Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

REVIEW OF THE FORESHORE AND SEABED ACT 2004: A SHARED MARINE SPACE

Proposal

1 This paper seeks agreement on the broad nature and scope of a shared marine space as part of the development of an equitable regime to replace the Foreshore and Seabed Act 2004 (the 2004 Act).

Executive summary

2 The government is considering how to deal with the issue of ownership in the development of a regime to replace the 2004 Act. This paper examines an innovative approach that offers an elegant solution to the vexed issue of ownership. This "shared marine space" approach is based on the interests that all New Zealanders have in the foreshore and seabed and their belief that their relationships with and use of the foreshore and seabed is a birthright.

3 The concept of a shared marine space is an alternative to vesting ownership. The foreshore and seabed would not be vested in any one group or entity as its absolute property. Rather, the foreshore and seabed within the territorial sea that is not privately owned would receive a new statutory classification: "a shared marine space". The groups or entities who exercise the various roles and responsibilities in the shared marine space would be identified, and their roles and responsibilities clarified, in legislation. This approach is innovative but not unprecedented. The Continental Shelf Act 1964 is a precedent example of a management regime that is not premised on ownership of the resources in question.

4 We have tasked ourselves with ensuring that the interests of all New Zealanders in the foreshore and seabed, as identified by the Cabinet, will be balanced [CAB Min (09) 39/27]. To do this, the disproportionate impact of the 2004 Act on customary interests will need to be addressed. My preliminary thinking is that customary interests ought to be recognised on a continuum that reflects the intensity of those interests. At one end of the continuum certain customary interests could be recognised through a universal mechanism that applies throughout the shared marine space. At the other end of the continuum I think it's appropriate to require proof of intense customary interests and, where such interests are proven and it is appropriate, additional roles and responsibilities would follow.

5 Further work will be undertaken to clarify existing roles and responsibilities in the foreshore and seabed, and the degree to which changes are required to recognise and provide for customary interests. As a stop-gap measure, I propose the Crown be the residual holder of any role or responsibility that is not explicitly identified as being held by another. Further work is required in considering Māori input into such residual roles and responsibilities and how any regime might provide for such input.

6 The Minister of Energy and Resources and I have begun to consider how the minerals regime and the Crown Minerals Act 1991 would operate in the shared marine space. We have agreed there will be no change to the current regime of nationalised minerals (petroleum, gold, silver and uranium) in terms of ownership and management. We have also agreed that further work is required to clarify roles and responsibilities with respect to non-nationalised minerals which are currently owned by the Crown by virtue of the Crown's ownership of the public foreshore and seabed through the Foreshore and Seabed Act 2004.

7 I propose undertaking further work on the shared marine space approach and reporting back to the Cabinet Committee on Treaty of Waitangi Negotiations in February 2010. This additional work will allow the Committee to make decisions on ownership by comparing the shared marine space option with the three other ownership options previously considered.

Background

8 On Monday 30 November 2009, the Cabinet considered four options for dealing with ownership of the foreshore and seabed in the regime that replaces the 2004 Act [TOW Min (09) 13/3, CAB Min (09) 42/4]. These options were absolute Crown ownership, absolute Māori ownership, Crown radical title subject to claims of customary title and a new approach.

9 The Cabinet noted the Attorney-General's view that all four options were 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 was to undertake further policy work on a new approach. Mark Solomon (representing the Iwi Leaders' Group) supported the Attorney-General's preference in principle at the Cabinet Committee on Treaty of Waitangi Negotiations meeting on 25 November 2009, noting that further work would be required in order to ensure that the new approach properly recognised the mana and tikanga of iwi and hapū.

10 The Cabinet directed officials to undertake further work on the new approach to compare it with the other three options [TOW Min (09) 13/3, CAB Min (09) 42/4]. The comparison of all four options will need to occur early in 2010 to meet the review timetable agreed by the Cabinet [TOW Min (09) 13/2, CAB Min (09) 42/4]. Final policy decisions are scheduled for mid-May 2010 subsequent to a structured public consultation process.

Issue definition

11 The new approach that I propose for dealing with ownership is a "shared marine space". This paper addresses three central issues that provide the framework for developing the finer detail of the shared marine space approach:

- what is a shared marine space? (paragraphs 13-22)
- where is it? (paragraphs 23-32)
- how would it work? (paragraphs 33-60)

12 This paper also considers how the minerals regime and the Crown Minerals Act 1991 would operate in the shared marine space (paragraphs 61-69).

