OFFICE OF THE DEPUTY PRIME MINISTER

The Chair
CABINET BUSINESS COMMITTEE

## FORESHORE AND SEABED: DRAFT OVERVIEW PAPER

## EXECUTIVE SUMMARY

1 This draft paper is the first in a suite of papers seeking Cabinet decisions on the government's policy on foreshore and seabed that will provide the basis for legislative drafting. This paper has three main aims:

a it reports on the key themes of the consultation process, and further engagement process;

b it outlines the key strategic policy decisions that will inform the government's proposed policy package;

c it recommends the establishment of an adhoc Ministerial group to consider detailed foreshore and seabed issues.

2 Following the extensive consultation process, the government proposes to confirm that the principles of Access, Regulation, Protection and Certainty continue to guide the government's approach to the foreshore and seabed.

3 To address the range of interests in the foreshore and seabed, the government recognises that each principle has to be considered together. The approach must address the status of the foreshore and seabed, protection of Māori customary rights, ways to improve existing mechanisms and consider how to treat private titles.

4 The government's proposals have several inter-related components:

a introduce legislation that:

i repeals provisions which vest the foreshore and seabed in the Crown and replaces them with provisions vesting the land in the people of New Zealand which applies to all foreshore and seabed areas except those in private Land Transfer Act titles;

ii amends Te Ture Whenua Maori Act to enable the Māori Land Court to award a Māori customary title which overlays the people of New Zealand title that:

Either:

(a) recognises ancestral connection between Māori and areas of the foreshore and seabed;

Or

(b) recognises ancestral connection between Māori and areas of the foreshore and seabed; and

specifies customary rights to the foreshore and seabed;

iii makes it clear that the Māori customary title would not alter existing public access over that area;

iv makes it clear that the above mechanisms replace:

(a) the current provisions of Te Ture Whenua Māori Act to decide whether land is Māori customary land, which in most respects is converted into an ordinary freehold title.

(b) the High Court's common law jurisdiction to look at these issues.

b the setting up of a joint central government /local government / Māori working group to:

i examine how to strengthen Māori participation in local government decision making processes related to the coastal marine area. That examination is to include, but is not limited to:

(a) co-management regimes across the coastal marine area;

(b) local government coastal policy and planning processes;

(c) local government resource consent processes.

ii examine ways to improve the Customary Fishing Regulations;

iii in light of the above, consider what legislative changes might be desirable;

iv scope initiatives to improve Māori capacity to participate effectively in local government processes and other relevant processes.

c develop ways to address access over areas of private Land Transfer Act title in the foreshore and seabed.

5 Subject to decisions contained in this paper, a suite of companion papers will be submitted to the Cabinet Policy Committee in early December.

## BACKGROUND

6 Māori have often asserted customary rights in the coastal area. The traditional importance of the coast and of marine resources, for both practical and spiritual purposes, is well documented. New Zealand law recognises the possibility of customary rights, but there is a long history of legal debate and uncertainty about what customary rights there might be in the marine environment.

7 In 1997 some iwi from the top of the South Island were concerned about the way in which marine farming, or aquaculture, was developing in the Marlborough Sounds. They were troubled by its impact on their customary fishing rights and what they considered to be their more general customary rights in the area. They brought a test case to the Māori Land Court, asking the Māori Land Court to determine that areas of the foreshore and seabed were Māori customary land.

8 After a long and complex process, the issues came before the Court of Appeal. In June 2003, the Court of Appeal issued a decision that stated the Māori Land Court has the jurisdiction to hear claims, and to investigate the status of "land" in the foreshore and seabed. This case is currently under appeal to the Privy Council.

9 In late June, a number of applications seeking an urgent Tribunal hearing were received. On 3 July, the Acting Chairperson declined urgency on the basis that the government announcements made at that stage could not be viewed as representing a policy or proposed policy on behalf of the Crown. Those directions also invited the parties to renew their applications if the Crown adopted a firm proposal on the matter.

10 On 11 August, Cabinet [CAB Min (03) 27/24 refers] agreed to a set of principles that would inform the preparation of a government paper for public feedback. The government released its proposals for consultation on 18 August 2003 and public submissions on the document closed on 3 October 2003.

11 Subsequent to the release of the government proposal for consultation, the Tribunal received a renewed application for urgency. The Tribunal decided on 12 November 2003 to hold an urgent hearing into the government proposals in late January 2004.

## PUBLIC CONSULTATION, SUBMISSION ANALYSIS & ENGAGEMENT WITH INTERESTED GROUPS

### Public Consultation Programme

12 The government has engaged in an extensive consultation process. This involved the distribution of 15,000 copies of the government proposals for consultation and 23,000 pamphlets which highlighted the issue. The 0508 Foreshore telephone line fielded over 650 calls for further information.

13 Over 60 meetings were held with the following groups:

a Māori – hui around the Northland area, Auckland, Thames, Maketu, Gisborne, New Plymouth, Wellington, Blenheim, Christchurch and Invercargill where over 3000 people attended and 180 oral submissions were heard;

b Interest/sector groups - which represented a wide range of recreational, sports, fishing interests and local government; and

c Public meetings organised by government Members of Parliament, where people demonstrated an interest in the issue.

14 The content and presentations at consultation meetings and hui were tailored to suit the specific audiences, and notes were taken of issues raised by participants. The information provided from these meetings has been used to assist in the refinement of the government policy proposals.

### Submissions

15 As at 4 November, 2150 written submissions have been received on the government proposals for consultation. An independent consultant with experience in analysing submissions has been contracted to review and summarise the submissions.

16 A formal review team has been established, consisting of participants from the Department of the Prime Minister and Cabinet, Ministry of Justice and Te Puni Kokiri. The team's role has been to monitor the review process, to provide a sounding board, and to supply feedback on draft reports to ensure content and tone accurately and fairly reflected the diverse range of views expressed by the submissions.

17 An overview of the key messages received from this process is attached as Appendix A. The report on the analysis of submissions will be part of the suite of papers to be submitted to the Cabinet Policy Committee for consideration in early December.

**Further dialogue / engagement process**

18 During November relevant Ministers and senior officials (led by the Department of the Prime Minister and Cabinet) entered into further engagement and dialogue with Māori and other sector/interest groups. This process involved discussion on the government's proposed policy proposals, options for implementation (including the nature of proposed legislative amendments), and the link between the foreshore and seabed policy and other related policy in the coastal marine area including oceans policy and marine reserves.

## FORESHORE AND SEABED: KEY STRATEGIC POLICY DECISIONS

19 It is clear from the consultation and further engagement process that the four Principles of Access, Regulation, Protection and Certainty should continue to guide the government's approach to the foreshore and seabed, and that the proposals to address the principles must recognise the inter-relationships between and within each Principle.

