Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

REVIEW OF THE FORESHORE AND SEABED ACT 2004: PRINCIPLES, BOTTOM LINES AND NEXT STEPS

Proposal

1 This paper seeks agreement to:

- repeal the Foreshore and Seabed Act 2004 (**the 2004 Act**);
- a set of principles to guide further policy work; and
- four proposed government bottom lines to guide further policy work.

Executive summary

2 The government's main objective in developing its foreshore and seabed policy response to the Ministerial Review Panel's (**the Panel**) report is to balance the interests of all New Zealanders in the foreshore and seabed. In undertaking this role, the government should look to produce equitable outcomes for all interests.

3 I agree with the Panel's view that the 2004 Act had a disproportionate impact on customary interests in the foreshore and seabed. The 2004 Act protected some interests, such as freehold title, and it provided certainty as to the balance of interests. The protection of some interests and certainty was at the expense of customary interests.

4 The 2004 Act extinguished any uninvestigated customary title in the foreshore and seabed. This situation has resulted in an ongoing sense of grievance within New Zealand, particularly amongst Māori.

5 For these reasons a repeal and replacement of the 2004 Act is necessary to mitigate the criticism of and grievances associated with the 2004 Act. As a consequence of repealing the Act a lot of work is required to develop a replacement regime.

6 The review of the foreshore and seabed legislation is a complex regulatory reform. At this stage in the process I am seeking decisions to be made only on the guiding principles for further policy development and some initial bottom lines. I am developing a detailed timetable to put in place a replacement regime by the end of 2010.

7 It is necessary to formally adopt a set of guiding principles for the development of the government's foreshore and seabed policy and its review of the 2004 Act. The guiding principles I propose are good faith, Treaty of Waitangi, recognition and protection of interests, equity, certainty and efficiency.

8 As well as these principles, I would like to establish some "bottom lines", or non-negotiable matters, in respect of decision-making on the government's foreshore and seabed policy. This will provide certainty in respect of key interests in the foreshore and seabed. It will also assist to manage any expectations that may have been created following the release of the Panel's report. I propose the following government bottom lines:

a reasonable public access;

b recognition of customary interests;

c protection of fishing and navigation rights; and

d protection of existing use rights to the end of their term.

9 There are four broad issues that will need to be carefully considered during the development of the replacement regime. These four issues are outlined in this paper are primarily for discussion only. I do not propose asking the Committee to make decisions on these matters now. The four issues are:

a ownership of the foreshore and seabed;

b models for recognising customary interests;

c determining and recognising customary interests (i.e. tests and awards); and

d collateral matters.

10 I propose to make a public announcement outlining the government's initial response to the Panel's report. The announcement will centre on the government's desire to repeal the 2004 Act, and that significant further work will need to be undertaken to develop a replacement regime that provides equitable outcomes for all.

11 I am aiming for a Bill to repeal the 2004 Act and to establish a new regime be introduced into the House and receive its first reading in mid-2010, with the enactment of the Bill occurring before the end of 2010. There is much work to be done in order for the government to be able to meet this ambitious goal.

12 To assist in achieving this goal I am in discussions with a number of stakeholders including national interest groups, iwi leaders and their technical advisors and the Māori Party.

Background

13 The Panel was appointed in March 2009 to provide advice to the government on its review of the 2004 Act [CAB (09) 6/3B refers].

14 On Monday 6 July 2009, the Cabinet considered a high-level summary of the Panel's report on the 2004 Act *Pākia ki uta, pākia ki tai*. The high-level summary noted that the majority of submitters to the Panel, and the Panel itself, considered that the 2004 Act should be repealed [CAB Min (09) 24/20].

15 On Monday 27 July 2009, the Cabinet considered a paper that canvassed options for the government's response to the Panel's report and next steps [CAB Min (09) 26/4 refers]. The Cabinet noted that my preliminary preferred option was to repeal the 2004 Act. The Cabinet also agreed that further advice was needed on the options open to the government in its review of the 2004 Act and invited me, in consultation with the Minister of Māori Affairs, to report back with further detail on those options and my preferred option. The Cabinet also asked me to outline the next steps the government could take in responding to the Panel's report.

16 Since that Cabinet meeting, I have undertaken further work on the options open to the government, including my preferred option, and have begun preliminary discussions with key stakeholders.

Framing the issue

17 The 2004 Act defines the foreshore and seabed as meaning the marine area that is bounded on the landward side by the line of mean high water springs and, on the seaward side, by the outer limits of the territorial sea. It includes the beds of rivers that are part of the coastal marine area.

18 The government's main objective in developing its foreshore and seabed policy response to the Panel's report should be to balance the interests of all New Zealanders in the foreshore and seabed. In undertaking this role, the government should look to produce equitable outcomes for all interests. I outlined my initial view on the nature of these interests in my previous paper [TOW Min (09) 8/1 refers].

19 The interests of New Zealanders in the foreshore and seabed include:

a *recreational and conservation interests* in accessing, using and enjoying the coastline and marine environment;

b *customary interests*, including usage, authority and proprietary interests as an expression of the relationship between iwi/hapū and the coastal marine area;

c *business and development interests*, such as the fishing, marine farming, marine transport, roading and airport infrastructure, mining and tourism industries, and port companies, which have a significant interest in how the coastal marine area is controlled and regulated; and

d *local government interests*, as local authorities represent community-wide interests and administer much of the law that regulates use of the coastal marine area.

20 I agree with the Panel's view that the 2004 Act had a disproportionate impact on customary interests in the foreshore and seabed. The 2004 Act protected some interests, such as freehold title (whether held by Māori or non-Māori),[1] and it provided certainty as to the balance of interests.

21 The protection of some interests and certainty was at the expense of customary interests. The 2004 Act extinguished any uninvestigated customary title in the foreshore and seabed. The ability to investigate any (potential) title was replaced in the 2004 Act with prescribed litigation avenues in the Māori Land Court and High Court and two negotiation avenues that required Court confirmation. The 2004 Act created new jurisdictions and new and specific tests that would likely result in the identification of limited areas that might be subject to either or both territorial and non-territorial customary interests. This situation has resulted in an ongoing sense of grievance within New Zealand, particularly amongst Māori.

22 Te Puni Kōkiri considers that customary interests should be explicitly addressed in the exercise of balancing the interests of all New Zealanders because they existed prior to other sets of interests, were affirmed by the Treaty of Waitangi and were disproportionately impacted by the 2004 Act.

Achieving a solution

23 Given my view that the government's role should be to balance the interests of all New Zealanders in the foreshore and seabed, I consider a repeal and replacement of the 2004 Act, rather than an amendment to it, is necessary to mitigate the criticism of and grievances associated with the 2004 Act.

24 I recommend the Committee agrees that the 2004 Act be repealed and that further policy work commence on the development of an equitable replacement regime.

Guiding principles

25 If the Committee agrees to repeal the 2004 Act and to further policy work, it will be necessary to formally adopt a set of guiding principles for the development of the government's foreshore and seabed policy and its wider review of the 2004 Act. This will ensure the policy development process is transparent and robust and will guide the government in its broader role of balancing the interests of all New Zealanders in the foreshore and seabed.