What is a shared marine space?

Basis of a shared marine space

13 A shared marine space is predicated on recognising the range of interests and values that different parts of the community have in relation to the space. These interests and values are accepted in the first instance as valid and worthy of accommodation and protection.

14 The application of a shared marine space classification to the foreshore and seabed would be based on the long standing belief held by most New Zealanders that we all have a right to use and enjoy nationally iconic areas such as the foreshore and seabed. The Ministerial Review Panel explained this belief as stemming from the idea of a national "birthright" which has evolved over a long period of time and has become deeply embedded in the histories of many New Zealanders.

15 As expressed by the Māori Party, the relationship between Māori and the foreshore and seabed is also deeply embedded and steeped in history. It incorporates values, norms, and practices that differ from iwi to iwi and hapū to hapū. For Māori, their relationship with the foreshore and seabed is an enduring source of identity built on tikanga, whakapapa and mana. This relationship must be protected for future generations and is recognised in and protected by the Treaty of Waitangi.

16 There is congruence between this range of values and beliefs in that people see the space itself and the way they interact with that space as special.

Comparative approaches

17 There are two key precedents for management, regulation and allocation of resources without underlying ownership in New Zealand:

a the environmental management of the coastal marine area through the Resource Management Act 1991; and

b the management of the continental shelf.

18 The Resource Management Act 1991 provides for the environmental management of the coastal marine area through a series of national and regional policies and plans. Both central and local government have roles and responsibilities in preparing and administering those policies and plans. The general public may also have an input. While the Crown currently owns most of the coastal marine area, the preparation and implementation of relevant policies and plans does not depend on that ownership. The allocation of space within the coastal marine area that is owned by the Crown is an exception. However, even there, the role of allocating space has been delegated by statute to regional councils (who do not own the space). A shared marine space approach would be consistent with the overall philosophy of the Resource Management Act 1991.

19 The New Zealand government has governance rights in the continental shelf based on international recognition of New Zealand's sovereignty (not ownership). This is covered by the Continental Shelf Act 1964.

20 A shared marine space is innovative and, as these examples demonstrate, it can be adapted to suit our changing circumstances. A shared marine space approach is consistent with the principle of certainty and should aim to incentivise high value use of coastal areas in a way that ensures consistency with environmental sustainability standards and protects existing rights and interests. It can avoid the pitfalls of the "tragedy of the commons" (where individual self-interest overrides the best long term use of the resource and ignores the interests of the community) because it is based on these values.

21 The success of a shared marine space approach relies in part on clear articulation and understanding of roles and responsibilities for decision-making. This means that there is a process for ascertaining what can take place and how to resolve conflict and ambiguity. These matters are canvassed in this paper in the section "How would a shared marine space work?" (paragraphs 33-60 below).

22 A shared marine space approach may potentially provide a framework for the management of other natural resources (e.g. riverbeds). The Office of Treaty Settlements thinks this framework might be particularly attractive to iwi representatives engaging with the Crown on other resources including in Treaty settlements negotiations. In order to respond to any proposals from iwi representatives, the Office of Treaty Settlements advises that the government will need to come to a view on what the appropriate limits of the approach are. I think an assessment will need to be made on a case by case basis.

Where is a shared marine space?

Certainty about boundaries

23 A preliminary step in developing a shared marine space is to define its physical boundaries. Clear physical boundaries will delineate the area subject to a new legal classification. Clear boundaries will also provide certainty about what activities may take place in the area.

24 An example of boundaries providing certainty for what activities may take place (or may not) is the way in which public access currently applies. There is no legal right of public access over private titles in the foreshore and seabed. This means that public access *to* the shared marine space is limited to those areas that are open to the public (e.g. public reserves or esplanades). If the shared marine space is the preferred option for providing the framework of the replacement regime, further work could be undertaken on how existing legislative regimes (with or without modification) could be used to provide the public with greater access *to* the shared marine space (e.g. public access strips could be gained through the Walking Access Act 2008 or the esplanade reserve provisions in the Resource Management Act 1991).

25 I have thought about the place of private titles (including general land and Māori freehold land) within a shared marine space. Although these titles will remain subject to existing and future regulatory regimes in the coastal marine area they should not be included within the physical definition of the shared marine space. The main reason for this is that the Cabinet has agreed that existing rights and interests would be protected for the length of their term [TOW Min (09) 13/3, CAB Min (09) 42/4]. Another reason is the legal difficulties of expropriation of private rights and compensation. If the shared marine space approach is progressed, further work should take place on the potential for bringing private titles into the shared marine space where the title holder agrees. This work would include:

- the potential for a first right of refusal over private titles; and
- prohibiting the alienation of private titles to anyone other than the Crown (on the basis that the Crown would buy it on behalf of all New Zealanders and place it automatically in the shared marine space).