20 The government's overall proposals therefore have several inter-related components:

a introduce legislation that:

i repeals provisions which vest the foreshore and seabed in the Crown and replaces them with provisions vesting the land in the people of New Zealand which applies to all foreshore and seabed areas except those in private Land Transfer Act titles;

ii amends Te Ture Whenua Maori Act to enable the Māori Land Court to award a Māori customary title which overlays the people of New Zealand title that:

Either

(a) recognises ancestral connection between Māori and areas of the foreshore and seabed;

Or

(b) recognises ancestral connection between Māori and areas of the foreshore and seabed; and

specifies customary rights to the foreshore and seabed;

iii makes it clear that the Māori customary title would not alter existing public access over that area;

iv makes it clear that the above mechanisms replace:

(a) the current provisions of Te Ture Whenua Māori Act to decide whether land is Māori customary land, which in most respects is converted into an ordinary freehold title; and

(b) the High Court's common law jurisdiction to look at these issues.

b the setting up of a joint central goovernment/local government / Māori working group to:

i examine how to strengthen Māori participation in local government decision making processes related to the coastal marine area. That examination is to include, but is not limited to:

(a) co-management regimes across the coastal marine area;

(b) local government coastal policy and planning processes;

(c) local government resource consent processes.

ii examine ways to improve the Customary Fishing Regulations;

iii In light of the above, consider what administrative and legislative changes might be desirable;

iv scope initiatives to improve Māori capacity to participate effectively in local government processes and other relevant processes.

c develop ways to address access over areas of private Land Transfer Act title in the foreshore and seabed.

21 The paper sets out two options for dealing with customary rights. Option A would set up a way of recognising customary rights through ancestral connection to the foreshore and seabed. This would recognise mana whenua to the foreshore and seabed.

22 The ancestral connection option as set out in paragraph 54 would not require whānau, hapū and iwi to go to the Māori land Court to specify all the customary rights including uses to the foreshore and seabed.

23 Most of this paper deals with a combined approach (Option B) of recognising ancestral connection and allowing whānau, hapū and iwi to identify specific customary rights to the foreshore and seabed through the Māori Land Court. This Option B involves a complex set of issues which are set out in this paper, including the need to integrate the customary rights regime with the Resource Management Act and other Acts. None of this intricacy would be needed if there were a decision to enhance participation and decision making (co-management) reflecting ancestral connection instead of developing a detailed and Court-based customary rights regime.

24 On that basis, this paper sets out the policy and legal approaches to the status of the foreshore and seabed, and recognition of customary rights. The key strategic policy issues that need to be considered include:

a Issue 1: The status of the foreshore and seabed;
b Issue 2: Protection of Maori customary rights in the foreshore and seabed;
c Issue 3: The effect of any right declared by the Maori Land Court;
d Issue 4: The effect of the proposed reform on Maori customary rights;
e Issue 5: How to improve existing systems for protecting customary rights; and
f Issue 6: The treatment of private titles in the foreshore and seabed.

25 These issues are considered against the backdrop of some legal uncertainty about the nature of Maori customary rights in the foreshore and seabed, and the effect of any government action on those customary rights. While there are some international situations to draw from, none of those can be applied wholly to the New Zealand situation. This paper therefore sets out a new approach for dealing with these complex issues in the New Zealand context.

## ISSUE 1: STATUS OF THE FORESHORE AND SEABED

*Capacity to make laws governing the foreshore and seabed*

26 The Crown, through Parliament, regulates the foreshore and seabed on behalf of all present and future generations of New Zealanders. In international law terms, the Crown has fundamental territorial jurisdiction over the entire territory of New Zealand, including over any Maori customary land. The same concept is also commonly described as "sovereignty", or as general regulatory responsibility.

27 This regulatory responsibility is consistent with both the principles of the Treaty of Waitangi, and with findings of the Courts and the Waitangi Tribunal. The capacity of Parliament to make laws for all of New Zealand is confirmed in sections 14-16 of the Constitution Act 1986.

28 The Crown does not need to have title to the foreshore and seabed to control activities in that area through the law making process. There are a number of precedents for exercising or allocating the rights that are frequently part of a set of ownership rights without having a vesting of ownership itself. Examples are:

a The foreshore and seabed in New Zealand were administered without any vesting for over a century. Vesting provisions were first included in law in 1965; and

b New Zealand law regulates the use of water, geotheResource Management Actl energy and fish without a vesting of the resource itself.

29 In recent years, however, it had been assumed that title in the foreshore and seabed did rest with the Crown following the various pieces of vesting legislation. Subsequent statutory regimes, and in particular the Resource Management Act, have been developed on the basis that there was no significant private ownership in the foreshore and seabed.

30 In terms of overseas jurisdictions, seabed in Australia within the territorial sea but beyond the 3 mile limit is controlled by the Commonwealth without any explicit vesting of title to the seabed. Presumably this is accomplished by confining any private rights to those recognised by statute.

31 International law requirements and responsibilities recognise the capacity of the New Zealand Crown, through New Zealand's law-making and associated regulatory processes, to regulate activity within the territorial sea of New Zealand. These responsibilities remain unaffected by any policy decision by the government on how to resolve the foreshore and seabed issue within this country's context.

32 This international legal recognition of responsibility reflects the fact that, as a matter of practical and constitutional fact, the fundamental role of the government is to balance competing interests and demands, and to make decisions on how those demands are best brought together in the overall public good. In New Zealand's constitutional arrangements, the executive branch of government develops proposals for legislation, to be introduced to and considered by Parliament. The government also considers the principles of the Treaty of Waitangi as it develops those proposals.

*Statutory rights*

33 The general policy for many years has been not to create freehold title in the foreshore and seabed, and to move to limit or recover any titles that were granted earlier in New Zealand's history. Several statutes create systems under which more specific rights are granted to undertake particular activities in the foreshore and seabed. Key Acts include the

Resource Management Act, which includes a comprehensive coastal permit regime, the Fisheries Act and the Crown Minerals Act.

34 Following the Court of Appeal decision in the *Ngati Apa* case, it is also possible that applications under Te Ture Whenua Maori Act could result in the creation of private rights in the foreshore and seabed. At present the Maori Land Court has jurisdiction to investigate the legal status of land and decide which status out of the six recognised in the Act apply to the particular piece of land. If the land has not been converted into any other form of title, the Court will find that it has the status of Maori customary land (which is defined to mean that it is held according to tikanga). If land is Maori customary land, the Maori Land Court can investigate who is entitled to that land, and then create a title vesting the land in those people. The title that the Maori Land Court creates is in most respects an ordinary freehold title under the Land Transfer Act, and gives owners the same rights as other owners of land but very limited rights to sell the land.

*Common law rights*

35 The common law also has capacity to recognise rights in the foreshore and seabed. Common law rights are developed by the High Court in the exercise of its general and inherent jurisdiction.

36 In particular, it is clear following the *Ngati Apa* decision that there is still scope in New Zealand for arguments to be put to the Court that there are customary rights in the foreshore and seabed that have not been extinguished in the past. The legal route for asserting such rights could be an application to the High Court to seek a declaration of a particular right, if there was a likelihood that someone was about to act inconsistently with those rights. The nature of any such rights is largely unexplored in the New Zealand context. In Australia, the High Court has held that exclusive rights akin to fee simple title cannot be recognised in the marine environment. In *Ngati Apa*, comments in some of the judgments indicate that a different conclusion might be reached in this country, at least in relation to some small and distinct geographical features such as particular reefs or shell banks.

37 There are other common law rights in the foreshore and seabed area. In particular, there is probably a common law right of public navigation, although its status is not completely free from argument. There was probably also in the past a common law right of fishing, although this would probably now be found to have been replaced by the statutory regimes that govern fishing activity.

