Office the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

REVIEW OF THE FORESHORE AND SEABED ACT 2004: ISSUE ONE: CLARIFYING ROLES AND RESPONSIBILITIES IN THE FORESHORE AND SEABED

Proposal

1 This paper seeks the Cabinet Committee's direction on further work for clarifying roles and responsibilities in the foreshore and seabed.

Executive summary

2 Ownership of the foreshore and seabed is a key issue in the review of the Foreshore and Seabed Act 2004 (the 2004 Act).

3 If the 2004 Act is to be repealed and replaced with an equitable regime, the government will need to consider how a replacement regime will achieve the government's two main objectives of a better balance of all the interests of New Zealanders and maintaining certainty and clarity of roles and responsibilities in the foreshore and seabed.

4 Ownership is one way of achieving certainty and clarity of roles and responsibilities but it tends to polarise people and it can be difficult to balance all interests if the effect of ownership is the extinguishment of another interest. Putting the 'who' of ownership to one side and instead focussing on authority and control is another way of achieving certainty and clarity of roles and responsibilities. This approach also has the potential to deliver a better balance of interests.

5 This paper seeks the Cabinet Committee's agreement to exploring an approach to clarifying roles and responsibilities in the foreshore and seabed that does not rely on the vesting of ownership but instead focuses on authority and control. This focus would draw on the existing legislative regimes in the foreshore and seabed and would consider all the interests of New Zealanders (their nature and extent and whether they are proprietary or non-proprietary). Underlying this approach is the recognition that the foreshore and seabed is a nationally iconic and important resource with interweaving and complex interests.

Background

6 On Monday 2 November 2009, the Cabinet noted it is likely the Foreshore and Seabed Act 2004 (the 2004 Act) will be repealed as a result of the review of the 2004 Act [CAB Min (09) 39/27 refers].

7 Of particular relevance to this paper, the Cabinet also noted the interests of New Zealanders in the foreshore and seabed include:

- recreational and conservation interests in accessing, using and enjoying the coastline and marine environment;
- customary interests, including usage, authority and proprietary interests as an expression of the relationship between iwi/hapū and the coastal marine area;
- 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
- local government interests, as local authorities represent community-wide interests and administer much of the law that regulates use of the coastal marine area.

8 At the same meeting, the Cabinet agreed the government has a role in balancing the interests of all New Zealanders in the foreshore and seabed [CAB Min (09) 39/27 refers].

9 The Cabinet also agreed further policy work should commence on the development of an equitable regime to replace the 2004 Act including policy work on clarifying roles and responsibilities in the foreshore and seabed. This paper seeks direction for further work on clarifying roles and responsibilities.

Clarifying roles and responsibilities

Context

10 If the 2004 Act is repealed, the government will need to decide how to achieve a better balance of all the interests of New Zealanders in the foreshore and seabed while maintaining certainty and clarity of roles and responsibilities. Currently a suite of legislation covers who does what regarding roles and responsibilities in the foreshore and seabed.

11 A key issue in the review of the 2004 Act is how to deal effectively with the issue of ownership. One of the main objections brought to light in the Ministerial Review Panel's review of the 2004 Act was the Crown's ownership of the public foreshore and seabed. Tied up with the issue of ownership is also the perception of what ownership *is*. There are widely held and sometimes inaccurate views about the meaning of ownership and the actual authority or control that ownership brings with it. Control or authority can also be burdened by liability. The person who has control is often ultimately liable for matters such as abandoned structures, vehicles and other issues.

12 In the foreshore and seabed, authority or control can be broken down into specific roles and responsibilities (which include rights and interests). For example, the authority to issue resource consents lies with local government even though in the coastal marine area the Crown owns all public foreshore and seabed.

13 Ownership is one way of providing certainty and clarity of roles and responsibilities in the foreshore and seabed but, depending on how it is framed, it can be viewed as a relatively blunt approach. There are other ways to provide the same certainty and clarity.

Options for achieving a better balance of interests and certainty and clarity of roles and responsibilities

14 As outlined to the Cabinet in the previous paper on this matter, there are a range of options for providing certainty about who does what in the foreshore and seabed [CAB (09) 655 refers]. This range can be reduced to four broad options:

- vesting radical or notional title to the foreshore and seabed subject to claims of customary title;
- vesting the foreshore and seabed in the Crown as its absolute property;
- vesting the foreshore and seabed with Māori as their absolute property; or
- taking a new approach to clarifying roles and responsibilities in the foreshore and seabed.

