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Welcome to the Summer 2010 Edition of the Exceltium Quarterly:

Foreshore & Seabed Issue Risks Going Off Rails

THIS SUMMER 2010 EDITION OF THE *EXCELTIUM QUARTERLY* BACKGROUNDS THE CONTROVERSIAL FORESHORE AND SEABED ISSUE, SET TO BE ONE OF THE KEY GOVERNMENT'S MAJOR CHALLENGES IN THE LAST TWO YEARS OF ITS FIRST TERM. IT DRAWS ON POLLING CARRIED OUT EXCLUSIVELY FOR EXCELTIUM BY CURIA MARKET RESEARCH LTD, WHICH ALSO HOLDS THE NATIONAL PARTY POLLING ACCOUNT.

THE NEWSLETTER finds that while the Key Government and its Māori Party supporters have to date managed the issue in a manner that is exponentially more competent than the previous Clark Government, they now appear to be adopting a policy development path very similar to the secretive process used for the discredited Emissions Trading Scheme (ETS) legislation in 2009 – and, indeed, by Michael Cullen in the development of his Foreshore & Seabed Bill, which led to political catastrophe for the previous Government.

In contrast, the new Government's approach to the issue initially had elements of commendable openness, transparency and good faith. However, once again, pivotal decisions appear set to be made by a small, informal group of iwi leaders, whose names are not readily available and who do not even claim to represent Māori generally, but who appear likely to determine the Māori Party's position on the issue. Once again, Ngāi Tahu's Mark Solomon and his adviser Sacha McMeeking appear to be playing key roles. It is a process which has more in common with former US Vice President Dick Cheney's Energy Taskforce rather than what should be expected in New Zealand.

Unless greater transparency and openness are adopted, the path seems likely to lead to a closed-door compromise that may satisfy a handful of iwi players, but which is not politically sustainable. This would be all the more disappointing because it is clear that the possibility remains open – as it always has been – to secure majority public support from Māori and Pakeha for a judicial solution.

This newsletter backgrounds the development of the issue in 2003 and 2004, including the Clark Government's very poor political management and the actual legal situation as it was at the time; looks at the options available to the Key Government; and explores which of these could lead to a politically sustainable outcome. Its main political finding is that a race exists to define the issues at stake, and whoever does so will see their view prevail in the public mind. The risk is that this could be a figure with the dividing power of a Winston Peters rather than the unifying power of John Key.

For a full copy of the Curia Market Research Ltd polling results, please contact Sarah Phillips at Exceltium Ltd – sarah.phillips@exceltium.com

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Introduction

FORESHORE AND SEABED ISSUE HAS PROVEN POWER TO REALIGN NEW ZEALAND POLITICS

National's current governing arrangement would be unimaginable if not for the political upheaval caused by the foreshore and seabed issue

Prime Minister John Key is right to be taking a cautious approach to the foreshore and seabed issue, given its track record as perhaps the most divisive – and almost undoubtedly the most consequential – political issue of recent New Zealand history. He knows as well as anyone that without the political realignments caused by the issue during the mid 2000s, his current National/ACT/Māori Party/UnitedFuture governing arrangement would be unimaginable.

These realignments included a split in New Zealand's oldest political party, Labour, and severe damage to its historic relationship with Māori. The new party which emerged, the Māori Party, is already a permanent feature of the New Zealand political landscape, positioned to decide, more often than not, whether Labour or National will be the lead party in future governments of New Zealand.[1]

On the other side of the political divide, the issue was used by the National Party to reconnect with voters it had lost in 2002 and so position itself as able to make a credible assault on the Treasury benches in 2005 and 2008 – despite having almost opposite policy positions on the issue for those two elections.

The issue remains contentious enough to offer Labour its one hope of a lifeline for the 2011 election – especially if it led to a re-emergence of Winston Peters

The possibility of such radical realignments again being driven by the issue should not be ruled out. While time, Mr Key's leadership, and a certain public and political amnesia may appear to have taken much of the heat out of the issue, the Curia polling commissioned by Exceltium suggests it remains contentious enough that, were it to be mishandled over the next 22 months, it could offer Labour its one hope of a premature return to power – especially if it were to lead to a re-emergence of Winston Peters and his New Zealand First Party.

Unfortunately, developments behind the scenes suggest the odds of such a scenario are creeping upwards. After a good start, parties to the governing arrangement now appear to be adopting the same processes to address the issue that were used for the ETS fiasco at the end of 2009 – processes which are ironically similar to those which led to disaster for the previous Labour Government on the issue in the mid 2000s.

Successful handling of the issue will require a principled approach and excellent political management

At the same time, the Curia work indicates such low levels of public understanding that the possibility is open for a figure such as Mr Peters – or perhaps Phil Goff or Shane Jones – to dramatically turn public sentiment against the kinder, gentler attitude to the foreshore and seabed issue, and race relations generally, that Mr Key and his Māori Party partners have so successfully built until now. Avoiding these risks will require a principled approach and excellent political management by the National and Māori parties over the next 22 months.