*The need for clarity about the status of the foreshore and seabed*

38 The Court of Appeal's decision has created the possibility that Te Ture Whenua Māori Act might provide an additional route for the creation of private (including collective) rights in the foreshore and seabed. The form in which those rights would be created – freehold title – was not anticipated by and is therefore not accommodated in the other statutes that control activity in the coastal marine area, in particular the Resource Management Act.

39 The situation in law now is that there are several different statutory systems for creating or recognising rights in the foreshore and seabed, as well as potentially several different types of common law rights in these areas. At this stage it is unclear how those various rights would be reconciled with one another. Steps are needed to clarify the general status of the foreshore and seabed, and the range of rights that may exist in these areas. Previous legislative attempts to clarify the general status of the foreshore and seabed in the vesting provisions of the Foreshore and Seabed Endowment Revesting Act and the Territorial Sea and Exclusive Economic Zone Act have now been found not to have provided clarity, as they have not specifically addressed the question of customary rights. It will therefore be important in this reform to be clear that the new system for recognising rights proposed here is comprehensive, and replaces all previous common law and statutory systems for recognising rights, including customary rights.

40 In clarifying the status of the foreshore and seabed, three objectives have been identified as the basis of the government's proposed policy approach:

a the foreshore and seabed should be communal space, with open access and use for all the people of New Zealand (subject to limited and appropriate restrictions);
b Court processes for considering claims of customary rights must not be able to result in the creation of exclusive freehold ownership; and
c there must be the capacity for customary rights to be recognised over the foreshore and seabed in an appropriate and contemporary way.

*Options for clarifying the status of the foreshore and seabed*

41 There is a range of ways for clarifying the status of the foreshore and seabed. Two of the options were considered the most appropriate for legally defining the land as communal land and unable to be sold or otherwise alienated. These are:

a Vesting the foreshore and seabed land in the Crown; or
b Vesting the foreshore and seabed land in the people of New Zealand.

42 It would be essential that the effect of these options ensures that the government has full administrative rights, so that the legislation does not need to recreate the full panoply of law relating to administration. The government would need to hold all management and landowner responsibilities on behalf of all New Zealanders.

43 Traditionally the mechanism that has been used to represent the people of New Zealand or the public interest has been 'the Crown'. In this sense a vesting in the Crown includes all New Zealanders, including Māori. However, in the Treaty context, the Crown is an entity apart from Māori, that is, the other Treaty partner. In that sense the Crown is viewed as excluding Māori. In the context of the current debate, the language of vesting in the Crown is viewed by many as highly provocative and adversarial, rather than as unifying.

44 In order to avoid this interpretation, it is proposed that the foreshore and seabed should be vested in the people of New Zealand which would apply to all foreshore and seabed areas except those in private Land Transfer Act titles. All New Zealanders have a relationship with the foreshore and seabed that is well recognised and understood. This new type of public title would confer ownership and property in the foreshore and seabed (including airspace, waterspace and subsoil etc) in the people of New Zealand. It would be the responsibility of government to then ensure that the foreshore and seabed were sustainably managed in the best interests of all New Zealanders. This regulatory responsibility would be carried out on the basis of partnership between the Crown and Maori, through a variety of means.

45 Further time will be required to allow for legal research and drafting to ensure that this proposal does not create unanticipated effects, and that all necessary consequential amendments are identified. It is proposed that all departments with legislative powers and duties in the foreshore and seabed should be directed to identify the powers and responsibilities of government in that context and the relevant legislation to determine what further legislative amendments may be required.

## ISSUE 2: PROTECTING MAORI CUSTOMARY RIGHTS IN THE FORESHORE AND SEABED

46 The protection principle provides that any specific rights in the foreshore and seabed should be identified and protected. It is proposed that a new and separate division of the Maori Land Court be established to consider these issues and have the ability to award a new Māori customary title. It is proposed that the 'Maori customary title' would overlay the 'people of New Zealand title' to the foreshore and seabed.

47 The Maori customary title would:

Either:

a recognise ancestral connection between Maori and areas of the foreshore and seabed, irrespective of the existence of customary rights;

Or

b recognise ancestral connection between Maori and areas of the foreshore and seabed, irrespective of the existence of customary rights; and

specify customary rights to the foreshore and seabed.

48 The new law will need to explicitly clarify that the characteristics of the proposed 'Maori customary title' are different from the characteristics associated with ownership of customary land under the Te Ture Whenua Maori Act as it currently stands. The new law will also need to be clear that this new 'Maori customary title' does not amount to an interest in land and that the customary rights attached to it are inalienable.

49 In implementing the principle of protection, it will be important to clarify:

a the role of the Maori Land Court in protecting Maori customary rights in the foreshore and seabed, and Maori customary title;

b the scope of those customary rights, which include ancestral connection to the foreshore and seabed, that can be given legal recognition;

c covenants of access to the foreshore and seabed; and

d the effect of protecting those customary rights to the foreshore and seabed and their impact on the regulatory regimes.

***Role of the Maori Land Court in protecting Maori customary rights***

50 Under the Maori Land Court's current jurisdiction, there is every prospect that concepts of dry land tenure would be applied to the foreshore and seabed. However, given that the foreshore and seabed is an important national resource, the government does not consider that the land should be either bought and sold or be the subject of exclusive possession (except in reasonable and appropriate circumstances) in the same way as dry land.

51 The government therefore proposes to amend Te Ture Whenua Maori Act and provide a new set of tools for the Maori Land Court to examine foreshore and seabed claims. This means that the ability to obtain an order that the land in question is Maori customary land will be removed. This is to be balanced by proposals to replace the Maori Land Court's current jurisdiction with a complete new statutory code that will recognise and protect customary rights.

52 In terms of an appeals process, the default system is that an appeal can be lodged with the Maori Appellate Court, then Court of Appeal and then the Supreme Court. It is proposed that the appellate structure remain the same for the new division of the Maori Land Court, and that Te Ture Whenua Maori Act be amended to ensure that the appeal bodies have the same tools available as the new division of the Maori Land Court.

53 I note that there are a number of generic issues relating to the structure, jurisdiction and composition of the Maori Land Court that require further consideration. It is proposed that officials be directed to undertake a review of the Maori Land Court.

***Ancestral connection***

54 Around New Zealand ancestral connections to different areas of the coastal marine area will be recognised by the issue of a Maori customary title. It is expected that ancestral connection will be claimed for all parts of the coast. The Maori customary title would recognise mana and ancestral association of the relevant grouping of that area.

55 The status of the title awarded by the Maori Land Court would mean that the Maori customary right holder should have the ability to enter into co-management arrangements with the relevant local authority and other organisations to manage that area of the coast. In practice, this would mean that current participation in decision making opportunities under the Resource Management Act (eg being automatically included in statutory processes related to that area) would not be sufficient to satisfy the effect of a Maori customary title that recognised mana and ancestral connection. It is proposed that what these co-management arrangements could entail and how these types of arrangements could be put in practice be the subject of discussions by a joint working group (refer to paragraphs 107-109).

