NEW ZEALAND BUSINESS ROUNDTABLE

SUBMISSION ON THE FORESHORE AND SEABED OF NEW ZEALAND

OCTOBER 2003

THE FORESHORE AND SEABED OF NEW ZEALAND

> For water is a movable, wandering thing, and must of necessity continue common by the law of nature: so that I can only have a temporary, transient, usufructuary property therein.
>
> William Blackstone (1765)[1]

> [W]e quickly discover in the evolution of English common law – and, I dare say, in Maori tribal law – that private and communal property institutions are adopted cheerfully and simultaneously within a single society.
>
> Richard A Epstein (2003)[2]

1 Overview

1.1 This submission on the *Foreshore and Seabed of New Zealand: Protecting Public Access and Customary Rights* (the Document) is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand business firms.[3] Its purpose is to contribute to the development of sound public policies that reflect overall New Zealand interests.

1.2 The decision of the Court of Appeal in *Ngati Apa and others v Attorney-General and others* (*Ngati Apa*) led to the proposals contained in the Document.[4] They relate to the ownership of the foreshore and seabed which is a significant public policy issue. Property rights, including Maori customary rights, are at the heart of the issue. Its resolution has important implications for prosperity and social cohesion.

1.3 The business community has a vital interest in the foreshore and seabed issue. The future ownership and control of the foreshore and seabed is uncertain. The government's proposals entail a substantial erosion of private property rights, including Maori customary rights to ownership, which is detrimental to

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1 Cited by Epstein, Richard A (1998), *Principles for a Free Society: Reconciling Individual Liberty with the Common Good*, Perseus Books, Reading, p 261.

2 Epstein, Richard A (2003), *Skepticism and Freedom: A Modern Case for Classical Liberalism*, The University of Chicago Press, Chicago, p 40.

3 New Zealand Government (2003), *Foreshore and Seabed of New Zealand: Protecting Public Access and Customary Rights,* Department of the Prime Minister and Cabinet, Wellington.

prosperity. The future development of sea-based industries is directly affected. The government's consultation process to date has not included the business community.

1.4 This submission focuses on a broad analysis of public policy issues raised by the Court of Appeal's decision and the proposals contained in the Document. We do not, however, claim expertise on the intricacies of the relevant law.

1.5 *Ngati Apa* raises the possibility that freehold title to the foreshore and seabed, not in private ownership or subject to certain legislation, could be issued to members of whanau, whanui and hapu. The decision overturned long-standing (albeit criticised) law and, in this respect, is arguably an unfortunate example of judicial activism.

1.6 The Document should have contained a detailed analysis of the legal options available to the government. The onus is on the government to explain why it is not appealing the Court's decision and, given that decision, why the court process should not be permitted to continue. The Document is essentially silent on these matters.

1.7 The principles advanced in support of the government's proposal are not derived from a proper examination of the role of the government or the application of efficiency criteria designed to further the overall welfare of citizens. They provide an inadequate basis for the development of sound public policy.

1.8 The concepts of property and ownership are not avoided, as the Document suggests, by vesting the foreshore and seabed in the public domain. The public domain is a form of ownership.

1.9 The Document does not identify on a principled basis whether the foreshore and seabed should generally be public domain (owned jointly by all citizens), public (ie owned by the Crown) or private property. It pays far too little attention to the importance of upholding private property rights for individual autonomy, the fostering of social cohesion and the creation of wealth.

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4 Unreported, 19 June 2003, Court of Appeal, Wellington, CA173/01.

1.10 Unless some group is given the power to dispose of property in the public domain and to control the proceeds that are obtained on behalf of all citizens, the development of such property will be infeasible and overall welfare will be impaired. In the case of the foreshore and seabed the stakes are potentially high. They include rights to fish, and to engage in marine farming, and oil and mineral exploration and development.

1.11 The problematical question of the control of property in the public domain is not easily resolved. There is good reason to avoid it altogether by not putting the foreshore and seabed into the public domain.

1.12 The foreshore and seabed should generally be publicly owned with open access and use. This rule should be modified, however, by upholding existing private rights to the foreshore and seabed, including legitimate Maori customary rights to title (if any) and lesser common law rights, and by the issue of new rights for fishing, marine farming, mining, oil exploration and other activities where the overall welfare of the community can be improved. Where resources are scarce, the price system should be used if practicable to allocate new rights among competing uses and users.

1.13 The government should allow the court process to run. It is the proper role of the courts to establish the nature and extent of Maori customary rights. There is considerable uncertainty as to whether customary title to the foreshore and seabed would be granted. That uncertainty cannot be resolved and justice cannot be done unless the courts address the substantive claims before them. The government has advanced no compelling argument to curtail the right of Maori to pursue their claims through the courts and, in any event, the threshold for doing so should be a high one.

1.14 The Document proposes to extinguish Maori customary rights to title. If Maori can establish customary title to the foreshore and seabed, just compensation would be required for the abrogation of such rights in the same way that the taking of land for public works warrants compensation. The government also proposes to substantially erode other private rights to the foreshore and seabed. Just compensation would also be required in this event.

1.15 This issue is an important one but it should be kept in perspective. The well-being of Maori in the future will largely depend on the education and skills that they acquire and their participation in the labour market and, more generally, in the market economy. Their well-being, as well as that of other citizens, is ultimately dependent on the overall economic and social performance of the country.

1.16 The balance of this submission is presented in 6 sections. The next section (section 2) discusses the Court of Appeal decision. The government's proposals are examined in section 3. Property rights and the question of whether the foreshore and seabed should be vested in the public domain are discussed in section 4. Section 5 discusses private property rights and compensation for extinguishing such rights. Section 6 examines other issues. Our main conclusions are presented in section 7.

2 The Court of Appeal decision

2.1 The decision of the Court of Appeal in *Ngati Apa and others v Attorney-General and others*, which was released on 19 June 2003, led to the proposals contained in the Document.[5] In 1997 certain iwi sought a declaration by the Maori Land Court that the foreshore and seabed of the Marlborough Sounds, extending to the limits of New Zealand's territorial sea, are Maori customary land in terms of Te Ture Whenua Maori Act 1993 (the Maori Land Act 1993). This legislation is referred to below as the Act.[6]

2.2 The claim is understood to have been motivated by the desire of iwi to have a larger input into decisions affecting the use of the Marlborough Sounds and to play a larger role in the expanding marine farming activities in the

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5 The following sources have been drawn upon in preparing this section: Alston, Andrew *et al* (2000), *Guide to New Zealand Land Law*, Brooker's Ltd, Wellington; Brookfield, F M (Jock) (2003), Maori Customary Title to Foreshore and Seabed, *The New Zealand Law Journal*, August, pp 295-297; Davies, Briony (2003), 'Staking Our Claim to the Beach', *Counsel,* Chapman Tripp Sheffield Young, 1 August, www.chapmantripp.com; Roche, Bob (2003), 'Just When You Thought it Was Safe to Go Back to the Foreshore', *Counsel*, Chapman Tripp Sheffield Young, 27 August, www.chapmantripp.com; Stone, Damian (2003), *Māori Services: Foreshore and Seabed Litigation*, Bell Gully, June, www.bellgully.com.

