OFFICE OF THE DEPUTY PRIME MINISTER

CABINET POLICY COMMITTEE

PAPER 1: FORESHORE AND SEABED: OVERVIEW – STATUS OF THE FORESHORE AND SEABED

EXECUTIVE SUMMARY

1 This paper is the first of two that seeks 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 a new system that recognises three different interests/rights (communal, Maori and private) in the coastal marine area; and

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

2 The accompanying paper outlines:

a That specific customary rights, as determined by the Maori Land Court, can be annotated to the customary title;

b the effect of the new system on protecting Maori customary rights; and

c the establishment of a joint working group to improve existing systems that protect Maori customary rights.

3 Following the extensive consultation process, it is proposed that the principles of Access, Regulation, Protection and Certainty should continue to guide the government's approach to the foreshore and seabed. To address the range of interests in the foreshore and seabed, it is recognised that each principle has to be considered together.

4 This paper proposes that the status of the foreshore and seabed be reformed and that a new system be developed that:

a repeals provisions which vest the foreshore and seabed in the Crown and replaces them with provisions vesting the full beneficial ownership of the land in the people of New Zealand;

b enables an inquiry process to award a customary title, which recognises mana whenua, to a relevant Maori grouping which overlays the people of New Zealand title and makes it clear that the new customary title would not alter reasonable and appropriate public access over that area;

c establishes that the people of New Zealand title would apply across all foreshore and seabed areas except those in private Land Transfer Act titles;

d develops ways to address access over areas of private Land Transfer titles in the foreshore and seabed.

5 This paper also proposes that a statutory Commission be set-up to inquire into and determine who should hold a customary title and that it refers its recommendations to the Maori Land Court for approval.

6 Subject to decisions contained in this paper and its companion, a suite of companion papers will be submitted to the Cabinet Policy Committee in mid December.

BACKGROUND

7 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.

8 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.

9 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.

10 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.

11 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.

12 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

13 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.

14 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.

15 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

16 As at 2 December, 2165 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.

17 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.

18 An overview of the key messages received from this process is set out in Appendix A. The penultimate draft of the analysis of submissions is attached as Appendix B.

Further dialogue / engagement process

19 During November and early December 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

20 The consultation and further engagement process demonstrate that the four Principles of Access, Regulation, Protection and Certainty have merit, but that how they are implemented requires careful consideration and a balancing of a range of interests. It is therefore proposed that the four principles 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.

21 On that basis, two papers have been prepared which provide an overview of the policy and legal approaches to the status of the foreshore and seabed, and recognition of customary rights.

22 This paper considers that it is appropriate to change the current statutory and common law systems that provide rights and interests in the foreshore and seabed and proposes a new system be established.

23 An accompanying paper deals with the following three key strategic policy issues:

a The effect of a 'customary title' and whether it should recognise and protect specific Maori customary rights;
b The effect of the new regime on protecting Maori customary rights;
c Improving existing systems that protect Maori customary rights.

24 The issues in both papers are considered against the backdrop of some legal and factual 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.

25 This paper therefore sets out a new approach for dealing with these complex issues in the New Zealand context.

SYSTEMS ABOUT THE 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, geothermal energy and fish without a vesting of the resource itself.

29 In recent years, however, it had been assumed that ownership of 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 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 government 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 ownership 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 High Court that there are customary rights in the foreshore and seabed that have not been extinguished in the past.

37 The legal route for asserting such rights could be an application to the High Court to seek a declaration of a particular right, and in particular 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.

38 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

39 The Court of Appeal's decision that the Maori Land Court has the jurisdiction to determine whether foreshore and seabed land is Maori customary land has created the possibility that Te Ture Whenua Māori Act might provide an additional route for the creation of private (including collective) ownership 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.

40 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.

41 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.

42 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 generally be communal space, with open access and use for all New Zealanders (subject to reasonable and appropriate restrictions);
b Court processes for considering claims of customary rights must not be able to result in the creation of any exclusive rights (subject to reasonable and appropriate circumstances) including freehold ownership in the foreshore and seabed; 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

43 There is a range of ways for clarifying the status of the foreshore and seabed. It is proposed that the current system is changed and replaced with a new system that balances the different interests and rights that exist in the foreshore and seabed.

44 It is also proposed that the new system would provide for three types of interests to be recognised and protected in the foreshore and seabed: communal interests, Maori interests and private interests.

Recognising communal interests/rights

45 Two options were considered the most appropriate for legally defining the foreshore and seabed as public domain that was 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.

46 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 hold all management and landowner responsibilities on behalf of all New Zealanders.

47 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.

48 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. This means that the new system would repeal the current provisions that vest the foreshore and seabed in the Crown.

