Outline of Possible Alternative to the Foreshore and Seabed Act 2004:

Introduction:

Engagement with Crown officials on the development of a regime to replace the Foreshore and Seabed Act 2004 has indicated that the government is currently looking at an approach which is unlikely to satisfy the expectations of Iwi and hapū. At this stage, rather than critiquing that approach, the Iwi Leaders' Group directed that an alternative proposal be developed that has the capacity to both meet Iwi/hapū expectations and the government's political imperatives. THIS IS WHERE THEIR (NOT OUR) PROCESS GOES WRONG – RIGHT AT THE START. COMPROMISE OUR CUSTOMARY OWNERSHIP RIGHTS FOR POLITICAL IMPERATIVES OF TAUIWI – THIS IS SAME OLD, SAME OLD – DON'T THEY KNOW OUR/THEIR HISTORY THIS IS KINO STUFF WHANAU

Characteristics of the proposed approach:

The replacement framework needs to:

- Be consistent with Iwi/hapū world viewS that places taonga status of foreshore and seabed at the centre (i.e. environmental sustainability is the priority) NO, INDIGENOUS CUSTOMARY OWNERSHIP RIGHTS IS THE ISSUE AND PRIORITY
- Provide for tikanga to be an operative source of law;
- Allow for flexibility for Iwi/hapū specific aspirations/realities OWNERSHIP to be reflected;
- Increase the decision making role and autonomy of Iwi and hapū; WE OWN, WE DECIDE, NO ONE GIVES US AN 'INCREASE IN DECISION MAKING'
- Not 'look and feel' like the 2004 Act ITS PANNING OUT THAT WAY
- Satisfy the Crown's political imperatives.

The latter are assessed as being:

- Rebalancing interests (a recognition that the 2004 Act struck an inequitable balance which should be redressed); GET THEM TO FACE FACTS, THE ACT WAS RACIST AND DID NOT STACK UP IN INTERNATIONAL LAW
- Environmental Sustainability
- Integration with the existing statutory matrix
- Efficiency (not increasing overheads, costs or red tape)
- Appropriate economic development
- Certainty and clarity
- Protection of existing rights/interests (including access)

SORRY – BUT THIS ABOVE LOOKS A LOT LIKE BEING LGNZ TAINTED – LOCAL COUNCILS HAVE HAD A SAY HERE

Key elements of the proposed approach:

- The proposed approach takes, as its starting point, the issues that led Te Tau Ihu to apply to the Māori Land Court, NO IT DOESN'T, IT S APPROACH IS TO KEEP THE MAJORITY CULTURE HAPPY WHILE PASSING THE SHADOW TO MAORI claiming customary title status in respect of the foreshore and seabed of the Marlborough Sounds, i.e. concerns in respect of environmental management of the sounds and lacking of weighting for Māori interests in decision-making;
- The key issues addressed by the proposed approach are therefore better management of the foreshore and seabed and provision for tikanga Māori to be operative; STARTING TO SOUND LIKE CUSTOMARY FISHERIES RIGHTS WITHIN THE FISHERIES LEGISLATION – OTHER ACTS HAVE PRECEDENCE – THIS CONTINUES THE RACISM SHOWN IN THE ORIGINAL FSSB – WE WILL NOT INTERFERE WITH PROVERTY PROPERTY RIGHTS OF TIKANGA PAKEHA, BUT WE WILL LEGISLATE WHERE MAORI COLLECTIVE RIGHTS ARE CONCERNED.

