Seabed and Foreshore

Waitangi Tribunal

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Preface

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Authorship

This report has been prepared at NZIER by Chris Nixon and John Yeabsley and reviewed by Brent Layton. The assistance of Sarah Spring is gratefully acknowledged.
1. Introduction

1. I am John Yeabsley, Senior Fellow of the New Zealand Institute of Economic Research (NZIER), an independent economic research agency. I hold the following qualifications: degrees in mathematics and philosophy and a Masters degree with first class honours in economics, all from the University of Canterbury. In addition, I have a Ph.D. in economics from the University of Essex, United Kingdom.

2. I spent twenty-five years with the public sector, largely as an economic policy advisor, working in a range of Departments and for a succession of governments. Positions held included Director of Economics and Assistant Secretary in the Department of Trade and Industry (DTI), and Chief Labour Market Advisor and General Manager with the Department of Labour. Much of my experience was involved with analysing and assessing policy, particularly from the viewpoint of national benefit.

3. On and off, during this public service career, particularly during my time with DTI (1969 to 1988), I was involved in resources policy, often considering the basics of the notion of property rights and their different forms and applications. Since leaving the public sector in 1994 I have been at the NZIER where I have undertaken a range of assignments, including several related to analytical aspects of resources policy.

4. The Waitangi Tribunal is holding hearings about the foreshore and seabed, and I have been asked to consider the wider social and economic aspects of property rights, and to thereby contribute to the ability of the Tribunal to form an overview of the situation. My contribution will cover: the broad social and economic setting of the foreshore and seabed, the nature of property rights and the different elements of these, and, finally, draw some conclusions.
5. The detailed shape of my evidence will be as follows. I will discuss matters in the following order:

5.1 Background to the matters considered;
5.2 Cultural setting;
5.3 The resources;
5.4 Property rights; and
5.5 Conclusion.

2. Background

6. Economics has little direct contribution to make to the debate in regard to the equity of the assignment of various property rights, or to the formal legal issues and outcome. But established and tested aspects of the discipline can provide insights into the various aspects of property rights. In other words, economics can help identify detailed aspects of the broad concept of “ownership,” which can then be used to develop the consequences of various possible proposals relating to the foreshore and seabed. This would assist with the quality of decisions by offering insights into the different ways of considering the resolution of the questions faced by the Tribunal.

7. Consideration of the important economic aspects and their probable consequences is vital if the final outcome is to be appropriate. Economic history has numerous examples where an original assignment of one or more aspect of property rights proved to be unsustainable, when the economics of using resources associated with it altered, or was not fully understood at the time of the original decision. Similarly, outcomes formulated without due consideration of the efficiency consequences of the property rights assignment are unlikely to be sustainable, and could thus,
reasonably quickly, generate further divisive controversy and debate.

8. The theory, by itself, does not give specific insights into understanding the appropriate or efficient allocation of property rights in any particular case. Lessons from institutional economics, though, suggest that those trying to understand the most efficient and optimal allocation of property rights must first examine the context in which the property rights are intended to be assigned before investigating the theoretical underpinnings. This is to ensure that institutional arrangements are fully taken into account when approaching an issue. Therefore when investigating any aspects of the foreshore and seabed property rights we must examine the:

8.1 importance of culture and the special characteristics of the resource;

8.2 characteristics of efficient allocation of property rights, and

8.3 the efficiency criteria required for optimal allocation.

9. One of the most sensible ways to consider the latter issues is through the examination of the way previous property right regimes have been implemented and their consequences. We are fortunate in New Zealand to have readily at hand several interesting examples to cite. We draw on these later in this document.
3. Cultural setting – the world view

10. “Sometimes the canoe of other races makes changes in its direction, but the steering of the Māori canoe should be in accordance with our tradition, it should travel on its set course.” [Terehia Kipa commenting to the Royal Commission on Genetic Modification 2001 p1].

11. A ‘world view’ is the lens by which any particular group views the opportunities and threats that confront them. To approach alternative property rights in the context of the foreshore and seabed we need to first look at the cultural setting, in this case Māori beliefs. I consider these by looking at the issues that I understand Māori see as important, when forming a view on how the foreshore and seabed should be managed. I am not an expert on Māori tradition and beliefs but venture into this area to illustrate the point I am making about culture and its impact.

