Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

REVIEW OF THE FORESHORE AND SEABED ACT 2004: REPORT BACK ON PUBLIC CONSULTATION PROCESS AND PROPOSALS FOR A NEW REGIME

Purpose

1 The purpose of this paper is to:

a report back to Cabinet on the public consultation process undertaken in April 2010; and

b seek Cabinet agreement to a set of policy proposals for a complete replacement regime which will form the basis for drafting instructions to the Parliamentary Counsel Office.

Executive summary

2 The Government has been undertaking a review of the Foreshore and Seabed Act 2004 (the 2004 Act), with a view to possible repeal and replacement with a new regime. The regime should achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed and align with Cabinet-agreed principles and assurances.

3 Any replacement legislation must ameliorate or remedy the substantive and procedural issues of the 2004 Act, in particular its discriminatory effect on Māori interests. In this respect, the Government has endeavoured to base the development of policy proposals on transparent and inclusive consultation processes that provide for public and stakeholder input at critical points.

4 A public consultation document outlining the Government's preferred policy proposals for a replacement regime was released in March 2010. The document asked for submissions on the proposals and sought feedback on specific questions about the possible characteristics of a new regime.

5 Hui and public meetings were held throughout New Zealand as part of the April 2010 consultation process. At the hui there was a clear theme of support for the repeal of the 2004 Act. This was in contrast to the public meetings where there was generally support for retention of the status quo.

6 A total of 1593 written submissions were received on the Government's proposals. The written submissions reflect a wide range of views. Most submitters were strongly of the belief that the foreshore and seabed should remain in Crown ownership, and many of those did not support any form of recognition of Māori customary interests. This finding is in stark contrast to the submissions on the Foreshore and Seabed Bill in 2004 (and a hīkoi over of

50,000 people), the critiques of two United Nations bodies and submissions to, and the recommendations of, the Ministerial Review Panel last year.

7 The proposals in this paper may not satisfy the views of those who repeatedly expressed a 'one law for all' argument. This argument is spurious. The negation of bona fide customary interests is not 'one law for all' – it is one law for the majority.

8 I do not think that prolonging the review process will result in better solutions: foreshore and seabed issues have now been thoroughly considered and discussed and it is likely that a longer process may result in further intractability. I think it is up to the Government to lead the development of a durable solution which addresses the flaws of the 2004 Act and provides certainty and equity for all the interests at stake.

9 The proposals in this paper build on the ideas outlined in the consultation document. Should Cabinet agree to these proposals, the public and interested parties will then get a further opportunity for input at the select committee stage.

High level proposals

10 I propose that the 2004 Act be repealed and replaced with legislation that has the following elements:

a a stated object and purpose reflecting the assurances and principles agreed by Cabinet earlier this year;

b customary title interests will be restored and able to be recognised through tests and awards specified in the replacement Act;

c the foreshore and seabed area currently vested in Crown ownership will be identified as the "New Zealand marine coastal access area", which is predicated on no one owning the foreshore and seabed (in a fee simple sense) other than those private titles already preserved;

d public access will be provided for in, on, over and across the New Zealand marine coastal access area, subject to any authorised limits; and

e the navigation and fisheries provisions set out in the 2004 Act will be continued in the new regime.

Negotiation and courts

11 I think applicant groups should be able to negotiate directly with the Crown for recognition of customary title. As an alternative to negotiations, recourse to a court process will be available to applicant groups for the recognition of both customary title and customary rights. I propose that the Crown makes a contribution to the negotiation costs of mandated groups under the new regime.

12 I invite Ministers to decide whether jurisdiction for customary title and customary rights applications should be held by the High Court or by the Māori Land Court. My own view is that the High Court should hold jurisdiction with the ability to refer matters of tikanga to the Māori Appellate Court.

13 I think the burden of proof for customary title and rights applications should be shared between the applicant group and the Crown with each proving the elements it is best placed to prove (i.e. the Crown to prove legal extinguishment).

Recognition of customary interests

14 I propose that the new legislation provide that any customary title extinguished by the 2004 Act be restored, and prescribe recognition for the following types of customary interests:

a 'mana tuku iho': statutory recognition of the enduring mana-based relationship of tangata whenua with the foreshore and seabed;

b customary rights: recognises non-territorial customary use rights including activities and practices; and

c customary title: recognises customary interests that are territorial in nature and extent.

15 Successful customary title and rights claims will only have legal effect through the awards provided for in the new Act or as negotiated.

Tests

16 The elements of the test will be set out in legislation in a way that positions tikanga Māori as an integral component for testing interests and ensures that those interests are broadly consistent with common law customary title. Accordingly, the nature of the test for customary title requires the area to be held in accordance with tikanga Māori. Exclusive use and occupation without substantial interruption since 1840 will also be required. The interest must not have been extinguished. Having continuous title to contiguous land is to be a relevant consideration rather than a requirement (as it was under the 2004 Act). The test will allow for shared exclusivity and customary transfers since 1840.

17 The test for customary rights will differ to that of customary title to reflect differences in the nature of interest. While continuity since 1840 will be a requirement, exclusive use and occupation is not, as the interest is not in the land itself.

Awards

18 The 'mana tuku iho' level of recognition will be in the form of a statutory acknowledgement of the enduring, mana-based relationship of tangata whenua

with the foreshore and seabed. The expression of this relationship would be facilitated through participation in conservation processes.

19 The proposed customary rights awards will result in protection of customary uses, activities and practices and provide for these in existing environmental management regimes.

20 In a no ownership regime, customary title will not amount to ownership of land, but the proposed awards have been developed to broadly reflect the interests and rights of a property owner. Awards are also proposed which would give the customary title holder a level of influence in the management of the area. This will be subject to the Government's assurances, most notably access, and to recognise and allow for the expression of the customary title holder's mana.

21 The proposed awards for customary title are:

a the right to permit activities requiring resource consent under the Resource Management Act 1991 (RMA);

b the right to permit certain conservation related activities;

c a planning document;

d ownership of non-nationalised minerals;

e prima facie ownership of taonga tuturu; and

f protection of wāhi tapu.

22 Customary title holders will be able to use, benefit from, and develop the area to which customary title applies, within the confines of existing legislative frameworks (e.g. resource consent and planning under the RMA).

Reclamations

23 A range of entities have interests in acquiring and using reclamations for expanding their activities (e.g. port companies, airports, yacht clubs and private developments). I invite Ministers to decide whether, in a regime predicated on no-ownership, the new legislation should provide for fee simple title, leasehold interests or coastal permits in reclamations.

24 I propose that the new legislation continue existing decision-making processes for reclamations. Existing applications will continue to be dealt with as though the Crown were the owner of the underlying land. For new applications, local authorities will continue to perform their current role of considering the environmental effects of a proposed reclamation. I also propose, unless a reclamation has been abandoned, the new foreshore and seabed regime will provide that only the person who constructs a reclamation can apply for an interest in that reclamation.

Allocation of space and other policy initiatives

25 The Crown with local government will continue to allocate space in a non-ownership regime. I propose the rationale for this is: the Crown's role is to manage resources in the area on behalf of all New Zealanders and 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. Decisions on allocation would also be subject to customary title holder rights to permit activities.

26 I propose that, aside from decisions on reclamations and customary interests, issues relating to infrastructure (including ports), resource consent security and duration and Māori participation in Resource Management Act 1991 (RMA) processes should be dealt with in the RMA Phase II reforms. I also note that Cabinet has already made decisions on resource consent security and duration for aquaculture (CAB Min (10) 9/2).

Interface with other legislation and miscellaneous matters

27 I make a number of proposals relating to:

a local authority-owned land;

b roads;

c structures;

d local Acts which apply to the foreshore and seabed; and

e other miscellaneous matters, for example leases and licences, adverse possession and prescriptive title and the performance of administrative functions in the foreshore and seabed.

Further decisions and drafting instructions

28 I seek agreement to instruct the Parliamentary Counsel Office to draft a Bill in accordance with Cabinet's decisions.

29 Following completion of the Bill's drafting by Parliamentary Counsel, I propose reporting to the Cabinet Legislation Committee in July 2010 to seek approval to introduce the Bill into the House. Following that approval, the Bill will be introduced into the House with the aim of enactment by December 2010.

30 At the same time, I will report back to Cabinet Legislation Committee on any technical changes that have arisen in the Bill drafting stage and the outstanding matters raised in this paper.

Table of contents

Background

Review of the 2004 Act

1 The review dates back to the substantive and procedural issues surrounding the enactment of the Foreshore and Seabed Act 2004 (the 2004 Act), the subsequent national and international criticism of the disproportionate negative effect of the 2004 Act on Māori, and the Relationship and Confidence and Supply Agreement between the National Party and the Māori Party.

2 As a result, the Government has been undertaking a review of the 2004 Act, with a view to possible repeal and replacement with a regime that achieves an equitable balance of the interests of all New Zealanders in the foreshore and seabed and aligns with Cabinet-agreed principles and assurances.

3 This review has been a Government priority and an important part of the Government's work programme. The proposals in this paper are a significant milestone towards the completion of the review.

The objective of the review of the 2004 Act

4 The Government's objective is that if the 2004 Act is to be repealed, it must be replaced by a regime that achieves an equitable balance of the interests of all New Zealanders in the foreshore and seabed [CAB Min (09) 42/4].

5 Any replacement legislation must also ameliorate or remedy the substantive and procedural issues of the 2004 Act, in particular its discriminatory effect on Māori interests. This discriminatory effect has been commented on internationally and nationally, by:

a the United Nations' Committee on the Elimination of Racial Discrimination (in 2005):

> *"The [2004 Act] appears to the Committee, on balance, to contain discriminatory aspects against Māori, in particular in its extinguishment of the possibility of establishing Māori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress."*

b the United Nations' Special Rapporteur (in 2006):

> *"..[under the 2004 Act the] Crown extinguished all Māori extant rights to the foreshore and seabed in the name of the public interest and at the same time opened the possibility for the recognition by the Government of customary use and practices through complicated and restrictive judicial and administrative procedures."*

c the Ministerial Review Panel (in 2009):

> *"[t]he Act is discriminatory as – by definition – it affects only Māori rights. While it grants to all the opportunity to bring cases, the titles that the legislation extinguishes are, exclusively, customary titles held by Māori."*

6 All three commentators urged the Government to reconsider the 2004 Act and to engage in a dialogue with Māori over their rights and interests in the foreshore and seabed. In this respect, the Government has endeavoured to base the development of policy proposals on transparent and inclusive consultation processes that provide for public, Māori and stakeholder input at critical points.

Cabinet-agreed principles and assurances

7 The policy underpinning the proposed new regime is, I believe, robust and substantively fair. It reflects the principles and assurances agreed by Cabinet [CAB Min (09) 42/4], which were set out in the consultation document.

PRINCIPLES

8 The Cabinet-agreed principles underlying the policy are:

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

b Good faith – to achieve a good outcome for all following fair, reasonable and honourable processes.

c Recognition and protection of interests – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed.

d Access to justice – the new regime must provide an accessible framework for recognising and protecting rights in the foreshore and seabed.

e Equity – provide fair and consistent treatment for all.

f Certainty – transparent and precise processes that provide clarity for all parties including for investment and economic development in New Zealand.

g Efficiency – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

COMMON UNDERSTANDINGS OR ASSURANCES

9 The Cabinet agreed assurances underlying the policy are:

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

b Respect for rights and interests – in particular:

i Recognition of customary rights and interests – the replacement regime will include recognition of customary rights and interests in order to address the disproportionate impact the 2004 Act had on customary interests.

ii Protection of fishing and navigation rights – fishing rights provided under fishing legislation will be protected, and rights of navigation in the foreshore and seabed will be protected, subject to certain exceptions such as in harbours.

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

Review process to date

10 To date, the following milestones have been achieved:

a Relationship and Confidence and Supply Agreement between the National Party and the Māori Party establishing the review as a priority;

b appointment of an independent Ministerial Review Panel which undertook a public consultation process on the 2004 Act and provided a report to Government;

c development of policy and Cabinet decisions on the objective, principles and assurances and options for repeal and replacement of the 2004 Act;

d release of a public consultation document *Reviewing the Foreshore and Seabed Act 2004* setting out the Government's preliminary proposals for replacing the 2004 Act; and

e completion of a public consultation process (involving hui and public meetings and a written submissions process in response to the proposals set out in the consultation document) and meetings with stakeholder groups and an Iwi Leaders' Group to discuss, in confidence, the Government's proposals.

Recommendations (Background)

- **Note** that, to date, the following milestones have been completed in the review of the Foreshore and Seabed Act 2004 (the 2004 Act):
    - Relationship and Confidence and Supply Agreement between the National Party and the Māori Party establishing the review as a priority.
    - appointment of an independent Ministerial Review Panel which undertook a public consultation process on the 2004 Act and provided a report to Government;
    - development of policy and Cabinet decisions on the objective, principles and assurances and options for repeal and replacement of the 2004 Act;
    - release of a public consultation document setting out the Government's preliminary proposals for replacing the 2004 Act; and
    - completion of a public consultation process (involving hui and public meetings and a written submissions process in response to the proposals set out in the consultation document) and meetings with stakeholder groups and an Iwi Leaders' Group to discuss, in confidence, the Government's proposals.

Part One: Report back on public consultation process

Purpose

1 This part of the paper provides information on the April 2010 public consultation process, the information gathered at the hui and public meetings and high-level outcomes of the written submissions process.

Background

2 On 22 March 2010, Cabinet agreed:

a to a four week public consultation process (31 March 2010 to 30 April 2010) on the Government's preferred regime for replacing the 2004 Act;

b that the public consultation process will include the release of a public discussion document seeking written submissions, supported by:

i public meetings and hui held nationwide, at which the Attorney-General will present the Government's policy proposals;

ii meetings between the Attorney-General and key stakeholders [CAB Min (10) 10/10].

3 At the same meeting, Cabinet agreed that the public discussion document to be released for public consultation should indicate the Government's preferred proposal for replacing the 2004 Act. That proposal included the following core elements:

a there would be no specified owner of the foreshore and seabed;

b recognition of two types of customary interests (non-territorial and territorial);

c the processes for determining customary interests (courts and negotiations);

d the applicable tests and awards; and

e other issues, including allocation of space and ownership of structures.

Overview of April 2010 public consultation process

4 This is the second round of consultation with the public on the review of the 2004 Act (the first being the Ministerial Review Panel). If the decision is made to repeal the 2004 Act and replace it with new legislation, the public will have a third opportunity to put forward their views in the select committee process.

5 Throughout this review process the Government has endeavoured to ensure that the development of its policy is based on a transparent and inclusive consultation process that provides for continued public input at critical points.

6 In this round of consultation, the Government consulted widely through public meetings and hui. Comments (both oral and written) on the Government's preliminary proposal were numerous. I think people have had sufficient time to participate.

7 On 31 March 2010, the public consultation document was released. It was also distributed to key stakeholders, including those who have submitted on the 2004 Act in the past (to the Fisheries and Other Sea-Related Legislation Select Committee on the Foreshore and Seabed Bill in 2004, and/or to the Ministerial Review Panel in 2009). It was also made publicly available on a dedicated website.

8 The consultation document formed the basis for discussion at the public meetings and hui. It also included a submission form comprising 27 questions or requests for comment, and invited people and groups to send their responses to the Government for consideration.

9 I presented the Government's proposals at 20 public meetings and hui around the country in April 2010. Attendees were able to give their views on the proposals and ask questions. The public meetings and hui were well attended, with over 1200 attendees in total. On average, more people attended the hui than the public meetings.

10 In addition, I met with numerous key stakeholder groups from a variety of sectors to discuss the Government's proposals, including Fish and Game New Zealand, Local Government New Zealand, the Business Roundtable, Federated Farmers, Aquaculture New Zealand, the New Zealand Law Society and Port Companies.

11 There were 1593 written submissions on the consultation document. A broad overview of the themes of these meetings and the written submissions is set out below. Submissions related to the specifics of the Government's proposals are presented in the remainder of the Cabinet paper under the relevant section.

Themes at hui and public meetings

12 The vast majority of those who spoke at the hui and many of those who spoke at public meetings supported repeal of the 2004 Act. Reasons commonly given were that the 2004 Act: breaches the New Zealand Bill of Rights Act 1990; is a violation of natural rights and the right to go to court; is racially discriminatory; and breaches the Crown's Treaty duty to act in good faith and actively protect Māori property.

13 A recurring view of those who spoke at the hui was that the 2004 Act was a fundamental breach of the Treaty of Waitangi and 'trampled' on tino rangatiratanga.

14 Several of those who did not support repeal disputed the Government's suggestion that there was widespread dissatisfaction with the 2004 Act and expressed concern about the reasons for changing it. Speakers stated the 2004 Act is correct in affirming the foreshore and seabed is owned by the Crown and that the present system is satisfactory.

15 The observations made by the Ministerial Review Panel regarding two distinctive worldviews, fundamental cultural differences and a lack of cross-cultural understandings were evident at the hui and public meetings. Ownership, race relations and equality were common themes and the perspectives generally differed depending on whether the meeting was a hui or a public meeting.

Written submissions process

16 The 1593 written submissions received in response to the consultation document reflected a wide range of views from both groups and individuals. Many submitters chose not to use the submission form and as a result did not directly address the questions posed in the consultation document. Submissions varied in size and content. Some clearly had been informed by the contents of the consultation document, while others provided more general comments on the foreshore and seabed issue or were copies of submissions that were provided in 2003/04 or 2009.

17 Overall, written submissions indicated that many submitters are still focused on the fundamental underlying issues associated with the foreshore and seabed, rather than on the detail of the Government's proposals. The minority of submissions that addressed the proposals in a clear and informed manner made it apparent that those submitters had thought deeply about the issues before making their submission.

18 In many cases, it seemed that submitters had not fully explored the issues raised in the Government's proposal. This is understandable given the complexities involved. It is also evident that there are still many common misunderstandings, ranging from the geographic area of the foreshore and seabed (i.e. we are not dealing with 'the beach') and the current balance of private and other ownership interests to the context and administration of the 2004 Act. These submissions tended to provide emotive responses rather than responses based on a considered analysis and understanding of the proposals.

Addressing the views gathered through consultation

19 Those people whose interests were most negatively affected by the 2004 Act (i.e. Māori) supported its repeal (through the written submissions process and in hui and public meetings). However, the majority of written submitters were strongly of the belief that the foreshore and seabed should remain in Crown ownership, and many of those did not support any form of recognition of Māori customary interests. The outcome of the written submissions process contrasts starkly with the submissions on the then Foreshore and Seabed Bill in 2004 (and the hīkoi of over of 50,000 people), the critique of two United Nations

bodies and the submissions to, and the recommendations of, the 2009 Ministerial Review Panel.

20 Like all consultation processes of a complex and controversial nature, final policy proposals cannot satisfy all submissions canvassed through that process, because of the wide diversity of views and ideas.

21 A key driver for the Government's proposals was to move away from the polarising issue of ownership. Vesting ownership can have the effect of extinguishment of other interests and would therefore be difficult to achieve an equitable balance of the interests of *all* New Zealanders in the foreshore and seabed. Many submitters (particularly those who used pro forma submissions) are still focused on the issue of ownership. It seems those particular submitters are not yet ready or able to see past this issue.

22 To some extent, I think the strong sentiments of many submitters are the result of the way in which the 2004 Act was passed. The intricacies of the issue then became obscured by emotion. Views were strongly polarised and remain so.

23 The proposals in this paper may not satisfy the views of those who repeatedly expressed a 'one law for all' argument. This argument is spurious. The negation of bona fide customary interests is not 'one law for all' – it is one law for the majority.

24 I do not think that prolonging the review process will result in better solutions. Foreshore and seabed issues have been thoroughly considered and discussed and it is likely that a longer review process may simply result in further intractability. I think it is up to the Government to lead the development of a durable solution which addresses the flaws of the 2004 Act and provides certainty and equity for all the interests at stake.

25 For the reasons above, I remain firmly of the view that the 2004 Act should be repealed and replaced by a new regime. I outline the policy proposals for such a regime here. The proposals build on the ideas outlined in the consultation document. Should Cabinet agree to these proposals, the public and interested parties will then get a further opportunity for input at the Select Committee stage once the Bill for the replacement regime is drafted.

Public release of submissions

45 I recommend the written submissions received on the consultation document be publicly released at the time that public announcements are made on the Government's final policy decisions on the review of the 2004 Act.

Recommendations (public consultation process)

- **Note** that the Government has recently completed a second round of consultation with the public as part of its review of the 2004 Act;

- **Note** that the vast majority of those who spoke at the 20 hui and public meetings held around the country supported repeal of the 2004 Act;
- **Note** that of the 1593 written submissions received, most did not support repeal or the Government's proposals;
- **Note** the Attorney-General's view that prolonging the review process is unlikely to result in better solutions; and
- **Agree** that the written submissions received on the consultation document are publicly released at the time that public announcements are made on the Government's final policy decisions on the review of the 2004 Act.

Part Two: High-level proposals for a new regime

Purpose

1 This part of the paper invites Cabinet to decide on the:

a repeal of the 2004 Act (and whether to replace it);

b stated object and purpose of any replacement legislation;

c ownership status of the foreshore and seabed;

d name of the new regime;

e area over which the new regime applies; and

f fishing, access, and navigation.

Repeal of the 2004 Act

Overview

2 The public response to the 2004 Act demonstrates that a significant number of New Zealanders do not support it. In 2004, approximately 94% of 3,946 submissions made to the Fisheries and Other Sea-Related Legislation select committee opposed the then Foreshore and Seabed Bill 2003. Independent international and national commentators have also criticised the 2004 Act including the United Nations' Committee on the Elimination of Racial Discrimination and the United Nations' Special Rapporteur. Of the 358 submitters to the Ministerial Review Panel who expressed an opinion on what should happen to the 2004 Act, only 5% supported retention of the 2004 Act in its current form.

Relevant submissions

3 In the April 2010 consultation process, submitters were asked whether the 2004 Act should be repealed. The majority of submitters (77%) do not want the 2004 Act to be repealed. Common reasons given were that: the Act is working well "in the best interests of all"; the basis for repeal is political; a no-ownership regime will be confusing; repeal would have a negative impact on society (e.g. be divisive and create racial disharmony); rights should not be conferred according to race; the consultation period was too short; and opposition to the review itself (i.e. it was politically driven or unnecessary).

4 Of those submitters who supported repeal of the 2004 Act the common reasons given were: it discriminates against Māori; is in breach of the Treaty; is in breach of human rights and international law; is fundamentally flawed; and it should be repealed for the reasons given in the consultation document.

Comment and proposals for new regime

5 The 2004 Act's extinguishment of any uninvestigated customary title created was strongly criticised for having extinguished the potential property rights of one group (i.e. Māori) and not others. Cabinet has previously acknowledged that the 2004 Act had a discriminatory effect on Māori [CAB Min (10) 10/9]. In my view, a replacement regime will need to be seen as a departure or break from the existing regime and its treatment of extant rights.

6 I think that repeal is necessary to rectify the discriminatory effect of the 2004 Act. It is clear from the hui I have attended that the majority of Māori support repeal of the 2004 Act. This support for repeal is not limited to Māori. For example, Rodney District Council submitted that:

> *"The Council was not satisfied [in 2004] that the Act provided for equity in the recognition of the respective interests in the foreshore and seabed, or that the Act would provide an enduring and just basis for administratively efficient and effective determination of property rights and awards."*

7 Taking all views into account, including the strong recommendations of the Ministerial Review Panel and the United Nations bodies, I believe the Government has a mandate to repeal the 2004 Act.

'REPEAL AND REVERT' OR 'REPEAL AND REPLACE'?

8 Although repeal is a crucial element in addressing the discriminatory effect of the 2004 Act, it is only desirable if a reasonable level of consensus can be found on an effective and durable replacement regime.

9 Repeal and reversion to the situation immediately post-*Ngāti Apa* is an option supported by some submitters. I think it is unlikely the courts could respond to these issues in a way that would effectively recognise all the interests at stake. This is consistent with the Ministerial Review Panel's comment that "we consider the ultimate apportionment of customary and public interests should not be left to the courts. The issues are not just legal." I think that a return to the situation immediately prior to the 2004 Act would result in significant uncertainty about important issues that could undermine the effective use and management of the foreshore and seabed. It would be possible that the Māori Land Court would find the majority of the coastal marine area to have the status of Māori customary land. It would then be uncertain whether the status of such lands could be changed to Māori freehold land and subsequently alienated, and public access would not be guaranteed.

10 I acknowledge the lack of consensus to date on the proposed options for repealing and replacing the 2004 Act. Though most of the written submissions did not agree with repeal of the 2004 Act, I think that many, if not most, of their interests and concerns will be addressed through the detail of the proposed new regime. The proposals provide for the relationship of Māori with the foreshore and seabed, and specifically protect and provide for customary rights and title. In addition the importance of the foreshore and seabed to all New Zealanders is

recognised and provided for, including recreational, conservation and development interests.

Recommendation (repeal of the 2004 Act)

- **Agree** to repeal the 2004 Act, subject to Cabinet's agreement on the proposals for a replacement regime.

The stated object and purpose of the new Act

Overview

11 The new legislation should clearly articulate the Government's stated objective for the new legislation and its purpose. The object of the new Act will set out the overarching intention of the legislation, while the purpose will summarise the way in which that object is given effect by the legislation.

12 I recommend that the Government's agreed principles and assurances should form the basis for the development of this object and purpose. In addition there should be express acknowledgement:

a of the relationship of Māori with the foreshore and seabed, which is based on mana and tipuna connections;

b that the foreshore and seabed is an area of great importance to the people of New Zealand, for its intrinsic and cultural worth; and

c that the Crown will retain all sovereign rights exercisable in New Zealand in respect of the foreshore and seabed and its natural resources, including those at international law and those particularly described in the regime, the Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977.

13 This proposal accords with the view of the Ministerial Review Panel which recommended a new Act "based on the Treaty of Waitangi principle of providing for both Māori and Pākehā world views. It would provide that hapū and iwi, and the general public, both have interests in the coastal marine area, that both interests must be respected and provided for."

Recommendation (Object and purpose of the new Act)

- **Agree** that the replacement legislation will include an object and purpose section based on the Government's agreed principles and assurances;

- **Agree** that the purpose section will expressly acknowledge:

  - the relationship of Māori with the foreshore and seabed, which is based on mana and tipuna connections;

- that the foreshore and seabed is an area of great importance to the people of New Zealand, for its intrinsic and cultural worth; and
- that the Crown will retain all sovereign rights exercisable in New Zealand in respect of the foreshore and seabed and its natural resources, including those at international law and those particularly described in the regime, the Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977.

Ownership of the foreshore and seabed

Overview

14 If the 2004 Act is repealed and new legislation enacted in its place, the Government's intent as to ownership of the foreshore and seabed needs to be explicit. This is because section 13 of the 2004 Act vests the full legal and beneficial ownership of the foreshore and seabed (excluding private titles) in the Crown to hold as its absolute property. The repeal of that section does not necessarily change the Crown's ownership nor does it make ownership certain. Legal certainty about ownership of the foreshore and seabed would require express statutory language.

15 The issue of ownership of the foreshore and seabed is at the heart of the review process. The vesting of the foreshore and seabed (excluding private titles) in the Crown under the 2004 Act was strongly opposed by many people, particularly Māori, because it extinguished any uninvestigated customary title. Ownership is also seen by many people (rightly or wrongly) as the guarantee of their rights in the foreshore and seabed (e.g. access).

16 The consultation document listed four ownership options with the purpose of clarifying roles and responsibilities in the foreshore and seabed: Crown notional title, Crown absolute title, Māori absolute title and public domain/takiwā iwi whānui (no ownership).

17 The Government's preferred ownership option was identified as public domain/takiwā iwi whānui. This preference was based on the recognition that continued Crown ownership of the foreshore and seabed would perpetuate the grievances inherent in the 2004 Act while, equally, vesting absolute ownership in Māori would fail to recognise and balance the interests of all New Zealanders in the foreshore and seabed.

18 The public domain/takiwā iwi whānui approach was considered as a way of providing the same certainty as to roles and responsibilities in the foreshore and seabed without using the blunt (and potentially divisive) tool of ownership.

19 The consultation document asked the public whether they agreed with the Government's proposed approach to ownership which also consisted of:

a the repeal and removal of Crown ownership;

b restoration of any customary title extinguished by the 2004 Act;

c specifying roles and responsibilities, rather than identifying an owner of the foreshore and seabed;

d enabling customary interests of hapū/iwi to be tested and, if proven, recognised through awards; and

e continuing the regulatory responsibility of the Crown and local government, subject to awards recognising customary interests.

Relevant submissions

20 The vast majority of submitters (91%) disagreed with the Government's proposed approach to ownership but the reasons for that disagreement varied widely. Reasons included that submitters:

a did not understand the proposal or feel informed enough to support it;

b were concerned that changes to ownership would impact on their rights (such as access or fishing);

c thought the foreshore and seabed should be in Crown ownership for the good of all New Zealanders;

d thought it promotes racism or is discriminatory (either in favour of Māori or against Māori);

e thought it does not deliver justice for Māori;

f supported Māori ownership;

g considered that the 'no-owner' proposal was contradictory to tikanga; and

h thought more time should be taken to explore other options (a "longer conversation").

21 A small minority agreed with the proposed approach to ownership.

Comment and proposals for new regime

22 The submissions confirm that ownership is a divisive issue. Ownership is strongly seen as the means by which people's rights and responsibilities in the foreshore and seabed are determined. Many people were concerned that changes to ownership would lessen or completely remove their rights and interests in the foreshore and seabed.

23 Any new regime needs to reflect the fact that New Zealanders have a special relationship with the foreshore and seabed. It is necessary to ensure that existing rights and interests of groups and individuals, including customary

rights, business and development, recreational and conservation interests, are recognised and provided for.

24 Some submissions claimed that the proposal means the foreshore and seabed does not belong to anyone and therefore diminishes the relationship of Māori with their whakapapa and rohe moana. I disagree. The new regime would expressly restore any customary title extinguished by the 2004 Act and comprehensively provide for it through certain new awards. The new legislation would explicitly recognise and provide for the enduring exercise of mana over the foreshore and seabed. At the customary title level it would allow for the expression of this relationship in a way that conventional ownership may not. The awards for recognition of customary title link a bundle of rights akin to ownership rights with management in a way that could be considered more consistent with the traditional Māori relationship with the foreshore and seabed than conventional western notions of ownership.

25 While I have given real consideration to the very divided range of views on ownership, I continue to think that the vesting of ownership of the foreshore and seabed (excluding private titles) in one party, whether the Crown or Māori, would not adequately provide for the wide range of rights and interests in the foreshore and seabed. As such, ownership based options would fail to address the key criticisms of the 2004 Act.

26 I recommend that the regime to replace the 2004 Act should not rely on ownership to determine roles and responsibilities. Instead, it should explicitly provide that the foreshore and seabed cannot be owned (in a fee simple sense) and therefore cannot be alienated, except for those areas already in private ownership.

Recommendations (Ownership)

- **Agree** that the replacement legislation will:
  - expressly declare that the new regime in respect of the foreshore and seabed (excluding private titles) will replace the vesting in section 13 of the 2004 Act (and all preceding vestings of the area); and
  - specify that the foreshore and seabed (excluding private titles) is an area:
    - that is not, and cannot, be owned;
    - in which rights of public access, fishing and navigation are recognised; and
    - in which any customary title extinguished by the 2004 Act will be restored and will be given its sole legal expression through agreed tests and awards (i.e. customary title will not amount to ownership).

Name of the new regime

Overview of proposal

27 A new name is necessary in order to symbolise and describe a fresh approach to the foreshore and seabed and to clearly differentiate the new regime from the current regime. The name "public domain/takiwā iwi whānui" was proposed for the regime and was put forward in the consultation document.

Relevant submissions

28 Submitters were asked whether they agreed with the proposed name "public domain/takiwā iwi whānui". Around half of those who explicitly responded to this question disagreed with the proposed name. About a quarter agreed with the name. A few suggested another name. Two examples were: 'Takutai Moana o Aotearoa' and 'Public domain of Aotearoa'. Common reasons given for disagreeing with the proposal included that a Māori name would be open to misinterpretation. A common reason given for agreeing with the proposal was that the name reflects the proposal that the area "belongs to everyone".

Comment and proposals for new legislation

29 I think that using both English and Māori names is appropriate given the fact that the new regime will recognise the Treaty relationship. However, I think 'public domain/takiwā iwi whānui' fails to convey the message that this is an area in which public access is assured. I also think that 'public domain' confuses the proposed regime with previous options considered during the 2003/04 process and may be perceived as too analogous to Crown ownership. I propose a new descriptive name "New Zealand marine coastal access area" to be used in the new legislation. I also think a te reo Māori term should be agreed. I will report back to Cabinet on this.

Recommendation (name of the new regime)

- **Agree** that the proposed regime, and its associated area, be referred to as the "New Zealand marine coastal access area";
- **Invite** the Attorney-General to report back to Cabinet in July 2010 with a te reo Māori term for the "New Zealand marine coastal access area".