6 For the purposes of the Act, all land in New Zealand has one of six statuses listed in s129 (1) of the Act. They are Maori customary land, Maori freehold land, general land owned by Maori, general

Marlborough Sounds. If land is determined to be Maori customary land, the Maori Land Court *may* grant an order vesting it in members of whanau, whanui and hapu found on investigation to be entitled to it.[7] If a vesting order is made the land becomes Maori freehold land. The district land registrar *must* then issue title to the land under the Land Transfer Act 1952.[8]

2.3 In an interim decision, Judge Hingston held that Maori customary rights to the foreshore (generally land lying between the low and high water marks) and seabed (generally land beneath the sea beyond the low water mark) had not, as a general proposition, been extinguished.[9] Accordingly, the Maori Land Court had jurisdiction to investigate the status of any such land, although further evidence would be required to establish if customary rights had been extinguished in the case before the Court.[10]

2.4 The Crown and certain other parties appealed the interim decision to the Maori Appellate Court. That court agreed in 1998 to a request to state a case to the High Court on eight questions of law that could substantially determine the application. In the High Court, Justice Ellis decided all questions in favour of the Crown and other appellants.[11]

2.5 The Court of Appeal heard an appeal by *Ngati Apa* and others in July 2002. A bench of five judges unanimously held that the Maori Land Court had jurisdiction to determine whether the foreshore and seabed are Maori

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land, Crown land and Crown land reserved for Maori. The Act defines land to "include Maori land [that is Maori customary land and Maori freehold land], General land, and Crown land."

7 The Act, sections 129-132. The Act does not specify the criteria to be applied in exercising the Court's discretion.

8 Maori customary land becomes a Crown-grant, multiply owned estate in fee simple in which the owners are tenants in common of undivided shares. The interests of each owner may differ. There are important restrictions on the sale of Maori freehold land that do not apply to general land whereas Maori customary land is inalienable (section 145 of the Act). Maori customary (dry) land was largely converted to Maori freehold land by about 1900.

9 The case does not affect land inland from the high water mark such as the dry part of the beach. Some beaches are privately owned. An example is Okahu Bay in Auckland City which was transferred to Ngati Whatua as part of the 1991 Orakei settlement.

10 *Re Marlborough Sounds Foreshore and Seabed*, 221 Nelson MB 1, 22 December 1997.

11 *Re Marlborough Sounds Foreshore and Seabed,* Decision of the Maori Land Court [2002] 2 NZLR 661.

customary land.[12] The Court also held that the foreshore and seabed are land for the purposes of the Act.[13]

2.6 A central issue before the Court of Appeal was whether Maori customary rights to the foreshore and seabed were extinguished when the Crown claimed sovereignty. The Court held that the Crown acquired only a 'radical' title (or imperium) to the foreshore and seabed. Thus, in accordance with long established principles of common law, its title was subject to the pre-existing property rights of Maori. Those rights can be extinguished (in a time of peace) only by consent or in accordance with statutory authority. In the latter case, there must be a clear and plain intention to extinguish customary rights.

2.7 The Court of Appeal ruled that its 1963 decision in *Ninety Mile Beach* was wrong at law.[14] In *Ninety Mile Beach* the Court had held that upon investigation, the land to the seaward side of any title granted through the Native Land Court (the predecessor of the Maori Land Court) "remained with the Crown, freed and discharged from the obligation which the Crown had undertaken when legislation was enacted giving effect to the promise contained in the Treaty of Waitangi." The investigation of title was "complete for all purposes", that is, there was no remaining entitlement to further investigation of title to the foreshore.[15]

2.8 There was no suggestion in *Ninety Mile Beach* that the Crown's title was limited to a 'radical' title, although some earlier decisions in New Zealand and in other comparable jurisdictions had held that the Crown's title was subject to customary rights.[16] *Ninety Mile Beach* was based on the premise that the English common law of tenure displaced customary property in land upon the assumption of sovereignty. It rested on the 1877 case of *Wi Parata v Bishop of*

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12 The Court of Appeal did not address seven of the questions considered by the High Court because, according to Chief Justice Elias, "it is impossible to resolve many of the legal points raised in them in advance of determination of the facts".

13 The case broadly related to the 12 nautical mile limit of New Zealand's territorial sea. The outer limit of the seabed was not decided. It could end at the 3 or 12 nautical mile limits, or extend to include New Zealand's exclusive economic zone which covers the territory between the 12 and 200 nautical mile limits.

14 In *Re Ninety Mile Beach* [1963] NZLR 461.

15 Davies (2003), *op cit*, p 7.

16 For example, *R v Symonds* [1847] NZPCC 387.

Wellington which had been criticised by the Privy Council in 1901 in *Nireaha Tamaki v Baker*.[17]

2.9 The Court of Appeal cited the views of two legal experts. First, Sir John Salmond argued in 1920 that under feudal law all England was originally not merely the territory but also the property of the Crown. When land was granted to subjects they were in theory tenants in perpetuity as the legal ownership of the land continued to be vested in the Crown. Sir John wrote, "when New Zealand became a British possession, it became not merely the Crown's territory, but also the Crown's property, *imperium* and *dominium* being acquired and held concurrently".

2.10 Secondly, Sir Kenneth Roberts-Way advanced the contrary view in 1966. He wrote that Salmon was wrong because he did not take account of the vital rule that when English law is in force in a colony it has to be applied subject to local circumstances. The Court of Appeal endorsed this view.

2.11 Some Court of Appeal judges, including the chief justice, suggested that Maori customary rights may lead to the conferment of property rights that fall short of freehold ownership of the land. The Crown contends that the Maori Land Court does not have authority to recognise Maori customary rights other than by vesting the land in those entitled to it.[18]

2.12 A majority of the judgments did not discuss whether the longstanding precedent set in *Ninety Mile Beach* should be overturned. Justice Tipping, however, acknowledged the decision in *Ninety Mile Beach* had stood for 40 years and "it must have been regarded as correctly stating the law by those

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17 Davies reports that in *Wi Parata v Bishop of Wellington* the Court of Appeal held that the rule of common law that native customary property survived the acquisition of sovereignty by the Crown had no application to the circumstances of New Zealand. The courts were required to assume that the Crown had properly respected its obligations to respect native proprietary rights and could not question the Crown's actions. In *Nireaha Tamaki v Baker* the Privy Council rejected the argument in *Wi Parata* and held that it was "rather late in the day" for it to be argued in a New Zealand court that there is "no customary law of the Maoris of which the Courts of law can take cognizance"; see Davies (2003), *op cit*, p 7.

18 Brookfield observes that the Maori Land Court's jurisdiction to determine Maori customary interests that do not approximate to freehold title interests needs to be clarified to make it unnecessary for the High Court to deal with the matter in the future; see Brookfield (2003), *op cit*, p 297.

responsible for subsequent legislation." This view was supported subsequently by Hon Michael Bassett who commented as follows:

> Prior to June this year, 99 New Zealanders out of every 100 believed that the land below the high-water mark and seabed belonged to the Crown that held it in trust for everyone.
>
> I sat on Parliament's Bills Committee for many years, and that was an article of faith; had there been any doubt, we would have removed it.[19]

2.13 *Ninety Mile Beach* was, nonetheless, set aside. The Court of Appeal has indicated a cautious willingness to overturn its ruling where the Court believes that there is good reason to do so.[20] At least one legal expert has argued that the Court should have given greater weight to precedent in *Ngati Apa* and more generally:

> Even if that old case were a mistake, at some point mistakes become too well entrenched and relied on to be overturned by unelected judges.[21]

2.14 The Court of Appeal also found the following as a matter of law:

- The nature and content of any pre-existing customary interest in any such property is a question of fact discoverable, if necessary, by evidence.