12. As I see it, Māori values bring a unique dimension to the assessment of foreshore and seabed property rights in the New Zealand context. Cultural values which stem from tradition are at the heart of the approach Māori take.

13. My information is that part of this tradition is that the current generation is a conduit for the spiritual values held by the Iwi which have been passed on by their ancestors (through their elders) and are required to be passed on to the next generation. I would describe it as follows. The current generation have the responsibility (obligated stewardship, or kaitiakitanga) to safeguard these spiritual values and to not devalue them. Devaluing these responsibilities could cause harm or reduction in mana.

14. Iwi lands, coastlines, and fisheries resources are part of Iwi mana and are required to be managed in accordance with their tikanga. Tikanga is a system of governance that dictates how Iwi manage and interact with their environment. In ‘quasi-legal’ terms these
manifest themselves as what might be roughly described as something close to a series of “customary rights.” The best examples of such “customary rights” are those recognised in the Fisheries Settlement. It is also worthwhile noting that the commercial rights of Iwi in fisheries stem from the “customary rights.”

15. Other aspects that seem to either flow from the world view, or are an integral part of it include:

15.1 The obligation to provide stewardship of the vital assets for the next generation means Māori are “risk averse” where these assets are concerned. For example, the land, fish quota, and other exclusive rights are not often for sale, nor available to be used as security, where they would be at risk of changing hands permanently. The rebuilding of the asset base has much more than just economic significance for Māori.

15.2 Iwi are committed to their lands and are focused on outcomes over the long term. Focus and commitment on these assets are key elements of their social, environmental, economic, and cultural development.

15.3 The preference for collective behaviour. As NZIER (2003) p44 points out, the language of Māori is “unequivocally framed in collective terms such as whanau, hapu, and iwi”.

16. The aspects of the world view as sketched above, suggest that the Māori attachment to the land, fisheries resources, and coastline is extremely strong, and, an innate part of being attached to whanau, hapu, and Iwi.

Setting – the resources
17. This raises specific social, environmental, cultural and economic questions that lie at the heart of the seabed and foreshore debate. It suggests important consequences for all significant potential uses of the resources under consideration, including critically, the interaction between such uses, and that these might be complex.

18. The resource uses associated with the foreshore and seabed include:

18.1 food and resource gathering (no numbers available);

18.2 recreation (recreation includes tourism which is growing between 3%-8% per year);

18.3 marine farming (employs 1,060 full time equivalents (or FTEs));

18.4 support for land reclamations and other structures – including those associated with commercial activities such as ports and bridges (ports employ 5,190 FTEs);

18.5 access to the surface and sub-surface minerals and petroleum products (for instance, Methanx has a gross output of 1.4 billion and employs 640 FTEs);

18.6 the inflows of water, wastewater and similar pollution effects (no numbers available);

18.7 access to the water that flows over and under the seabed and the energy these flows generate (no numbers available);

18.8 transportation (see ports).
4. Property rights – the framework for optimal rights

19. In the real world, the costs associated with managing rights means that many property rights are not perfectly delineated. It is not the case that property rights either exist or do not; they exist to a degree - somewhat imperfectly - along a continuum of more or less precisely defined rights. The characteristics of particular property rights determine the precision of definition.

20. There are at least six of these: duration, flexibility, exclusivity, quality of title, transferability and divisibility (Scott, 1988, p 291). The values of these characteristics are not independent of each other. An increase in the permanency of a right, for example, raises the value that attaches to all other characteristics.

21. Figure 1 subjectively measures these six characteristics along what could best be described as a star of axes, with each axis measuring increasing qualities of a particular characteristic. A regime that maximises all characteristics creates a large hexagon when we link the end points of each axis.

22. It is important to note that the gains associated with better defined rights must be weighed up against other important considerations such as the societal objective for the seabed and foreshore, and equity among groups and individuals.