1 Unlike other minor parties, the Māori Party's powerbase lies in electorates, meaning it would survive a switch back to First Past the Post or a hybrid electoral system such as Supplementary Member. The party would also have a fair chance of surviving an abolition of the Māori electorates, should its 76,836 electorate voters in those seats be encouraged to give it their party votes.

Background

LABOUR'S POLITICAL DEBACLE OF 2003–4

Analysis of news coverage following the *Ngāti Apa* decision suggests it was the Government, not the media, that inflamed the situation

That the foreshore and seabed led to such drama in New Zealand politics was largely the result of surprisingly incompetent political management by the previous Government, in particular Prime Minister Helen Clark and Attorney-General Margaret Wilson. Exceltium's analysis of news coverage following the Court of Appeal's unanimous decision in *Ngāti Apa*[2] on Thursday 19 June 2003 suggests it was the Government itself which inflamed the situation, not the media. Initial reporting in the major newspapers was entirely factual and largely confined to the inside pages. It carried an appropriately banal government response from Labour Party strategist Pete Hodgson that the Government wanted to carefully consider the judgment before commenting.[3]

No such careful consideration appears to have occurred. The very next day, Friday 20 June 2003, Ms Clark announced that her Government would legislate to overturn the decision. She said, wrongly, that the decision had widespread implications for all New Zealanders and her Government would not allow the issue to be considered by the courts. Such statements almost certainly legitimised in the public mind similarly false claims by National's Nick Smith that the decision would "open the floodgates to more Māori claims over beaches".[4]

Inflammatory comments by the Clark Government helped convince the public that recreational access to the foreshore and seabed was at stake

Three days later, on Monday 23 June 2003, the Cabinet confirmed Ms Clark's announcement, deciding to pass legislation to extinguish any and all Māori claims to customary title over the foreshore and seabed. It was only this decision that propelled the issue onto the front pages of the *New Zealand Herald* and *Dominion Post*. Ms Wilson claimed the legislation was necessary to prevent parts of the Marlborough Sounds becoming off-limits to boaties. With such comments from senior ministers, it is little wonder the public reached the conclusion that their rights to enjoy the foreshore and seabed for recreation were at stake.

The local council's preference was for an appeal to the Privy Council, but no real consideration was given to that approach

No serious consideration was given to simply appealing the decision to the nation's then highest court, the Privy Council, as would be expected from a government in a First World democracy which disagreed with a court decision to which it was a party. This was despite an appeal being the preference of the Marlborough District Council,[5] the key litigant. It seems most likely that a decision not to appeal was made because the Government feared this may have risked undermining political support for Ms Wilson's efforts at the time to abolish appeals to that Court. It is also likely that the Crown knew it would have no chance of success at the Privy Council, with it almost certain to uphold the unanimous Court of Appeal decision in *Ngāti Apa*.

Political volatility and confusion meant that extreme commentary seemed justified

By the end of July, the issue had become so politically contentious and misunderstood that behaviour that would normally have been considered extreme now appeared justified: hundreds joined a protest through Nelson led by Dr Smith and UnitedFuture leader Peter Dunne, where placards were displayed including "Whites Have Rights Too"; while then National Leader Bill English launched a web-based campaign called "Beaches for All" based on the false proposition that there was a suggestion otherwise. It is doubtful that such initiatives would have been credible had the then Government's response to the issue been more considered and rational.

2 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643.
3 Audrey Young "Go-ahead for iwi on seabed" *New Zealand Herald* (20 June 2003) at A3.
4 Colin Espiner "Govt likely to oppose decision" The Press (21 June 2003) at A2.
5 Sue Allen "Privy Council asked to rule on foreshore" *Dominion Post* (28 June 2003) at A5.

Labour's approach, including Ms Clark's disdain for Māori disaffection, meant the formation of the Māori Party became inevitable

The upshot of these developments was that the iwi litigants and other Māori, including Labour's then strong Māori Caucus, were rightly appalled and the process which led to the creation of the Māori Party began. Within the Government, Michael Cullen began informal and unpublicised discussions with iwi to try to find a middle ground, coming up with the concept of "public domain". With doubt over what this term meant, new National Leader Don Brash was able to go on the attack in January 2004,[6] contributing to an immediate 17-point increase in his party's poll ratings.[7] On the other side of the issue, 15,000 New Zealanders, mainly Māori, marched on Parliament on 5 May 2004, led by the Ratana Brass Band, protesting the legislative solution. Ms Clark dismissed the hikoi as "haters and wreckers"[8] and declared she instead preferred the company of a sheep – statements which finally made all but inevitable the formation of the Māori Party on 7 July 2004. When John Key launched his new kinder, gentler National Party on 28 November 2006,[9] indicating greater willingness to work with the Māori Party, Labour's debacle was complete.