56 A key issue for consideration is whether the recognition of mana and ancestral connection should be at all levels of whanau, hapu and iwi level, or whether the recognition should occur at either the hapu and/or iwi level. It is also recognised that in some areas, particularly where boundaries overlap, that there could be more than one group that held mana and

ancestral connection with an area. Each approach has its particular issues and risks:

a Whanau, hapu and iwi recognition – it provides for the widest range of groups to have standing at all levels but may have the effect of fragmenting groups over a foreshore and seabed area and of significantly increasing compliance costs for decision-makers and others;

b Hapu and Iwi recognition – potentially provides for a level of co-ordination amongst the aggregated groupings, while keeping some localised decision making. Both hapu and iwi would need to ensure that its processes involve all interests;

c Iwi – potentially provides for greater internal co-ordination and understanding within the relevant grouping, and the prospect of reducing fragmentation. The iwi would need to ensure its systems and processes involve all those with interests in the foreshore and seabed area.

57 Given the developments in the Treaty settlements area, the processes of Te Ohu Kaimoana and other related policy implementation such as the Customary Fishing regulations in recognising those with mana and ancestral connection, there is some scope to apply those frameworks as a starting point. Whether the body holding the Maori customary title was a governance entity, a Maori Trust Board or some other body would be the subject of discussion.

58 To expedite this component of the Maori customary title, further consideration is being given to whether a separate process of regional inquiry that proceeded systematically around the country could commence in 2004/05.

***Recognising customary rights***

59 The government proposes to give legal recognition and protection to Maori customary rights in the seabed and foreshore that are not currently given legal recognition and protection by the Treaty of Waitangi Fisheries Settlement. However, this will not preclude the Maori Land Court from identifying linkages with the customary fishing regulations where appropriate.

60 The extent to which the Maori Land Court can identify the range of Maori customary interests is determined in the main by the tests and guidance provided in statute. A discussion of the common law principles and current Maori Land Court test is outlined below.

*Summary of common law principles*

61 The common law has been the vehicle for recognition of the property rights of indigenous people in Australia, Canada and the USA. It has developed jurisprudence in relation to customary rights that are sometimes referred to as a right of aboriginal or native title.

62 The common law generally tries to match the defined right of native title to the nature of the activity performed by an aboriginal people. It does not insist that the traditional customs and practice must remain frozen in time in the way that they are exercised. The origin of the right is in pre-sovereignty law and custom but modern technology may be employed in exercising a native title that is grounded in traditional practice. For instance, the common law would allow a modern dingy with an outboard motor to be used to conduct customary fishing. There must, however, be a sufficiently proximate connection between the current behaviour and the traditional customs.

63 The common law may also recognise lesser forms of property. These may involve rights that are not dependent on an underlying ownership by anybody. They may also be non-exclusive in character. If the common law tests were applied by the courts in this country, the group claiming the interest/activity would need to demonstrate that:

a the claimed customary right deserves legal protection;
b the claimed customary right has been continuously exercised; and
c the claimed customary right is an element of a practice, custom, or tradition integral to the distinctive culture of the group claiming the right.

64 There are certain customary rights that the common law may not recognise. The High Court of Australia recently held that any claim to exclusive possession and control in the sea cannot succeed at common law. It held that such rights would be fundamentally inconsistent with fundamental public rights of navigation and fishing and the international obligation to allow innocent passage. The Court of Appeal decision in *Ngati Apa* has, however, signalled an expectation that some rights of this nature might exist. This brings into question whether the Australian common law could be applicable in the New Zealand context.

65 The common law does not recognise, as a feature of a customary use, a development right to undertake a new activity that had not been a feature of customary practice. This would preclude an entitlement to harvest a newly discovered resource in the same area in which a particular use was conducted. Such a development right is a feature of an ownership interest

of the kind reflected in a title regime but does not arise in relation to use based rights.

*Maori Land Court Test*

66 As outlined in paragraph 34, the Maori Land Court currently determines the status of land according to tikanga Maori. The determination that land is held in accordance with tikanga Maori is made as a result of finding that it is not land within any of the other categories of land defined by the Land Transfer Act.

67 The Maori Land Court then invokes tikanga to determine who owns the land. This means that the way in which the Maori Land Court has used a tikanga based test has been focused on identifying those who hold tikanga rights.

68 It has, however, established some general jurisprudence in relation to determining who holds rights in accordance with tikanga. The established jurisprudence is that:

a The principal rights upon which Maori rely when making claim to any particular area are discovery, ancestry, conquest or gift;

b The rights existed at the date of signing the Treaty of Waitangi; and

c The rights have continued to be exercised or there is evidence of a continued association of those rights.

69 Existing jurisprudence from the Maori Land Court has not required it to determine the meaning of "holding in accordance with tikanga Maori" so there is no guidance or precedent available for future Courts. A Tikanga Maori test is therefore less certain and could lead to an expansive approach being used in the Maori Land Court.

*Proposed New Approach*

70 Due to the new statutory regime becoming the contemporary way in which customary rights can be given legal recognition, it is proposed that the approach should be to build on the current tikanga Maori test and augment it with a set of common law criteria. This type of framework could include:

a A direction to the Maori Land Court to have particular regard to tikanga Maori when identifying who holds the specific rights in relation to a defined area of the foreshore and seabed and the nature of the rights held;

b Defining the relevant "continuity test" to be applied in determining the existence of a specific right;

c Defining any limits to the way in which a customary right may be exercised in a contemporary context; and

d Guidance on what actions in the past might have led to the extinguishment of any potential customary right.

71 This type of approach would draw on both tikanga and the common law to ensure that:

a the Maori Land Court is given clear guidance as to the Maori customary rights that can be given legal recognition;

b all those who use or administer the foreshore and seabed have certainty as to the nature and extent of Maori customary rights that may be recognised by the Maori Land Court.

72 It is recognised that this type of approach will impose a level of prescription as to the nature and extent of customary rights that may be given legal recognition. The advantage is that such prescription results in the highest level of certainty as to the nature and extent of the rights the Maori Land Court may declare.

73 However, the greater the level of prescription imposed the greater the risk that Maori will regard the Crown as seeking to define the nature and extent of the interests, rather than recognising and protecting those that exist in accordance with tikanga. The extent to which that is considered acceptable to Maori will depend on the extent to which the criteria are consistent with tikanga Maori and those interests or activities that would be recognised at common law.

***Access and customary rights***

74 To achieve the objective of the protection principle it may be that it is necessary to impose some limit on public access to effectively protect the specific customary right. For instance, it may be necessary to have some limits on public access to protect a burial site or other site-specific cultural use. To this extent the customary rights holder could restrict the access of others to that area in order to preserve the integrity of the customary right.

75 This approach to public access would be consistent with the way in which both the Resource Management Act and the New Zealand Coastal Policy Statement deals with this issue. The Resource Management Act has a strong presumption in favour of public access and it is stated as a matter of national importance in the Act. It does, however, recognise that there may be valid reasons to limit public access and allows restrictions 'to the extent necessary to the activity' in those situations. The Coastal Policy Statement also contains provisions that allow restriction on access to 'protect Maori cultural values'.

76 It is proposed that, to appropriately balance the objectives of the Access principle and the protection principle, legal recognition and protection can be given to a customary right that restricts public access only to the extent that is necessary to preserve the integrity of the specific customary right identified.