26 These two pieces of work will need to be cognisant of the fact that, if unilaterally imposed, they would affect the rights of private title holders and may reduce the value of those titles through constraining potential use. Issues of compensation would also arise. The shared marine approach should aim to mitigate these issues. The Department of Conservation thinks those parcels of land within the public foreshore and seabed that are public in nature but are effectively treated as private land should be brought within the shared marine space (e.g. seabed held by port companies, Watercare Services Auckland and Wellington

Waterfront Limited). My preliminary thinking for these parcels of lands is that they be treated in the same way as the broader category of private titles.

27 I will report back to the Cabinet in February 2010 on these issues.

Possible boundaries

28 The 2004 Act defines the "foreshore and seabed" as extending from mean high water springs to the outer limits of the territorial sea (12 nautical miles). The line of mean high water springs was adopted in the 2004 Act as the landward boundary because it aligned with the definition of the coastal marine area in the Resource Management Act 1991. It also correlated with the limits within which New Zealand had full territorial rights at international law and matches modern surveying practices. The outer limit of the territorial sea was adopted as the seaward boundary because it also aligned with the statutory definitions of "coastal marine area" and "territorial sea".

29 I have considered alternatives to the existing definition including extending the seaward boundary beyond the outer limit of the territorial sea and into the Exclusive Economic Zone. I have rejected adopting an alternative definition because, at least in relation to the seaward boundary, it would be inconsistent with New Zealand's international rights and obligations beyond the limits of the territorial sea. Outside of the territorial sea the government does not have full sovereign rights – it has a diminishing territorial jurisdiction which is subject to international law. I think changing the existing landward and seaward boundaries is likely to have unintended legal and political implications.

30 In order to progress the shared marine space option, I propose the following working definition of the physical boundaries of the shared marine space:

> *Shared marine space means 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 does not include existing private titles.*

31 The finer detail of this definition will need to be decided in future papers.

32 The Associate Minister of Local Government intends to extend the seaward boundaries of those territorial authorities whose boundaries do not currently extend to mean low water springs to ensure that all territorial authorities' boundaries cover the foreshore. This does not impact on the status of the shared marine space approach.

How would a shared marine space work?

33 There are three broad areas that will drive the operation of the shared marine space:

- a new statutory classification that reflects the innovative nature of the space;
- clear and positive articulation of roles and responsibilities; and

- a stop-gap or "wash up" mechanism whereby the Crown is the residual holder of any role or responsibility not explicitly identified in legislation.

Statutory classification

34 Given its innovative nature, the shared marine space should have a new statutory classification expressly set out in legislation. At this stage, I propose the classification be: "the shared marine space".

35 The legislation could identify the particular attributes of the shared marine space statutory classification where these attributes are not provided for elsewhere or are necessary to ensure clarity and certainty in relation to regulation, allocation and decision-making. These specific attributes could provide for the protection of defined interests including those agreed by the Cabinet [TOW Min (09) 13/1, CAB Min (09) 42/4]:

- public access for all; and
- respect for rights and interests:
  - recognition of customary rights and interests;
  - protection of fishing and navigation rights; and
  - protection of existing legal uses.

36 The following attributes could also be covered:

- the regulatory and protective role of the Crown;
- where legal liability and enforcement powers reside;
- who may charge for the use of resources including coastal occupation charges and charges for sand and shingle;
- all existing authorisations including those that have transferred a legal interest in land to another party (e.g. leases that did not become coastal permits);
- responsibility for managing activities that have yet to occur (e.g. bioprospecting); and
- providing that this regime and existing or future legislative regimes are the source of legal rights in the shared marine space (e.g. rather than the common law) unless otherwise specified in the legislation.

37 The new regime will need to connect appropriately with existing and future legislative regimes and the treatment of different rights and interests within those regimes. Setting out in legislation other attributes of the shared marine space could clarify how the shared marine space connects with those regimes and interests and could, where appropriate or necessary, bring consistency to

the over 40 pieces of legislation in operation in the coastal marine area. I do not propose undertaking extensive or ambitious reform of those regimes within the timeframe we have available. I see this work as a first step towards such reform.