Area where "New Zealand marine coastal access area" regime will apply

Overview

30 Cabinet has previously agreed that the new regime will apply to the same area as the "foreshore and seabed" in the 2004 Act. That area comprises the "public

foreshore and seabed" (currently vested in the Crown) and all privately held title [CAB Min (09) 45/4].

31 It is proposed that "New Zealand marine coastal access area" replace "public foreshore and seabed" in the new legislation. A new definition will also be required that excludes private titles from the "New Zealand marine coastal access area". This is a drafting issue for the Parliamentary Counsel Office to consider. This is consistent with the 2004 Act definition of "public foreshore and seabed".

32 The only difference from the 2004 Act definition of "public foreshore and seabed" is that Te Whaanga Lagoon in the Chatham Islands would be excluded from "New Zealand marine coastal access area" (and will remain in Crown ownership) [CAB Min (10) 10/9].

33 The reason for Te Whaanga Lagoon remaining in Crown ownership is to enable ownership of Te Whaanga Lagoon to be resolved through the Treaty settlements process. [redacted]

s9(2)(j)

Relevant submissions

34 Some submitters expressed a view on the definition of the foreshore and seabed. Some took the view that the new regime should apply to 200 nautical miles, rather than 12 nautical miles.

Comment and proposals for new legislation

35 I do not propose any amendments to the Cabinet-agreed description of where the new regime will apply. Because of our international obligations, and because the 2004 Act only applied within the territorial sea and only vested title to that area in the Crown, it is not appropriate to extend the seaward limit of the foreshore and seabed beyond 12 nautical miles.

36 I recommend that the new regime will apply to the same physical area as that defined as "foreshore and seabed" in the 2004 Act with the exception that Te Whaanga Lagoon in the Chatham Islands will be excluded from the "New Zealand marine coastal access area" and will remain in Crown ownership.

Recommendations (area where the new regime will apply)

- **Agree** that the new regime will apply from the mean high water springs to the outer limits of the territorial sea (12 nautical miles);

- **Agree** that the term "New Zealand marine coastal access area" will be used to define the area described in the recommendation above;

- **Agree** that the "New Zealand marine coastal access area" will replace "public foreshore and seabed" (as defined in the 2004 Act) in the new regime, thus excluding private titles;

- **Agree** that Te Whaanga Lagoon in the Chatham Islands is excluded from the definition of "New Zealand marine coastal access area" (and will therefore remain in Crown ownership); and

- **Note** the Attorney-General's intention for the Crown retaining ownership of Te Whaanga Lagoon to be resolved through the historical Treaty settlements process.

Assurances: access, fishing and navigation

Access

OVERVIEW

37 The Government has been consistent in its assurance of public access (subject to reasonable limitations) in, on, over and across the foreshore and seabed. Public access is a key element of the new foreshore and seabed regime.

38 This assurance was stated in the consultation document as:

> *Public access will be guaranteed for all New Zealanders subject to certain exceptions, for example, for health and safety reasons in port operational areas, or protection of wāhi tapu such as urupā (burial grounds).*

RELEVANT SUBMISSIONS

39 Support for guaranteed access was a prominent theme of the submissions. Some submitters thought the proposal should include access *to* the foreshore and seabed in addition to *in, on, over and across* it. Others misunderstood, believing that access *to* the foreshore and seabed was already guaranteed under the 2004 Act.

COMMENT AND PROPOSALS FOR NEW REGIME

40 While there is strong public interest in access *to* the coastline, this matter is outside the scope of the foreshore and seabed review because access to the coastline depends on ownership of the adjacent land. If the adjacent land is held in private ownership, public access cannot be compelled. I recommend that the new regime maintain the provisions for public access set out in the consultation document and paragraph 38 above.

41 The Department of Conservation has commented that limits to public access are required to maintain the integrity of some conservation reserves (e.g. nature and scenic reserves). I think this is an example of the type of authorised limits that my proposal would provide for under the new regime.

RECOMMENDATION (ACCESS)

- **Agree** that the new legislation provide for public access in, on, over and across the marine coastal access area (which excludes private titles), subject to any authorised limits.

Fishing

42 Protection of existing fishing rights is one of the Cabinet-agreed assurances of any new legislation. The Government has settled the issue of commercial customary fishing rights and interests and comprehensively provided for non-commercial customary fishing rights and interests. As these issues have been addressed, no further redress is proposed as part of the new regime. It is important that the awards for customary rights and title do not compromise or undermine the quota management system or the operation of the fisheries regime. Accordingly, there would be clear provision that nothing in the new legislation affects any rights of fishing recognised immediately before the commencement of the Act, by or under any enactment or rule of law. This would be consistent with section 9 of the 2004 Act.

RECOMMENDATION (FISHING)

- **Agree** the replacement legislation will contain a provision that nothing in this Act affects any rights of fishing recognised by or under an enactment or a rule of law.

Navigation

43 Section 8 of the 2004 Act provided statutory recognition of (and also replaced) the common law rights of navigation in the foreshore and seabed. In addition, section 8 expressly states that it does not affect New Zealand's binding obligations at international law in relation to navigation. The navigation rights of any person within the foreshore and seabed, as provided for by section 8, will be preserved under the new legislation. As with the 2004 Act, these rights may be subject to authorised limits that are imposed by or under an enactment.

RECOMMENDATION (NAVIGATION)

- **Agree** the replacement legislation will preserve the statutory rights and uphold New Zealand's international law obligations relating to navigation in the foreshore and seabed.

Part Three: Engagement models for recognition of customary interests: negotiation and litigation

1 This part of the paper asks Cabinet to decide whether an applicant group should be able to:

a negotiate with the Crown for the recognition of their customary interests (and what that process might involve); and

b access either the Māori Land Court or the High Court for recognition of their customary interests (and what that process might involve).

Negotiations and access to the courts

Overview

2 An effective and just process for the recognition of customary interests will be a key component within the new regime. The consultation document stated that the preferred method for recognising customary interests would be through direct negotiations between the Crown and a coastal hapū/iwi. Recourse to the courts, as an alternative to direct negotiations, would also be available to applicant groups.

Relevant submissions

3 Submitters were asked whether they thought coastal hapū/iwi should be able to negotiate with the Crown for recognition of their customary interests. Most of those who addressed this question were opposed to the proposition. The comments most commonly offered by this group were that: Māori should have no "special rights"; all races should be treated equally; customary interests should be available to all New Zealanders; a court process was more appropriate; and that negotiations were political and not transparent. A minority of submitters supported the proposition although many of these provided qualifying statements, for example that the courts should have a role.

4 Submitters were also asked whether they thought that coastal hapū/iwi should be able to claim recognition of their customary interests through the courts. There was no clear consensus on this question, although a slight majority of those that responded to the question opposed it. Submitters opposed to the proposition raised such issues as: high cost; that it was too time consuming; their preference for negotiations; and that Māori should not have to prove their customary interests/rights through the courts. Reasons stated in support included: the courts represent restoration of due process; the courts will provide just, fair and consistent outcomes; and the courts will provide a transparent and inclusive process.

Comment and proposals for new regime

5 I think it is important that applicant groups have the opportunity to go to court. The right to have legal interests tested in an independent and transparent judicial process is an important one, reflected in some submissions. A court process will ensure that third parties are able to have appropriate input to proceedings. The public could be satisfied that the extent of customary interests would be properly assessed in a neutral forum.

6 Despite the provision of a court process in the new regime, it would always be open to an applicant group to seek a direct negotiation with the Crown for the recognition of their customary interests in the foreshore and seabed. In my view, this is also important. The rationale for direct negotiations would be that it is appropriate that the Crown act in the public interest to agree to the recognition of customary interests in the foreshore and seabed. There are advantages to a direct negotiation process. Some efficiency can be gained through the avoidance of litigation. A direct negotiation process can result in tailored awards that suit the particular characteristics of the group concerned. A direct negotiation can also foster and develop the Crown–Māori relationship. Negotiations do, however, need to be managed well to achieve these outcomes. Out of court solutions are commonplace in New Zealand.

7 I do not propose that a negotiated outcome be subject to confirmation by the courts, as currently occurs under the 2004 Act. I acknowledge that a court is a necessarily independent and transparent process. I acknowledge that some may consider that a negotiation process, without court confirmation, is at risk of favouring one group at the expense of another. These concerns do not make a negotiation process inappropriate. Rather, these concerns mean that any direct negotiation process ought to be the subject of a policy that ensures that correct decisions are made following a fair process.

Recommendations (negotiations and access to the courts)

- **Agree** that the new regime should specify a court process for the recognition of both customary title and customary rights.
- **Agree** that, as an alternative to a court process, it would always be open to groups to seek to enter direct negotiations with the Crown for the recognition of customary title and customary rights.

Negotiations process

8 I do not propose that the details of a negotiated process be specified within the new legislation. I do, however, think that certain matters, such as who the Crown will negotiate with and with which Minister and department administrative responsibility for negotiations will sit, need to be agreed by Cabinet in this paper. In addition, I will report back to Cabinet with a clear set of policies addressing relevant steps and requirements in July 2010.

Who the Crown will negotiate with

9 A key issue to be addressed in the negotiations process is who the Crown will negotiate with. The tests for recognition of customary title and rights will use the term 'applicant group'. This is a flexible and inclusive term which ensures that any group that could otherwise meet the customary title or rights' tests would be able to have their interests recognised. It also allows for the groups themselves to determine mandate. The risk is that customary interests may or may not sit with the groups which are currently recognised in legislation (e.g. iwi authorities under the RMA) and in previous settlements (e.g. mandated iwi authorities under the fisheries settlement). It also increases the possibility of there being a higher number of smaller claims (i.e. at the whānau level), and in-turn, cross-claims between groups which has cost and time implications.

10 The elements in the test for customary title of 'held in accordance with tikanga Māori' and 'exclusive use and occupation' will to some extent allow for the resolution of these issues – ensuring that any successful claimants are the correct group for that area.

11 However, while it is important to allow flexibility for groups to determine their own mandate in accordance with tikanga and to accurately reflect the nature of customary interests, it is also necessary for the Crown to avoid entering into onerous and potentially factitious negotiations with smaller groups.

12 It will be necessary for the Crown to look to negotiate with groups that represent the broader range of claims – the largest possible grouping which accurately reflects the nature of the customary title interest claimed.

13 I also propose that where it makes practical sense foreshore and seabed negotiations should be aligned with historical Treaty settlements to create further efficiencies. A number of iwi leaders have requested this.

14 Wherever possible negotiations should also, if appropriate, be consistent with the Treaty fisheries and aquaculture settlement groupings. This would reduce the potential to undermine these existing processes and settlements through arrangements at a lower level.

15 The Ministry of Fisheries, the Ministry for the Environment and the Department of Conservation consider that they will face substantial issues in meeting the costs associated with foreshore and seabed negotiations. What I propose here will reduce the potential costs and complexities of departments incurred through negotiations.

RECOMMENDATIONS (WHO THE CROWN WILL NEGOTIATE WITH)

- **Agree** that the Crown look to negotiate with groups that represent the largest possible grouping which accurately reflects the nature of the customary title interest claimed;

- **Agree** that where it makes practical sense, foreshore and seabed negotiations should be aligned with historical Treaty settlements to create further efficiencies;

- **Agree** that, if appropriate, negotiations should be consistent with existing fisheries and aquaculture settlement groupings;

- **Note** that the Ministry of Fisheries, the Ministry for the Environment and the Department of Conservation consider that they will face substantial issues in meeting the costs associated with foreshore and seabed negotiations;

- **Note** that the proposals to negotiate with larger groupings and to align these processes with the historical Treaty settlement process will reduce departmental costs associated with foreshore and seabed negotiations; and

- **Invite** the Attorney-General to report back to Cabinet in July 2010 with a clear set of policies addressing relevant steps and requirements for negotiations under the new framework.

Ministerial and administrative responsibility for negotiations

16 The 2004 Act prescribes that Ministerial responsibility for negotiations is held by the Attorney-General and the Minister of Māori Affairs. If foreshore and seabed negotiations are aligned with historical Treaty settlement negotiations to maximise efficiencies, this would have the effect of significantly impacting on clear lines of Ministerial responsibility and accountability. Some efficiencies would therefore be lost.

17 I propose that only the Attorney-General holds responsibility for negotiations on behalf of the Crown. It is appropriate for the Attorney-General to have an overview role, because of the matters of public interest in relation to management of the foreshore and seabed. There is also a need for the Attorney-General to ensure alignment between the tests for recognition of customary title and rights through the court and negotiations process.

18 Administrative responsibility for the new legislation and for the Crown negotiations under the new regime should remain with the Ministry of Justice. The Ministry of Justice has expertise, experience and relationships with relevant parties built through negotiations under the current regime.

RECOMMENDATIONS (MINISTERIAL RESPONSIBILITY FOR NEGOTIATIONS)

- **Agree** that the Attorney-General hold Ministerial responsibility for foreshore and seabed negotiations on behalf of the Crown; and

- **Agree** that responsibility for administering the new legislation will lie with the Ministry of Justice.

Awards through negotiations

19 I propose that the awards provided in the new legislation (described in Part Four) will be available to those who successfully negotiate for recognition of their customary interests by meeting the proposed tests.

20 The Ministry of Fisheries and the Ministry of Economic Development consider that allowing for flexibility in the awards available through negotiations creates uncertainty as to the potential effects on other interests in the foreshore and seabed. I think that, while there must be flexibility in a negotiating situation to take account of particular circumstances, it will be important to conduct a stringent analysis of the effect of the awards on other interest holders. It would allow for an outcome which reflects the nature of the customary interests at issue and takes advantage of any advances in the types of mechanisms available.

21 The final package of negotiated awards (including financial implications) would need to be confirmed by Cabinet in relation to each negotiation. This is appropriate given the significance of the issues which impact on many portfolios and may have wider implications nationally, and is consistent with the historical Treaty settlement negotiations process. It is also likely that most agreements could be brought into effect by Order In Council without requiring separate legislation. This would be a Cabinet decision on a case-by-case basis.

RECOMMENDATIONS (AWARDS THROUGH NEGOTIATIONS)

- **Agree** that any final package of negotiated awards for the recognition of customary title claims be confirmed by Cabinet.

- **Agree** that any final package of negotiated awards could be brought into effect by Order in Council, and that a Cabinet decision would be required.

Funding groups for participation in negotiations

22 The Crown makes a contribution towards expenses incurred by mandated groups (i.e. costs of mandate, negotiations, and ratification) during negotiations under the 2004 Act. The negotiation costs for the five groups who have been in foreshore and seabed negotiations with the Crown under the 2004 Act has varied significantly due the nature and extent of research and evidence required and the stage reached in negotiations. The Ministry of Justice's experience in both historical Treaty settlement and foreshore and seabed negotiations is that the process is expensive and can be financially onerous for an applicant group. Without funding it is likely some groups would be unable to participate in the negotiations process.

23 I propose that the Crown make a contribution to the costs of mandated groups under the new regime. It is important that the Crown ensures that no group is disadvantaged in negotiations due to a lack of funds and that the cost of negotiations does not preclude any group from seeking recognition of their customary title claims. This does not mean the Crown should have to meet all

the costs that groups incur when negotiating. That would be inconsistent with historical Treaty settlement policy, and the Crown's role to "support" the negotiating process.

24 Negotiations will put extra pressure, from time to time, on departments in terms of costs and resourcing. A degree of expertise and experience has already been built up in the relevant departments during the Ngāti Porou and Te Whānau a Apanui negotiations. Some of the difficult policy work has now been completed on the development of the awards. This took up a considerable amount of departmental time and resources during negotiations under the 2004 Act and during the development of the proposals in this paper.

25 Given I am proposing historical Treaty of Waitangi and foreshore and seabed negotiations be aligned where practical, this will create efficiencies for negotiating groups (e.g. less transaction, legal and mandate costs) reduce the Crown's contribution to claimant costs. It will also create efficiencies for departments participating in negotiations. However, where this is not the case, departments may need to seek additional appropriations.

RECOMMENDATIONS (FUNDING FOR NEGOTIATIONS)

- **Agree** that the Crown will make a contribution to the foreshore and seabed negotiations costs of mandated groups under the new legislation.

Notification of negotiated agreement

26 As is the case under the 2004 Act, any negotiated agreement would be notified to all relevant parties, including the Chief Executive of the Ministry of Justice, and entered on a register held by the Chief Executive of the Ministry of Justice.

Recommendation (Notification of negotiations)

- **Agree** that any negotiated agreement would be notified to all relevant parties, including the Chief Executive of the Ministry of Justice, and entered on a register held by the Chief Executive of the Ministry of Justice.

Litigation

Which Court should hold jurisdiction for customary title and customary rights claims?

27 There are two options for the court that would hold jurisdiction to hear applications for customary title and rights: the Māori Land Court and the High Court.

RELEVANT SUBMISSIONS

28 The consultation document sought submissions on whether the Māori Land Court and/or the High Court should have jurisdiction to hear and determine claims for customary title and customary rights. The consultation document also sought submissions on whether the applicant alone should be responsible in Court for proving tests for customary title and customary rights or whether this burden should be shared by the Crown.

29 A majority of submitters did not support the Māori Land Court holding jurisdiction for hearing and determining claims. Common reasons were that: the Māori Land Court judges would have conflicts of interest; the High Court is more balanced and independent; and that there should be no recognition of customary rights. Of the minority of submitters who agreed with the Māori Land Court holding jurisdiction, common reasons provided were that: the Māori Land Court is appropriate because of its specialist nature; the proposed reference to tikanga in the tests; and the extensive records it holds.

30 Submitters were fairly evenly divided on the question of whether the High Court should hold jurisdiction for hearing and determining claims.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

31 It is likely the application of the customary title test will involve significant questions of both tikanga Māori and the application of common law elements.

32 The Māori Land Court is a specialist court with a vast body of legal expertise as well as extensive experience in tikanga Māori, Māori land tenure and Māori representation issues. The Māori Land Court is unique in the way it operates: it is flexible in terms of its application of evidence and is a less adversarial environment. Issues are dealt with in a traditional and culturally appropriate manner, for example court sittings may be conducted in te reo Māori. This was a reason some submitters preferred the Māori Land Court over the High Court.

33 The Māori Land Court has the ability (along with the Māori Appellate Court) to refer matters to the High Court by stating a case requesting the High Court's opinion on any point of law arising in proceedings before it. Applicants may be entitled to special funding to meet some of the costs of their claims through the Māori Land Court's special aid fund. Te Puni Kōkiri prefers the Māori Land Court for the reasons above.

34 The High Court is a court of higher status; it is able to apply the common law to fill the interstices of statute law and has a vast body of expertise on a wide range of legal matters, including Māori and Treaty issues. It is the lynchpin of New Zealand's judicial system. The High Court has determined many major legal issues in respect of Māori customary and Treaty rights, including *Te Weehi v Regional Fisheries Officer* (where it recognised the extent of Māori customary rights in fishing, which are essentially non-territorial customary rights).

35 A significant issue is that groups taking applications to the High Court would not have recourse to legal aid: only individuals (not groups) may apply for legal aid for the High Court. This is the situation under the current regime (with regard to groups lodging territorial customary rights applications to the High Court). It is not a foreshore and seabed specific issue, however, as it applies to any group of applicants to the High Court. In this context, it raises issues in relation to access to justice as groups may be prevented from testing their interests due to a lack of funds. Any changes to this model would, however, have wider implications for the legal aid system and should not be done in the relative isolation of the foreshore and seabed regime.

36 On balance, I think the High Court is best placed to hold jurisdiction for customary title applications. Notwithstanding the concern that the High Court is inexperienced in determining tikanga issues, I think this can be addressed by other means, for example making provision for referral of tikanga issues to the Māori Appellate Court, if necessary. In addition, special procedures as to evidence may be prescribed for the court process, to ensure that the special nature of foreshore and seabed claims may be accommodated in the context of the High Court environment. These matters are further discussed below.

RECOMMENDATION (JURISDICTION)

- EITHER:
  - **Agree** that the High Court hold jurisdiction for hearing customary title and rights applications;

  OR

  - **Agree** that the Māori Land Court hold jurisdiction for hearing customary title and rights applications.

Expert advice for the High Court

37 Should Cabinet agree that the High Court hold jurisdiction for customary title and rights claims, I think it is appropriate that the High Court is able to draw on tikanga and other expertise as necessary.

38 I propose the High Court be given the discretion to consider whether, when considering the application before it, it needs:

a specialist tikanga Māori advice through the appointment of pūkenga; and/or

b to refer matters of tikanga Māori to the Māori Appellate Court for a binding decision.

RECOMMENDATION (EXPERT ADVICE FOR THE HIGH COURT)

- **Agree** (if Cabinet decides that the High Court should hold jurisdiction for hearing customary title and rights applications) that the High Court be given the

discretion to consider whether, when considering the application before it, it needs:

- specialist tikanga Māori advice through the appointment of pūkenga (specialist advisors); and/or
- to refer matters of tikanga Māori to the Māori Appellate Court for a binding decision.

Evidence

39 If Cabinet agrees that the High Court should hold jurisdiction for customary title and rights applications, the usual rules of evidence may not be appropriate to foreshore and seabed applications. This is because the nature of the evidence which it will need to consider in light of the proposed tests is likely to involve oral histories and statements (e.g. given by kaumatua or kuia) given in accordance with Māori protocol, evidence of a sensitive nature, historical documents and other information not ordinarily admissible in High Court actions.

40 To ensure that the normal rules of evidence do not preclude such evidence, I propose that the new legislation provide, as in the 2004 Act, that the High Court may accept any oral or written statement, document, matter, or information that the Court considers to be reliable (whether or not that evidence would otherwise be admissible).

RECOMMENDATION (EVIDENCE IN THE HIGH COURT)

- **Agree** (if Cabinet decides that the High Court should hold jurisdiction for hearing customary title and rights applications) that, as in the 2004 Act, the High Court may accept any oral or written statement, document, matter, or information that the Court considers to be reliable (whether or not that evidence would otherwise be admissible.

Awards through the courts

41 Successful customary rights and customary title applications will result in the court's conferral of the awards, as prescribed in the new legislation (discussed below). Courts will have no ability to make awards other than those in the new legislation. Customary rights or title findings will be appealable from both applicant groups and the Crown. There will be no right of appeal on the awards conferred by the Court.

RECOMMENDATION (AWARDS THROUGH THE COURTS)

- **Agree** that courts will not have the ability to make awards other than those prescribed in the new legislation.

Burden of Proof

42 Submitters were asked whether the applicant alone should be responsible in court for proving a test for customary interests is met. Submissions on this question were fairly evenly divided. Slightly more submitters thought the applicant alone should be responsible for proving a test for customary interests than those who did not. A few indicated they had no preference.

43 Submitters were also asked whether the applicant and the Crown should share responsibility in court for proving a test for customary interests is met. A majority of submitters who addressed this question disagreed. A minority thought the Crown and applicant should share responsibility while a small number indicated they had no preference.

COMMENT AND PROPOSAL FOR NEW REGIME

44 In normal circumstances, an applicant applying to the court bears the burden of proving their case. However, one view expressed in submissions and supported by some iwi leaders is that the onus of proving customary interests should not be on Māori. Instead it should be on the Crown to prove those interests had been terminated or extinguished. The requirement that (as applicants) they should bear the onus of proof in establishing their foreshore and seabed rights is therefore objectionable.

45 Although it is contrary to the normal judicial process, I think it is appropriate that the Crown and Māori applicant groups share the burden of proof in the court process. Accordingly, the Crown and applicant groups would be responsible for those aspects of the tests in respect of which they are best placed to call evidence. As there is always the likelihood the Crown will need to call evidence against an application, I am not suggesting that a shared burden of proof will necessarily lessen the adversarial nature of the court or negotiations process, but it will demonstrate an intention that both parties are embarking on the inquiry together.

46 There is a further concern that proving the customary title and rights tests will put applicant (Māori) groups to considerable cost. The Crown's experience of foreshore and seabed negotiations to date has shown that any assessment of claims to exclusive use and occupation since 1840 involves considerable research from both historical and cultural sources. The Crown provided limited funding to the groups to collate of both historical and cultural evidence in foreshore and seabed negotiations under the 2004 Act.

47 In a court process, having a shared burden of proof may not lessen the cost to the applicant groups, as they will still be required to bring evidence of a cultural and historical nature. It is possible that if jurisdiction for customary title applications lies with the High Court, the Court would refer certain matters to the Māori Land Court for determination. However, an assessment of historical evidence can only realistically and appropriately be gained from the research of expert historians. It will be matter for the court, in conjunction with the parties to the application, to determine the most appropriate way of obtaining this

information. On balance, I think the Crown and applicant should share the burden of proof.

RECOMMENDATIONS (BURDEN OF PROOF)

- EITHER:
  - **Agree** that the Crown and applicant groups will share the burden of proof in terms of the test elements (in respect of customary title and customary rights);

  OR

  - **Agree** that applicant groups be required to prove their case (i.e. there be no sharing or shifting of the burden of proof).

Part Four: Customary interests: Mana tuku iho, customary rights and customary title

Purpose

1 This part of the paper asks Cabinet to decide:

a what types of customary interests should be recognised in the legislation;

b whether the tests for recognising those interests should be set out in legislation or left for the courts to determine;

c if the tests are set out in legislation, what elements should be prescribed within the tests; and

d what awards should be provided for interests where the tests have been met.

Overview

2 The tests are the requirements groups have to meet (in negotiations or in court) to claim the awards pertaining to either customary title or non-territorial interests recognition. The tests and awards must be carefully aligned to establish an overall system which effectively recognises the customary interests of Māori.

3 The following table sets out how the and tests and awards set out in this Part Four align.

Recognition	Rationale	Test	Awards
Mana tuku iho	Recognition of the tipuna/ mana-based relationship of tangata whenua with the foreshore and seabed	No test – statutory recognition of tangata whenua awards will be consistent with engagement processes under the Conservation Act 1987	Acknowledgment of relationship in statute Automatic standing for participation in conservation processes
Customary rights	Recognition of customary activities, uses and practices that are non-territorial	Combination of tikanga Māori and common law components	Customary activities to have a protected status

Recognition	Rationale	Test	Awards
Customary title	Recognition of customary territorial interests generally akin to ownership	Combination of tikanga Māori and common law components	Right to permit activities requiring resource consent Right to permit certain conservation related activities Planning document Prima facie ownership of newly found taonga tūturu[1] in foreshore and seabed Placement of prohibition or restriction over wāhi tapu

Types of customary interest: mana tuku iho, customary rights and customary title

Overview

4 One of the criticisms of the 2004 Act is that the territorial interests it recognised were based on the extinguishment of customary title. Under the proposed approach those extinguished interests would be restored and provided for comprehensively through new awards. Customary title in the New Zealand marine coastal access area would not amount to ownership. The new legislation would contain a specific provision to this effect.

5 The consultation document proposed two types of recognition for customary interests: territorial rights (customary title) and non-territorial rights (customary rights). This approach reflects differences in the nature of customary interest, i.e. whether the customary interest relates to a use or activity, or an interest in land/area, more akin to ownership.

Relevant submissions

6 Several submitters explicitly agreed that legislation should recognise non-territorial and territorial interests. The majority of submitters, however, opposed any recognition of customary interests. Some submitters opposed any reference to the common law as the source of customary interests, noting tikanga was the appropriate basis for such an analysis. Other submitters thought that

[1] An object that: relates to Māori culture, history or society; was or appears to have been manufactured, modified, brought into New Zealand or used by Māori; and is more than 50 years old.

recognition of the relationship of Māori with the foreshore and seabed should not be limited to those groups that can prove a legal test.

Comment and proposals for new legislation

7 I continue to think that the new legislation should include provision that any customary title extinguished by the 2004 Act be restored and recognised only through the awards conferred by the courts or agreed in negotiations and would not amount to ownership. There should also be recognition of ongoing customary rights.

8 I agree with those submitters who think there should be recognition of the enduring, mana-based relationship of Māori with the foreshore and seabed without the need to negotiate or go to court to prove a test. It is important that any new legislation expressly recognises this connection and provides a means for its expression. Accordingly, I think that, in addition to recognition of customary rights and title, there should be statutory recognition of the enduring mana-based relationship of tangata whenua with the foreshore and seabed. This would add a third type of recognition of customary interest to the existing proposal.

9 This form of recognition would be an acknowledgement in the new legislation that tipuna and mana are the source of the relationship of tangata whenua with the foreshore and seabed and the rights and responsibilities which that relationship bestows. The effect of this statutory acknowledgment would be provided for, comprehensively, by a proposed award designed to support the expression of this relationship.

10 The mana tuku iho recognition would apply across the foreshore and seabed within the outer limits of the territorial sea (12 nautical miles) without the need for negotiation or court applications. The proposed mana tuku iho award is set out below.

11 The three types of recognition together provide for the continuum of customary interests; the starting point being recognition that tangata whenua have an enduring relationship with the foreshore and seabed that is inalienable. Recognition of customary rights and title continues New Zealand's legal tradition of demarcating between customary use rights and proprietary interests (as in the Fisheries and Aquaculture Settlements). This is also consistent with the distinction between aboriginal rights and title in Canada.

MARAE-BASED CUSTOMARY TITLE

12 The possibility of providing customary title to coastal marae in adjacent areas of foreshore and seabed was raised during the consultation process. Prima facie, I think this proposal has merit as it recognises the longstanding and culturally intense connections of marae to the areas of the foreshore and seabed directly adjacent to them. However, the proposal needs further analysis on how and to whom it may be awarded, the areas it would apply to, and a stringent assessment of the potential effects on other existing interests in the areas.

13 I would like to report back to Cabinet on a proposal that effectively accommodates the various interests and provides increased recognition to marae in the foreshore and seabed.

Recommendations (types of customary interest)

- **Agree** that the new legislation include provision that any customary title extinguished by the 2004 Act be restored and recognised only through the awards conferred by the courts or agreed in negotiations and would not amount to ownership;
- **Agree** that new legislation will include three types of recognition for customary interests:
    - mana tuku iho: statutory recognition of the enduring mana-based relationship that tangata whenua have with the foreshore and seabed;
    - customary rights: recognises non-territorial customary use rights including activities and practices; and
    - customary title: recognises customary interests that are territorial in nature.
- **Note** that the possibility of providing customary title to coastal marae in adjacent areas of foreshore and seabed was raised at hui and in submissions and by the Iwi Leaders' Group;
- **Agree** that the Attorney-General will carry out further work in assessing the merits and refining the details of this proposal and report back to Cabinet in July 2010.

Should tests be left to the courts or set out in legislation?

Overview

14 The consultation document proposed that the tests for customary interests or title be set out in legislation. This is to ensure clarity from the outset that the new regime will recognise these customary rights and title where the interest or practice meets the requirements of the tests.

Relevant submissions

15 Submitters were asked whether any new legislation should set out the tests and awards or whether these should be left to the courts to develop. A majority of submitters who explicitly responded to this question thought legislation should set out the tests and awards. Common reasons given were that: the approach would provide for public input, clarity, certainty and consistency; and it is the Government's role (to define the tests and awards) not the courts'. A minority of submitters thought it should be left to the courts to develop tests and awards,

for example because the issue is too politically fraught and therefore the court is best placed to develop the law on such an important matter.

Comment and proposals for new legislation

16 I think there is some validity to the view expressed in submissions that it should be left to the courts to develop tests. This is one way of ensuring access to justice. However, this approach may result in protracted litigation. It is likely such a contentious issue as tests for customary rights and title would be appealed through the higher courts. There would also be real uncertainty about the nature and extent of customary interests in the interim. Having no legislative test for customary interests would also fail to provide any parameters or basis for negotiations, which submissions have supported as the primary means for engagement.

17 I think the majority of Māori do not want to spend time and resources in protracted litigation developing common law tests for their interests. Setting out clear tests in legislation would save time and cost to all parties involved in the resolution of these issues and provide more certainty for all New Zealanders. I think there is an opportunity to clarify the tests now in a way which:

a respects the integrity of tikanga Māori as the traditional Māori system of authority and management over the foreshore and seabed;

b is broadly consistent with the way common law might develop if no test were prescribed in legislation; and

c increases efficiency and certainty of process for all.

Recommendation (Tests for customary interests in legislation)

- **Agree** the tests for customary interests should be set out in legislation.

Elements of tests for customary title and customary rights

Test for customary title

OVERVIEW

18 The consultation document set out three possible approaches to prescribing tests for customary title in legislation. These were:

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

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

c tests that are a combination of tikanga Māori and common law (the Government's preferred option).

19 The consultation document contained the following proposed elements for the test for customary title:

a new legislation will state that a territorial interest is recognised where the following elements are proven:

i in order to establish the necessary connection/interest the relevant foreshore and seabed area must be held by the applicant group *in accordance with tikanga Māori*;

ii 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

iii "exclusive use and occupation" must be from 1840 until the present without substantial interruption.

b in assessing "exclusive use and occupation":

i the following may be taken into account (but not required):

– ownership of abutting land; and

– customary fishing;

ii 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;

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

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

20 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.