26 The guiding principles I recommend the Committee agrees to are:

- **good faith** – to achieve a good outcome for all: following fair, reasonable and honourable processes;
- **Treaty of Waitangi** – the development of a new regime must reflect the Treaty of Waitangi, its principles and related jurisprudence;

[1] As at December 2003, Land Information New Zealand identified that 12,499 privately owned parcels would (at least in part) be within the boundary of the foreshore.

- **recognition and protection of interests** – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
- **equity** – provide fair and consistent treatment for all;
- **certainty** – transparent and precise processes that provide clarity; and
- **efficiency** – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

27 Te Puni Kōkiri the proposed principle of "equity" should be replaced by the principle of "fairness". Te Puni Kōkiri considers the word "equity" can suggest equality, and that, in this case, equal outcomes may not be possible if a fair outcome is to be achieved.

28 Te Puni Kōkiri considers the following additional principles should be included:

a **due recognition and protection of rights and interests**: the recognition and protection to be afforded to rights and interests be commensurate with the nature of the rights or interests concerned;

b **prior-rights priority**: priority should be given to pre-existing and long held rights;

c **minimum intrusion**: if an intervention requires the restriction or the reduction of an existing right, then any intrusion should only be to the minimum extent needed to achieve the objective sought. In addition, if pre-existing rights are taken, removed or reduced, some form of reciprocal consideration should be provided to the right holders; and

d **evolution and development of customary rights**: customary rights should not be limited to the situation at 1840, because custom and customary rights evolve and develop over time (this is supported by the Ministry of Fisheries).

29 The Ministry of Economic Development and The Treasury consider that a sixth **principle of development** should be included (and the Ministry of Fisheries support a **principle of sustainable development**), providing for development opportunities (for Māori and non-Māori). The Department of Conservation does not support this position and has advised that it supports the position I have reached in paragraph 33 below.

30 I have considered the views of these agencies. Their proposed additional principles are inherent in the principles that I have suggested and my description of the key interests of New Zealanders in the foreshore and seabed (see paragraph 19 above).

31 The additional principles suggested by Te Puni Kōkiri reflect concepts inherent in the notion of customary interests. For example, customary interests are pre-existing and longstanding, and they evolve and develop over time. Customary interests are expressly recognised within my description of all New Zealanders'

interests in the foreshore and seabed. Recognition of customary interests is one of the bottom lines I propose in paragraph 37 below. I think that other components of the principles proposed by Te Puni Kōkiri are matters of policy choice for the government. For example, whether one or more of the different kinds of interests in the foreshore and seabed should be given "priority" or be subject to "minimum intrusion" is a matter for government to consider when making policy decisions on what regime should replace the 2004 Act.

32 I think that including a principle of development and/or sustainable development would have the effect of elevating development interests above other interests (e.g. recreational and conservation interests). My explicit recognition of business and development interests within the description of interests in the foreshore and seabed ensures the appropriate balance. A component of the principle of development and/or sustainable development is covered by the proposed principle of efficiency, which aims to ensure alignment with other natural resource management regimes. An illustration of my point is that the purpose of the Resource Management Act 1991 is to "promote the sustainable management of natural and physical resources", where sustainable management means managing the use, development and protection of natural physical resources.

33 I therefore recommend the Committee agrees to the six guiding principles listed in paragraph 26 above.

Government bottom lines

34 As well as principles to guide the policy development process, I would like to establish "bottom lines", or non-negotiable matters, in respect of decision-making on the regime to replace the 2004 Act. I consider that the public release of these bottom lines will provide certainty in respect of key interests in the foreshore and seabed (such as public access) and will seek to manage any expectations that may have been created following the release of the Panel's report.

35 I think that a public statement framing the bottom lines, and information about each bottom line, would go a long way to reassure all New Zealanders of the government's overall intent in reviewing the 2004 Act.

36 I propose that the Committee agrees to the following statement for framing the government's bottom lines:

- the 2004 Act did not strike an appropriate balance of the rights and interests in the foreshore and seabed;
- by reviewing the 2004 Act, the government intends to achieve a better balance; and
- the government will consider all options, and the end result will be fair and just.

37 The proposed bottom lines that I recommend the Committee agrees to are:

a reasonable public access;

b recognition of customary interests;

c protection of fishing and navigation rights;

d protection of existing use rights to the end of their term.

38 The Ministry of Economic Development considers that "no change to Crown minerals policy" should also be a bottom line. Crown minerals policy is longstanding. Any changes to it could have substantial fiscal implications for the Crown. Any signalling of possible policy changes would create uncertainty for existing permit holders and potential investors. The Ministry of Economic Development's view is that such uncertainty would have a significant impact on investment in areas out to 12 nautical miles from shore until customary interests are recognised and provided for which could take a number of years from the passage of the new legislation.

39 I think the issue of including "no change to Crown minerals policy" requires further consideration, including further discussions between the Minister for Energy and Resources and myself, and subsequently discussions with the Māori Party. I will report back to the Cabinet Committee on Treaty of Waitangi Negotiations in 25 November 2009 with a proposal in respect of including "no change to Crown minerals policy" as a government bottom line.

REASONABLE PUBLIC ACCESS IN, ON, OVER AND ACROSS THE PUBLIC FORESHORE AND SEABED

40 Prior to the passage of the 2004 Act, there was no legal right of public access in, on, over and across the public foreshore and seabed.[2] While some legislation, for example the Resource Management Act, did encourage public access, legislation did not provide the protection for public access that the general public mistakenly believed existed.

41 The Panel expressed the view that there was "a widespread lack of understanding or confusion about public rights to the foreshore and seabed". The Panel observed that there was a *perceived* public right rather than an *actual* right and quoted the Human Rights Commission's description of public access as an emerging "quasi-customary right" within New Zealand culture. The Panel also expressed the view that the cultural dimension of the public interest in the coastal marine area was the maintenance of the area as a natural environment that is a public recreation ground, "the birthright of every New Zealander". They noted that "[t]he popular perception is that there is free access for all."

[2] The "public foreshore and seabed" is defined in the 2004 Act as foreshore and seabed, including foreshore and seabed that was owned by local authorities in November 2004, but excluding land held in private title.

42 The 2004 Act provides for public rights of access in, on, over and across the public foreshore and seabed, subject to certain limitations (including prohibitions imposed under an "enactment" or for the protection of wāhi tapu).

43 The Panel supported a principle of "reasonable" public access, noting that the exclusion of the general public may be reasonable in some circumstances. The Panel considered that an appropriate reason to restrict public access was for safety (for example, for port operational areas).

44 I propose that the Committee agrees to a bottom line of reasonable public access in, on, over and across the public foreshore and seabed (excluding foreshore and seabed held in private title), subject to certain limitations including for example restrictions for safety or cultural matters. I do not propose that this bottom line would impact on getting "to" the foreshore and seabed, which could involve crossing private property. The Walking Access Act 2008 could be utilised in such situations.

RECOGNITION OF CUSTOMARY INTERESTS

45 Customary interests are one of the four groups of interests that New Zealanders have in the foreshore and seabed described in paragraph 19 above. As I noted above, I think the 2004 Act had a disproportionate impact on customary interests and this is one of the primary sources of grievance, particularly amongst Māori, associated with the 2004 Act.

46 Including the recognition of customary interests as a bottom line will make explicit the government's intention to redress the balance of all New Zealanders' interests in the foreshore and seabed by recognising customary rights and interests.