38 Our task is to balance all of the interests in the foreshore and seabed and address the disproportionate impact of the 2004 Act on customary interests. The approach that should be taken is one that focuses on those regimes which impact on or should recognise and provide for customary interests. The scope of this review should not be confined to only those legislative regimes that are affected by the overlay of a shared marine space approach (i.e. those regimes that are based on a proprietary interest). It should also include purely regulatory regimes (i.e. those regimes that are *not* based on a proprietary interest) where those regimes are relevant to addressing customary interests.

39 A particular focus could be the Resource Management Act 1991. This Act connects to varying degrees with approximately 35 of the 40 statutes in operation in the coastal marine area and acts as a fulcrum for their operation. Critically, it connects central and local government (or allows central government to 'talk' to local government) through the use of national policy statements and national environmental standards.[1]

40 A number of regimes in operation in the coastal marine area contain differing provisions in relation to customary interests and the Treaty of Waitangi. Generally, the purpose of these provisions is to recognise and provide for the relationship and interests of Māori with resources and physical areas. There is no consistency in these clauses, in the way they relate to the other provisions in the statutes or in their application. Some statutes have specific additional protections of Māori interests (e.g. the Resource Management Act 1991) while others do not.

41 An approach that looks at both regulatory and proprietary-based legislation is consistent with the principles of recognition and protection of interests and the Treaty of Waitangi. It also offers the opportunity to address any inconsistencies in the treatment of customary interests.

42 I propose the following working definition of the shared marine space classification:

> *The shared marine space provides for rights of public access and navigation in, on, over and across the shared marine space subject to certain exceptions and for customary interests in the shared marine space in a manner and at a level that appropriately recognises the intensity of those interests.*

43 The finer detail of this definition will need to be decided in future papers.

[1] Part 5 of the Resource Management Act 1991. Currently there are no national environmental standards that relate to the coast.

Articulation of roles and responsibilities

44 The clear articulation of the Crown's roles and responsibilities in a shared marine space requires the following broad policy steps:

- Step one: assessing existing roles and responsibilities;
- Step two: assessing what changes are required to recognise and provide for customary interests; and
- Step three: ensuring the regulatory integrity of the shared marine space.

STEP ONE: EXISTING ROLES AND RESPONSIBILITIES

45 The existing roles and responsibilities in the foreshore and seabed can be articulated as falling generally into either policy setting or regulatory powers and are carried out on four different governance levels: international, national, regional and local. At times these two broad roles and responsibilities intersect and overlap.

46 Across these roles and responsibilities, a range of opportunities are provided for Māori input into decision-making processes. This input can range from notification to decision making. In some cases, such as the Conservation Act 1987 and the Crown Minerals Act 1991, Māori input derives from statutory references to the principles of the Treaty of Waitangi. In other cases, such as the Resource Management Act 1991, references to Treaty principles are coupled with more explicit references to Māori interests to be considered in decision making processes. In still other cases, such as the Maritime Transport Act 1994, Māori do not have any specific recognition of an entitlement to have input to decision making processes. Some of these statutory provisions, such as the Resource Management Act 1991, have been criticised in the Waitangi Tribunal.

47 Generally, Māori input into policy and regulatory processes is concentrated at the notification end of the input range. It is unclear whether this concentration accurately reflects the scale of customary interests in recognition of the exercise of mana through to use rights to authority and control over resources and land.

48 At paragraph 54 below I propose undertaking further work on the nature and extent of customary interests, how they can be tested, the thresholds of those interests and how they might be tested (either through litigation or negotiation). This work will assist in the balancing of interests in the new regime.

Aquaculture

49 Aquaculture policy is undergoing separate and parallel reform to the review of the 2004 Act. Implementing policy to allocate space in the foreshore and

seabed has the potential to undermine the 2004 Act review. It also presupposes outcomes and processes.

50 Aquaculture infrastructure attaches to the seabed. The basis for Crown allocation of aquaculture space is ownership of the foreshore and seabed. For this reason, it is essential that the aquaculture reform links with the 2004 Act review at all stages. I have instructed my officials to work with the lead aquaculture departments (Ministry of Fisheries, Ministry for Economic Development and Ministry for the Environment) and other relevant departments to ensure consistency in approach, outcomes and timing of the respective reform processes. The lead Aquaculture Ministers and I expect both reform processes to be progressed in a complementary manner which is cognisant of their intersection.