21 The proposed test addresses these criticisms and makes several changes to ensure each of the elements has a sound policy rationale in terms of how it will apply in practice in New Zealand. The introduction of tikanga Māori as a key element of the test is a significant move which would:

a acknowledge tikanga as the traditional Māori system of authority and management over the foreshore and seabed;

b continue New Zealand's legal tradition of using tikanga Māori to test Māori land tenure interests;

c allow for differences in tikanga from group to group; and

d mitigate the Panel's criticism of relying on Australian and Canadian case law to test Māori interests.

22 In addition, the test provides certain clarifications and changes to the requirement for "exclusive use and occupation". These are detailed below.

CONTINUOUS OWNERSHIP OF CONTIGUOUS LAND

23 The 2004 Act required continuous title to contiguous land. While the ability to control the land-side border of the foreshore and seabed is a relevant consideration in assessing exclusivity, it is not appropriate for this to be an absolute requirement. Some discretion to look into the facts of a claim is needed.

FISHING AND NAVIGATION

24 The test will specify that fishing and navigation by third parties, while also relevant considerations, do not necessarily preclude a finding of exclusivity. The 2004 Act only provided for navigation in this way.

CUSTOMARY TRANSFERS AND SHARED EXCLUSIVITY

25 The test would allow for customary transfers of land in accordance with tikanga since 1840. This would be consistent with tikanga Māori and early decisions of the Native Land Court which recognised such transfers. It would also allow for shared exclusivity. This would mean that more than one hapū / iwi can show that they hold the area exclusively to any non-members of those groups. A practical example is where groups at either end of a bay have interests that are shared in the middle yet still exclusive as against all others. This is effectively joint customary title and is consistent with tikanga Māori and Canadian common law.

RELEVANT SUBMISSIONS

26 The discussion document invited comment on the elements of the proposed test. Some submissions expressed concern that an easier test might result in large areas of customary title. In particular, submissions were concerned that the removal of the requirement for ownership of continuous title to contiguous land might mean it would be reasonable to expect applications from most iwi, hapū and whānau in New Zealand. Some particularly disagreed with the tikanga Māori element of the test, feeling it was too broad and undefined, or not relevant to the modern world.

27 There was some support for either the Canadian common law tests, and some for the TTWMA test. There were claims that the tests were in breach of the Treaty of Waitangi and were based on a discriminatory concept of subordinate

rights which failed to recognise that the Treaty guaranteed Māori full unencumbered ownership of the foreshore and seabed.

28 In contrast, some submitters agreed with the proposed elements of the test including the use of tikanga Māori. Some submitters commented that the test was fairer than in the 2004 Act, as the continuous title to contiguous land test in that Act disadvantaged those iwi who had lost land through raupatu (confiscation).

COMMENT AND PROPOSALS FOR NEW LEGISLATION

29 The submissions demonstrate that there is no overall consensus about what tests should be in a new regime. There is a range of views on the appropriateness of including common law aspects and/or tikanga Māori.

30 In developing tests for customary rights and title, 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 in New Zealand 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 happened 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.

31 In New Zealand, there has been little judicial investigation of common law customary title, particularly in the foreshore and seabed. Investigation of customary land interests have been through TTWMA, which provides a specific legislative framework for recognising land status. The test in TTWMA (section 129(2)(a)) requires that the land is "held in accordance with tikanga Māori". One option is simply to adopt this test. Te Puni Kōkiri supports this approach which they consider would effectively allow the courts to look to sources of common law to interpret how the test should apply in the foreshore and seabed.

32 I think it is important both tikanga Māori and the common law elements of exclusive use and occupation since 1840 provide the basis for establishing whether an interest in an area amounts to customary title.

33 I think it is also appropriate to explicitly set out elements in the test which would ensure it is broadly consistent with common law customary/aboriginal title as developed in comparable jurisdictions. This would provide a clearer basis for testing customary title under the new regime than a test which leaves these issues for the courts to determine.

34 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. The elements of the test set out in the consultation document do this and are therefore appropriate.

35 It is possible the proposed test would allow for recognition of customary title in more areas than under the 2004 Act. Although the application of the test will be on a case by case basis and dependent on the evidence, substantial activities in an area by non-members of the claimant group would likely displace claims of exclusivity. This means that customary title is likely to be limited to relatively discrete areas.

36 Setting out the test in legislation provides more certainty of process than leaving it to the courts and, therefore, creates efficiencies in an area that has led to extensive litigation in comparable jurisdictions.

RECOMMENDATIONS (TEST FOR CUSTOMARY TITLE)

- **Agree** the test for customary title should be a combination of tikanga Māori and common law based elements.
- **Agree** the new legislation will provide that a customary title is recognised where the following elements are proven:
    - in order to establish the necessary connection/interest the relevant foreshore and seabed area must be held by the applicant group *in accordance with tikanga Māori*;
    - 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
    - "exclusive use and occupation" must be from 1840 until the present without substantial interruption.
- **Agree** the new legislation will provide that in assessing "exclusive use and occupation":
    - the following may be taken into account (but not required):
        - ownership of abutting land; and
        - customary fishing;
    - 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;
    - customary transfers of territorial interests between hapū and iwi post-1840 will be recognised; and
    - "shared" exclusivity between coastal hapū/iwi as against other third party interruptions will be allowed for.

Test for customary rights

OVERVIEW

37 The test for recognition of non-territorial interests will differ from the test for customary title to reflect the different nature of the interest at issue. Exclusivity is not relevant given the interest in question is an activity rather than an interest in land. Instead, the test will focus on continuity in accordance with tikanga and extinguishment.

38 The test set out in the consultation document contains the following elements:

39 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:

a has been *in existence since 1840*; and

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

c has *not been extinguished*.

RELEVANT SUBMISSIONS

40 Submitters were asked whether they agreed with each of the elements of the test for determining non-territorial customary interests (customary rights) proposed by the Government. A majority of submitters who addressed this question disagreed with the proposed test. Of those who commented, there was a wide range of reasons for disagreement, for example: many submitters considered that there should be no recognition of customary interests; others thought there should be no reference to tikanga Māori (e.g. because it creates uncertainties); some thought the test is too high and unsympathetic to Māori and should not use common law as the basis for testing Māori interests. Those who agreed with the proposed test gave reasons such as: the test was reasonable and fair, and it was appropriate to include tikanga Māori.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

41 I think one change to the tests set out in the consultation document is necessary. The reference to iwi and hapū as the only groups eligible to apply for customary rights recognition should be changed to the more inclusive and less contentious 'applicant groups'. It is possible that some customary rights have been exercised by groups other than iwi or hapū, e.g. activities done at a whānau level. It is not appropriate to deny a group which would otherwise have a valid claim for a customary right, the ability to establish that right on the basis that it was not exercised at a iwi or hapū level.

42 While this would not explicitly limit the potential applicants to Māori groups, it would be inconsistent with the tikanga Māori element of the test and the common law doctrine of customary rights for non-Māori to apply for these

customary rights. In practice, non-Māori groups would be unlikely to make such a claim and if they did it is very unlikely to be successful.

RECOMMENDATIONS (TEST FOR CUSTOMARY RIGHTS)

- **Agree** the test for customary rights should refer to "applicant groups" and not be limited to hapū or iwi;
- **Agree** that the new legislation state that a customary right (activity, use or practice) carried out by an applicant group in the relevant foreshore and seabed area is recognised where the right:
    - has been in existence since 1840; and
    - continues to be carried out by the applicant group in accordance with tikanga Māori in the area specified; and
    - has not been extinguished.

Awards for customary interests

'Mana tuku iho' award for recognition of the relationship of tangata whenua with the foreshore and seabed

OVERVIEW

43 I believe it is important that there should be recognition of the enduring relationship all tangata whenua have with the foreshore and seabed. This will be through an express acknowledgment in the new legislation and participation in conservation processes relating to the foreshore and seabed.

RELEVANT SUBMISSIONS

44 Recognition of the relationship that all tangata whenua have with the foreshore and seabed was not included in the consultation document. However, there were some references in support of this theme. Some hui participants supported the notion of universal recognition of mana which endures in perpetuity irrespective of what happens to property rights.

45 The Iwi Leaders' Group has also stressed the importance of recognising the relationship of all tangata whenua with the foreshore and seabed without a requirement for meeting a test.

COMMENT AND PROPOSALS FOR A NEW REGIME

46 I propose that the ongoing relationship of tangata whenua with the foreshore and seabed (mana tuku iho) be recognised in part through a statutory acknowledgement of the enduring mana-based relationship of tangata whenua with the foreshore and seabed. As discussed in Part Two, this will sit within the

new Act's purpose section. The effects of this statement would be limited to the proposed mana tuku iho award.

47 The award I propose for mana tuku iho recognition is participation in conservation processes. For practical reasons, I think this award will need to sit with groups who are currently recognised under the Conservation Act 1987, which is with iwi authorities. This will ensure that the additional recognition I am proposing will not undermine existing engagement processes.

48 Section 4 of the Conservation Act 1987 requires the Department of Conservation to administer and interpret the Conservation Act 1987 (and related conservation legislation) to give effect to the principles of the Treaty of Waitangi. This includes consulting and involving tangata whenua when undertaking functions under those Acts. This award will further facilitate effective participation of tangata whenua in the processes related to conservation of the foreshore and seabed and is intended to be similar to the conservation mechanism in the Ngāti Porou Deed of Agreement.

49 The award will allow tangata whenua, through iwi authorities, to participate in decision-making processes (e.g. through notification and seeking views) within their rohe moana relating to:

a the establishment or extension of marine reserves (under the Marine Reserves Act 1971);

b the establishment or extension of marine mammal sanctuaries (under the Marine Mammals Protection Act 1978);

c the management of stranded marine mammals (under the Marine Mammals Protection Act 1978);

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

e the establishment or extension of conservation protected areas (under the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act 1953); and

f granting concessions (under the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act 1953).

50 Prior to any decision being made on the above matters the Department of Conservation will notify iwi authorities about any proposals and give particular regard to their views when progressing any proposals.

51 In areas where customary title is recognised, the right to permit certain conservation-related activities award would override this award in the customary title area and in those aspects which that award covers as it offers a higher level of decision making authority.

RECOMMENDATIONS (MANA TUKU IHO AWARD)

- **Agree** that the mana tuku iho award will provide tangata whenua (through iwi authorities) with the ability to participate in decision making processes (through notification and seeking their views) on matters relating to:
    - the establishment or extension of marine reserves (under the Marine Reserves Act 1971);
    - the establishment or extension of marine mammal sanctuaries (under the Marine Mammals Protection Act 1978);
    - the management of stranded marine mammals (under the Marine Mammals Protection Act 1978);
    - applications for marine mammal watching permits (under the Marine Mammal Protection Regulations 1992);
    - the establishment or extension of conservation protected areas (under the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act 1953); and
    - granting concessions (under the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act 1953).
- **Agree** that the Department of Conservation will notify iwi authorities of any proposals within their rohe and give particular regard to their views when progressing any proposals.
- **Note** that where applicable, the right to permit certain conservation related activities awards would override the participation in conservation processes award in customary title areas and in those aspects which that award covers as an award of customary title offers a higher level of participation in decision making.

Customary rights award

OVERVIEW

52 The consultation document proposed that the awards for "proven non-territorial rights" (customary rights) would offer protection to customary uses, activities and practices and ensure these are provided for in existing environmental management regimes.

53 The consultation document proposed three specific awards for customary rights which would apply only in the area where the right had been proven:

a customary activities to have a protected status;

b placement of rāhui over wāhi tapu; and

c planning document.

RELEVANT SUBMISSIONS

54 Submitters were asked whether they agreed with each of the elements of the awards for customary rights proposed by the Government. Submissions were divided. A large number of submitters who answered this question disagreed with the elements but for very different reasons. Some thought that iwi/hapū should receive more or different recognition, including full Māori ownership, or did not agree with a particular aspect of the proposed awards. Other submitters did not support any type of customary interest/right or award. Some who disagreed did however agree that the awards should include participation in environmental management. In hui and public meetings there was concern that proposed elements of the award did not fully express mana or that award holders may charge the public for access. Some submitters were also concerned about fees for public access.

55 A small number of submitters agreed with the proposed elements of the award and some noted that the award should be with hapū and whānau on the coast rather than with iwi.

56 There were a number of other comments about customary rights awards including that Māori should be able to develop the awards themselves. A number of submitters provided specific comments on aspects of the proposed awards including the need to avoid conflicts of interest in RMA processes, that customary rights might limit other activities, and that the planning document should go through a public consultation process. Some submitters expressed concern about how the environment would be protected from any adverse effect of customary activities. Local government submitters asked for resourcing and guidance on incorporating planning documents into the planning framework.

COMMENT AND PROPOSALS FOR A NEW REGIME

57 I remain of the view that the protection of customary activities award should be conferred for recognised customary rights. However, I propose that the other awards are removed from the customary rights level, as discussed below.

CUSTOMARY ACTIVITIES TO HAVE A PROTECTED STATUS

58 This award will ensure protection and regulation (under the RMA) of customary activities recognised through the customary rights test. This means that the activities would not be subject to sections 9-17 of the RMA or rules in plans or proposed plans (such as for coastal occupation charges), including resource consent requirements. The customary rights holder will be legally entitled to (in accordance with their tikanga): continue to carry out those activities; determine who will be able to carry out a protected customary activity; limit or suspend a protected customary activity; and derive a commercial benefit from carrying out a protected customary activity.

59 A third party resource consent would not be granted if it would adversely affect that customary activity (similar to section 107A of the RMA) without written

approval of the customary rights group. The Minister of Conservation, in consultation with the Minister of Māori Affairs and taking account of the views of the customary rights group, could impose controls on the exercise of a customary activity if it were having significant adverse effects on the environment. This 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.

60 To provide for existing interests and future investments in aquaculture, I think the new legislation should provide that recognised customary rights should not be able to effect consent renewal for aquaculture.

PLANNING DOCUMENT AND PROTECTION OF WĀHI TAPU

61 The consultation document proposed that the placement of rāhui over wāhi tapu award as a customary rights award which would allow customary rights holders to restrict or prohibit access to wāhi tapu (e.g. burial grounds) and wāhi tapu areas, if necessary to protect the wāhi tapu. The consultation document also set out the proposed details of the planning document as a customary rights award.

62 I now propose that these two awards be removed from the customary *rights* level of awards. On further consideration, I believe they are better suited as customary *title* awards. This is because the recognition of customary rights appropriately relates to the protection of existing customary activities and practices, rather than to the ability to identify wāhi tapu or participate in resource management processes.

RECOMMENDATIONS (CUSTOMARY RIGHTS AWARD)

- **Agree** that the "customary activities to have a protected status award" would protect and regulate (under the RMA) customary activities which had been recognised through the customary rights test;
- **Agree** that protected customary activities would not be subject to sections 9-17 of the RMA, or rules in plans or proposed plans (including for coastal occupation charges), including resource consent requirements;
- **Agree** that the customary rights holder will be legally entitled to (in accordance with their tikanga):
  - continue to carry out those activities;
  - determine who will be able to carry out a protected customary activity;
  - limit or suspend a protected customary activity; and
  - derive a commercial benefit from carrying out a protected customary activity;

- **Agree** that a third party resource consent will not be granted if it would adversely affect that customary activity (similar to section 107A of the RMA) without written approval of the customary rights group;

- **Agree** that the Minister of Conservation, in consultation with the Minister of Māori Affairs and taking account of the views of the customary rights group, could impose controls on the exercise of a customary activity if it were having significant adverse effect on the environment;

- **Agree** that, in order to provide for existing interests and future investments in aquaculture, the new legislation will provide that recognised customary rights should not be able to prevent consent renewal for aquaculture.

Customary title awards

OVERVIEW

63 The consultation document noted that, in order to accurately reflect the nature of territorial interests and to contribute to the ongoing expression of mana, any award for customary title should:

a draw on property rights (akin to the rights of a land owner); and

b provide for input to environmental management processes.

64 The consultation document proposed awards to recognise proven territorial interests (customary title). These awards would apply only in areas where territorial customary interests have been proven and would be held collectively by the successful applicant group. The proposed awards included a right to permit activities (both resource management and certain conservation-related activities) and a planning document.

65 Any customary title in a non-ownership regime would only have legal effect through the awards provided in the new Act or as negotiated, and in either case would not amount to ownership of land within the New Zealand marine coastal access area. This means that although customary title is revived by the legislation it does not amount to an interest in real property and could not be leased, licensed, mortgaged or alienated because the title would consist solely of the new rights and powers conferred in this new regime. The new rights and powers that are awarded could however be delegated or transferred in accordance with tikanga. Customary title would allow for commercial benefits and for customary title holders to develop and benefit from the title area within the confines of the existing legislative framework.

RELEVANT SUBMISSIONS

66 Submitters were asked whether they agreed with the customary title award for territorial interests. The majority of submitters who answered this question disagreed with the customary title awards but for different reasons. The reasons for disagreement ranged from the proposed awards being too limited to

the opposition of any recognition of customary interests including that they were race based and would be divisive. There was some opposition to the right of customary title holders to gain a commercial benefit while some just wanted to be sure that access was not restricted for the general public or that there would be no excessive charges for users. Others were concerned about ensuring all interests were balanced (customary and public).

67 Only a few submitters agreed with the proposal, some noting that it was reasonably fair and just. Some submitters who disagreed with the proposal made comments related to specific awards including: disagreement with the permission right award; that there should be clarity about the grounds upon which Māori exercise the proposed permission right; and that permission decisions should be challengeable in court. Others expressed concern that the award would mean Māori would have sole right of development in customary title areas as they would be able to prevent development through the permission right or charge a fee. Local authorities expressed the need to have certainty about what the awards would mean for them.

68 There was support for customary title at hui, public meetings and in submissions including support for tipuna or treaty title. At hui and public meetings there was also concern that the award did not fully express the mana of tangata whenua. Some defined customary title as including full ownership and some stated that it should include development rights; others that it should be inalienable. Some attendees wanted to be involved in designing the awards to ensure they fully expressed mana. Others noted they wished to play a major role in resource management processes or wanted joint management arrangements. Hui and public meeting participants also expressed concern about the possibility of award holders charging for public access. Many raised the issue of minerals and how these would be reflected in a customary title award and this theme also came through in a number of submissions.

69 There were a number of other comments made about the proposed customary title award. These included: agreement with an inalienable form of Māori title that provides for public access; disagreement with the permission right aspect of the award as it could inhibit essential infrastructure; and that customary title should be subject to the Public Works Act 1981 (similar to other land owners). Others thought Māori should determine the awards themselves, that all the awards should comply with all provisions of the RMA, or the submitters made specific comments on the planning document award.

Comment and proposals for a new legislation

70 I propose the awards for customary title are the same as outlined in the consultation document, with some modifications as outlined below. Additionally, I propose three new awards: one award which will enable customary title holders to receive prima facie ownership of all newly found taonga tūturu in the customary title area and another which will vest ownership of non-nationalised minerals within customary title areas in the customary title holders. I also propose that the protection of wāhi tapu award will be conferred at this level instead of at the customary rights level.

71 The awards for customary title will therefore be:

a right to permit activities requiring resource consent;

b right to permit certain conservation-related activities;

c planning document;

d prima facie ownership of newly found taonga tūturu;

e non-nationalised minerals; and

f placement of prohibition or restriction over wāhi tapu.

72 Together, the awards for customary title holders provide the ability to input into protecting customary activities through the permission rights awards and planning document. Customary title holders could also have customary activities and practices protected where they have demonstrated their existence in the application for customary title.

73 It is appropriate that customary title holders will be able to use, benefit from, and develop the area to which customary title applies, within the confines of existing legislative frameworks (e.g. resource consent and planning under the RMA).

RECOMMENDATION (USE OF CUSTOMARY TITLE AREA)

- **Agree** that customary title holders will be able to use, benefit from, and develop the area to which customary title applies, within the confines of existing legislative frameworks (e.g. resource consent and planning under the RMA).

RIGHT TO PERMIT ACTIVITIES REQUIRING RESOURCE CONSENT

74 The consultation document noted that the right to permit activities requiring resource consent award would involve the customary title holder having the right to decide whether an activity requiring resource consent could be processed by the appropriate consent authority. They would:

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

b be able to request any further information they may wish from the applicant.

75 This award would apply only in the customary title area and would not apply to resource consents for activities outside the customary title area. This approval is similar to the ability of private property owners of the foreshore and seabed. When giving or refusing to give consent, the customary title holder's decision could be made on any grounds.

76 If the customary title holder does not give its permission, the consent authority (or any other person, 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) would not be able to process the application. The RMA would need to be amended to reflect this.

77 If the customary title holder gives permission, the consent authority could process the application but would still need to decide whether it satisfied the statutory criteria of the RMA before granting or declining consent. The consent authority would be unable to grant a resource consent beyond the scope of the application that was permitted by the customary title holder.

78 There would be no obligation on a customary title holder to comply with the requirements of the RMA when giving or declining permission for a resource consent. This is because the decision of the customary title holder 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.

79 This award is intended to be similar to the permission right award in the Ngāti Porou Deed of Agreement; this means it will also encompass resource consents for controlled activities.

80 The Ministry of Fisheries has raised concerns about the potential cumulative impacts of this award on aquaculture development, improved consent renewal processes developed in the aquaculture reforms and the durability of the aquaculture settlement (i.e. the creation of new space). I believe that this award will clarify decision making in customary title areas and ensure customary title holders are in a strong position to engage. I understand that the Ministry of Fisheries plans on undertaking proactive activity to work through any disagreements that may occur. This may mitigate these issues. In addition, I think it should not be assumed that customary title holders would oppose aquaculture development in their customary title areas, and may actively look to advance those interests through aquaculture development.

81 The Ministry for the Environment, Department of Internal Affairs and some submitters queried the rationale for including the customary title holder permission as a step in the RMA consent process. They thought it would be more efficient if the applicant sought the customary title holder's written consent prior to lodging an application with a regional council. This would allow the customary title holder to directly engage with any applicant, particularly about any additional information the customary title holder would require in order to make a decision on allowing the application rather than this process being managed by the regional council. Applicants would need to continue to gain permission from the customary title holder if they modified the application as part of going through the resource consent process.

82 This approach would mean the resource consent could not be processed until it had the customary title holder's approval. Consequently, there would be no timeframe for seeking customary title holder permission and no ability to deem that a lack of response equates to permission. On the balance, I agree with this approach as it would help streamline RMA processes and be less work for councils.

RECOMMENDATIONS (RIGHT TO PERMIT ACTIVITIES REQUIRING RESOURCE CONSENT)

- **Agree** that customary title holders will have the right to approve, or withhold approval, for an activity requiring a resource consent;
- **Agree** that the "right to permit activities requiring resource consent award" will cover controlled activities under the RMA.

RIGHT TO PERMIT CERTAIN CONSERVATION-RELATED ACTIVITIES

83 The second award under customary title is the "right to permit certain conservation-related activities". A customary title holder will have the right to give, or refuse to give, its consent to conservation proposals and applications, subject to the Crown's ability to achieve essential conservation outcomes. As with the right to permit activities requiring resource consent award, the decision of the customary title holder to give or refuse consent could be made on any grounds.

84 The relevant conservation proposals and applications are:

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

b proposals to establish or extend conservation protected areas (under the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act); and

c applications for concessions (under conservation legislation).

85 The Minister of Conservation or Director-General of Conservation would be required to forward to the customary title holder any such proposal or application. The customary title holder would be required to give, or refuse, their consent in writing within a set time period. I think an appropriate timeframe for receiving customary title holder permission would be within 40 working days. If the customary title holder does not respond within those timeframes then it would be deemed that they had provided permission.

86 The Minister of Conservation or Director-General of Conservation would not be able to progress a proposal or application until approval has been given by the customary title holder. With that approval:

a 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 customary title holder;

b in the case of a marine reserve application, the Director-General of Conservation would be required to process the application in accordance with the Marine Reserves Act, provided that:

i consent would be deemed to include consent for signs, boundary markers and categories of management activities that were disclosed to the customary title holder when their consent was sought; and

ii where the Minister intends 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 the customary title holder.

87 Cabinet agreed the Government's preferred approach was that the "right to permit certain conservation-related activities award" would include:

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

b applications for marine mammal watching permits (under the Marine Mammals Protection Regulations 1992) [CAB Min (10) 10/9].

88 The public consultation document did not contain proposals relating to marine mammal sanctuaries and marine mammal watching permits. The public has not had the opportunity to review and comment on these proposals. The Department of Conservation considers there is a risk of adverse public reaction should they subsequently be included in the final award.

89 The Department of Conservation also advises there are considerable risks with including marine mammal sanctuaries and marine mammals watching permits (which are important tools for species protection) within the scope of this award.

90 I agree with this but consider that, in the case of marine mammal watching permits, customary title holders should be given a degree of preferential treatment for obtaining those permits.

91 The right to permit certain conservation-related activities award would be subject to the Crown retaining the ability to achieve essential conservation outcomes in relation to marine reserves and conservation protected areas. This applies in circumstances in which it is not possible for the Crown to achieve an important conservation outcome in any other location. Examples of the sorts of protection that might be essential include:

a Island nature reserves which extend to the low water mark, to allow control of boat landings. This is essential to ensure that the risk of rats and other pests getting onto the islands is minimised, and to enable effective enforcement to prevent poaching of endangered species and other damage to these areas.

b Marine Protected Areas: the objective of the Marine Protected Areas Policy is to create a network of marine protected areas that is representative of the full range of marine ecosystems, including at least one marine reserve for each ecosystem type. In many cases there will be many alternative locations in which an ecosystem can be protected, but in a few cases there is only one example of a habitat or ecosystem type, or

only one in which a viable marine reserve can be created, and no option to shift protection to another location.

c Coastal areas that have been listed under the Ramsar Convention, to protect internationally important wetlands, particularly those which are used by migratory wading birds (e.g. at Miranda).

d A reserve was created adjacent to Abel Tasman National Park to allow management of water-based tourism operations, to prevent potential adverse effects on visitors, the park, and the operators.

92 Where there is no practical alternative to achieve these types of outcomes, the protection should be able to proceed without customary title holder consent. I propose that the legislation contain criteria that the Minister of Conservation or Director-General of Conservation would apply in deciding whether protection would proceed without customary title holder consent.

93 The Minister of Conservation or Director-General of Conservation would need to be satisfied that the establishment of a marine reserve or conservation protected area is essential for protection purposes having regard to the following:

a the views of the customary title holder about the impact of the protection action on their interests, and whether such impacts as set out by the customary title holder has been minimised as far as practicable; and

b whether there are no practicable options to achieve nationally important conservation outcomes without carrying out protection within the customary title area, because:

i the protection relates to a unique or rare habitat, ecosystem, feature, population, or area of scientific value; or

ii it is an area that is nationally important for the conservation of a species; or

iii the protection of the area is essential to ensure the viability, integrity or effective management of a nationally important conservation protected area, or marine reserve or network of such protected areas; or

iv the protection relates to a habitat, ecosystem or species that occurs at a number of sites, but where achieving the desired outcomes at other sites is not practicable; or

v any other matter similar to the matters above.

94 After a marine reserve or conservation protected area is established, the customary title holder would have opportunities to be involved in the management of the protected area through consultation and other similar means, in accordance with the Department of Conservation's obligations under

section 4 of the Conservation Act (to give effect to the principles of the Treaty of Waitangi), and in light of the group's standing as customary title holder.

RECOMMENDATIONS (RIGHT TO PERMIT CERTAIN CONSERVATION-RELATED ACTIVITIES)

- **Agree** that customary title holders will have the right to give, or refuse to give, its consent to conservation proposals and applications (subject to the Government's ability to achieve essential conservation outcomes);
- **Agree** that these 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 the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act); and
    - applications for concessions (under conservation legislation).
- **Agree** that the Minister of Conservation or Director-General of Conservation would not be able to progress a proposal or application until approval has been given by the customary title holder;
- **Agree** that customary title holder should have forty working days within which to give, or decline to give, permission for conservation-related activities covered by the right to permit certain conservation related award;
- **Agree** that if the customary title holder does not respond within forty working days it will be deemed that permission has been granted;
- **Note** that the right to permit certain conservation-related activities award includes proposals to establish or extend marine mammal sanctuaries and applications for marine mammal watching permits [CAB Min (10) 10/9] but these were not included in the consultation document;
- **Agree** to rescind the previous Cabinet minutes [CAB Min (10) 10/9] and remove proposals to establish or extend marine mammal sanctuaries and applications for marine mammal watching permits from the award;
- **Agree** that customary title holders receive a reasonable degree of preference in applications for marine mammal watching permits in customary title areas;
- **Agree** that the right to permit certain conservation related activities award will be limited to encompass the Crown achieving essential conservation outcomes where there are no practical alternatives;
- **Agree** that the Minister for Conservation or Director-General would need to be satisfied that the establishment of a marine reserve, or conservation protected area is essential for protection purposes having regard to the following:

- the views of the customary title holder about the impact of the protection action on their interests, and whether such impacts as set out by the customary title holder has been minimised as far as practicable; and

- whether there are no practicable options to achieve nationally important conservation outcomes without carrying out protection within the customary title area, because:

  - the protection relates to a unique or rare habitat, ecosystem, feature, population, or area of scientific value; or

  - it is an area that is nationally important for the conservation of a species; or

  - the protection of the area is essential to ensure the viability, integrity or effective management of a nationally important conservation protected area, or marine reserve or network of such protected areas; or

  - the protection relates to a habitat, ecosystem or species that occurs at a number of sites, but where achieving the desired outcomes at other sites is not practicable; or

  - any other matter similar in nature to the matters set out above.

ACCOMMODATED MATTERS FROM PERMISSION RIGHT AWARDS

95 I think there is no obvious reason why the exercise of the two "right to permit activities" awards should be subject to any right of appeal. As customary title provides rights akin to ownership, it is the prerogative of the owner to make a decision without expecting this to be challenged.

96 In order to provide certainty to other interests in customary title areas, I propose that the following accommodated matters be protected from the right to permit activities requiring resource consent and right to permit certain conservation related activities awards:

a any activity that can be lawfully undertaken without a resource consent;

b any activity that is lawfully undertaken in accordance with a current resource consent including existing structures;

c any existing[2] infrastructure work and its associated operations, maintenance and upgrades;

d any emergency activity (e.g. search and rescue etc.);

e the access provisions in the Crown Minerals Act for nationalised minerals;

[2] Existing at the date a new regime is enacted.

f scientific research or monitoring undertaken or funded by a crown agency or regional council;

g an existing marine reserve and activities necessary to manage that area;

h any existing conservation protected area and activities necessary to manage that area;

i any existing marine mammal sanctuary and activities necessary to manage that area;

j any existing concession in a conservation protected area; and

k any existing commercial marine mammal permit under the Marine Mammal Protection Regulations 1992.

97 In addition, to recognise existing interests and future investments in aquaculture, I think the permission right should not be able to be exercised in relation to consent renewal for aquaculture. I note that it is unlikely that such an issue would arise as customary title is unlikely to be found in areas where there are existing marine farms due to the requirement for exclusivity.

98 I acknowledge that limiting the scope of the permission right in this respect diminishes the extent to which the awards for customary title reflect the rights of a land owner. This is why I have provided for other awards such as the planning document and participation in conservation processes to balance the overall effect of the awards with respect to recognising customary title interests.

RECOMMENDATIONS (ACCOMMODATED MATTERS)

- **Agree** that the "right to permit activities" awards will not be able to be appealed;
- **Agree** that the following activities are protected from the "right to permit activities" awards:
  - any activity that can be lawfully undertaken without a resource consent;
  - any activity that is lawfully undertaken in accordance with a current resource consent including existing structures;
  - any existing infrastructure work and its associated operations, maintenance and upgrades;
  - any emergency activity (e.g. search and rescue etc);
  - the access provisions in the Crown Minerals Act for nationalised minerals;
  - scientific research or monitoring undertaken or funded by a crown agency or regional council;
  - an existing marine reserve and activities necessary to manage that area;

- any existing conservation protected area and activities necessary to manage that area;
- any existing marine mammal sanctuary and activities necessary to manage that area;
- any existing concession in a conservation protected area;
- any existing commercial marine mammal permit under the Marine Mammal Protection Regulations 1992; and

- **Agree** the "right to permit activities" award should not be able to be exercised to prevent consent renewal for aquaculture.

PLANNING DOCUMENT

99 The third award is a planning document for the customary title area. Customary title holders would be able, but not required, to prepare a foreshore and seabed planning document that sets out their objectives and policies according to their world view, including sustainable management and the protection of cultural identity. The planning document could also contain particular heritage values and identify wāhi tapu.

100 The planning document will build on existing RMA planning provisions but with a particular focus on giving effect to the relationship of the customary title holder with the foreshore and seabed. I expect that this award will provide for fuller expression of section 6(e) of the RMA. That section requires that decision makers recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga as matters of national importance.