15 Each option has different impacts and risks. Several options will have a polarising effect on people's perception of the new regime. Some options will have a disproportionately negative effect on some interests. All of these effects should be considered in light of the government's role in balancing all the interests of New Zealanders in the foreshore and seabed.

16 This paper assesses the four options against the government's objective to balance all interests as well as how each option affects the development of an equitable regime to replace the 2004 Act [CAB Min (09) 39/27 refers].

17 Whichever option is progressed, it will need to co-exist effectively with the more than 40 pieces of legislation that apply in the foreshore and seabed which includes fisheries, conservation and minerals legislation. The replacement legislation will need to be carefully drafted to intersect appropriately with the existing legislative regimes. A number of those regimes are predicated on the assumption that Crown ownership of land is necessary. If a different approach to ownership is adopted the policy development process will need to consider the best way to preserve the integrity of those regimes.

18 In considering the options, it is relevant to keep in mind that ownership is not necessary for protecting the common understandings set out in the previous paper (public access and respect for rights and interests). These common understandings can be provided for in legislation without the need for vesting the foreshore and seabed in an entity.

OPTION ONE: VESTING RADICAL OR NOTIONAL TITLE TO THE FORESHORE AND SEABED SUBJECT TO CLAIMS OF COMMON LAW CUSTOMARY TITLE

19 Under this option, radical or notional title could be vested in the Crown in line with the common law concept of radical title or it could be vested jointly in the Crown and Māori as suggested by Te Puni Kōkiri. The effect of radical or notional title is that the title holder has a right to regulate the foreshore and seabed but it does not necessarily hold proprietary interests akin to fee simple unless customary interests are shown to have lapsed or been extinguished.

20 If radical or notional title was vested in the Crown, it would be subject to Māori customary interests, if any. The Crown would hold this title until the resolution of Māori claims that customary title exists in any particular area of the foreshore and seabed. This situation is effectively a return to immediately-post *Ngāti Apa* where the Court of Appeal assumed that the Crown had radical title in the seabed. Where customary title is investigated and found to have lapsed or been extinguished then the Crown's notional ownership becomes absolute ownership. This approach would be consistent with the common law in respect of dry land in New Zealand prior to the 2004 Act.

21 The benefit of this option is that it allows for customary title to co-exist with Crown ownership. This option has the added benefit of providing Māori with their "day in court".

22 The disadvantages of this option are that it relies heavily on common law concepts of property interests and it uses a litigation process. Overseas experience indicates the use of litigation processes to determine customary title claims can be protracted and costly.[1] I am unsure what a court would consider is the content of customary title in the foreshore and seabed, that is, what the practical outcomes of a finding of extant customary might be. This could be problematic for how the replacement regime could anticipate or integrate a successful finding into the complex legislative environment operating in the coastal marine area.

23 Te Puni Kōkiri has put forward a new construct of radical title where radical or notional title is vested jointly in the Crown and a nationally representative Māori entity subject to claims of customary title. This approach requires further analysis because it fundamentally diverges from the traditional common law concept of radical title. This option fuses Crown and Māori interests together in a new legal construction rather than recognising the intersection of a prior customary interest and the acquisition of a new interest. It is unclear whether the initial vesting in Māori would be based on customary title and if so, how this vesting could be subject to further claims of customary title.

[redacted]

24 A benefit of Te Puni Kōkiri's approach is that it is new. It could provide fruitful grounds for resolving issues of ownership in the foreshore and seabed.

25 The disadvantage is that it would require an interim regime until the completion of all investigations into customary title in the foreshore and seabed. This interim regime would require the establishment of a joint Crown-Māori body and a national or regional body representative of Māori. An interim regime is undesirable as it can mean uncertainty about all rights and interests until potential customary interests have been explored. This exploration may take some time. Further, the indications are that there is no appetite among Māori for the creation or imposition of a national or regional body to represent Māori interests.

26 The option of radical or notional title may ultimately produce a better balance of interests than the 2004 Act. It will not provide immediate clarity of roles and responsibilities as it relies on a potentially lengthy investigative process to determine ownership and can require an interim regime.

OPTION TWO: VESTING THE FORESHORE AND SEABED IN THE CROWN AS ITS ABSOLUTE PROPERTY

27 This option is the status quo. The effect of this option is that the Crown would continue to hold the full legal and beneficial title to the foreshore and seabed. Customary title would remain extinguished as this absolute form of ownership precludes the possibility of any owner other than the Crown.

28 The benefit of this option is that it would retain the certainty of the Crown's authority to manage and administer the coastal marine area.