51 I understand one component of aquaculture reform is to provide for the Māori commercial aquaculture settlement. The review of the 2004 Act will not undermine the Māori commercial aquaculture settlement.

STEP TWO: ASSESSING WHAT CHANGES ARE REQUIRED TO RECOGNISE CUSTOMARY INTERESTS

52 In order to balance all of the interests of New Zealanders in the foreshore and seabed, the government has tasked itself with addressing the disproportionate effect of the 2004 Act on customary interests. In the shared marine space, this requires an assessment of what change is required to the existing roles and responsibilities to provide an appropriate recognition of customary interests.

53 My preliminary thinking is that the new regime will need to recognise the continuum of customary interests in the shared marine space. This continuum of interests can be recognised through mechanisms couched at three levels. My preliminary thinking on the continuum of interests and the mechanisms through which they can be recognised is set out in the table below:

Level of customary interests	Recognition mechanism / Award

Automatic: • an automatic level of recognition of interests that will apply to all coastal Māori • no need to embark on a process of litigation or negotiation.	The *automatic* level recognises the relationship that all coastal Māori have with the foreshore and seabed and provides broad recognition of the unbroken, inalienable and enduring nature of mana. The underlying values associated with the Māori Party's concept of tipuna title appear to resonate with such a concept. • an example of an automatic mechanism that recognises aspects of the concept of tipuna title is the environmental covenant in the ngā hapū o Ngāti Porou Deed of Agreement. It sets out the issues, objectives, policies and rules of the hapū relating to the promotion of environmental standards in a manner consistent with their world view and the protection of their cultural and spiritual identity. It requires local authorities to review their key public documents to ensure that they 'take it into account' the matters set out in the environmental covenant. • may be appropriate to apply throughout the shared marine space and to link into the Māori Party's concept of tipuna title.

Level of customary interests	Recognition mechanism / Award
Intermediate: • recognition of customary use rights • relies on a process of litigation or negotiation.	The *intermediate* level recognises the demonstration of mana through the exercise of, for example, customary use rights including activities and practices. • an example of a mechanism at this level is the protected customary activities instrument in the ngā hapū o Ngāti Porou Deed of Agreement. Specified customary activities can be undertaken without a resource consent and without needing to comply with rules in any district or regional plan. The Crown retains the ability to undertake any necessary environmental effects assessment. • might be appropriate to apply throughout the shared marine space where customary use rights are proved.
High/Intense: • highest level of recognition • relies on a process of litigation or negotiation.	The *high/intense* level recognises the demonstration of mana through the exercise of, for example, customary interests similar to customary title (or rights akin to ownership). • similar to the permission right in the ngā hapū o Ngāti Porou Deed of Agreement. It enables hapū to approve applications for resource consents under the Resource Management Act 1991 and within their territory. • would be the "high water mark" of customary interests recognition in the new regime – only some groups would be able to achieve this level of recognition.

54 I propose undertaking further work on assessing what changes are required to recognise customary interests in the shared marine space including:

- the scale of customary interests that need to be balanced within the shared marine space (i.e. customary interests are on a continuum);
- (where relevant) how customary interests might be tested and the appropriate engagement model(s) for testing those interests (e.g. litigation and/or negotiation);
- how any proposals for recognising customary interests in the shared marine space accord with the principles and assurances agreed by the Cabinet and the disproportionate effect of the 2004 Act on customary interests [TOW Min (09) 13/1, CAB Min (09) 42/4]; and
- how non-commercial customary interests in aquaculture can be recognised (the aquaculture settlement has already dealt with Māori commercial aquaculture claims).

STEP THREE: THE REGULATORY INTEGRITY OF THE SHARED MARINE SPACE

55 We will need to ensure that a shared marine space approach is consistent with the regimes outlined above and their related roles and responsibilities. This means that the underlying premises of these regimes accord with the shared marine space approach in that they are not based on a proprietary interest.

56 As noted above, where existing regimes do rely on an underlying proprietary interest they will need to be reassessed and potentially changed to ensure that the decision-making processes under those regimes will still occur under the new shared marine space approach.

57 While the activity itself may not change (although the intention is that it may evolve), the decision-maker and the process may. In such a situation, the Cabinet would need to make decisions on who the appropriate decision-maker is and what process (including criteria) should be adopted. Issues of representation and accountability in decision-making will also need to be considered. These decisions would need to be made on a case by case basis and should be made using the policy development principles agreed to by the Cabinet [TOW Min (09) 13/1, CAB Min (09) 42/4].