With a more measured Labour response, it is possible that Ms Clark would still be Prime Minister

It is interesting to speculate how events would have turned out had Mr Hodgson's initial statement been honoured, and had Ms Wilson then simply appealed the decision to the Privy Council and allowed due process to be followed. It is possible that Ms Clark would still be Prime Minister.

WHAT NGĀTI APA ACTUALLY SAID

The *Ngāti Apa* case began with Ngāti Apa and seven other iwi exploring whether customary title to marine farming resources could be recognised by the Māori Land Court

Ngāti Apa began as a dispute about the administration of marine farming permits under the Resource Management Act and the since-repealed Marine Farming Act. The iwi wanted to develop its marine farming business but encountered what it saw as intransigence or incompetence from the local council in granting resource consents. Together with seven other iwi, Ngāti Apa applied to the Māori Land Court to explore whether its customary title to the area could be legally recognised in order to better assert its position over the bureaucrats, and participate in marine farming development.

The case was brought under Te Ture Whenua Māori Act 1993 (the Māori Land Act), which allows the Māori Land Court to investigate Māori customary title in accordance with tikanga Māori.[10] Customary or aboriginal title had existed under the English common law since the 1700s,[11] and therefore in the New Zealand common law since 1840 and was codified in New Zealand statute law as far back as the Native Lands Act 1862. As early as 1942, the Māori Appellate Court found in *Ngakororo* that there was no difference between investigating title to the foreshore and investigating title to any other piece of land.[12]

The Court of Appeal found that the Māori Land Court had jurisdiction to consider customary title to the foreshore and seabed, though any claimant would likely find it difficult to prove their claim

In *Ngāti Apa*, the Court of Appeal found unanimously that because the Crown had never extinguished customary title to the foreshore and seabed, the Māori Land Court had jurisdiction to consider it, and that Ngāti Apa and the joint applicants should not be barred from making an application to that court.[13] The Court of Appeal made no judgment about the likelihood of the applicants succeeding in the Māori Land Court based on their particular facts, but did add that it thought it would be difficult for any claimant to prove customary title. Justice Gault was of the opinion that the bar would be high – possibly set too high for most applicants.[14]

6 Dr Don Brash, National Party Leader "Nationhood" (Speech to Orewa Rotary Club, 27 January 2004).
7 One News Colmar Brunton poll: February 2004.
8 "Helen Clark slams hikoi" *One News* (4 May 2004).
9 John Key, National Party Leader (Speech to North Shore National Party luncheon, 28 November 2006).
10 See ss 132 (1) and (2), Te Ture Whenua Māori Act 1993.
11 Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989).
12 Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 12.
13 *Ngāti Apa*, above n 2, at [91] per Elias CJ.
14 *Ngāti Apa*, above n 2, at [106] per Gault J.

The case was about access to the courts

The case was therefore entirely jurisdictional. It was about access to the courts, and this point was made extensively by all those at the sharp end of opposition to the previous Government's handling of the issue:

"We will never give up the fight to restore to tangata whenua the right to due process"[15]

Hon. Tariana Turia, 5 February 2008

"We will never give up the fight to restore to tangata whenua the right to due process"
Hon. Tariana Turia

"We seek to return to the ruling that iwi should at least have the right of access to Court preserved"[16]

Dr Pita Sharples, 16 November 2006

"The government should allow the court process to run. It is the proper role of the courts to establish the nature and extent of Māori customary rights"[17]

New Zealand Business Roundtable, July 2004

[The coalition] submits that it would be entirely improper for Parliament to, in effect, unilaterally over-rule the judgment in Ngāti Apa to prevent the successful appellants in that case from having their arguments heard by and ruled upon by the Māori Land Court"[18]

Treaty Tribes Coalition, February 2004

"Helen Clark is legislating away iwi rights to have heard in court their claim of customary title to the foreshore and seabed"[19]

Rodney Hide, 14 September 2004

"Ngāti Apa were denied the right to due process"[20]

Ngāti Apa, 19 May 2009

"The Government should not have created an Act before the full court process had finished because there are constitutional principles which mean that the due process of the courts should be seen to completion"[21]

Ngāi Tahu, 5 November 2009

A consensus could have been built around this point, had the political will existed

As time has gone on, more people have come to understand these points, including, ironically given the boost the issue gave to his poll ratings, Dr Brash, who stated in November 2009: "I think the National Party got it wrong; I think we should have in fact supported the right of iwi to go to the High Court."[22]

It was always quite clear, not just with the benefit of hindsight, that it was possible for a consensus to have been built around this point, had the politicians chosen that course.