29 The disadvantage of this option is that it preserves the status quo. The Ministerial Review Panel noted the key grievance of submitters was the 2004 Act's vesting of the foreshore and seabed in the Crown and extinguishment of customary title. This option does not address this key grievance. It may lead to the legitimate criticism that the review of the 2004 Act did not produce any significant or even symbolic change. If this grievance is not explicitly addressed in the replacement regime, any successor to the 2004 Act is likely to be perceived by some as a futile exercise.

30 This option provides clarity for roles and responsibilities in the foreshore and seabed. It does not provide a better balance of the interests of all New Zealanders because it preserves the status quo of the 2004 Act.

OPTION THREE: VESTING THE FORESHORE AND SEABED WITH MĀORI AS THEIR ABSOLUTE PROPERTY

31 This option vests the full legal and beneficial ownership of the foreshore and seabed with Māori as their absolute property. One effect of this option would be the extinguishment of other interests in the foreshore and seabed subject to any statutory savings.

32 It is likely that a transitional regime would be required to implement this option. This transitional regime would need to address 'who' held the ownership interests and could involve identifying a representative body for Māori that was national or regional or both. As this option changes the status quo, processes would need to be put in place to negotiate the interaction of other interests in the foreshore and seabed.

33 The advantage of this option is that it would deliver the aspirations of those Māori groups and individuals who see the foreshore and seabed as always having been their absolute property. This option aligns with the Ministerial Review Panel's view that prior to *Ngāti Apa* the whole of the coastal marine area to the outer limits of the territorial sea, or to such limits as could be customarily controlled, was subject to common law customary title unless clear and plain extinguishment could be shown.[2] [redacted]

s9(2)(h)

34 A disadvantage of this option is that it would be difficult to appropriately balance all interests in the foreshore and seabed. It is likely to be perceived as tipping the balance of interests too far in favour of one interest group. There is also the disadvantage that a transitional regime will not provide immediate clarity of roles and responsibilities in the foreshore and seabed.

OPTION FOUR: TAKING A NEW APPROACH TO CLARIFYING ROLES AND RESPONSIBILITIES IN THE FORESHORE AND SEABED

35 In the paper considered by the Cabinet on 2 November 2009, I outlined my initial thoughts on a new approach to clarifying roles and responsibilities in the foreshore and seabed [CAB (09) 655 refers]. Underlying this approach is the recognition that the foreshore and seabed is a nationally iconic and important resource with interweaving and complex interests.

36 The new approach I outlined moves away from the traditional discourse on ownership and instead focuses on authority and control. To that extent, it diverges from options one – three described above. Instead of identifying an owner of the foreshore and seabed, the replacement regime would provide detail on roles and responsibilities of all interests in the foreshore and seabed. The detail of those roles and responsibilities would be informed by the legislative regimes already in place as well as a consideration of the interests involved and their nature and extent (including whether they are proprietary or non-proprietary). As set out above, these interests include recreation and conservation interests, customary interests, business and development interests and local government interests.

37 A move away from an ownership discourse is bold. It is innovative and reflects New Zealand's longstanding history of taking an inclusive approach to the management of important resources. This approach also recognises the uniqueness of New Zealand. It has the potential to align with how Māori

[2] *Pākia ki uta, pākia ki tai* pp 146.

traditionally interact with the foreshore and seabed where the different elements of interests are not fragmented but each informs and strengthens the other.

38 This new approach is effectively a "shared space" concept whereby different public and private interests co-exist. It will be critical for this approach to cover both regulatory and property rights given the replacement regime will need to connect with the more than 40 pieces of legislation operating in the coastal marine area, some of which are property related and others that are related to regulation.

39 This concept would be unique to New Zealand because it would not derive from a purely property or purely regulatory framework. A demarcation between property and regulatory interests can often be artificial. An approach that looks at both property and regulatory interests in the round can produce a comprehensive and durable regime that recognises the Crown's role to regulate the coastal marine area while ensuring appropriate recognition and participation of all interests including customary.

40 I think this new approach could deliver a permissive replacement regime that uses simple, transparent and effective processes and results in an area where everyone's interests are provided for, everyone knows what to do, when and how to do it and there are processes in place to resolve any uncertainties.

41 This option is different from a "commons" concept which has various forms including internationally and in property and English law. Nor is it the same as a "public domain". Under a public domain approach, the foreshore and seabed would be vested in the Crown on behalf of the public. This vesting would be seen as effectively the status quo. A public domain approach was also put forward by the former administration in the development of their policy response to *Ngāti Apa*.

42 I am looking to construct a new approach that is pragmatic rather than theoretical.

43 In constructing this new approach, there would be two clear requirements for the policy development and bill drafting processes:

- reducing the potential for confusion by users (including decision-makers and adjudicators) of the replacement regime; and
- crisply distilling into legislation the government's intentions regarding roles and responsibilities.