23. We can now look in some detail at the way these different characteristics have consequences. I am drawing here on previous examples of the implementation of property rights regimes to illustrate the way these have implications. The discussion is not exhaustive; it is included to illustrate (via examples where possible) the way that different versions of property rights have different economic and social implications.
4.1 **Flexibility**

24. The first of the characteristics is flexibility. Flexibility implies the freedom to structure operations or arrangements to maximise selected objectives e.g. it is the significant cultural value Māori place on coastline (translate into customary rights), which are the basis for Māori claims on the seabed and foreshore. Flexibility is important because it is not that Māori hold those customary rights, but how those customary rights are exercised that matters.

25. Note that under the fisheries and land settlement agreements some Iwi have shown that the regime permits remarkable flexibility. For example, ownership has been vested in Māori, while management has been transferred to the Crown.

26. Other alternatives, which would create increased flexibility, include allowing easements over land, or having a right of way in certain areas as an alternative to ownership of a fixed path. Another
approach would be to use other forms of use, while retaining ‘ownership’ this could be one of a number of types of leasehold.

### 4.2 Exclusivity

27. Exclusivity means the extent to which a single user can control the activities relating to the resources. The less exclusive are rights, the more likely is it that operational use intention and action clashes will arise, and the less likely that coordination will occur between those having competing interests in the same resources. The more common is ownership (i.e. the more different interests are engaged with the resource the more likely is the intensity of competing interests).

28. Common ownership also opens up the possibility that the “tragedy of the commons” will occur. This happens when individuals seek to make the most of their access provisions without taking due regard of the impact of their actions on the overall resource. It comes about because individuals only bear a share of the damage they inflict on the resource, while potentially reaping significant unshared rewards.

29. It also does not encourage least-cost management solutions for the resource, since there is little chance of a self-managed *de facto* adoption of a sustainable management regime. This arises as there will always be incentives for ‘holdouts’ (that is deliberate refusals to cooperate, pending the offer of some advantage, such as privileged access) by the individuals whose engagement is required to properly implement such a scheme.
4.3 Quality of title

30. A high quality title is one that is certain and secure. Certainty and security are increased the more predictable, or foreseeable, is the nature of the entitlement, and, if applicable, how this may change over time.

31. The more certain and secure are rights, the more likely the owners or those with an incentive to improve sustainability of the asset are to invest in capital to enhance the quality of what the asset may produce or to work toward other aspects of sustainability.

32. In the case of the seabed and foreshore, a poor quality of title would tend to limit the potential funds for improvement to (or remedial action to address existing problems with) the seabed and foreshore. This comes about because the investors will be looking at how secure the flow-on benefits are, and a poor title undermines the assurance of these results. Moreover, the more uncertain and insecure are rights, the more unlikely it is that financial institutions will accept such title as collateral against loans. And access to borrowed funds may be an important prerequisite for financing resource enhancing investment (Collons, 1996).

4.4 Transferability and Divisibility

33. Transfer and divisibility both refer to the dynamic rights associated with the ability to dispose of the resource. In effect, these are rights permitting certain aspects of trading and alienation in the other rights. There are economic benefits attached to the transferability and divisibility of rights. These include the advantages that transferable rights offer through their capacity to enable efficient users to buy out inefficient users who are rights holders, thereby ensuring rights end up in the hands of those to whom they are of most value. For example, under the New Zealand fishing regime (the Quota Management System) this has been instrumental in easing retirement from the industry, and
reducing the overcapitalisation of commercial fishing (Annala, 1996, p48).

34. But the potential is wider than the economic effects. For instance, the ability to divide assets into smaller amounts and to transfer or assign some of these parcels to subgroups of original rights holders, or even to other groups, can help ease social or cultural problems of use rights associated with sections of a particular asset.

4.5 Duration

35. Duration relates to the length of time over which rights are secure and is measurable in seasons (for, say, shell fish harvest), or in years. A short duration means that renewal or extension is costly, or possibly doubtful. A more permanent (longer) duration is valuable to holders as it reduces renewal costs and uncertainty. The advantages of this situation can be as simple as the saving in time and worry that might be associated with the regular process of right renewal. It also can be more culturally appropriate to assign guardianship to a group for a lengthy period.