15 Māori Party "'Foreshore deal a sham charade' says Turia" (Press release, 5 February 2008).
16 Dr Pita Sharples, Māori Party co-leader (Speech at Whakatu Marae, 16 November 2006).
17 New Zealand Business Roundtable "Submission on the Foreshore and Seabed Bill" at 1.
18 Treaty Tribes Coalition "One Rule of Law For All New Zealanders: submission on the foreshore and seabed issue" at 2.
19 Rodney Hide (Speech to Wellington Central Rotary, 14 September 2004).
20 Ngāti Apa "Submission to Ministerial Review Panel".
21 Ngāi Tahu "Background paper – foreshore and seabed" (5 November 2009).
22 Interview with Don Brash, former leader of the National Party (Paul Holmes, Q&A, TVNZ, 1 November 2009) transcript provided by TVNZ.

WHAT *NGĀTI APA* MIGHT HAVE GIVEN AN IWI

Post-*Ngāti Apa*, the Māori Land Court could investigate customary title to the foreshore and seabed and determine the owners

As the law stood immediately after *Ngāti Apa* in June 2003, it would have been possible for the Māori Land Court to determine and declare, subject to appeal, the status of the foreshore and seabed.[23] The Māori Land Court could further investigate the title to the foreshore and seabed as customary land, in accordance with tikanga Māori, and determine the owners.[24] For any such parts of the foreshore and seabed, it could then have gone on, again subject to appeal, to find that it should issue a vesting order which would automatically translate Māori customary title into freehold title.

Tough tests to achieve a status declaration of customary title, and even tougher tests to achieve a vesting order for freehold title

For an iwi to achieve a **status declaration** of customary title for any piece of land, including potentially foreshore and seabed, their rights must be ascertained by studying the particular history of the iwi and their usages in each case.[25] The Māori Land Court does not categorise or set in stone the relationships with the land that are involved in establishing customary title, however these have been known to include evidence of uninterrupted harvesting and guardianship of traditional resources, and "ahi kā roa" – continuous occupation.[26]

Justice Gault suggested the test would be high – even impossibly high for most applicants

With the Māori Land Court denied the right to investigate title to the foreshore and seabed, one can only theorise about what an iwi would need to prove in order to be granted a **vesting order**, turning customary title of foreshore and seabed into Māori freehold title (a fee simple title). As noted, Justice Gault in *Ngāti Apa* felt that the bar was perhaps impossibly high for most applicants.[27] Applying the test from *Ninety-Mile Beach*,[28] it is likely that applicants would, in addition to the above criteria, have to satisfy the Court that the area had been occupied to the exclusion of other tribes.

Any hope iwi could achieve freehold land was prevented by the Act

These are tests that the Foreshore & Seabed Act 2004 prevented Ngāti Apa from being able to try to satisfy. Had they been able to prove them to the Māori Land Court for any part of the foreshore and seabed, and had any such decision been upheld on appeal, they would have had the chance of achieving Māori freehold land title. Only then would there have been the possibility of exclusion, sale (although this would be subject to the limitations in

23 Section 131 (1), Te Ture Whenua Māori Act 1993.
24 Section 132, Te Ture Whenua Māori Act 1993.
25 *Ngāti Apa*, above n 2, at [33] per Elias CJ.
26 In the case of *John Da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (1998) 25 Tai Tokerau MB 212 (which did not relate to foreshore and seabed, but to land on Great Barrier Island), the evidence of customary title offered by the applicants was:
- take raupatu: conquest
- take tupuna: descent
- tikanga: knowledge and customary practices passed down by their tupuna
- wāhi tapu: knowledge and guardianship of all places of spiritual significance
- mahinga: uninterrupted harvesting and guardianship of traditional resources which continue to the present day
- ahi kā roa: the maintenance of continuous occupation

27 *Ngāti Apa*, above n 2, at [106] per Gault J.
28 The test in *Re the Ninety-Mile Beach* (1957) 85 Northern MB 126–127 was:
- the area was part of the tribal territory;
- they had kāinga and burial grounds scattered inland from the beach;
- the beach had been occupied to the exclusion of other tribes;
- the foreshore land itself was a major source of food;
- fish were caught in the sea from the beach;
- for various reasons, from time to time rāhui (restrictions) were imposed upon various parts of the beach and the sea itself (demonstrating management under Māori customary law); and
- the beach was "used generally" by the iwi

Te Ture Whenua Māori Act) or successful commercial development.[29] There is also the possibility that the Māori Land Court could have placed encumbrances on titles of Māori freehold land – perhaps allowing public access for recreation by other New Zealanders.[30]

HOW MUCH LAND WAS INVOLVED?

The Act nationalised as much as 170,000km², vastly exceeding any colonial land confiscations

The Foreshore & Seabed Act was described as the greatest land confiscation in New Zealand history,[31] but that is debatable. With the Crown declaring itself to be the owner of all land from the high-water mark to the outer limits of the territorial sea, as much as 170,000km² was nationalised under the Act.[32] This would indeed vastly exceed any of the land confiscations of the previous 163 years. If, however, the nationalisation is considered to be limited only to foreshore and seabed which could conceivably meet the tests summarised in the previous section, then the confiscation was much smaller.