58 I will report back to the Cabinet Committee on these issues as part of the further work I propose at paragraph 54 above .

A stop-gap or "wash up" mechanism and future uses or interests

59 A mechanism that provides for future uses and that acts as a "wash up" for interests not explicitly identified will also be necessary. My preliminary thinking is that the Crown should be the residual holder of any roles and responsibilities that are not explicitly identified in the shared marine space, in order to avoid a situation where no one is responsible for certain activities. This could be seen as an attribute of the shared marine space classification. It could provide for the Crown to exercise responsibilities of government or regulation, to be carried out in accordance with the principles/purpose of the replacement regime, unless expressly stated otherwise in the replacement regime.

60 Further work is required in considering Māori input into such residual roles and responsibilities and how any regime might provide for such input.

Treatment of minerals in a shared marine space

61 I have met with the Minister of Energy and Resources to explore how the minerals regime and the Crown Minerals Act 1991 would operate in the shared marine space.

STATUS QUO

62 The status quo for the ownership and management of minerals is set out in the table below:

Table 1: Ownership and management of minerals

	Nationalised Minerals	Non-Nationalised Minerals
Types of minerals	Petroleum, gold, silver, uranium	Coal, ironsands, copper, phosphate and all other minerals (such as sand and shingle)

	Nationalised Minerals	Non-Nationalised Minerals
Ownership	Always Crown s9(2)(h)	If land is part of the public foreshore and seabed (i.e. it is vested in the Crown) the Crown has ownership by virtue of the Foreshore and Seabed Act 2004. If land is held in private title, ownership depends on the history of land ownership and specific legislation (e.g. Coal Mines Amendment Act 1908). [redacted]
Legislation	Crown Minerals Act 1991	
Administered by	Minister of Energy and Resources (Crown Minerals under delegation)	
Management of environmental effects	Resource Management Act 1991	
Occupation of land/seabed	At discretion of landowner (if privately owned) but subject to compulsory arbitration in relation to petroleum Coastal permit for occupation required if land of the Crown	At discretion of landowner (if privately owned) Coastal permit for occupation required if land of the Crown
Current royalties collected by the Crown	~$500,000,000 pa (all petroleum)	~$72,000 pa

63 Nationalised minerals are of particular importance. Petroleum is the most important nationalised mineral as it is currently the third largest export, it delivers substantial revenue to the Crown in the form of royalties and taxes, and is critical for energy security.

64 There is currently no development of non-nationalised minerals (aside from gravel and similar materials) in the foreshore and seabed. The efficient development of non-nationalised minerals has the potential to deliver significant benefits to New Zealand.

65 Prospecting, exploration and development (production) are expensive activities that take place over a number of years with only a small proportion of exploration programmes leading to commercial development. It is essential that potential investors are not discouraged from undertaking these activities by legislative uncertainty or unreasonably high transaction costs that could affect

[redacted]

their existing and potential future investments. For this reason, it is not just current use rights in respect of nationalised minerals that need to be protected.

MINERALS IN A SHARED MARINE SPACE

66 The Minister for Energy and Resources and I have discussed how nationalised minerals might be translated into a shared marine space. We agree that the current regime (in terms of ownership and how they are currently managed) for nationalised minerals should not be changed as part of the review of the 2004 Act. This is because their ownership predates and would not be affected by the repeal of the Foreshore and Seabed Act 2004. We have agreed that further work is necessary on issues such as access to nationalised minerals and occupation of space.

67 A number of submitters to the Ministerial Review Panel asserted their belief that the 2004 Act was passed so that the Crown could solely derive benefit from the exploitation of minerals. Although this was not the reason, if the Crown had not prior to the 2004 Act owned minerals in the foreshore and seabed, this was an effect.

68 Te Puni Kōkiri advises that the extinguishment of rights to non-nationalised minerals affected by the vesting of title in the Crown under the 2004 Act impacted "solely on Māori as the holders of Māori customary rights in the foreshore and seabed". In order to ensure certainty as to the Crown's role, the new regime will need to clarify the status of non-nationalised minerals in a shared marine space. Te Puni Kōkiri is of the view that the consideration of this status should begin with a decision on whether to unwind the vesting of non-nationalised minerals in the Crown that occurred by virtue of the 2004 Act.

69 The Minister for Energy and Resources and I will undertake further work on the treatment of non-nationalised minerals including:

- how a shared marine space can deliver high levels of certainty in regards to the management of non-nationalised minerals (including access, occupation of space, control over, accrual of benefit and responsibility/ liability matters); and
- how particular interests, particularly customary interests, in respect of non-nationalised minerals might be addressed.

