OFFICE OF THE DEPUTY PRIME MINISTER

CHAIR
CABINET POLICY COMMITTEE

FORESHORE AND SEABED (PAPER 2): PROTECTION OF CUSTOMARY RIGHTS

Proposal

1 This paper outlines options for the recognition and protection of customary rights in the foreshore and seabed.

Executive Summary

2 Paper one outlined proposals that would reform the basic status of the foreshore and seabed so that it was vested in the people of New Zealand, as a shared resource of national significance. The ancestral associations of iwi and hapu with the foreshore and seabed would be investigated and documented in the form of new customary titles, that would overlay the general public areas. The few remaining areas of foreshore and seabed currently covered by private titles under the Land Transfer Act would be reviewed on a case by case basis over time. These elements of the proposal are the same in all three options.

3 This paper outlines proposals for the effect of a customary title, as well as the means for recognition of customary rights that protect particular areas or activities. The proposals are similar to those put forward in the consultation paper published in August, but now also include the establishment of a joint working group to examine ways of enhancing participation by the holders of customary titles.

4 In summary the proposals are:

- Ancestral association would be documented in a new customary title, by the application of a test of tikanga. A statutory Commission would undertake the initial investigation of the boundaries of customary titles, and would refer its conclusions to the Maori Land Court for formal customary titles to be issued.

- A customary title would make clear who is mana whenua, and is therefore entitled to participate in decision making processes under the Resource Management Act and other legislation.

- A working group would be established to examine how to enhance participation opportunities and practice, including possible amendments to the current legislative framework.

- The Maori Land Court would also be given a new jurisdiction to investigate and record specific customary rights. The Court would apply a test based on tikanga, that also incorporated the common law tests developed elsewhere that essentially require continuous use to be demonstrated. These rights would be recorded on the relevant customary title. Any customary rights recognised through the customary fishing regulations would also be recorded on the title. Once recorded, these rights would be treated as property rights in the rest of the legal system.

- Any customary rights that had existed up until this reform, but were no longer able to be recognised, would be identified during the Maori Land Court process. The Court would refer these rights to the government for direct discussion on a case by case basis with the former rights holder.

- The High Court jurisdiction to look at customary rights issues in the foreshore and seabed would be removed, and the Maori Land Court jurisdiction would be replaced with the new jurisdiction set out above.

Background

5 The general background to the foreshore and seabed issue has been set out in paper 1.

6 The current legal situation in relation to customary rights over the foreshore and seabed is that the Court of Appeal has confirmed that it is legally possible for such rights to exist. Whether such rights do exist, and the nature of them, is unknown at present. The issues are able to be explored by the High Court, through its general common law jurisdiction. The Court of Appeal has confirmed that they could also provide a foundation for a claim that foreshore and seabed land is customary land, in terms of Te Ture Whenua Maori Act.

7 The status quo is therefore that rights to use foreshore and seabed areas are in general allocated by regional councils under the Resource Management Act. It is possible, however, that there may be foreshore and seabed areas subject to existing private rights (Maori customary rights). In these areas, the holder of those rights would have the right to control use of those spaces (within the terms of the relevant coastal plan). The regional council would be limited to managing the effect of activity in those spaces.

8 Without further action, the process for working out which areas are controlled by Maori and which are not is likely to be long and slow. Until it is completed, it is a very uncertain environment for all of those attempting to

undertake activity and/or make statutory decisions in the coastal marine area. Moreover, any private rights of Maori recognised under Te Ture Whenua Maori Act would result in the creation of a fee simple title under the Land Transfer Act. This gives the capacity to control access to the area and, potentially, to alienate the land. Giving these powers to private parties in the coastal marine area has been regarded as undesirable from a general policy perspective for many years.

Discussion of the proposed option

9 The main difference from the published proposal is the suggestion to establish a joint working group comprising representatives from the Crown, local government and Maori to examine how to improve Maori participation in decision making processes.

10 The customary title would make clear that the holders of that title were mana whenua, and entitled to participate in the decision making processes systems under the Resource Management Act and other statutes. The working group would examine how to make those existing systems work better in practice, as well as possible amendments to those systems to enhance opportunities for participation. Examples of possible enhancements might include:

- notification arrangements to support current consultation requirements,
- an enhanced formal advisory role for mana whenua in the development of coastal plans, or
- an increased ability to devolve authority to iwi to regulate issues or activities governed largely by tikanga (such as customary uses or take).

11 The main benefits of this proposal are that:

- Documenting mana whenua, through the customary titles, would provide local authorities and other groups with greater certainty about who they are required to work with on resource management issues.
- The system of documenting specific customary rights would produce clear rights over time, by effectively codifying all remaining customary rights in the foreshore and seabed.

12 There are also some risks with this proposal.

- The development of a new category of private rights in the foreshore and seabed (in the form of the specific customary rights documented by the Court) will require significant readjustment of the Resource Management Act. That Act was designed on the assumption that there

were few if any private rights that needed to be accommodated as decisions were made on the allocation and regulation of coastal space.

- At present there is very little certainty about what types of rights might eventually be protected by this system, or how wide-ranging those rights might be around the coastline.

- If the rights prove to be extensive, and are protected as property rights, the effect will be to give the holders of those rights significant leverage whenever there is an application for a conflicting use of those areas.

- If the rights prove to be limited in their content and spread, there is a risk that an extremely complex system will have been developed and resourced, but is little used.