44 The success of this regime will be in the legislative detail and in the success of people understanding and utilising the replacement regime. The policy development process would need to undertake a forensic examination of the current legislative regimes in operation and the rights and interests that interact in the foreshore and seabed. It will necessarily require a consideration of where the benefits (e.g. income) and burdens (e.g. liabilities) of any roles and responsibilities sit as well as how the replacement regime will provide for unexpected or unanticipated developments in the foreshore and seabed.

45 The benefit of this option is that it allows for a considered balancing of interests. It does not necessarily require the extinguishment of any interests. It will ensure certainty and clarity of roles and responsibilities because it is predicated on setting these out in detail.

46 The disadvantage of this option is that it requires an intensive policy and bill drafting process which in turn relies on the close engagement of numerous government departments. It will require timely decision-making.

Comment from Iwi Technical Advisory Group

47 The Iwi Technical Advisory Group (on behalf of Iwi Leaders) agrees with the view that debate over ownership of foreshore and seabed is polarising and a focus on it is likely to make it difficult to find broadly acceptable outcomes. For many Iwi and hapū, the question of ownership is not really the key issue. For them, the better question to ask is how can the mana of Iwi and hapū, which exists independent of legal rules around ownership, be recognised and accommodated in practical ways by that system? The 'roles and responsibilities' approach, option four seems to have the capacity for that discussion to occur – as well as providing a framework for the protection of other rights and interests.

48 The shared radical title concept proposed by Te Puni Kōkiri has merit (and is one that some Iwi and hapū have advocated) but Iwi Leaders have been very strongly of the view that a no 'national settlement' will be entertained on this issue, and no pan-iwi entities established or imposed. Option two would be totally unacceptable to Iwi and hapū and adoption of it would only serve to deepen, rather than heal, the wounds inflicted by the 2004 Act. Option three is likely to attract strong support from many Iwi and hapū both as a symbolic remedy to the injustice of the 2004 Act and in that it restores property rights that existed prior to the 2004 Act. However, Iwi Leaders have strongly emphasised the importance of finding an enduring replacement framework that expressly provides for public access, therefore there would need to be consideration of provision for other interest holders.

Where to from here?

49 In considering all four options in light of the government's objective to balance all interests and produce an equitable replacement regime, I think option four (a new approach) can deliver both a balance of interests and certainty and clarity of roles and responsibilities whereas options one - three may deliver one or the other rather than both.

50 I seek the Cabinet Committee's agreement to explore option four further. That is not to say options one - three do not remain 'on the table' but rather a bold and innovative approach that moves away from the vexed discourse on ownership warrants further investigation.

51 Te Puni Kōkiri would like both options one (radical or notional title) and four to be progressed. I do not agree that option one should be progressed for the reasons set out at paragraphs 22-23 and 25-26.

52 The Māori Party's concept of tipuna title, if adopted in its entirety, would sit outside option four as the Māori Party considers tipuna title to sit outside a "western framework". A move away from the traditional discourse of ownership and a focus on roles and responsibilities would allow exploration of how the underpinning values of the tipuna title concept could be provided for in the replacement regime in the same way that the Iwi Technical Advisory Group sees the proposed new approach as having the capacity to recognise the mana of Iwi and hapu.

Next steps

53 I propose a further, detailed paper on a shared roles and responsibilities approach to managing the foreshore and seabed. This paper would address how this new approach interacts with the proposed principles and common understandings and whether it might be usefully applied in similar contexts involving natural resources and customary interests.

54 The paper would also cover:

- the current roles and responsibilities in the foreshore and seabed;
- how these roles and responsibilities might be provided for in the replacement regime based on a shared space approach (including connection with and participation in existing regulatory and management regimes in the foreshore and seabed and how customary interests can be given effect within this approach);
- how all the interests of New Zealanders, including customary interests, might be balanced within those roles and responsibilities; and
- how the development of the replacement regime intersects with the issues set out in the previous paper and noted by Cabinet [CAB Min (09) 39/27 refers]:
    - engagement models (negotiation, litigation or hybrid);
    - determining and recognising customary interests (i.e. tests and awards); and
    - determining and recognising other interests (e.g. reclamations, declamations, applications and negotiations under the 2004 Act).

55 This paper would be submitted to the Cabinet Committee for consideration on Wednesday 16 December 2009.

Consultation

56 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.