36. Economically, it raises the incentives to invest long term, given the relatively safe assumption of being able to benefit from such investments. The more permanent are rights the more likely are rights holders to be able to invest in capital intensive, slow yielding infrastructure, (such as providing better access to the foreshore) or even in training for guides to provide a tourism experience.

4.6 Efficiency criteria

37. Under this heading we compare a spectrum of property right measures with respect to achieving efficient management. We start from the premise that rights emerge where it is feasible or necessary for this outcome. Typically, this will be where the (social, cultural, environmental, and economic) ‘value’ of the resource involved exceeds the costs of defining and enforcing (i.e.
in the case of land, this amounts to exclusion) the resource right, however defined. Given that the benefits of rights-based approaches depend on the characteristics of those rights (refer to previous discussion) we examine some of the efficiency implications of various property right regimes in relation to the characteristics of different types of seabed and foreshore.

38. A range of property right measures can be distinguished with varying degrees of excludability:

38.1 **open access to the seabed and foreshore:** Access to these areas are either non-excludable or excludable at very high cost. Rights to access are held in common by the Crown.

38.2 **territorial rights to the seabed and foreshore:** These are restricted to specific groups or communities, but with shares (relating to say harvesting specific products and/or costs) allocated within the group through a variety of administrative or negotiated processes.

38.3 **restrictive licensing or ownership:** This limits access to specific groups, and includes conditions on use, but licences/ownership are not necessarily transferable or perpetual.

38.4 **individual ownership:** These provide the holders with certainty as to the returns of their designated seabed and foreshore assets, and ability to capture improvements in seabed and foreshore value if the assets are transferable.

38.5 **sole ownership:** This provides a mechanism for a single holder of all of the seabed and foreshore rights to internalise all decisions regarding the utilisation of the seabed and foreshore, provided externalities can be adequately dealt with.
39. The focus of the discussion that follows is on the seabed and foreshore, but the other variants are included to show the relative strengths and weaknesses of measures in different circumstances.

40. To the extent that there are unpriced external impacts (that is, effects not included in any charges) associated with seabed and foreshore uses, it is not possible to fully quantify the components of economic efficiency. Nevertheless, criteria which can be used to compare the various property instruments to different aspects of social goals are:

40.1 effectiveness in achieving society’s objectives:

40.1.1 cultural,

40.1.2 social,

40.1.3 environmental, and

40.1.4 economic.

40.2 efficiency in eliminating waste;

40.3 equity, both contemporary and inter-generational;

40.4 continuing incentive for innovation and adaptive responses; and

40.5 administrative feasibility, including transaction costs.

41. Issues to consider include:

41.1 the suitability of the various rights-based approaches to the different seabed and foreshore issues is required to be assessed with respect to the asset’s biological, mineral, environmental, social, cultural, and economic characteristics.
41.2 A specific examination of the impact on third parties and the environment.

41.3 an assessment of the implications of each rights based measure for other seabed and foreshore management institutions:

41.3.1 the extent to which they replace or are superimposed on existing regulations;

41.3.2 the residual role for complementary measures (for example, foreshore and seabed conservation measures); and

41.3.3 the consequences for stakeholder participation and management planning processes.

5. Conclusion

42. There are many different possible ways that property rights regimes can be designed and implemented. These have different implications that can be cultural, social, environmental and/or economic or a mix of these. The particular upshot that eventuates will result from an interaction of the detailed character of the resource with the specific rights regime selected.

43. This complexity provides the potential to sift among the regimes, as well as among the potential rights holders, to seek possible improvements in the quality of the final outcomes of any particular assignment of property rights. The most appropriate regime judged on a broad basis that might include cultural and social effects, as well as environmental and economic, will be the one that best takes all these various factors into account.
6. References

44. Annala, J (1996) “New Zealand’s ITQ system: have the first eight years been a success or failure?” Reviews in Fish Biology and Fisheries, 6, pp 43-62.


46. NZIER (2003), Māori Economic Development, NZIER.
