, creating a port or marina, etc.

It was only in the late 1990s that Ngati Apa, being unfairly cut out of the aquaculture boom in the Marlborough Sounds, raised the question. Iwi negotiated 20% of all aquaculture sites as a consequence. As well the Maori Land Court decided in the iwi's favour that customary title must exist, as no-one had bought it from them, or annulled it. The Crown appealed to the Court of Appeal. The Court said in 2003 that some form of customary title may exist, but they considered this unlikely.

Labour's 2004 Act resulted from the Appeal Court ruling. Its object was to preserve the public foreshore and seabed as unalienable, and as the common heritage of all New Zealanders via Crown ownership and management.

It allowed iwi and non-Maori to seek customary rights through the courts, though they were not to gain customary title, but rather compensation and recognition. It confirmed public access, recreation, fishing, navigation and commercial rights. Most recreational users and non-iwi supported this approach, as it endorsed the status quo of 160 years.

In place of this the Panel recommends a complicated national approach, with a "bicultural body" to oversee the whole coastal marine area. This body looks remarkably like a Waitangi

Tribunal for undersea land. As well regional negotiations between iwi and the Crown could proceed.

An interim Act would repeal the 2004 Act, and state that “entitled hapu and iwi have customary rights in the coastal marine area”. The general public will have as yet undefined rights of use and enjoyment. The Panel proposes both sets of rights must be respected and provided for within the limits necessary to accommodate the other. This is subject to future negotiation, so is not guaranteed.

The Panel says beneficial and perhaps the legal title would be held by hapu or iwi, or the Crown, or both jointly. The Panel sees exclusive reserves under hapu control as one option, and customary authority as possibly being the full right to manage reserves and regulate customary activities.

They also recommend iwi co-management gets priority attention. The Panel sees ownership of the foreshore and seabed requiring a national negotiated solution, including iwi ownership of seabed resources and substratum resources, and the income streams resulting from their income and use licences. At present the Crown owns the minerals, oil and gas and other resources on the seabed, as it does on dry land.

These proposals could be one of the largest privatisations of resources ever seen. The present foreshore and seabed is only part of it. Once iwi ownership of the foreshore and seabed is legitimised, then iwi ownership of the continental shelf minerals follows almost automatically, out to 200 nautical miles and beyond. This is an area over 20 times the size of New Zealand’s land mass.

The Panel’s conclusions are the opposite of the 2004 Act. In place of guaranteed public rights and Crown ownership, private customary rights are guaranteed, and made private iwi property and resource rights.

No public rights are guaranteed, and all are subject to negotiation. Winston Peters is right – this report is Treaty humbug and an extension of the Treaty process probably for another 20 years. But will John Key and National recognise the poisoned chalice the Maori Party is offering them?

Hugh Barr is Secretary of the Council of Outdoor Recreation Associations, and also has a background in risk analysis. A similar opinion piece appeared in the New Zealand Herald in July 2009.