101 The difference between this proposed award and iwi management plans under the RMA is that this award is focused on the foreshore and seabed only. For clarity it should be noted that iwi management plans prepared under the RMA can be used, or if necessary adapted, to fit with this award.

102 If customary title holders decided to develop a planning document they would need to lodge the planning document with the Ministry of Justice's foreshore and seabed register and the relevant regional council. Once lodged the relevant regional council would have to recognise and provide for the document as it relates to resource management issues and is consistent with the RMA (this is the same status of the planning document which is part of the Ngāti Porou Deed of Agreement - extended environmental covenant). This would happen during the next review of the relevant provisions in the regional policy statement or, regional plans. Until such reviews are completed, a regional council would:

a attach the planning document to its relevant documents; and

b when considering a resource consent application wholly or partly within, or directly affecting, the area covered by the customary title, recognise and

provide for the matters within the planning document that relate to resource management issues.

103 After lodging the planning document with the agencies below, it would also require:

a the New Zealand Historic Places Trust to have particular regard to the document when considering an application for an authority to destroy, damage, or modify an archaeological site within the relevant area. The Environment Court will also have particular regard to the planning document when determining appeals on these matters;

b local authorities to take into account the document under relevant sections of the Local Government Act 2002;

c the Director-General of the Department of Conservation to take into account the document in relation to conservation management strategies; and

d the Minister of Fisheries to take into account the document in relation to fisheries plans.

104 The exclusive nature of a customary title holder's interest means that only that group would be able to develop a plan for that area. The customary title plan could cover areas outside of the customary title area (i.e. for that group's rohe moana) but in those areas would have the status as an iwi management plan under the RMA. The effect of the planning document outside the customary title area would be the same as an iwi management plan under the RMA which requires regional councils to 'take into account' plans recognised by an iwi authority when reviewing their plans and policy statements.

105 The Ministry of Fisheries has commented that a requirement to consider new planning documents in relation to fisheries plans could create difficulty for their initiatives to develop fisheries plans. However I consider that including fisheries will allow for the development of a more holistic approach to planning across the different jurisdictions within the foreshore and seabed.

106 A number of departments have expressed concerns that there would be multiple planning documents that could be inconsistent and would create difficulties for agencies having to consider them. I think that it is clear that the planning document in a customary title area has a high status and would have priority in those areas. I expect that customary title holders may opt to work together with iwi authorities to develop a single planning document where there were efficiencies in doing so.

RECOMMENDATIONS (PLANNING DOCUMENT)

- **Agree** that customary title holders would be able, but not required, to prepare a planning document which sets out objectives and policies for the management of the customary title area;

- **Agree** that the planning document must be lodged with the relevant regional council, the New Zealand Historic Places Trust, the Department of Conservation, the Ministry of Fisheries and the Ministry of Justice;

- **Agree** that once lodged, regional councils will be required to recognise and provide for the planning document as it relates to resource management issues and is consistent with the RMA, during the next review of the relevant provisions in the regional policy statement or regional plan;

- **Agree** that until regional councils complete a review of the relevant provisions of the regional policy statement or regional plan they will attach the planning document to their relevant documents and recognise and provide for the matters within the planning document that relate to resource management issues when considering a resource consent application wholly or partly within, or directly affecting, the customary title area;

- **Agree** that once lodged, the New Zealand Historic Places Trust will be required to have particular regard to the planning document when considering an application to destroy, damage, or modify an archaeological site within the iwi authority area and the Environment Court will have particular regard to the planning document when determining appeals on these matters;

- **Agree** that once lodged local authorities will be required to take into account the planning document under relevant sections of the Local Government Act 2002;

- **Agree** that once lodged the Director-General of the Department of Conservation will be required to take into account the planning document in relation to conservation management strategies;

- **Agree** that once lodged the Minister of Fisheries will be required to take into account the planning document in relation to fisheries plans; and

- **Agree** that outside of customary title areas, and if the document covers a broader area, the planning document will have the status of 'take into account'.

PRIMA FACIE OWNERSHIP OF NEWLY FOUND TAONGA TŪTURU

107 This new award will provide that:

a customary title holders will gain prima facie ownership of all newly found taonga tūturu in the area where those interests have been recognised. Prima facie ownership will remain with the customary title holder until ownership becomes final if no competing application is made (see below), or ownership is determined in accordance with an order of the Māori Land Court under the Protected Objects Act;

b prima facie ownership awarded to a customary title holder will be transferred to final ownership of the newly found taonga tūturu if there are no competing applications for ownership within six months from the time of public notice of the find; and

c any customary title holder with prima facie ownership is entitled to interim custody of the newly found taonga tūturu, subject to approval of the Chief Executive of the Ministry for Culture and Heritage, until final ownership is determined.

RECOMMENDATIONS (TAONGA TŪTURU)

- **Agree** that the customary title award includes prima facie ownership of newly found taonga tūturu within the customary title area, until ownership is determined by the Māori Land Court;

- **Agree** that where a customary title holder is awarded prima facie ownership of newly found taonga tūturu this will become final ownership if there are no competing applications for ownership within six months from the time of public notice of the find; and

- **Agree** that any customary title holder with prima facie ownership of taonga tūturu will be entitled to interim custody of the newly found taonga tūturu subject to the approval of the Chief Executive of the Ministry of Culture and Heritage.

NON-NATIONALISED MINERALS

108 Cabinet has agreed that the status quo in respect of the regime for nationalised minerals (petroleum, gold, silver and uranium) will not change under a new regime for the foreshore and seabed [TOW Min (09) 14/1, CAB Min (09) 45/4 refers]. I have been working with the Minister for Energy and Resources on how customary interests in non-nationalised minerals in the foreshore and seabed can best be recognised.

109 I propose that outside of customary title areas, non-nationalised minerals would have the same status as under the current regime (Crown ownership). In customary title areas there are three potential options for dealing with non-nationalised minerals:

a maintaining the current status quo which is that the Crown would continue to own non-nationalised minerals in the foreshore and seabed;

b while the minerals remain in Crown ownership, customary title holders have an increased role in relation to non-nationalised minerals which would allow them to control access, and gain commercial benefits from those minerals (the same rights of access as accorded to landowners under the Crown Minerals Act 1991); or

c providing ownership of non-nationalised minerals to customary title holders within customary title areas (the same rights as certain private title holders), which would allow them to control access and gain commercial benefits from those minerals.

110 The Ministry of Economic Development considers that retaining Crown ownership of all non-nationalised minerals is the simplest way of effectively managing allocation of mineral resources throughout the foreshore and seabed

area and realising their value. However, Te Puni Kōkiri point out that, but for the 2004 Act, the holders of Māori customary land would have had rights to these minerals.

111 I think it is preferable that full ownership of non-nationalised minerals be awarded to customary title holders as this would provide the same rights that holders of private title have in relation to non-nationalised minerals which would have been the case but for the 2004 Act vesting ownership in the Crown. The relevant controls under the RMA would continue to apply.

RECOMMENDATIONS (NON-NATIONALISED MINERALS)

- **Note** that non-nationalised minerals outside of customary title areas and prior to customary title areas being determined would have the same status as under the current regime (Crown ownership);
- EITHER:
    - **Agree** that the Crown will continue to own all non-nationalised minerals in the foreshore and seabed (in customary title areas as well);

    OR

    - **Agree** that while the Crown continues to own the minerals, customary title holders will be provided an increased role in non-nationalised minerals allowing them to control access and gain commercial benefit in customary title areas (the same rights of access as accorded to landowners under the Crown Minerals Act 1991);

    OR

    - **Agree** that customary title holders have ownership of non-nationalised minerals within customary title areas (the same rights as certain private title holders), which would allow them to control access, and gain commercial benefits from the non-nationalised minerals.

WĀHI TAPU AWARD

112 The wāhi tapu award was included in the consultation document as an award at the customary rights level. However, I think this award would sit better at the customary title level as the test for customary title will identify aspects of a group's relationship with particular geographical area and likely include wāhi tapu.

113 I think the wāhi tapu award as outlined in the consultation document should be slightly reframed so that it no longer refers to rāhui. This ensures it fits with the intent of protecting wāhi tapu in an enduring way, if required, rather than a rāhui which suggests periodic protection.

114 For the wāhi tapu award I propose the definitions of wāhi tapu and wāhi tapu area would be the same as in the Historic Places Act 1993 (HPA). The HPA and TTWMA are the two Acts which provide definitions of wāhi tapu (TTWMA

does not include a definition for wāhi tapu area). TTWMA definition restricts wāhi tapu to being on Māori freehold land or general land (land in fee simple not owned by Māori) so would not provide for the recognition of wāhi tapu in the foreshore and seabed. The HPA provides a broader definition of wāhi tapu which is likely to encompass more significant sites for Māori. Accordingly I propose the definition for wāhi tapu and wāhi tapu area will be as follows:

a wāhi tapu is a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense; and

b wāhi tapu area is an area of land that contains one or more wāhi tapu.

115 I propose that a wāhi tapu, or wāhi tapu area(s), would be agreed during negotiations or through a court process. There would need to be agreement that a wāhi tapu, or wāhi tapu area:

a is recognised in accordance with the tikanga of the customary title holder; and

b requires the proposed level of restriction to access in order to adequately protect it.

116 Once agreement on the wāhi tapu or wāhi tapu area(s) has been reached, the Minister of Conservation would be notified. Notification will set out: the location of the wāhi tapu or wāhi tapu area(s); the access prohibition or restrictions (and reasons for them); any exemptions to allow someone to carry out a protected customary activity and any conditions related to exemptions. The Minister of Conservation would then be required to restrict or prohibit access by issuing a gazette notice. The Minister of Conservation would release a public notice of the wāhi tapu and wāhi tapu area(s) and send notices to the customary title holder and the local authority with responsibilities covering the relevant area of the foreshore and seabed. The notice would also be recorded in the New Zealand marine coastal access area register (discussed in Part Seven).

117 Restrictions or prohibitions would be enforced by the relevant local authority, in consultation with the customary title holder. Local authorities would be required to take any reasonable steps necessary to implement a prohibition or restriction (e.g. including erecting signs and barriers, if appropriate). Wardens could be appointed to promote compliance, if required, in accordance with regulations which would provide for their appointment.

118 In addition a fine of up to $5000 would apply to anyone who intentionally fails to comply with a prohibition or restriction. I believe a fine is a necessary additional deterrent to individuals who might seek to willingly desecrate a wāhi tapu. Wāhi tapu which are also classified under the HPA would not be subject to this fine as those sites are already subject to a fine for the same reasons under that legislation. This fine is the same as the fine from the Ngāti Porou Deed of Agreement and is smaller than the possible fine for destroying a wāhi tapu or wāhi tapu area protected by a heritage covenant, set out in the HPA, which can be up to $100,000. That Act also contains a fine of up to $40,000 for damaging or modifying a wāhi tapu or wāhi tapu area protected by a heritage covenant.

RECOMMENDATIONS (WĀHI TAPU AWARD)

- **Agree** that the intent of the wāhi tapu award is to protect or restrict access to wāhi tapu if required;
- **Agree** that the definitions of wāhi tapu and wāhi tapu area will be the same as the definitions from the Historic Places Act 1993, which are:
    - wāhi tapu is a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense; and
    - wāhi tapu area is an area of land that contains one or more wāhi tapu;
- **Agree** that the customary title holder should provide evidence that demonstrates the wāhi tapu or wāhi tapu area:
    - is recognised in accordance with the tikanga of that customary title holder; and
    - requires the proposed restriction to access in order to protect it;
- **Agree** that the Minister of Conservation must be notified of agreed wāhi tapu and wāhi tapu areas, and that notification will set out:
    - the location of the wāhi tapu or wāhi tapu area(s);
    - the access prohibition or restrictions (and reasons for them); and
    - any exemptions to allow someone to carry out a protected customary activity and any conditions related to exemptions;
- **Agree** that the Minister of Conservation would be required to:
    - restrict or prohibit access to the wāhi tapu and wāhi tapu area(s) by issuing a gazette notice;
    - release a public notice of the wāhi tapu and wāhi tapu area(s); and
    - send notices to the customary title holder and the local authority with responsibilities covering the relevant area of the foreshore and seabed;
- **Agree** that notice of agreed wāhi tapu or wāhi tapu areas will be recorded in the New Zealand marine coastal access area register;
- **Agree** that restrictions or prohibitions to wāhi tapu would be enforced by the relevant local authority, in consultation with the customary title holder;
- **Agree** that local authorities would be required to take any reasonable steps necessary to implement a prohibition or restriction to wāhi tapu (e.g. including erecting signs and barriers, if appropriate);

- **Agree** that wardens could be appointed to promote compliance on prohibitions or restrictions to wāhi tapu, if required, in accordance with regulations which would provide for their appointment;

- **Agree** that a fine of up to $5000 would apply to anyone who intentionally fails to comply with a prohibition or access restriction for wāhi tapu; and

- **Note** that the $5000 fine would not apply to wāhi tapu which are also classified under the Historic Places Act 1993 as those sites are already subject to a fine under that legislation.

Part Five: Reclamations

Purpose

1 This part of the paper asks Ministers to make decisions on:

a the type of interest that can be granted in a reclamation;

b who can apply for a reclamation?

c can a reclamation have alternative uses?

d can an interest in a reclamation be alienated?

e should there be transitional provisions regarding reclamations?

2 These questions are broader than the questions posed in the consultation document.

OVERVIEW

3 A reclamation is the construction of dry land where there was previously land covered by water. A range of entities have an interest in acquiring and using a reclamation for the principal reason of expanding of their activity (e.g. port companies, airports, yacht clubs and private development). Reclamations may be created for a number of specific purposes such as providing the foundations for infrastructure for airports, railways and roads. A large proportion of the Wellington and Auckland airports are built on reclaimed land.

4 Currently, both central and regional Government have decision-making roles in regard to reclamations. Regional councils can decide whether a proposal to reclaim areas of the foreshore and seabed is in accordance with the purpose of the RMA and how environmental effects can be minimised. The Minister of Conservation can decide whether to vest a legal interest in the reclamation (e.g. a leasehold interest and its term) in a person and, if so, at what price.

5 In regard to the Minister of Conservation's role, there is no statutory guidance as to the form that an application must be made in, the criteria that applies or any specified time frames within which a decision must be made. As noted in previous papers, the Department of Conservation (on behalf of the Minister) is dealing with 22 vesting applications for reclamations made through two different processes under the RMA. The Minister for Land Information is responsible for vesting decisions for pre-1991 illegal reclamations under a third regime (the Land Act 1948). These 22 applications have the potential to result in the granting of freehold or leasehold interests depending on the date of the relevant reclamation.

6 In summary (excluding historical applications and extant applications grand-parented under current processes):

a only a leasehold interest to a maximum of 50 years can be granted in a reclamation (with the exception of a perpetual right of renewal for port companies if the reclamation continues to be used for port facilities) constructed since 2004; and

b anyone can apply for a leasehold interest in a reclamation.

The type of interest that can be granted in a reclamation

OVERVIEW

7 Repealing the 2004 Act and moving to a regime where there is no specified owner of the foreshore and seabed (with the land being inalienable) means decisions need to be made about reclamations and, in particular, the type of interest that can be granted.

8 If the no-ownership regime is to apply to reclaimed land and a new interest, a coastal permit, could be granted. This would be consistent with a "no-ownership regime". The coastal permit would be easily renewable for additional terms of 50 years or more, provided the applicant has observed the terms of the permit and proposes to continue using the reclamation for relevant activities.

9 If, however, it was considered that reclaimed land (being dry land and now above the foreshore) should not continue to be treated as part of the New Zealand marine coastal access area, the legislation could provide that the reclaimed land automatically becomes land owned by the Crown. It would then be possible to grant:

a fee simple title (as was available prior to the 2004 Act); or

b a leasehold interest (as available under the 2004 Act).

10 Both these types of interest are inconsistent with there being no owner of the foreshore and seabed. These types of interest are the maximum that could be granted. This means that if fee simple title is applied for, the Minister of Conservation or Minister for Land Information may decide that it is more appropriate to grant a lesser interest, such as a long term lease. The Government has other work streams focussed on infrastructure interests. Part Six of this paper refers to those other work streams, in particular RMA Phase II, and asks Ministers to agree that critical decisions on national and regional infrastructure should be made as part of those processes, rather than as part of the review of the 2004 Act.

RELEVANT SUBMISSIONS

11 The consultation document asked whether submitters agreed with the Government's proposals regarding reclamations. These were:

a existing decision-making processes would continue in respect of reclamations although the nature of the interest granted may change;

b existing applications would continue to be dealt with as though the Crown were the owner of the underlying land; and

c for new applications, local authorities would continue to perform their role of considering the environmental effects of a proposed reclamation.

12 The consultation document also asked submitters whether they agreed with the length of time proposed for the new form of coastal permit for port companies (50 years or more, renewable).

13 Most submitters agreed with the Government's proposal for decision making about reclamations. Views about the appropriate length of a coastal permit were split reasonably evenly between agreement, disagreement and no preference.

14 Many submitters with interests in reclamations, including port companies, airports and local authorities disagreed with the proposal, emphasising their need for fee simple title in reclamations as this provides them with the necessary certainty of investment in, and use of, their infrastructure.

15 Some submitters disagreed with the Government's proposals, believing that the period for coastal permits for reclamations should either be shorter or longer than 50 years. A number of submitters disagreed with the Government's proposal on the basis that decisions about reclamations should involve more input from Māori or that the proposal is unacceptable because it assumes the Crown is the owner of the land without appropriately recognising tikanga and Māori ownership of the land.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

16 In considering which type of interest to grant in a reclamation, the following matters must be considered:

a the underlying intent of a no ownership regime;

b that the foreshore and seabed is an area of great importance to the people of New Zealand, for its intrinsic and cultural worth; and

c equity of treatment of different interests in the foreshore and seabed.

17 It is arguably inequitable to treat applicants for an interest in a reclamation preferentially by granting them fee simple title. In addition, this would be an exception to the Government's assurance of access.

18 An alternative view is that once land is reclaimed it no longer has the same value or nature as land that is below mean high water springs. A reclamation is a valuable piece of land created using the resources of the applicant. Arguably, for these reasons, it is appropriate to treat this land as though it is not part of the

New Zealand marine coastal access areaand therefore fee simple title could be granted in it.

19 I think there are the following three options for the interest available in reclamations: fee simple title, leasehold interests and coastal permits. I favour the granting of fee simple title in reclamations as this provides the certainty necessary for business and development interests in the foreshore and seabed to undertake their activities, which in turn provides economic benefit to the whole country.

RECOMMENDATION (TYPE OF INTEREST IN RECLAMATIONS)

- EITHER:
  - **Agree** that the new legislation provides for fee simple title in reclamations, as an exception to the New Zealand marine coastal access area, including providing for Crown ownership prior to transfer;

  OR

  - **Agree** that the new legislation provides for leasehold interests (for specified time periods) in reclamations, as an exception to the New Zealand marine coastal access area, including providing for Crown ownership prior to transfer;

  OR

  - **Agree** that the new legislation provides for coastal permits to occupy reclamations and the land continues to be part of the New Zealand marine coastal access area even though the land is above mean high water springs.

Who can apply for an interest in a reclamation?

OVERVIEW

20 As noted above, there is a lack of clarity about the process for recognition of an interest in a reclamation. The two substantive issues that can be resolved here are:

a who can apply for an interest in a reclamation; and

b what the process is (e.g. who will make the decision).

21 Under the 2004 Act, there is no criterion as to who may apply for an interest in a reclamation. This has led to the Department of Conservation having to deal with competing applications with no statutory guidelines on who has the more legitimate interest.

22 The process has been developed by the Department of Conservation with little statutory guidance. The Department of Conservation has a Standard Operating

Procedure and Price Guideline in place for the Department and Minister of Conservation to ensure that decisions are made effectively and in accordance with the law.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

23 I recommend that, if a decision is made that fee simple title or a leasehold interest in reclamations is granted, the existing decision-making processes should continue to apply to current and future applications as though the Crown were the owner of the underlying land. Accordingly, the Crown would continue to decide whether to grant an interest in a reclamation and local authorities would continue to perform their current role of considering the environmental effects of a proposed reclamation in granting a permit for the act of reclaiming land.

24 I recommend that, if a decision is made that the maximum interest available in a reclamation is a coastal permit, further consideration will need to be given to the identity of the decision-maker.

25 I do not believe it is in anyone's interests to allow competing applications for an interest in a reclamation unless the reclamation has been abandoned. I recommend that the new legislation should provide that only the person or entity who constructed a reclamation should be able to apply for an interest in that reclamation unless the reclamation has been abandoned or the creator cannot be identified. The applicable regime prior to the RMA, the Harbours Act, contained a provision of this nature and I think including a provision like this in the new regime would accord with the policy development principles of certainty and efficiency.

26 An application for an interest in a reclamation by a third party should be allowed where the creator cannot be identified or where a reclamation has been abandoned. The new legislation could include a deeming provision stating that any reclamation which has not had an application for an interest in it for 10 years after the date of completion of the reclamation, can be the subject of an application by a third party.

RECOMMENDATIONS (WHO CAN APPLY FOR INTERESTS IN RECLAMATIONS)

- **Agree** that, if a decision is made to grant freehold or lease hold interests in reclamations, the new legislation will provide for existing and future applications to continue to be dealt with as though the Crown were the owner of the underlying land, with the Crown deciding whether to vest an interest in the reclamation;

- **Note** that, if the decision is made to grant an interest similar to a coastal permit in reclamations, there will need to be further consideration of the identity of the appropriate decision-maker;

- **Agree** that the legislation would provide for existing and future applications and local authorities would continue to perform their current role of considering the environmental effects of a proposed reclamation;

- **Agree** that the legislation will provide that, unless a reclamation has been abandoned, only the person who constructs a reclamation can apply for an interest in that reclamation;

- **Agree** that the legislation will provide that a reclamation will be deemed to be abandoned if no application in respect of that reclamation has been made for 10 years after the date of completion of the reclamation;

- **Agree** that a person who did not construct a reclamation can apply for an interest in a reclamation that has been abandoned.

Can a reclamation have alternative uses?

OVERVIEW

27 Section 355AA of the RMA relates to the effect of the 2004 Act on the vesting of reclamations. It provides that a port company or a port operator may have a 50 year leasehold interest granted to it, with a perpetual right of renewal on the same terms as the original lease, to the extent that the land continues to be used for port facilities.

RELEVANT SUBMISSIONS

28 Some submitters, including port companies have argued that section 355AA restricts their ability to use reclaimed land for alternative uses, for example, cafes or apartments. They would prefer to be able to put reclamations to alternative uses, other than for port company purposes.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

29 The policy intent of the 2004 Act is that a reclamation must be used for port facilities if a lease with a perpetual right of renewal is to be granted in that lease. This policy could be re-visited in the new foreshore and seabed regime. Accordingly, I invite Cabinet to consider whether or not a reclamation can have alternative uses. I recommend that reclamations should not have uses alternative to the purposes for which they were originally constructed.

RECOMMENDATION (ALTERNATIVE USES FOR RECLAMATIONS)

- EITHER:
  - **Agree** that reclamations will be able to have alternative non-coastal uses regardless of the purposes for which they were originally constructed;

  OR

  - **Agree** that reclamations will not be able to have alternative non-coastal uses to the purposes for which they were originally constructed.

Can an interest in a reclamation be alienated?

OVERVIEW

30 If a decision is made to grant fee simple title in reclamations, a subsequent decision will need to be made as to whether that interest can be alienated. I propose that, if an owner of a reclamation wishes to sell it, it should first be offered to the Crown. If the Crown does not elect to buy the reclamation, it should then be offered to the relevant coastal iwi or hapū. If the relevant group elects not to purchase the reclamation, it could then be offered to third parties.

RECOMMENDATIONS (ALIENATION OF RECLAMATION INTERESTS)

- EITHER:
    - **Agree** that, if fee simple title in reclamations is available, the Crown will have a right of first refusal over the reclamation and the relevant coastal iwi or hapū will have a right of second refusal. If neither the Crown nor group elects to purchase the reclamation, the owner will be able to sell the reclamation to another third party;

    OR

    - **Agree** that, if fee simple title in reclamations is available, there will be no right of first refusal to the Crown in respect of reclamations.

Savings and transitional provisions

OVERVIEW

31 The 2004 Act, the RMA, the Foreshore and Seabed Endowment Revesting Act 1991 and the Land Act 1948 are the four relevant regimes for determining the interest in a reclamation. The applicable regime is primarily determined by the date the application for an interest in a reclamation is lodged.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

32 One option is to provide that all extant reclamations are dealt with under the new legislative framework. Providing that all applications are dealt with under one regime will improve efficiency as there will only be one applicable regime rather than three or four.

33 If Cabinet agrees to coastal permits (rather than fee simple title or leasehold interests), providing for extant reclamations under the new legislative framework will have negative effects for older reclamations where a leasehold or freehold interest can currently be obtained.

34 An alternative is to preserve existing rights by providing that extant applications for an interest in a reclamation, and future applications over existing reclamations (where an application for an interest has not yet been made), are

dealt with under the provisions of the legislative regime that applied when the application for the reclamation was submitted.

35 Another alternative is to include transitional provisions in the new regime to simplify the processes for granting interests in extant applications, by applying only one of the present regimes (and land status) to all of the existing reclamations and applications. This could, for example, provide that all reclamations undertaken before the New Zealand marine coastal access area regime comes into force can be treated as land of the Crown and, accordingly title could be obtained under the RMA and the Foreshore and Seabed Endowment Revesting Act 1991. This eliminates other potential regimes that would otherwise apply, for example, the Land Act 1948 or the 2004 Act.

RECOMMENDATIONS (SAVINGS AND TRANSITIONAL PROVISIONS)

- EITHER:
  - **Agree** that all extant applications for an interest in a reclamation will be considered under the provisions of the new legislation;

  OR

  - **Agree** that the new legislation will contain savings and transitional provisions so that all extant applications for an interest in a reclamation will be considered under the provisions of the regime that was applicable when the application was made for the reclamation;

  OR

  - **Agree** that the new legislation will contain transitional provisions to simplify the processes for granting interests in extant and future applications.

Other matters

36 The following matters will require further Cabinet consideration:

a should the new legislation include a definition of "reclamation"?

b who should be the decision maker in respect of reclamations?

c should there be express requirements for a public consultation process for an application for an interest in a reclamation?

d what is the effect on extant Treaty claims over the reclaimed area?

e should the applicant lodge a standard form for an interest in a reclamation?

f what criteria, if any, apply to the decision maker?

g what conditions can be imposed on the interest granted in the reclamation?

h what timeframes should the reclamation application be subject to?

i can costs for the right to occupy be required by the decision maker and, if so, what is the basis for the imposition of this cost?

j if a freehold or leasehold interest in a reclamation is granted, is a subdivision consent also required over a reclamation?

37 I recommend that I report back in July 2010 on these issues.

RECOMMENDATION (OTHER MATTERS)

- **Invite** the Attorney-General to report back in July 2010 on other matters related to reclamations.

Part Six: Allocation of coastal marine space and other policy initiatives

Purpose

1 This part of the paper asks Cabinet to make decisions on:

a allocation of coastal marine space (the decision-maker and the process); and

b alignment of the decisions in this paper with other Government policy initiatives including:

i Aquaculture;

ii RMA Phase II reforms;

iii the New Zealand Coastal Policy Statement; and

iv the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill.

Allocation of coastal marine space

Overview

2 Space is allocated in the foreshore and seabed for uses such as aquaculture, mining operations (for holders of a permit under the Crown Minerals Act) and the construction of structures 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.

3 There are a number of policy initiatives underway in Government to refine and streamline the processes for allocating space, namely the Aquaculture reforms and the RMA Phase II reforms. These are discussed further below.

4 The consultation document asked whether submitters agreed with the Government's proposals for the allocation of coastal space. These are:

a the existing processes for the allocation of space would be retained on the basis that it is the Crown's role to regulate and manage resources in the foreshore and seabed;

b the Crown would continue to delegate the role of allocating space to regional councils; and

c this would be done in conjunction with those coastal hapū/iwi whose customary interests in the area have been recognised through the planning document.

Relevant submissions

5 The response to the Government's proposal was fairly evenly split between agreement and disagreement, with a small majority disagreeing with the proposal. Some submitters supported the proposal because they see it as broadly representing the status quo. Some submitters either disagreed or gave their qualified agreement to the proposal because of the third aspect of the proposal. These submitters sought further information on what it would mean for allocation of space to take place "in conjunction with" coastal iwi and hapū and how the allocation of space and recognition of customary activities would occur, in particular the permission right. Some submitters opposed the proposal because they thought it gave too many rights to Māori. Others disagreed with the proposal because it gives insufficient rights to Māori and/or assumes Crown ownership and the right to regulate the foreshore and seabed.

Comment and proposals for new legislation

6 I do not think there are sound policy reasons for a departure from the current way in which the allocation in space is managed in the foreshore and seabed. The Crown should continue to hold and delegate this role in the new regime, effectively a continuation of the status quo under the RMA. In a no-ownership regime however, the basis for the Crown's role (in delegating this function to local government) would need to change. Instead of holding the role of allocation of space as land owner, the new rationale will be that in a no-ownership regime it is the Crown's role to manage resources in the area on behalf of all New Zealanders. The proposed awards, in particular the permission right, will have implications for the allocation of space.

7 I note that new proposals for the allocation of space in the foreshore and seabed for the purposes of aquaculture are to be considered concurrently with this paper by Ministers as part of the RMA Phase II reforms, developed in tandem with this process. This matter is discussed below (Interface with other legislation and policy areas).

8 I recommend that regional councils retain decision-making over the allocation of space (granting coastal permits to occupy) in the coastal marine area, subject to any developments in Aquaculture reforms or RMA Phase II.

Recommendations (Allocation of Space)

- **Agree** that the rationale for the allocation of space by the Crown 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; and

- **Agree** 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.

Alignment with other policy areas

Overview

9 There are a number of parallel policy streams taking place that have an impact on the review of the 2004 Act and vice versa. These are:

a Aquaculture;

b RMA Phase II reforms;

c the New Zealand Coastal Policy Statement; and

d the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill.

10 It is essential that the foreshore and seabed review is aligned with these other work streams in order to ensure consistency and efficiency and to avoid the development of conflicting or incompatible regimes.

Relevant submissions

11 Other policy areas were not specifically raised in the consultation document.

Comment and proposals for new legislation

AQUACULTURE

12 The Government has initiated a reform process to address the current costs, delays and uncertainty with the aquaculture regulatory process, and promote investment in aquaculture development and to support the significant potential for sustainable economic growth in the sector. Cabinet has agreed that one of the Government's objectives for reform of the aquaculture regulatory system is to enable integrated decision-making that co-ordinates aquaculture policy with the review of the 2004 Act [CAB Min (10) 9/2].

13 Cabinet has also noted that the Minister for Economic Development, the Minister for the Environment, the Minister of Conservation, and the Minister of Fisheries and Aquaculture are discussing with other Ministers how to coordinate policy decisions and consultation between aquaculture reform and the review of the 2004 Act [CAB Min (10) 9/2].

14 One key area of overlap between the review of the 2004 Act and aquaculture reform is the implementation of the Māori Aquaculture Settlement. Charging for the use of coastal marine space is also potentially an area of overlap between

the two policy streams. The focus for the next Cabinet report back on Aquaculture is on a development levy (which aligns with the no-ownership model) rather than coastal occupation charges.

15 In addition, the proposed customary title planning documents are designed to influence RMA planning processes and therefore could have implications on aquaculture development.

RMA PHASE II REFORMS

16 The purpose of the RMA Phase II reforms is to continue the process of simplifying and streamlining the RMA and its associated processes. The main areas of overlap with RMA Phase II reforms are infrastructure (including ports), resource consent security and duration and Māori participation in RMA processes.

NEW ZEALAND COASTAL POLICY STATEMENT

17 The purpose of the New Zealand Coastal Policy Statement (NZCPS) is to provide Government guidance to local government on decision-making in the coastal marine area. It is prepared by the Minister of Conservation and the only mandatory national policy statement under the RMA that must be in force at all times. It is designed to guide local authorities in their day to day management of the coastal environment and is implemented through Regional Policy Statements and Regional Coastal Plans.

18 The current NZCPS came into force in 1994. A Board of Inquiry was established to review the NZCPS in 2008. The Board delivered its report and recommendations to the Minister of Conservation in June 2009. The Minister of Conservation is currently considering that report and recommendations.

EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF (ENVIRONMENTAL EFFECTS) BILL

19 The seas surrounding New Zealand are essentially divided into three main "jurisdictional boundaries" outward from New Zealand. The first area is the territorial sea and it extends from the shores of New Zealand out to 12 nautical miles (and includes the foreshore and seabed). This area is governed by the RMA. The second area is the exclusive economic zone (EEZ) and it begins at 12 nautical miles and extends out to 200 nautical miles. The third area is the extended continental shelf which extends from the edges of the EEZ to just beyond the edge of the continental shelf. The RMA does not apply to these outer two areas.