77 It is appropriate that decisions as to the potential scope of specific customary rights that may be given legal recognition and protection are made at this stage. This will provide the greatest level of certainty as to those rights that are to be included in the regime and that must, therefore, be accommodated by existing statutory regimes. This will allow effective links to be developed between the customary rights regime and existing regulatory regimes. Effective links will be essential to meeting the objectives of both the protection principle and the regulation principle. Operational issues relevant to ensuring such effective links are addressed in a later paper.

78 Specific decisions as to what can and can not be given legal recognition ensures that the government:

a is respecting the entitlements associated with the rights; and
b avoids the risk that it could be regarded as treating any such use as a 'privilege' to be accorded by the government from time to time on such conditions as it considers appropriate.

## ISSUE 3: SCOPE OF CUSTOMARY RIGHTS TO BE RECOGNISED AND THEIR EFFECT

79 As outlined above, the government proposes to give legal recognition and protection to Maori customary rights in the foreshore and seabed. There will, however, be a number of issues that under this new regime may constrain the recognition of certain elements of customary rights:

a Any customary rights that fall within the Treaty of Waitangi Fisheries Settlement will not be included in the new protection regime as they have already been given legal recognition and protection by the Customary Fishing Regulations. The extended definition of fish, aquatic life and fishing in the Fisheries Act means that there are limited living resources in the seabed and foreshore that are not covered by the Fisheries Settlement. For instance, the harvesting of seaweed, seabirds and seashells are all included. However, this will not preclude the Court from making linkages with the Customary Fishing Regulations;

b Some customary rights may not be able to be given full expression and protection due to the Crown's fundamental territorial jurisdiction generally being governed in the Exclusive Economic Zone by international law. For example this may restrict some activities in relation to the innocent passage of vessels;

c customary rights must allow for appropriate and reasonable public access (as discussed above in paragraphs 74 - 78);

d customary rights may not be able to be given full expression and protection if they interfere with the national interest (eg defence and infrastructure requirements);

e customary rights are inalienable and do not amount to an interest in land (as discussed in paragraph 48); and

f customary rights that are akin to fee simple which includes the ability to exercise exclusive possession of an area, the ability to control and manage an area, the ability to allocate and develop the area are excluded. This is based on the Court of Appeal's statement that such instances would be small and rare. If such an instance occurred, then the Maori Land Court would have the ability to notify the government, who would enter into discussions to resolve the issue.

80 To be able to obtain the full benefit of any identified right the customary rights holder must be able to exercise the right to the fullest extent possible. Two key issues arise in this context:

a The extent to which the nature and extent of the right is accommodated by, or made subject to, the relevant regulatory regime; and

b the ability to enforce the right against third parties.

81 To assist consideration of the potential effect of a recognised customary right, officials have identified a range of potential customary rights that could arise in the foreshore and seabed (outside of the constraints listed in paragraph 79):

a extraction of sand, rock, or other minerals;

b the harvesting of parts of marine mammals (eg whale bone);

c harvesting of plants, and animals on the foreshore that are not governed by the Fisheries Settlement (i.e., not including seaweed);

d temporary use of space for undertaking customary activities, apart from fishing eg waka launching;

e protection of access routes for fishing;

f erection of cultural amenities;

g navigation;

h protection of existing burial sites and undertaking new burials;

i protection of historical features and places;

j protection of spiritual values associated with the foreshore and seabed, including wähi tapu and the exercise of cultural and spiritual customs; and

k use of features or characteristics of the seabed and foreshore eg specific rocks or trees.

82 There are a number of statutes in place that regulate the activities listed above. They generally fall into two categories which:

a Primarily prohibit the conduct of the activity, either absolutely or with limited scope for exceptions; and

b Primarily regulate the conduct of an activity, particularly in relation to the effects of the activity on the environment and the rights of third parties.

83 In relation to the first kind of regime, I propose that rights that are prohibited would not be able to be authorised by the Māori Land Court. In such circumstances the Māori Land Court would notify the government. As happens now, the government might in some circumstances be able to authorise exceptions. When making that decision, the govenrment will need to consider whether any customary use declared by the Maori Land Court outweighs the policy interests protected by the regulatory regime on a case-by-case basis. This will require consideration of whether the existence of a customary right provides the basis for an exception to the prohibition on the exercise of the customary right.

84 In making such decisions on a case by case basis, the following factors could assist in balancing the different interests:

a The extent to which the customary right has previously been identified and asserted;

b The impact of the loss of the customary right on te ao me nga tikanga Maori (the integrity of customary practice and exercise of tikanga); and

c The impact on other interests as defined by the regulatory regime.

85 The following table sets out the primary pieces of relevant legislation, the potential restraint imposed on the exercise of the customary right and possible responses on a case-by-case basis:

| *Act* | *Current Restraint* | *Existing Customary Reference* | ***Possible Response*** |
|---|---|---|---|
| Trade in Endangered Species Act | Regulates export of endangered species and any product derived from them | Link with section 4 of the Conservation Act | No change |
| Marine Mammals Act | Potential limits on allowable levels of catch;<br>Permit required to take bone, teeth etc not naturally separated | Link with section 4 of the Conservation Act | Customary take possible if approved by Minister |
| Wildlife Act | May limit areas in which wild life may be taken (eg excluded from reserves), requirement for permit | | Customary take possible if approved by Minister |
| Marine Reserves Act | No take provision | Links with section 4 of the Conservation Act | Issue to be considered in context of decisions on Marine Reserves Bill |

86 Other Acts do not prohibit the specific activity but regulate the conduct of the activity and seek to mitigate the impact of that activity on the environment and the balance the interests of different right holders. This primarily relates to the Resource Management Act 1991 that uses conditions imposed on a resource consent to manage the impact of the activity on the environment and on the rights of others.

87 There are two options for moving forward on this issue. Both include a Resource Management Act consent permit being issued by the relevant local authority and either:

a *Option* 1: Require the local authority to decide whether the customary right should be exercised and how it should be exercised; or

b *Option* 2: Require the local authority to only decide on how the customary right could be exercised. This means that the Māori customary title would provide the legal authority for carrying out the activity. In this scenario, the customary right becomes a controlled activity and an application cannot be turned down.

88 The first option requires no change to the Resource Management Act. It means that if the activity is prohibited in a plan, then a coastal permit would not be granted. A discretionary activity may also be turned down if the activity did not achieve the objectives of the regional coastal plan. This approach is consistent with how privately owned land is currently regulated under the Resource Management Act and ensures that the sustainability principle in the Resource Management Act is not undermined. However, this approach could mean that any rights that had been recognised by the Maori Land Court could be suppressed by the actions of local government.

89 The second option, of regional councils placing necessary controls on the exercise of the right, means that the Maori Land Court finding is the allocation tool that allows the customary right holder the right to do the activity. In effect, this would mean that a regional coastal plan could not prohibit the conduct of a customary right. This approach is based on the customary right not having an adverse effect on the environment. At this stage, coastal permits are limited in time to 35 years or less. It is proposed that the relevant local authority could issue a permit for a longer or unlimited period of time if it was clear the environmental effects would always be managed sustainably.

90 While the principle of kaitiakitanga may ensure the sustainable exercise of a customary right, it does not guarantee this. It may be that customary right is prohibited or discretionary and may not be allowed under the Resource Management Act for sustainability reasons. Having the Resoure Management Act accommodate a Maori customary right regardless of potential environmental effects is a significant shift in the way the Resource Management Act operates. Furthermore, if a declaration by the Maori Land Court allowed customary right holders to do things that were prohibited to other people, it would create a new class of permit or right holders. The creation of a class of right holders is not new to the Customary Fishing Regulations under the Fisheries Act which allow customary fishing to be undertaken in ways that are not lawful under the provisions governing non-customary recreational fishing. It is, however, an issue that would be new to the Resource Management Act regime.