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

Financial implications

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

Human rights

59 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

60 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

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

Regulatory Impact Analysis

62 A preliminary draft Regulatory Impact Statement (RIS) is attached (**Appendix A**). Continuous regulatory impact analysis will be undertaken by the Ministry of Justice throughout the policy development process and the results of this analysis will be updated into the RIS.

63 The Regulatory Impact Analysis Team (the Team) at Treasury notes that: "this preliminary RIS has been prepared to provide a framework for the decisions that are being taken at this time, namely the principles to guide future policy development and which option should be the focus of future policy work. The Team has provided the Ministry of Justice with comments on the preliminary RIS to assist in the ongoing development of the RIS for future policy decisions. The key issues that the Team were looking for in this RIS were a discussion of the pros and cons of different timelines for the policy development process

(including any flexibility around these) and the pros and cons of focusing further work on option 4 (Taking a new approach to clarifying roles and responsibilities in the foreshore and seabed), given that these are the key decisions being taken at this time".

Publicity

64 No announcements are planned based on this paper. The media strategy in place will remain until a new strategy is agreed by Cabinet.

Recommendations

65 I recommend that the Committee:

BACKGROUND

1 **note** that the Cabinet has agreed further policy work should commence on the development of an equitable regime to replace the 2004 Act including policy work on clarifying roles and responsibilities in the foreshore and seabed [CAB Min (09) 39/27 refers];

CLARIFYING ROLES AND RESPONSIBILITIES

2 **note** that there are four options for clarifying roles and responsibilities in the foreshore and seabed:

2.1 Option one: Vesting radical or notional title in the Crown subject to claims of customary title;

2.2 Option two: Vesting the foreshore and seabed in the Crown as its absolute property;

2.3 Option three: Vesting the foreshore and seabed with Māori as their absolute property; or

2.4 Option four: Taking a new approach to clarifying roles and responsibilities in the foreshore and seabed;

3 **note** that the Attorney-General's view is all of these options are viable but in light of the government's role to balance all the interests of New Zealanders and its aim to produce an equitable replacement regime, his preference is to undertake further policy work on recommendation 2.4 (taking a new approach to clarifying roles and responsibilities in the foreshore and seabed); and

4 **invite** the Attorney-General, in consultation with the Minister of Māori Affairs and other Ministers on the Foreshore and Seabed Ministers' Group, to report to the TOW by 16 December 2009 on recommendation 2.4.

Hon Christopher Finlayson
Attorney-General

Date: 18 / 11 / 09

REGULATORY IMPACT STATEMENT

Draft as at 19 November 2009

Review of the Foreshore and Seabed Act 2004

MINISTRY OF JUSTICE DISCLOSURE STATEMENT

Status of the Regulatory Impact Statement

1 This draft Regulatory Impact Statement (RIS) was prepared on 19 November 2009 by the Ministry of Justice in relation to the policy development process for the review of the Foreshore and Seabed Act 2004 (the Review). The Ministry of Justice is the lead agency advising the Government on foreshore and seabed policy.

2 This RIS is a preliminary draft. Its purpose is to provide a broad analysis of elements that have been considered and addressed up to this stage of the Review. The intention is for continuous regulatory impact analysis to be undertaken throughout the policy development process, and the results of this analysis updated into the RIS. The RIS will be finalised and published on completion of the Review.

3 This draft RIS was prepared under a tight timeframe.

Background

4 The Relationship and Confidence and Supply Agreement between the National Party and the Māori Party included an agreement to initiate the Review. The Government announced the Review on 4 March 2009. The Review is in its early stages. At this stage, the Cabinet decision-making has been limited to agreeing to establish a Ministerial Review Panel, noting the Panel's advice and instructing the Attorney-General, in consultation with the Minister of Māori Affairs and a Foreshore and Seabed Ministers' group, to report back with policy options.

5 At this stage, the Ministry of Justice is not seeking substantive policy decisions that will have direct regulatory implications. The decisions being sought at this time will inform, guide and focus the policy development process.

Solving the problem

6 The Ministry of Justice has identified three factors that will affect reaching a solution:

- the timetable for reaching a solution (set externally to the Ministry of Justice);
- the policy development process to identify and assess the options available to the government in choosing a solution (including guiding principles and common understandings); and

- the options, and the sequencing of Cabinet decisions given the complexity and wide-reaching implications of the subject area.

TIMETABLE FOR REACHING A SOLUTION

7 The timetable for the policy development process is determined by the Cabinet. It provides a clear indication of the Cabinet's expectations of the Ministry of Justice regarding delivering timely advice that informs the Cabinet's decisions on reaching a solution. The timeframes for this work should be cognisant of and align with the development and the timing of other Government initiatives.