47 I propose that the Committee agrees to recognition of customary interests as a bottom line.

PROTECTION OF FISHING RIGHTS

48 The Panel considered that prior to the decision in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (***Ngāti Apa***), and indeed until the enactment of the 2004 Act, the legal rights of the general public in the coastal marine area included rights of fishery.

49 General fishing rights are provided for under the Fisheries Act 1996. Māori commercial fishing rights were settled and claims extinguished under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Fishing regulations (e.g. the Fisheries (Kaimoana Customary Fishing) Regulations 1998 and the Fisheries (South Island Customary Fishing) Regulations 1999) generally provide for customary fishing. Section 9 of the 2004 Act provides that existing fishing rights are preserved.

50 I propose that the Committee agrees that fishing rights be protected as a bottom line.

PROTECTION OF NAVIGATION RIGHTS

51 The Panel considered that prior to the *Ngāti Apa* case, and indeed until the enactment of the 2004 Act, the legal rights of the general public in the coastal marine area included rights of navigation.

52 Prior to the enactment of the 2004 Act, the common law provided for public rights of navigation but there was uncertainty about the nature and extent of these rights. The general position was that there was a common law right of navigation over the foreshore and seabed. This right could be restricted directly by legislation (for instance, in the case of ports, harbours and some reserves) and incidentally by legislation (for instance, through the grant of coastal permits to occupy space in the coastal marine area). There was some uncertainty in the common law as to whether the public had a right to navigate over private land.

53 The 2004 Act codified a common law position for rights of navigation over the foreshore and seabed, including over foreshore and seabed held in private title.

54 I propose that the Committee agrees that the government's bottom line be the protection of navigation rights within the foreshore and seabed (including foreshore and seabed held in private title) but is subject to legislative restrictions.

PROTECTION OF EXISTING USE RIGHTS TO THE END OF THEIR TERM

55 Use rights in respect of the foreshore and seabed can be issued under a range of legislative regimes, including the Resource Management Act 1991 and conservation legislation. Coastal permits issued under the Resource Management Act 1991 are required for activities undertaken in the foreshore and seabed, unless provided for by a rule in a regional coastal plan or allowed by the Resource Management Act 1991. Concessions and other approvals issued under conservation legislation may be required to legally undertake certain activities. Existing rights also include protected areas and protection classifications (e.g. marine reserves, marine mammal sanctuaries, and national parks and reserves that include the foreshore and seabed).

56 I note that existing use rights tend to be time limited. If there is a time limit, without a right of renewal, the use right will be protected until the end of its term. If there is a right of renewal, the use right will continue to be protected.

57 I propose that the Committee agrees to the protection of existing use rights to the end of their term in the foreshore and seabed as a bottom line.

Developing a replacement regime: Four broad issues to be covered

58 There are four broad issues that the government will need to ensure are carefully considered in the development of the new replacement regime. They are:

a ownership of the foreshore and seabed;

b models for recognising customary interests;

c determining and recognising customary interests (i.e. tests and awards); and

d collateral matters.

59 These issues intersect. I think that all of these issues must be considered together. More importantly, making decisions on one or two of the issues should not be made in isolation of decisions on the other one or two issues. Each of these broad issues will be analysed against the guiding principles (e.g. analysing the efficiency and effectiveness of each option). The next section of this paper highlights my preliminary thinking and indicates progress that has been made on each issue to date.

Issue One: Ownership of the foreshore and seabed

60 Section 13(1) of the 2004 Act vests the full legal and beneficial ownership of the public foreshore and seabed in the Crown as its absolute property. As I have stated above, I think a repeal and replacement of the 2004 Act, rather than an amendment to it, is necessary. One likely effect of a simple repeal of the 2004 Act would be that the Crown would retain full legal and beneficial ownership of the public foreshore and seabed. A separate effect is that any customary title extinguished by the 2004 Act would likely remain extinguished. If section 13(1) of the 2004 Act is repealed, it would be prudent for the repeal legislation to be explicit about ownership in order to avoid any uncertainty or unintended legal effects.

61 The primary decision in relation to ownership is about what will replace section 13(1) of the 2004 Act. Decisions about vesting the foreshore and seabed will impact on the breadth of options that are available for recognising other proprietary interests.

Options for vesting

62 There are two broad options for vesting the public foreshore and seabed:

- *Vesting absolutely* – vesting full legal and beneficial ownership of the public foreshore and seabed in an owner. Absolute vesting precludes the possibility that another *owner* of the foreshore and seabed could be recognised. The absolute owner could, however, grant *a proprietary interest* to others. This is essentially how New Zealand's current land tenure system operates, whereby the Crown can grant a fee simple title but remains the underlying owner; or

- *Vesting in the interim* – the interim owner acts as if they have the full legal and beneficial ownership of the foreshore and seabed until a final owner has been determined. Interim vesting explicitly recognises that the owner of the foreshore and seabed could change.

63 Within each of these two broad options for vesting there is a multiplicity of sub-options. I have attempted to capture the range of sub-options below.

VESTING ABSOLUTELY

64 I have identified three sub-options for vesting the public foreshore and seabed in an absolute owner:

- Crown absolute ownership;
- Joint Māori-Crown absolute ownership; and
- Māori absolute ownership.

65 These are set out on the spectrum below, with absolute Crown ownership at one end and absolute Māori ownership at the other:

SPECTRUM OF OWNERSHIP OPTIONS FOR REPLACEMENT REGIME

Crown absolute ownership	Joint Māori-Crown absolute ownership	Māori absolute ownership
o i.e. status quo o the Crown could grant proprietary interests to Māori (which replicate customary title) and to third parties, but the Crown would remain the underlying owner	o i.e. Māori and the Crown have equal ownership o proprietary interests could be granted by Māori-Crown, but they would remain the underlying joint owners	o i.e. Māori are the owners o Māori could grant the Crown or third parties with a proprietary interest in the form of title, but Māori would remain the underlying owner

66 Under any of the absolute ownership options, the owner would be vested with a full legal and beneficial title. The absolute owner, regardless of who that is, can grant proprietary interests (which are less than absolute ownership) to third parties. Proprietary interests could be granted to recognise customary interests. For example, the Crown as absolute owner could grant a title with encumbrances to a group who have successfully proven their customary interests. The Crown's absolute ownership would then be burdened by that title.

67 "Tipuna title" as expressed by the Māori Party would fall at the same end of the spectrum as absolute Māori ownership, but is different because it sits outside of New Zealand's legal framework. For this reason it is uncertain how "tipuna title" would integrate with existing resource management frameworks in the coastal marine area.

VESTING IN THE INTERIM

68 I have identified two sub-options for vesting the public foreshore and seabed in an interim owner:

- *Notional Crown (interim) ownership* – the Crown has notional ownership of the public foreshore and seabed until the completion of any investigative process established by the replacement regime.

- *Crown trusteeship (in the interim)* – the Crown holds ownership of the public foreshore and seabed in trust for Māori until the completion of any investigative process.

69 Under both options, the Crown would be the owner until customary interests in any given area are investigated and proven. At that point, Māori would become the owner of a particular area of foreshore and seabed and the Crown's interim ownership would cease. If Māori customary interests are investigated and found not to exist, then the Crown's interim ownership would become absolute ownership in that area of public foreshore and seabed.

