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Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

REVIEW OF THE FORESHORE AND SEABED ACT 2004: PRINCIPLES AND COMMON UNDERSTANDINGS OR "ASSURANCES"

Proposal

1 This paper notes it is likely that the Foreshore and Seabed Act 2004 (**the 2004 Act**) will be repealed and seeks agreement to:

- a set of principles to guide further policy work; and
- two proposed common understandings or "assurances" to provide certainty and guide further policy work.

Executive summary

2 On Monday 2 November 2009, Cabinet noted it is likely the Foreshore and Seabed Act 2004 (the 2004 Act) will be repealed as a result of the review of the 2004 Act [CAB Min (09) 39/27 refers]. Cabinet also agreed to further policy work commencing on the development of a replacement regime to the 2004 Act. This paper reflects further work on the proposed principles to guide policy development and assurances for the replacement regime.

3 The government's main objective in developing its foreshore and seabed policy response to the Ministerial Review Panel's (**the Panel**) report is to establish a regime that balances 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.

4 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 extinguished any uninvestigated customary title 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. 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. As a consequence of repealing the Act a lot of work is required to develop a replacement regime. I have developed timing options for the enactment of a replacement regime and these are outlined in the accompanying Cabinet Paper "Review of the Foreshore and Seabed Act 2004: Timetable Options" for consideration at this meeting.

6 This paper seeks Cabinet decisions on two key matters:

a a set of guiding principles for further policy development; and

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b two common understandings or "assurances".

7 I propose the Cabinet agree to adopt the following set of guiding principles for the development of the regime to replace the 2004 Act:

- **Treaty of Waitangi** – the new regime must reflect the Treaty of Waitangi, its principles and related jurisprudence;
- **good faith** – to achieve a good outcome for all by following fair, reasonable and honourable processes;
- **recognition and protection of interests** – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
- **access to justice** –the new regime must provide an accessible framework for recognising and protecting rights in the foreshore and seabed;
- **equity** – provide fair and consistent treatment for all;
- **certainty** – transparent and precise processes that provide clarity for all parties including for investment and economic development in New Zealand; and
- **efficiency** – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

8 As well as these principles, I propose the Cabinet agree to certain common understandings, or "assurances",, in respect of policy development and decision-making on the replacement regime. 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 two assurances:

- **public access for all** – access will be guaranteed for all New Zealanders, subject to certain exceptions (e.g., for health and safety reasons in port operational areas or protection of wāhi tapu such as urupā); and
- **respect for rights and interests** in particular:
  - *recognition of customary rights and interests* – the replacement regime will include recognition of customary rights and interests in order to address the disproportionate impact the 2004 Act had on customary interests;
  - *protection of fishing and navigation rights* –fishing rights provided under fishing legislation will be protected, and rights of navigation in the foreshore and seabed will be protected, subject to certain exceptions such as in harbours; and
  - *protection of existing legal use rights*– existing use rights (e.g. coastal permits, mining exploration permits, marine reserves) that operate in the foreshore and seabed will be protected to the end of their term,

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including any existing preferential right or rights of renewal or process right.

9 A public announcement outlining the government's response to the Panel's report has already been made by the Prime Minister after Cabinet on Monday 2 November. He also indicated that the government's intention is likely to repeal the 2004 Act, and significant further work will need to be undertaken to develop a replacement regime. In response to any further media queries, I may announce the guiding principles and common understandings or assurances outlined in this paper.

Background

10 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].

11 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].

12 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 asked me to outline the next steps the government could take in responding to the Panel's report.

13 On Monday 2 November 2009, Cabinet noted that it is likely the 2004 Act would be repealed and agreed to the establishment of Foreshore and Seabed Ministers' Group to progress the work on the review of the 2004 Act [CAB Min (09) 39/27refers]. Cabinet also noted that I would undertake further work to refine and develop the principles and assurances that I propose to guide the development of policy and decision making on the replacement regime. This paper reflects this further work.