8 The Ministry of Justice has been directed to develop options that result in an outcome to the Review by December 2010.

9 This timeframe of reaching an outcome by December 2010 may have implications for the analysis of options open to the government and the ability to consult and gain input from various stakeholders. For example, given the time available, it may not be possible to comprehensively analyse all of the options open to the government in responding to the Panel's report. It also may not be possible to undertake a lengthy consultation process.

10 Regardless of the timeframe specified, it is expected that there will be some flexibility to shift timeframes to ensure a durable and effective outcome.

POLICY DEVELOPMENT PROCESS

11 The Ministry of Justice has proposed a set of principles be adopted by the Cabinet to guide policy development.

12 The adoption of principles is not intended to limit options available to the government. Rather, a formal set of principles can ensure that the policy development is both transparent and robust and will inform and guide the evaluation of the range of policy options open to the government. The adoption of principles will ensure that the Ministry of Justice and the government is cognisant of the various interests in the foreshore and seabed and undertakes a balanced and considered policy development process.

13 The draft principles have been developed with relevant government departments and have been subject to Cabinet discussion.

14 As well as guiding principles, two common understandings and assurances will also be considered by the Cabinet: Public access for all and respect for rights and interests.

15 These assurances will provide certainty in respect of key interests in the foreshore and seabed while other policy decision are being made and will help to further guide the policy development process.

16 The Ministry of Justice is mindful that the Review involves multiple complex issues which affect numerous Ministerial portfolios. There is high public interest in the Review and various stakeholders whose competing interests need to be considered and balanced.

17 The Ministry of Justice expects that there will be many Cabinet papers and discrete policy decisions before the final outcomes for the Review are reached. Policy development will not necessarily be linear but rather incremental and iterative. Policy decisions will need to be carefully sequenced to produce durable outcomes and to ensure substantive policy development processes are followed.

OPTIONS OPEN TO GOVERNMENT AND THE SEQUENCING OF DECISIONS

18 In rebalancing interests in the foreshore and seabed, the Ministry of Justice has assumed there will be some degree of change to the 2004 Act (whether that be amendment or repeal) given the status quo does not enable such a rebalancing to occur. The following three issues will need to be canvassed in considering any form of amendment or repeal:

- Issue One: Clarifying roles and responsibilities in the foreshore and seabed (exploring options to address section 13 of the 2004 Act, which provides for the absolute ownership of the public foreshore and seabed in the Crown);
- Issue Two: Engagement models; and
- Issue Three: Determining and recognising interests.

19 The Ministry of Justice is undertaking analysis on clarifying the roles and responsibilities in the foreshore and seabed and is seeking Cabinet's direction to undertake further work on this issue.

Key assumptions/ gaps/ dependencies and uncertainties

20 Given the preliminary stages of the policy development process, it is premature to identify gaps and assumptions at this stage. Further work will be undertaken to identify the key assumptions, key gaps, dependencies and uncertainties.

STATUS QUO AND PROBLEM DEFINITION

Status Quo

21 The Foreshore and Seabed Act 2004 (the 2004 Act) clarified the rights and interests of all New Zealanders in the foreshore and seabed including use rights such as public access, fishing and navigation. These rights and interests include:

- recreational and conservation interests in accessing, using and enjoying the coastline and marine environment;
- customary interests, including usage, authority and proprietary interests as an expression of the relationship between iwi/hapū and the coastal marine area;
- 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

- local government interests, such as community-wide interests and the administration of the law that regulates use of the coastal marine area.

22 The 2004 Act sought to clarify those rights and interests by vesting the ownership of the public foreshore and seabed in the Crown as its absolute property.[1] This absolute form of ownership precludes the existence of any other owner. The effect of the 2004 Act was to extinguish any existing but as yet uninvestigated customary title in the foreshore and seabed. The 2004 Act created a new form of customary title called territorial customary rights which could be obtained through meeting specific statutory tests applied by the High Court.[2] Customary rights orders (akin to use rights) could be obtained through either the High Court or the Māori Land Court.[3]

23 The 2004 Act is part of a complex legislative environment operating in the coastal marine area.[4] There are more than 40 pieces of legislation in operation, some of which relate to property and others that relate to regulation (including fisheries, conservation and minerals legislation). The 2004 Act interacts with most of those pieces of legislation by connecting with the Resource Management Act 1991, which itself connects to approximately 35 of the 40 statutes in operation.