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19 Bassett, Michael (2003), 'Court-ordered Confusion', *The Dominion*, September 16, p B4.

20 *Martyn Raymond Jones v Sky City Auckland Limited and Anor* [2003] CA 257/02. In *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404, Justice Richardson stated: "Clearly the Court would and should adopt a cautious approach to the review of earlier decisions. Adherence to past decisions promotes certainty and stability. People need to know where they stand, what the law expects of them. So do their legal advisers. And a Court which freely reviews its earlier decisions is likely to find not only that the Court lists are jammed by litigants seeking to find a chance majority for change, but also that the respect for the law on which our system of justice largely depends is eroded. However, any judicial development and change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in the particular case. This Court [the Court of Appeal] has the final responsibility within New Zealand for the administration of the laws of New Zealand and while its decisions are subject to review by the Privy Council few litigants, less than one percent of those unsuccessful in this Court, feel able to follow that path. It is I think unwise to try to formulate any absolute rule. I tend to the view that we should go no further than to indicate that this Court will ordinarily follow its earlier decisions but will be prepared to review and affirm, modify or overrule an earlier decision where it is satisfied it should do so, but without attempting to categorise in advance the classes of cases in which it will intervene. In the end and after weighing the considerations favouring and negating review in the particular case, the members of the Court must make their own value judgments as to whether it is appropriate in the interests of justice to review and perhaps overrule an earlier decision."

21 Allan, James (2003), 'Old Cases Should Lie, Even When Wrong: Judicial Precedent', *National Business Review*, 5 September. Also see Hodder, Jack (2003), 'Departure From "Wrong" Precedents by Final Appellate Courts: Disagreeing with Professor Harris', *New Zealand Law Review*, pp 161-184.

- The existence and content of customary property is determined as a matter of the custom and usage of the particular community and, in the case of status determinations under the Act, in accordance with tikanga Maori (Maori customary values and practices).

- The legislation relied on in the High Court decision (for instance, that relating to territorial seas) could not be properly construed to have extinguished Maori customary title to the foreshore and seabed. The Court did not, however, discuss the international treaties and law on which some such legislation is based.

2.15 The Court of Appeal suggested that its decision was a narrow one relating only to the jurisdiction of the Maori Land Court. The chief justice, for instance, wrote:

> The significance of the determinations this Court is asked to make should not be exaggerated. The outcome of the appeal cannot establish that there is Maori customary land below high water mark. And the assertion that there is some such land faces a number of hurdles in fact and law which it will be for the Maori Land Court in the first instance to consider, if it is able to enter on the inquiry.

The president observed:

> [W]e are concerned with land capable of supporting an estate in fee simple and ownership interests capable of conversion to registered estates under the Land Transfer Act. Interests in land in the nature of usufructuary rights or reflecting mana, though they may be capable of recognition both in tikanga Maori and in a developed common law informed by tikanga Maori, are not interests with which the provisions of Part VI [of the Act] are concerned. The requirements of the statute must be met before the point is reached that calls for consideration of tikanga Maori. It is for this reason that, even if we hold that the Maori Land Court has the jurisdiction contended for, I have real reservations about the ability for the appellants to establish that which they claim. But that, of course, would be for the Maori Land Court.

Justices Keith and Anderson expressed similar sentiments.

2.16 The Australian High Court case, *The Commonwealth v Yarmirr* (*Yarmirr*), may indicate the legal obstacles that the justices had in mind. The claimants, Mary Yarmirr and others, were unsuccessful (by a majority of 4 to 1) in their

application for a determination of native title in respect of an area generally described as the seas in the Croker Island region of the Northern Territory. Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne wrote:

> There is … a more fundamental difficulty standing in the way of the claimants' assertion of entitlement to exclusive rights of the kind claimed. This difficulty stems both from the common law public rights to navigate and to fish and from the international right of innocent passage which is recognised by Australia. *These are rights which cannot co-exist with rights to exclude from any part of the claimed area all others (even those who seek to exercise those public rights or the right of innocent passage)*.[22]

2.17 The Federal Court of Australia's determination, that the native title rights and interests do not confer possession, occupation, use and enjoyment of the sea and seabed within the claimed area to the exclusion of all others, was upheld. That Court's determination did, however, confer lesser rights:

> The native title rights and interests that the Court considers to be of importance are the rights and interests of the common law holders, in accordance with and subject to their traditional laws and customs to -
>
> (a) fish, hunt and gather within the claimed area for the purpose of satisfying their personal, domestic or non-commercial communal needs including for the purpose of observing traditional, cultural, ritual and spiritual laws and customs;
>
> (b) have access to the sea and sea-bed within the claimed area for all or any of the following purposes:
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> (i) to exercise all or any of the rights and interests referred to in subparagraph (a);
>
> (ii) to travel through or within the claimed area;
>
> (iii) to visit and protect places within the claimed area which are of cultural or spiritual importance;
>
> (iv) to safeguard the cultural and spiritual knowledge of the common law holders.[23]

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22 *The Commonwealth v Yarmirr* and *Yarmirr v Northern Territory* [2001] HCA 56 (emphasis added).

23 The majority of the High Court raised what was meant by paragraphs (b)(iii) and (iv) or how effect might be given to a right of access to "protect" places or "safeguard" knowledge but said nothing about these matters.

These rights are not exclusive. They might be viewed as nugatory from a material perspective.

2.18 Despite the cautions noted by the Court of Appeal, *Ngati Apa* raises the possibility, if not the probability, that freehold title to the foreshore and seabed, not otherwise in private ownership or subject to certain legislation such as that related to port activities, could be issued to whanau, whanui and hapu. The public debate that ensued led a leading law firm to observe as follows:

> Instinctively we know something about this case is different. It's meddling with the great kiwi day at the beach. Perhaps it should be unsurprising that any perceived disturbance of the status quo regarding ownership of New Zealand's foreshore and seabed is capable of rousing a high degree of passion and fervour, whichever side of the beach you sit on.
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> Unfortunately … the result has been a whole lot of alarmist posturing and not too many facts. Expectations have been raised. Somehow we have lurched from a narrow finding of jurisdiction, to a government announcement that it will legislate to extinguish customary title in the foreshore and seabed (to the extent that it exists), to a united claim by Maori to ownership by hapu and iwi of all New Zealand's foreshore and seabed. Not bad for a week's work.[24]

The confusion was accentuated when the government introduced the essentially separate issue concerning public access by foot to rivers, lakes, the coastline, forests, mountains and countryside.[25, 26]

3 The government's proposals

3.1 The proposals contained in the Document were drawn up hastily in the inhospitable environment for the development of sound public policy alluded to above.