- A key part of the proposals is the capacity for the Court to identify any rights that existed until this reform but are no longer able to be given legal recognition, and to refer those situations to the government. As the nature and extent of customary rights is unknown at present, there is a risk that this process could result in a significant series of ongoing discussions about redress and/or special acknowledgements. In particular, it is possible that the Court would identify commercial rights, whether based on the nature of a former interest in an area of coastal space or on development aspect of customary uses, as having existed up until this reform.

13 In summary, this proposal protects customary rights through two routes. It provides for clear documentation and ongoing protection of a limited range of property rights to undertake particular activities. It aims to make more effective the existing systems for recognising ancestral association in decision making processes, by establishing a joint working group to explore practical and legislative change. It also acknowledges the possibility that there may be other customary rights not recognised by either of these routes. If such rights are identified, their non-recognition will be the subject of further discussions between the government and the former rights holder.

Improving existing systems that protect Maori customary rights

1 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, including the provision that requires local authorities to take account of iwi management plans;

b Provisions in the customary fishing regulations and the Fisheries Act that recognise and provide for tangata whenua authority to manage customary harvesting of fish and all other forms of aquatic life;

c Local Government Act provisions that set overall requirements for the way in which local authorities involve Māori in decision-making processes.

2 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.

3 The purpose of the working group would be to examine how to enhance participation opportunities and practice, including the possible development of the current legislative framework. For example this could involve reviewing central government coastal policy and planning processes (e.g. the New Zealand Coastal Policy Statement) and local government coastal policy and planning processes (e.g. Regional Coastal Plans) to see whether any current legislative mechanisms could be maximised.

Operationalising the Working Group

4 Further detail to operationalise the working group will be provided in a later paper. 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.

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

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

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

c Keeping Ministers informed on progress.

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

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

A system for recognising specific customary rights

Scope of customary rights to be recognised

8 As outlined above, the proposal is that the government would give legal recognition and protection to specific 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. It is intended that any rights obtained through the customary fishing regime could be recorded on a customary title.

b Some customary rights may not be able to be given full expression and protection due to the Crown's fundamental territorial jurisdiction being governed 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;

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; 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.

9 It is proposed that the elements outlined in paragraphs c-e above be generic constraints on the rights that any New Zealander may hold in the foreshore and seabed, excluding those who already hold private Land Transfer Act titles.

Interface of customary rights with other statutes

10 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.

11 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:

a extraction of sand, rock, stones, mud, gravel and some 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.

12 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.

13 In relation to the first kind of regime, it is proposed 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 government 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 fact that that activity was undertaken as a customary use provides the basis for an exception to the general prohibition on that activity.

14 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);

c The public policy arguments and any international obligations that may have led to the enactment of the general prohibition on the activity;

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

15 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.

16 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 each proposes that the Resource Management Act would govern the exercise of the customary right. The options are:

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

b *Option* 2: Require the local authority to decide only 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.

17 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. 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.

18 The second option, of regional councils placing necessary controls on the exercise of the right, means that the Maori Land Court finding is the source of the authority to undertake the activity. In effect, this would mean that a regional coastal plan could not prohibit the conduct of a customary right, other than for sustainability reasons. 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.

19 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, for reasons that were not related to sustainability, the exercise of a customary right.

20 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 authority 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.

21 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.

Effect of customary rights on third party interests

22 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.

23 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.

24 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 coastal permits to determine the appropriate response.

25 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.

26 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.

Overall effect of proposals on customary rights

14 A major difficulty in assessing the effect of any proposals for reform is that the scope of any existing customary rights is unknown. Assessments of the likely or possible findings from either the High Court or the Maori Land Court differ greatly. The debate is also complicated by uncertainty about whether some rights might be found to have been extinguished by past government actions, or merely suspended or limited in their operation. For example some would argue that a marine reserve suspended rather than extinguished customary harvesting rights in that area. Similarly, a port companies control of an area to enable ships using the port to manoeuvre

safely could be regarded as suspending rather than extinguishing customary rights in that area.

15 The assessment of the effect of the proposals on customary rights must therefore be a theoretical assessment, which looks at whether the types of rights that might be recognised by either the High Court or the Maori Land Court are able to be accommodated in the new regime.

16 The proposals enable ancestral association and mana to be recognised through the customary title, which provides the foundation for Maori participation in decision making systems. It enables particular customary rights in the area that are not already protected by the fisheries regime to be protected through the Maori Land Court.

17 It is possible that there are other types of rights that will be found to have existed until now. In particular, it is possible that some rights of occupancy may be found to have existed in some areas. There is also extensive debate about whether customary rights might be found to extend to include commercial activities developed from customary uses. If any rights are found to have existed up until this reform that are not able to be recognised through either of these routes, the proposal is that those are to be drawn to the attention of the government for direct discussion about redress and/or some specific form of recognition.

18 This provision for any lost rights to be the subject of further discussion with the government is an important backstop for the policy. It ensures that any gap in the new regime is able to be identified and addressed on a case by case basis.

Consultation

19 The following departments have been consulted on earlier papers on this issue: 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. No departments have been consulted on this paper.

Financial Implications

20 Financial implications will be addressed in a later paper.

Human Rights

21 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

22 Legislation is required to implement these proposals. Paper 1 seeks decisions on legislative matters.

Regulatory Impact and Compliance Cost Statement

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

Gender Implications

24 There are no gender implications.

Treaty Implications

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

26 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

27 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

28 It is recommended that Ministers:

1 **Direct** DPMC, in consultation with other departments, to develop detailed papers for Cabinet Policy Committee to consider on 10 December 2003, to give effect to the proposal outlined in this paper.

Hon Dr Michael Cullen
Deputy Prime Minister