Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

REVIEW OF THE FORESHORE AND SEABED ACT 2004: PROPOSALS FOR PUBLIC DISCUSSION DOCUMENT

Purpose

1. The purpose of this paper is to seek Cabinet's agreement on its preferred regime for replacing the Foreshore and Seabed Act 2004 (2004 Act). This preferred regime will be presented in a public discussion document for public consultation from 31 March to 30 April 2010.

Executive Summary

2. The Government's objective in developing a new regime to replace the 2004 Act is to achieve an equitable balance of interests of all New Zealanders in the foreshore and seabed. This paper aims to secure preliminary policy decisions on a new regime to inform the public discussion document that will provide a focus for the consultation process. Consultation is scheduled to take place 31 March to 30 April 2010.

3. Cabinet has previously noted that there are four options for clarifying roles and responsibilities in the foreshore and seabed:

   - *Option one*: vesting radical or notional title of the foreshore and seabed in the Crown subject to claims of customary title;
   - *Option two*: vesting the foreshore and seabed in the Crown as its absolute property;
   - *Option three*: vesting the foreshore and seabed in Māori as their absolute property; or
   - *Option four*: taking a new approach to clarifying roles and responsibilities in the foreshore and seabed [TOW Min (09) 13/3, CAB Min (09) 42/4].

4. My preferred option is Option four, a non-ownership regime, which I think will achieve an equitable balance of all interests in the foreshore and seabed. I recommend the Cabinet Committee agree that my preferred option will form the basis of the Government's proposals for replacing the 2004 Act and be included in the public discussion document. This option represents a bold break from the past. It has similarities to the Continental Shelf Act 1964, by which the Crown does not own the area but still regulates it.

5. Under a non-ownership regime customary interests in the foreshore and seabed would be determined by direct negotiation between the Crown and coastal hapū/iwi and/or accessing the courts. I propose thresholds, tests and awards for recognising customary interests be prescribed in legislation. However, I would

also like to consult on whether it should be left to the courts to decide thresholds, tests and awards.

6. I propose that the Cabinet Committee agree to two thresholds to reflect the differences in the nature of customary interests be included in the public discussion document:

   - *Non-territorial* – recognises customary use rights including activities and practices; and
   - *Territorial* – recognises customary interests that are territorial in nature and extent (otherwise known as "customary title").

7. I think that tikanga Māori should be the starting point for tests to examine the nature and extent of customary interests, with the common law also being utilised. I propose the Cabinet Committee agree that my preferred tests be included in the public discussion document, along with two other approaches I have considered: tests based on Canadian jurisprudence (common law only); and tests based on Te Ture Whenua Māori Act 1993 (tikanga Māori only).

8. I propose, and seek the Cabinet Committee's agreement to, the public discussion document containing my preferred awards. These awards are an amalgamation of property and regulatory rights. The document will also include the options of awards based on Canadian jurisprudence and on Te Ture Whenua Māori Act 1993. My preferred awards reflect the two thresholds for recognising customary interests while seeking to provide specific outcomes for coastal hapū/iwi, which would be:

   - *authority* – a level of authority over resources and activities in a non-ownership regime; and
   - *environmental management* – a role in environmental management in a non-ownership regime.

9. My proposed awards are:

Threshold	Awards
Non-territorial (to apply to areas where non-territorial interests have been recognised)	• Protection of customary activities (including non-commercial interests in aquaculture) • Placement of rāhui (prohibition) over wāhi tapu (sacred site) • Planning document
Territorial (to apply to areas where territorial interests have been recognised)	• Right to permit activities • Participation in conservation processes • Planning document

10. I also think that a non-ownership regime would provide:

    - that the Crown will continue to delegate the role of allocating space to local government, which will continue to make decisions on the allocation of space;
    - for ownership of new and existing structures and that ownership of existing structures will be unaffected;
    - that it will be possible for port companies to obtain a potentially renewable 50 year permit (akin to leasehold interest) in reclamations;
    - that any existing local authority-owned land be incorporated into the public foreshore and seabed and that there would be no owner of that land; and
    - that no person may claim an interest in any part of the foreshore and seabed on the grounds of adverse possession or prescriptive title.

11. I seek the Cabinet Committee's agreement to the public discussion document including the proposals in paragraph 10.

12. I am working with the Minister of Energy and Resources on non-nationalised minerals issues related to the foreshore and seabed. I will report back to the Cabinet Committee on this matter in May.

Background

13. Cabinet has previously:

    - noted the Government's intention to develop legislation that will repeal the 2004 Act and enact a replacement regime in 2010 [TOW Min (09) 13/2, CAB Min (09) 42/4];
    - agreed to guiding principles and common understandings or assurances for the development of that replacement regime [TOW Min (09) 13/1, CAB Min (09) 42/2];
    - agreed that the Government has a role in balancing the interests of all New Zealanders in the foreshore and seabed [TOW Min (09) 12/1, CAB Min (09) 39/27]; and
    - noted that one option for replacing the 2004 Act is a new approach, which I have referred to as a "shared marine space" [TOW Min (09) 14/1, CAB Min (09) 45/4]. In this paper I refer to a "non-ownership regime" rather than a "shared marine space" as it is not necessary to impose a name on the area at this stage.

14. Since the last Cabinet discussion on the review of the 2004 Act (the Review), I have met with the Iwi Leaders' Group and other stakeholders, including port

companies and Business New Zealand. At these meetings I have broadly outlined my preferred regime for replacing the 2004 Act (i.e. a non-ownership regime) and the upcoming consultation process. The meetings have been a useful way of engaging with those parties who have key interests in the foreshore and seabed, and have been generally positive.

Issue definition

15. The 2004 Act extinguished uninvestigated customary title in the foreshore and seabed by vesting full and beneficial ownership in the Crown. The 2004 Act also precluded Māori from seeking customary title through the courts. While it is impossible to say what Māori would have received through the courts, the point is that no group other than Māori had its rights affected to such an extent. Ownership is the definitive issue in the Review. This is because it determines many other issues in the public foreshore and seabed. Under the 2004 Act, for instance, the Crown's ownership extinguished customary title in the area. In my view, a replacement regime will need to be seen as a departure or break from the existing regime and its treatment of ownership.

16. The Government's objective in developing a new regime is to achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed. I think the best way to achieve this is to create a new statutory regime that avoids the polarising issue of ownership and clearly sets out the rights, interests, roles and responsibilities of all who have such interests.

17. This paper aims to secure preliminary policy decisions on a preferred regime to replace the 2004 Act. These decisions will inform the public discussion document that will provide a focus for the consultation process on the Government's policy proposals. This process is scheduled to take place from 31 March to 30 April 2010. It is intended that final policy decisions will be made in May and June 2010.

Geographical area where new regime would apply

18. Cabinet has previously agreed that the working definition of the geographical area is:

> *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 private titles.* [TOW Min (09) 14/1, CAB Min (09) 45/4].

19. I think this definition needs to be augmented with:

- the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
- the air space and the water space above the areas described; and
- the subsoil, bedrock, and other matters below the areas described.

20. My proposed definition is similar to the definition in the 2004 Act, except that mine would not include the bed of Te Whaanga Lagoon in the Chatham Islands. The reason for this is so the Crown retains ownership of Te Whaanga Lagoon in order for it potentially to be used as redress in Treaty settlement negotiations.

Options for clarifying roles and responsibilities

21. The definitive issue in the review of the 2004 Act is ownership and how to address section 13 of the 2004 Act and its consequences. Section 13 vested the full legal and beneficial ownership of the public foreshore and seabed in the Crown to hold as its absolute property. This vesting had the consequent effect of extinguishing any uninvestigated customary title in the public foreshore and seabed, while providing no compensation. In repealing and replacing section 13, the new legislation should clearly set out the Government's intention with regard to ownership.

22. Ownership (i.e. legal title) is one way of providing certainty and clarity of roles and responsibilities in the foreshore and seabed. It can be a blunt and unhelpful approach, however, and I think there are other ways to provide the same certainty and clarity.

23. Cabinet has noted that there are four options for clarifying roles and responsibilities in the foreshore and seabed. These are:

- *Option one*: vesting radical or notional title of the foreshore and seabed in the Crown subject to claims of customary title;
- *Option two*: vesting the foreshore and seabed in the Crown as its absolute property;
- *Option three*: vesting the foreshore and seabed in Māori as their absolute property; or
- *Option four*: taking a new approach to clarifying roles and responsibilities in the foreshore and seabed [TOW Min (09) 13/3, CAB Min (09) 42/4].

24. Options one, three and four are premised on the 2004 Act being repealed. Option two could be implemented through amending the 2004 Act. All options are premised on the Cabinet-agreed assurances and principles to guide policy development [TOW Min (09) 13/1, CAB Min (09) 42/2].

25. A core component of all the options (apart from Option two) will be the restoration of any uninvestigated customary title that was extinguished by the 2004 Act.

Summary of options for clarifying roles and responsibilities

OPTION ONE: CROWN NOTIONAL TITLE SUBJECT TO RECOGNITION OF CUSTOMARY INTERESTS

26. Under Option one the Crown's absolute title would be replaced with a notional title (also referred to as radical title). Any customary title that was extinguished

by the 2004 Act would be restored. Where customary interests are investigated and found not to amount to customary title the Crown's notional title would become absolute ownership.