20 The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (the Bill) covers these outer two areas and is deliberately modelled on the RMA. Like the RMA, the proposed Bill adopts an effects-based framework although it does not adopt the planning structure of the RMA.

21 The purpose of the Bill is to enable environmentally sustainable exploration and exploitation of resources in the outer two areas and accords with New Zealand's international obligations.

22 The Bill has not been introduced into the House and is currently on hold. It is rated priority 5 on the 2010 legislation programme. While work is not currently being undertaken on this matter, it is important that foreshore and seabed policy is developed with an awareness of the policy underlying the Bill. I have instructed my officials to work with the Ministry for the Environment on the overlap of the two policy streams.

Recommendation (alignment with other policy areas)

- **Note** that I have instructed Ministry of Justice officials to continue working with other agencies on parallel policy streams (Aquaculture, RMA Phase II, New Zealand Coastal Policy Statement and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill) to ensure that the new legislation is aligned with these other work streams.

Part Seven: Interface with other legislation and miscellaneous matters

Purpose

1 This part of the paper invites Cabinet to make decisions on:

a the Interface of the proposals in this paper with other legislation:

i consequential amendments based on the decisions in this paper;

ii the transitional provisions required to move from the repealed regime to the new regime; and

iii how to deal with local Acts that apply to the foreshore and seabed area;

b miscellaneous matters:

i ownership status of local authority-owned land;

ii legal status of roads in the foreshore and seabed;

iii status of leases and licences;

iv ownership of existing and new structures

v continuation of the public foreshore and seabed register (as the New Zealand marine coastal access area register);

vi continued preservation of Māori reservations;

vii Crown's administrative functions in the foreshore and seabed; and

viii allowance (or otherwise) of claims for adverse possession.

Interface with other legislation

Consequential amendments

OVERVIEW

2 As a result of the repeal of the 2004 Act and the enactment of new legislation, there will be a number of consequential amendments that will need to be made to other legislation. For example, section 12(2) of the RMA refers to "land of the Crown". This section will need to be amended to refer to the Crown's role as regulator/manager rather than owner of the New Zealand marine coastal access area.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

3 The coastal management regime is complex and piecemeal. Therefore, definitive advice on consequential amendments can only be made once the Bill drafting process is complete.

4 Accordingly, I recommend that when I seek approval to introduce the Bill, I report back to Cabinet on the consequential amendments to other legislation that will be required to give effect to Cabinet's decisions on the review of the 2004 Act.

RECOMMENDATION (CONSEQUENTIAL AMENDMENTS)

- **Invite** the Attorney-General, when he seeks approval to introduce the Bill, to report back to Cabinet on the consequential amendments to other legislation that will be required to give effect to Cabinet's decisions on the review of the 2004 Act.

Transitional provisions

OVERVIEW

5 As a result of the repeal of the 2004 Act and the enactment of new legislation, there will be a number of issues that will require transitional provisions. For example if existing processes for reclamations remain in the new regime, transitional provisions will be required to enable to continuation of these regimes.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

6 I recommend that I report back to Cabinet in July 2010 with the transitional provisions that will be required in light of the enactment of replacement legislation.

RECOMMENDATION (TRANSITIONAL PROVISIONS)

- **Invite** the Attorney-General to report back to Cabinet in July 2010 with the transitional provisions that will be required in light of the enactment of replacement legislation.

Local Acts

OVERVIEW

7 Currently, there are approximately 100 local and special Acts that apply in the foreshore and seabed. Section 102 of the 2004 Act sets out the relationship between local Acts and the 2004 Act. It provides that where a local Act is

inconsistent with the 2004 Act, the 2004 Act prevails. This includes the 2004 Act provisions relating to reclamations based on accretion caused by the sea.

8 The 2004 Act includes an exception to section 102 for the Wellington Harbour Board and Wellington City Council Vesting and Empowering Act 1987 (section 102(3)). This exception clarified that Wellington Waterfront Limited, a council controlled organisation, held private title to two areas of the seabed in Wellington (these titles relate to areas beneath Queens Wharf and the Overseas Passenger Terminal). This issue is considered further in the section on local authority-owned land in Part 8 of this paper.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

9 I recommend that the new legislation should provide that its provisions prevail over any local Act, similar to section 102 of the 2004 Act. I recommend the new regime continues the exception for the Wellington Harbour Board and Wellington City Council Vesting and Empowering Act 1987.

RECOMMENDATIONS (LOCAL ACTS)

- **Agree** that the new legislation provides that its provisions prevail over those of any local Act, including any local Act that permits land reclaimed from the sea by accretion by the action of the sea to be vested in any person or body; and
- **Agree** that the new legislation will continue the exception for Wellington Harbour Board and Wellington City Council Vesting and Empowering Act 1987.

Miscellaneous matters

Ownership status of local authority-owned land

OVERVIEW

10 The vesting in section 13(1) of the 2004 Act of the public foreshore and seabed in the Crown meant that any local authority-owned land within the public foreshore and seabed was automatically vested in the Crown. Section 25 of the 2004 Act created processes for those local authorities who had land divested from them in this way to seek redress from the Crown. Applications under this section had to be made within 12 months of the commencement of that section.

RELEVANT SUBMISSIONS

11 Submitters were asked whether they agreed with the Government's proposals to incorporate any existing local authority-owned land within the foreshore and seabed into the New Zealand marine coastal access area. The Crown would pay compensation for that land (if there is any) to the relevant local authority.

12 Most submitters disagreed with the proposal. Several local authorities disagreed, saying there was no principled reason for this approach and that there were cases where local authorities held land for important and valid

reasons (e.g. flood protection). Some submitters said that they would need an understanding of what land had been acquired by local authorities before they could comment on this proposal. Those who agreed did so for a range of reasons including that is was consistent with the public domain proposal and that it seemed fair.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

13 I think it is unlikely that there is any local authority owned land as this land should have been vested in the Crown as at 25 November 2004.

14 However, having considered the views of submitters, I think there are good reasons for local authorities to retain any land they do currently hold in the foreshore and seabed. I recommend that the new legislation should provide that any existing local authority-owned land within the foreshore and seabed should not be incorporated into the New Zealand marine coastal access area.

RECOMMENDATIONS (LOCAL AUTHORITY-OWNED LAND)

- EITHER:
  - **Agree** that the new legislation should not incorporate any existing local authority-owned land within the foreshore and seabed into the New Zealand marine coastal access area;

  OR

  - **Agree** that the new legislation should incorporate any existing local authority-owned land within the foreshore and seabed into the New Zealand marine coastal access area.

Legal status of roads in the foreshore and seabed

OVERVIEW

15 There are three issues to consider in relation to roads:

a formed roads not owned by the Crown;

b Government roads; and

c new roads.

16 One of the key issues to consider is the entity responsible for the maintenance of a road. Under the 2004 Act, the vesting of the ownership of the public foreshore and seabed in the Crown effectively made the Crown responsible. In a New Zealand marine coastal access area, this issue will need to be addressed explicitly as the default responsibility of the Crown as owner will not apply.

17 Section 15 of the 2004 Act preserves the rights of owners of formed roads and roads under construction in the public foreshore and seabed. This means that any road in the public foreshore and seabed owned by a person other than the Crown (e.g. a local authority), continues to be owned by that person (notwithstanding section 13). Ownership extends to the subsoil and any new materials added to the roads (including bridges). Section 15 also provides that a road vests in the Crown (consistent with section 13 of the 2004 Act) where the road ceases to be used as a road or the formation of the road is stopped.

18 The 2004 Act does not explicitly deal with Government roads. This was because the vesting of the foreshore and seabed (excluding private titles) in the Crown was not necessary as the Crown owned the foreshore and seabed. If the New Zealand marine coastal access area option is adopted, the status of Government roads will need to be considered.

19 The 2004 Act did not address issues surrounding the formation of new roads in the public foreshore and seabed. It was not necessary to do so as the Crown could make these decisions as owner.

RELEVANT SUBMISSIONS

20 The consultation document asked submitters the following question: what are your views on roads within the foreshore and seabed in view of the Government's proposals?

21 Many submitters supported the status quo and raised concerns that any change could create uncertainty. Some local authorities submitted that there is a need for an effective regime to manage and enforce roading and vehicle matters. Some submitters emphasised the importance of ensuring access to essential infrastructure (e.g. electricity infrastructure). Some submitters said that there should be no roads, or no new roads, in the foreshore and seabed.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

22 I recommend that the existing ownership of formed roads (including the subsoil, any added material and bridges) remain with existing owners. This is consistent with section 15 of the 2004 Act. This will effectively address the situation where roads are formed and cross the boundary between the foreshore and seabed and dry land.

23 Where a formed road not owned by the Crown ceases to be used as a road, it should be incorporated into the New Zealand marine coastal access area. If the formation of a road is stopped then it should also be incorporated into the New Zealand marine coastal access area.

24 I recommend that existing Government roads should remain in Crown ownership. Where a Government road ceases to be used as a road, I propose it is incorporated into the New Zealand marine coastal access area as should a Government road that stops being formed.

25 I recommend that where a new road is formed, new roads should provide an exception to the New Zealand marine coastal access area and be able to be owned by the Crown.

RECOMMENDATIONS (ROADS)

- **Agree** that the new legislation provides for the existing ownership of formed roads (including the subsoil, any added material and bridges) to remain with existing owners by specifying that roads are an exception to the New Zealand marine coastal access area;
- **Agree** that the new legislation provides that where a formed road not owned by the Crown ceases to be used as a road that it be incorporated into the New Zealand marine coastal access area;
- **Agree** that the new legislation provides where the formation of a road is stopped that it be incorporated into the New Zealand marine coastal access area;
- **Agree** that the new legislation provides for Government roads to remain in Crown ownership;
- **Agree** that the new legislation provides for Government roads that are no longer used as roads be incorporated into the New Zealand marine coastal access area;
- **Agree** that the new legislation provides that where the formation of a Government road ceases, it be incorporated into the New Zealand marine coastal access area; and
- **Agree** that the new legislation provides that new roads are an exception to the New Zealand marine coastal access area and are able to be owned by the Crown.

Status of leases and licences

OVERVIEW

26 Section 17 of the 2004 Act preserved the rights of specified interests (according to their tenor) in the public foreshore and seabed. These specified interests were leases, licences, permits, consents, or any other authorisation (not being a resource consent) granted under any enactment. This provision is similar to the Government's assurance that all existing uses will be protected to the end of their term.

27 The current policy intent of the RMA is that leases and licences in the foreshore and seabed (i.e. of the land itself, not of structures in the area) will be replaced by coastal permits to occupy on expiry of the lease. Leases cannot be renewed. Notwithstanding this, there are a number of extant leases and licences in the foreshore and seabed that have been entered into including those with port companies under the Port Companies Act 1988. The Department of

Conservation (which, under the 2004 Act, has responsibility for administration of such leases) is working through these leases with port companies. In most cases there are already relevant coastal permits so the leases are not needed.

28 Some extant leases and licences in the foreshore and seabed were entered into under the authority of special Acts of Parliament. Some of these interests have very long terms and some are perpetually renewable.

RELEVANT SUBMISSIONS

29 The consultation document asked submitters for their views on leases and licenses in the foreshore and seabed in light of the Government's proposals.

30 Very few submitters understood the current policy intent of the RMA in relation to leases and licences therefore these submissions are of limited utility. Some submitters did not present strong views on this issue, provided that they could continue to undertake their current activities in the area (e.g. business or recreational). Some submitters supported leases and licences for business interests. Some opposed them for all interests.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

31 The new legislation will need to provide that *existing* leases and licences of land will continue until they expire. This is consistent with the Government's assurance that all existing use rights will be protected to the end of their term. On expiry, if it is wished that occupation continue, coastal permits for occupation will be required which can be granted by regional councils under the existing provisions in the RMA. The new legislation will need to make it clear that leases of structures in the New Zealand marine coastal access areawill also be able to continue (although such leases will not be of the land). The policy intent of the New Zealand marine coastal access areais that while there will be no owner of the underlying land, it will be possible for the structures on that land to be owned, leased and licensed as a chattel (not real estate). There is further information about structures below.

32 In the New Zealand marine coastal marine access area it would not be possible for leases or licences to be granted in the area as there would be no owner able to grant an interest of that nature. Instead, coastal permits could be issued by regional councils. This reflects the policy intent of the RMA.

RECOMMENDATIONS (LEASES AND LICENCES)

- **Agree** that the new legislation preserves the rights of specified interests (leases, licences, permits, consents, or any other authorisation not being a resource consent granted under any enactment) according to their tenor in the New Zealand marine coastal access area; and

- **Note** that in the New Zealand marine coastal access area it would not be possible for leases or licences to be granted as there would be no owner able to grant an interest of that nature, instead, coastal permits could be issued by regional councils.

Ownership of existing and new structures

OVERVIEW

33 The 2004 Act severs ownership of land from ownership of structures (in direct contrast to dry land). This means that although the Crown owns the public foreshore and seabed, structures in the public foreshore and seabed may be privately owned.

RELEVANT SUBMISSIONS

34 The consultation document asked whether submitters agreed with the Government's proposals regarding structures. These are:

a ownership of existing structures will remain with existing owners;

b new structures will be owned by those who own the material in the structures; and

c coastal hapū/iwi whose customary interests have been recognised will have an enhanced role in decision-making processes in relation to new structures (through the planning document described).

35 Most submitters disagreed with the Government's proposals.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

36 I think certainty about the status of existing and future structures in the foreshore and seabed is fundamental so those that develop structures in public space take responsibility for their maintenance and remove them when they are no longer required.

37 Therefore, I recommend that the new legislation provide for private ownership of structures regardless of the status of the land on which the structure is located. Determining the status of existing structures will require an analysis of the basis on which these structures occupy coastal space and whether or not they are structures or fixtures. I propose that officials undertake this work with entities that have interests in structures, in particular port companies, to establish a workable statutory regime.

38 Awards for customary interests may apply to the decision-making processes for structures but this will depend on the nature of the interest and the award (e.g. the permission right or the planning document).

39 The new regime will need to consider how dangerous structures in the foreshore and seabed are dealt with. I propose that territorial authorities or regional councils be empowered to maintain or remove dangerous structures in the foreshore and seabed and that the Director of Maritime New Zealand retains the power to deal with hazardous structures in the marine area.

RECOMMENDATIONS (STRUCTURES)

- **Agree** that the new legislation provides for continued private ownership of existing structures where the private owner is known;
- **Agree** that the new legislation provides for private ownership of new structures;
- **Agree** that officials will undertake further work about the status of existing structures in conjunction with interested parties, including port companies;
- **Note** that the customary title awards "right to permit activities requiring resource consent" and the planning document would apply to the decision-making processes for structures;
- **Agree** that the new foreshore and seabed regime will provide that territorial authorities or regional councils be empowered to maintain or remove dangerous structures in the foreshore and seabed; and
- **Agree** that the new foreshore and seabed regime will provide that the Director of Maritime New Zealand retains the power to deal with hazardous structures in the marine area.

Continuation of a public register

OVERVIEW

40 Sections 92–95 of the 2004 Act require the Chief Executive of the Ministry of Justice to keep a public register as a permanent record of any:

a orders made by the High Court or Māori Land Court;

b management plans in relation to a foreshore and seabed reserve created under the 2004 Act;

c agreements entered into under section 96 (agreements to recognise territorial customary rights);

d restrictions or prohibitions on access imposed by the Minister of Conservation; and

e any controls imposed by the Minister of Conservation under schedule 12 of the RMA.

41 The purpose of the public register was to provide a centralised source of information about the public foreshore and seabed and relevant implications flowing from decisions made under the 2004 Act.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

42 I recommend that the new legislation contain similar provisions to sections 92-95 of the 2004 Act, and that the register be called "the New Zealand marine coastal access area register".

RECOMMENDATION (PUBLIC REGISTER)

- **Agree** that the new legislation will include provisions for the keeping of a "New Zealand marine coastal access area register" of:
    - orders made by the High Court or Māori Land Court;
    - negotiated agreements;
    - restrictions or prohibitions on access imposed; and
    - any other relevant information that will need to be publicly available.

Continued preservation of Māori reservations

OVERVIEW

43 Section 100 of the 2004 Act provides that Māori reservations are treated as though they are a "specified freehold interest" and are therefore not part of the public foreshore and seabed under the 2004 Act.[3]

RELEVANT SUBMISSIONS

44 This issue was not specifically raised in the consultation document.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

45 It is uncertain whether there are any pieces of land caught by section 100. It would be a difficult task to come to a final determination on the issue within the required timeframes. Even if it were a straightforward matter to determine the existence of current Māori reservations, it is possible that in the future areas will become Māori reservations through erosion. Accordingly, the new legislation should continue to provide for the protection of Māori reservations by treating them as though they are a specified interest excluded from the New Zealand marine coastal access area. This will ensure that no existing (or new) Māori reservations are inadvertently subsumed into the New Zealand marine coastal access area.

[3] Part XVII of Te Ture Whenua Māori Act 1993 provides that the Chief Executive of Te Puni Kōkiri may set apart land as a Māori reservation for the purposes of a village site; marae; meeting place; recreation ground; sports ground...; place of cultural, historical, or scenic interest; or for any other specified purpose.

46 I recommend that any Māori reservations are treated as private titles and therefore are not incorporated into the New Zealand marine coastal access area.

RECOMMENDATION (MĀORI RESERVATIONS)

- **Agree** that the Māori reservations will be excluded from the New Zealand marine coastal access area in the new legislation.

The Crown's administrative functions in the foreshore and seabed

OVERVIEW

47 Section 28 of the 2004 Act states that the Minister of Conservation has and may exercise in relation to the public foreshore and seabed all the functions, duties, and powers of the Crown as owner of the public foreshore and seabed. The exercise of these functions, duties and powers includes an underlying responsibility for liabilities in the foreshore and seabed such as abandoned vehicles, fire, weeds and stock. District Councils, assuming the foreshore and seabed is within their district, have the regulatory controls over these matters.

48 The Department of Conservation has a number of attributes that mean it is a suitable entity to continue to carry out a management role in the foreshore and seabed. In a no-ownership regime it would not be exercising the functions on the basis of ownership, as it currently does under the 2004 Act. These attributes are:

a technical expertise in statutory land management;

b a local presence;

c operational staff who can undertake work on matters such as weed management, fire management, removal of dead stock and car bodies;

d established and well-functioning relationships with iwi; and

e expertise in the management of the foreshore and seabed.

49 There are a number of other functions performed in the foreshore and seabed in relation to alcohol bans (local authorities), navigation aids (regional councils and Maritime New Zealand), shipwrecks (regional councils and/or Maritime New Zealand), fires (NZ Fire Service, territorial authorities), animals (local authorities) and stock, litter (territorial authorities) and dead animals (territorial authorities, abandoned vehicles (territorial authorities), biosecurity, structures and roads. The last two matters are dealt with separately above.

50 The new foreshore and seabed regime will need to provide for any necessary changes to existing legislation to allow the entity that currently performs roles in the foreshore and seabed to continue to perform those functions. This may require that the description of, or rationale for, the exercise of that role is

amended. In some circumstances this may require an amendment to legislation and will be addressed as a consequential amendment.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

51 I recommend that the Minister of Conservation continues to have and exercise in relation to the New Zealand marine coastal access area the functions, duties, and powers of manager of the New Zealand marine coastal access area that the Minister currently exercises under the 2004 Act as representative of the Crown as owner. The Department of Conservation has the necessary attributes to continue to carry on a central role in the management of the foreshore and seabed.

52 I recommend that the entities other than the Minister of Conservation who have roles and responsibilities in the foreshore and seabed continue to have and exercise their roles in relation to the New Zealand marine coastal access area.

RECOMMENDATION

- **Agree** that the Minister of Conservation continues to have and exercise in relation to the New Zealand marine coastal access area the functions, duties, and powers of manager of the New Zealand marine coastal access area.

- **Agree** that the entities other than the Minister of Conservation who have roles and responsibilities in the foreshore and seabed continue to have and exercise their roles in relation to the New Zealand marine coastal access area.

Allowance (or otherwise) of claims for adverse possession and prescriptive title

OVERVIEW

53 Section 24 of the 2004 Act provides that no person may claim an interest in any part of the foreshore and seabed on the ground of adverse possession (i.e. "squatting") and prescriptive title. This section applies to both the New Zealand marine coastal access area and to foreshore and seabed in private title.

RELEVANT SUBMISSIONS

54 Many submitters either said they did not understand the question or the concept and many misunderstood the concept. Many submitters did not provide reasons for their view. Some submitters supported the proposal on the basis that it retains the status quo while others agreed that squatting should not be allowed. Some of those who disagreed did so because they thought the pre 2004 act provisions should apply while others said that provisions in the new Act should be the same, not similar to, the 2004 Act.

COMMENT AND PROPOSALS FOR NEW LEGISLATION

55 The underlying policy of the Government's proposal is that no-one can hold an ownership interest. Accordingly, there would be no owner against whom a claim

for adverse possession or prescriptive title could be made, nor could such an interest be granted. As it would not be possible for these claims based on adverse possession or prescriptive title to be successful, it would not be necessary to provide that ownership cannot be achieved through the avenue of adverse possession or prescriptive title. However, it may be prudent to include a "to avoid doubt" provision in order to make it clear that no such claims can be successful.

56 For foreshore and seabed in private title, it is possible that such claims could be made.

57 I recommend that the new legislation include a general clause specifying that no person may claim an interest in any part of the foreshore and seabed that is held in private title, on the ground of adverse possession or prescriptive title. I also propose that the new legislation include a clause stating that, to avoid doubt, no person may claim an interest in any part of the New Zealand marine coastal access area, including any part that is found to be in customary title, on the ground of adverse possession or prescriptive title.

RECOMMENDATIONS (ADVERSE POSSESSION OR PRESCRIPTIVE TITLE)

- **Agree** that the new legislation include a general clause specifying that no person may claim an interest in any part of the foreshore and seabed held in private title on the ground of adverse possession or prescriptive title;

- **Agree** that the new legislation include a clause stating that, for the avoidance of doubt, no person may claim an interest in any part of the New Zealand marine coastal access area, including any part that is found to be in customary title, on the ground of adverse possession or prescriptive title.

Part Eight: Financial implications, other matters and next steps

Next steps

46 If Cabinet agrees to the proposals for new legislation to replace the 2004 Act, I request Cabinet's agreement to instruct Parliamentary Counsel Office to draft a Bill in accordance with Cabinet's decisions.

47 I propose reporting to the Cabinet Legislation Committee in July 2010 to seek agreement to introduce the Bill to repeal and replace the 2004 Act into the House. Following that agreement, the Bill will be introduced into the House with the aim of enactment by December 2010.

48 I will also report back to the Cabinet Legislation Committee in July 2010 on any technical changes that have arisen (including consequential amendment and transitional provisions) and the following matters raised in this paper:

a a te reo Māori term for the "New Zealand marine coastal access area" (in Part Two of this paper);

b a clear set of policies addressing relevant steps and requirements for negotiations under the new framework (in Part Three of this paper);

c funding for foreshore and seabed negotiations (in Part Three of this paper);

d further information on the details and merits of the proposal of providing customary title to coastal marae (in Part Four of this paper); and

e additional reclamations matters (in Part Five of this paper):

i should the new legislation include a definition of "reclamation"?

ii who should be the decision maker in respect of reclamations?

iii should there be express requirements for a public consultation process for an application for an interest in a reclamation?

iv what is the effect on extant Treaty claims over the reclaimed area?

v should the applicant lodge a standard form for an interest in a reclamation?

vi what criteria, if any, apply to the decision maker?

vii what conditions can be imposed on the interest granted in the reclamation?

viii what timeframes should the reclamation application be subject to?

ix can costs for the right to occupy be required by the decision maker and, if so, what is the basis for the imposition of this cost?

x if a freehold or leasehold interest in a reclamation is granted, is a subdivision consent also required over a reclamation?

Consultation

49 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, Land Information New Zealand and the Treasury.

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

Financial implications

51 The Ministry of Justice receives funding to support foreshore and seabed negotiations and the jurisdictions which determine territorial customary and customary right claims. This funding is based on the anticipated number of claims and negotiations forecast to arise from the 2004 Act (60-65 customary right orders and four territorial customary right cases per year – levels which are yet to be challenged).

52 The Ministry of Justice considers this existing level of resourcing will be sufficient to meet the uptake of the proposed new regime. However, any major uptake in cases beyond the 2004 forecasts would require additional funding and are estimated to be some time away.

53 In addition, the Crown makes a contribution towards claimant negotiation expenses under the 2004 Act ($0.300m per annum). The existing funding for claimant negotiation expenses will be insufficient to support the new regime beyond 2010/11. New negotiations from 2010/11 will require additional claimant funding. Using current negotiations as a guide, approximately $0.650m is required to support each negotiation. Preliminary analysis suggests this means an increase of up to $1.200m per annum could be required. If there is no additional funding provided, then the timing of commencing new negotiations and their completion will be elongated.

54 In this paper I am proposing historical Treaty of Waitangi and foreshore and seabed negotiations be aligned where practical. This will create efficiencies (e.g. less transaction, legal and mandate costs) and reduce the Crown's contribution to claimant costs. It makes sense that I (with the Minister of Justice) report back on any changes required for foreshore and seabed claimant funding levels as part of the September 2010 report back on clarifying legal aid for historical Treaty of Waitangi claims and settlement negotiations [DOM Min (10) 2/2 refers].

Human rights s9(2)(h)

55 [redacted]

56

Treaty of Waitangi implications

57 Treaty principles would require that any new regime must be developed in good faith and must actively protect Māori property interests in the foreshore and seabed. Within those (very) broad parameters, there is flexibility. Treaty principles do not dictate any particular outcome.

58 While the overriding guarantee of public access in any new regime amounts to an apparent restriction on the recognition of customary title, the guarantee is reasonable and not inconsistent with Treaty principles.

59 The tests for both customary rights and title constitute a genuine attempt to reflect accurately what interests the common law would have recognised in New Zealand, with express certainty that tikanga would be a source for that recognition.

60 [redacted]

s9(2)(h)

61 The proposed awards to recognise customary interests would be consistent with Treaty principles. The awards would provide adequate protection of the interests at stake.

62 This assessment of the proposals' consistency with Treaty principles is subject to the assessment noted above as to whether the proposals with the New Zealand Bill of Rights Act.

Legislative implications

63 Legislation is required to repeal the 2004 Act and replace it with a new framework. This legislation will bind the Crown. A Bill to give effect to the policy outlined in this paper has a priority 2 (to be introduced and passed, if possible) on the 2010 Legislation Programme.

Regulatory Impact Analysis

Regulatory Impact Analysis requirements

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

Quality of Impact Analysis

65 The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry of Justice and associated supporting material, and considers that the information and analysis summarised in the RIS only partially meets the quality assurance criteria.

66 The RIS systematically identifies the key decisions and options relating to each of those decisions. The analysis of the potential impacts of choosing particular options lacks rigour and depth, however, including any useful sense of the scale and scope of the potential economic and fiscal costs associated with the different options, or the risks of potential unintended consequences and how these might be managed. Nor is it clear that this analysis has been properly informed by the results of the extensive consultation undertaken. Some of these issues are acknowledged in the Ministry of Justice's disclosure statement.

67 In RIAT's view, the level of analysis able to be provided at this time is not commensurate with the nature and significance of the issues at stake, including the durability of any proposed replacement regime and the potential flow-on effects to other regulatory regimes concerned with economic use of the foreshore and seabed.

Consistency with Government Statement on Regulation

68 I have considered the analysis and advice of my officials, as summarised in the attached RIS and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

a are required in the public interest;

b will deliver the highest net benefits of the practical options available;

c are consistent with the commitments in the Government Statement on Regulation.

Gender implications

69 There are no gender implications arising from this paper.

Disability perspective

70 There are no disability implications arising from this paper.

Publicity

71 There are no announcements planned based on this paper.

72 This paper seeks Cabinet agreement to the public release of written submissions received on the consultation document at the time that public announcements are made on the Government's final policy decisions on the review of the 2004 Act.

Recommendations

73 I recommend that the Committee:

Background

1 **note** that, to date, the following milestones have been completed in the review of the Foreshore and Seabed Act 2004 (the 2004 Act):

1.1 Relationship and Confidence and Supply Agreement between the National Party and the Māori Party establishing the review as a priority;

1.2 appointment of an independent Ministerial Review Panel which undertook a public consultation process on the 2004 Act and provided a report to Government;

1.3 development of policy and Cabinet decisions on the objective, principles and assurances and options for repeal and replacement of the 2004 Act;

1.4 release of a public consultation document setting out the Government's preliminary proposals for replacing the 2004 Act;

1.5 completion of a public consultation process (involving hui and public meetings and a written submissions process in response to the proposals set out in the consultation document) and meetings with stakeholder groups and an Iwi Leaders' Group to discuss, in confidence, the Government's proposals;

Part One: April 2010 public consultation process

2 **note** that the Government has recently completed a second round of consultation with the public as part of its review of the 2004 Act;

3 **note** that the vast majority of those who spoke at the 20 hui and public meetings held around the country supported repeal of the 2004 Act;

4 **note** that of the 1593 written submissions received, most did not support repeal or the Government's proposals;

5 **note** the Attorney-General's view that prolonging the review process is unlikely to result in better solutions;

6 **agree** that the written submissions received on the consultation document are publicly released at the time that public announcements are made on the Government's final policy decisions on the review of the 2004 Act;

Part Two: High-level proposals for new regime

REPEAL OF THE 2004 ACT

7 **agree** to repeal the 2004 Act, subject to Cabinet's agreement on the proposals for a replacement regime;

OBJECT AND PURPOSE OF THE NEW ACT

8 **agree** that the replacement legislation will include an object and purpose section based on the Government's agreed principles and assurances;

9 **agree** that the purpose section will expressly acknowledge:

9.1 the relationship of Māori with the foreshore and seabed, which is based on mana and tipuna connections;

9.2 that the foreshore and seabed is an area of great importance to the people of New Zealand, for its intrinsic and cultural worth;

9.3 that the Crown will retain all sovereign rights exercisable in New Zealand in respect of the foreshore and seabed and its natural resources, including those at international law and those particularly described in the regime, the Territorial Sea Contiguous Zone and Exclusive Economic Zone Act 1977;

OWNERSHIP

10 **agree** that the replacement legislation will:

10.1 expressly declare that the new regime in respect of the foreshore and seabed (excluding private titles) will replace the vesting in section 13 of the 2004 Act (and all preceding vestings of the area);

10.2 specify that the foreshore and seabed (excluding private titles) is an area:

- that is not, and cannot, be owned;
- in which rights of public access, fishing and navigation are recognised;

- in which any customary title extinguished by the 2004 Act will be restored and will be given its sole legal expression through agreed tests and awards (i.e. customary title will not amount to ownership);

NAME OF NEW REGIME

11 **agree** that the proposed regime, and its associated area, be referred to as the "New Zealand marine coastal access area";

12 **invite** the Attorney-General to report back to Cabinet in July 2010 with a te reo Māori term for the "New Zealand marine coastal access area";

AREA WHERE THE NEW REGIME WILL APPLY

13 **agree** that the new regime will apply from the mean high water springs to the outer limits of the territorial sea (12 nautical miles);

14 **agree** that the term "New Zealand marine coastal access area" will be used to define the area described in the recommendation above;

15 **agree** that the "New Zealand marine coastal access area" will replace "public foreshore and seabed" (as defined in the 2004 Act) in the new regime, thus excluding private titles;

16 **agree** that Te Whaanga Lagoon in the Chatham Islands is excluded from the definition of "New Zealand marine coastal access area" (and will therefore remain in Crown ownership);

17 **note** the Attorney-General's intention for the Crown retaining ownership of Te Whaanga Lagoon to be resolved through the historical Treaty settlements process;

ACCESS

18 **agree** that the new legislation provide for public access in, on, over and across the marine coastal access area (which excludes private titles), subject to any authorised limits;

FISHING

19 **agree** the replacement legislation will contain a provision that nothing in this Act affects any rights of fishing recognised by or under an enactment or a rule of law;

NAVIGATION

20 **agree** the replacement legislation will preserve the statutory rights and uphold New Zealand's international law obligations relating to navigation in the foreshore and seabed;

Part Three: Engagement models

NEGOTIATIONS AND ACCESS TO THE COURTS

21 **agree** that the new regime should specify a court process for the recognition of both customary title and customary rights;

22 **agree** that, as an alternative to a court process, it would always be open to groups to seek to enter direct negotiations with the Crown for the recognition of customary title and customary rights;

WHO THE CROWN WILL NEGOTIATE WITH

23 **agree** that the Crown look to negotiate with groups that represent the largest possible grouping which accurately reflects the nature of the customary title interest claimed;

24 **agree** that where it makes practical sense, foreshore and seabed negotiations should be aligned with historical Treaty settlements to create further efficiencies;

25 **agree** that, if appropriate, negotiations should be consistent with existing fisheries and aquaculture settlement groupings;