70 The key difference between the two options is that under the interim Crown trusteeship option the Crown would hold title subject to fiduciary duties owed to Māori. Broadly speaking, the Crown would need to make decisions on behalf of and in the best interests of Māori.

Implications of vesting

71 These options are couched at a high level and they require further work if they are to be developed. An assessment of the risks is required, as well as the potential precedent effects for other resources and the implications for the integrity and efficiency of resource management frameworks.

72 A number of resource management regimes (e.g. fisheries, aquaculture and the Resource Management Act 1991) presume or rely on the Crown's absolute ownership of the foreshore and seabed. If this position changes, I will need to consider the impact of that change on the legislative regimes that overlay the foreshore and seabed. As an example of the complexities, ownership is relevant for fishing rights because most fishing activities interfere with underlying land to such a degree that the land owner's permission would be required. The Māori Commercial Aquaculture Claims Settlement Act 2004 also relies on Crown ownership of the foreshore and seabed.

73 Decisions on ownership will need to be made in order to progress the development of the replacement regime. I do not propose asking the Committee to make decisions on ownership at this time. The whole replacement regime needs be carefully calibrated in light of the other three broad issues. I will report back to the Cabinet Committee on Treaty of Waitangi Negotiations in 25 November 2009 with a preferred ownership regime.

Issue Two: Models for recognising customary interests

74 The replacement regime will need to establish a process for dealing with the recognition of customary interests in the foreshore and seabed. There are a several options for a process, and they can be categorised as falling into one or more of three models, which broadly align with the models set out in the Panel's report: a negotiation model, a litigation model or a hybrid model.

Negotiation model

75 A negotiation model would entail the Crown and iwi/hapū reaching a political solution on the nature and extent of customary interests in the foreshore and seabed. Within the negotiation model there are two broad options that could be used to undertake negotiations with iwi/hapū in order to recognise interests:

a a nationwide option; or

b group by group option at a regional or tribal level.

Litigation model

76 A litigation model would have the judiciary (a court, Tribunal or Commission of Inquiry) determine the nature and extent of customary interests in the foreshore and seabed in the context of a statutory regime and in accordance with any statutory tests.

Hybrid model

77 A hybrid model would combine the ability of groups to negotiate with the Crown with an efficient litigation process. There are efficiencies to be gained from the combination of these two models, potentially resulting in a timely and pragmatic recognition of customary interests in the foreshore and seabed.

78 My hybrid model would provide groups with two options. The nature and extent of the customary interests and the appropriate award would be agreed via negotiations or tested and awarded in the courts. It allows flexibility *within* the model, for example if disputes arise in the course of negotiations that cannot be sorted then groups have the opportunity to go to court for resolution.

79 Negotiations are inherently flexible and allow the Crown and the group to tailor solutions appropriate to the circumstances. While there would not be prescribed negotiation requirements in the legislation, I envision that Cabinet would have an active role in decision making about the negotiations (e.g. Cabinet approved guidelines for negotiations and agreeing to a Crown Negotiating Brief for individual negotiations). The Office of Treaty Settlements considers that the hybrid approach poses some risks for the completion of all historical Treaty settlements by 2014. Importantly, there is a risk that the negotiations on foreshore and seabed customary title may distract groups from historical negotiations and impact on groups' capacity to participate in them.

80 I also think that litigation should be provided as an option to groups. One of the key difficulties with litigation is that, in my experience, it is protracted especially when the legislature has not provided guidance to the courts. I propose that any litigation model should have prescribed tests and awards to assist the courts to make timely judgments.

Preferred model

81 At this time, my preliminary thinking leans towards a hybrid model. This model provides groups with the opportunity to choose to either litigate or negotiate

their customary interests in the foreshore and seabed. Once a group has selected their preferred process they would remain in that process while they determine the nature and extent of their customary interests (i.e. tests) and, consequently, any resulting outcome or agreement (i.e. the award).

82 I note that the Minister of Māori Affairs has no preferred model at this point.

83 I will report back to the Cabinet Committee on Treaty of Waitangi Negotiations in 25 November 2009 with a preferred model.

Issue three: Determining and recognising customary interests

84 Customary interests are one of the four groups of interests that New Zealanders have in the foreshore and seabed, as described in paragraph 19 above. As I have noted above, the 2004 Act had a disproportionate impact on customary interests, which needs to be redressed in the design of the regime to replace the 2004 Act.

85 I propose that the replacement regime directly provides for customary interests by testing the nature of any claimed interests and giving legal recognition to any proven interests. I have undertaken quite a lot of thinking on this issue. In order to recognise proven customary interests, any uninvestigated customary title that was extinguished by the 2004 Act ought to be explicitly revived.

86 I have already given some thought to how customary interests in the foreshore and seabed could be tested and recognised through awards. I have set out my initial proposed tests and awards in **Appendix 1**.

Designing tests

87 In designing the tests outlined in **Appendix 1**, I have drawn on the common law and tikanga. The common law provides for a doctrine of customary title, which describes those pre-existing interests of an indigenous population to which the common law accords legal recognition. The common law does not recognise rights that have been lost or extinguished by a breach of the Treaty of Waitangi by the Crown. The replacement regime will not cover those issues because they are dealt with in the historical Treaty settlements process.

88 New Zealand has long accepted the possibility of non-territorial and non-territorial customary rights existing at common law in the marine area. Recognition and protection of customary fishing rights is a clear example of that recognition to date. I have drawn on this legal tradition by distinguishing between customary title and customary rights (this distinction is also applied by the Canadian courts):

a **customary title** can confer rights akin to traditional incidents of fee simple title (such as exclusive use and control); and

b **customary rights** are associated with uses, activities and practices that do not require underlying land ownership.

89 Because New Zealand law accepts the distinction between territorial and non-territorial customary interests, I propose a test and award for customary title and a separate test and award for customary rights. As the "title" and "rights" confer different incidents, different tests and awards are required.

90 The common law elements of my proposed tests derive from jurisprudence from Australia and Canada (with a small component of English jurisprudence). I am also considering examples from the Pacific Islands. The Ministerial Review Panel was critical of the importation of Australian and Canadian jurisprudence because, in Panel's view:

a New Zealand has its own unique circumstances;

b in Australia, only rights short of a title can be recognised in the seabed;

c Canada has yet to decide whether title can be recognised in the seabed; and

d most countries with comparable jurisdictions have only considered customary title in relation to dry land.

91 Despite the Panel's view on the use of Australian and Canadian jurisprudence, New Zealand has a legal tradition of drawing from England, Australia and Canada in shaping the content of the common law as it applies in New Zealand. In terms of common law customary title jurisprudence, there is little else to draw from because of the paucity of New Zealand's own common law customary title jurisprudence.

92 I also think tikanga is directly relevant to the tests because:

a it demonstrates how Māori regulate their interaction with land and resources (therefore it is directly relevant to recognising customary interests); and

b it is part of New Zealand's legal heritage to recognise tikanga (e.g. common law, Māori Land Court, use of tikanga concepts in regulatory legislation).