27. The process of investigating and recognising customary interests could be undertaken by either:

- the courts alone; the courts would decide on the tests to determine the nature and extent of customary interests, and the consequent awards in recognition of those interests; or
- the courts using tests and awards specified in legislation (as in Option four – see paragraphs 69-145); the tests would be applied to determine the nature and extent of customary interests and the relevant awards would be applied in recognition of those interests; or
- by negotiation with the Crown; there could be tests and awards specified in legislation (as in Option four) as well as awards negotiated on an individual hapū or iwi basis.

28. Further detail on Option one is provided in the RIS (attached as Appendix 1).

OPTION TWO: ABSOLUTE CROWN OWNERSHIP

29. Under Option two, the Crown would continue to hold the full legal and beneficial ownership of the foreshore and seabed that was vested in the Crown by section 13 of the 2004 Act.

30. There would be tests for the recognition of (former) territorial and non-territorial customary interests of coastal hapū/iwi. If the test for territorial or non-territorial customary interests were met, the Crown's title would remain unaffected. Proven customary interests would be recognised, however, through certain statutory awards. The tests could be set out in legislation and could be applied by the courts or through negotiation. The tests and awards could be the same as those proposed in Option four.

31. Further detail on Option two is provided in the RIS (attached as Appendix 1).

OPTION THREE: ABSOLUTE MĀORI OWNERSHIP

32. Under Option three the full legal and beneficial ownership of the foreshore and seabed would be vested in Māori as their absolute property. There would need to be a process for determining which Māori group/s would hold such title in any given area. Te Puni Kōkiri notes that this is a novel option and considers that it would be useful to provide further information about it, including consideration of how it can interface with 'tipuna title'.

33. Further detail on Option three is provided in the RIS (attached as Appendix 1).

OPTION FOUR: TAKING A NEW APPROACH – A NON-OWNERSHIP REGIME

34. Under Option four new legislation would explicitly provide that no one owns, or can own (in the sense of having a freehold title or similar level of ownership interest), what was designated the "public foreshore and seabed" (which excludes existing private title owners) under the 2004 Act (except for Te Whaanga Lagoon). Instead of identifying an owner of the foreshore and seabed, this option would entail legislating to specify and assign roles and responsibilities to all interests in the foreshore and seabed, including customary interests. 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). The Crown would retain all statutory and regulatory powers, subject to the awards set out in paragraphs 88-145. [redacted]

s9(2)(h)

35. Any customary title extinguished by the 2004 Act would be restored and would be recognised through the proposed tests and awards (as set out in paragraphs 69-145 of this paper). In addition I think direct negotiation with the Crown should be the primary means of engagement for the recognition of customary interests while also allowing claimant groups to go to court (as set out in paragraphs 48-58).

36. Further detail on Option four is provided in paragraphs 45-164 and in the RIS (attached as Appendix 1).

Analysis of options

37. The 2004 Act's extinguishment of any uninvestigated customary title created a number of strongly felt criticisms. The key criticisms relate to the fact that the potential property rights of one interest group (i.e. Māori) and not others were extinguished without consent and that, upon that extinguishment, meaningful compensation was not provided. An unfair anomaly was also created as land in private title (whether Māori freehold land or general land) was explicitly preserved, whereas land in potential Māori customary title was deemed to be in Crown ownership.

38. I do not think the vesting of ownership of the public foreshore and seabed in one party, whether the Crown (Option two) or Māori (Option three), adequately addresses these key criticisms. Option two (continued Crown ownership) would perpetuate them. Option three (Māori absolute ownership) would not effectively balance the interests of all New Zealanders in the foreshore and seabed. Therefore, neither is satisfactory in that they would neither resolve key criticisms nor achieve Government's objectives.

39. In my view, a non-ownership regime (Option four) will effectively address the criticisms and achieve the Government's objectives. It restores any uninvestigated customary title that was extinguished by the 2004 Act. It then provides for the effective recognition of this title through the awards set out in paragraphs 88-145, despite there being no owner of the area.

40. My non-ownership regime represents a bold break from the past. It has similarities to the Continental Shelf Act 1964, by which the Crown does not own the area but still regulates it. It recognises there are different views on rights and responsibilities in the foreshore and seabed. It acknowledges and provides for the relationship of Māori with the foreshore and seabed, which is based on tipuna connections and mana. This relationship does not necessarily accord with Western concepts of ownership (e.g. the separation of ownership from management responsibilities in a model such as absolute Crown ownership). Option four also provides other interests in the foreshore and seabed, such as local authorities and businesses, with certainty as to how the foreshore and seabed will be regulated. It is a flexible and accommodating approach to a complex issue.

41. I do not think providing for recognition of customary title through the courts alone (as would be possible under Option one) is the best approach. Litigation is an expensive, protracted process. I acknowledge that negotiation is also resource intensive; however, I think the expense and length of a courts-only process would be more significant. The experience of aboriginal title litigation in Canada has shown how long a court-based process can take. Most, and probably all, aboriginal title in Canada has been awarded through negotiation. Two of the major Canadian aboriginal title decisions have taken 13 to 19 years from filing to the decision of the highest court and have not resulted in clear tests or awards.

42. By way of comparison, it has taken just under four years for the Crown and Ngāti Porou to negotiate and sign the first foreshore and seabed agreement. Under the 2004 Act, this agreement is subject to High Court confirmation of the areas over which certain mechanisms will apply. This confirmation requirement extends the time somewhat before the agreement can be implemented. I think that it will be possible to be more efficient with any future negotiations. Historical Treaty settlement negotiations are becoming increasingly efficient processes in order to meet the 2014 deadline and I think this efficiency of process could also be achieved in the foreshore and seabed arena.

43. While legislative prescription could address many of the above concerns, Option one still provides for reversionary Crown ownership (i.e. where customary title is not found, Crown absolute ownership is established), which fails to address the key criticisms. By contrast, the non-ownership model (Option four) provides that no one owns the area, effectively by-passing this contentious issue.

44. I recommend the Cabinet Committee agree that my preferred option of a non-ownership regime will form the basis of the Government's proposals for replacing the 2004 Act. If agreed, this preferred regime will be presented in a public discussion document to be taken out for public consultation.

Detailed analysis of my proposal

45. If the Committee agrees that the Government's policy proposals will be premised on a non-ownership model, the following issues will also need to be canvassed:

- *Issue one*: How will customary interests be determined?
- *Issue two*: What thresholds, tests and awards might apply?
- *Issue three*: How will coastal space be allocated?
- *Issue four*: Clarifying the status of structures
- *Issue five*: Clarifying the status of reclamations
- *Issue six*: Clarifying the status of local authority-owned land
- *Issue seven*: Clarifying the status of adverse possession and prescriptive title
- *Issue eight*: Non-nationalised minerals

46. The ways in which these issues are dealt with presently (under the 2004 Act and the RMA) are set out below by way of contrast with my proposals for a new regime. Comparing the status quo with my preferred option will also enable the desirable and undesirable features of the status quo to be considered in the design of a new regime. Further work will be required to refine the details of how a new regime would work in practice.

Issue one: How will customary interests be determined?

47. In order to provide certainty and clarity of roles and responsibilities, it must be made clear that customary interests will be able to be determined by:

- direct negotiation between the Crown and coastal hapū/iwi; and/or
- coastal hapū/iwi accessing the courts.

Negotiations

48. My current preference for recognising customary interests is through negotiations. Negotiations are also the Iwi Leaders Group's preferred option for engagement. I think negotiation rather than litigation better reflects the Treaty partnership in that it respects the mana of the negotiating group and the ability of the government to address these issues, rather than relying on the courts to prescribe rules and outcomes.

49. There will still be thresholds and tests which coastal hapū/iwi will have to meet in order to have their customary interests recognised and thus receive awards. Crown negotiating briefs would be signed off by Cabinet as under the historical Treaty Settlement process.

50. Ultimately, the awards negotiated would reflect the nature of interests recognised. I envisage awards similar in nature to those outlined in paragraphs 88-145 being utilised. Any final package of awards would be agreed to by

Cabinet. To enter into an engagement process the coastal hapū/iwi negotiators would have to be mandated representatives of coastal hapū/iwi.

51. The Canadian experience of aboriginal title could be seen as supporting this approach given that, despite extensive litigation, awards (e.g. the granting of aboriginal title) have been agreed through direct negotiations. Also, the experience of the 2004 Act to date (i.e. the Te Whānau ā Apanui and Ngāti Porou negotiation processes) has revealed a preference by iwi for negotiation over litigation.

Access to the courts

52. I think it is important for there to be clear processes in legislation for the treatment of customary interests through access to the courts. If customary interests were determined through a court process either the High Court or the Māori Land Court could have jurisdiction to hear and determine applications.

53. Te Puni Kōkiri has indicated a preference for the Māori Land Court to hold jurisdiction. This is due, in part, to that court's extensive history of considering Māori land tenure issues, albeit through the Te Ture Whenua Māori Act 1993 (TTWMA) and its preceding legislation.

54. My preference is for the High Court to hear and determine applications for recognition of customary interests. It is the lynchpin of New Zealand's court hierarchy with efficient and timely processes and an ability to seek specialist advisers where necessary. It already has recourse to the Māori Appellate Court for determining matters of tikanga.

55. Whichever court is determined to be appropriate, issues of tikanga Māori will be determined using existing processes and no new mechanisms need be created.

56. As there are alternative views on this point, I think Government should consult the public on the issue of which court will hear and determine applications for recognition of customary interests. If agreed, this issue will be included in the public discussion document in order to gauge public opinion. Following public feedback, I will make my final recommendation to the Cabinet Committee on which court should hear and determine claims.