Framing the issue

14 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 (12 nautical miles). It includes the beds of rivers that are part of the coastal marine area.

15 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].

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16 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.

17 These interests are interconnected and overlap. Māori interests in the foreshore and seabed extend beyond customary interests and include recreation and conservation, business and development, and local government interests.

18 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.

19 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.

20 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.

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[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.

Achieving a solution

21 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.

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

Guiding principles

23 If the Cabinet 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.

24 The guiding principles I recommend the Cabinet agrees to are:

- **Treaty of Waitangi** – the development of a new regime must reflect the Treaty of Waitangi, its principles and related jurisprudence;
- **good faith** – to achieve a good outcome for all: following fair, reasonable and honourable processes;
- **recognition and protection of interests** – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
- **access to justice** –the new regime must provide an accessible framework for recognising and protecting rights in the foreshore and seabed;
- **equity** – provide fair and consistent treatment for all;
- **certainty** – transparent and precise processes that provide clarity for all parties including for investment and economic development in New Zealand ; and
- **efficiency** – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

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

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

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b **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

c **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).

26 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 rights and interests is one of the bottom lines I propose in paragraph I think the 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.

27 I therefore recommend the Cabinet agrees to the guiding principles listed in paragraph 24 above.

Common understandings or "assurances"

28 As well as principles to guide the policy development process, I would like to establish common understandings or "assurances", in respect of decision-making on the regime to replace the 2004 Act. I consider the public release of these assurances 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.

29 The proposed common understandings or assurances I recommend the Cabinet agrees to are:

a **public access for all** – access will be guaranteed for all New Zealanders, subject to certain exceptions (e.g., for health and safety reasons in port operational areas or protection of wāhi tapu such as urupā); and

b **respect for rights and interests,** in particular:

- *recognition of customary rights and interests* – the replacement regime will include recognition of customary rights and interests in order to address the disproportionate impact the 2004 Act had on customary interests;

- *protection of fishing and navigation rights* –fishing rights provided under fishing legislation will be protected, and rights of navigation in the

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foreshore and seabed will be protected, subject to certain exceptions such as in harbours; and

- *protection of existing use rights to the end of their term* – existing use rights (e.g. coastal permits, mining exploration permits, marine reserves) that operate in the foreshore and seabed will be protected to the end of their term, including any existing preferential right or rights of renewal or process right.

30 The Ministry of Economic Development considers "no change to Crown minerals policy" should also be assured. 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.

31 I think the issue of including "no change to Crown minerals policy" requires further consideration, including further discussions with the Minister for Energy and Resources and subsequently discussions with the Māori Party. I will report back to the Cabinet Committee on Treaty of Waitangi Negotiations on 16 December 2009 with a proposal in respect of including "no change to Crown minerals policy" as an assurance.

PUBLIC ACCESS FOR ALL

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

33 The Panel considered there was "a widespread lack of understanding or confusion about public rights to the foreshore and seabed". The Panel observed 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 "[t]he popular perception is that there is free access for all."

34 The 2004 Act provides for public rights of access in, on, over and across the public foreshore and seabed,[2] subject to certain limitations (including prohibitions imposed under an "enactment" or for the protection of wāhi tapu).

[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.

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

36 I propose the Cabinet agrees to a common understanding or assurance of public access for all. Access will be guaranteed for all New Zealanders, subject to certain exceptions (e.g., for health and safety reasons in port operational areas or protecting wāhi tapu such as urupā). I do not propose this assurance 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. I also do not propose this assurance would impact on those parcels of foreshore and seabed held in private title.

RESPECT FOR RIGHTS AND INTERESTS

37 I propose Cabinet agree to an assurance that the new regime will respect and uphold rights and interests, in particular customary rights and interests, fishing and navigation rights, and existing use rights to the end of their term.

