Whither the Foreshore and Seabed?

Due process or a new FSA?

Discussion paper – ACT Northern Region Conference 2009

Now that the FSA is up for repeal the question is – where do we go from here?

Putting aside the principles and simply looking at it from a pragmatic point of view the concern that might arise are:

1. Unreasonably high expectations on the part of Maori.
This is the point of view that is often raised. Sir Doug Graham has a minimalist view of what he expects Maori would successfully be able to make claim to.
(http://www.nzherald.co.nz/maori/news/article.cfm?c_id=252&objectid=10583725)

Putting the thing through an objective due process of law has the effect of dealing with those expectations on the part of Maori, rather than reducing it to a political argument, as was the case with the various proposals for reserved seats on the Auckland Council.

But there is more to it than that.

Sir Doug's position [That Maori won't be able to prove much title] is based on a premise that has not been tested in court.

That premise is that Maori who have not kept up a relationship with [adjoining] land, cannot therefore claim foreshore and seabed. (It's this rule that Labour invented and built into their tortuous definition of 'customary right').

But that premise is just Sir Doug's opinion, and is countered by at least one other expert in this area, namely Professor of Law Jim Evans in this speech in 2004
(http://publicaddress.net/default,1248.sm#post)

The entire speech is well worth reading, but it's long, and the salient part as it affects this discussion is as follows:

What, then, must be proved to establish such a [Maori] title? This is not entirely clear, but a rough statement is: enjoyment in 1840 of effective control held as of right under customary understandings. ***Nothing in the doctrine of native title requires that the holders of such a title must have maintained a continuous presence since that time,*** *although Maori notions of territorial right seem themselves to have contained such an element.* ***In any event, there is no good reason why Maori who subsequently failed to maintain a presence because the law failed to support their rights should lose them as a consequence.***

Key bits are bolded.

There is another aspect to consider as well, namely:

2. Unreasonably low expectations on the part of non-Maori.

There are several compelling privy council rulings in respect of customary title and they require a very clear head to navigate. Some of these are referenced in this ACT document on the consequences of the NZ Foreshore case published in 2003 prior to the FSA (Bill) coming before parliament. (http://www.act.org.nz/news/the-nz-foreshore-case-its-social-consequences-and-resolution)

Another document well worth the reading, but here is a relevant paragraph:

That the Ngati Apa case has little to do with the Treaty of Waitangi, and a lot to do with the English Common law- in protecting conquered peoples from expropriation, has escaped many people. It is based on a famous Privy Council case set in Nigeria in the 1920s, and also takes some of its authority from a succession of Australian cases starting with the famous Mabo case of 1992; and by implication the Wik decision of 1996. The latter is important for therein lies the solution.

It's been in tests like this that the privy council has excelled, and it will be a test of our own supreme court to see if they can be as authoritive.

If Maori do end up proving title to more-than-expected areas of the FS&SB, then for the same reasons as under point one, it is best if this is delivered through an objective due process.

Conclusion
If the argument is not de-politicised and we try and handle it through some other kind of negotiated means then the real potential exists that we will end up with aggrieved parties however it is cut.

On the other hand, at the end of a due process approach, if there are genuine public good issues that need to be addressed, navigation and free access are two that spring to mind, then they can reasonably be handled separately by legislation. Given the published statements so far by various stakeholders it would not seem that such a course of events could not be accomplished.

In terms of a negotiated solution, we also need to be aware that already the vultures are gathering trying to set up quangos to control the whole thing (In this case Gary Taylor of EDS wanting to replace FSA with 'Coastal Commission')
(http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10584008)

As to the question of exactly which Maori are entitled, we already have a court process to determine that very question, which is the Maori Land Court.

Peter Tashkoff
August 2009