91 In summary, under Option 1 there is some potential for streamlining the application process for customary right holders. It would mean, however, that once a Maori Land Court had identified a customary right it would not automatically mean that the right could be protected as the relevant local authority could decline, on sustainability reasons, the exercise of a customary right.

92 Under Option 2 this would mean that:

a The finding of the Maori Land Court that a specific right exists provides the legal authority to conduct that activity;
b No further action to undertake the activity would be required under the Resource Management Act; and
c The Resource Management Act would regulate the conduct of the activity to ensure it was consistent, as far as possible, with the sustainable management of natural and physical resources.

93 It would mean that the conduct of the activity could potentially contravene the sustainable management principle of the Resource Management Act but would not be able to be turned down by the relevant local authority.

94 On balance, it is proposed that Option 2 be adopted. As a customary right, under the new regime, will not include a commercial or development aspect, it is considered that the impact on the sustainable management of our natural and physical environment will not be generally significant. It is also considered inappropriate for local government to have the authority to not allow for a customary right to be conducted as it is incompatible with the protection principle.

*Third party interests*

95 As a customary right under the new regime will not include a commercial or development aspect, it is not considered that there would generally be competition between customary rights and coastal permit holders.

96 However, if the activity associated with a customary right has been allocated to its fullest extent, it is proposed that the customary right holder's rights be suspended until such time that the relevant resource consent(s) expire. On expiry of the consent, the customary holder's rights would take precedence in any allocation of the activity by the local authority. This approach would not preclude the capacity of the government, current consent holders and the customary rights holder to enter into discussions to resolve the matter before the expiry date.

97 If there were a specific area that included an activity that needed to be carried out in the national interest, over which a specific customary right was identified, it is proposed that the government have the authority to "call-in" the relevant consents to determine the appropriate response.

98 In addition, the recognition of a customary right would also result in a level of protection of those rights similar to that accorded to customary fishing rights. That is, if a proposed activity (by someone other than the customary

rights holder) would have an undue adverse effect on the customary right, the proposed activity:

a could not be undertaken in that area without the consent of the customary rights holder; or
b would need to be modified so as not to unduly affect the customary right.

99 These approaches mentioned above would require amending the Resource Management Act. It is proposed that officials be directed to report back on the proposed amendments.

## ISSUE 4: EFFECT OF PROPOSED REFORMS ON MAORI CUSTOMARY RIGHTS

100 It is important that the reform is clear about its effect on common law rights, including possible customary rights that might be recognised at common law.

101 As previously outlined, at present there is an uncertain mix of statutory and common law rights that could be found to exist in the foreshore and seabed. These may well conflict with one another. The intention with this reform is to provide a clear and unified system for establishing rights, which works through the consequences of any new customary rights that might be established and how they mesh with other systems for allocating and regulating activity in the foreshore and seabed.

102 That goal of a clear and unified system can only be achieved by statutory reform. The proposed statutory reform is to create a system that completely replaces the two existing routes by which the courts can be asked to explore customary rights issues – the High Court common law jurisdiction and the current general Maori Land Court jurisdiction.

103 The intention with the proposed new court jurisdiction just outlined is to create a system that enables the Maori Land Court to examine all aspects of customary rights, as they would be likely to be examined and incorporated over time under the common law, and give effect to them. If the Court identifies rights that would have existed according to common law tests until this reform, it will have the ability to refer those to the government for consideration.

104 A necessary consequence of the reform is therefore to remove the general High Court jurisdiction to look at customary rights in the foreshore and seabed. In technical legal terms, this step can be characterised as an extinguishment of those rights. In practical terms, however, it is a theoretical extinguishment only, given that it is to be accompanied by the

establishment of a replacement system intended to enable exploration of the same issues in a more structured and developed way. The replacement system includes a mechanism for identifying if there are any rights that would have existed at common law that can no longer be effectively recognised.

105 The question then is what type of statement is necessary in the legislation to achieve these outcomes. Officials have considered a number of options.

a Remaining silent in the legislation on the effect of the reforms on common law customary rights is not considered feasible, in light of the Court of Appeal's comments on the need for explicit language to achieve extinguishment of potential common law rights.

b A statement to the effect that the reforms are premised on a determination that New Zealand law cannot recognise freehold or similar fee simple interests in land in the foreshore and seabed (a non-recognition approach) is also unlikely to be effective. It may be seen as insufficiently explicit to achieve extinguishment of potential common law rights, now that the New Zealand Court of Appeal has signalled an expectation that some rights of this nature might exist.

c Partial or minimal extinguishment of specific aspects of common law customary rights that may be found in the future, but are inconsistent with the proposed reforms. Given that what is proposed is a statutory codification of potential common law rights, it is in effect a full extinguishment and replacement of those rights. Attempting to translate some rights into the new system without technical extinguishment and to extinguish fully others that are not yet identified is considered too complex to be workable.

106 It is therefore considered necessary, in order to achieve a unified and clear system for recognising and protecting customary rights that is integrated with the rest of New Zealand's statute law, to remove the common law jurisdiction to develop these rights and replace it completely with the new statutory regime. Although that is in technical terms a complete extinguishment, it is a theoretical extinguishment only so long as the replacement system maps the scope of the common law jurisdiction reasonably precisely. So long as the test that is proposed for the new jurisdiction is drawn from common law jurisprudence, and the Court is empowered to draw the government's attention to any gaps that may emerge in particular cases, then it can be argued that no material or general issue of extinguishment arises. If the issue arises under these proposals, it will be able to be dealt with on a case by case basis, informed by the facts of the particular situation.

## ISSUE 5: IMPROVING EXISTING SYSTEMS FOR PROTECTING CUSTOMARY RIGHTS

107 The government recognises that there are a number of mechanisms currently in place that seek to protect Maori customary rights. These include:

a Resource Management Act provisions, specifically the provision that requires local authorities to take account of iwi management plans;

b Customary Fishing Regulation provisions that recognise and provide for tangata whenua participation in managing customary take of fish;

c Local Government Act provisions that give overall consideration to the way in which local authorities involve Māori in decision-making processes.

108 Throughout the consultation and further engagement phase, a lot of comment centred on the need to improve existing systems for protecting Maori customary rights. Improvements however cannot be undertaken by central government alone. Local government plays a significant decision making and administrative role across the coastal marine area and must be party to discussion in this area. Māori too have an important role because it is their customary rights that the government is seeking to protect. It is therefore proposed that the government sponsor the setting up of a joint central government/local government / Māori working group.

109 The purpose of the working group is to:

a examine how to strengthen Māori participation in local government decision making processes related to the coastal marine area. That examination is to include, but is not limited to:

i co-management regimes across the coastal marine area;

ii local government coastal policy and planning processes;

iii local government resource consent processes.

b examine ways to improve the Customary Fishing Regulations;

c in light of the above, consider what administrative and legislative changes might be desirable;

d scope initiatives to improve Māori capacity to participate effectively in local government processes and other relevant processes.