Recognition of customary rights and interests

38 Customary interests are one of the four groups of interests that New Zealanders have in the foreshore and seabed described in paragraph 16 above. The term "customary interests" includes customary title and customary rights. As I noted above, I think the 2004 Act had a disproportionate impact on customary rights and interests and this is one of the primary sources of grievance, particularly amongst Māori, associated with the 2004 Act.

39 Including the recognition of customary rights and interests as an assurance 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.

40 I propose the Cabinet agrees to the recognition of customary rights and interests as a common understanding or assurance.

Protection of fishing rights

41 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.

42 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.

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43 I propose the Cabinet agrees that fishing rights be protected as a common understanding or assurance.

Protection of navigation rights

44 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.

45 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.

46 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.

47 I propose the Cabinet agrees that one of the assurances 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

48 The policy intent of this assurance is to ensure that existing use rights that operate within the foreshore and seabed will be protected.

49 Use rights in respect of the foreshore and seabed can be issued under a range of legislative regimes. I note 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 under current laws and regulations.

50 Examples include:

- prospecting, exploration or mining permits issued under the Crown Minerals Act 1991 and mining licences issued under previous legislation (existing prospecting and exploration permit holders will continue to be able to seek subsequent permits under section 32 of the Crown Minerals Act);

- coastal permits issued under the Resource Management Act 1991, which 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, which may be required to legally undertake certain activities; and

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- protected areas and protection classifications (e.g. marine reserves, marine mammal sanctuaries, and national parks and reserves that include the foreshore and seabed).

51 I propose the Cabinet agrees to the protection of existing use rights to the end of their term in the foreshore and seabed as a common understanding or assurance.

Next Steps

Consultation on government policy proposals

52 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.

53 I will update the Cabinet Committee on Treaty of Waitangi Negotiations on 16 December 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.

Consultation

54 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.

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

Financial implications

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

Human rights

57 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.

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Treaty of Waitangi Implications

58 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

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

Regulatory Impact Analysis

60 A Regulatory Impact Statement is attached to the paper: Review of the Foreshore and Seabed Act 2004: Issue one: Clarifying roles and responsibilities in the foreshore and seabed.

Publicity

61 A public announcement outlining the government's response to the Panel's report has already been made by the Prime Minister after Cabinet on Monday 2 November. He also indicated that the government's intention is likely to repeal the 2004 Act, and significant further work will need to be undertaken to develop a replacement regime. The Prime Minister also noted that such work could take months. I am not intending to make any further announcements on the review of the 2004 Act at this stage. However, in response to any further media queries I may announce the guiding principles and common understandings or assurances outlined in this paper.

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Recommendations

62 I recommend the Cabinet:

BACKGROUND

1 **note** that on Monday 2 November 2009, Cabinet:

1.1 noted that it is likely the 2004 Act will be repealed as a result of the review of the 2004 Act;

1.2 agreed that further policy work commence on the development of an equitable replacement regime to the Foreshore and Seabed Act (the 2004 Act)

1.3 noted that I would undertake further work to refine and develop the proposed guiding principles and assurances to guide the development of policy and decision making on the replacement regime; [CAB Min (09) 39/27 refers];

PRINCIPLES AND ASSURANCES

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

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

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

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

2.4 *access to justice* –the new regime must provide an accessible framework for recognising and protecting rights in the foreshore and seabed;

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

2.6 *certainty* – transparent and precise processes that provide clarity for all parties including for investment and economic development in New Zealand; and

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

3 **agree** to the following statement for framing the government's common understandings or assurances:

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

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

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

4 **agree** to the following common understandings or assurances for the development of a replacement regime:

4.1 **public access for all** – access will be guaranteed for all New Zealanders, subject to certain exceptions (e.g., for health and safety reasons in port operational areas or protection of wāhi tapu such as urupā); and

4.2 **respect for rights and interests-** in particular, recognition of customary rights and interests, protection of fishing and navigation rights and protection of existing use rights to the end of their term

Hon Christopher Finlayson
Attorney-General

Date: 18 / 11 / 09

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