Next steps

70 There are a number of matters that will require further consideration in order to determine whether a shared space approach will effectively achieve the government's goal of balancing all the interests of New Zealanders in the foreshore and seabed through an equitable replacement regime.

71 I propose working closely with the Minister of Māori Affairs and utilising the Iwi Leaders' group and their technical advisors to undertake further work on the recognition and protection of customary interests. This work should be predicated on the recognition that Māori have a relationship with the shared

marine space that pre-dates the Treaty of Waitangi and is an enduring source of identity built on tikanga, whakapapa and mana. It is something that should be protected for future generations in an appropriate way. In my view, it will be important that the statutory consequences of, and entitlements associated with any findings of customary interests are outlined in the replacement regime.

72 I propose reporting to the Cabinet in February 2010 on the following matters:

a the scale of customary interests that need to be balanced within the shared marine space;

b how customary interests might be tested and the appropriate engagement models for testing those interests;

c how proposals for recognising customary interests in the shared marine space accord with principles and assurances agreed by Cabinet [TOW Min (09) 13/1, CAB Min (09) 42/4] and mitigate the disproportionate effect of the 2004 Act on customary interests; and

d comparing the shared marine space option with the three ownership options.

Comment from Iwi Technical Advisory Group

73 Iwi Technicians, on behalf of the Iwi Leaders' Group remains of the view that a replacement to the Foreshore and Seabed Act 2004 based on the shared marine space/roles and responsibilities approach has the capacity to provide appropriate recognition and protection of the unbroken, enduring and inalienable mana of iwi and hapū over their rohe moana. This recognition and protection is integral to their identity and ancestral connections to the coastal areas within their respective rohe. Much work remains to be done, however, and Iwi Leaders will not be able to support a proposed replacement regime unless or until proposals have been agreed that provide for that recognition and protection.

Spatial definition – treatment of Private titles

74 In relation to the spatial definition of the shared marine space, the exclusion of private titles creates a double standard whereby pre-existing Māori rights (e.g. customary title) are within the shared marine space regime, while the rights of private title holders are left outside it. This approach continues the discriminatory effect of the 2004 Act and is contrary to the principle supported by Iwi Leaders that all property rights should be respected and none privileged as against others. The point is not that private titles should be impinged upon, but that pre-existing Māori interests should be accorded the same level of recognition and protection.

Spatial definition – boundaries of shared marine space

75 While it is understood that an inland boundary of foreshore and seabed is a practical necessity, it should be borne in mind that such a boundary is an arbitrary and artificial one. In managing effects of the environment, and recognising the mana of iwi and hapū, measures may be required to ensure the arbitrary boundary does not impede good decision making. At the other extent of the area, it is proposed to stop at the outer limit of the territorial sea. As confirmed in the Muriwhenua and Ngāi Tahu Sea Fisheries Reports of the Waitangi Tribunal, the interests and mana of iwi and hapū do not necessarily stop at that point and extend into the exclusive economic zone. Engagement should therefore continue on how those interests can be recognised, alongside any other interests and consistent with New Zealand's international obligations.

Minerals

76 In respect of minerals, the Crown's continuing assertion of ownership of 'nationalised' minerals, based on statute continues to be a sensitive topic for Maori and is not accepted by Iwi Leaders as being appropriate. That issue aside, to the extent that the Crown's claim to proprietary rights in non-nationalised minerals and to control of access to nationalised minerals arose only by virtue of the 2004 Act, it will be necessary to revert as a starting point to the pre-2004 position. The respective rights and interests of the Crown, iwi and hapu should then be addressed as part of the development of the shared marine space regime. Failing to revert to the pre-2004 Act position and properly reflect iwi and hapū rights in relation to mineral resources will be viewed as a continuation of the disproportionate treatment of Maori that occurred through the 2004 Act. It would also be viewed as the Crown retaining rights and interests that it appropriated through the 2004 Act and will give rise to further claims against the Crown in respect of that appropriation.

Consultation

77 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.

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

Financial implications

79 There are no financial implications that arise directly from this paper. Any financial implications, if any, arising out of the development of a replacement regime will be addressed in future detailed policy papers.

Human rights

80 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.

s9(2)(h)

Treaty of Waitangi Implications

81 [redacted]

82

83

Legislative implications

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

Regulatory Impact Analysis

85 The Regulatory Impact Assessment Team from the Treasury have indicated that a Regulatory Impact Analysis is not required at this stage.