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24 Davies (2003), *op cit*, p 2.

25 Acland, John *et al* (2003), *Walking Access in the New Zealand Outdoors: A Report by the Land Access Ministerial Reference Group*, Ministry of Agriculture and Forestry, Wellington.

26 The minister for Auckland issues was reported as stating that the principles declared by the government – that the foreshore and seabed should be in the public domain with open access and use for all New Zealanders – must apply to Westhaven and Hobson West marinas. These marinas are owned by Ports of Auckland Limited, a listed public company in which a local authority (Infrastructure Auckland) holds an 80 percent interest. The company had announced that it proposed to sell the marinas; see *New Zealand Herald*, 22 August 2003, p A7.

3.2 The following main options appear to be open to the government:

- *The government could take no action at least until the Maori Land Court rules on the substantive claims before it.*

  This option would allow the normal court process to establish the nature and extent of Maori customary rights (if any) in an environment that should be politically neutral. Those rights arise from common law and are independent of Treaty claims. This is a role that properly belongs to the courts. If the practical effect of the Court of Appeal decision proves to be as limited as some justices implied, public anxiety over the decision would in due course subside.

  On the other hand, if the decision is as far-reaching as apparently perceived by the public, this option would risk the possibility that freehold title to large areas of the foreshore and seabed could be issued to whanau, whanui and hapu. Another disadvantage is that the court process might take an extended period. The option may also have been compromised to some extent by political statements on the announcement of the Court of Appeal's decision, including those by the government, that did little to explain the judgment but heightened public anxiety and increased pressure on the government to 'do something'.

  The onus is on the government to explain why the court process should not be permitted to continue. The Document is silent on this matter.

- *The government could appeal to the Privy Council if it has sufficiently strong grounds to successfully challenge the decision.*[27]

  It is the function of courts to interpret the law. Appeal processes should generally be exhausted, where there are reasonable grounds for appeals, before court decisions are overruled by legislation. The Document reports "the government considers that it is no longer appropriate to argue these issues through the courts."[28] No reason is given for this stance although it is central to the government's proposals. Has the

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27 The Marlborough Harbour Board, a respondent, has resolved not to appeal the decision.

28 New Zealand Government (2003), *op cit*, p 12.

government decided not to appeal because its case is weak or is there some political reason for the stance, for instance because the government proposes to abolish appeals to the Privy Council?

- *The government could legislate to reinstate the Ninety Mile Beach ruling.*

  This would maintain the *status quo* as policy and new legislation has proceeded for many years on the basis of that ruling. The government would be required to extinguish explicitly Maori customary rights to title to the foreshore and the seabed. Compensation for the taking of customary rights to title could be required (see below). Customary rights, other than to title, similar to those granted in *Yarmirr* are not necessarily incompatible with Crown or public domain ownership of the foreshore and seabed.[29] They would not need to be extinguished.

  No consideration is given to this option in the Document, although there may be grounds for it, if the first option is not adopted.

3.3 The Document should have contained a detailed analysis of the above options and provided cogent reasons for the government's proposals. This may have provided the basis for an informed debate and assisted in building support for a sound policy. Principled public policy analysis is notably absent from the Document. Instead the Document presents the government's proposals and advances doubtful so-called 'principles' in an attempt to justify them.

3.4 The government's preferred option, initially, was to pass legislation vesting ownership of the entire foreshore and seabed in the Crown. This suggestion went much further than is necessary to reinstate the *status quo* as it would extinguish private property rights including Maori customary rights. However, certain Maori, alert to the proposed taking of their claimed customary rights and the opportunity provided by the Court of Appeal decision to further their cultural and material aspirations, objected, thereby threatening the government's ability to obtain majority support in parliament for the proposed

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[29] All legal claims arising from customary rights to fish were addressed in the 1992 Deed of Settlement on Maori fishing which led to the passing of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

legislation. The government then sought a political accommodation with Maori that would be acceptable to Maori members of the Labour caucus.

3.5 The key proposals outlined in the Document are summarised below:

- The government is to legislate that the foreshore and seabed are "public domain with the consequence that all New Zealanders can enjoy open access and use."[30] Further, "in general the starting point is that the foreshore and seabed should not generally be subject to private rights of ownership."[31]

  The government's rights to administer the foreshore and seabed would not be derived from its ownership interests. The term 'public domain' does not have an established legal meaning in New Zealand and would need to be defined by statute.[32] The proposed general principle, that the foreshore and seabed are public domain, would be subject to limitations imposed by law or under powers created by parliament but these are not outlined in the Document. The nature of the concept of public domain and its practical effects are yet to be developed.

  The critical issue is not whether the foreshore and seabed are in the public domain or owned publicly but the distribution of rights. Without a clear statement of the distribution of rights it is difficult to examine the proposal on an principled basis. An elaboration of what the government has in mind was sought in preparing this submission but proved fruitless.

  The public domain is intended to be distinct from Crown ownership because, in the words of the prime minister, the deputy prime minister and the minister of Maori Affairs, the proposal "deliberately says nobody owns the foreshore and seabed."[33] This approach is aimed at avoiding "the language of vesting" and "concepts of property and ownership" because they lead "to divisive and unsettling discussion" about who owns

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30 New Zealand Government (2003), *op cit,* p 16.

31 *Ibid*, p 33.

32 Roche, Bob (2003), *op cit*, p 2.

33 Clark, Helen, Cullen, Michael, Horomia, Parekura (2003), 'Foreshore and Seabed: Protecting Public Access and Customary Rights', media statement, 18 August, Prime Minister's Office, Wellington.

which parts of the foreshore and seabed and "what rights those owners might have".[34]

- The government proposes to bring existing private ownership of the foreshore and seabed (with some exceptions, for instance for ports) or other rights to such land into conformity with the new policy. It proposes "two options for addressing these *inconsistencies*, which are either to legislate across private titles for public access or to set up a process to identify any areas where private rights to exclude others exist and negotiate with owners over time to achieve public access and use."[35] The issue of compensation for the taking is not discussed in either option.

- Legislation is also to be passed to prohibit the Maori Land Court from making an order vesting the foreshore and seabed in whanau, whanui and hapu.

- A new dedicated jurisdiction of the Maori Land Court is to be established to investigate *Maori customary interests* in the foreshore and seabed. The term Maori customary interests is understood to be intended to cover a wider range of claims than Maori customary rights but it also seems to be designed to indicate that those interests do not extend to title and is consistent with the attempt to avoid the language of ownership. The Court would be given a new set of tools for recognising mana over, and ancestral association with, particular places in the foreshore and seabed, and for recognising specific use rights. It seems that these rights are to be conferred by legislation. They seem to go well beyond customary rights recognised in common law. They may not, therefore, be subject to the limitations that the Court of Appeal alluded to. These provisions are intended to apply to existing claims before the Maori Land Court.

3.6 The principles are listed below with a related comment:

- *The principle of access: the foreshore and seabed should be public domain, with open access and use for all New Zealanders.*

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34 New Zealand Government (2003), *op cit*, p 16.

35 *Ibid*, pp 33-34 (emphasis added).