Court route: burden of proof

57. There are various matters to consider in deciding where the burden of proof should lie. My preferred approach is for the burden of proof to be shared by the Crown and the applicant. The applicant would be responsible for proving those elements of the test that they would be best placed to provide evidence for (e.g. occupation, connection to land), whereas the Crown would be responsible for proving other elements (e.g. actions of the Crown such as extinguishment). Sharing the burden may create efficiencies in the court process by directing that the party best placed to provide the evidence be required to produce such evidence. This approach would depart from the requirement in the 2004 Act where the applicant bears the entire burden of proof and is required to prove all elements of the test. Further work is required on how burden of proof will

operate. I have directed the Ministry of Justice and Crown Law to carry out this further work.

58. I therefore propose that the Cabinet Committee agrees to my proposal for shared burden of proof being the Government's preferred approach, and to include that approach and the current approach under the 2004 Act in the public discussion document.

Issue two: What thresholds, tests and awards might apply?

Thresholds, tests and awards under the 2004 Act: degree of prescription

59. The 2004 Act recognises two types of customary interests: territorial customary rights that "but for" the 2004 Act would have been customary title; and non-territorial customary rights (ongoing use rights, activities and practices). It provides for limited awards (e.g. a foreshore and seabed reserve to be recognised through court processes). Both forms of customary interests have their own statutory test. The 2004 Act allows groups to enter into negotiations with the Crown to seek awards, subject to High Court confirmation that certain tests have been met.

60. The tests in the 2004 Act have been criticised from several angles. The Ministerial Review Panel (the Panel) found that the tests relied too heavily on aspects of other countries' common law and did not reflect New Zealand's legal experience. The Panel also found that in combining the strictest aspects of both Australian and Canadian common law the tests are set too high. The Panel's findings are consistent with broader national and international criticism of the treatment of customary interests in the 2004 Act and the way in which the tests built on and interpreted existing common law precedents.

61. One approach to thresholds, tests and awards is to not prescribe them in legislation and allow the courts to determine what they are. This approach could be favoured by Māori as it would allow groups to "have their day in court" and may be seen as a more flexible approach. As I commented earlier in this paper, however, litigation is an expensive and protracted process. This approach could also recreate the level of uncertainty that existed after the *Ngāti Apa* decision by leaving the thresholds, tests and awards undefined and potentially open-ended. My preferred approach is to prescribe thresholds, tests and awards in legislation, as described in paragraphs 59-145.

62. I therefore propose that the Cabinet Committee agrees to my proposal to prescribe tests, thresholds and awards in legislation being the Government's preferred approach, and to include that approach in the public discussion document.

63. If agreed, the public discussion document would include the following two alternatives:

- leaving it to the courts to determine thresholds, tests and awards; and

- prescribing tests, thresholds and awards in legislation as the Government's preferred approach.

My proposals for thresholds, tests and awards

THRESHOLDS

64. I think the policy intent of the 2004 Act is sound: to recognise two forms of customary interest (non-territorial and territorial). Recognising these two forms of interests would continue New Zealand's legal tradition of demarcating between customary use rights and proprietary interests (as in the Fisheries and Aquaculture Settlements), and cover commercial and non-commercial interests.

65. One of the criticisms of the 2004 Act is that the territorial interests recognised by the 2004 Act were based on the extinguishment of customary title. Under my proposed approach those interests that were extinguished would be restored.

66. I wish to reflect the differences in the nature of these two forms of customary interest by providing two thresholds (each with its own test and set of awards):

    - *Non-territorial* – recognises customary use rights including activities and practices; and

    - *Territorial* – recognises customary interests that are territorial in nature and extent (otherwise known as "customary title").

67. I have considered a "universal" threshold in order to explicitly recognise in legislation the relationship that all coastal hapū/iwi have with the foreshore and seabed, i.e. a relationship that is enduring and inalienable (mana moana). This acknowledgement would have been based on the recognition that tipuna and mana are the source of the relationship of hapū/iwi with the foreshore and seabed and the rights and responsibilities that that relationship bestows. This acknowledgement would be consistent with some of the underlying concepts associated with "tipuna title", in particular, that any new regime needs to recognise and provide for the expression of mana. I had intended that the awards connected to this threshold would elevate the status of coastal hapū/iwi in decision-making processes relating to the foreshore and seabed (e.g. increasing participation in conservation-related legislative processes). I have decided, however, not to pursue a universal threshold as I think that the two proposed thresholds adequately reflect the nature of customary interests I am looking to recognise.

68. I propose the Committee agree that my proposal for having two thresholds for determining customary interests be the Government's preferred approach, and agree to its inclusion in the public discussion document.

TESTS

69. Each of the thresholds proposed in this paper will have its own test. A test is the requirements that must be met by a hapū/iwi in order to have customary

interests recognised and therefore to claim the specified awards. I have considered three different tests:

- tests based on Canadian jurisprudence (common law only);
- tests based on TTWMA (tikanga Māori only); and
- tests that are a combination of tikanga Māori and common law (my preferred option).

70. In developing new tests, I think it is important to recognise that the interests being tested are the traditional practices and customs of Māori that are enduring – they both pre-date the Crown and continue today. In this respect it is important that tikanga Māori be used as a starting point to examine the nature and extent of these interests. At the same time, common law and statute have been the legal basis for much of what has applied in respect of the foreshore and seabed since 1840. An equitable regime, which Government seeks, must accommodate these two sources of authority in line with the principles and associated jurisprudence of the Treaty of Waitangi.

71. I think that using tikanga Māori as the starting point for the tests would:

- acknowledge tikanga as the traditional Māori system of authority and management over the foreshore and seabed;
- continue New Zealand's legal tradition of using tikanga Māori to test Māori land tenure interests;
- allow for differences in tikanga from group to group; and
- mitigate the Panel's criticism of relying on Australian and Canadian case law to test Māori interests.

72. I agree with the Panel's criticism that the tests in the 2004 Act rely too much on the common law of other jurisdictions. However, given the lack of common law on customary title in the foreshore and seabed in New Zealand, I think Australian and Canadian common law offers valuable precedents. Common law tests should be used to the extent they resonate with New Zealand's law and society.

73. Accordingly, I think there are compelling reasons for drawing on the common law of Australia and Canada. This is because:

- these two bodies of common law have developed in a considered manner over a long period of time;
- they provide valuable insights into how to give legal recognition and protection to customary interests;

- there is a paucity of common law on customary rights (particularly in relation to customary title in the foreshore and seabed) in existence in New Zealand;
- New Zealand has a legal tradition of drawing from Australia and Canada in shaping the content of the New Zealand common law; and
- there are some consistencies between these countries and New Zealand in approaching the investigation of customary interests (one example is the requirement of exclusive use and occupation for customary land status which was a key factor in the *Ninety-Mile Beach* (1957) Māori Land Court decision).

74. I think Australian and Canadian common law, so far as it relates to the New Zealand context, should be used in addition to tikanga Māori to develop tests which clearly set out the required components for recognising customary interests.

ALTERNATIVE TESTS CONSIDERED

75. I have considered two other tests; a test based on Canadian jurisprudence and a test based on TTWMA.

CANADIAN TEST

76. One option would be to formulate a test solely from Canadian common law (i.e. not in conjunction with tikanga Māori). In order to meet this test a group would need to show that:
    - the relevant land was occupied at sovereignty; and
    - occupation was exclusive to the group at sovereignty; and
        - there is an "intention and capacity to retain control"
        - "positive acts" of exclusion would not be necessary; and
    - the connection between the people and the land remains substantial.

77. I think using a test based entirely on another country's legal experience is an inappropriate means of testing Māori customary interests. I also note that despite the extensive case law in Canada on aboriginal title much uncertainty remains - there is still no clear and settled test for aboriginal title. I do not recommend using Canadian-only jurisprudence for testing customary interests in the foreshore and seabed.

TE TURE WHENUA MĀORI ACT 1993 TEST

78. Another option would be a test solely based on tikanga Māori (i.e. not in conjunction with the common law). In order to meet this test, a group would need to show that the relevant land is "land that is held by Māori in accordance with tikanga Māori" (section 129(2)(a) of TTWMA).

79. I think that a tikanga Māori-only test would not provide the certainty of process required. I say this because following the Court of Appeal's *Ngāti Apa* decision there would have been genuine uncertainty as to how the Māori Land Court would have applied the "held in accordance with tikanga Māori" test, had the 2004 Act not been enacted. I think that if a tikanga-Māori-only test were applied there may be a risk that the Panel's presumption that all of the foreshore and seabed would be considered customary land until the contrary is proven, would be seen as a starting point. I think such an approach would fail to acknowledge the existing range of interests and uses of the foreshore and seabed. I do not recommend using tikanga Māori alone for testing customary interests in the foreshore and seabed.

RECOMMENDED TESTS

80. In my view, tikanga Māori should be the starting point for examining the nature and extent of customary interests, with the common law also being utilised. This approach would strike the right balance by recognising the continuum of customary interests and testing these in a manner that is consistent with New Zealand's legal heritage and that resonates with the treatment of customary interests in comparable jurisdictions.

81. I therefore propose the test for recognition of non-territorial customary interests should have the following elements:

Threshold	Policy intent	Elements of test
Non-territorial (to apply to areas of the foreshore and seabed where non-territorial interests have been recognised - either in the courts or through negotiation)	Recognition of customary activities, uses and practices that are non-territorial	• *Date of existence*: The customary interests must have been generally in existence in 1840. • *Continued existence of an identifiable community*: The customary interests must be carried out by an identifiable community within traditional laws and customs (tikanga Māori). • *Connection with the area*: There must be proof the right connects to the area claimed by the applicant group (coastal hapū or iwi). • *Continuous exercise*: The right must have been carried out in a continuous manner since the date of its existence. To be clear, the question of continuity should be determined according to tikanga Māori. (It is important to also make clear that the purpose of the test is to recognise ongoing and existing customary interests (which may have evolved over time in their application) rather than customary interests that have been extinguished.) • *Extinguishment*: The non-territorial interests must not have been extinguished. NB: Extinguishment is a question of law (e.g. by statute), not fact.