Problem definition

24 As part of their Relationship and Confidence and Supply Agreement, the National Party and the Māori Party agreed to initiate as a priority a review of the 2004 Act to ascertain whether it adequately maintained and enhanced mana whenua.[5] As part of that Review, the government established a Ministerial Review Panel (the Panel) and provided the Panel with terms of reference.[6]

25 The Panel undertook a wide consultation process and delivered its report, *Pākia ki uta, pākia ki tai*, to the government on 30 June 2009.[7] In its report, the Panel observed that the key grievance associated with the 2004 Act was its disproportionate effect on customary interests, which was described as "unfair and discriminatory".[8] This observation reflects similar observations made by the United Nations' Committee on the Elimination of Racial Discrimination and the United Nations' Special Rapporteur.[9] The Panel recommended to the government that "the [2004] Act should be repealed and the process of balancing Māori property rights in the foreshore and seabed with public rights and public expectations must be started again".[10]

26 In summary, national and international commentators have stated that the 2004 Act had a disproportionate impact on Māori interests as compared to other interests in the foreshore and seabed. This disproportionate impact was caused

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[1] *Section 13(1), Foreshore and Seabed Act 2004. Public foreshore and seabed is defined as meaning the foreshore and seabed but not including any land that is for the time being subject to a specified freehold interest.*
[2] *Section 33, Foreshore and Seabed Act 2004.*
[3] *Sections 50 and 74 , Foreshore and Seabed Act 2004*
[4] *Pākia ki uta, pākia ki tai: Report of the Ministerial Review Panel (Vol 2) 2009, pp 28.*
[5] *Relationship and Confidence and Supply Agreement between the National Party and the Māori Party, 2008. <http://www.national.org.nz/files/agreements/National-Maori_Party_agreement.pdf>Accessed as at 16 November 2009.*
[6] *Terms of Reference for the Review of the Foreshore and Seabed Act 2004, 2009. http://www2.justice.govt.nz/ministerial-review/index.html#terms. Accessed as at 16 November 2009.*
[7] *Pākia Ki Uta, Pākia Ki tai: Report of the Ministerial Review Panel, 2009.*
[8] *Pākia Ki Uta, Pākia Ki tai: Report of the Ministerial Review Panel, 2009.*
[9] [insert reference to reports]
[10] *Pākia ki Uta, Pākia Ki Tai: Report of the Ministerial Review Panel(Vol 1) 2009, pp 6. Approximately 85% of submitters to the Ministerial Review Panel wanted the 2004 Act repealed.*

by extinguishing customary title in the foreshore and seabed and replacing potential litigation options in the Māori Land Court and High Court with new jurisdictions, new and specific tests, and limited outcomes. This situation has resulted in an ongoing sense of grievance within New Zealand, particularly amongst Māori.

27 In light of the views of the Panel, the public and the overall concerns about the 2004 Act, it is clear that the 2004 Act does not achieve:

- a solution that balances interests in the foreshore and seabed area;
- a solution that will be effective and durable; and
- a solution that provides clarity and certainty about the rights and interests in the foreshore and seabed area.

OBJECTIVE

28 The objective of the Review is to respond to the Panel's report by developing a solution:

- that will achieve an equitable balance of the interests of New Zealanders in the foreshore and seabed;
- that will ensure certainty and clarity of roles and responsibilities in the foreshore and seabed;
- that is cost effective, efficient and durable; and
- that will address the grievances associated with the 2004 Act.

REGULATORY IMPACT ANALYSIS

Options

29 Four main options have been identified as practically available for dealing with the 2004 Act:

- retaining the Act status quo;
- amending the Act;
- repealing the Act but not replacing it with another regime; or
- repealing the Act and replacing it with another regime.

30 Preliminary analysis has been undertaken on the four options. A decision about how to address the 2004 Act and initially respond to the Panel's report is still pending. The implications of repeal and what regime may be implemented in its place require further policy analysis and Cabinet consideration. More information will be added to this section of the RIS at a later date.

Status quo

31 Retaining the status quo would mean keeping the current 2004 Act. This option would be the least complex option to address the 2004 Act and would take the least time. However, it is not likely that this option will result in a durable and effective outcome. The disproportionate effect on Māori and the other grievances associated with the 2004 Act would continue.

Amend the 2004 Act

32 Altering parts of the current 2004 Act could be done to varying degrees. This will involve less time and less complex policy development. It also may go some way in balancing the interests of all New Zealanders in the foreshore and seabed. However, an amendment to the 2004 Act is not preferred as the grievances associated with the 2004 Act itself would likely remain associated with an amended Act. This view is also similar to that taken by the Panel on the option of amending the 2004 Act.