This principle is simply a statement of the government's intended policy. It is not derived from a proper examination of the role of the government, the application of efficiency criteria designed to further the overall welfare of citizens or a legal analysis of the options available to the government. Indeed the real starting point in the Document is simply an assertion that the Court of Appeal's decision is inconsistent with the perceived view of New Zealanders that the foreshore and seabed are mostly owned by the Crown – a view which, according to the Court of Appeal, is mistaken.

- *The principle of regulation: the Crown is responsible for regulating the use of the foreshore and the seabed, on behalf of all present and future generations of New Zealanders.*

  This principle is subject to similar criticism to the first principle. The government should regulate on a principled basis where appropriate. But regulation, like ownership, and taxes and subsidies, is merely one tool that is available to the government to advance the overall welfare of the community.

- *The principle of protection: processes should exist to enable the customary interests of whanau, hapu and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected.*

  The principle is a statement of one element of the government's proposed policy. It is defined to protect certain interests of one section of society in a Document that outlines a proposal to extinguish its ability to claim customary rights to the foreshore and seabed. The interests of other sections of society are ignored.

- *The principle of certainty: there should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.*

  While certainty is desirable, other things being equal, it is not a sufficient ground to justify the abolition of private property rights. Moreover, the government's proposals, by introducing the concept of the public domain,

new customary interests, and a process to address the "inconsistencies" of private ownership, arguably create substantial uncertainty.

3.7 The principles provide a most unsatisfactory basis for the development of public policy. Standard public policy criteria should be applied.

4 Property rights

4.1 The most important protection afforded to the individual by the law is the protection of his or her property. Property led to the emergence of political and legal institutions that foster individual autonomy by limiting the power of the state. Property rights thereby protect citizens against expropriation by the government and powerful elites. They allow individuals to pursue their interests free from fear and unwarranted coercion. This protects the weak from the strong and the minority from the majority, promotes social cohesion by encouraging cooperation and helps to establish the conditions necessary for prosperity.

4.2 Democracy does not guarantee such protections and is not essential to achieve prosperity, as some people believe. A majority in a democratic government may exploit a minority, including racial or ethnic minorities. While democratic governments may provide secure private property rights, some undemocratic governments, such as that led by Chile's Augusto Pinochet, have also upheld property rights. Similarly, democracy is not essential for prosperity. Hong Kong, under British rule, grew rapidly in the second half of the twentieth century.

4.3 Property rights arise from scarcity. In the absence of scarcity each individual could achieve all his or her wants without constraining the level of satisfaction attainable by other people. Once scarcity is recognised conflicts over the use of resources are unavoidable. They are resolved through competition. Competition for the use of resources cannot be eliminated. The forms and kinds of property rights sanctioned by society define and identify the kinds of competition that will take place.

4.4 Private property allows resources to be allocated through voluntary exchange. As such exchanges involve costs, they will only occur where there is mutual advantage to the parties involved. In the absence of force or threat of force, mutual benefit between the parties creates a presumption that society as a whole is better off. The increase in wealth of the immediate parties will generally increase the opportunities for exchange available to other parties.

4.5 Well-defined and appropriately enforced property rights encourage individuals and firms to undertake wealth-generating activities with confidence. They discourage lobbying and other wasteful rent-seeking activities. Epstein expressed the point succinctly when he wrote:

> The ability to plan and to plant depends upon secure property rights that allow those who sow to reap.[36]

4.6 Ownership is a shorthand way of describing a particular bundle of rights to property. Private ownership of property encompasses the following rights:

- The exclusive right to use a resource or to decide how to use it. This includes the right to exclude other people from use of, or access to, the resource.
- The exclusive right to income generated by using the resource.
- The exclusive right to transfer rights to the resource, which includes the right to enter into contracts.

Private property rights are substantially reduced, if not abrogated, if the right to exclude others from access to, or use of, a resource is taken away. A change in language cannot obscure this fundamental point.

4.7 Some Maori have indicated that if title were granted, they would not exclude the public from accessing and using the foreshore and seabed. The relevant point, however, is that if title is issued to the foreshore and seabed the registered Maori owners would have the right to exclude others and they could exercise that right at any time in the future.

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[36] Epstein (1998), *op cit*, p 189.

4.8 The concepts of property and ownership are not avoided by vesting the foreshore and seabed in the public domain, as that is a form of ownership. Moreover, as discussed below, property that is held in common by the citizens and residents of New Zealand is private property to others. If the foreshore and seabed are in the public domain they are not available to non-residents to claim as they will.

4.9 The vital importance of secure private property rights for prosperity is emphasised in contemporary economic literature.[37] Mancur Olson concluded:

> [T]hat (if we leave aside a few special conditions that are not important in this context) only two general conditions are required for a market economy that generates economic success.[38]

These conditions are "secure and well-defined individual rights" and "the absence of predation of any kind".[39]

4.10 Richard Roll and John Talbott found that more than 80 percent of the cross-country variation in wealth (gross national income per capita) could be explained by nine mutable influences. The most significant and consistent positive influences were strong property rights, political rights, civil liberties, press freedom and government expenditures. Roll and Talbott "conclude that countries can develop faster by enforcing strong property rights, fostering an independent judiciary, attacking corruption, dismantling burdensome regulation, allowing press freedom, and protecting political rights and civil liberties. These features define a healthy environment for economic activity.[40]

4.11 Although private property rights are vital for individual autonomy and prosperity, it is inappropriate for all resources to be held privately. Epstein expressed this point in the following terms:

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37 See, for example, Landes, David (1998), *The Wealth and Poverty of Nations*, Basic Books, New York; North, Douglass C (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge; and Olson, Mancur (2000), *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships*, Basic Books, New York.

38 Olson (2000), *op cit*, p 195.

39 *Ibid*, pp 195-196.

40 Roll, Richard and Talbott, John (2001), 'Why Many Developing Countries Just Aren't', unpublished paper, University of California, Los Angeles.

> A fully matured legal system is not one in which all resources have passed from some primitive commons into private control. Many natural resources take the form in which their value is maximised only by leaving them, in whole or part, in some form of social commons. Air and water cannot be uniformly and completely reduced to private ownership.[41]

4.12 The question of whether property should be held in some form of common or private ownership involves a tradeoff between exclusion and coordination costs. With private ownership there is an obligation on all others to refrain from entry or use of property belonging to another or from using force or deception to prevent its transfer to a third party. A cost is imposed on third parties because their freedom of action is restricted. In most cases such external costs are worth bearing because there are larger social benefits from private property.

4.13 Private property may also lead to the problem of mutual blockage where the agreement of a large number of property owners is required before anyone could obtain private gain. Epstein examines what would happen if the law required the consent of all affected landowners before aeroplanes could fly high over their land or broadcasters could transmit their signals. In these cases, the costs of contracting with landowners would be high whereas routine overflights and transmissions do not interfere significantly with the productive use of the land.[42]

4.14 On the other hand, coordination costs are incurred in imposing and maintaining a stable system of common property. They can, for example, create obstacles to the efficient use of the property – the tragedy of the commons, where over-exploitation and under-investment arise, is an example. Incentives for productive activities are impaired. Mutually beneficial trade, which arises with private property, is hindered. Some person or entity (not necessarily the government) must coordinate the activities of the various claimants to the common asset.