93 I have been considering the degree to which the tikanga component should be prescribed in any legislation. Some submissions to the Panel expressed concern about prescribing tikanga in legislation. The Māori Land Court has a wealth of jurisprudence deriving from their statutory jurisdiction that can be drawn upon in terms of the application of tikanga as a test for determining customary land status. I think that tikanga Māori should not be prescribed. If further advice is required then specialist advice can be sought.

94 I assume applicants for customary title or rights would be, for the most part, iwi and/or hapū. I am considering whether to specify the class of groups or persons that can apply to become customary title or rights holders in the legislation.

Designing awards

95 I am designing awards for applicants who meet the test for customary title or the test for customary rights. As noted in paragraph 88 above, customary title is traditionally associated with rights akin to land ownership. This is distinct from customary rights which are uses, activities or practices that do not require underlying title to the land.

96 In designing the awards outlined in **Appendix 1**, I intend to draw on two principal sources of rights:

- property rights (i.e. spectrum from fee simple title to usufructary rights); and
- regulatory rights.

97 I think these two sources are appropriate for two reasons. First, an award that combines property rights with regulatory rights is more likely to align with the holistic approach to resource management advocated in Māori lore. In the customary title context, this holistic approach includes both property rights akin to land ownership and recognition and regulation of the relationship between humans and the environment (specifically including management or regulatory rights and responsibilities).

98 Secondly, by using these two sources I can ensure that the award integrates with the legislative environment of the coastal marine area. This is critical if the award is to be functional and desirable. Because there are over 40 statutes that operate in the coastal marine area, I have focussed on connecting the awards, at a high level, to the Resource Management Act 1991 as it is the predominant legislation in this area (connecting with approximately 35 of the 40 statutes in operation). I am also considering how the award may be connected to three other statutes: the Conservation Act 1987, the Marine Reserves Act 1971 and the Marine Mammals Protection Act 1978.

99 I have used the Deed of Agreement between ngā hapū o Ngāti Porou and the Crown concerning ngā rohe moana o ngā hapū o Ngāti Porou as a source for regulatory-related awards.

Comment on tests and awards

100 I note that the nature of the proposed tests and awards outlined in **Appendix 1** may change as decisions are made on other matters relating to the replacement regime.

101 I do not propose asking the Committee to make decisions on tests and awards at this time. The whole replacement regime needs be carefully calibrated in light of the other three broad issues. I will report back to the Cabinet Committee on Treaty of Waitangi Negotiations in 25 November 2009 with my preferences in respect of determining and recognising customary interests in the replacement regime.

Issue four: Collateral matters

102 As part of the policy development process, I have identified a number of collateral matters that require the Committee's decision. I have distinguished between collateral matters that can be agreed to immediately, and those matters requiring further consideration.

103 The collateral matters that can be dealt with immediately relate to two of the suggested government bottom lines (providing for reasonable public access and navigation rights, and protecting fishing rights). The 2004 Act sets out a clear set of access and navigation rights and clarifies that existing fishing rights are protected. My view is that the Committee should agree to enact in the new legislation provisions similar to the access, navigation and fishing rights provisions in the 2004 Act.[3]

104 I will report back to the Cabinet Committee on Treaty of Waitangi Negotiations in 25 November 2009 with proposals in respect of these collateral matters:

a ownership-related issues, including reclamations, declamations, roads, fixtures, structures and transitional matters;

b the applications and negotiations under the 2004 Act (including those before the courts); and

c related legislation that may be affected (e.g. the Foreshore and Seabed Endowment Revesting Act 1991).

Discussions with interested parties

Interest groups

105 I have commenced discussions with a range of interest groups including Petroleum Exploration and Production Association of New Zealand (PEPANZ), representatives of Port Companies, Te Ohu Kaimoana, and Local Government New Zealand to ensure that I am fully apprised of the issues they may raise. I see further correspondence and meetings with these groups and other national sector interest groups in the future to continue discussing issues of shared importance.

Consultation with iwi/hapū

106 The Prime Minister, Ministers of Māori Affairs, Fisheries and Conservation, the Hon Tariana Turia and I met with a group of iwi leaders (and their technical advisors) in late August to discuss the review of the 2004 Act. The Associate Minister of Māori Affairs and I met with the group of iwi leaders again earlier this month to continue the discussions. I see further meetings with the iwi leaders group occurring before I put papers before the Cabinet for consideration.

[3] 2004 Act: rights of access (sections 7, 26 and 27), rights of navigation (section 8) and rights of fishing (section 9).

107 In consultation with the iwi leaders group, I have established a Technical Advisory Group to provide input into the policy development process. The Technical Advisory Group meets weekly to discuss issues of shared importance, and advises me on a monthly basis. The Technical Advisory Group comprises:

- four advisors to the iwi leaders – [redacted] and

s9(2)(a)

- four government advisors – Senior Advisor to the Minister of Māori Affairs, Senior Advisor to the Attorney-General, and two officials from the Ministry of Justice (the Director and a Manager from the Foreshore and Seabed Unit).

Consultation on government policy proposals

108 Decisions are required on what (if any) consultation needs to occur in the next phase of the review, once the Cabinet has made decisions on the replacement regime.

109 I will update the Cabinet Committee on Treaty of Waitangi Negotiations on 25 November 2009 on:

- my discussions with interested parties;
- iwi/hapū consultation, including with iwi leaders and the Technical Advisory Group; and
- proposals (if any) for consultation on the government's policy proposals during the next phase of the review.

Next steps

110 I am aiming for a Bill to be introduced into the House and receive its first reading in mid-2010, with the enactment of the Bill occurring before the end of 2010. There is much work to be done in order for the government to be able to meet this ambitious goal.

111 In order to meet this ambitious target, the Minister of Māori Affairs has proposed the establishment of a Ministerial Group to assist the government to develop its foreshore and seabed policy. The Minister of Māori Affairs considers that a small group of Ministers would facilitate timely and effective decision-making, with other Ministers being consulted as necessary. I agree with this approach.

112 I propose that the Committee agrees to the establishment of a Foreshore Ministers' Group comprising the Attorney-General (chair), Minister of Māori Affairs, the Prime Minister and/or the Deputy Prime Minister.

113 I anticipate that the Ministerial Group would have ad hoc meetings, as required, to make policy decisions on the review of the 2004 Act. I propose that the group be serviced by the Ministry of Justice.

Consultation

114 The Foreshore and Seabed Unit within the Ministry of Justice prepared this paper. The following departments were consulted in the development of this paper: the Department of Conservation, the Ministry of Fisheries, the Ministry for the Environment, the Ministry of Economic Development, Department of Internal Affairs, Ministry of Transport, Te Puni Kōkiri, the Crown Law Office, the Office of Treaty Settlements and The Treasury.

115 The Department of the Prime Minister and Cabinet was informed.

Financial implications

116 There are no financial implications that arise directly from this paper.

Human rights

117 There are no human rights implications that arise directly from this paper. Any human rights implications arising out of the development of a replacement regime will be addressed in future detailed policy papers.

Treaty of Waitangi Implications

118 There are no Treaty of Waitangi implications that arise directly from this paper. Any Treaty of Waitangi implications arising out of the development of a replacement regime will be addressed in future detailed policy papers.