- Main effect of Act WHAT ACT? would be to provide for integrated management of the foreshore and seabed through setting out principles for management and decision making; HULLO – RMA HERE WE COME
- Iwi/hapū rights would be expressed through:
    - Recognising that mana is enduring and inalienable and contains right to development;
    - Providing for tikanga of mana whenua to be an integral aspect of management and decision making (but in a way that tikanga is not defined by statute);
    - Recognising that Iwi/hapū have OWNERSHIP NEEDS TO BE CONFIRMED rights and responsibilities over the foreshore and seabed as a matter of principle;
    - Providing for Iwi/hapū to determine how those rights and responsibilities are exercised (i.e. would draw on the awards identified in the TAG paper);
    - Recognising that Iwi/hapū have a right to share in benefits of development in FSSB;KAO, WITH OWNERSHIP, ALL OTHERS BUTT OUT
    - Provide for Iwi/hapū to assert title in the courts according to a new test based on tikanga and the Declaration on the Rights of Indigenous Peoples that would give rights to review/injunct decisions over the FSSB, permission right and to impose rahui; STARTING TO CONFLICT WITH ABOVE – DON'T DEFINE TIKANGA
- The structural starting point for the proposed approach is a 'rights and responsibilities' framework – management and administration is not based on any assertion of 'ownership' IS THERE A RIGHTS AND RESPONSIBILITIES APPROACH FOR PRIVATE PROPERTY RIGHTS HOLDERS - THE PEOPLE WHO DEVELOPED THIS DO NOT BELIEVE THAT WE OWN THE FORESHORE AND SEABED (Crown or otherwise) of foreshore and seabed, but on statutory specification of rights, responsibilities and decision-making processes;
- Rather than requiring Iwi/hapū to go to Court or negotiation with the Crown to prove their rights and be 'awarded' certain legal recognitions of those rights, the proposed approach would specify what rights and responsibilities Iwi/hapū have in respect of environmental management and what processes and mechanisms are available to express those rights; WHAT A LOT OF PLAQUE, NOTHING CHANGES. IN OTHER WORDS CAN'T GO TO COURT?
- As a matter of principle, the right to have rights determined by the Courts should be restored (with the 2004 Act's extinguishment of rights legally reversed), but it is suggested that such rights should be determined in accordance with the principles set out in the Declaration on the Rights of Indigenous Peoples. E SHOULD SET UP A PANEL OF INTERNATIONAL EXPERTS TO HEAR OUR CASE.

Purpose of replacement Act:

The purpose of the Act would be to recognise that:

- The foreshore and seabed is nationally important; and CONSISTENT WITH International Law is owned by Maori
- Mana is enduring and inalienable,fluffy wuffy, just the stuff that would appeal to the Maori male "leadership" that coastal Iwi/hapū have the right to continue to express that mana and that mana encompasses development and other rights. WE OWN THE FORESHORE AND SEABED UNDER ANY INTERNATIONAL LAW TEST

'Ownership' framework:

The 2004 Act would be repealed and:

- The rights extinguished by the Act legally reinstated;
- The new Act would be silent on the issue of ownership; NOT GOOD ENOUGH
- The physical boundaries of the foreshore and seabed, for the purposes of the Act, would be defined; and
- Rights, responsibilities, liabilities, decision-making processes, etc in respect of foreshore and seabed would be specified.

Environmental sustainability
This would be addressed in the Act through:

- A statutory statement that integrated management of foreshore and seabed should occur
- Principles for integrated management would be set out. These could include:
    - Decisions to be made wWith regard to the precautionary principle; and
    - In accordance with the tikanga of those holding mana whenua, mana moana;
- Roles and responsibilities specified, including the roles and responsibilities of Iwi/hapū;
- Mechanisms/processes for giving effect to integrated management would be set out. This would include mechanisms for Iwi/hapū involvement, with enhanced versions of mechanisms utilised in the Ngāti Porou and Te Whānau a Apanui Deed of Agreement and Treaty settlements (including the Waikato River settlement) as the starting point; and YEP I WAS RIGHT I CAN SEE COUNCILS INFLUENCE IN THE DOC – EVEN IN THE LANGUAGE
- Some processes/mechanisms might not be of universal application, but might only be available where certain 'triggers' apply. At the least, it may be necessary to resolve which Iwi or hapū holds mana whenua, mana moana in any given area.

Sustainable economic development:
This would be addressed in the Act through:

- A statutory statement that economic development which is compatible with environmental sustainability is in the national interest;
- Principles governing development would be set out, including the tikanga of those holding mana whenua, mana moana and that Iwi/hapū have the right to share in the benefits of development; and WE HAVE A RIGHT TO DEVELOP OUR LANDS WITHOUT INTERFERENCE – THE RACISM IS STILL EVIDENT – ONE RULE FOR US AND ANOTHER FOR PRIVATE PROPERTY HOLDERS
- Roles and responsibilities would be specified, including the roles and responsibilities of Iwi/hapū; and THIS IS NOT ACCEPTABLE
- Processes and mechanisms for giving effect to integrated management would be set out, as above.

Non-commercial uses/activities:
This would be addressed in the Act through:

- The statute would specify the extent of third party/public interests in non-commercial access and use in principle;
- Principles governing non-commercial access and use would be set out, including the tikanga of those holding mana whenua, mana moana and the circumstances in which such access and use may be limited; and
- Roles and responsibilities would be specified, including the roles and responsibilities of Iwi/hapū (in managing the non-commercial activities of Iwi/hapū members, e.g. customary fishing and in respect of access and use by third parties); and
- Processes and mechanisms for giving effect to integrated management would be set out, as above.