4.15 The question of whether coordination or exclusion costs are the larger depends on the nature of the resource and the technology available to exploit it. Because

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41 Epstein (1998), *op cit*, p 231.

42 *Ibid*, p 254.

technology and the uses to which resources may be put change over time, no single regime of property will be good for all times and all occasions.

4.16 The choice of property regime is not solely between the polar cases of private ownership and common ownership. In certain situations intermediate solutions are possible and may be appropriate. A bag or catch limit applicable to recreational hunting or fishing is a simple example. Marine farming provides another illustration. Exclusive right to the relevant area of sea may not be required but rights to occupy, install facilities and harvest are often necessary. Other activities such as rights of peaceful navigation may not be incompatible with marine farming and may not need to be excluded.

Public domain and Crown ownership

4.17 Up until this point, the discussion has focused on the polar cases of private property and common property. To address the issues raised by the Document it is necessary to distinguish two forms of common property, namely, public domain and Crown (or public) property. The terminology used by a range of sources differs. The analysis which follows uses the terminology used in the Document, ie public domain, Crown or public, and private property.

4.18 The central notion of public domain property is that it is quite literally owned by no one so that all people have access to it. The air is an example. The use of mathematical ideas and intellectual property that is no longer protected by copyright or patent are also key illustrations. No transaction costs are incurred in using such property because people can simply use what is available to them. In the case of intellectual ideas scarcity does not arise (in contrast to, say, the use of public roads) and thus there is no economic reason for the Crown or anyone else to have the right to exclude people from using them.

4.19 In contrast, public property is owned by the Crown and *the Crown reserves the right to exclude its citizens*. There are many examples of public property from which citizens without lawful cause are excluded such as defence land, office buildings (aside from public reception areas) and parliament (aside from the public gallery and access thereto).

4.20 An argument for treating the sea and foreshore as public domain is that the costs of exclusion are relatively high whereas the costs of coordination are low:

> Today the oceans and rivers may be used for transportation, recreation, fishing, and trade. The thought that one nation or person could block all these activities on the high seas or impose tolls for such use is an unpleasant specter. And for what purpose? No one has to build or maintain the Mediterranean Sea. The privatization is not justified as a means to create value that others can share.
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> In a regime of common [public domain] waterways, the costs of coordination are in general low … To be sure, these commons may turn out to be complex: some form of public enforcement might be needed to prevent their pollution or degradation of the commons. [43]

But Epstein then indicates that it is necessary to go further:

> Yet even here the analysis is not at an end, for while the primary values in the use of seas and rivers are preserved when they are held in common [public domain], further improvement is possible if some limited conversion of water to private use is tolerated.[44]

4.21 The Document expresses a similar view:

> The ocean is an open space, shared and used by us all. It is true however that different people can have different and more narrowly defined rights, responsibilities and interests in parts of the marine environment. One person may have a right to fish commercially there, another may have a right to take tourists whale-watching, others have a general interest in the water quality, and the public in general is usually free to swim, fish and sail there.

4.22 As Epstein notes:

> The formal problem to be solved … is how to devise a system of rights in a body of water, which has multiple uses simultaneously, to maximize the combined return from its common and private uses.

4.23 Unless some group is given the power to dispose of property in the public domain and to control the proceeds that are obtained on behalf of all citizens, its use for purposes that require exclusive rights will be infeasible and overall

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43 *Ibid*, pp 261-262.

44 *Ibid*, p 262.

welfare will be impaired. In the case of the foreshore and seabed the stakes are potentially high. They involve rights to fish, and to engage in marine farming, and oil and mineral exploration and development.

4.24 The government does not envisage that the foreshore and seabed would be locked up for good because nobody can overcome the coordination costs involved in transactions involving property owned by everybody (or nobody). The vital questions are what group is to be charged with the task of representing the public, what is the group's mandate and how are agency problems to be controlled?

4.25 The need to transfer resources from government control is one reason why an organised system of collective ownership has been imposed on public property. The suggestion that the government should control the property may lead to a merging of the public domain and public property and undermine the government's proposal to divest its ownership interest in the foreshore and seabed. Similarly, the implicit suggestion in the Document that property in the public domain will be owned by nobody but controlled through statute and regulation seems to be aimed at replicating the rights and duties that attach to Crown ownership.

4.26 The public trust doctrine applies in the United States.[45] It arose in the late nineteenth century. Common property is held by the state in trust for the public at large. The disposition of property owned in common in the original position (ie from time when the law first applied) is governed by the public trust doctrine. Such property is alienable but it cannot be disposed of other than for just compensation (for example, a market value determined by competitive bid) which is to be used for the benefit of all individuals who had, in the original position, some undivided interest in the property. The disposal of common property to fund welfare benefits, for instance, would be inconsistent with this doctrine. It is understood that an equivalent doctrine does not apply in New Zealand.

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45 Epstein, Richard A (1987), 'The Public Trust Doctrine', *Cato Journal*, vol 7, no 2, pp 411-430.

4.27 The transfer of property out of the public domain is a key problem with that approach. The Document is silent on the rules that would apply in respect of the sale of rights to property in the public domain. In the United States, groups have vigorously opposed proposals to alienate property subject to the public trust doctrine. Similar difficulties could be expected in New Zealand if property is vested in the public domain. The scope for marine farming and mineral and oil extraction activities in the future is unknown. The foreshore and seabed should not, therefore, be vested in the public domain if it cannot subsequently be used to improve overall community welfare.

4.28 Property in the public domain such as rights required to engage in marine farming and rights to minerals (and public property) may be scarce. Such property must be allocated among competing uses and users. The price mechanism (for instance competitive tenders) should generally be used to allocate resources because the resources are most likely to be allocated to their most highly valued uses and the proceeds accrue to the community.

4.29 Most New Zealanders probably consider any suggestion that access to beaches should be subject to a charge as ridiculous. But the future is unknown. With increased tourism the most popular beaches may become over-crowded as they are in some other countries. In such circumstances, charges for use by tourists and, perhaps, residents could be more efficient than other methods of allocating access, such as queuing. Decisions taken now should have regard to the possible needs of generations well into the future.

4.30 The problematical question of the control of property in the public domain is not easily resolved. There are good grounds to avoid it altogether in the case of the foreshore and seabed by not putting them into the public domain. They are listed below:

- As with any issue, it is the responsibility of the government (or other proponents) to show that policy proposals would lead to an improvement in overall welfare. To satisfy this test the government must show that divesting Crown ownership of the foreshore and seabed and vesting it in the public domain would enhance community welfare. It has not

attempted to do so. Furthermore, it is doubtful whether the government could satisfy the test.

- A large body of established law specifies the rights and duties that arise from public ownership. The task of establishing a new framework to apply to property in the public domain is likely to be very costly both in terms of resources committed and the uncertainty generated.

- The government's approach is intended to appease the Maori caucus who apparently believe that a focus on title is a "Pakeha way of looking at the issue".[46] As noted at the start of this submission, Epstein speculated (perhaps on the basis of research into the property rights of primitive societies that had not mastered the art of writing) that Maori would have had private and communal property institutions.[47] Neither Maori nor other citizens are likely to be persuaded that fudging the issue of ownership rights advances their interests. A wide range of conditions relating to access and use apply to different classes of Crown-owned property now.