A better way to give some scale of the confiscation is to assume some relationship – although not an absolute relationship – between the extent of Māori ownership of land adjoining the foreshore and seabed and the ability of iwi to prove the tests in the previous section. Approximately 2,000km of coastline is in this category, with another 4,000km of coastline being owned by other private interests.[33] All in all, around 30% of New Zealand coastline is currently in private ownership, some of which includes foreshore and seabed land, so it is arguably already possible for other New Zealanders to be excluded from these areas.[34]

WHAT MĀORI *LOST* FROM THE FORESHORE & SEABED ACT

Actual confiscations as a result of the Act are likely to have been very small proportional to New Zealand's total territory

The Foreshore & Seabed Act confiscated whatever area of foreshore and seabed iwi might one day have been able to have transferred into Māori freehold land title. This cannot be quantified but it is likely to be a very small area compared with New Zealand's total territory. It is important to note, however, that whatever area of foreshore and seabed might have been vested into freehold ownership by the Māori Land Court, Māori did not lose any customary fishing rights nor the right to 20% of all current and future aquaculture space.

The right to due process was arguably the main loss for Māori

It can be argued – and has been by the Waitangi Tribunal,[35] among others – that the main loss was the confiscation of the right to due process. The Treaty Tribes Coalition argued in 2004 that were the courts to ultimately rule that the applicants do not have rights and interests in the foreshore and seabed, it would not leave such a bitter taste in the mouths of Māori, as it would be a fair and final legal determination.[36]

29 It is worth noting that Māori freehold land is usually held collectively. For any commercial development to take place, all of the owners of the land would need to be consulted, which could be very difficult. It is also possible under Te Ture Whenua Māori Act 1993 to change the status of Māori freehold land to general, fee simple land, which would facilitate commercial development.

30 Section 132 allows an applicant for Māori freehold title to specify any conditions to which the land would be subject. A savvy applicant for title to the foreshore and seabed could specify a condition that the land would be subject to a public right of recreation or navigation, which would allay any fears about exclusion.

31 "The largest confiscation in our time" *Stuff* website (8 April 2004).

32 http://earthtrends.wri.org/pdf_library/country_profiles/coa_cou_554.pdf (at 3 February 2009).

33 Land Information New Zealand "Foreshore Project Final Report" (12 December 2003).

34 Ibid.

35 Waitangi Tribunal "Report on the Crown's Foreshore and Seabed Policy".

36 Treaty Tribes Coalition submission, above n 18, at 2.

WHAT MĀORI *GAINED* FROM THE FORESHORE & SEABED ACT

Dr Cullen gave iwi the chance to apply for customary activities to be protected...

There is little doubt that Dr Cullen worked hard and in good faith behind closed doors to try to develop a regime which would compensate for the losses under the Foreshore & Seabed Act, constrained as he was by the premature and ill-considered announcements made immediately following the decision in *Ngāti Apa* by his Prime Minister.

The Act he designed nationalised the entire foreshore and seabed, as had been demanded by the Prime Minister, but then went on to give groups the opportunity to apply to the courts for **customary rights orders**, which would recognise and protect activities, such as collecting hangi stones.[37]

...and the right to seek confirmation that they would have held customary rights

To try to avoid accusations he was preventing iwi from having their day in court, Dr Cullen also built into his Act the right of iwi to seek confirmation that they would have held **territorial customary rights** had it not been for the nationalisation. Achieving this would require an iwi to show that:

- they had continuous title to the land contiguous to the relevant area of foreshore and seabed since 1840; and
- the area had been used and occupied exclusively by the iwi without substantial interruption.

The Act allowed iwi to circumvent the court process, and Ngāti Porou did well out of it

Dr Cullen's Act also provided for iwi to be able to circumvent the court process for territorial customary rights and proceed directly to negotiations with the Crown. This option was taken up quickly by Ngāti Porou and led to a Deed of Settlement about which former Treaty of Waitangi Negotiations Minister Sir Douglas Graham observed: "They actually, I think, ended up with more rights than they would have done by going to court." It is not clear why an iwi should end up with greater rights under Dr Cullen's process than it could have achieved from the courts. Other New Zealanders in dispute with the Crown, such as leaky home victims, seldom end up in this position.

What's happening now

THE NATIONAL/MĀORI PARTY REVIEW

One of the conditions of the Māori Party's confidence and supply agreement with National was National's recognition of Māori Party concerns in relation to the Act

On 16 November 2008, the leaders of the National and Māori parties signed a confidence and supply agreement in which the National Party said it recognised the concerns of the Māori Party relating to the Foreshore & Seabed Act and set out a process for it to be reviewed.[38] A three-person panel was then appointed on 4 March 2009 to carry out the review, led by former High Court judge and Waitangi Tribunal chair Justice Eddy Durie. The other members were barrister and university professor Richard Boast, whose *Foreshore and Seabed* text has been referenced in this newsletter, and Hana O'Regan, an educationalist who specialises in Māori politics and culture.