26 **note** that the Ministry of Fisheries, the Ministry for the Environment and the Department of Conservation consider that they will face substantial issues in meeting the costs associated with foreshore and seabed negotiations;

27 **note** that the proposals to negotiate with larger groupings and to align these processes with the historical Treaty settlement process will reduce departmental costs associated with foreshore and seabed negotiations;

28 **invite** the Attorney-General to report back to Cabinet in July 2010 with a clear set of policies addressing relevant steps and requirements for negotiations under the new framework;

MINISTERIAL RESPONSIBILITY FOR NEGOTIATIONS

29 **agree** that the Attorney-General hold Ministerial responsibility for foreshore and seabed negotiations on behalf of the Crown;

30 **agree** that responsibility for administering the new legislation will lie with the Ministry of Justice;

AWARDS THROUGH NEGOTIATIONS

31 **agree** that any final package of negotiated awards for the recognition of customary title claims be confirmed by Cabinet;

32 **agree** that any final package of negotiated awards could be brought into effect by Order in Council, and that a Cabinet decision would be required;

FUNDING FOR NEGOTIATIONS

33 **agree** that the Crown will make a contribution to the foreshore and seabed negotiations costs of mandated groups under the new legislation;

NOTIFICATION OF NEGOTIATIONS

34 **agree** that any negotiated agreement would be notified to all relevant parties, including the Chief Executive of the Ministry of Justice, and entered on a register held by the Chief Executive of the Ministry of Justice;

JURISDICTION

35 EITHER:

35.1 **agree** that the High Court hold jurisdiction for hearing customary title and rights applications;

OR

35.2 **agree** that the Māori Land Court hold jurisdiction for hearing customary title and rights applications;

EXPERT ADVICE FOR THE HIGH COURT

36 **agree** (if Cabinet decides that the High Court should hold jurisdiction for hearing customary title and rights applications) that the High Court be given the discretion to consider whether, when considering the application before it, it needs:

36.1 specialist tikanga Māori advice through the appointment of pūkenga (specialist advisors); and/or

36.2 to refer matters of tikanga Māori to the Māori Appellate Court for a binding decision;

EVIDENCE IN THE HIGH COURT

37 **agree** (if Cabinet decides that the High Court should hold jurisdiction for hearing customary title and rights applications) that, as in the 2004 Act, the High Court may accept any oral or written statement, document, matter, or information that the Court considers to be reliable (whether or not that evidence would otherwise be admissible;

AWARDS THROUGH THE COURTS

38 **agree** that courts will not have the ability to make awards other than those prescribed in the new legislation;

BURDEN OF PROOF

39 EITHER:

39.1 **agree** that the Crown and applicant groups will share the burden of proof in terms of the test elements (in respect of customary title and customary rights);

OR

39.2 **agree** that applicant groups be required to prove their case (i.e. there be no sharing or shifting of the burden of proof);

Part Four: Customary interests

TYPES OF CUSTOMARY INTEREST

40 **agree** that the new legislation include provision that any customary title extinguished by the 2004 Act be restored and recognised only through the awards conferred by the courts or agreed in negotiations and would not amount to ownership;

41 **agree** that new legislation will include three types of recognition for customary interests:

41.1 mana tuku iho: statutory recognition of the enduring mana-based relationship that tangata whenua have with the foreshore and seabed;

41.2 customary rights: recognises non-territorial customary use rights including activities and practices;

41.3 customary title: recognises customary interests that are territorial in nature;

42 **note** that the possibility of providing customary title to coastal marae in adjacent areas of foreshore and seabed was raised at hui and in submissions and by the Iwi Leaders' Group;

43 **agree** that the Attorney-General will carry out further work in assessing the merits and refining the details of this proposal and report back to Cabinet in July 2010;

SETTING OUT TESTS FOR CUSTOMARY INTERESTS IN LEGISLATION

44 **agree** the tests for customary interests should be set out in legislation;

TEST FOR CUSTOMARY TITLE

45 **agree** the test for customary title should be a combination of tikanga Māori and common law based elements;

46 **agree** the new legislation will provide that a customary title is recognised where the following elements are proven:

46.1 in order to establish the necessary connection/interest the relevant foreshore and seabed area must be held by the applicant group *in accordance with tikanga Māori*;

46.2 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;

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

47 **agree** the new legislation will provide that in assessing "exclusive use and occupation":

47.1 the following may be taken into account (but not required):

- ownership of abutting land; and
- customary fishing;

47.2 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;

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

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

TEST FOR CUSTOMARY RIGHTS

48 **agree** the test for customary rights should refer to "applicant groups" and not be limited to hapū or iwi;

49 **agree** that the new legislation state that a customary right (activity, use or practice) carried out by an applicant group in the relevant foreshore and seabed area is recognised where the right:

49.1 has been in existence since 1840; and

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

49.3 has not been extinguished;

MANA TUKU IHO AWARD

50 **agree** that the mana tuku iho award will provide tangata whenua (through iwi authorities) with the ability to participate in decision making processes (through notification and seeking their views) on matters relating to:

50.1 the establishment or extension of marine reserves (under the Marine Reserves Act 1971);

50.2 the establishment or extension of marine mammal sanctuaries (under the Marine Mammals Protection Act 1978);

50.3 the management of stranded marine mammals (under the Marine Mammals Protection Act 1978);

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

50.5 the establishment or extension of conservation protected areas (under the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act 1953);

50.6 granting concessions (under the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act 1953);

51 **agree** that the Department of Conservation will notify iwi authorities of any proposals within their rohe and give particular regard to their views when progressing any proposals;

52 **note** that where applicable, the right to permit certain conservation related activities awards would override the participation in conservation processes award in customary title areas and in those aspects which that award covers as an award of customary title offers a higher level of participation in decision making;

CUSTOMARY RIGHTS AWARD

53 **agree** that the "customary activities to have a protected status award" would protect and regulate (under the Resource Management Act 1991 (RMA)) customary activities which had been recognised through the customary rights test;

54 **agree** that protected customary activities would not be subject to sections 9-17 of the RMA, or rules in plans or proposed plans (including for coastal occupation charges), including resource consent requirements;

55 **agree** that the customary rights holder will be legally entitled to (in accordance with their tikanga):

55.1 continue to carry out those activities;

55.2 determine who will be able to carry out a protected customary activity;

55.3 limit or suspend a protected customary activity;

55.4 derive a commercial benefit from carrying out a protected customary activity;

56 **agree** that a third party resource consent will not be granted if it would adversely affect that customary activity (similar to section 107A of the RMA) without written approval of the customary rights group;

57 **agree** that the Minister of Conservation, in consultation with the Minister of Māori Affairs and taking account of the views of the customary rights group, could impose controls on the exercise of a customary activity if it were having significant adverse effect on the environment;

58 **agree** that, in order to provide for existing interests and future investments in aquaculture, the new legislation will provide that recognised customary rights should not be able to prevent consent renewal for aquaculture;

CUSTOMARY TITLE AWARD

USE OF CUSTOMARY TITLE AREA

59 **agree** that customary title holders will be able to use, benefit from, and develop the area to which customary title applies, within the confines of existing legislative frameworks (e.g. resource consent and planning under the RMA);

RIGHT TO PERMIT ACTIVITIES REQUIRING RESOURCE CONSENT

60 **agree** that customary title holders will have the right to approve, or withhold approval, for an activity requiring a resource consent;

61 **agree** that the "right to permit activities requiring resource consent award" will cover controlled activities under the RMA;

RIGHT TO PERMIT CERTAIN CONSERVATION-RELATED ACTIVITIES

62 **agree** that customary title holders will have the right to give, or refuse to give, its consent to conservation proposals and applications (subject to the Government's ability to achieve essential conservation outcomes);

63 **agree** that these conservation proposals and applications are:

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

63.2 proposals to establish or extend conservation protected areas (under the Conservation Act 1987, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act);

63.3 applications for concessions (under conservation legislation);

64 **agree** that the Minister of Conservation or Director-General of Conservation would not be able to progress a proposal or application until approval has been given by the customary title holder;

65 **agree** that customary title holder should have forty working days within which to give, or decline to give, permission for conservation-related activities covered by the right to permit certain conservation related award;

66 **agree** that if the customary title holder does not respond within forty working days it will be deemed that permission has been granted;

67 **note** that the right to permit certain conservation-related activities award includes proposals to establish or extend marine mammal sanctuaries and applications for marine mammal watching permits [CAB Min (10) 10/9] but these were not included in the consultation document;

68 **agree** to rescind the previous Cabinet minutes [CAB Min (10) 10/9] and remove proposals to establish or extend marine mammal sanctuaries and applications for marine mammal watching permits from the award;

69 **agree** that customary title holders receive a reasonable degree of preference in applications for marine mammal watching permits in customary title areas;

70 **agree** that the right to permit certain conservation related activities award will be limited to encompass the Crown achieving essential conservation outcomes where there are no practical alternatives;

71 **agree** that the Minister for Conservation or Director-General of Conservation would need to be satisfied that the establishment of a marine reserve, or conservation protected area is essential for protection purposes having regard to the following:

71.1 the views of the customary title holder about the impact of the protection action on their interests, and whether such impacts as set out by the customary title holder has been minimised as far as practicable; and

71.2 whether there are no practicable options to achieve nationally important conservation outcomes without carrying out protection within the customary title area, because:

- the protection relates to a unique or rare habitat, ecosystem, feature, population, or area of scientific value; or
- it is an area that is nationally important for the conservation of a species; or
- the protection of the area is essential to ensure the viability, integrity or effective management of a nationally important conservation protected area, or marine reserve or network of such protected areas; or
- the protection relates to a habitat, ecosystem or species that occurs at a number of sites, but where achieving the desired outcomes at other sites is not practicable; or
- any other matter similar in nature to the matters set out above;

ACCOMMODATED MATTERS

72 **agree** that the "right to permit activities" awards will not be able to be appealed;

73 **agree** that the following activities are protected from the "right to permit activities" awards:

73.1 any activity that can be lawfully undertaken without a resource consent;

73.2 any activity that is lawfully undertaken in accordance with a current resource consent including existing structures;

73.3 any existing infrastructure work and its associated operations, maintenance and upgrades;

73.4 any emergency activity (e.g. search and rescue etc);

73.5 the access provisions in the Crown Minerals Act 1991 for nationalised minerals;

73.6 scientific research or monitoring undertaken or funded by a crown agency or regional council;

73.7 an existing marine reserve and activities necessary to manage that area;

73.8 any existing conservation protected area and activities necessary to manage that area;

73.9 any existing marine mammal sanctuary and activities necessary to manage that area;

73.10 any existing concession in a conservation protected area;

73.11 any existing commercial marine mammal permit under the Marine Mammal Protection Regulations 1992;

74 **agree** that the "right to permit activities" awards will not be able to be exercised to prevent consent renewal for aquaculture;

PLANNING DOCUMENT

75 **agree** that customary title holders would be able, but not required, to prepare a planning document which sets out objectives and policies for the management of the customary title area;

76 **agree** that the planning document must be lodged with the relevant regional council, the New Zealand Historic Places Trust, the Department of Conservation, the Ministry of Fisheries and the Ministry of Justice;

77 **agree** that once lodged, regional councils will be required to recognise and provide for the planning document as it relates to resource management issues

and is consistent with the RMA, during the next review of the relevant provisions in the regional policy statement or regional plan;

78 **agree** that until regional councils complete a review of the relevant provisions of the regional policy statement or regional plan they will attach the planning document to their relevant documents and recognise and provide for the matters within the planning document that relate to resource management issues when considering a resource consent application wholly or partly within, or directly affecting, the customary title area;

79 **agree** that once lodged, the New Zealand Historic Places Trust will be required to have particular regard to the planning document when considering an application to destroy, damage, or modify an archaeological site within the iwi authority area and the Environment Court will have particular regard to the planning document when determining appeals on these matters;

80 **agree** that once lodged local authorities will be required to take into account the planning document under relevant sections of the Local Government Act 2002;

81 **agree** that once lodged the Director-General of the Department of Conservation will be required to take into account the planning document in relation to conservation management strategies;

82 **agree** that once lodged the Minister of Fisheries will be required to take into account the planning document in relation to fisheries plans;

83 **agree** that outside of customary title areas, and if the document covers a broader area, the planning document will have the status of 'take into account';

TAONGA TŪTURU

84 **agree** that the customary title award includes prima facie ownership of newly found taonga tūturu within the customary title area, until ownership is determined by the Māori Land Court;

85 **agree** that where a customary title holder is awarded prima facie ownership of newly found taonga tūturu this will become final ownership if there are no competing applications for ownership within six months from the time of public notice of the find;

86 **agree** that any customary title holder with prima facie ownership of taonga tūturu will be entitled to interim custody of the newly found taonga tūturu subject to the approval of the Chief Executive of the Ministry of Culture and Heritage;

NON-NATIONALISED MINERALS

87 **note** that non-nationalised minerals outside of customary title areas and prior to customary title areas being determined would have the same status as under the current regime (Crown ownership);

88 EITHER:

88.1 **agree** that the Crown will continue to own all non-nationalised minerals in the foreshore and seabed (in customary title areas as well);

OR

88.2 **agree** that while the Crown continues to own the minerals, customary title holders will be provided an increased role in non-nationalised minerals allowing them to control access and gain commercial benefit in customary title areas (the same rights of access as accorded to landowners under the Crown Minerals Act 1991);

OR

88.3 **agree** that customary title holders have ownership of non-nationalised minerals within customary title areas (the same rights as certain private title holders), which would allow them to control access, and gain commercial benefits from the non-nationalised minerals;

WĀHI TAPU AWARD

89 **agree** that the intent of the wāhi tapu award is to protect or restrict access to wāhi tapu if required;

90 **agree** that the definitions of wāhi tapu and wāhi tapu area will be the same as the definitions from the Historic Places Act 1993, which are:

90.1 wāhi tapu is a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense;

90.2 wāhi tapu area is an area of land that contains one or more wāhi tapu;

91 **agree** that the customary title holder should provide evidence that demonstrates the wāhi tapu or wāhi tapu area:

91.1 is recognised in accordance with the tikanga of that customary title holder; and

91.2 requires the proposed restriction to access in order to protect it;

92 **agree** that the Minister of Conservation must be notified of agreed wāhi tapu and wāhi tapu areas, and that notification will set out:

92.1 the location of the wāhi tapu or wāhi tapu area(s);

92.2 the access prohibition or restrictions (and reasons for them); and

92.3 any exemptions to allow someone to carry out a protected customary activity and any conditions related to exemptions;

93 **agree** that the Minister of Conservation would be required to:

93.1 restrict or prohibit access to the wāhi tapu and wāhi tapu area(s) by issuing a gazette notice;

93.2 release a public notice of the wāhi tapu and wāhi tapu area(s); and

93.3 send notices to the customary title holder and the local authority with responsibilities covering the relevant area of the foreshore and seabed;

94 **agree** that notice of agreed wāhi tapu or wāhi tapu areas will be recorded in the New Zealand marine coastal access area register;

95 **agree** that restrictions or prohibitions to wāhi tapu would be enforced by the relevant local authority, in consultation with the customary title holder;

96 **agree** that local authorities would be required to take any reasonable steps necessary to implement a prohibition or restriction to wāhi tapu (e.g. including erecting signs and barriers, if appropriate);

97 **agree** that wardens could be appointed to promote compliance on prohibitions or restrictions to wāhi tapu, if required, in accordance with regulations which would provide for their appointment;

98 **agree** that a fine of up to $5000 would apply to anyone who intentionally fails to comply with a prohibition or access restriction for wāhi tapu;

99 **note** that the $5000 fine would not apply to wāhi tapu which are also classified under the Historic Places Act 1993 as those sites are already subject to a fine under that legislation;

Part Five: Reclamations

TYPE OF INTEREST IN RECLAMATIONS

100 EITHER:

100.1 **agree** that the new legislation provides for fee simple title in reclamations, as an exception to the New Zealand marine coastal access area, including providing for Crown ownership prior to transfer;

OR

100.2 **agree** that the new legislation provides for leasehold interests (for specified time periods) in reclamations, as an exception to the New Zealand marine coastal access area, including providing for Crown ownership prior to transfer;

OR

100.3 **agree** that the new legislation provides for coastal permits to occupy reclamations and the land continues to be part of the New Zealand

marine coastal access area even though the land is above mean high water springs;

WHO CAN APPLY FOR INTERESTS IN RECLAMATIONS

101 **agree** that, if a decision is made to grant freehold or lease hold interests in reclamations, the new legislation will provide for existing and future applications to continue to be dealt with as though the Crown were the owner of the underlying land, with the Crown deciding whether to vest an interest in the reclamation;

102 **note** that, if the decision is made to grant an interest similar to a coastal permit in reclamations, there will need to be further consideration of the identity of the appropriate decision-maker;

103 **agree** that the legislation would provide for existing and future applications and local authorities would continue to perform their current role of considering the environmental effects of a proposed reclamation;

104 **agree** that the legislation will provide that, unless a reclamation has been abandoned, only the person who constructs a reclamation can apply for an interest in that reclamation;

105 **agree** that the legislation will provide that a reclamation will be deemed to be abandoned if no application in respect of that reclamation has been made for 10 years after the date of completion of the reclamation;

106 **agree** that a person who did not construct a reclamation can apply for an interest in a reclamation that has been abandoned;

ALTERNATIVE USES FOR RECLAMATIONS

107 EITHER:

107.1 **agree** that reclamations will be able to have alternative non-coastal uses regardless of the purposes for which they were originally constructed;

OR

107.2 **agree** that reclamations will not be able to have alternative non-coastal uses to the purposes for which they were originally constructed;

ALIENATION OF RECLAMATION INTERESTS

108 EITHER:

108.1 **agree** that, if fee simple title in reclamations is available, the Crown will have a right of first refusal over the reclamation and the relevant coastal iwi or hapū will have a right of second refusal. If neither the Crown nor group elects to purchase the reclamation, the owner will be able to sell the reclamation to another third party;

OR

108.2 **agree** that, if fee simple title in reclamations is available, there will be no right of first refusal to the Crown in respect of reclamations;

SAVINGS AND TRANSITIONAL PROVISIONS

109 EITHER:

109.1 **agree** that all extant applications for an interest in a reclamation will be considered under the provisions of the new legislation;

OR

109.2 **agree** that the new legislation will contain savings and transitional provisions so that all extant applications for an interest in a reclamation will be considered under the provisions of the regime that was applicable when the application was made for the reclamation;

OR

109.3 **agree** that the new legislation will contain transitional provisions to simplify the processes for granting interests in extant and future applications;

OTHER MATTERS

110 **invite** the Attorney-General to report back in July 2010 the following other matters related to reclamations:

110.1 should the new legislation include a definition of "reclamation"?

110.2 who should be the decision maker in respect of reclamations?

110.3 should there be express requirements for a public consultation process for an application for an interest in a reclamation?

110.4 what is the effect on extant Treaty claims over the reclaimed area?

110.5 should the applicant lodge a standard form for an interest in a reclamation?

110.6 what criteria, if any, apply to the decision maker?

110.7 what conditions can be imposed on the interest granted in the reclamation?

110.8 what timeframes should the reclamation application be subject to?

110.9 can costs for the right to occupy be required by the decision maker and, if so, what is the basis for the imposition of this cost?

110.10 if a freehold or leasehold interest in a reclamation is granted, is a subdivision consent also required over a reclamation?

Part Six: Allocation of coastal marine space and other policy initiatives

ALLOCATION OF COASTAL MARINE SPACE

111 **agree** that the rationale for the allocation of space by the Crown 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;

112 **agree** 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;

ALIGNMENT WITH OTHER POLICY AREAS

113 **note** that I have instructed Ministry of Justice officials to continue working with other agencies on parallel policy streams (Aquaculture, RMA Phase II, New Zealand Coastal Policy Statement and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill) to ensure that the new legislation is aligned with these other work stream;

Part Seven: Interface with other legislation and miscellaneous matters

CONSEQUENTIAL AMENDMENTS

114 **invite** the Attorney-General, when he seeks approval to introduce the Bill, to report back to Cabinet on the consequential amendments to other legislation that will be required to give effect to Cabinet's decisions on the review of the 2004 Act;

TRANSITIONAL PROVISIONS

115 **invite** the Attorney-General to report back to Cabinet in July 2010 with the transitional provisions that will be required in light of the enactment of replacement legislation;

LOCAL ACTS

116 **agree** that the new legislation provides that its provisions prevail over those of any local Act, including any local Act that permits land reclaimed from the sea by accretion by the action of the sea to be vested in any person or body;

117 **agree** that the new legislation will continue the exception for Wellington Harbour Board and Wellington City Council Vesting and Empowering Act 1987;

LOCAL AUTHORITY-OWNED LAND

118 EITHER:

118.1 **agree** that the new legislation should not incorporate any existing local authority-owned land within the foreshore and seabed into the New Zealand marine coastal access area;

OR

118.2 **agree** that the new legislation should incorporate any existing local authority-owned land within the foreshore and seabed into the New Zealand marine coastal access area;

ROADS

119 **agree** that the new legislation provides for the existing ownership of formed roads (including the subsoil, any added material and bridges) to remain with existing owners by specifying that roads are an exception to the New Zealand marine coastal access area;

120 **agree** that the new legislation provides that where a formed road not owned by the Crown ceases to be used as a road that it be incorporated into the New Zealand marine coastal access area;

121 **agree** that the new legislation provides where the formation of a road is stopped that it be incorporated into the New Zealand marine coastal access area;

122 **agree** that the new legislation provides for Government roads to remain in Crown ownership;

123 **agree** that the new legislation provides for Government roads that are no longer used as roads be incorporated into the New Zealand marine coastal access area;

124 **agree** that the new legislation provides that where the formation of a Government road ceases, it be incorporated into the New Zealand marine coastal access area;

125 **agree** that the new legislation provides that new roads are an exception to the New Zealand marine coastal access area and are able to be owned by the Crown;

LEASES AND LICENCES

126 **agree** that the new legislation preserves the rights of specified interests (leases, licences, permits, consents, or any other authorisation not being a resource consent granted under any enactment) according to their tenor in the New Zealand marine coastal access area;

127 **note** that in the New Zealand marine coastal access area it would not be possible for leases or licences to be granted as there would be no owner able to grant an interest of that nature, instead, coastal permits could be issued by regional councils;

STRUCTURES

128 **agree** that the new legislation provides for continued private ownership of existing structures where the private owner is known;

129 **agree** that the new legislation provides for private ownership of new structures;

130 **agree** that officials will undertake further work about the status of existing structures in conjunction with interested parties, including port companies;

131 **note** that awards for customary interests may apply to the decision-making processes for structures but this will depend on the nature of the interest and the award (e.g. the permission right or the planning document);

132 **agree** that the new foreshore and seabed regime will provide that territorial authorities or regional councils be empowered to maintain or remove dangerous structures in the foreshore and seabed;

133 **agree** that the new foreshore and seabed regime will provide that the Director of Maritime New Zealand retains the power to deal with hazardous structures in the marine area;

PUBLIC REGISTER

134 **agree** that the new legislation will include provisions for the keeping of a public register of:

134.1 orders made by the High Court or Māori Land Court;

134.2 negotiated agreements;

134.3 restrictions or prohibitions on access imposed;

134.4 any other relevant information that will need to be publicly available;

MĀORI RESERVATIONS

135 **agree** that the Māori reservations will be excluded from the New Zealand marine coastal access area in the new legislation;

136 **agree** that the Minister of Conservation continues to have and exercise in relation to the New Zealand marine coastal access area the functions, duties, and powers of manager of the New Zealand marine coastal access area;

137 **agree** that the entities other than the Minister of Conservation who have roles and responsibilities in the foreshore and seabed continue to have and exercise their roles in relation to the New Zealand marine coastal access area;

ADVERSE POSSESSION OR PRESCRIPTIVE TITLE

138 **agree** that the new legislation include a general clause specifying that no person may claim an interest in any part of the New Zealand marine coastal access area held in private title on the ground of adverse possession or prescriptive title;

139 **agree** that the new legislation include a clause stating that, for the avoidance of doubt, no person may claim an interest in any part of the New Zealand marine coastal access area, including any part that is found to be in customary title, on the ground of adverse possession or prescriptive title;

Next steps

140 **invite** the Attorney-General to instruct Parliamentary Counsel Office to draft a Bill in accordance with Cabinet's decisions;

141 **invite** the Attorney-General to report back to the Cabinet Legislation Committee in July 2010 on any technical changes that have arisen (including consequential amendment and transitional provisions);

142 **invite** the Attorney-General to report back to the Cabinet Legislation Committee in July 2010 on the following matters raised in this paper:

142.1 a te reo Māori term for the "New Zealand marine coastal access area" (in Part Two of this paper);

142.2 a clear set of policies addressing relevant steps and requirements for negotiations under the new framework (in Part Three of this paper);

142.3 funding for foreshore and seabed negotiations (in Part Three of this paper);

142.4 further information on the details and merits of the proposal of providing customary title to coastal marae (in Part Four of this paper);

142.5 additional reclamations matters (in Part Five of this paper):

- should the new legislation include a definition of "reclamation"?
- who should be the decision maker in respect of reclamations?
- should there be express requirements for a public consultation process for an application for an interest in a reclamation?
- what is the effect on extant Treaty claims over the reclaimed area?
- should the applicant lodge a standard form for an interest in a reclamation?
- what criteria, if any, apply to the decision maker?

- what conditions can be imposed on the interest granted in the reclamation?
- what timeframes should the reclamation application be subject to?
- can costs for the right to occupy be required by the decision maker and, if so, what is the basis for the imposition of this cost?
- if a freehold or leasehold interest in a reclamation is granted, is a subdivision consent also required over a reclamation?

142.6 **invite** the Attorney-General to report to the Cabinet Legislation Committee in July 2010 to seek agreement to introduce a Bill to repeal and replace the 2004 Act into the House;

142.7 **note** that the Bill will be introduced into the House with the aim of enactment by December 2010; and

Financial implications

143 **note** the Ministry of Justice receives funding for foreshore and seabed negotiations and determining customary rights and title cases in the courts based on claims and negotiations forecast to arise from the 2004 Act;

144 **note** the Ministry of Justice considers the level of activity forecast, and existing funding provided for operational and court activity for the 2004 Act will be sufficient to meet the uptake of the new regime;

145 **note** new negotiations in 2010/11 will require up to an additional estimated $1.200m per annum of claimant funding and this funding will be considered as part of work already underway on clarifying legal aid for historical Treaty of Waitangi claims and settlement negotiations;

146 **note** it is anticipated that some contemporaneous management of foreshore and seabed and historical Treaty of Waitangi negotiations will result in savings to Government in operational and claimant funding costs which can be applied to additional negotiations;

147 **note** the Minister of Justice and Minister for Treaty of Waitangi Negotiations are required in September 2010 to clarify legal aid for Treaty of Waitangi claims and settlement negotiations, and at that time the Attorney-General will recommend changes required to foreshore and seabed claimant funding; and

Agree that the Attorney-General report back to Cabinet in July 2010 on the matters set out above.

Hon Christopher Finlayson
Attorney-General

Date: _____ /_____ /_____

MINISTRY OF JUSTICE
Tāhū o te Ture

Regulatory Impact Statement
Review of the Foreshore and Seabed Act 2004: Post Consultation Decisions

Disclosure Statement

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1. This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice as part of the policy development process for the Review of the Foreshore and Seabed Act 2004 (the 2004 Act). It provides a summary of the regulatory impact analysis of options for the allocation of rights and obligations of ownership in the public foreshore and seabed. These options were developed as part of the policy process in reviewing the 2004 Act. Substantial policy development has taken place to address concerns the 2004 Act does not provide an equitable balance between all the interests of New Zealanders in the foreshore and seabed.

2. This is the second RIS prepared in relation to the Review of the 2004 Act. The first RIS analysed the preliminary policy options for replacing the 2004 Act as one possible outcome of the Review. Its purpose was to inform Ministerial decisions on the Government's preferred policy option which was set out in a public discussion document. This RIS only briefly addresses the status quo, problem definition and objective of the Review, which were covered in more detail in the first RIS.

3. Cabinet has set a tight timetable for completing the Review by the end of 2010 (which includes enactment of a replacement regime). This means the Ministry's ability to develop and analyse options is limited and focuses on areas with accessible evidence. If it were not for the externally set timeframe our analysis would be more comprehensive and our analysis less constrained. With respect to consultation the timetable has impacted on the depth of analysis of the public submissions. The submission period closed on the 30 April and approximately 1600 submissions were received. To date we have summarised the submissions with a focus on the 27 questions asked in the consultation document.

4. The policy process that underpins the RIS includes Cabinet decisions about assurances that must apply to all options and therefore constrain them. These assurances are the protection of public access, fishing and navigation rights and existing use rights. An example of the constraint on policy development is the options for recognising customary interests are restricted because an option which allows the holder to exclude the public is not possible.

5. The policy proposals discussed in the RIS has interdependencies and implications for other regulatory regimes and reform processes underway. These include the Aquaculture and RMA reforms as well as more established regimes such as the Crown Minerals Act and the Protected Objects Act. Changes that result from this Review could adversely impact on these regimes. For example the permission right (the right of customary title holders to permit activities requiring resource consent) will undermine the proposed improvements to the consent renewal process. This is a key element of both the aquaculture reforms and the RMA streamlining and simplifying work. If a customary interest holder exercised their right to

not permit a renewal of an aquaculture coastal permit this could compromise aquaculture development. These policy processes need to remain aligned to prevent unintended impacts and we are working with other departments to ensure this alignment.

6. We have concerns about the proposal to give businesses seeking a reclamation in the coastal marine area (eg a port company) a fee simple title because it is potentially inconsistent with the non-ownership concept. It may discriminate against customary interest holders who cannot have this property right. This proposal may be perceived by iwi as not balancing all the interests and therefore not meeting the government's overall objective for the review.

7. The RIS has some gaps in quantifying the risks, costs and benefits of the options identified. These primarily relate to the extent to which customary interests would be found in the foreshore and seabed under some of the options because it is not possible to determine with accuracy the outcome of the proposed tests because they have yet to be tested through the courts and/or negotiations. There is a lack of evidence of the number of Māori affected by the 2004 Act and the number impacted by the policy options in this RIS.

Benesia Smith
General Manager, Public Law (Acting)
Ministry of Justice

Date: 27/05/10

Executive Summary - incorporating conclusions and recommendations

1 This RIS considers the options available to the Government to address the problems associated with the Foreshore and Seabed Act 2004 (the 2004 Act). The options are assessed using principles developed to guide the review process. While the 2004 Act provides certainty and protects some interests (such as freehold title) it is at the expense of customary interests. This has a much greater negative effect on Māori interests compared to others. The objective in addressing this problem is to rebalance the interests of all New Zealanders in the foreshore and seabed.

2 The decisions that Ministers will need to make are split into four main sets. The first looks at what should happen to the 2004 Act. The second is about the options available to the government in respect of a replacement regime. The third set addresses the issue of ownership of the foreshore and seabed. The fourth set covers options available to recognise customary interests in the foreshore and seabed including subsidiary decisions about tests and awards.

3 When the 2004 Act is assessed against the principles developed to guide the review process the Ministry concluded it will not meet the government's objective. Although it provides a certain solution because processes are already in place it is a breach of the principles of the Treaty of Waitangi, contrary to good faith, inequitable and not a fair balance of recognition of interests.

4 In terms of the options available to replace the 2004 Act, both amend or repeal of the 2004 Act provide an opportunity to balance interests and to address the negative criticism the 2004 Act has attracted. They provide an opportunity to establish a just and enduring solution that enables customary interests to be recognised. On balance the Ministry considers amending the 2004 Act will have only a limited effect in achieving the government's objective. It will not remove the negative symbolism associated with the 2004 Act and therefore will not achieve an equitable balance of all interests. Therefore repeal is our preference because it will ensure certainty around decision-making processes and the balance of interest.

5 If a new regime to recognise customary interests is preferred, we think allowing claimants the choice of entering into direct negotiations or taking their claim to court to determine their interests is a fair and reasonable approach. Prescribing tests and awards in legislation provides the greatest level of certainty and efficiency for all parties and interests.

6 Using a combination of Canadian common law and tikanga Māori to develop unique New Zealand tests and awards to determine and recognise customary interests ranks highly when assessed against the policy principles. As the awards have been developed to take into account the New Zealand context and to fit with the existing legislative environment of the coastal marine area they are likely to be functional and durable. Where customary title has been recognised the holders will be able to prevent activities from taking place within the 'title area'. The exemption for existing aquaculture permits dilutes this award but aligns with the government's priority for aquaculture development.

7 The Ministry has taken the approach of not explicitly defining the detail of its preferred approach towards replacement legislation including ownership. We note the government's preferred approach of non ownership has benefits. We consider the proposal to give businesses seeking reclamation a fee simple title may be inconsistent with the non ownership concept. It may discriminate against customary interest holders who cannot have this property right. This may be perceived by iwi as not balancing all the interests and will not meet the government's objective.