49 This new type of communal title would confer ownership and property in the foreshore and seabed (including airspace, waterspace and subsoil etc) in the people of New Zealand. The new law would also make it clear that all New Zealanders have the right to reasonable and appropriate access to the foreshore and seabed. 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.

50 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.

Recognising Maori interests / rights

Customary title to recognise mana whenua

51 Maori have the ability to seek recognition and protection of their interests / rights in the foreshore and seabed through the Maori Land Court and the High Court. As outlined in paragraph 40, the new system will replace all previous common law and statutory systems for recognising rights, including customary rights in the foreshore and seabed.

52 To recognise the interests / rights that Maori have in the foreshore and seabed, it is proposed that subsequent to an inquiry process a 'customary title' be awarded to an appropriate Maori grouping (using a tikanga Maori test). This title would recognise mana whenua of the relevant Maori grouping to particular areas of the foreshore and seabed. The customary title would sit alongside the 'people of New Zealand title' to the foreshore and seabed. The customary title would not affect the right of all New Zealanders to reasonable and appropriate access to the foreshore and seabed.

53 It is proposed that the new system would need to be clear that this type of 'customary title' was a ***new*** form of title would provide an enhanced opportunity for the customary title holder to participate in decision making processes concerning the foreshore and seabed. The new title would also not amount to an interest in land, not carry the same connotations as an aboriginal or native title in common law and not carry the connotations of tenure.

54 It is also proposed that the any customary rights, as determined by the Maori Land Court, could be annotated to the customary title. This issue, the effect of a customary title, the scope of the customary rights to be protected and the effect of the new system on protecting Maori customary rights are explored further in the accompanying paper.

The holder of a customary title

55 A key issue for consideration is whether the holder of a customary title, which will recognise mana whenua, 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 whenua with an area.

56 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 On balance, it is proposed that the holder of a customary title be recognised at both the hapu and iwi levels. Whether the body holding the customary title was a governance entity, a Maori Trust Board or some other mandated body would be the subject of discussion. It is proposed that officials report back to Cabinet on what type of entity should be able to hold a customary title.

Inquiry process that recognises the holder of a customary title

58 There are two options that could be implemented to expedite the awarding of a customary title including:

a Option 1: Establishing a new and separate division of the Maori Land Court to investigate mana whenua

b Option 2: Establishing a statutory commission that proceeded systematically around the country and inquired into and determined who holds mana whenua, which would then be subsequently confirmed by the Maori Land Court.

59 Under Option 1, amendments could be made to Te Ture Whenua Maori Act to provide the Maori Land Court with a set of tools to investigate and determine who holds mana whenua in the coastal marine area.

Advantages	*Disadvantages*
▪ Legislation governing the inquiry includes the specific provisions for the direction of the inquiries ▪ Process and findings will be seen to be independent from the government and credible ▪ Is experienced in tikanga Maori issues and mediating mandate issues	▪ Expensive to set up and run (eg likely require another Maori Land Court judge to be appointed) ▪ Costly for those wanting to participate in the Court process ▪ Can be subject to the appeals structure ▪ Lengthy inquiries could hold up implementation of new policy initiatives ▪ Legislation would set up an ongoing authority for the Court to look into this issue

60 Under Option 2, the form, powers and functions of the statutory commission to investigate and determine who holds mana whenua would need to be set out clearly in legislation.

Advantages	*Disadvantages*
▪ Membership will have an in-depth understanding of the issues ▪ Process and findings will be seen to be independent from the government and credible ▪ Consult widely and produce robust findings ▪ Could insert a sunset provisions into the governing legislation that enables the commission to complete its work in a timely fashion	▪ Limited to inquiring into issues that fall under their governing legislation

61 As indicated, each approach has its own advantages and disadvantages. However, it is proposed that a separate statutory Commission be established to inquire into which relevant Maori grouping holds mana whenua and therefore who should hold a customary title in the foreshore and seabed. It is proposed also that officials be directed to report to Cabinet on the form, function and powers of the statutory Commission.

62 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 whenua, there is some scope to apply those frameworks as a starting point.

Recognising current private title interests / rights

63 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 recently confirmed that there are now relatively few private titles over foreshore and seabed. It is therefore proposed that the new system recognise current private interests by ensuring that general 'people of New Zealand' vesting and subsequent administration do not apply.

64 It has been a general and long-standing policy of successive governments that the foreshore and seabed should not be in private hands. It is considered desirable to continue with this policy.

65 Therefore, in relation to foreshore and seabed areas held by wholly private owners, it is proposed that the following principles guide further policy development:

a It is desirable to bring privately owned foreshore and seabed into the public domain on a case-by-case basis, over time; 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

66 In relation to titles still held by public bodies, it is proposed that the following principles 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 is 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

67 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

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

69 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.