82. I propose that the test for recognition of territorial customary interests should have the following elements:

Threshold	Policy intent	Elements of test
Territorial (to apply to areas of the foreshore and seabed where territorial interests have been recognised - either in the courts or through negotiation)	Recognition of customary territorial interests	• *Recognition of territorial interests:* Explicit direction in the statute that territorial interests exist where the elements of the test are proven (this is a precursor to the actual test). This would remove uncertainty about whether New Zealand should recognise territorial interests in the foreshore and seabed. • *Demonstrating the exercise of territorial interests:* The applicant group must provide proof of its connections, acts and practices which equate with the nature of "territorial" interests in accordance with tikanga Māori. Two elements should be required to demonstrate proof: i. "exclusive use and occupation"; this should be interpreted in accordance with tikanga Māori; fishing and navigation by third parties would not prevent a finding of "exclusive use and occupation"; and ii. "continuity" of "exclusive use and occupation" from 1840 to the present. • *Demonstrating the content and extent of the territorial interests:* Whether the area is held by the applicant group according to its own customs and usages, i.e. in accordance with tikanga Māori. This may include where hapū and iwi have 'shared' exclusive interests as against other third parties. • *Extinguishment:* The territorial interests must not have been extinguished. NB: Extinguishment is a question of law (e.g. by statute), not fact. The test ought to exclude any extinguishment caused by the 2004 Act.

83. Although the 2004 Act uses similar elements to those I propose here, there are six significant changes in my proposal. The regime I propose:

- uses tikanga Māori as a starting point for the tests, which would inform how the other elements of the test, for example "exclusive use and occupation", would be applied;
- removes "continuous title to contiguous land" as a requirement to be considered, but this can be taken into account;
- provides that customary fishing practices can be taken into account in assessing exclusive use and occupation;
- clarifies that fishing by third parties should not prevent a finding of "exclusive use and occupation";
- ensures that customary transfers of territorial interests between hapū and iwi post-1840 will be recognised; and
- allows for "shared" exclusivity between coastal hapū/iwi as against other third party interruptions.

84. In addition, the test would repeat a provision of the 2004 Act that navigation by third parties should not prevent a finding of "exclusive use and occupation".

85. I am mindful that the setting of thresholds and tests for the determination and recognition of customary interests is a contentious issue. The proposals in this paper will likely be seen by some as going too far in providing for two different thresholds and setting the tests too low. Conversely, others will likely argue that the thresholds do not capture the nature and extent of customary interests and the tests are too high. Some will also argue that it should be for the courts to determine the tests.

86. I therefore propose the Committee agree to my proposals for tests being the Government's preferred approach, and agree to their inclusion in the public discussion document to be taken out for public consultation.

87. The document would include:

- my proposal for the tests as detailed in this paper; and
- the other two approaches to tests I have considered (Canadian and TTWMA).

AWARDS

88. The awards proposed in this paper are intended to:

- recognise the unbroken, inalienable and enduring mana held by coastal hapū/iwi. The awards will not, and cannot, be a source of mana but will

contribute to the legal expression, recognition and protection of the ongoing exercise of the mana of coastal hapū/iwi; and

- relate to the nature and extent of the respective common law interests.

89. All awards would follow the new statutory regime in that the land in customary title would be:

- inalienable (i.e. could not be sold); and
- subject to the Cabinet-agreed assurances, for example of public access subject to certain limitations.

90. Further work will need to be carried out on whether customary title can be leased, licensed, mortgaged or transferred to other coastal hapū/iwi in accordance with tikanga Māori. I will report back to the Cabinet Committee in May 2010 on this matter.

91. I am aware that there will be some who will think that, as with tests, it should be for the courts alone to determine the awards. I therefore propose the Committee agree to my proposals for awards being the Government's preferred approach, and to their inclusion in the public discussion document. The document would include:

- my proposal for awards as detailed in this paper;
- the other two approaches to awards I have considered (Canadian and TTWMA); and
- the question of whether the replacement legislation should specify awards or whether these should be left to the courts to develop over time.

ALTERNATIVE AWARDS CONSIDERED

92. I have considered three different types of awards:

- awards based on Canadian jurisprudence;
- awards based on TTWMA; and
- awards that are an amalgamation of property and regulatory rights (my preferred option).

CANADIAN JURISPRUDENCE

93. One option would be to have the awards follow Canadian jurisprudence, that is they would be based on assurances that the rights are held collectively and are only alienable to the Crown. The awards would be based on property rights and provide:

- an exclusive right to use and possess as a group sees fit, including in a non-traditional way (but the group would be unable to use land in a manner irreconcilable with the fundamental nature of its own connection with the land);
- the right to approve or withhold consent to activities; and
- the right to obtain a commercial benefit from land use subject to relevant legislative frameworks (e.g. RMA).

TE TURE WHENUA MĀORI ACT 1993

94. Another option is to base the awards on TTWMA, that is, they would be based on assurances that the rights are held collectively. Under the current regime, the status of Māori customary land can be changed to Māori freehold or general land (which are alienable). This would need to be modified if this option were favoured. These awards would be based on property rights and provide:

- a declaration that land has "Māori customary land" status;
- the right to approve or withhold consent to activities;
- that the land is deemed to be Crown land for some purposes (e.g. trespass (section 144 (1) TTWMA); and
- the right to obtain a commercial benefit from land use subject to relevant legislative frameworks (e.g. RMA).

PREFERRED AWARDS

95. My preferred awards are an amalgamation of property and regulatory rights. Owners of private titles are allowed to exclude others from their property. The customary rights awarded under my proposals would be subject to the Cabinet-agreed assurances (e.g. public access). Accordingly, I have incorporated regulatory rights into the awards to compensate for the diminished bundle of rights coastal hapū/iwi would receive. My preference in this area is based on the assumption that some of the assurances Cabinet has decided on might not be provided for if the 2004 Act were repealed and the courts decided cases solely on the basis of the common law.

96. I therefore propose that the Cabinet Committee agrees that the public discussion document will include the three types of awards, with my preferred awards as the Government's preferred option.

97. The awards reflect the two thresholds for recognising customary interests, while seeking to provide specific outcomes for coastal hapū/iwi. Those outcomes would be:

- *authority* – a level of authority over resources and activities in a non-ownership regime; and

- *environmental management* – a role in environmental management in a non-ownership regime.

98. Coastal hapū/iwi will also have the right to obtain commercial benefit from land use, subject to relevant legislative frameworks such as the RMA.

99. In developing these awards, I have used the Ngāti Porou Deed of Agreement and the Te Whānau ā Apanui Heads of Agreement as a base. I think the mechanisms proposed in those agreements provide coastal hapū/iwi with opportunities to have their customary interests recognised in a meaningful and tangible way.

100. The awards proposed in this paper would be available to either coastal hapū or iwi as appropriate, i.e. groups with legitimate customary interests in the foreshore and seabed. The awards would apply automatically where a coastal hapū/iwi meets the required test through the court process. The awards, and potentially others, would also be available through negotiation with the Crown. The awards would be area specific (i.e. they would only apply in the specific area where customary interests were considered to have met the test, either through a court process or through a negotiations process).

101. I have considered the following:

Threshold	**Awards**
Non-territorial (to apply to areas where non-territorial interests have been recognised)	• Protection of customary activities (including non-commercial interests in aquaculture) • Placement of rāhui (prohibition) over wāhi tapu (sacred site) • Planning document
Territorial (to apply to areas where territorial interests have been recognised)	• Right to permit activities • Participation in conservation processes • Planning document

102. I am also considering an award to recognise the relationship coastal hapū/iwi have with taonga tūturu (protected objects under the Protected Objects Act 1975). I have directed the Ministry of Justice and Ministry for Culture and Heritage to work together on developing an appropriate award or awards. I will not be consulting on such an award at this stage as further work is required; however, a relevant award, or awards, may be proposed for inclusion in the final regime to be considered by Cabinet in May or June 2010.

103. I therefore propose that the Cabinet Committee agrees to my proposals for awards for recognition of non-territorial and territorial customary interests being the Government's preferred approach, and agree to their inclusion in the public

discussion document to be taken out for public consultation, along with the other two approaches (Canadian and TTWMA).

AWARDS FOR THE NON-TERRITORIAL THRESHOLD

104. The awards for reaching the non-territorial threshold would offer protection to non-territorial customary interests (i.e. customary uses, practices and activities) and provide regulatory rights to ensure those interests are provided for within regulatory regimes.

105. I propose three awards for the non-territorial threshold:

- protection of customary activities;
- placement of rāhui over wāhi tapu; and
- a planning document.

PROTECTION OF CUSTOMARY ACTIVITIES (INCLUDING NON-COMMERCIAL INTERESTS IN AQUACULTURE)

106. This award would provide that customary activities recognised through this award would be protected and regulated under the RMA. The award would do this by first excluding the recognised customary activities from the usual provisions of the RMA (by making such activities not subject to sections 9-17 of the RMA, or rules in plans or proposed plans, including resource consent requirements).

107. There would also be a provision to prevent a third-party resource consent being granted if it would adversely affect the customary activity being protected (as under section 107A of the RMA).