37 This has been a popular example used by Pakeha politicians; however it is not clear where in New Zealand any iwi had been prevented from collecting hangi stones, nor whether in fact any iwi preferred to collect hangi stones from the foreshore rather than from riverbeds.

38 Relationship and Confidence and Supply Agreement between the National Party and the Māori Party (16 November 2008) http://www.national.org.nz/files/agreements/National-Maori_Party_agreement.pdf (at 3 February 2010).

A panel reviewing the Act recommended that it be repealed, and replaced by one of four options

The panel reported back on 30 June 2009 and claimed that customary title to the foreshore and seabed, if not extinguished, continues to exist by default. This suggests the panel believes that iwi do not have to first prove that the customary title exists in the courts, but that it is enough to simply assert it. The panel went on to recommend that the Foreshore & Seabed Act should be repealed and considered four options that could be considered as a replacement:

1. A **judicial model**, returning to the status quo after the decision in *Ngāti Apa*, and allowing the Māori Land Court and subsequent courts to investigate title
2. A **staged settlement model**, based on negotiations between iwi and the Crown, either as part of, or independent to, the Treaty settlement process
3. **A national settlement model**, where there would be a single, nationwide settlement, as was the case for the landmark Sealord deal on fisheries
4. A **mixed model**, which combined either a national settlement or regional iwi negotiations, with allocations of rights and interests, local co-management and an ability to gain more specific access and use rights

Contrary to the previous views of Māori leaders, the panel did not favour a judicial model, and instead supported a mixed model

In a departure from the previous strong statements by Māori leaders and others that the main issue was the right to due process, the review panel rejected the so-called judicial model, arguing it would be "protracted, laborious and expensive" and incapable of facilitating a reconciliation between customary interests and public interests in the foreshore and seabed. Instead, the panel put its weight behind the so-called mixed model, proposing that an interim act be put in place to give effect to the model and which would allow the Crown to hold the foreshore and seabed in trust until title could be determined.

It is not clear why the panel felt that a mixed process would be cheaper and more straight-forward

It is not clear why the panel felt that a mixed process – involving staged settlements between iwi and the Crown; a possible national settlement; an interim act; and the development of yet-to-be-defined rights and interests, access and use rights and local co-management regimes; supposedly to be followed by a final act – would be less "protracted, laborious and expensive" than allowing due process to be followed in the courts.

The weight of bureaucratic opinion appears to be behind a "mixed model"

Nevertheless, the "mixed model" appears to be where events are heading. On 2 November 2009, Cabinet confirmed that it would repeal the Foreshore & Seabed Act with the Prime Minister saying it was important to work out what to replace it with first. Neither National nor the Māori Party appears to now be expressing any appetite for implementing what had been claimed iwi were wanting – the right to explore customary rights and title in court.

ENTER THE "IWI LEADERS' GROUP"

The emergence of the Iwi Leaders' Group and its dominant role in articulating the Māori Party's position is a worrying development

More worrying is the emergence of the so-called Iwi Leaders' Group (ILG) and how it appears set to determine the Māori Party's position on the issue, just as an ILG did over amendments to the ETS in 2009. It is not clear whether the foreshore and seabed ILG should be seen as an identical group to the climate change ILG but their memberships overlap, with key players being the besieged Mark Solomon of Ngāi Tahu, Dr Api Mahuika of Ngāti Porou and Timi Te Heuheu of Ngāti Tūwharetoa. Sacha McMeeking of Ngāi Tahu controls the day-to-day agenda and the interactions between the ILG and the Māori Party.

The Group's inter-relationships with iwi, the Māori Party, and the Government are murky. The Group does not claim to speak for all Māori, but behaves as if it does in relation to the Act

The precise role of the ILG is murky, as are its interrelationships with the Māori Party, the National Party and government officials. The ILG does not claim to speak for all Māori but is nonetheless seeking to influence the new foreshore and seabed policy framework so that it "better accounts for the rights and entitlements of Iwi/hapū."[39]

It is appropriate that the ILG admits it does not speak for all Māori given how strongly it is being criticised by northern iwi in particular. Nor do the litigants in *Ngāti Apa* appear to have any formal role. It is even doubtful how long Mr Solomon can genuinely claim to speak for his own iwi of Ngāi Tahu, given ongoing challenges to his leadership of the tribe.

The Group favours a replacement act over the judicial model

Undeterred, the ILG has been strong in its condemnation of the so-called judicial model describing it as its least preferred option, claiming it will be protracted and expensive. Instead, it seeks a replacement act that would ensure that iwi can exercise authority and have decision-making roles over the marine environment.[40] Yet, if the courts are not to be used to explore the issue, it is unclear where the source of these iwi rights comes from or why they should be recognised by anyone as anything more than the results of political manoeuvring.