70 A copy of the penultimate draft of the analysis of submissions is attached as Appendix B. It is proposed that the analysis of submissions be made generally available, subject to final style and tone editing changes.

71 The costs associated with the public release of the submissions and submissions analysis will be canvassed in a later paper to Cabinet.

Release of government policy decisions to the Waitangi Tribunal

72 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

73 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, Marine Reserves Bill and general government policy and planning processes relating to the foreshore and seabed.

Oceans policy

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

Marine Reserves Bill

75 The Marine Reserves Bill, presently being considered by the Local Government 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.

76 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 proposed 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 Reserves Bill.

General government foreshore and seabed policy and planning processes

77 There are a number of general government foreshore and seabed policy and planning processes that have not progressed due to work on the new system outlined in this paper and its companion. In particular issues concerning the vesting of reclamations of foreshore and seabed and the approval of restricted coastal activities. It is proposed, that the Minister of Conservation and the Minister for the Environment report back within two working months of Cabinet decisions on foreshore and seabed on an appropriate process to follow.

Consultation

78 The following departments have been informed of this paper: Te Puni Kokiri, Ministry of Justice, Department of Conservation, Ministry of Fisheries, Ministry for the Environment, The Treasury, Department of Internal Affairs, Ministry of Economic Development and the Crown Law Office. The Department of the Prime Minister and Cabinet was consulted.

Financial Implications

79 Financial implications will be addressed in a later paper to be submitted in mid December.

Human Rights

80 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

81 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

82 A regulatory impact and compliance cost statement will be provided in a paper to be submitted in mid December.

Gender Implications

83 There are no gender implications.

Treaty Implications

84 The proposals in this paper and the accompanying one 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.

85 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

86 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

87 It is recommended that the Cabinet Policy Committee:

Public Consultation, Submission Analysis & Engagement with interested groups

1 **note** that the government has engaged in an extensive consultation process on protecting public access and customary rights that involved:

1.1 the distribution of 15,000 copies of the government proposals for consultation and 23, 000 pamphlets;

1.2 over 60 meetings with a variety of groups including a number of hui with Maori, and meetings with interest/sector groups and the public which were organised by government Members of Parliament;

2 **note** that, as at 2 December 2003, 2165 submissions were received on the government proposals for consultation;

3 **note** the overview of the key messages received from the submissions process is set out in Appendix A;

4 **note** that relevant Ministers and senior officials, led by the Department of Prime Minister and Cabinet, entered into further engagement and dialogue with Maori and other sector/interest groups during November and early December 2003;

Foreshore and Seabed: Overarching Principles

5 **agree** that the four principles of Access, Regulation, Protection and Certainty as agreed to by Cabinet in August 2003 [CAB Min (03) 27/24 refers] should continue to guide the government's approach to the foreshore and seabed;

Foreshore and Seabed: Status of Foreshore and Seabed land

6 **note** that the situation in law now is that there are several different common law and statutory systems for creating or recognising rights and interests in the foreshore and seabed;

7 **note** that it is unclear how the various rights outlined in recommendation 6, can be reconciled with one another;

8 **note** that in international law terms, the Crown has territorial jurisdiction over the entire territory of New Zealand;

9 **note** that the general government policy for many years has been not to create freehold title in the foreshore and seabed;

10 **agree** that the following three objectives should form the basis of the government's proposed policy approach to clarifying the status of the foreshore and seabed:

10.1 the foreshore and seabed should generally be communal space, with open access and use for all New Zealanders (subject to reasonable and appropriate restrictions);

10.2 Court processes for considering claims of customary rights must not be able to result in the creation of any exclusive rights (subject to reasonable and appropriate circumstances) including freehold ownership in the foreshore and seabed; and

10.3 there must be the capacity for customary rights to be recognised over the foreshore and seabed in an appropriate and contemporary way.

11 **agree** that the new system for recognising rights in the foreshore and seabed:

11.1 is to be comprehensive;

11.2 replaces all previous common law and statutory systems for recognising rights, including customary rights;

11.3 provides for three different types of interests/rights to be recognised and protected including communal, Maori and private interests/rights;

11.4 recognises that all New Zealanders have the right to reasonable and appropriate access across the foreshore and seabed

Recognising communal interests/rights

12 **agree** that the foreshore and seabed land be vested in the people of New Zealand;

13 **agree** that the new form of communal title vesting the foreshore and seabed in the people of New Zealand would:

13.1 confer ownership and property in the foreshore and seabed (including airspace, waterspace and subsoil)

13.2 clarify that it is the responsibility of government to ensure that the foreshore and seabed were sustainably managed in the best interests of all New Zealanders;

13.3 apply across all foreshore and seabed areas except those in private Land Transfer Act titles;