108. The award would, however, be subject to some controls through the RMA. The Minister of Conservation, in consultation with the Minister of Māori Affairs and taking account of the views of the relevant hapū/iwi, could impose controls on a customary activity if it were found that it was having significant adverse effects on the environment. This means the award would allow for the regulation of activities that would normally require resource consent.

109. As the award would recognise extant activities that have existed since 1840 and have been continuously exercised to the present day, I anticipate that the imposition of controls by the Minister of Conservation would be invoked infrequently.

110. This proposed award is similar to the provisions for the recognition of a customary rights order (under the 2004 Act), currently provided for in the RMA and the protected customary activities instrument in the Ngāti Porou Deed of Agreement.

PLACEMENT OF RĀHUI OVER WĀHI TAPU

111. This award would allow coastal hapū/iwi whose non-territorial interests have been recognised in a specific area to restrict or prohibit access to wāhi tapu (e.g. burial sites) and wāhi tapu areas in that specified area. Restriction and prohibition would only be put in place where it was required to protect wāhi tapu.

112. Access to wāhi tapu and wāhi tapu areas would be prevented through the Minister of Conservation and the Minister of Māori Affairs gazetting information on restrictions and prohibitions. The Minister of Conservation would also release a public notice of the wāhi tapu and wāhi tapu area(s).

113. How this award will work in practice, e.g. how prohibitions would be enforced and definitions of "rāhui" and "wāhi tapu", will be explored further by the Ministry of Justice. This proposed award is, however, similar to the provisions under the 2004 Act to establish wāhi tapu following the making of a customary rights order, and the wāhi tapu instrument in the Ngāti Porou Deed of Agreement.

PLANNING DOCUMENT

114. In thinking about awards for a universal threshold (which, as mentioned earlier in the paper, I am no longer pursuing) I had been thinking about a planning document that all coastal hapū/iwi would be entitled to develop. A planning document does not necessarily sit well as a non-territorial award as that threshold relates to recognising customary uses and practices, which a planning document does not explicitly do. I would still, however, like to provide as many groups as possible with a planning document award. Accordingly, I am proposing this award for the non-territorial threshold as it is a meaningful way of enhancing coastal hapū/iwi participation in environmental decision-making processes.

115. This award would allow coastal hapū/iwi to develop a planning document that sets out their objectives and policies according to their world view, including sustainable management and the protection of cultural and spiritual identity. The document would apply to the area where non-territorial interests have been recognised. Relevant local authorities would be required to have particular regard to the document to the extent that it relates to resource management issues and is consistent with the RMA. The planning document would need to be prepared in accordance with Part 2 of the RMA.

116. This award would require local authorities to review those provisions in their regional policy statements, regional and district plans that cover the area where non-territorial interests have been recognised to ensure those documents have particular regard to the coastal hapū/iwi planning document. This review would be done simultaneously with the local authority's scheduled review of its policy and planning documents. Until such reviews are completed, a local authority would:

- attach the coastal hapū/iwi planning document to its own documents; and

- when considering a resource consent application wholly or partly within, or directly affecting, the area where non-territorial interests have been recognised, have particular regard to the matters within the coastal hapū/iwi planning document that relate to resource management issues.

117. Such an approach:

- provides immediate effect to the planning document when decisions are made on resource consent applications;
- allows local authorities to change their policies and plans to incorporate the planning document in an effective and efficient manner; and
- ensures public involvement.

118. The Department of Internal Affairs (DIA) considers that this award should not apply to non-territorial customary interests. DIA thinks that it is difficult to see what applying the planning document to the area where non-territorial interests have been recognised actually provides hapū/iwi along with the other awards proposed (i.e. the ability to undertake customary activities as of right and protection from third party resource consents adversely impacting on the customary activity). DIA is concerned that the award could trigger council reviews of RMA plans and extra steps in resource consent processes, which could have high compliance costs for councils, ratepayers and applicants, and which are not commensurate with the scale and nature of the customary interest identified, nor necessary given the other awards. It also states that the current RMA provision that requires councils to take account of iwi management plans generally would continue to apply.

119. I think that it is appropriate for a planning document to apply to an area where non-territorial interests have been recognised, for the reasons given in paragraph 114. I do not agree with DIA's concerns that this award would trigger reviews of RMA plans. As stated in this paper (at paragraph 116), the intention is for reviews to coincide with a local authority's scheduled review of its policy and planning documents.

120. The planning document award would also require:

- the New Zealand Historic Places Trust to have particular regard to the planning document when considering an application for an authority under the Historic Places Act 1993 to destroy, damage, or modify an archaeological site within the area where non-territorial interests have been recognised;
- local authorities to consider the planning document under relevant sections of the Local Government Act 2002 where the relevant decision relates to the area where non-territorial interests have been recognised;
- the Department of Conservation to consider the document in relation to conservation management strategies covering the area where non-territorial interests have been recognised;

- the Ministry of Fisheries to consider the document in relation to fisheries plans covering the area where non-territorial interests have been recognised; and

- the coastal hapū/iwi to review its own document at regular intervals. The exact timeframes for review will require further consideration.

121. It would be unnecessarily onerous to require hapū/iwi to compile a new planning document if they have already developed a similar document. Therefore, I think groups may collate existing planning documents (e.g. iwi management plans under the RMA). I also think it should not be mandatory for coastal hapū/iwi to compile a planning document. A group might consider it unnecessary or not have the resources to compile one at the time of receiving the award. The Ministry for the Environment advises that producing effective planning documents requires significant resources.

AWARDS FOR THE TERRITORIAL THRESHOLD

122. I think awards that would accurately reflect a territorial level of customary interest, while also contributing to the expression of mana, should draw on two principal sources of rights:

- property rights (akin to some aspects of a fee simple estate); and

- regulatory rights.

123. I propose three awards for the territorial threshold:

- the right to permit activities;

- participation in conservation processes; and

- a planning document.

124. I do not envisage that these awards would have widespread geographical effect. In practice, the tests for high levels of recognition of customary interests are only likely to be met where there has been limited development of the foreshore and seabed and where coastal hapū/iwi have been able to maintain a demonstrably strong connection to the coast.

RIGHT TO PERMIT ACTIVITIES

125. This award would provide coastal hapū/iwi with the right to make an initial decision on whether a consent authority (e.g. a regional council) could progress an application for an activity requiring resource consent in the area where territorial interests have been recognised.

126. In exercising the right to permit activities, coastal hapū/iwi would:

- be required to give, or decline to give, their permission in writing within a set time period; and

- be able to request that the consent authority seek further information from the applicant.

127. If an applicant for resource consent did not receive permission from the coastal hapū/iwi, then the consent authority, or any other person[1], would not have jurisdiction to process, consider, or otherwise act on the application until permission had been received from the coastal hapū/iwi.

128. If the coastal hapū/iwi gave permission in respect of an application for a resource consent, the consent authority would be required to process the application in accordance with the RMA. Even with approval from the coastal hapū/iwi, however, the consent authority would still need to decide whether the application satisfied the statutory criteria of the RMA before consent could be granted. This means that two approvals would be required: an initial decision from the coastal hapū/iwi and, if its approval were given, a subsequent decision from the consent authority. The consent authority would be unable to grant a resource consent beyond the scope of the application that was permitted by the coastal hapū/iwi.

129. There would be no obligation on a coastal hapū/iwi to comply with the requirements of the RMA when giving, or declining, permission for a resource consent. This is because the decision of the coastal hapū/iwi could be made according to a Māori world view, on grounds which are not covered by the RMA. This also reflects the nature of the territorial interest, i.e. rights akin to those of a land owner.

130. The Ministry for the Environment advises that further consideration will need to be given to how potential delays to the consenting process that could result from a dual approval will be reconciled with the provisions of the 2009 amendments to the RMA. These provisions impose financial penalties on local authorities that do not meet statutory consenting timelines.

PARTICIPATION IN CONSERVATION PROCESSES

131. This award would provide a coastal hapū/iwi with the right to give, or refuse to give, its consent to conservation proposals and applications, where these are within the area where territorial interests have been recognised. This right would be subject to an additional element to ensure the Government's ability to achieve essential conservation outcomes is preserved. This additional element would be modelled on the existing test in the Ngāti Porou Deed of Agreement.

132. The relevant conservation proposals and applications are:

- applications to establish or extend marine reserves (under the Marine Reserves Act 1971);
- proposals to establish or extend conservation protected areas (under conservation legislation);

[1] Including the Minister for the Environment and Minister of Conservation in relation to calling in an application as a matter of national importance under the RMA.

- applications for concessions (under conservation legislation);
- proposals to establish or extend marine mammal sanctuaries (under the Marine Mammals Protection Act 1978); and
- applications for marine mammal watching permits (under the Marine Mammal Protection Regulations 1992).

133. The Minister of Conservation or Director-General of Conservation would be required to forward to the relevant coastal hapū/iwi any proposal or application for any matters contained in paragraph 132. The coastal hapū/iwi would then be required to give, or refuse, their consent in writing within a set time period.