8 Introducing a new regime in the timeframe proposed by government will provide a level of certainty the issue is being actively addressed and allow for a process to recognise customary interests to be established and interests to be rebalanced sooner rather than later. Although the option of taking time now to consider other options may allow for the determination of a durable solution it will slow the momentum for change.

9 This RIS discusses problems with the Foreshore and Seabed Act 2004, the objective of the Review and options to meet this objective. The decisions that Ministers will need to make are split into four sets including further subsets:

- what should happen to the 2004 Act?
- the preferred replacement option
- ownership options for the foreshore and seabed
- options recognise customary interests in the foreshore and seabed including subsidiary decisions about tests and awards.

Status Quo

Defining the foreshore and seabed

10 The foreshore and seabed is the marine area bounded on the landward side by the line of the mean high water springs and on the seaward side by the outer limits of the territorial sea (12 nautical miles). It includes the beds of rivers that are part of the coastal marine area as defined by the Resource Management Act 1991. In practical terms it is the 'wet' part of the beach.

Value of the foreshore and seabed

11 The economic, social, cultural and environmental (biophysical) values associated with the foreshore and seabed are:

- Economic values – associated with ports, fishing, aquaculture, mining, oil and gas, electricity generation and tourism
- Cultural values – including recognition of mana based on ancestral rights and heritage values
- Environmental values- the diversity of coastal ecosystems which support biological communities
- Social values - the value to people from recreational uses such as diving and fishing.

In the 2007/8 year local authorities processed 1312 coastal permits which equates to 3 percent of all consents processed.[1] Of these 74 percent were not publically notified.

Foreshore and Seabed Act

12 Information about the background to the Foreshore and Seabed Act 2004 (the 2004 Act), the key provisions of the 2004 Act and the implementation of the Act to-date are laid out in full in the previous Regulatory Impact Statement 11 March 2010 (the previous RIS).

Problem definition

13 The previous RIS canvassed the problem definition in detail. In summary there is a body of opinion focused on the 2004 Act's creation of an inequitable and discriminatory regime that treats customary interests differently to the interests of other New Zealanders. Despite the benefits of the 2004 Act (including certainty of ownership and public access), the Act treats Māori rights differently to non Maori. The Act removed the legal rights of Māori to have the nature and extent of their customary title interests determined by the Courts in accordance with established principles of New Zealand law.

14 The faults of the 2004 Act have come to symbolise systemic race-relations issues. For Māori, the 2004 Act represents a range of issues, from the role of Māori in managing natural resources to the meaning of 'one law for all'. It is not expected that all these issues will be resolved through the development of new foreshore and seabed policy. The negative symbolism of the 2004 Act needs to

[1] Ministry for the Environment RMA Two-yearly Survey of Local Authorities 2007/08

be acknowledged as polarising New Zealanders' views, not only on the foreshore and seabed, but on many other issues of which customary interests are part. As highlighted in the consultation process, many New Zealanders define the foreshore and seabed problem as one about 'access to beaches' rather than extinguishment of customary rights.

15 The following problem statement has been developed during the course of the Review:

Although the 2004 Act provided a greater degree of certainty about the range and operation of interests in the foreshore and seabed compared to the situation immediately before its enactment, it had a much greater negative effect on Māori interests compared to others and therefore does not provide for a satisfactory balance of all interests in the public foreshore and seabed.

Objective

16 The previous RIS described how the government objective for the Review was developed. The objective is:

Any regime should achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed (including customary interests).

17 The policy work has highlighted the need to find a solution that will prove durable and robust over the long-term. To help achieve this goal we have ran an inclusive and robust policy characterised by on-going consultation (with a range of people and groups etc) since the review commenced in early 2009. We have used the views to understand the interests of all new Zealanders to consensus build on the options under development. We acknowledge that the outcome of the Review will involve important trade-offs between the various interest represented in the foreshore and seabed.

18 Generally public policy analysis assesses the impacts of policy proposals on net national well being. Under this review additional assurances and principles have been developed that act as constraints on the options being considered. The review and policy development process has been underpinned by those principles which have also been used in this RIS to determine if the objective has been achieved:

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

Assurances

19 The replacement regime will apply to the foreshore and seabed (excluding private titles). The replacement regime needs to provide for the following assurances:

- **public access** in, on, over and across the public foreshore and seabed for all (subject to certain exceptions such as health and safety reasons);
- **recognition of customary rights and interests** – any new legislation will include recognition of customary rights and interests in order to address the disproportionate impact of the 2004 Act on customary interests
- **protection of fishing and navigation rights** within the foreshore and seabed; and
- **protection of existing use rights** to the end of their term (e.g. coastal permits, mining exploration permits, and marine reserves).

20 We note that the assurances are already provided for in the status quo (either explicitly or implicitly in the 2004 Act) and will not conflict with the objective. The consultation process has not brought to light any obvious objection to these assurances. Many submitters, particularly those with business interests in the foreshore and seabed seek the certainty which these assurances provide.

Regulatory impact analysis

What should happen to the 2004 Act?

21 The 2004 Act has taken on symbolic significance for many New Zealanders. As described in the problem definition, the symbolism is on the whole, negative. Addressing this negative symbolism has therefore been included in our analysis which considers:

- what options are available to the Government to address the problems of the 2004 Act?
- which of these options best achieves the objective?

22 When the Status Quo is assessed against the principles the Ministry concluded it provides a relatively certain solution. It is efficient because processes are already in place. However it has been regarded as breach of the Treaty of Waitangi, contrary to good faith, inequitable and not a fair balance of recognition and protection of interests and therefore will not meet the government's objective.

23 The public response to the 2004 Act demonstrates that most people do not support it. In 2004, approximately 94% of 3,946 submissions made to the Select Committee opposed the then Foreshore and Seabed Bill 2003. Of the 358 submitters to the Ministerial Review Panel who expressed an opinion on what should happen to the 2004 Act, approximately 85% wanted it repealed.

24 This contrasts with the results from the public consultation process in April 2010 where of the 1234 submitters that addressed the question of repealing the 2004 Act, 21% supported the repeal of the 2004 Act and 77% opposed repealing the 2004 Act. Generally reasons were the Act is working well "in the best interests of all", repeal would have a negative impact on society and that rights should not be conferred according to race.

25 The following A3 diagram set out the options available when considering what to do with the 2004 Act. It outlines the elements of each option to consider and the impacts that each option may encompass.

Table 1: Review of the Foreshore and Seabed Act 2004: Options available to meet the objective

OBJECTIVE

Achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed

- Business and development interests
- Customary interests
- Recreational and conservation interests
- Local government interests

CABINET-AGREED PRINCIPLES

- Treaty of Waitangi
- Good faith
- Recognition and protection of interests
- Equity
- Access to justice
- Certainty
- Efficiency

Options for change and next steps assessed against Cabinet-agreed principles

1ST DECISION – OPTIONS FOR CHANGE TO 2004 ACT

AMEND 2004 ACT

- May not fully address Treaty principles because inhibits fundamental change
- Lacks good faith because does not address negative symbolism
- Tests can be recalibrated to recognise customary interests
- Provides a limited framework for recognising customary interests
- Equitable
- Certain
- Efficient

STATUS QUO

- Does not reflect principles of the Treaty
- Lacks good faith because does not address negative symbolism
- Does not fully recognise customary interests
- Inequitable-discriminates against Māori
- Provides a limited framework for recognising customary interests
- Certain
- Efficient

REPEAL 2004 ACT

- Provides opportunity to be fully aligned with the principle of the Treaty
- Good faith – removes negative symbolism-supported by many at hui and public meetings
- Recognises and protects customary interests
- Equitable - opportunity to find a just and durable solution
- Provides for access to justice
- Greater level of uncertainty
- Moderately efficient

(IF DECIDE TO REPEAL 2004 ACT) 2ND DECISION – NEXT STEPS

DO MORE WORK

- Addresses Waitangi Tribunal's call for a "longer conversation"
- Good faith- responds to majority of submitters
- Opportunity to develop a framework for recognising and protecting rights
- Designed to balance interest of all NZers
- Certain - opportunity to build consensus on the solution

REVERT TO POST-NGĀTI APA

- Aligns with Treaty principles
- Good faith – removes negative symbolism
- Allows Court based determination of titles and rights
- Pure form of access to justice
- Level of uncertainty as to how Courts would determine customary interests
- Inefficient -Ministerial Review Panel said it would lead it a "unmanageable patchwork of litigation"

NEW REGIME

- Provides an opportunity to be fully aligned with the principle of the Treaty
- Good faith – an opportunity to find a just and durable solution
- Recognises and protects customary interests
- Equitable
- Provides for access to justice
- Greater level of uncertainty
- Moderately efficient

Amend or repeal?

26 The choice of whether to amend or repeal the 2004 Act depends on:

- the degree to which amendment or repeal will address the problems associated with the 2004 Act; and
- whether fundamental changes are necessary to the regime (i.e. to better recognise customary interests and to correct the operational deficiencies of the 2004 Act).

27 We consider that amending the 2004 Act will have only a limited effect in achieving the government's objective. The negativity associated with the development and enactment of the 2004 Act is entrenched and unlikely to be ameliorated by amendment. The 2004 Act itself has become a representation of New Zealand wide disharmony.

28 In our view amendment would not comply with the advice the government received from the Ministerial Review Panel in 2009 which recommended the Act be repealed. We also consider that amendment would not satisfy the concerns raised by the United Nations or the Waitangi Tribunal.

29 Of the two options (amend or repeal), repeal goes considerably further towards mitigating the negative symbolism of the 2004 Act. If it was not for the symbolic value of repeal and a desire to address the Crown ownership aspect of the Act, then amendment could be an appropriate solution to recalibrate the tests or potentially establish new litigation processes

30 Any replacement regime will require a substantial rewrite of the Act. For example, if Crown ownership was to be replaced with a new ownership model, it would require substantial amendment throughout the Act to the point where it would be more efficient to repeal and start afresh. If an amendment takes an Act beyond its original purpose in a fundamental way then the preference is to simply repeal and replace it.

Repeal the Act

31 If repeal is preferable to amendment, we have identified two repeal sub-options. Either:

- repeal and revert to the post-Ngati Apa situation; or
- repeal and replace the 2004 Act with a new legislated solution.

32 Repealing and remaining silent is not a viable option because it would not restore the original position and would create a vacuum a as it would not necessarily change the Crown's absolute ownership of the foreshore and seabed. It is preferable to repeal and replace the 2004 Act with a new regime immediately rather than repeal and then develop a new regime over time..

Reverting to the post-Ngati Apa situation

33 The sub option of repeal and revert to the post Ngati Apa will require legislation because the repeal of an Act does not necessarily revive anything from the past and therefore the Crown's absolute ownership of the foreshore and seabed would remain.

34 If the Act were repealed and the post-Ngāti Apa situation positively restored the Māori Land Court would have jurisdiction to hear and determine claims that areas of the foreshore and seabed have the status of Māori customary land. The High Court would have the jurisdiction to hear and determine claims of customary title.

35 There would be a number of complex issues to be resolved associated with ownership, collateral matters and how to integrate court derived title into wider frameworks. These issues are dealt with later in this RIS we when discuss the ownership models, recognising customary rights and collateral matters.

Replacing the 2004 Act with a new legislated solution

36 The Ministry of Justice considers that new legislation should be enacted to establish a new regime for ownership and management of the foreshore and seabed. This would allow the negative symbolism associated with the 2004 Act to be removed and replaced with a more balanced regime. If new legislation was put in place at a minimum it would need to include:

- an ownership regime
- a process to allow for customary interests
- public access
- protection of fishing rights and navigation rights
- protection of existing use rights
- a process for dealing with other matters affected by repeal of the 2004 Act (eg reclamations).

Ownership options for the replacement regime

37 The 2004 Act vested the full legal and beneficial ownership of the public foreshore and seabed in the Crown as its absolute property. The Act also extinguished all potential Māori customary title in the foreshore and seabed and instead provided a prescribed form of customary title that recognises customary interests akin to exclusive rights (territorial customary rights orders). Ongoing customary rights (activity based rights) were not affected by the vesting of the public foreshore and seabed in the Crown. The Act provided mechanisms for their recognition and protection under the RMA if certain requirements were met.

38 Ownership of the foreshore and seabed is a fundamental issue in the context of the review of the 2004 Act. Decisions made about ownership will shape the government's response to a range of flow-on issues and interests in the public foreshore and seabed. For example, the form of ownership chosen can limit the nature of customary interests that could be recognised.

39 To achieve certainty and clarity for the management of the foreshore and seabed, it is necessary to specify clear roles and responsibilities in respect of it. The 2004 Act did this by specifying the Crown as its owner. There are alternative mechanisms for achieving certainty which involve specifying particular roles and responsibilities in legislation for management and responsibility of the resource including when, how and by whom they are to be exercised.

40 Any ownership option will need to accommodate the government's assurance such as public access and the business interests that exist in the foreshore and seabed will need statutory protection. The Government's assurance of public access for all in, on and over the foreshore and seabed will protect the social and recreational values of the foreshore and seabed and these values are are unlikely to be changed by the policy proposals.

41 Under any of the ownership options, the following features of the status quo *would not change*:

- treatment of areas in private title;
- public access (subject to certain exceptions such as for health and safety reasons);
- fishing and navigation within the foreshore and seabed (subject to certain exceptions such as in harbours); and
- existing use rights (eg, coastal permits and marine reserves) until the end of their term.

42 Under any of the ownership options, the following features of the status quo *could change*:

- the residual rights and obligations of ownership, including who allocates space;
- regulatory processes (eg, public participation and the mechanics of how coastal permits are decided); and
- customary interests - how they are recognised and what is recognised.

Five feasible options

43 The review process identified five feasible options for 'ownership' as described in **Table 2**.

Assessment of options

44 Our analysis has been informed by feedback from the latest consultation round. The vast majority of submitters that responded to this question (91%) disagreed with the Government's proposal for a non- ownership approach but the reasons for that disagreement varied widely. Reasons included submitters:

- did not understand the proposal and did not feel informed enough to support it;
- were concerned that changes to ownership would impact on their rights (such as access or fishing);
- thought the foreshore and seabed should be in Crown ownership for the good of all New Zealanders;
- thought it promotes racism or is discriminatory (either in favour of Māori or against Māori);
- thought it does not deliver justice for Māori;
- supported Māori ownership;
- considered that the 'no-owner' proposal was contradictory to tikanga; and
- want more time to explore other options (a "longer conversation").

45 A small minority of submitters that responded to this question (7%) agreed with the government's preferred non-ownership approach. Reasons and comments focused on support of the concept that the foreshore and seabed should belong to everyone and that the approach has the potential to deal pragmatically and flexibly with a complex and contentious issue.

46 All the ownership options carry levels of risk. The option of absolute Māori ownership appears to carry the greatest level of risk given the levels of uncertainty it creates for most of the interests in the foreshore and seabed (i.e, business and development and local government). This option also conflicts with the government's aim of creating a balance of interests in the foreshore and seabed as it is weighted too heavily in favour of customary interests. The detail of how it could be given effect, the length and nature of any transition, and why it is assumed that this extinguishes the need to recognise the customary rights of particular groups of Maori in particular areas of the foreshore and seabed have yet to be determined.

47 The option of absolute Crown ownership provides certainty for most interests in the foreshore and seabed, although it does carry risks similar to those associated with absolute Māori ownership. There is no proper balance of interests given that customary interests must be extinguished to accommodate absolute Crown ownership and it does not accord with most of the principles (excluding certainty). Absolute ownership (either Crown or Māori differs from the rights and responsibilities of current private owners because the assurances do not apply to private owners.

48 Crown Notional title could lead to uncertainty in that it could affect the Crown's ability or willingness to exercise the rights and obligations of ownership in locations where it has identified that customary title is likely to be recognised later. Some submitters consider that Crown Notional and the non-ownership option will have similar impacts (For example the Seafood Industry Council).

49 In a practical sense the proposed regime is similar to Crown notional title as the roles and responsibilities for managing the foreshore and seabed are likely to be the same and the potential awards and tests for customary interests would be the same.

50 Under the no owner option the normal rights of ownership will not exist. For example fee simple title could not be granted. Possible interests that could be recognised in a non–ownership regime are management and use rights.

TABLE 2

OBJECTIVE
Achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed

- Business and development interests
- Customary interests
- Recreational and conservation interests
- Local government Interests

CABINET-AGREED PRINCIPLES

- Treaty of Waitangi
- Good faith
- Recognition and protection of interests
- Equity
- Access to justice
- Certainty
- Efficiency

Options for ownership assessed against impacts on types of interests

(IF DECIDE ON NEW REGIME) 3RD DECISION – OWNERSHIP OPTIONS

CROWN ABSOLUTE TITLE

Crown holds absolute title despite customary interests being proved

- Doubtful whether meets principles of Treaty
- Does not demonstrate good faith towards Maori
- Does not restore customary title
- Inequitable- for customary interests
- Does not adequately provide for access to justice
- Certainty- status quo largely maintained
- Efficient
- Supported by written submissions
- Positive impact on business interests
- Negative impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

CROWN NOTIONAL TITLE

A form of statutory title that recognises pre existing customary ownership

- Generally consistent with Treaty principles
- Demonstrates good faith
- Restores customary title extinguished by the 2004 Act
- Equitable in the long terms as will rebalance interests over time
- Provides for access to justice
- Uncertainty over ownership until all claims resolved
- Relatively inefficient
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

JOINT MĀORI/CROWN TITLE

Maori and the Crown have equal ownership and joint decision making

- Generally consistent with Treaty principles
- Demonstrates good faith
- Recognises and protects all interests
- Likely to provide access to justice
- Equitable
- Less efficient
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

MĀORI ABSOLUTE TITLE

Ownership is vested in Māori as absolute property

- Generally consistent with Treaty principles
- Does not align with principle of good faith
- Uncertainty - reduced role for government
- Inequitable- prioritises customary interests
- Would not provide for a wide range of interests
- Uncertain
- Inefficient
- Supported by oral submission made ay hui
- Negative impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Negative impact on local government

NEW ZEALAND MARINE COASTAL ACCESS AREA

No-one owns foreshore and seabed; instead specified roles and responsibilities

- Generally consistent with Treaty principles
- Demonstrates good faith
- Restores customary title,
- Provides for access to justice as includes a framework to recognise customary interests
- Equitable as seeks to balance of all interests
- Less certain
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

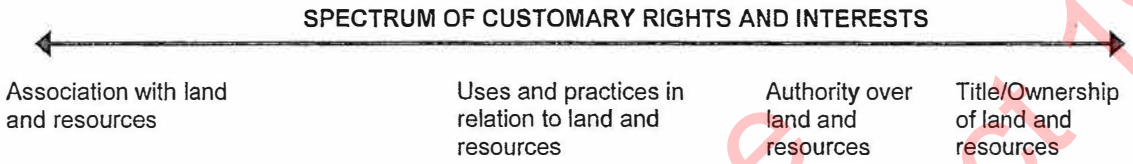
Government's preferred approach

Recognising customary interests

51 This section of the RIS discusses options available to determine and recognise customary interests in the foreshore and seabed. Three key decisions need to be made in this area. The first is what process (or 'engagement model') should be used for determining and recognising customary rights. The second is what tests should be used to determine if customary interests exist (and the nature of those interests). Finally, decisions need to be made regarding awards for customary interests that have been proven.

Types of customary interests

52 There is a range of customary interests that exist in the foreshore and seabed which sit along a continuum. This range includes use interests (which do not rely on control of the underlying land) or property-type interests (that do rely on control of the underlying land).



53 The customary interests in the foreshore and seabed that are proposed to be recognised reflect this range and are grouped into three types:

- the customary relationship of tangata whenua with the foreshore and seabed, such as is expressed in kaitiakitanga;
- customary uses, activities and practices ('customary rights'); and
- customary interests that are territorial in nature and extent ('customary title').

54 Recognising this range of customary interests is consistent with previous recognition in New Zealand (eg, fishing) and other Commonwealth countries to date (eg, Canada).

Options for processes to determine and recognise customary interests (engagement models)

55 A key component within the new regime will be a clear process for determining and recognising customary interests. Negotiations and court processes are provided for under the 2004 Act. Claims for recognition of both territorial and non-territorial customary interests can be made by either Māori or non Māori groups through the High Court. Alternatively, groups can enter into direct negotiations with the Crown and, once agreement is reached, have the High Court confirm that the legislative tests have been met.

56 If the preference were to repeal the 2004 Act and return to a post-Ngāti Apa situation, the process could be solely court based. Post-Ngati Apa, both the High Court and the Māori Land Court had jurisdiction to receive and determine applications concerning customary interests in the foreshore and seabed. These 'dual jurisdictions' were able to make decisions on the same (or similar) issues but each had different tests and different corresponding outcomes.

57 The Ministry of Justice has identified four other options to determine and recognise customary interests in the foreshore and seabed: negotiations alone; using the courts alone; providing a choice of either negotiations or accessing the courts; and establishment of a specialist commission or tribunal to consider claims. All the process/engagement model options can be applied to all the ownership options currently under consideration by government except Option

4: Māori absolute title. Under that option Māori themselves would determine the processes for defining a new customary interests regime and any tests for determining differing types of interests.

58 The tables below provide an overview of the options. Each option is assessed as to how strongly it meets the seven principles for the development of policy for the foreshore and seabed review. For example, if an option provides little or no reflection of a particular principle it is indicated as 'low'.

NEGOTIATION-BASED PROCESS

Reflects Treaty of Waitangi	High- relational approach reflects Treaty partnership
Good faith	Moderate to high – lacks transparency but can be collaborative process
Recognises all interests	Moderate to low – third/other parties may have less opportunity to be involved
Access to justice	Moderate – claimants have no 'day in court' but accessible as costs can be reimbursed
Equity	Moderate – treatment of claims may not be consistent however tailored solutions are allowed for. Clear guidelines with parameters for negotiations would assist consistency.
Certainty	Low to moderate–various outcomes available through negotiations. Clear guidelines and parameters for awards would increase certainty.
Efficiency	Moderate–pre-existing process however can be expensive & time consuming

COURT-BASED PROCESS

Reflects Treaty of Waitangi	Dependant on particular Court used, eg High Court (HC) or Māori Land Court (MLC).
Good faith	High – considered, transparent & objective process
Recognises all interests	Moderate to high – third/other parties able to be involved
Access to justice	Moderate– claimants have 'day in court. MLC has special aid fund available. No legal aid available if HC.
Equity	High consistent treatment for all
Certainty	Moderate to high – outcomes determined in consistent manner based on precedent.
Efficiency	Moderate– pre-existing process however can be complex, costly & prone to delays. Prescription of tests and awards in legislation would increase efficiency.

CHOICE OF NEGOTIATION OR COURT

Reflects Treaty of Waitangi	Dependant on particular process/court chosen.
Good faith	High– provision of choice is a fair & reasonable approach
Recognises all interests	Dependant on process chosen
Access to justice	High- groups can choose process most suitable for them. Accessibility may encourage more groups to seek recognition of interests (regardless of size/wealth)
Equity	Moderate- outcomes may be different for similar claims depending on which process chosen
Certainty	Moderate to high- clear parameters for negotiations and prescribed tests and awards increase certainty.
Efficiency	Moderate- enables flexibility so if negotiations falter can transfer into court process but two requires two processes to be provided

SPECIALIST TRIBUNAL

Reflects Treaty of Waitangi	Moderate to high- more inquisitorial/less adversarial than courts, can adapt procedures & protocol to suit
Good faith	Moderate to high- hearings can be open to public
Recognises all interests	Moderate– third parties can be involved. Inquisitorial approach can allow broad interests and issues to be considered.
Access to justice	Moderate to high– claimants can cover costs through legal aid regime
Equity	Moderate to high –consistent procedures and processes for investigating claims
Certainty	Moderate - recommendations only not binding decisions
Efficiency	Moderate to low substantial investment required if new tribunal established or ongoing investment if existing Waitangi Tribunal was expanded.

59 The two options that involve the use of Courts require subsequent decisions to be made regarding the appropriate jurisdiction for the hearing of claims for recognition of customary interests, provisions relating to evidence and the appeal process. The table below provides a high level summary of analysis of the decisions required. The two options are the Māori Land Court or High Court and are set out below.

ANALYSIS OF OPTIONS RELATED TO COURT-BASED PROCESS

	Advantages	*Disadvantages*
Māori Land Court	• **Expertise:** specialist jurisdiction and expertise in tikanga and Māori land tenure, and representation of Māori groups • **Procedure:** traditional framework, flexible rules of evidence and less adversarial • **Special Aid Fund:** funding for applicant groups available	• **Expertise:** traditionally limited to land and not the foreshore and seabed • **Appeal structure** could affect the timeliness of decisions • **Only Māori** can apply (although this could be amended)
High Court	• **Expertise:** has considered major issues affecting Crown–Māori relations • **Timely appeal structure:** decisions cannot be judicially reviewed • **Symbolic & practical:** may be perceived by some as a more appropriate court to consider cases that will affect the interests of all New Zealanders	• **Symbolic:** May not be viewed by Maori as the appropriate court to consider customary interest claims • **Legal Aid:** no legal aid funding available for applicant groups (although this could be changed)

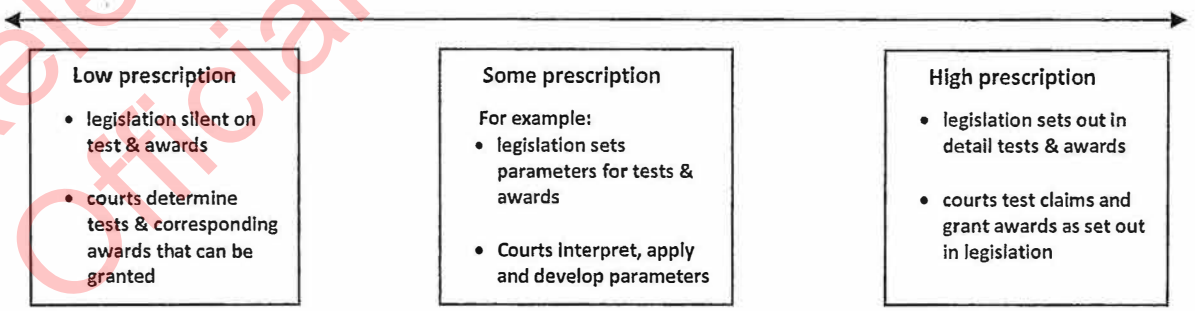
Analysis/conclusions

60 Overall, the option of **providing claimants with a choice of entering into direct negotiations or taking their claim to court most closely reflects the policy principles** of the foreshore and seabed review. The **High Court and Māori Land Court jurisdiction options both have merit** and where each may have shortcomings they can be mitigated in some way.

Prescribing tests and awards for customary interests in legislation

61 Consideration must be given to the level of prescription for the tests and awards used to determine and recognise customary interests. In other words, whether tests to determine customary interests and corresponding awards for proven interests should be left to the courts to develop over time or if they should be set out in legislation. The scope of possible prescription is set out below.

SCALE OF PRESCRIBING TESTS AND AWARDS



62 Tests are prescribed in the 2004 Act. The corresponding awards are also prescribed although the awards developed in foreshore and seabed negotiations to date were not prescribed in the 2004 Act. An overview of the analysis of the three options relating to prescribing tests and awards for any new regime is set out in the tables on the following page.

LEAVE TO COURTS

Reflects Treaty of Waitangi	**Moderate to high-** allows unique New Zealand common law to develop
Good faith	**Moderate to low–** not as transparent as setting out in legislation
Recognises all interests	**Moderate** other interests can be involved but still discretion of judge as to weighting of interests in decision making
Access to justice	**High** allows dialogue of rights takes place solely between the applicant and the courts
Equity	**Moderate to low** more room for discretion in judicial decision-making. No parameters for negotiations
Certainty	**Low-** long period of uncertainty likely until common law established
Efficiency	**Low-** protracted litigation and appeals likely. No parameters or basis for negotiations provided.

PROVIDE GUIDENCE IN LEGISLATION

Reflects Treaty of Waitangi	**Moderate-** allows for unique New Zealand common law to develop to a certain extent
Good faith	**Moderate–** not as transparent as setting out in full in legislation but provides some indication of parameters
Recognises all interests	**Moderate to high** can test interests in way that recognises other existing interests and rights
Access to justice	**Moderate-** allows restricted dialogue of rights to take place between the applicant and courts
Equity	**Moderate** allows some judicial discretion but provides parameters for consistency of process
Certainty	**Moderate-** narrows scope of possible outcomes
Efficiency	**Moderate–** will take time for courts to interpret and develop tests however parameters provided for negotiations

PRESCRIBE ACTUAL TESTS AND AWARDS IN LEGISLATION

Reflects Treaty of Waitangi	**Moderate to low-** less flexibility for New Zealand common law to develop
Good faith	**Moderate to high-** transparent but may be perceived that restricts or limits rights, or alternatively
Recognises all interests	**High-** ensures that all interests protected and recognised
Access to justice	**Moderate to low-** as Legislative determines not judiciary alone
Equity	**Moderate to high –** prescription ensures consistency in process
Certainty	**High-** provides significant level of certainty of process and outcome for both negotiation & litigation
Efficiency	**High–** prescription in legislation saves time and money for all involved

Analysis/conclusions

63 Overall, the **prescription of tests and awards in legislation is the most efficient option**. This option would also provide clarity and **the greatest level of certainty and transparency** because the way customary interests will be determined and correspondingly recognised would be made explicit. A risk with prescribing tests and awards in legislation is that Māori may feel that they have not been adequately involved in the process to develop them. However, Māori may equally be dissatisfied with outcomes that are determined through the court process.

Options for determining customary interests (tests)

64 The tests in the 2004 Act have been heavily criticised. The Ministerial Review Panel found 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 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 2004 Act.

65 The objective of establishing new tests is to address the flaws in the 2004 Act's test while at the same time ensuring clarity and consistency with common law customary title in the New Zealand context. Three options for determining and testing customary interests have been considered:

- Canadian common law;
- Te Ture Whenua Māori Act 1993; and
- a combination of both Canadian common law and Te Ture Whenua Māori Act 1993.

66 These options represent the broad range of tests available although the combinations are almost limitless. All three options could involve higher or lower thresholds than those required in the 2004 Act depending on how they are calibrated. The result of lower thresholds is that claimant groups would be more likely to be able to prove their customary interests; therefore, the areas in which those interests could be recognised would be more extensive than could be recognised under the 2004 Act. The result of higher thresholds would be the converse. An overview of the analysis of each option is provided on the following page as **Table 3**.

Canadian jurisprudence (common law only)

67 Canadian courts have extensive experience in considering claims to aboriginal title (customary title) and a body of law that developed over a long period of time. As this option is based on established Canadian common law, a level of certainty is provided as to how tests will likely be interpreted in New Zealand. This option would not mitigate criticism regarding reliance on overseas case law to develop tests to determine Māori interests. A test based entirely on another country's legal experience is not the most appropriate means of testing Māori customary interests given the cultural, historical and constitutional divergence between the two countries.

Te Ture Whenua Māori Act 1993 (tikanga Māori only)

68 Under this option, a claimant group would need to prove that the relevant foreshore and seabed is 'land that is held by Māori in accordance with tikanga Māori (section 129(2)(a)) to meet a test for territorial customary interest. This option provides the same threshold as would have been applied by the Māori Land Court post-Ngāti Apa however this option does not provide a great deal of certainty.

Tikanga Māori and common law combined (government's preferred option)

69 This option would draw on both tikanga Māori and overseas common law (so far as it relates to the New Zealand context) to develop the tests. This approach accommodates both sources of authority in line with the Treaty of Waitangi, its principles and associated jurisprudence.

Views from submissions on tests

70 Submitters were asked whether they agreed with each of the elements of the test for determining non-territorial customary interests (customary rights) proposed by the Government. A majority of submitters who addressed this question disagreed with the proposed test. Of those who commented, there was a wide range of reasons for disagreement. Many submitters thought that there should be no recognition of customary interests at all. Other reasons for disagreement included that there should be no reference to tikanga Māori (eg, because it is uncertain); the test is too high and unsympathetic to Māori; and the common law tests from overseas jurisdictions should be used. Of the minority who agreed with the proposed test, reasons given included that the test was reasonable and fair and that it was appropriate to include tikanga Māori.

Analysis/conclusions

71 On balance, the option of tikanga Māori and common law combined ranks highest when assessed against the principles. This option allows for the recognition of the full spectrum of customary interests. It provides consistency with New Zealand's legal heritage and context as well as some level of certainty as to how tests will likely be interpreted here.