Past shortcomings in the process seem set to be repeated

The flaws which existed in the previous Government's process in 2004 – secrecy, the lack of clear accountability and the failure to base decisions on a set of legally agreed principles – seem set to repeat themselves.

What the public says

THE PUBLIC SUPPORTS RECONSIDERATION OF THE ACT ...

64% favour re-consideration of the Act

There is evidence of considerable public goodwill towards resolving the foreshore and seabed issue in a sensible way. According to the Curia polling carried out for Exceltium, 64% of the public support a reconsideration of the Act,[41] including 54% of those who voted Labour in 2008, 69% of women and a massive 72% of those who voted National. This is despite 44% of the public saying they are happy with the ways things are now, with only 39% disagreeing with this proposition.[42]

There is broad public disapproval of National and Labour's previous handling of the issue

Neither main party's handling of the issue in the mid 2000s now scores well among the public. There is strong agreement that Labour handled the issue poorly, with 46% saying its handling was "poor" or "very poor", and only 16% prepared to say it was handled "well" or "very well".[43] In contrast to what polls suggested at the time, more people (36%) now claim to have disagreed with Dr Brash's Orewa speech than those who say they agreed with it (25%).[44] Remarkably, only 12% of National voters in 2008 now say they "strongly agreed" with their former leader's speech. These figures suggest a degree of revisionism by voters about their own opinions in 2004.

39 Iwi Leaders' Group "Takutai Moana – Foreshore and Seabed Reform" Context Questions and Answers (November 2009).
40 Sacha McMeeking "Outline of Possible Alternative to the Foreshore and Seabed Act" (28 January 2010) http://news.tangatawhenua.com/wp-content/uploads/2010/01/PossibleAlternative2ForeshoreSeabedAct2004.pdf (at 3 February 2010).
41 Curia Market Research Ltd: *Foreshore and Seabed Poll* January 2010, Question 5.
42 Ibid, Question 7.
43 Above n 41, Question 3.
44 Above n 41, Question 4.

... BUT HAS LOW LEVELS OF UNDERSTANDING

But public support for re-consideration may be driven more by the positive state of race relations under Key than by awareness of the issues

The apparent willingness of the public for the Act to be reconsidered appears to have been driven more by political leadership and the more positive race relations evident since Mr Key became Prime Minister than detailed understanding of the issues. As many as 70% of respondents to the Curia poll say they are "not at all informed" or only "a little informed" about the issues around the Act.[45] Just 8% say they are "highly informed". This is confirmed by the fact that 36% of New Zealanders believe that less than 10% of the coastline is currently owned privately and only 20% of people believe more than 20% of the coastline is in private hands.[46] In fact, about 30% of the coastline is currently owned privately.

ACCESS TO FORESHORE MORE IMPORTANT THAN OWNERSHIP

62% don't care who owns the foreshore and seabed as long as they can access the beach

Of propositions tested by Curia, overwhelmingly the public agreed most strongly with the statement "the Government should ensure equal access to the foreshore and seabed for everyone".[47] As many as 59% of people strongly agreed with this proposition with another 27% somewhat agreeing. Just 6% disagreed. Access overwhelmed even ownership as an issue with 62% agreeing with the statement "I don't mind who owns the foreshore and seabed, so long as I can access the beach whenever I want to."[48] Consistent with this, 59% say "private owners of coastal areas shouldn't be allowed to exclude the public from using the area."[49]

PUBLIC AGREES MĀORI SHOULD HAVE ACCESS TO THE COURTS

50% believe the Courts should decide who owns the foreshore and seabed; only 31% disagree

The notion, strongly promoted by Māori and business interests, that the main problem with the Foreshore & Seabed Act was that it interfered with due process, seems to have the power to unify voters. Second only to agreement with the proposition about equal access was agreement with the statement "the Government should not pass a law to remove the right of any group of New Zealanders to take a claim to court."[50] As many as 62% of New Zealanders agreed with that statement – 30% strongly agreeing – and only 21% disagreed. Half the population agree with the statement "the courts are the right place to decide who owns the foreshore and seabed" with only 31% disagreeing.[51] Demonstrating the importance of wording, however, only a third of the population agrees with the proposition "the Foreshore & Seabed Act was unfair to Māori as it took away their right to go to court."[52]

"SPECIAL RIGHTS" FOR MĀORI OPPOSED BUT "CUSTOMARY RIGHTS" OK

48% of respondents consider that the Act gives "special rights" to Māori

In contrast with the view that the courts are the best place to resolve the foreshore and seabed issue, 48% of respondents to the Curia poll agree the Act was "too generous" to Māori as it gave them "special rights".[53] It is not clear what the public defines as "special" because 53% of the population appears to agree the law should provide for local Māori to undertake customary activities on beaches where continuity of use since 1840 can be proved.[54]

45 Above n 41, Question 2.
46 Above n 41, Question 6.
47 Above n 41, Question 8.
48 Above n 41, Question 12.
49 Above n 41, Question 14.
50 Above n 41, Question 9.
51 Above n 41, Question 15.
52 Above n 41, Question 11.
53 Above n 41, Question 13.
54 Above n 41, Question 10.