Restoring the right to litigate:
The Act would provide for the right to seek a judicial declaration of title: YEAH

- The tests to be applied would be drawn from tikanga and the standards derived from the Declaration on the Rights of Indigenous Peoples (including extinguishment only being effective if it occurred with the free, prior and informed consent of the holders of title);
- The outcome(s) of a declaration of title Could include – rights to:

Deleted: w

- Injunct environmental decisions (?);
- Impose rāhui; and SO NOW WE HAVE TO DEFINE RAHUI?
- Give or withhold permission for new activities (ie permission right?

Example Structure of new Act:
Note- lots of details missing, and location of particular things not included as yet- e.g. where to put repeal of 2004 Act and revival of rights of iwi/hapū, navigation etc….AT PRESENT A HARBOUR MASTER HAS MORE RIGHTS THAN MAORI AND EFFECTIVELY CAN STOP CUSTOMARY FISHERIES – HOW BROAD WOULD THIS ACTS POWERS BE? WHERE WOULD IT SIT IN THE HIERARCHY OF LEGISLATION – HIGHER THAN LGA AND RMA? NEEDS TO BE TO ENSURE ANY POWER at all – EVERYTHING ELSE BELOW HAS ALREADY BEEN NEGATED ABOVE. THIS PAPER HAS BEEN DEVELOPED BY OTS using the RMA advice from Councils who worked on the Whanau Apanui and Ngati Porou cases.

Purpose
- Standard feel good about importance of foreshore and seabed to NZ; SHOCKING
- Statement that mana is enduring and contains a right to development (*rationale- statement that irrespective of what the Crown has done over time, the inherent mana of Iwi/hapū is unaffected)GET OFF GROUND*

Definition
- That FSSB is a shared space (*get away from polarising 'ownership' issue*)WRONG, WRONG, WRONG

Principles for Management of the Foreshore and Seabed
- Standard statement of principles about sustainability, integrated decision making etc;
- Statement that tikanga of mana whenua is operative (*not sure about language- don't want the 'have regard to/take into account'- so, word set that reflects the status as first law without scaring the horses*)

Part One—Integrated Environmental Management
Principles – set out the specific principles – i.e. collaboration between decision makers, precautionary principle etc. Again, word set that reflects first law status of tikanga;

Roles and Responsibilities – set out the roles and responsibilities of all players in the FSSB e.g. TLA's consent processing etc (whatever is set out in other legislation). Iwi/hapū/mana whenua defined as having role and responsibility to be kaitiaki over their rohe moana.

Mechanisms for Integrated Environmental Management
This subpart would have a whole pile of mechanisms for Iwi/hapū to give effect to roles and responsibilities- would draw on the awards paper we prepared before Christmas. This level of detail is not well thought through as yet, but our starting point is that the Act should create a minimum suite of tools that Iwi/hapū can amend/build on to suit their particular circumstances.

Part Two —Economic Development
Principles – set out the specific principles – i.e. economic development is in the national interest providing it is environmentally sustainable. Again, word set that reflects first law status of tikanga;

Roles and Responsibilities – set out the roles and responsibilities of all players in the FSSB e.g. TLA's consent processing etc (whatever is set out in other legislation). Iwi/hapū/mana whenua defined as benefit sharing role as well as kaitiaki.

Mechanisms for Economic Development
This subpart would have mechanisms for Iwi/hapū to share in benefits as well as mechanisms to exercise some degree of control over economic development e.g. veto rights over coastal occupation/resource extraction etc, with perhaps some threshold triggers (the Crown will panic at the thought of a nationwide veto, but if it was applied to identifiable sites they might cope- trigger could be mahinga kai, location of marae/settlements, wāhi tapu etc defined)

Part Three – Non – Commercial Access
NB- this is Pākehā non-commercial access i.e. recreational purposes etc
Principles – set out the specific principles – i.e. FSSB significant for all NZ etc. Again, word set that reflects first law status of tikanga;

Roles and Responsibilities – set out the roles and responsibilities of all players in the FSSB e.g. Port Companies etc. Iwi/hapū/mana whenua defined as kaitiaki.

Mechanisms for Economic Development
This subpart would have mechanisms for Iwi/hapū to oversee recreational/public access e.g. rahui

Part Four - Right to Sue
This part is in here as the AG is very attached to restoring the right to sue
So that it doesn't become a bare title discussion—suggestion is that the outcomes of a finding of title are connected to the purposes/scheme of the Act – e.g. standing for judicial review of any decisions etc.