Legislative implications

119 Any legislative implications arising out of this proposal will be addressed in future detailed policy papers.

Regulatory Impact Analysis

120 A regulatory impact statement is not required at this time. As the review of the 2004 Act is part of the government's regulatory reform programme, I will ensure I keep relevant Ministers apprised of issues as they arise.

Publicity

121 The last media statement issued jointly by the Minister of Māori Affairs and I indicated that the government is considering the Panel's report. I propose that the Committee agree that a media announcement is made that covers the following matters (subject to the Committee's approval of those matters):

- the report of the Ministerial Review Panel provided a good starting point for considering the government's view on the future of the 2004 Act;

- the 2004 Act had a disproportionate impact on customary interests in the foreshore and seabed, and this has resulted in an ongoing sense of grievance within New Zealand, particularly amongst Māori;
- the government intends to repeal the 2004 Act in 2010 because it did not strike an appropriate balance of the interests of all New Zealanders in the foreshore and seabed;
- the repeal of the 2004 Act constitutes complex regulatory reform, and a lot of work is required to develop a replacement regime that will produce equitable outcomes;
- the government's intention is for legislation to repeal the 2004 Act and to establish a new regime to be introduced into the House and receive its first reading in mid-2010, with the enactment of the Bill occurring before the end of 2010;
- the four broad issues that will need to be carefully considered during the development of the replacement regime are:
    - ownership of the foreshore and seabed;
    - models for recognising customary interests;
    - determining and recognising customary interests (i.e. tests and awards); and
    - collateral matters (e.g. reclamations, declamations, structures, etc);
- the five principles that will guide the development of the replacement regime are: good faith, Treaty of Waitangi, recognition and protection of interests, equity, certainty, and efficiency;
- the government's bottom lines in relation to developing a replacement regime are: reasonable public access, recognition of customary interests, protection of fishing and navigation rights, and protection of existing use rights to the end of their term;.

122 I have liaised with the Prime Minister and the Minister of Māori Affairs on this matter. It is proposed that the media announcement will be made after Cabinet on Monday 2 November.

Recommendations

123 I recommend that the Committee:

BACKGROUND

1 **note** that the government is reviewing the Foreshore and Seabed Act 2004 (the 2004 Act);

2 **note** that:

2.1 on 23 February 2009, Cabinet agreed to the establishment of a Ministerial Review Panel to provide advice to the government on the review of the 2004 Act, and approved the terms of reference for the review of the 2004 Act [CAB Min (09) 6/3B];

2.2 on 22 July 2009, the Cabinet Committee on Treaty of Waitangi Negotiations (TOW) [TOW Min (09) 8/1]:

2.2.1 **noted** that the Ministerial Review Panel delivered its report to the Attorney-General on 30 July 2009;

2.2.2 **noted** that the majority of submitters, and the Ministerial Review Panel, recommended the 2004 Act be repealed;

FRAMING THE ISSUE

3 **note** that the interests of New Zealanders in the foreshore and seabed include:

3.1 *recreational and conservation interests* in accessing, using and enjoying the coastline and marine environment;

3.2 *customary interests*, including usage, authority and proprietary interests as an expression of the relationship between iwi/hapū and the coastal marine area;

3.3 *business and development interests*, such as the fishing, marine farming, marine transport, roading and airport infrastructure, mining and tourism industries, and port companies, which have a significant interest in how the coastal marine area is controlled and regulated;

3.4 *local government interests*, as local authorities represent community-wide interests and administer much of the law that regulates use of the coastal marine area.

4 **agree** that the government has a role in balancing the interests of all New Zealanders in the foreshore and seabed;

5 **note** the Attorney-General's view is that the 2004 Act:

5.1 does not strike an appropriate balance of the interests of all New Zealanders;

5.2 should be repealed and replaced because it disproportionately affects customary interests;

ACHIEVING A SOLUTION

6 **agree** that the 2004 Act be repealed and that further policy work (set out in recommendations 10 to 13 below) commence on the development of an equitable replacement regime;

7 **agree** that the following principles be adopted to guide the next stage of the government's review:

7.1 *good faith* – to achieve a good outcome for all following fair, reasonable and honourable processes;

7.2 *Treaty of Waitangi* – the development of a new regime must reflect the Treaty of Waitangi, its principles and related jurisprudence;

7.3 *recognition and protection of interests* – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;

7.4 *equity* – provide fair and consistent treatment for all;

7.5 *certainty* – transparent and precise processes that provide clarity; and

7.6 *efficiency* – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies;

8 **agree** to the following statement for framing the government's bottom lines (non-negotiable elements):

8.1 the 2004 Act did not strike an appropriate balance of the rights and interests in the foreshore and seabed;

8.2 by reviewing the 2004 Act, the government intends to achieve a better balance;

8.3 the government will consider all options, and the end result will be fair and just;

9 **agree** to the following bottom lines (non-negotiable elements) for the development of a replacement regime:

9.1 reasonable public access for all;

9.2 recognition of customary interests;

9.3 the protection of fishing and navigation rights;

9.4 the protection of existing use rights to the end of their term;

NEXT STEPS

10 **note** that there are three models open to the government for establishing a process for dealing with the recognition of customary interests in the foreshore and seabed:

10.1 a negotiation model (the Crown and Māori reach a political agreement to resolve the nature and extent of Māori customary interests);

10.2 a litigation model (the judiciary decides the nature and extent of Māori customary interests);

10.3 a hybrid model (a combination of elements or options in the litigation and negotiation model);

11 **note** that:

11.1 the Attorney-General prefers a hybrid model because of the efficiencies that may be gained, in particular the timely resolution of customary interests;

11.2 the Minister of Māori Affairs has no preference at this point;

12 **note** that further policy development work on the development of an equitable regime to replace the 2004 Act should be undertaken on the following matters:

12.1 ownership of the foreshore and seabed;

12.2 the three broad models (negotiation, litigation and hybrid);

12.3 determining and recognising customary interests (tests and awards);

12.4 collateral matters;

13 **note** that further policy work should be done on how the government might engage with New Zealanders about the government's proposals;

14 **agree** that the Attorney-General should continue discussions with key stakeholders, including those groups negotiating under the 2004 Act;

15 **agree** to the establishment of a Foreshore Ministers' Group comprising the Attorney-General (chair), Minister of Māori Affairs, the Prime Minister and/or the Deputy Prime Minister to make policy decisions on the review of the 2004 Act, as required;

16 **invite** the Attorney-General, in consultation with the Minister of Māori Affairs, to report back to the Cabinet Committee on Treaty of Waitangi Negotiations by 25 November 2009 on the issues outlined in

recommendations 10 to 13 above, including further details on what regime should replace the 2004 Act;

PUBLICITY

17 **agree** that a media announcement to be made after Cabinet on Monday 2 November 2009;

18 **agree** that the media announcement will cover the following matters:

18.1 the report of the Ministerial Review Panel provided a good starting point for considering the government's view on the future of the 2004 Act;

18.2 the 2004 Act had a disproportionate impact on customary interests in the foreshore and seabed, and this has resulted in an ongoing sense of grievance within New Zealand, particularly amongst Māori;

18.3 the government intends to repeal the 2004 Act in 2010 because it did not strike an appropriate balance of the interests of all New Zealanders in the foreshore and seabed;

18.4 the repeal of the 2004 Act constitutes complex regulatory reform, and a lot of work is required to develop a replacement regime that will produce equitable outcomes;

18.5 the government's intention is for legislation to repeal the 2004 Act and to establish a new regime to be introduced into the House and receive its first reading in mid-2010, with the enactment of the Bill occurring before the end of 2010;

18.6 the four broad issues that will need to be carefully considered during the development of the replacement regime are:

18.6.1 ownership of the foreshore and seabed;

18.6.2 models for recognising customary interests;

18.6.3 determining and recognising customary interests (i.e. tests and awards); and

18.6.4 collateral matters (e.g. reclamations, declamations, structures, etc);

18.7 the five principles that will guide the development of the replacement regime are: good faith, Treaty of Waitangi, recognition and protection of interests, equity, certainty, and efficiency;

18.8 the government's bottom lines in relation to developing a replacement regime are: reasonable public access, recognition of customary interests, protection of fishing and navigation rights, and protection of existing use rights to the end of their term; and

19 **note** that the media announcement and its contents is subject to Committee approval.