What might happen now

POLITICAL RISKS AND OPPORTUNITIES IN JUDICIAL OPTION

Both polling and history suggest that granting iwi the right to access the courts is the only outcome likely to achieve support from both Māori and Pakeha

The polling and the history of the issue – and any respect for the rule of law – suggests that the point around which majority support can be achieved is that Ngāti Apa and all other iwi with an interest in the foreshore and seabed issue should be able to make their cases to the courts. There is no other outcome from the current deliberations which appears capable of achieving support both from Māori and Pakeha, and therefore no conceivable ability for the Prime Minister to achieve unanimous support in Parliament,[55] nor to leave behind a legacy of improved race relations, both of which he says he seeks.[56] The judicial option offers Mr Key his only path forward.

Such an approach entails some political risk

That is not to say such a move is without risk. The Curia polling suggests that a quarter of National's voters in 2008 would be less likely to vote National if the right of iwi to test ownership in court were restored. Balancing this, a reasonable chunk of 2008 Labour voters – 14% – would become more likely to vote National. The polling does not indicate whether the issue would be decisive for either 2008 National or Labour voters in terms of how they will vote in 2011. Interestingly – but only very indicatively – the Māori Party may be able to survive a failure to repeal the Foreshore & Seabed Act with 59% of their 2008 voters (10 out of 17 in the poll) indicating they would remain loyal.

ARISE WINSTON PETERS?

Any negotiated settlement involving the ILG, the Māori Party and National could easily be exploited by a populist politician

The National-led Government can – just – build a majority around the judicial option. The right of access to the courts is something the public can understand, and that a majority will support. The outcome is likely to be accepted by all parties as fair and final, the process is transparent, and crucially there would be time for public understanding to build as the judicial process continued. There would be no particular moment in time for a figure such as Winston Peters to spread misinformation and fear among the Pakeha population.

In contrast, any negotiated settlement which emerged from a process involving the ILG, the Māori Party and National – which was not based on any judicial decision – would lack transparency and integrity. On the very day of announcement, it could easily be positioned by an effective populist politician as offering iwi "special deals" and jeopardising access to the beach, especially given the acknowledged low levels of public understanding. The deal with the ILG over the ETS was poorly received by the public, emerging as it did from a behind-closed-doors process. A similar deal over the foreshore and seabed could be catastrophic for public tolerance of the National and Māori Party governing arrangement.

An alliance between Labour and a Winston Peters-type figure would be well placed to capitalise on such a scenario

In this worst case scenario, an unholy alliance of Labour Leader Phil Goff and a Peters-type figure would be well positioned to make all the arguments against the National and Māori parties that National politicians and others made against Labour in the mid 2000s. While unlikely to be as profound as the political realignments caused by the issue under Helen Clark's prime ministership, it would represent a major setback for the programme of national reconciliation that Mr Key, Mrs Turia and Dr Sharples have led so well thus far.

55 Prime Minister John Key, in his 2 November 2009 press conference: "if ultimately we could get to a point where all parties in Parliament voted for replacement legislation that would be a good thing, whether it's possible, I don't know."

56 Prime Minister John Key, in his post-Cabinet press conference on 1 February 2010, reiterated an earlier wish that "one of the legacies I'd like to have of our Government, is that we have improved race relations; that we've moved on from a grievance mentality that some people have into a much more positive view on where New Zealand can go."

EXCELTIUM SAYS:

Players Need To Act Fast To Avoid Debacle

The most important priority for anyone with an interest in the foreshore and seabed issue is to act fast to position the issue in the public mind. If the Government, for example, acts to define the issue as about due process it will likely carry the public behind it.

If, on the other hand, it decides to opt for a negotiated settlement, it will need to act quickly to explain to the public why it is negotiating "special rights for Māori" behind closed doors and without the benefit of judicial consideration. Under this second option there is a clear opportunity for Labour or a Peters-type figure to use the low levels of public understanding to build fear among Pakeha and capture the political initiative, however destructive that would be. Even worse would be if the Government leaves a vacuum.

On the other side of the issue, the same need for speed exists for iwi who are disenfranchised from the murky ILG process who want to assert their right to due process. Such iwi could capture the moral high ground and achieve and maintain a (slim) majority of the public in support. It will be too late to build a majority around this message if and when public fears emerge.

Our best bet, regrettably, is that the most likely outcome at the present time is that the very sensitivity of the issue will lead to those players with integrity standing back – until it is too late to avoid the unscrupulous from whipping up public fears.