- The initial allocation of property rights affects the ultimate distribution of them, given that costs are incurred in transacting. This points to the importance of retaining public ownership of rights to the foreshore and seabed rather than transferring them to an imprecise and ill-defined common which may be very costly to transact with.

4.31 The above analysis implies that the foreshore and seabed that is not privately owned should generally be retained in public ownership rather than vested in the public domain. The question of marginal adjustments to improve overall social outcomes then arises. They could involve rights for marine farming, commercial fishing, tourism and recreational activities. Each case should be considered on its merits.

4.32 Customary rights should also be recognised as, for example, in *Yarmirr*. Such rights are recognised by the common law. They should generally be left to the

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46 *New Zealand Herald*, 12 September, 2003, p A3.

47 See Epstein (1998), *op cit*, p 257.

courts to determine. There is no need to confer such rights by statute and establish a separate branch of the Maori Land Court to address them. That approach risks igniting a new round of claims that would be difficult to sustain at common law and could take decades to settle.

4.33 The new provisions are intended to apply to existing claims before the Maori Land Court. Retrospective legislation is generally to be avoided because it is inconsistent with the rule of law. Claims that have been lodged at least up to the date of the decision of the Court of Appeal should be permitted to proceed on the basis of the law at that time.

4.34 Customary rights recognised by common law are likely to be limited. If the customs on which the rights are based have been abandoned, the rights are lost for good. Customary rights may also have been voluntarily surrendered as with the settlement relating to fishing. If the customary right is to a resource, it must be shown that the claimants were in exclusive possession of the resources prior to sovereignty passing and have continued to follow customary practices since then, thereby maintaining a physical link with the resources at all times. There can be no customary right to commercial activities such as mining and fishing. Mana over and guardianship of the seabed and foreshore that has been open to all are also unlikely to recognised as a customary right at common law.

5 Private property rights and compensation

5.1 Despite the importance of secure property rights to prosperity, they have been seriously eroded by policies adopted in the recent past. In addition, business has been subjected to increasing regulation that discourages investment and innovation. The following examples illustrate these concerns:

- The Resource Management Act 1991 enables property rights to be expropriated without compensation, provides extensive consultation and objection rights over the use and disposal of private property, raises transaction costs substantially and confers on elected officials undue power over private property. The Act results in long delays on many significant projects, including those required to improve infrastructure.

- Regulation of the electricity market forced distribution activities on the one hand and energy retailing and generation on the other to be undertaken by independent companies. Compensation for loss of commercial value was explicitly ruled out.

- The decision to ratify the Kyoto Protocol involved uncompensated takings of forestry carbon sinks.

- The 2000 ministerial inquiry has led to additional inefficient and arbitrary regulation of the telecommunications market. The proposed unbundling of the local network undermines the rights conferred when Telecom was privatised.

- The government imposed restrictions on the harvesting of native trees and abrogated the West Coast Accord. The legislation relating to the latter explicitly denied compensation to those harmed.

- The new takeovers code expropriates the premium that accrues to parcels that confer control.

5.2 An erosion of property rights is inconsistent with the government's stated top priority which is to increase the rate of economic growth. The Speech from the Throne at the opening of the current parliament indicated that the government:

> [S]ees its most important task as building the conditions for increasing New Zealand's long term sustainable rate of economic growth.[48]

5.3 The Document would further erode property rights by proposing to bring existing private ownership of the foreshore and seabed or other rights to such land into conformity with the new policy. A requirement to allow other people to access and use private property is a substantial erosion of property rights, even if the property continues to be held by the present owner. Similarly, property rights are taken when private owners consent to open access under the threat of legislation to abrogate their exclusivity. This is not the case, however, where the government buys the property in a genuinely voluntary transaction.

5.4 There is no principled argument in the Document to extinguish such rights. It is simply based on the assertion that all foreshore and seabed should be in the public domain. The government has not identified the nature and extent of such rights although they are thought to be limited. It is not therefore in a position to assess the overall marginal benefit to the community from extending the level of property to be held in the public domain against the cost in terms of coercion, output forgone and heightened risk of further erosion of property rights. The government has not even established whether private property owners unduly restrict public access to the foreshore and seabed.

5.5 There are compelling grounds for the government to compensate individuals and firms if private property rights are appropriated. This requires the government to weigh up the costs and benefits of its proposals. The Document is silent on the question. It seems reasonable to assume that compensation is not contemplated.

5.6 Because the government and many others believed that Maori customary rights to title had been extinguished and acted on that basis, it might be argued that no rights would be extinguished if the *status quo* were reinstated or if the government's proposal were implemented. The claimants would, however, maintain that their property rights were being extinguished without consent or compensation.

5.7 The Court of Appeal's decision determines the law as it now stands and acceptance of the rule of law requires the government to recognise that decision until the courts or statute overrules it. In these circumstances, the abolition of any customary property rights that are found by proper process to have existed since British common law first applied in New Zealand requires just compensation in the same way that the taking of land for public works warrants compensation. The payment of compensation in cash or kind for the losses imposed on affected whanau, whanui and hapu would require the government to value the gain to society as a whole against the related cost. Such compensation would need to be negotiated with affected parties and not with some pan-Maori or other group that does not represent them.

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48 Cartwright, Silvia (2002), Speech from the Throne, 27 August.

5.8 The same approach should apply to the government's proposal to extend open access and use to the foreshore and seabed that is in private hands. With most foreshore and seabed in Crown ownership it is difficult to believe that the marginal social benefit from extending Crown ownership is significant and yet the cost is likely to be high. How many hip operations, say, is the government prepared to forgo to put the final small percentage of the foreshore and seabed into the public domain?

5.9 This situation is different from the settlement of Treaty of Waitangi claims for land confiscated in the distant past because it relates to the expropriation of private property rights that Maori are currently entitled to. It would create a new Treaty breach.

5.10 The problem for the government and the claimants is that the question of whether compensation should be paid and, if so, the level of compensation payable is difficult to determine until the status of Maori customary land has been determined and thus the extent of valid claims (if any) is known. This reinforces the view that the court process should be allowed to continue.

5.11 The suggestion has been made that Maori should be compensated for the loss of customary title to the foreshore and seabed by allocating a share of all commercial developments to Maori interests. If compensation is to be paid, that proposed form of compensation is inappropriate. The successful operation of joint ventures in the private sector rests only in part on legal rules that govern conflicts of interest. The ability of individuals to freely choose their business partners is much more important. It allows them to choose people who share similar preferences and with whom they can transact with confidence. The first reduces the likelihood of major disagreements on joint decisions. The second reduces the risk of illicit appropriation of the joint venture's assets by one of the parties. If compensation is to be paid, it should be in cash or limited to a fraction of the net proceeds from the sale of rights and not confer on Maori preferential participation in commercial projects or preferential rights to determine the nature of any such projects.

5.12 In summary, the government has not established that the proposed extension of the public domain to privately held property is justified on a cost and benefit

basis. Until such a case is made no private property rights should be extinguished. Furthermore, private property owners should be fully compensated for any expropriation of their rights that occurs.