*Operationalising the Working Group*

110 Further detail to operationalise the working group is subject of a further paper, but it is intended that a secretariat be established in December/January and that members of the Working Group meet in late January/early February 2004. It is proposed that the Working Group report around September 2004 to ensure that their recommendations can be considered alongside the foreshore and seabed legislation.

111 A secretariat would be established in the Department of the Prime Minister and Cabinet and would have overall responsibility for:

a Advancing the terms of reference;

b Developing in conjunction with local government and Māori, working papers for consideration by the Working Group;

c Meeting with relevant groups and organisations to consider ways to improve existing systems.

d Keeping Ministers informed on progress.

112 The secretariat will require policy and technical support, with the potential for departmental secondments to assist with detailed discussions on specific proposals.

113 It is also envisaged that resources would be made available to ensure participation by Māori.

**Issue 4: Private Titles**

114 Since the 1850s government policy and legal provisions have restricted the granting of private title over foreshore and seabed. In 1991, most private titles held by public bodies were revested in the Crown. Work undertaken by Land Information New Zealand has confirmed that there are now relatively few private titles over foreshore and seabed. Nevertheless, there do continue to be a number of titles held by both public and private owners over foreshore and seabed, and the lands which are subject to those titles would be outside the general 'people of New Zealand' vesting and subsequent administration.

115 In relation to foreshore and seabed areas held by wholly private owners, Ministers are asked to endorse the following principles to guide further policy development:

a It is desirable to bring privately owned foreshore and seabed into the public domain; and

b It is a general presumption that title to property, or full enjoyment of its possession may not be compulsorily acquired without compensation, unless such an acquisition was clearly the intention of Parliament

116 In relation to titles still held by public bodies, Ministers are asked to endorse the following principles to guide further policy development:

a Lands owned by public bodies that were vested in them, by the Crown, for public purposes can be viewed differently from privately owned lands;

b It is desirable to revest or remove interests in land where possible. Given recent reforms and the government's objectives in this reform, lands should be incorporated into the "public domain" regime wherever possible. This would include revesting lands, or replacing allocations with occupation rights;

c It is desirable to protect the interests of affected parties. It is recognised that the change in ownership should not adversely affect any legitimate on-going interests that the public body has in the land, or result in them making a loss on past investments; and

d It is desirable to bring any interests under the general 'vesting in the people of New Zealand' regime. It considered desirable to avoid having those interests recognised through special legislative provisions, but rather to convert them into the types of interests that can be issued under the new regime (eg through issuing Resource Management Act occupation rights or their equivalent under the new law).

## OTHER ISSUES

### Confirmation of legislative priority

117 To give effect to any policy decisions by Cabinet on these proposals, a Bill will need to be drafted. If the Bill is to be introduced into the House in early March 2004, careful prioritisation of Parliamentary Counsel Office drafting and House time will be required. As such, this paper seeks confirmation that a Bill to give effect to Cabinet policy decisions on foreshore and seabed has the necessary legislative priority (in terms of Parliamentary Counsel Office drafting and House time) to enable it to be introduced in March 2004.

### Adhoc Ministerial Group

118 It is possible that, in order for a Bill to be available for introduction in March 2004, some further detailed decisions may be required in the interim to facilitate legislative drafting. It is therefore proposed that an adhoc Ministerial group be established and authorised to make further detailed decisions where necessary. It is proposed that the adhoc group comprise

the Prime Minister, Deputy Prime Minister (lead), Attorney General and the Minister of Maori Affairs.

**Release of submissions and submissions analysis**

119 It is proposed that the submissions received be made generally available subject to an assessment of any material that may need to be withheld under the Official Information Act. It is also proposed that the analysis of submissions be made generally available. Such an approach has been taken in other legislative reviews.

**Release of government policy decisions to the Waitangi Tribunal**

120 The government has committed to advising the Tribunal of its decisions on foreshore and seabed policy around mid-December 2003. Subject to Cabinet taking decisions on this set of papers, it is proposed that the Deputy Prime Minister releases a public statement (including to the Waitangi Tribunal) that outlines the nature of the government's decisions on foreshore and seabed policy as soon as reasonably practicable. It is also proposed that the Cabinet papers outlining the government's policy on foreshore and seabed be made publicly available, subject to an assessment of any material that may need to be withheld under the Official Information Act.

**Implications of foreshore policy on other policy issues**

121 There are a number of other policy issues that have been put on hold awaiting final policy decisions on foreshore and seabed policy, namely the Oceans policy, and Marine Reserves Bill.

122 It is proposed that the Oceans policy consultation should be delayed until after foreshore and seabed issues are more clearly resolved.

123 The Marine Reserves Bill, presently being considered by the Land and Environment Select Committee, includes provisions for the recognition and consideration of Maori customary rights and interests in making decisions on marine reserves and the participation of affected iwi and hapu in the management of reserves. Once decisions have been made about the policy direction to be followed for the foreshore and seabed, the relevant provisions in the Marine Reserves Bill should be considered as to whether they are appropriately aligned with the decisions taken over foreshore and seabed. If not, recommendations should be made for amendments. It is recommended that the Minister for Conservation report back within two working months of Cabinet decisions on foreshore and seabed on proposed changes, if any, to the Marine Reserve Bill.

## Consultation

124 The following departments have been consulted on earlier drafts of this paper: Department of the Prime Minister and Cabinet, Te Puni Kokiri, Ministry of Justice, Department of Conservation, Ministry of Fisheries, Ministry for the Environment, The Treasury and the Crown Law Office.

## Financial Implications

125 Financial implications will be addressed in a later paper.

## Human Rights

126 Some of the proposals may raise issues in terms of the Human Rights Act 1990 or Bill of Rights Act 1993. Where there are specific issues, these will be identified in the individual papers. Relevant officials will continue to work with the Ministry of Justice, and/or the Crown Law Office in this regard. A final view as to whether the proposals comply with the Human Rights Act or Bill of Rights Act will be possible once the Bill has been drafted.

## Legislative Implications

127 Legislation is required to implement these proposals. This paper seeks confirmation that a Bill to give effect to Cabinet policy decisions on foreshore and seabed has the necessary legislative priority (in terms of Parliamentary Counsel Office drafting and House time) to enable it to be introduced in early March 2004. On that basis, it is proposed that a single bill be drafted with a range of schedules that consequentially amend other legislation as necessary.

## Regulatory Impact and Compliance Cost Statement

128 A regulatory impact and compliance cost statement will be provided as part of the later papers.

## Gender Implications

129 There are no gender implications.

## Treaty Implications

130 The proposals in this paper are designed to provide an effective mechanism for the protection of the customary rights of Maori in the foreshore and seabed which integrates those rights with the more general regulatory framework for managing this important national resource.

131 The Waitangi Tribunal has scheduled a hearing for January 2004 to consider whether the policy proposals are consistent with the principles of the Treaty of Waitangi. The Tribunal's findings will be able to be considered by the government as it finalises the legislation and by the Select Committee that then considers the Bill.

**Publicity**

132 It is proposed that the Deputy Prime Minister publicly releases the Crown's statement to the Waitangi Tribunal outlining the government's final foreshore and seabed policy decisions as soon as reasonably practicable.