TABLE 3: DETERMINING CUSTOMARY INTERESTS - OPTIONS FOR TESTS

OPTION 1: CANADIAN JURISPRUDENCE (COMMON LAW ONLY)

TESTS FOR CUSTOMARY RIGHTS

- Has been in existence since pre-sovereignty
- Continued existence of an identifiable community
- Connection of right to area where claimed
- Continuous exercise
- Integral to culture of group prior to contact, and
- Whether the right was extinguished

TESTS FOR CUSTOMARY TITLE

- Land occupied prior to sovereignty
- Show occupation was exclusive at sovereignty, and
  - "intention and capacity to retain control"
  - need not be "positive acts" of exclusion
- Show substantial maintenance of connection between the people and the land

Reflects Treaty of Waitangi	Low – fails to recognise New Zealand's own approach to recognising customary interests within the Treaty framework or the validity of tikanga Māori
Good faith	Moderate to low- may be perceived as unfair and inappropriate to apply overseas model only
Recognises all interests	Moderate to low- unique New Zealand common law unable to develop but consistent with common law of comparable jurisdictions
Access to justice	Moderate-allows for customary use and proprietary type interests to be considered and recognised but not full spectrum of interests
Equity	Moderate to high-upholds common law principle of recognising property rights
Certainty	Moderate to low- uncertainty as to how Canadian common law tests might be applied in New Zealand
Efficiency	Moderate- uncertainty about aspects of common law tests in Canada remains, will take time to apply and develop related common law in New Zealand

OPTION 2: TE TURE WHENUA MĀORI ACT 1993 (TIKANGA MĀORI ONLY)

TESTS FOR CUSTOMARY RIGHTS

- No test – Te Ture Whenua Māori Act 1993 deals with Māori land tenure not use rights

TESTS FOR CUSTOMARY TITLE

- "land that is held by Māori in accordance with tikanga Māori" (section 129(2)(a) of Te Ture Whenua Māori Act 1993)

Reflects Treaty of Waitangi	High- acknowledges tikanga as traditional Māori system of authority and management
Good faith	High- same test that would have been applied had 2004 Act not been introduced
Recognises all interests	Moderate to low- allows for differences in tikanga from group to group but may not recognise other valid interests in foreshore and seabed
Access to justice	Moderate to low- no express test for customary rights so may restrict groups from making these sorts of claims
Equity	Moderate - potential for customary interests to be recognised in a way that fails to provide for other interests
Certainty	Low- unclear how 'held in accordance with tikanga Māori' might be applied in the foreshore and seabed
Efficiency	Moderate to low- will take time to determine how test will be applied in foreshore and seabed

OPTION 3: TIKANGA MĀORI AND COMMON LAW COMBINED

TESTS FOR CUSTOMARY RIGHTS

- Has been in existence since 1840
- Continues to be carried out in the area in accordance with tikanga Māori
- Has not been extinguished

TESTS FOR CUSTOMARY TITLE

- Held in accordance with tikanga Māori
- Exclusive use and occupation of area (without substantial interruption) since 1840
- "Exclusive use and occupation" allows for:
  - shared exclusivity
  - customary transfers since 1840
  - ownership of abutting land relevant (but not required)
  - fishing and navigation by 3rd parties does not necessarily preclude exclusivity

Reflects Treaty of Waitangi	Moderate to high- acknowledges tikanga as traditional Māori system of authority and management and role of common law in determining customary interests
Good faith	Moderate- Māori may perceive as unfair& unreasonable to not use test that Māori Land Court would have applied
Recognises all interests	Moderate to high- allows for recognition of customary interests in a way that does not displace other valid interests in the foreshore and seabed
Access to justice	Moderate to high- acknowledges full spectrum of customary interests
Equity	Moderate to high- allows for recognition of customary interests in a way that does not displace other valid interests in the foreshore and seabed
Certainty	Moderate to high- prescription of tests in legislation will increase certainty
Efficiency	Moderate to high- prescription of tests in legislation will increase efficiency

TABLE 4: RECOGNISING PROVEN CUSTOMARY INTERESTS - OPTIONS FOR AWARDS

OPTION 1: CANADIAN JURISPRUDENCE (COMMON LAW ONLY)

AWARDS FOR CUSTOMARY RIGHTS

- Dependant on right claimed and established case law:
  - Rights generally not capable of evolving
  - "right to development" tied to individual right and whether right integral to culture of group prior to contact

AWARDS FOR CUSTOMARY TITLE

- Exclusive right to use and possess as groups see fit, including in a non-traditional way (but unable to use land in a manner irreconcilable with fundamental nature of groups' connection with land)
- Right to permit activities
- Can obtain commercial benefit from land use

Assurances
Held collectively and inalienable except to the Crown

PRINCIPLES

Reflects Treaty of Waitangi	Low- no recognition of 'customary relationship' of tangata whenua with foreshore & seabed or of tikanga Māori
Good faith	Moderate to low- may be perceived as unfair and inappropriate to use overseas model
Recognises all interests	Moderate to low-does not allow for unique New Zealand context to be taken into account
Access to justice	Moderate to low-allows for customary use and proprietary type interests to be recognised but not full spectrum of interests
Equity	Low- allows for exclusive possession
Certainty	Moderate- right to permit activities may increase uncertainty
Efficiency	Low- right to permit activities may decrease efficiency and awards not aligned with other New Zealand legislation

IMPACTS

Stakeholder	Possible Impact
Maori	Potential for increased control over resources, can gain commercial benefit
Recreational	No change
Business	Greater uncertainty and potential for loss of access to resources
Local Government	No significant change likely, additional decision makers (consent approval) may slow consent process
Conservation	Environmental impacts largely controlled by RMA but some increased Māori input into the process may have environmental benefits

OPTION 2: TE TURE WHENUA MĀORI ACT 1993 (TIKANGA MĀORI ONLY)

AWARDS FOR CUSTOMARY RIGHTS

- No award provided for in Te Ture Whenua Māori Act 1993

AWARDS FOR CUSTOMARY TITLE

- "land that is held by Māori in accordance with tikanga Māori" Property rights
- Declaration that land has "Māori customary land" status
- Right to permit activities
- Deemed to be Crown land for some purposes, e.g. trespass (section 144(1))
- Can obtain commercial benefit from land use

Assurances
Held collectively and inalienable (as Māori customary land) but status can change to Māori freehold or General land (which are alienable)

PRINCIPLES

Reflects Treaty of Waitangi	Moderate to high - tikanga recognised as traditional Māori system of authority and management
Good faith	Moderate to high- same awards that would have been available had 2004 Act not been introduced
Recognises all interests	Moderate to low- potential for customary interests to be recognised in a way that fails to provide for other interests
Access to justice	Low- only allows for proprietary type interests to be recognised
Equity	Moderate to low- potential for customary interests to be recognised in a way that fails to provide for other interests
Certainty	Moderate- right to permit activities may increase uncertainty
Efficiency	Moderate to low- right to say no to consents may decrease efficiency

IMPACTS

Stakeholder	Possible Impact
Maori	Potential for increased control over resources, can gain commercial benefit
Recreational	No change
Business	Greater uncertainty & potential for loss of access to resources
Local Government	No significant change likely, additional decision makers (consent input) may slow consent process
Conservation	Environmental impacts largely controlled by RMA but some increased Māori input into process may have environmental benefits

OPTION 3: TIKANGA MĀORI AND COMMON LAW COMBINED

AWARD FOR CUSTOMARY RELATIONSHIP

- Participation in conservation processes

AWARDS FOR CUSTOMARY RIGHTS

- Protection of customary activities:
  - can carry out activities without resource consent
  - activities do not need to comply with an RMA plan
- Placement of prohibition or restriction over wāhi tapu

AWARDS FOR CUSTOMARY TITLE

- Planning document (input into conservation & environmental management & planning in coastal marine area)
- right to permit activities requiring RMA consent (excluding renewals for aquaculture) & some specific conservation authorisations (eg marine mammal watching permits but not marine mammal sanctuaries
- Prima facie ownership of newly found taonga tūturu (protected objects)
- Can obtain commercial benefit from land use

Assurances
Held collectively and inalienable

PRINCIPLES

Reflects Treaty of Waitangi	High- recognition of 'customary relationship' of tangata whenua with foreshore & seabed
Good faith	Moderate–uses similar awards that would have been available had 2004 Act not been introduced and provides additional benefits
Recognises all interests	Moderate to high– awards developed specifically to ensure all interests can be provided for
Access to justice	High- allows for full spectrum of customary interests to be recognised
Equity	Moderate to high– awards developed specifically to ensure all interests can be provided for
Certainty	Moderate- right to permit activities may increase uncertainty
Efficiency	Moderate recognition of their planning document and the permission right may decrease efficiency & increase costs for departments but awards align well with other legislation

IMPACTS

Stakeholder	Possible Impact
Maori	Full spectrum of customary interests recognised, potential for significant level of input into resources management plus ability to gain commercial benefit
Recreational	No change
Business	Potential for uncertainty and for loss of access to resources
Local Government	Additional time & resource may be required to consider and provide for planning document
Conservation	Environmental impacts largely controlled by RMA but increased Māori input into decision making may have environmental benefits

Options for recognition of proven customary interests (awards)

72 When developing options for awards, both Canadian common law and Te Ture Whenua Māori Act 1993 were considered. Instruments developed in the foreshore and seabed negotiations between Ngā Hapū o Ngāti Porou and the Crown were also drawn on, for example, territorial rights orders, customary rights orders).2 Three options were identified and considered. All three provide for property rights including the right to permit activities and the right to obtain commercial benefit from land use. An overview of the analysis and impact of each option is provided as Table 4 on the previous page.

Views from submissions regarding awards

73 Submitters were asked whether they agreed with each of the elements of the awards for customary interests proposed by the government. Submissions were divided. A number of submitters thought that iwi/hapū should receive more or different recognition, or did not agree with a particular aspect of the proposed awards (eg, because they may cause uncertainty for development). Other submitters did not support any type of customary interest/right or award.

Analysis/conclusions

74 **All three options are likely to cause uncertainty** for business and development interests as all three involve the right to permit activities. On balance, the option **combining tikanga Māori and common law ranks highest when assessed against the policy principles**. Although this option may involve some negative impacts for local government (and some central government departments) relating to the proposed planning document, it entails **significant positive impacts for Māori and balances other interests** in the foreshore and seabed much the same way the alternative award options do.

75 The awards in this option have been **specifically developed to take into account the New Zealand context and to fit with the existing legislative environment of the coastal marine area**. Because there are over 40 statutes that operate in the coastal marine area, the awards under this option connect at a high level to the Resource Management Act 1991 (RMA). The RMA is the predominant legislation in the area and connects with approximately 35 of the 40 statutes in operation. The Conservation Act 1987, the Marine Reserves Act 1971, the Protected Objects Act, and the Marine Mammals Protection Act 1978 have also been accommodated in the development of this option. This option also allows for bundles of rights to be compensated for the constraints of Cabinet's agreed assurances, such as public access. **These are elements are critical if the award is to be functional and desirable**.

Award options relating to minerals within customary title areas

76 Prior to the 2004 Act, "non-nationalised" minerals in the foreshore and seabed (all minerals other than petroleum, gold, silver and uranium) were either owned by the Crown, privately owned or the ownership was undetermined because of claims by Māori that the land was Māori customary land. As the 2004 Act vested the full and beneficial ownership of the public foreshore and seabed in the Crown, any non-nationalised minerals within the public foreshore and seabed that were not privately owned were vested in the Crown. There is no policy intention to change Crown ownership of nationalised minerals (petroleum, gold, silver and uranium)

77 As some private title holders own non-nationalised minerals in their land within the foreshore and seabed an equitable regime would provide some recognition of the interest in non nationalised minerals that holders of customary titles have in their land. The following three options represent

[2] The Deed of Agreement with Ngā Hapū o Ngāti Porou provides various other instruments that would apply throughout the rohe moana of Ngā Hapū o Ngāti Porou. These are made in recognition of the mana of Ngā Hapū o Ngāti Porou. They are not made in recognition of territorial customary rights.

the broad range of options for recognising proven customary title interests in non nationalised minerals considered and all three can be applied to any of the above award options:

- **maintain the status quo**– the Crown would continue to own all non-nationalised minerals in the foreshore and seabed;
- **provide customary title holders with an increased role** in relation to non-nationalised minerals allowing them to control access and gain commercial benefit in customary title areas; or
- **vest non-nationalised minerals in customary title holders**- allowing them to control access and gain commercial benefit from those minerals.

Analysis/conclusions

78 Providing customary title holders with an increased role in relation to non nationalised minerals to control access and gain commercial benefit in customary title areas and vesting non-nationalised minerals in customary title holders are effectively the same. However vesting the minerals in customary title holders may be perceived as more fair and equitable as customary title holders will own the minerals in their land the same way private title holders do.

79 Both options reflect the policy principles well with the exception of 'certainty' and 'efficiency' because both options increase the number of decision makers involved in non-nationalised mineral management, regulation and (for the vesting option) investment. Conversely, the status quo option ranks high against these two principles but low against the remaining five ('Reflects Treaty of Waitangi', 'Good Faith', 'Recognises all interests', 'Access to justice' and 'Equity').

80 An overview of the impacts on key stakeholders for each option is outlined in the table below.

	Status quo (Crown owns)	Provide customary title holders with increased role	Vest in customary title holders
Maori	**No compensation for reduced property rights** - no opportunity for role in management or regulation or to gain commercial benefit	**Some recognition of property rights**- Increased decision making role & ability to gain commercial benefit	**Property rights equitable to private title holders** who own minerals
Business	**No change**– status quo provides certainty for business and investment	**Increased number of decision makers** may cause uncertainty for business & investment	Fracturing of mineral ownership **may increase transaction costs** for mineral explorers and developers
Environment	**No change**	**Greater influence of Maori** over decision making has **potential to positively affect environmental outcomes**	**Maori ownership** has **potential to positively affect environmental outcomes**

Implementation

81 There are a number of matters that will need to be considered as part of implementation of a new foreshore and seabed regime. There will not need to be any substantive change to the way these matters are dealt with in under any of the five ownership options. These matters are allocation of space (although the rationale for Crown, decision-making would change in a non-ownership regime); coastal permits; coastal occupation charges; leases and licences; structures and roads; local authority administrative functions and local authority-owned land; and the preservation of Māori reservations.

Reclamations

82 With respect to reclamations there are a number of decisions to be in respect of how they should be managed under a new regime based on the non ownership concept. Three options have been identified for providing for reclamations under the new regime.

83 The options are:

- fee simple title;
- a leasehold interest; or
- a coastal permit.

84 The fee simple option and the leasehold option are inconsistent with the no ownership option. Although a fee simple title would give applicants certainty it does not fairly balance all interests in the coastal marine area. Customary interests are unable to be recognised as fee simple titles. The coastal permit option is consistent with all ownership options as it relies on a use right permission (rather than an ownership interest). Furthermore a coastal permit allows for input from the wider community to ensure that all interests are considered when decisions are being made about the scale and location of the activity.

85 Decisions need to be made about who can apply for a reclamation. To avoid dealing with competing applications in respect of the same reclamation (eg: the person who constructed the reclamation and a local iwi) we propose that unless a reclamation has been abandoned, only the person who constructed a reclamation will be able to claim an interest in it. Decisions also need to be made about whether a reclamation can have alternative uses? There are two options either reclamations will or will not be able to have alternative uses to the purposes for which they were constructed. We consider that it is a sustainable use of resources to allow for alternative uses if the original use is no longer viable. We note that declamations rarely happen.

86 There are several transitional options for dealing with applications for an interest in a reclamation. These are:

- All applications considered under the provisions of the new foreshore and seabed regime; or
- the new regime will contain transitional provisions so that applications are considered under the relevant regime that was applicable when the application was made; or
- the new regime will contain transitional provisions to simplify the processes for granting interests in extant and future applications.

87 There is unlikely to be opposition to the first option if the new regime provides for fee simple title as this is considered the most desirable interest by applicants. If all applications are dealt with under one regime, this will improve efficiency compared to the current three or four. However if reclamation receive a coastal permit (rather than fee simple title) this will have negative effects for older reclamations where a leasehold or freehold interest can currently be obtained.

Consultation

88 Consultation on the review of the 2004 Act has been underway since March 2009. In addition to the iterative interdepartmental policy development processes consultation has been undertaken in a number of forums as set out below.

Iwi Leaders Group

89 A group of eight leaders from across New Zealand was appointed by the Attorney-General in to operate as a 'sounding-board' for the government's proposals. The iwi leaders are generally very supportive of repeal and removal of Crown ownership. They are supportive of recognition of the three levels of customary interests

Ministerial Review Panel [2009]

90 The Terms of Reference for the Ministerial Review required the Panel to undertake consultation with Māori and the general public through a series of public meetings and hui. The y undertook a series of 21 consultation hui and public meetings from which 580 submissions were received. The Panel also met with 30 significant interest groups and the five groups who had been in

negotiations with the under the 2004 Act as well as other key commentators and members of the judiciary.

91 The primary grievance articulated by submitters to the Ministerial Review Panel related to the Act's extinguishment of (potential) Māori customary title and the vesting of ownership of the in the Crown. The Panel concluded that the Foreshore and Seabed Act 2004 failed to balance the interests of all New Zealanders in the foreshore and seabed, and was discriminatory and unfair. It advised repealing the law and replacing it with new legislation.

Consultation with targeted stakeholders

92 The Attorney-General met with sixteen stakeholders (eg local government, port companies, recreational, conservational, farming, aquaculture, energy and human rights groups) who were considered to be affected by the legislation more than the general public. The Attorney-General used this process to explain his preference and to hear concerns from stakeholders. Some specific feedback received from Local Government advised the views of councils across the country were very diverse. Port Companies were looking for certainty so they can run business without interruption. The Council of Trade Unions thought the 2004 Act should be replaced or repealed and that was a need for greater dialogue.

Consultation with negotiating groups

93 The Attorney-General met with the five iwi groups in foreshore and seabed negotiations with the Crown. The meetings were an opportunity for the Attorney General to explain his preference and to gather feedback on issues such as the workability of the proposed tests.

Government's public consultation

94 In March 2010 Cabinet agreed to a four week public consultation process (31 March to 30 April 2010) on the government's preferred regime for replacing the 2004 Act. The process consisted of preparation and distribution of a consultation document that included a detailed submission form for feedback on questions about the proposals. For example submitters were asked to comment on whether the 2004 Act should be repealed or not and whether they support government's preferred approach to ownership of the foreshore and seabed.

95 Hui and public meetings were held during April 2010. At the hui there was a clear theme of support for the repeal of the 2004 Act. This was in contrast to the public meetings where there was generally support for retention of the status quo.

96 Approximately 1600 written submissions were received on the Government's proposals. The written submissions reflect a wide range of views. Most submitters felt that the foreshore and seabed should remain in Crown ownership, and many of those did not support any form of recognition of Maori customary interests. This outcome is in stark contrast to the submissions on the then Bill in 2003 (including a hīkoi over of 50,000 people), the very unfavourable critiques of two United Nations bodies and the recommendations of the Ministerial Review Panel last year.

97 The overall nature of written submissions indicated that a lot of submitters are still focussed on the fundamental issues that are seen to be associated with the foreshore and seabed issue, rather than on the detail of the government's proposals. In many cases, submitters did not appear to fully appreciate some of the issues being canvassed, which is understandable given the complexity of the subject matter. It is also evident that there are many common misunderstandings about this issue, ranging from the geographic area of the foreshore and seabed to the administration of the 2004 Act.

98 People are likely to have another chance to participate in the review when a Select Committee considers the replacement legislation.

Table 1: Review of the Foreshore and Seabed Act 2004: Options available to meet the objective

OBJECTIVE

Achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed

- Business and development interests
- Customary interests
- Recreational and conservation interests
- Local government Interests

CABINET-AGREED PRINCIPLES

- Treaty of Waitangi
- Good faith
- Recognition and protection of interests
- Equity
- Access to justice
- Certainty
- Efficiency

Options for change and next steps assessed against Cabinet-agreed principles

1ST DECISION – OPTIONS FOR CHANGE TO 2004 ACT

AMEND 2004 ACT

- May not fully address Treaty principles because inhibits fundamental change
- Lacks good faith because does not address negative symbolism
- Tests can be recalibrated to recognise customary interests
- Provides a limited framework for recognising customary interests
- Equitable
- Certain
- Efficient

STATUS QUO

- Does not reflect principles of the Treaty
- Lacks good faith because does not address negative symbolism
- Does not fully recognise customary interests
- Inequitable-discriminates against Māori
- Provides a limited framework for recognising customary interests
- Certain
- Efficient

REPEAL 2004 ACT

- Provides opportunity to be fully aligned with the principle of the Treaty
- Good faith – removes negative symbolism-supported by many at hui and public meetings
- Recognises and protects customary interests
- Equitable - opportunity to find a just and durable solution
- Provides for access to justice
- Greater level of uncertainty
- Moderately efficient

(IF DECIDE TO REPEAL 2004 ACT) 2ND DECISION – NEXT STEPS

DO MORE WORK

- Addresses Waitangi Tribunal's call for a "longer conversation"
- Good faith- responds to majority of submitters
- Opportunity to develop a framework for recognising and protecting rights
- Designed to balance interest of all NZers
- Certain - opportunity to build consensus on the solution

REVERT TO POST-NGĀTI APA

- Aligns with Treaty principles
- Good faith removes negative symbolism
- Allows Court based determination of titles and rights
- Pure form of access to justice
- Level of uncertainty as to how Courts would determine customary interests
- Inefficient -Ministerial Review Panel said it would lead it a "unmanageable patchwork of litigation"

NEW REGIME

- Provides an opportunity to be fully aligned with the principle of the Treaty
- Good faith – an opportunity to find a just and durable solution
- Recognises and protects customary interests
- Equitable
- Provides for access to justice
- Greater level of uncertainty
- Moderately efficient

TABLE 2

OBJECTIVE
Achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed

- Business and development interests
- Customary interests
- Recreational and conservation interests
- Local government Interests

CABINET-AGREED PRINCIPLES

- Treaty of Waitangi
- Good faith
- Recognition and protection of interests
- Equity
- Access to justice
- Certainty
- Efficiency

Options for ownership assessed against impacts on types of interests

(IF DECIDE ON NEW REGIME) 3RD DECISION – OWNERSHIP OPTIONS

CROWN ABSOLUTE TITLE

Crown holds absolute title despite customary interests being proved

- Doubtful whether meets principles of Treaty
- Does not demonstrate good faith towards Maori
- Does not restore customary title
- Inequitable- for customary interests
- Does not adequately provide for access to justice
- Certainty- status quo largely maintained
- Efficient
- Supported by written submissions
- Positive impact on business interests
- Negative impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

CROWN NOTIONAL TITLE

A form of statutory title that recognises pre-existing customary ownership

- Generally consistent with Treaty principles
- Demonstrates good faith
- Restores customary title extinguished by the 2004 Act
- Equitable in the long terms as will rebalance interests over time
- Provides for access to justice
- Uncertainty over ownership until all claims resolved
- Relatively inefficient
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

JOINT MĀORI/CROWN TITLE

Maori and the Crown have equal ownership and joint decision-making

- Generally consistent with Treaty principles
- Demonstrates good faith
- Recognises and protects all interests
- Likely to provide access to Justice
- Equitable
- Less efficient
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

MĀORI ABSOLUTE TITLE

Ownership is vested in Māori as absolute property

- Generally consistent with Treaty principles
- Does not align with principle of good faith
- Uncertainty - reduced role for government
- Inequitable- prioritises customary interests
- Would not provide for a wide range of interests
- Uncertain
- Inefficient
- Supported by oral submission made ay hui
- Negative impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Negative impact on local government

NEW ZEALAND MARINE COASTAL ACCESS AREA

No-one owns foreshore and seabed; instead specified roles and responsibilities

- Generally consistent with Treaty principles
- Demonstrates good faith
- Restores customary title,
- Provides for access to justice as includes a framework to recognise customary interests
- Equitable as seeks to balance of all interests
- Less certain
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

Government's preferred approach

TABLE 3: DETERMINING CUSTOMARY INTERESTS - OPTIONS FOR TESTS

OPTION 1: CANADIAN JURISPRUDENCE (COMMON LAW ONLY)

TESTS FOR CUSTOMARY RIGHTS

- Has been in **existence since pre-sovereignty**
- **Continued existence** of an identifiable community
- **Connection of right to area** where claimed
- **Continuous exercise**
- **Integral to culture** of group prior to contact, and
- Whether the **right was extinguished**

TESTS FOR CUSTOMARY TITLE

- **Land occupied prior to sovereignty**
- Show **occupation was exclusive at sovereignty**, and
  - "Intention and capacity to retain control"
  - need not be "positive acts" of exclusion
- Show substantial **maintenance of connection between the people and the land**

Reflects Treaty of Waitangi	**Low** fails to recognise New Zealand's own approach to recognising customary interests within the Treaty framework or the validity of tikanga Māori
Good faith	**Moderate to low-** may be perceived as unfair and inappropriate to apply overseas model only
Recognises all interests	**Moderate to low-** unique New Zealand common law unable to develop but consistent with common law of comparable jurisdictions
Access to justice	**Moderate-**allows for customary use and proprietary type interests to be considered and recognised but not full spectrum of interests
Equity	**Moderate to high-**upholds common law principle of recognising property rights
Certainty	**Moderate to low-** uncertainty as to how Canadian common law tests might be applied in New Zealand
Efficiency	**Moderate-** uncertainty about aspects of common law tests in Canada remains, will take time to apply and develop related common law in New Zealand

OPTION 2: TE TURE WHENUA MĀORI ACT 1993 (TIKANGA MĀORI ONLY)

TESTS FOR CUSTOMARY RIGHTS

- **No test** Te Ture Whenua Māori Act 1993 deals with Māori land tenure not use rights

TESTS FOR CUSTOMARY TITLE

- **"land that is held by Māori in accordance with tikanga Māori"** (section 129(2)(a) of Te Ture Whenua Māori Act 1993)

Reflects Treaty of Waitangi	**High-** acknowledges tikanga as traditional Māori system of authority and management
Good faith	**High-** same test that would have been applied had 2004 Act not been introduced
Recognises all interests	**Moderate to low-** allows for differences in tikanga from group to group but may not recognise other valid interests in foreshore and seabed
Access to justice	**Moderate to low-** no express test for customary rights so may restrict groups from making these sorts of claims
Equity	**Moderate -** potential for customary interests to be recognised in a way that fails to provide for other interests
Certainty	**Low-** unclear how 'held in accordance with tikanga Māori' might be applied in the foreshore and seabed
Efficiency	**Moderate to low-** will take time to determine how test will be applied in foreshore and seabed

OPTION 3: TIKANGA MĀORI AND COMMON LAW COMBINED

TESTS FOR CUSTOMARY RIGHTS

- **Has been in existence since 1840**
- **Continues to be carried out in the area in accordance with tikanga Māori**
- **Has not been extinguished**

TESTS FOR CUSTOMARY TITLE

- **Held in accordance with tikanga Māori**
- **Exclusive use and occupation** of area (without substantial interruption) since 1840
- "Exclusive use and occupation" allows for:
  - shared exclusivity
  - customary transfers since 1840
  - ownership of abutting land relevant (but not required)
  - fishing and navigation by 3rd parties does not necessarily preclude exclusivity

Reflects Treaty of Waitangi	**Moderate to high-** acknowledges tikanga as traditional Māori system of authority and management and role of common law in determining customary interests
Good faith	**Moderate-** Māori may perceive as unfair& unreasonable to not use test that Māori Land Court would have applied
Recognises all interests	**Moderate to high-** allows for recognition of customary interests in a way that does not displace other valid interests in the foreshore and seabed
Access to justice	**Moderate to high-** acknowledges full spectrum of customary interests
Equity	**Moderate to high-** allows for recognition of customary interests in a way that does not displace other valid interests in the foreshore and seabed
Certainty	**Moderate to high-** prescription of tests in legislation will increase certainty
Efficiency	**Moderate to high-** prescription of tests in legislation will increase efficiency

TABLE 4: RECOGNISING PROVEN CUSTOMARY INTERESTS - OPTIONS FOR AWARDS

OPTION 1: CANADIAN JURISPRUDENCE (COMMON LAW ONLY)

AWARDS FOR CUSTOMARY RIGHTS

- **Dependant on right claimed** and established case law:
  - Rights generally **not capable of evolving**
  - **"right to development" tied to individual right** and whether right integral to culture of group prior to contact

AWARDS FOR CUSTOMARY TITLE

- **Exclusive right to use and possess** as groups see fit, including in a non-traditional way (but unable to use land in a manner irreconcilable with fundamental nature of groups' connection with land)
- **Right to permit activities**
- Can obtain **commercial benefit** from land use

Assurances

Held collectively and inalienable except to the Crown

PRINCIPLES

Reflects Treaty of Waitangi	**Low**- no recognition of 'customary relationship' of tangata whenua with foreshore & seabed or of tikanga Māori
Good faith	**Moderate to low**- may be perceived as unfair and inappropriate to use overseas model
Recognises all interests	**Moderate to low**-does not allow for unique New Zealand context to be taken into account
Access to justice	**Moderate to low**-allows for customary use and proprietary type interests to be recognised but not full spectrum of interests
Equity	**Low**- allows for exclusive possession
Certainty	**Moderate**- right to permit activities may increase uncertainty
Efficiency	**Low**- right to permit activities may decrease efficiency and awards not aligned with other New Zealand legislation

IMPACTS

Stakeholder	Possible impact
Maori	Potential for increased control over resources, can gain commercial benefit
Recreational	No change
Business	Greater uncertainty and potential for loss of access to resources
Local Government	No significant change likely, additional decision makers (consent approval) may slow consent process
Conservation	Environmental impacts largely controlled by RMA but some increased Māori input into the process may have environmental benefits

OPTION 2: TE TURE WHENUA MĀORI ACT 1993 (TIKANGA MĀORI ONLY)

AWARDS FOR CUSTOMARY RIGHTS

- No award provided for in Te Ture Whenua Māori Act 1993

AWARDS FOR CUSTOMARY TITLE

- **"land that is held by Māori in accordance with tikanga Māori"** Property rights
- Declaration that land has **"Māori customary land" status**
- **Right to permit activities**
- Deemed to be **Crown land for some purposes**, e.g. trespass (section 144(1))
- Can obtain **commercial benefit** from land use

Assurances

Held collectively and inalienable (as Māori customary land) but status can change to Māori freehold or General land (which are alienable)

PRINCIPLES

Reflects Treaty of Waitangi	**Moderate to high** - tikanga recognised as traditional Māori system of authority and management
Good faith	**Moderate to high**- same awards that would have been available had 2004 Act not been introduced
Recognises all interests	**Moderate to low**- potential for customary interests to be recognised in a way that fails to provide for other interests
Access to justice	**Low**- only allows for proprietary type interests to be recognised
Equity	**Moderate to low**- potential for customary interests to be recognised in a way that fails to provide for other interests
Certainty	**Moderate**- right to permit activities may increase uncertainty
Efficiency	**Moderate to low**- right to say no to consents may decrease efficiency

IMPACTS

Stakeholder	Possible impact
Maori	Potential for increased control over resources, can gain commercial benefit
Recreational	No change
Business	Greater uncertainty & potential for loss of access to resources
Local Government	No significant change likely, additional decision makers (consent input) may slow consent process
Conservation	Environmental impacts largely controlled by RMA but some increased Māori input into process may have environmental benefits

OPTION 3: TIKANGA MĀORI AND COMMON LAW COMBINED

AWARD FOR CUSTOMARY RELATIONSHIP

- **Participation in conservation processes**

AWARDS FOR CUSTOMARY RIGHTS

- **Protection of customary activities:**
  - can carry out activities without resource consent
  - activities do not need to comply with an RMA plan
- Placement of **prohibition or restriction over wāhi tapu**

AWARDS FOR CUSTOMARY TITLE

- **Planning document** (input into conservation & environmental management & planning in coastal marine area)
- **right to permit activities** requiring RMA consent (excluding renewals for aquaculture) & some specific conservation authorisations (eg marine mammal watching permits but not marine mammal sanctuaries
- **Prima facie ownership** of newly found **taonga tūturu (protected objects)**
- Can obtain **commercial benefit** from land use

Assurances

Held collectively and inalienable

PRINCIPLES

Reflects Treaty of Waitangi	**High**- recognition of 'customary relationship' of tangata whenua with foreshore & seabed
Good faith	**Moderate**–uses similar awards that would have been available had 2004 Act not been introduced and provides additional benefits
Recognises all interests	**Moderate to high**– awards developed specifically to ensure all interests can be provided for
Access to justice	**High**- allows for full spectrum of customary interests to be recognised
Equity	**Moderate to high**– awards developed specifically to ensure all interests can be provided for
Certainty	**Moderate**- right to permit activities may increase uncertainty
Efficiency	**Moderate**– recognition of their planning document and the permission right may decrease efficiency & increase costs for departments but awards align well with other legislation

IMPACTS

Stakeholder	Possible impact
Maori	Full spectrum of customary interests recognised, potential for significant level of input into resources management plus ability to gain commercial benefit
Recreational	No change
Business	Potential for uncertainty and for loss of access to resources
Local Government	Additional time & resource may be required to consider and provide for planning document
Conservation	Environmental impacts largely controlled by RMA but increased Māori input into decision making may have environmental benefits