C. J. Finlayson

Hon Christopher Finlayson
Attorney-General

Date: 21 / 10 / 2009.

Appendix 1

Customary title and customary rights tests and awards

Purpose

1 This appendix summarises my preliminary preferred:

a customary title test and award; and

b customary rights test and award.

Customary title – test and award

Possible test for customary title

2 The doctrine of customary title can be conceived as having four building blocks. These building blocks are the fundamental tenets of customary title and all must be established for a successful customary title claim. The building blocks are:

- *Recognition*: Before an investigation can occur into whether an applicant can establish customary title, customary title must be capable of being recognised at common law. To remove uncertainty about the recognition of customary title in the foreshore and seabed, there should be explicit direction in the statute that customary title exists where the elements of the test are proven[4]. The 2004 Act does not provide for this explicit recognition.

- *Proof:* This is arguably the most difficult building block to establish. Proof requires an examination of the connections, acts and practices demonstrating that the claimed right exists and equates with customary title. I have distilled two elements that should be required to demonstrate proof – exclusive use and occupation, and continuity of exclusive use and occupation. This provision is provided for in the 2004 Act.

- *Content and extent*: This building block is about the definition of the content and extent of the customary interests and particularly how those claimed customary interests can find expression in common law terms. I think the key element here is whether the area is held by the group according to customs and usages, which in the New Zealand context would be tikanga. This provision is not included in the 2004 Act.

- *Extinguishment*: The final inquiry is whether there has been extinguishment of the customary interests – where extinguishment is a question of law, not fact. Customary title cannot exist if there is clear and

[4] This approach carefully manages the risk of the Panel's view that all of the coastal marine area should be considered to be Māori land until the contrary is proven by requiring customary title is proved rather than assumed.

plain extinguishment of interests. This provision is not explicitly provided for in the 2004 Act.

3 In terms of the *proof* building block, I think that the meaning of "exclusive use and occupation" should be clarified in the legislation. I consider that there are three factors that could assist with clarifying the meaning of "exclusive use and occupation":

a exclusive use and occupation *from 1840 until the present* (which means that there must be a period of continuity in use and occupation. The point at which the Crown acquires sovereignty until the present is an accepted common law approach to continuity);

b exclusive use and occupation should be *without substantial interruption* (which means that minor or intermittent activities do not disqualify a finding of exclusive use and occupation); and

c fishing and navigation by third parties may be relevant to, but do not necessarily preclude, a finding of exclusive use and occupation.

4 The demonstration of exclusive use and occupation should be through a physical association with the area. I have considered the factors that could support the demonstration of customary title. These factors are supportive of a finding, not conclusive. I think there are two factors that should be addressed in legislation:

a ownership of abutting land (this factor assists with demonstrating the ability to control exclusive use and occupation); and

b customary fishing (because fishing is an integral customary practice and evidence of fishing should be able to be taken into consideration by the courts).

5 The ownership of abutting land factor is currently included in the 2004 Act as a "must have" factor. There is not an express principle of common law that imposes a strict requirement that a property right below high water be linked with the possession of adjoining land. However, it does assist with demonstrating the ability to control landward access to the foreshore and seabed. I think having adjoining land ownership goes to proving exclusivity but is <u>not</u> determinative of exclusive use and occupation in the foreshore and seabed.

6 In relation to customary fishing, I think it is an integral practice in the foreshore and seabed. There are issues associated with how evidence of fishing may be called before the courts, given the settlement of commercial customary fishing rights and the regulation of non-commercial customary fishing rights under the Treaty of Waitangi (Fisheries Settlement Claims) Act 1992. These issues will be addressed in further detailed policy work.

7 I also think the means by which customary title can be extinguished should be prescribed in the legislation to avoid any confusion or uncertainty (e.g. statutory vesting in a third party would extinguish customary title).

8 In addition, I think the test should be premised on the requirement the foreshore and seabed is held by the group in accordance with tikanga Māori. These words are similar to the statutory language in Te Ture Whenua Māori/Māori Land Act 1993 which uses the phrase "held by Māori in accordance with tikanga Māori".

9 I think a test to recognise customary title could be along the lines of:

Recognition Block 1	Customary title in the foreshore and seabed is recognised only where it is proved that the relevant foreshore and seabed area is held by the applicant in accordance with tikanga Māori.	*Tikanga*
Proof Block 2	"Held" means exclusive use and occupation from 1840 until the present without substantial interruption. o To avoid doubt, fishing and navigation by third parties may be relevant to, but does not necessarily preclude a finding of exclusive use and occupation; o In considering whether there is exclusive use and occupation, supporting factors may include: • ownership of abutting land • customary fishing	
Content and Extent Block 3	Exclusive use and occupation must be demonstrated through physical association with the area.	
Extinguishment Block 4	Customary title must not be extinguished.	

Possible nature and extent of award for customary title

10 Because customary title is traditionally associated with rights akin to land ownership (as distinct from customary rights which are uses, activities or practices that do not require underlying title to the land), I propose an award that draws on two principal sources of rights:

- property rights (akin to fee simple); and
- regulatory rights.

s9(2)(h)

11 [redacted]

12 My current thinking is it may be necessary to provide for a customary title that is subject to the government's bottom lines. (i.e. access, navigation and fishing, and existing use rights). The effect, however, of the government bottom lines proposed in this paper is to significantly diminish the property rights available in an award for customary title. For instance, the ability to exclusively possess the property could not occur if there are to be exercisable statutory rights of public access, navigation and fishing.

[redacted]

13 Generally speaking, this approach would likely be to require compensation for any diminishing of the bundle of rights. Parliament has also recognised that, in some circumstances, any interference or removal of private property rights requires compensation to be paid to the affected land owner.

14 I do not think that a monetary compensatory approach accords with statements made by submitters to the Panel that "money is not an issue" for Māori. I think a more appropriate approach than monetary compensation is to augment the diminished bundle of property rights with regulatory rights. I think that in some circumstances, regulatory rights could be considered on a par with or more valuable or powerful than some incidents of fee simple title.

15 An innovative award that combines property rights with regulatory rights is more likely to align with the holistic approach to resource management advocated in Māori lore. This holistic approach includes both property rights akin to land ownership and recognition and regulation of the relationship between humans and the environment (specifically including management or regulatory rights and responsibilities).