134. The Minister of Conservation or Director-General of Conservation would not have the jurisdiction to progress a proposal or application for any matters contained in paragraph 132 within the area where territorial interests have been recognised, until initial approval had been given by that coastal hapū/iwi. Where initial approval were given:

- the Minister of Conservation or Director-General of Conservation would not be able to approve a proposal or application beyond the scope of the application or proposal that was provided to the coastal hapū/iwi;
- the Director-General of Conservation, in the case of a marine reserve application, would be required to process the application in accordance with the Marine Reserves Act, provided that:
    - consent would be deemed to include consent for signs, boundary markers and management activities that were disclosed to the coastal hapū/iwi when their consent was sought;
    - where the Minister intended to recommend boundaries that include parts of the area where territorial interests have been recognised, but which were not included in the original application, further consent would need to be obtained from that hapū/iwi;
- in the case of a marine mammal sanctuary, consent would be deemed to include consent for all activities necessary to manage the sanctuary that were disclosed to the coastal hapū/iwi when their consent was sought.

135. When giving, or refusing to give, consent there would be no obligation on the coastal hapū/iwi to make a decision based on criteria or restrictions set out in the relevant legislation. As with the "right to permit activities" award, the decision of the coastal hapū/iwi to give or refuse consent could be made according to a Māori world view, on grounds which are not covered by the relevant legislation. This also reflects the nature of the territorial interest, i.e. rights akin to those of a land owner.

136. The Department of Conservation advises that there are risks with including marine mammal sanctuaries and marine mammal watching permits within the scope of this award. The Department states that marine mammals are managed

independently of the foreshore and seabed because they are mobile, and that no private title holder in the foreshore and seabed has any rights to affect decisions on marine mammals that encroach on their land. My proposed award aims to provide for both rights similar to those of a private title holder and regulatory rights. These regulatory rights are necessary to compensate for the diminished bundle of rights groups receive due to the awards being subject to the Cabinet-agreed assurances.

137. The Department of Conservation considers that while the proposed award was provided in the Ngāti Porou Deed of Agreement it was only acceptable because the areas that would be affected were known and were not used by endangered marine mammals. The Department advises that it cannot assess the potential effects of this award on marine mammal management as it cannot predict what areas might be identified under the proposed tests. It notes that marine mammals are not evenly distributed throughout the marine environment and cannot be moved from an area if "protection has been vetoed".

138. The Department of Conservation also considers that the creation of a representative network of marine protected areas or the protection of a vulnerable terrestrial reserve has the same national significance as national infrastructure. The Department also thinks that, while it would often be possible to create protected areas in places that are not covered by the awards, there is no flexibility for unique ecosystems and offshore islands.

139. I want to ensure coastal hapū/iwi that meet the territorial tests enjoy a significant level of authority over what happens in the area where their territorial customary interests have been recognised in law. This award would not be available to all coastal hapū/iwi but would be geographically limited to those specific and discrete areas. I therefore think that there will not be a significant impact on the matters above raised by the Department.

140. The Department of Conservation also considers that an unfair commercial advantage could be created for coastal hapū/iwi over other operators in marine mammal watching and other commercial activities, which could also have a negative effect on the Crown's ability to fulfil its regulatory role.

141. I think that the Department of Conservation's concern over unfair commercial advantage is based on an assumption that coastal hapū/iwi will refuse to give consent for all applications and on the basis of commercial interests. This is a possibility; however, I do not think that it is likely that all groups with this award would automatically refuse consent.

PLANNING DOCUMENT

142. This would be the same document that coastal hapū/iwi would receive for the non-territorial threshold. The difference would be that the document would have a "higher status" (i.e. be recognised and provided for) in relation to areas where territorial interests have been recognised.

143. In these areas:

- local authorities would recognise and provide for the hapū/iwi planning document in relation to their own planning documents under the Resource Management Act 1991; and

- until the relevant local authority documents have been updated to recognise and provide for the hapū/iwi planning document, local authorities would recognise and provide for that document when considering an application for a resource consent.

144. The Ministry for the Environment advises that the effect of recognising and providing for the planning document would be that coastal hapū/iwi would exercise a very high level of control in the area where territorial interests have been recognised. This control would include effectively setting the planning framework under which the group could undertake any of its own "non-customary" activities.

145. DIA considers that the planning document with the status of "recognise and provide for" should not apply. It thinks the status is too directive and will undermine the governance role of local authorities. I think the status of the document is appropriate to recognise the nature of territorial interests. Also, as outlined in paragraph 115 the planning document must be developed in accordance with Part 2 of the RMA.

Issue three: How will coastal space be allocated?

146. The ability to undertake an activity in the foreshore and seabed is essentially a question about the allocation and occupation of space. Space is allocated for uses such as aquaculture, mining operations and the construction of structures (e.g. pipelines, wharves and drilling platforms) through the granting of coastal permits (a type of resource consent). The allocation of space is currently regulated by the RMA. Under the RMA the Crown (as owner of the foreshore and seabed) delegates the role of allocating space to local government. Regional councils decide who can occupy space and on what terms. The Director of Civil Aviation allocates air space above the foreshore and seabed.

147. Coastal permits are not a legal interest in land. They do not transfer ownership; they allow someone to occupy space. The RMA explicitly provides that coastal permits are not real or personal property.

148. If a non-ownership regime were adopted and Crown ownership removed, this would remove the current rationale for the allocation of space and a new rationale would be required. I think that existing processes for the allocation of space should be retained but with a new rationale: that it is the Crown's role to manage resources in the area on behalf of all New Zealanders. The Crown would continue to delegate the role of allocating space to local government which would make decisions on the allocation of space. Those decisions would be made in conjunction with those coastal hapū/iwi that receive awards to recognise their customary interests in the area. The degree of hapū or iwi involvement would depend on the level of customary interest (i.e. non-territorial or territorial) recognised and the consequent awards received. The awards

would be as specified in this paper (paragraphs 88-145), or could be new awards negotiated between the coastal hapū/iwi and the Crown.

149. I therefore propose the Cabinet Committee agrees to my proposals for allocation of space in a non-ownership regime being the Government's preferred approach, and agree to their inclusion in the public discussion document to be taken out for public consultation.

Issue four: Clarifying the status of structures

150. On dry land, the owner of land generally owns structures on that land (the same applies to foreshore and seabed land in private title). In contrast, the 2004 Act severs the ownership of a structure from the public land (foreshore and seabed) on which it is located. Accordingly, the public foreshore and seabed is now owned by the Crown, but privately owned structures on that land remain in private ownership (where that differs from the ownership of underlying land).

151. Certainty about the status of existing and yet-to-exist structures in the foreshore and seabed is fundamental to encouraging development of the area. Therefore, in a non-ownership regime where there would be no owner of the land itself, private ownership of both existing and new structures should be provided for. Existing ownership of structures should remain. Coastal hapū/iwi would participate in decision-making processes about whether new structures should be built. The degree of hapū or iwi involvement would depend on the level of customary interest (i.e. non-territorial or territorial) recognised and the consequent awards received. The awards would be as specified in this paper, or could be new awards negotiated between the coastal hapū/iwi and the Crown.

152. I therefore propose the Cabinet Committee agrees to my proposals for clarifying the status of structures in a non-ownership regime being the Government's preferred approach, and agree to their inclusion in the public discussion document to be taken out for public consultation in late March and April 2010.

Issue five: Clarifying the status of reclamations

153. A reclamation is the construction of dry land where there was previously land covered by water. In respect of reclamations the RMA empowers:

- regional councils to decide whether a proposal to reclaim is in accordance with the purpose of the RMA; and
- the Minister of Conservation to decide whether to vest an interest in the reclaimed land in a person and, if so, at what price.

154. The Department of Conservation (on behalf of the Minister) is currently dealing with 22 formal vesting applications for reclamations through two different processes under the RMA. Land Information New Zealand is dealing with pre-1991 reclamations under a third regime, the Lands Act 1948.

155. I note that when I recently met with some port companies representatives they suggested that Land Information New Zealand (on behalf of its Minister) be responsible for deciding where to vest an interest in the reclaimed land, and if so, at what price.

156. The 2004 Act provides that fee simple title is not available in reclamations. In lieu of fee simple title, port companies can obtain potentially renewable 50-year leasehold interests in reclamations. Port companies have indicated to me that they would like the law to revert to the pre-2004 Act status quo so that it would be possible for them to obtain fee simple title to reclamations. In the non-ownership regime I propose it would not be possible for port companies, or any other entity, to obtain fee simple title in reclamations.

157. If the Crown is not the owner of the foreshore and seabed it will not be possible for the Crown to grant a 50-year leasehold interest in reclamations to port companies. If the non-ownership regime were adopted, I propose that it would be possible for port companies to obtain a permit from the relevant local authority (similar to a coastal permit under the RMA) that would provide for an interest akin to a leasehold interest in a reclamation for up to 50 years (compared with a maximum of 35 years for a resource consent). This interest could be easily renewed for additional 50-year terms provided the applicant had observed the terms of the permit and proposed to continue using the reclamation for relevant port activities.

158. I therefore propose the Cabinet Committee agrees to my proposals for clarifying the status of reclamations in a non-ownership regime being the Government's preferred approach, and agree to their inclusion in the public discussion document to be taken out for public consultation.

Issue six: Clarifying the status of local authority-owned land

159. The 2004 Act vested all foreshore and seabed land owned by local authorities in the Crown. Local authorities could apply to the Minister of Conservation for redress for loss of these divested areas where they had been obtained by purchase. The 2004 Act set out the criteria to guide the Minister of Conservation in determining how much compensation was payable to local authorities, if any.

160. I propose that any existing local authority-owned land within the foreshore and seabed (i.e. purchased subsequent to the 2004 Act), if there is any, be incorporated into the public foreshore and seabed. There would therefore be no owner of that land. The Crown would pay compensation for that land to the local authority. I understand there may not be any land that fits this category and have directed my officials to identify any such land through Land Information New Zealand.