13.4 provide all New Zealanders with appropriate and reasonable access across the foreshore and seabed;

14 **direct** officials from the Department of Conservation, Ministry for the Environment and others as necessary to report back to Cabinet by the end of January 2004 on:

14.1 the powers and responsibilities of government in relation to the foreshore and seabed;

14.2 what further legislative amendments may be required to give effect to the new foreshore and seabed communal title;

Recognising Maori interests / rights

15 **agree** to recognise Maori interests / rights in the new system, subsequent to an inquiry process, by awarding a customary title to an appropriate Maori grouping that holds mana whenua in particular areas of the foreshore and seabed;

16 **agree** that the new form of customary title would:

16.1 recognise that the customary title holder has an enhanced opportunity to participate in decision making processes relating to the foreshore and seabed;

16.2 sit alongside the communal title to the foreshore and seabed;

16.3 not affect the rights of all New Zealanders to access the foreshore and seabed;

16.4 not amount to an interest in land;

16.5 not carry the same connotations of tenure or aboriginal or native title in common law;

17 **note** that any customary rights, as determined by the Maori Land Court, could be annotated to the customary title;

18 **note** that the issue referred to in recommendation 17, the effect of a customary title, the scope of the customary rights to be protected and the effect of the new system on protecting Maori customary rights are explored further in the accompanying Cabinet paper;

19 **note** that the holder of a customary title could be recognised at EITHER:

19.1 whanau, hapu or iwi levels;

19.2 hapu or iwi levels;

19.3 iwi level only;

20 **agree** that the holder of a customary title could be either at hapu or iwi;

21 **direct** Te Puni Kokiri and other officials to report back to Cabinet on which type of entity could hold a customary title by early February 2004;

22 **agree** to establish a statutory commission to investigate and determine who holds mana whenua to the foreshore and seabed which would subsequently be confirmed by the Maori Land Court;

23 **direct** officials to report back to Cabinet by early February 2004 on the form, function and powers of the statutory commission;

Recognising private interests

24 **note** that the new communal title will not apply across foreshore and seabed currently held in private Land Transfer Act titles;

25 **agree** that the general policy for foreshore and seabed should continue to be that it can not be held in private hands;

26 **agree**, in relation to foreshore and seabed areas held by wholly private owners, that the following principles guide further policy development:

26.1 It is desirable to bring privately owned foreshore and seabed into the public domain on a case-by-case basis over time; and

26.2 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

27 **agree**, in relation to private titles still held by public bodies, that the following principles guide further policy development:

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

27.2 It is desirable to revest or remove interests in land where possible and that this would include revesting lands, or replacing allocations with occupation rights;

27.3 It is desirable to protect the interests of affected parties as 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

27.4 It is desirable to bring any interests under the general 'vesting in the people of New Zealand' regime by converting them into the types of interests that can be issued under the new regime;

Foreshore and Seabed: Other issues

Legislation

28 **note** that to give effect to any policy decisions on foreshore and seabed that a Bill will need to be drafted;

29 **agree** that the Foreshore and Seabed Bill has drafting and House priority to enable its introduction to Parliament in March 2004;

Ad Hoc Ministerial Group

30 **agree** to establish an ad hoc Ministerial group comprising the Prime Minister, Deputy Prime Minister, Attorney General and the Minister of Maori Affairs;

31 **authorise** the adhoc Ministerial group to make further detailed legislative decisions on foreshore and seabed policy, if necessary;

Release of submissions, submissions analysis and Cabinet papers

32 **agree** that the submissions received on the government proposals for consultation be made generally available subject to an assessment of any material that may need to be withheld under the Official Information Act;

33 **note** that a copy of the penultimate draft of the analysis of submissions is attached at Appendix B;

34 **note** that the penultimate draft of submissions will be the subject of final editing changes;

35 **agree** that, once finalised, the analysis of submissions be made generally available;

36 **agree** 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;

37 **note** the costs associated with the public release of the submissions and submissions analysis will be canvassed in a later paper to Cabinet;

Publicity

38 **agree** to the Deputy Prime Minister releasing a public statement that outlines the nature of the government's decisions on the foreshore and seabed as soon as reasonably practicable;

Impact on other policy issues

39 **agree** that the Oceans policy consultation be delayed until after foreshore and seabed issues are more clearly resolved;

40 **invite** the Minister of Conservation to report back to Cabinet within two months Cabinet decisions on foreshore and seabed policy on proposed changes, if any, to the Marine Reserves Bill;

41 **invite** the Minister of Conservation and the Minister for the Environment to report back to Cabinet within two months Cabinet decisions on foreshore and seabed policy on an appropriate process to follow relating to current government foreshore and seabed policy and planning processes.

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.