Publicity

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

[redacted]

Recommendations

87 I recommend that the Committee:

BACKGROUND

1 **note** that the Cabinet is considering how to deal with ownership of the foreshore and seabed in the regime that replaces the Foreshore and Seabed Act 2004 (the 2004 Act) [TOW Min (09) 13/3, CAB Min (09) 42/4];

2 **note** that this paper examines a new approach to dealing with the vexed issue of ownership as directed by the Cabinet [TOW Min (09) 13/3, CAB Min (09) 42/4];

A SHARED MARINE SPACE

3 **note** that the new approach proposed by the Attorney-General:

3.1 is "a shared marine space";

3.2 is that the foreshore and seabed is not vested in any one person or entity as its absolute property;

4 **note** the management of the Continental Shelf Act 1964 is managed by the New Zealand government based on governance rights rather than ownership;

5 **note** that the shared marine space could have a customised statutory classification with particular legal attributes set out in legislation;

6 **agree** that the working definition of the classification of the shared marine space is:

The shared marine space provides for rights of public access and navigation in, on, over and across the shared marine space subject to certain exceptions and for customary interests in the shared marine space in a manner and at a level that appropriately recognises the intensity of those interests.

7 **note** that the adoption of the shared marine space approach may have a precedent effect on negotiations with iwi on natural resources, including in Treaty settlement negotiations, to which the government may need to respond;

8 **note** that the shared marine space approach will need to be developed further so that it can be compared to ownership options one to three that have been considered by the Cabinet [TOW Min (09) 13/3, CAB Min (09) 42/4];

BOUNDARIES FOR THE SHARED MARINE SPACE

9 **agree** that the working definition of the shared marine space is:

> *Shared marine space means 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 does not include existing private titles.*

10 **invite** the Attorney-General to undertake further work on providing greater public access *to* the shared marine space and incorporating private title (where agreed);

OPERATION OF THE SHARED MARINE SPACE

11 **note** that the shared marine space would need to connect appropriately with existing and future legislative regimes and the treatment of different interests within those regimes;

12 **note** that in order to balance all the interests of New Zealanders and address the disproportionate effect of the 2004 Act on customary interests, an assessment of what change is required to the existing roles and responsibilities in the foreshore and seabed is required;

13 **invite** the Attorney-General to report back on what changes are required to recognise Māori interests in the shared marine space, including:

13.1 the scale of customary interests that need to be balanced (i.e. customary interests are on a continuum);

13.2 (where relevant) how interests might be tested and the appropriate engagement model for testing those interests e.g. litigation and/or negotiation);

13.3 how any proposals for recognising customary rights in the shared marine space accord with the principles and assurances agreed by the Cabinet and address the disproportionate effect of the 2004 Act on customary interests [TOW Min (09) 13/1, CAB Min (09) 42/4]; and

13.4 how non-commercial customary interests in aquaculture can be recognised;

14 **note** the integrity of a shared marine space approach relies on all regimes operating on a non-proprietary basis;

15 **note** those regimes relying on an underlying proprietary interest will need to be reassessed and modified if necessary to allow them to continue to operate in a shared marine space;

MINERALS IN THE SHARED MARINE SPACE

16 **note** the Minister for Energy and Resources and the Attorney-General have discussed the treatment of minerals in the shared marine space;

17 **agree** that the status quo in respect of the regime for nationalised minerals (petroleum, gold, silver and uranium) will not change in the shared marine space, that is, the Crown will continue to own the nationalised minerals as outlined in the Crown Minerals Act 1991;

18 **invite** the Attorney-General, in consultation with the Minister for Energy and Resources, to report back on the occupation of space to mine (and any related issues) nationalised minerals;

19 **invite** the Attorney-General, in consultation with the Minister for Energy and Resources, to report back on the treatment of non-nationalised minerals in a shared marine space including:

19.1 how a shared marine space can deliver high levels of certainty in regards to the management of non-nationalised minerals (including access to, occupation of space to mine, control over, accrual of benefit and responsibility/liability matters); and

19.2 how particular interests, particularly customary interests, in respect of non-nationalised minerals might be dealt with;

20 [redacted] s9(2)(h)

REPORT BACK

21 **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 Cabinet Committee on Treaty of Waitangi Negotiations on 3 February 2010.

Hon Christopher Finlayson
Attorney-General

Date: 15/12/09

[redacted]