Repeal the 2004 Act but not replace it with another regime

33 Repealing the 2004 Act without replacing it will result in a situation similar to that before the 2004 Act was enacted. While this option will address the grievances associated with the 2004 Act, it could resurrect the uncertainties about ownership and the recognition of rights and interests that existed immediately before the 2004 Act came into force. The roles and responsibilities in the foreshore and seabed would not be clear, which would result in uncertainty for many interest groups. This option may also result in a time consuming and costly process to clarify the rights and interests in the foreshore and seabed through the courts. This option may not be an agreeable option to most New Zealanders as it could continue the imbalance of rights and interests in the foreshore and seabed.

Repeal the 2004 Act and replace it with another regime

34 Repeal of the 2004 Act has a symbolic value that will assist in resolving grievances associated with the passage of the 2004 Act. Replacing it with a new regime will provide an opportunity to follow the Panel's advice and start the process of balancing rights again. This is likely to be the most complex option but is more likely to result in a durable outcome that will balance the interests of all New Zealanders in the foreshore and seabed. This option will also create an opportunity to clarify rights and responsibilities in the foreshore and seabed.

Decisions sought

TIMELINES

35 Agreement is sought on a timetable that provides for a replacement regime to be enacted in December 2010. It provides for a six week consultation phase to occur before final Cabinet policy decisions are made and the Bill is drafted. This option requires both the consultation process and the policy decisions to be undertaken in a timely fashion in order to avoid any slippage in the timeframe.

36 Consultation is a key component of the policy development process and a benefit of this option is that it allows for time to consult with key stakeholders. This option

will also provide certainty to iwi, the wider public and stakeholders as quickly as possible and meet the government's need to have a new regime enacted by December 2010.

37 If this option is agreed to, it may be necessary to truncate certain parts of the policy development process. For example it may not be possible to comprehensively analyse all of the options open to the government in responding to the Panel's report. It also will not allow time for a lengthy consultation process and may limit the ability for key stakeholders to coordinate their input.

38 Regardless of the timetable, it is expected that there will be some flexibility to shift timeframes to ensure a durable and effective outcome.

PRINCIPLES AND COMMON UNDERSTANDINGS OR ASSURANCES

39 The formal adoption of principles and common understandings to guide policy development will guide the evaluation of the range of policy options open to the government to respond to the Panel's report. The principles and common understandings are complimentary to the government's high level objectives and once agreed to, will provide a more specific framework to evaluate policy options. Using the principles and common understandings in the policy development process will go some way to ensure that the outcome of the Review meets the government's objectives.

OPTIONS FOR FURTHER WORK

40 At this time, the Ministry of Justice is seeking agreement to undertake further work on an option that is a new approach to clarifying roles and responsibilities in the foreshore and seabed. The Ministry of Justice is not seeking agreement to an option to address roles and responsibilities at this time. This option would not identify an owner of the foreshore and seabed, instead it would provide detail on roles and responsibilities of all interests in the foreshore and seabed. The detail of those roles and responsibilities would be informed by the legislative regimes already in place as well as a consideration of the interests involved and their nature and extent (including whether they are proprietary or non-proprietary).

41 It is necessary to explore this option as it is new and innovative. This approach reflects New Zealand's longstanding history of taking an inclusive approach to the management of important resources and recognises the uniqueness of New Zealand. It has the potential to align with how Māori traditionally interact with the foreshore and seabed where the different elements of interests are not fragmented but each informs and strengthens the other. It also has potential to use simple, transparent and effective processes and results in an area where everyone's interests are provided for, everyone knows what to do, when and how to do it and there are processes in place to resolve any uncertainties. Exploring this option is likely to be complex as it will involve investigating the interface with the approximately 40 other pieces of legislation.

42 While the Ministry of Justice is seeking agreement to explore this option further, it does not mean that the other options canvassed in the Cabinet paper cannot be considered at a later date. Rather, once this option has been explored it will enable the Ministry of Justice to effectively evaluate this option against the other options available, as well as analyse it against the government's objectives and

subject to agreement, the principles and common understandings to guide policy development.

CONSULTATION

43 This draft RIS was prepared under a tight timeframe. Due to this timeframe, there was no time to consult with other government departments on the contents of this draft RIS. 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, The Treasury and the Department of the Prime Minister and Cabinet have provided departmental input to date on all papers considered by Cabinet. Further consultation will take place as the policy work develops.

CONCLUSIONS AND RECOMMENDATIONS

44 Further information will be inserted at a later date.

IMPLEMENTATION

45 Further information will be inserted at a later date.

MONITORING, EVALUATION AND REVIEW

46 Further information will be inserted at a later date.

GLOSSARY

47 The glossary is in development and will be inserted at a later date.