161. I therefore propose the Cabinet Committee agrees to my proposals for clarifying the status of local authority-owned land in a non-ownership regime being the Government's preferred approach, and agree to their inclusion in the public discussion document to be taken out for public consultation.

Issue seven: Clarifying the status of adverse possession and prescriptive title

162. Adverse possession and prescriptive titles are ways of acquiring a proprietary interest, by possessing or using, someone else's land (commonly known as "squatting"). The 2004 Act provides that no person may claim an interest in any part of the foreshore and seabed on the grounds of adverse possession or prescriptive title. I think the new regime should contain similar provisions to the 2004 Act by providing that no person may claim an interest in any part of the foreshore and seabed on the grounds of adverse possession or prescriptive title.

163. I therefore propose the Committee agree to my proposals for clarifying the status of adverse possession and prescriptive title in a non-ownership regime being the Government's preferred approach, and agree to their inclusion in the public discussion document to be taken out for public consultation.

Issue eight: Non-nationalised minerals

164. Cabinet has invited me, in consultation with the Minister of Energy and Resources, to report to the Treaty of Waitangi Cabinet Committee on non-nationalised minerals issues relating to the foreshore and seabed. I am working with the Minister of Energy and Resources to complete further work on these matters and will report to Cabinet in May.

Public discussion document

165. A public discussion document will be taken out for public consultation in late March and April 2010. In summary, I am seeking the Committee's agreement that its contents include the following:

- a non-ownership model will form the basis of the Government's proposals for replacing the 2004 Act;
- my preferred approach is that the High Court would have jurisdiction to determine claims for recognition of customary interests;
- the Government, however, seeks the public's view on which court should hear and determine applications for recognition of customary interests;
- my preferred approach is that, in a non-ownership regime, customary interests would be determined by direct negotiation between the Crown and coastal hapū/iwi, *and/or* coastal hapū/iwi accessing the courts;
- my preferred approach is that the burden of proof would be shared between the Crown and coastal hapū/iwi;
- my preferred approach is that the thresholds, tests and awards would be prescribed in legislation;

- the Government seeks the public's view on whether the replacement legislation should specify the thresholds, tests and awards or whether these should be left to the courts to develop over time;
- my proposal that there be two thresholds for determining customary interests (non-territorial and territorial respectively);
- my proposals for the tests of territorial or non-territorial customary rights as detailed in this paper, along with the other two approaches to tests I have considered (Canadian and TTWMA);
- my proposals for the awards on recognition of non-territorial or territorial customary rights as detailed in this paper, along with the other two approaches to awards I have considered (Canadian and TTWMA);
- my proposals for the allocation of space in a non-ownership regime;
- my proposals for clarifying the status of structures in a non-ownership regime;
- my proposals for clarifying the status of reclamations in a non-ownership regime;
- my proposals for clarifying the status of local-authority-owned land in a non-ownership regime; and
- my proposals for clarifying the status of adverse possession and prescriptive title in a non-ownership regime.

Next steps

166. Following public consultation in late March and April 2010, I will report back to the Cabinet Committee on Treaty of Waitangi Negotiations in May and June seeking final decisions on the regime that will replace the Foreshore and Seabed Act 2004.

Consultation

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

168. The Department of the Prime Minister and Cabinet and the Historic Places Trust were informed.

169. The Ministry of Economic Development and Treasury support public consultation occurring on the proposals outlined in this paper as the Government's preferred option. They state that Ministers need to be aware, however, that the flexibility and therefore uncertainty associated with the

proposed tests and awards is likely to impact investment in sectors such as aquaculture, minerals and tourism over coming years, and may attract negative comment from business. The scale of this impact will depend on factors such as the perceived extent of territorial interests and whether issues that can be covered in planning documents and the right to permit or decline activities are subject to statutory frameworks. It may be possible to design ways to mitigate this uncertainty when the details of the regime are finalised.

Discussion with Iwi Leaders Group

170. I met with the Iwi Leaders Group on Monday 8 March to discuss, in confidence, the draft proposals outlined in this paper. The Iwi Leaders Group indicated its commitment to:

- repeal of the 2004 Act;
- repeal of section 13 of the 2004 Act and no suggestion of continuing Crown ownership;
- recognition in the replacement framework of the mana, tikanga and kawa of iwi and hapū;
- engagement – both in the development and implementation of the regime – at the level of rangatira to rangatira.

171. Consistent with those principles, the Iwi Leaders Group supports further development of my proposals, but absolutely reserves its position on the substance of that proposal, pending the detail of it.

172. In particular, the Iwi Leaders Group has indicated that further work and consideration should be given to three elements of the proposals:

- that the replacement regime should provide a default level of recognition of mana (through improved input into, and influence of, management decisions), not dependent on achieving outcomes through either litigation or negotiation;
- that the tests should truly give effect to tikanga – not merely pay lip service, distort or redefine it – and should not exacerbate the effects of historical Treaty breaches by the Crown; and
- a trigger and/or framework for negotiations – that hapū/iwi take part in negotiations from a position of strength and are not solely subject to the discretion of the Crown as to whether negotiations begin and how they are conducted.

Financial implications

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

Human rights

174. 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

[redacted]

Legislative implications

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

Regulatory Impact Analysis

Regulatory Impact Analysis requirements

183. The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached (Appendix 1).

Quality of Impact Analysis

184. The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS and considers that the information and analysis summarised in the RIS meets the quality assurance criteria agreed by Cabinet, bearing in mind that this paper is not seeking final policy decisions but is simply identifying options on which public consultation will be undertaken. While RIAT thinks that the potential for unexpected or unintended effects may need further exploration, particularly for Option 4, identifying these issues is presumed to be one of the purposes of the planned consultation.

Consistency with Government Statement on Regulation

185. I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement. I am satisfied that regulation is likely to be required in the public interest but, as further policy details and implementation issues still need to be considered, I cannot be certain that the regulatory proposals in this paper will deliver the highest net benefits of the practical options available or are fully consistent with commitments to deliver better regulation and less regulation. Consequently, this paper seeks agreement to consult on a preferred option.

Publicity

186. The decisions made in this paper will form part of the public discussion document for the public consultation process (see the Cabinet paper: *Review of the Foreshore and Seabed Act 2004 – Proposed Consultation Process*). I propose issuing a media statement on the public consultation process, in conjunction with the release of the public discussion document on or about Wednesday 31 March, inviting the public to make written submissions.

Recommendations

187. I recommend that the Cabinet Committee:

BACKGROUND

1 **note** that Cabinet has previously noted the Government's intention to enact a regime to replace the Foreshore and Seabed Act 2004 and has agreed to principles and assurances to guide the development of that regime [TOW Min (09) 13/2, CAB Min (09) 42/4 and TOW Min (09) 13/1, CAB Min (09) 42/2];

2 **note** that the Cabinet has previously noted that the Government has a role in balancing the interests of all New Zealanders in the foreshore and seabed and one option for doing this is a "shared marine space" [TOW Min (09) 12/1, CAB Min (09) 39/27 and TOW Min (09) 14/, CAB Min (09) 45/4];

ISSUE DEFINITION

3 **note** that this paper seeks preliminary policy decisions on a preferred regime to replace the Foreshore and Seabed Act 2004 and that these decisions will inform the public discussion document, which will provide a focus for the consultation process scheduled to take place from 31 March to 30 April 2010;

GEOGRAPHICAL AREA WHERE NON-OWNERSHIP REGIME WILL APPLY

4 **note** that Cabinet has previously agreed that the working definition of the geographical area is:

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 private titles. [TOW Min (09) 14/1, CAB Min (09) 45/4].

5 **note** that the definition will be augmented with:

5.1 the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and

5.2 the air space and the water space above the areas described; and

5.3 the subsoil, bedrock, and other matters below the areas described;

6 **agree** that the new regime will apply to the same physical area as the "foreshore and seabed" in the Foreshore and Seabed Act 2004, except that Te Whaanga Lagoon in the Chatham Islands would be excluded (and will remain in Crown ownership);

OPTIONS FOR CLARIFYING ROLES AND RESPONSIBILITIES

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

7.1 Option One: vesting radical or notional title of the foreshore and seabed in the Crown subject to claims of customary title;

7.2 Option Two: vesting the foreshore and seabed in the Crown as its absolute property;

7.3 Option Three: vesting the foreshore and seabed with Māori as their absolute property; and

7.4 Option Four: taking a new approach to clarifying roles and responsibilities in the foreshore and seabed [TOW Min (09) 13/3, CAB Min (09) 42/4];

8 **note** that the Attorney-General recommends that Option four, a non-ownership regime, should replace the Foreshore and Seabed Act 2004 because such a regime will:

8.1 effectively address the criticisms associated with the Foreshore and Seabed Act 2004 and achieve the Government's objectives;

8.2 recognise there are different views on rights and responsibilities in the foreshore and seabed;

8.3 acknowledge and provide for the relationship of Māori with the foreshore and seabed; and

8.4 provide other interests, such as local authorities and businesses, with certainty as to how the foreshore and seabed will be regulated;

9 **agree** that the Attorney-General's preferred option of a non-ownership regime (Option four) will form the basis of the Government's proposals for replacing the Foreshore and Seabed Act 2004;

HOW WILL CUSTOMARY INTERESTS BE DETERMINED?

10 **agree** that customary interests will be able to be determined by:

10.1 direct negotiation between the Crown and coastal hapū/iwi; and/or

10.2 coastal hapū/iwi accessing the courts;

WHAT THRESHOLDS, TESTS AND AWARDS MIGHT APPLY?