16 I also propose that the award integrates with the legislative environment of the coastal marine area. This is critical if the award is to be functional and desirable. Because there are over 40 statutes that operate in the coastal marine area, I have focussed on connecting the awards, at a high level, to the Resource Management Act 1991 as it is the predominant legislation in this area. I am thinking further about how the award may connect to three other substantial statutes: the Conservation Act 1987, the Marine Reserves Act 1971 and the Marine Mammals Protection Act 1978. Further work is required on that front.

17 Although the Fisheries Act 1996 is also a relevant and substantial statute operating in the coastal marine area, I recommend that the award should not provide for customary fishing rights given that commercial customary fishing rights have been comprehensively settled under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and non-commercial customary fishing rights are comprehensively provided for through regulations made under the Fisheries Act 1993 and Fisheries Act 1996. Cabinet has previously noted that the review was not intended to have an impact on the fisheries settlement [CAB Min (09)6/3B refers]

18 I have drawn on the regulatory rights instruments that were designed to apply over an exclusive area (i.e. territorial customary rights area) in the Deed of Agreement between the Crown and Ngāti Porou. I am aware that these instruments were designed specifically in the context of the Ngāti Porou and Te Whānau a Apanui foreshore negotiations. I am also aware that there are some provisions in current legislation that provide for components of some of these instruments. I think the instruments could apply as a component of a customary title award because they were designed to mimic or replicate the property right of permitting and excluding activities (which is an essential part of my preferred customary title award). My preliminary thinking is to include these types of instruments in a customary title award.

19 A customary title award could contain the following elements:[5]

Customary title award If an applicant group is successful in an application for customary title in the foreshore and seabed, an order providing for the following matters can be made:	
• The holder of the customary title has the following rights: o to undertake activities, uses and practices consistent with the appropriate legislative regime in place o to permit or refuse in the claimed area any activity in the claimed area (to be given effect through the **Permission Right)** o cannot sell property except to the Crown, but can lease/licence • To avoid doubt, customary title is subject to: o public access o public rights of fishing and navigation	**Property rights**
• The holder of the customary title has the following input into decision-making processes concerning the coastal marine area: o a **Permission Right** would provide the right to approve or withhold approval for any resource consent for activities; and o an **Environmental (customary title) Plan** would provide that relevant local authorities must ensure all statutory plans that cover the customary title area recognise and provide for an Environmental Covenant prepared by the customary title holder, to the extent that the Environmental Covenant relates to resource management issues.	**Regulatory rights**

20 I will be undertaking further work to assess the appropriateness of this award, its application in a litigation, negotiation or hybrid model, and how it would link with the legislative regimes that apply in the coastal marine area.

Customary rights – test and awards

Possible test for customary rights

21 I have adopted the same approach to constructing the customary rights test as I took with the customary title test. The test for customary rights was designed using five building blocks distilled from the common law:

- *Date of existence*: The right must have been in existence at the time of sovereignty

[5] Note: the property rights provided (e.g. to permit any activity in the claimed area) are in addition to other legal requirements such as a resource consent.

- *Continued existence of an identifiable community*: The right must be carried out by an identifiable community with traditional laws and customs
- *Connection with the area*: There must be proof that the right connects to the area claimed by the applicant group
- *Integral to the distinctive culture*: The right must be integral to the culture of the applicant group
- *Continuous exercise*: The right has been carried out since the date of its existence. I think it is important to make clear that the purpose of the test is to recognise existing rights rather than extinguished rights.

22 Although not explicitly a requirement of the common law, I have also added a similar 'recognition' (ability of the common law to recognise the interest at issue) building block as an introduction to the test (i.e. a chapeau). It is important to be explicit in the statutory test that customary rights can be recognised at law.

23 I think that tikanga appears in a number of the common law elements and does not require a separate component in the test.

24 Unlike the test for customary title, the common law building blocks do not fit into sequential elements of a test. Nonetheless, each building block is represented in my preferred customary rights test which can be depicted as follows:

A customary right (activity, use or practice) carried out by a whānau, hapū or iwi in the relevant foreshore and seabed area is recognised where the right:
• has been in existence since 1840; and
• continues to be carried out in accordance with tikanga in the area of the foreshore and seabed specified by the applicant; and
• is integral to the tikanga of the applicant group; and
• continues to be practised to the present day; and
• has not been extinguished.

Possible nature and extent of award for customary rights

25 Similar to the approach for customary title, the award draws on two principal sources for rights:

- property rights (of a usufructary nature); and
- regulatory rights.

26 The Deed of Agreement provides for usufructary rights by way of a Protected Customary Activities mechanism. This mechanism allows recognised customary rights holders to continue exercising their customary rights without resource

consent. A group can also generate a commercial benefit from any protected activities. I think this mechanism should be used to recognise usufructary rights in the new regime.

27 I recognise that there are a number of positive elements in the existing regulatory regime that overlays the foreshore and seabed. I think these elements should be incorporated into an award for customary rights.

28 The Deed of Agreement contains a number of regulatory instruments that were designed to apply throughout the rohe moana of ngā hapū o Ngāti Porou in recognition of the mana and the relationship of Ngāti Porou hapū with the environment. The regulatory instruments build on the positive elements of the applicable regulatory regimes. I have taken five of those instruments and applied them here.

29 A customary rights award could have the following elements:

Customary rights award If an applicant is successful in an application for a recognised customary right in the relevant foreshore and seabed area:	
• The holder of the recognised customary right can continue to undertake the customary right or rights according to a **Protected Customary Activities** instrument. This mechanism will allow the customary right(s) holder the right to continue carrying out the recognised customary right(s) without resource consent in the foreshore and seabed in the customary rights area.	**Usufructary component**
• In recognition of the relationship of the customary rights holder with the customary rights area, the customary rights holder may be granted, where sought, rights according to the following instruments: o a **Statutory Overlay** that recognises the special status of the customary rights area to the customary rights holder. It also ensures that this status is recorded in key public documents such as district and regional plans and policy statements and is taken into account of in consent processes under the Resource Management Act and Historic Places Act; and/or o a **Wāhi tapu** protection mechanism that will give the applicant the right to restrict or prohibit access to wāhi tapu and wāhi tapu areas within the customary rights area; and/or o an **Environmental (customary rights) Plan**, which would provide that relevant local authorities must ensure all statutory plans that cover the customary rights area take into account an Environmental Covenant prepared by the customary rights holder, to the extent that the Environmental Covenant relates to resource management issues; and/or o a **Placenames** instrument that will officially recognise traditional names or alter names of culturally significant areas.	**Regulatory component**

Comment on tests and awards

30 I am mindful that some of the elements of my proposed tests look similar to those tests included in the 2004 Act and that the Panel considered that the thresholds for the 2004 Act tests were too high and prescriptive. Despite my proposed tests having similar elements, I have dealt with those elements in

different ways and also incorporated new elements which will likely impact on the interpretation of the other elements of the test.

31 I am also mindful the elements of the awards are similar that were negotiated with Ngāti Porou and Te Whānau a Apanui representatives. But the 2004 Act did not provide for these types of awards. The award for customary title in the 2004 Act is an inadequate instrument that does mimic the nature of a customary title. My proposals will help to rebalance this inadequacy of the 2004 Act in the replacement regime.