6 Other issues

6.1 The following issues are also raised by the proposals contained in the Document:

- Judicial activism is arguably the underlying cause of the predicament that the government now finds itself in. There are grounds for arguing that the Court of Appeal should have given greater weight to precedent and the fact that much legislation and investment had been made on the basis of the decision in *Ninety Mile Beach*. Parliament had ample time to overrule that decision if it had judged it to be socially unjust.

  The Court of Appeal should perhaps have said that it thought the *Ninety Mile Beach* decision was wrong, and why, but refused to interfere because it was law that had stood for a long time. Instead it could have invited parliament to consider whether the law as enunciated in 1963 should now be changed. Any decision would then have been made by democratically elected and accountable legislators not unelected judges.

  Over recent years, the Business Roundtable has highlighted the costs of uncertainty and, in some cases, bad law that judicial activism has caused. We judge that they are likely to increase if appeals to the Privy Council are abolished as proposed. Unless this underlying problem is addressed, similar problems will continue to arise in the future. This requires a consideration of changes in the process of appointment of judges and parliament needs to refrain from passing legislation that invites judicial activism, such as the inclusion of ill-defined Treaty clauses in bills.

- The Business Roundtable is, in general, opposed to the use of specialist courts such as the Maori Land Court and the Employment Court because of their tendency over time to reflect special interests, their unwillingness to apply general legal principles to resolve disputes and their

vulnerability to political interference.[49] The general courts can decide cases on the basis of evidence and argument, including expert evidence on tikanga. An expanded role for the Maori Land Court and the removal of some of the High Court's powers in respect of Maori land issues, as proposed in the Document, would be a step in the wrong direction.

- There is overwhelming evidence that the possession of natural or inherited resources is not a reliable basis for economic success, and can even be a handicap. The experience of different countries, and of groups within them, is striking in this regard. Argentina, one of the most richly endowed countries, has been a classic case in point. Australia, with considerable mineral resources, and indeed New Zealand, have been lesser versions of the same phenomenon. In a similar way, the provision of resources through foreign aid has done little for development in many third world countries. By contrast, countries like Japan, Hong Kong and Switzerland, with few resources and many natural disadvantages, have performed well. The lesson is that economic success owes far more to how intelligently countries manage their own affairs, and on cultural attitudes towards work, saving and enterprise, than it does to an initial resource base.

- It follows that the economic well-being of Maori in the future is only minimally related to the possession of specific resources and is ultimately dependent on the overall economic and social performance of the country. Key factors in the economic and social performance of Maori, along with other citizens, are the education and skills that they acquire and their participation in the labour market and, more generally, in the market economy.

- Maori customary rights, properly investigated and proved, should be upheld. They are property rights that pre-date the introduction of British common law.

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[49] See Bernard Robertson (1996), *The Status and Jurisdiction of the Employment Court*, New Zealand Business Roundtable, Wellington.

- Treaty of Waitangi claims are best regarded as issues of justice rather than as issues that will have a material bearing on the overall economic position of Maori in the future. In economic terms they involve redistribution, and cutting the cake in a different way has strict limits as a route to economic advancement compared with the route of making the cake larger. The administration of justice also has limits. All wrongs cannot be remedied and there are weak moral grounds for exacting restitution from living people for the deeds of those who died many decades ago. For very sound reasons most legal systems have a statute of limitations and at a certain point byegones are best left as byegones. Such a pragmatic approach has been taken in Eastern Europe, where expropriation and injustice occurred on a grand scale.

  This is not in any way to call in question the case for addressing valid claims. They should be dealt with as best they can through patience, imagination and generosity on both sides. But the outcome will be of fairly limited importance to the economic well-being of most Maori. The best policy is to work as carefully and rapidly as possible to resolve the major cases of injustice, and then to move on. Otherwise we risk being stuck in grievance mode, which is likely to be no more beneficial to Maori than it has been to the Irish.[50]

7 Conclusions

7.1 The ownership of the foreshore and seabed is a significant public policy issue that has important implications for prosperity and social cohesion. The omission from the Document of a sound legal and public policy analysis of the options that are available to the government following the Court of Appeal's decision in *Ngati Apa* is a conspicuous weakness.

7.2 The foreshore and seabed should generally be publicly owned with open access and use. This rule should be modified, however, by upholding existing private rights to the foreshore and seabed, including legitimate Maori customary rights

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50 See Minogue, Kenneth (1998), *Waitangi Morality and Reality*, New Zealand Business Roundtable, Wellington.

to title (if any) and lesser common law rights, and by the issue of new rights for fishing, marine farming, mining and other activities where the overall welfare of the community can be improved. Where resources are scarce, the price system should be used if practicable to allocate new rights among competing uses and users.

7.3 The government should allow the court process to run. It is the proper role of the courts to establish the nature and extent of Maori customary rights. There is considerable uncertainty as to whether customary title to the foreshore and seabed would be granted. That uncertainty cannot be resolved and justice cannot be done unless the courts address the substantive claims before them. The government has advanced no compelling argument to curtail the right of Maori to pursue their claims through the courts and, in any event, the threshold for doing so should be a high one.

7.4 If Maori can secure customary title to the foreshore and seabed, just compensation would be required for the abrogation of such rights in the same way that the taking of land for public works warrants compensation. The government also proposes to substantially erode other private rights to the foreshore and seabed. Just compensation would also be required in this event.

7.5 If compensation is to be paid, it should be in cash or limited to a fraction of the net proceeds from the sale of rights and not confer on Maori preferential participation in commercial projects or preferential rights to determine the nature of any such project.

7.6 The Crown's interests in the foreshore and seabed property should remain in public (Crown) ownership for the following principal reasons:

- The government has not attempted to demonstrate that vesting the Crown's interest in the foreshore and seabed in the public domain would enhance overall welfare. Furthermore, it is doubtful whether the government could establish that such a policy would improve welfare.

- Established law specifies the rights and duties that arise from public ownership. The task of establishing a new framework to apply to property in the public domain is likely to be costly both in terms of

resources committed and the uncertainty generated. Why go to the trouble of introducing a new legal concept with all the uncertainty that entails if the objective is simply to guarantee open access and use of the foreshore and seabed that all New Zealanders have generally enjoyed since the 1840s?

7.7 The following proposals are not supported:

- The introduction of the concept of public domain.
- The expropriation of existing private property rights to the foreshore and seabed. The government has not demonstrated that the benefits of doing so would outweigh the costs.
- The introduction of legislation conferring customary rights (other than ownership) on Maori and the establishment of a separate branch of the Maori Land Court to allocate such rights. Existing common law rights should continue to apply. There is no need to confer such rights by statute and establish a separate branch of the Maori Land Court to address them. That approach risks igniting a new round of claims that would be difficult to sustain at common law, could take decades to settle and would be divisive.

7.8 Judicial activism is arguably the underlying cause of the predicament that the government now finds itself in. Unless this problem is addressed, similar difficulties will arise in the future. Changes in the process of appointment of judges need to be considered and parliament needs to refrain from passing legislation that invites judicial activism, such as the inclusion of ill-defined Treaty clauses in bills.