11 **note** that the Attorney-General has considered leaving it to the courts to determine tests, thresholds and awards;

12 **note** that the Attorney-General's preferred approach is to prescribe thresholds, tests and awards in legislation;

THRESHOLDS

13 **agree** there will be two thresholds, each with its own test and set of awards, for recognising customary interests in a non-ownership regime:

13.1 *Non-territorial* – recognises customary use rights including activities and practices; and

13.2 *Territorial* – recognises customary interests that are territorial in nature and extent (otherwise known as "customary title");

TESTS

14 **note** the Attorney-General considered three different tests for customary title:

14.1 tests based on Canadian jurisprudence (common law only);

14.2 tests based on Te Ture Whenua Māori Act 1993 (tikanga Māori only); and

14.3 tests that combines tikanga Māori and common law elements;

15 **note** that the Attorney-General's preferred tests combine tikanga Māori and common law elements;

16 **agree** the test for recognition of non-territorial customary interests will have the following elements:

16.1 state that a customary right (activity, use or practice) carried out by a hapū or iwi in the relevant foreshore and seabed area is recognised where the right:

16.1.1 has been in existence since 1840; and

16.1.2 continues to be carried out in accordance with tikanga Māori in the area specified by the applicant; and

16.1.3 has not been extinguished;

17 **agree** the test for recognition of territorial customary interests will have the following elements:

17.1 state that a territorial interest is recognised where the following elements are proven:

17.1.1 in order to establish the necessary connection/interest the relevant foreshore and seabed area must be held in accordance with tikanga Māori;

17.1.2 this connection/interest must be of a level that accords with the applicant group having "exclusive use and

occupation" of the relevant foreshore and seabed area; and

17.1.3 this "exclusive use and occupation" must be from 1840 until the present without substantial interruption;

17.2 in assessing exclusive use and occupation the following points will be clarified:

17.2.1 the court may take into account (but not require):

i. ownership of abutting land; and

ii. customary fishing; and

17.2.2 fishing and navigation by third parties does not preclude a finding that a group has had exclusive use and occupation from 1840 until the present without substantial interruption;

17.2.3 customary transfers of territorial interests between hapū and iwi post-1840 will be recognised; and

17.2.4 "shared" exclusivity between coastal hapū/iwi as against other third party interruptions will be allowed for.

AWARDS

18 **agree** that the land in customary title would be inalienable;

19 **note** that the Attorney-General has considered three different types of awards:

19.1 awards based on Canadian jurisprudence;

19.2 awards based on Te Ture Whenua Māori Act 1993; and

19.3 awards that are an amalgamation of property and regulatory rights;

20 **note** that the Attorney-General's preferred option is awards that are an amalgamation of property and regulatory rights;

21 **agree** that awards should provide for specific outcomes for coastal hapū/iwi:

21.1 *authority* – a level of authority over resources and activities in a non-ownership regime; and

21.2 *environmental management* – a role in environmental management in a non-ownership regime;

22 **note** that coastal hapū/iwi will have the right to obtain commercial benefit from land use, subject to relevant legislative frameworks such as the RMA;

23 **agree** that the awards for the non-territorial threshold will be:

23.1 *protection of customary activities* – customary activities, including non-commercial aquaculture, in an area where a non-territorial interest has been recognised would be:

23.1.1 able to be carried out without the need for a resource consent;

23.1.2 protected against the granting of consents to others where that consent would have an adverse effect on the non-territorial interest;

23.2 *placement of rāhui over wāhi tapu* – coastal hapū/iwi would be able to restrict or prohibit access to wāhi tapu or wāhi tapu areas within an area where non-territorial interests have been recognised;

23.3 *a planning document* covering the area where non-territorial interests have been recognised, outlining objectives and policies of coastal hapū/iwi that:

23.3.1 local authorities will have particular regard to, to the extent it relates to resource management issues and is consistent with the Resource Management Act 1991, in relation to their planning documents and resource consent processes under the Resource Management Act 1991;

23.3.2 the Historic Places Trust will have particular regard to when considering an application relating to an historic site;

23.3.3 local authorities will consider under relevant sections of the Local Government Act 2002;

23.3.4 the Department of Conservation will consider in relation to conservation management strategies; and

23.3.5 the Ministry of Fisheries will consider in relation to fisheries plans.

24 **agree** that the awards for the territorial threshold will be:

24.1 *a right to permit activities* – providing coastal hapū/iwi with the right to approve, or withhold approval, for an activity requiring a resource consent in an area where territorial interests have been recognised;

24.2 *participation in conservation processes* – in an area where territorial interests have been recognised, coastal hapū/iwi would have the right to give, or refuse to give, consent to:

24.2.1 applications to establish or extend marine reserves (under the Marine Reserves Act 1971);

24.2.2 proposals to establish or extend conservation protected areas (under conservation legislation);

24.2.3 applications for concessions (under conservation legislation);

24.2.4 proposals to establish or extend marine mammal sanctuaries (under the Marine Mammals Protection Act 1978); and

24.2.5 applications for marine mammal watching permits (under the Marine Mammal Protection Regulations 1992);

24.3 *a planning document* – the same document as for the non-territorial threshold, with the addition of, in an area where territorial interests have been recognised,:

24.3.1 local authorities will recognise and provide for, to the extent it relates to resource management issues and is consistent with the Resource Management Act 1991 in relation to the local authority's planning documents and resource consent processes under the Resource Management Act 1991;

24.3.2 until the relevant local authority documents have been updated to recognise and provide for the planning document, local authorities will recognise and provide for the planning document when considering an application for a resource consent;

HOW WILL COASTAL SPACE BE ALLOCATED?

25 **agree** that the rationale for the Crown/local government allocation of space in a non-ownership regime will be that it is the Crown's role to manage resources in the area on behalf of all New Zealanders;

26 **agree** that in a non-ownership regime, the Crown will continue to delegate the role of allocating space to local government, which will continue to make decisions on the allocation of space;

27 **note** that in a non-ownership regime, decisions on the role of allocating space will be made in conjunction with coastal hapū/iwi that receive awards to recognise their customary interests in an area; and

28 **note** that in a non-ownership regime the degree of hapū/iwi involvement in decision-making on the allocation of space would depend on the level of customary interest recognised and the consequent awards received;

CLARIFYING THE STATUS OF STRUCTURES

29 **agree** that the non-ownership regime will provide for private ownership of new and existing structures in the public foreshore and seabed;

30 **agree** that the non-ownership regime will provide that current ownership of existing structures in the foreshore and seabed will remain unaffected;

31 **note** that in a non-ownership regime decisions about whether new structures should be built could provide for enhanced hapū/iwi participation in decision-making, depending on the level of customary interest recognised and the consequent awards received;

CLARIFYING THE STATUS OF RECLAMATIONS

32 **agree** that in a non-ownership regime it will be possible for port companies to obtain a potentially renewable 50-year permit (akin to a leasehold interest) in reclamations in the public foreshore and seabed;

CLARIFYING THE STATUS OF LOCAL AUTHORITY-OWNED LAND

33 **agree** that in a non-ownership regime any existing local authority-owned land within the foreshore and seabed (i.e. purchased subsequent to the Foreshore and Seabed Act 2004) will be incorporated into the public foreshore and seabed and that there would therefore be no owner of that land;

CLARIFYING THE STATUS OF ADVERSE POSSESSION AND PRESCRIPTIVE TITLE

34 **agree** that in a non-ownership regime no person would be able to claim an interest in any part of the foreshore and seabed on the grounds of adverse possession or prescriptive title;

PUBLIC DISCUSSION DOCUMENT

35 **agree** that the public discussion document to be taken out for public consultation in late March and April 2010 will include the following:

35.1 a non-ownership model will form the basis of the Government's proposals for replacing the Foreshore and Seabed Act 2004;

35.2 my preferred approach is that the High Court would have jurisdiction to determine claims for recognition of customary interests;

35.3 the Government, however, seeks the public's view on which court will hear and determine applications for recognition of customary interests;

35.4 my preferred approach is that, in a non-ownership regime, customary interests would be determined by direct negotiation between the Crown and coastal hapū/iwi, *and/or* coastal hapū/iwi accessing the courts;

35.5 my preferred approach is that the burden of proof would be shared between the Crown and coastal hapū/iwi;

35.6 my preferred approach is that the thresholds, tests and awards would be prescribed in legislation;

35.7 the Government seeks the public's view on whether the replacement legislation should specify the thresholds, tests and awards or whether these should be left to the courts to develop over time;

35.8 my proposal that there be two thresholds for determining customary interests (non-territorial and territorial respectively);

35.9 my proposals for the tests of territorial or non-territorial customary rights as detailed in this paper, along with the other two approaches to tests I have considered (Canadian and TTWMA);

35.10 my proposals for the awards on recognition of non-territorial or territorial customary rights as detailed in this paper, along with the other two approaches to awards I have considered (Canadian and TTWMA);

35.11 my proposals for the allocation of space in a non-ownership regime;

35.12 my proposals for clarifying the status of structures in a non-ownership regime;

35.13 my proposals for clarifying the status of reclamations in a non-ownership regime;

35.14 my proposals for clarifying the status of local-authority-owned land in a non-ownership regime; and

35.15 my proposals for clarifying the status of adverse possession and prescriptive title in a non-ownership regime.

NEXT STEPS

invite the Attorney-General to report back to the Cabinet Committee on Treaty of Waitangi negotiations on 19 May 2010 seeking final decisions on the regime which will replace the Foreshore and Seabed Act 2004.

Hon Christopher Finlayson
Attorney-General

Date: 10 / 3 / 2010.