**Recommendations**

133 It is recommended that the Cabinet Business Committee:

a **note** the draft overview of the foreshore and seabed policy;

b **invite** the Deputy Prime Minister to report to the Cabinet Policy Committee on 3 December 2003 with an overview of the foreshore and seabed policy;

c **invite the Deputy Prime Minister to report further on the views of Māori to the proposal to recognise ancestral connection between Māori and the areas of the foreshore and seabed as the mechanism for recognising customary title or mana whenua.**

Hon Dr Michael Cullen
Deputy Prime Minister

Appendix A

## PUBLIC CONSULTATION : KEY MESSAGES FROM THE WRITTEN SUBMISSIONS

1. This Appendix provides an overview of the key messages received from the written submissions on the four principles contained in the government proposals for consultation.

### Process

2. Some respondents considered that the policy development process and consultation period (18 August to 3 October) were inappropriate in method and insufficient in scale. Several Maori groups requested that the closing date for submissions be extended, and that the government should engage in more timely discussion with iwi, hapu and whanau. Some individuals and organisations also considered the consultation process to be inadequate.

### The four principles

3. Around half of the respondents agreed that the four principles were a good starting point. However, approximately one in five respondents rejected the four principles, as they were either concerned that the government proposals:

   - unduly limited, or effectively extinguished, Maori customary rights related to the foreshore and seabed; and
   - unduly infringed on the property rights of those holding existing title (private or customary) to the foreshore and seabed.

4. Nearly all hui participants rejected the principles and related proposals outright.

### Principle of Access

5. There was general widespread support for ensuring open access and use to most of the foreshore and seabed. There was also a great deal of comment around how this should be given effect. Most respondents accepted that there are occasions, where there is a threat to health and safety, environmental concerns, or sites of cultural or heritage significance (Maori and non-Maori), that access may be reasonably restricted.

6. The concept of public domain was seen by some respondents as ill-defined and unfamiliar. Many respondents preferred the more secure

and familiar status of Crown ownership. Some saw the public domain concept as unifying the nation. Others saw it as offering greater protection from the foreshore and seabed being 'sold off' by a future government, than Crown ownership.

7. Many respondents were strongly opposed to the government's proposal to legislate a right of access across all foreshore and seabed. Most saw this as an infringement of existing property rights, and many doubted that it would be of any value except in a small number of locations. The options of negotiating improved access, where required, were preferred by most respondents.

8. A small number of respondents thought that legislating a right of access, or indeed expropriating privately owned foreshore and seabed was appropriate. Some argued this on the grounds of equity with the treatment of Maori property rights and customary interests proposed in the consultation paper. While a small number argued that compensation was inappropriate, others argued strongly that any loss should be compensated fully.

**Principle of Regulation**

9. Most respondents supported the principle of regulation. A few said that no alternative proposition was acceptable.

10. Most Maori however, were extremely unhappy with sole regulation by the Crown. Many respondents, Maori and non-Maori, advocated regulatory partnership between Maori and central and local government, and made various suggestions for achieving this.

11. The performance of local authorities in carrying out responsibilities under particular legislation was often criticised. Some suggested that clearer guidance, better tools, improved resourcing, and stronger incentives would address some of these issues, and remove the need for introducing new measures that might in fact exacerbate existing problems rather than resolve them.

**Principle of Protection**

12. The principle of protection was the most contentious issue among respondents. On one level there was widespread agreement among both Māori and non-Māori that Māori customary rights should be respected, although there were different ideas around what this would entail. Many believed though, that existing measures already provide for a reasonable level of protection, although some noted they were not always effectively implemented.

13. Many non-Māori respondents felt that at this time in our history, it was inappropriate to provide privileges based on race, and saw this as having the potential to lead to a very divided society. They argued for 'one law for all'.

14. Others felt that, after 160 years of colonisation, some non-Māori New Zealanders may also have established customary rights equivalent in status to those claimed by Māori. They argued to have their customary rights recognised through a common process, and subject to the same criteria as Māori claims.

15. Some respondents felt that the principle of protection was unnecessary. They considered that there are already adequate provisions in law, regulation and practice for the protection of Māori customary rights although many acknowledged that they were not always well implemented.

16. The validity of attempting to reflect tikanga Māori in concrete was questioned, given the enormous cultural and linguistic barriers to common understanding, and wide disparities in the philosophical underpinnings of each system. Many Māori respondents feared that the principle of protection and related proposals would be used to limit the scope of Māori customary rights, if not extinguish them altogether.

17. A small number of respondents felt that the principle as it stands could mean anything and declined to comment on it without clarification of how it would apply in practice.

**Principle of Certainty**

18. There was widespread agreement that certainty is desirable, though few saw the government's proposals as providing any greater certainty than at present and many saw them as giving rise to uncertainty.

19. The general public is hopeful that the government's proposals would safeguard their access to the foreshore and seabed for the future, but many feel that in the process a serious grievance will be created that will result in ongoing litigation and a serious deterioration in race relations.

20. Māori felt that the principles and related proposals offered them no certainty. They saw the proposals set out in the consultation paper as removing their existing customary title to the foreshore and seabed, and diminishing their mana and rangatiratanga. Many Maori respondents considered that at present non-Māori are defining and circumscribing Maori customary rights in non-Māori terms, and as yet there is little indication what real protection, if any, might be offered.

21. Private property owners are threatened by the prospect that their right to control access across their coastal property will be eroded to provide the public with unrestricted access to the foreshore and seabed, compromising their business operations, security and privacy as a result. Others face the prospect of having privately owned foreshore and seabed expropriated, without necessarily receiving any compensation.

22. Business investors are concerned that recognition of customary rights may compromise the viability of many operations. The potential for there to be additional hurdles to overcome in the consent process, occupancy fees, enforced partnership with Māori, enforced profit-sharing with Māori, a breakdown in race relations that undermines cooperation, are among the factors seen as serious threats to future business viability by some respondents. In addition, the prospect that they may not be able to exclude the public from areas of their operation or to hold fee simple title to the foreshore and seabed on which they operate, were not scenarios respondents felt would provide them with the security they need to invest. This was especially so among respondent representing companies involved in national infrastructure such as power generation, which operate over a long time-frame.

23. Local government was concerned that new measures may further complicate the systems within which they operate. Local government interests urged the government to be specific in any new measures to be introduced so that their proper implementation would be facilitated, and expectations of process and outcomes would be shared by all. They were also concerned that the proposals will result in a deterioration of relations between them and disenfranchised Māori, thereby making their work more difficult.

24. Certainty was seen by many as resting as much on process as on legislation. Many respondents advocated a more considered approach to resolving the foreshore and seabed issues, which would feature a longer consultation process, and greater participation in the development of proposals that would be practical, acceptable and enduring.

25. The government's undertakings to ensure that any future changes do not put people in jeopardy for decisions made now or in the past, that were deemed to be legal at the time they were made, was valued – especially by businesses and administrators.

**Way Forward**

26. Respondents were unanimous that the foreshore and seabed should be widely accessible. All interest groups indicated a desire to respect others and be respected in turn, and that they wished to have a say in

determining the future of this issue. Many constructive suggestions were offered on a proposed way forward by respondents. Optimism was expressed for being able to achieve a satisfactory resolution of the issues raised, although this may take longer than originally envisaged in the then proposed government timetable.