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OFFICE OF THE DEPUTY PRIME MINISTER

Chair
CABINET

FORESHORE AND SEABED: A FRAMEWORK

PROPOSAL

1 This paper seeks Cabinet decisions on the government's policy on foreshore and seabed. The decisions will:

a provide the basis for legislative drafting of the Foreshore and Seabed Bill; and

b be provided to the Waitangi Tribunal, to enable it to consider whether the policy is consistent with the principles of the Treaty of Waitangi.

EXECUTIVE SUMMARY

2 The policy proposes a new framework to provide a clear and unified system for recognising rights in the foreshore and seabed, as well as practical initiatives to develop effective working relationships between Māori, who hold mana and ancestral connection over an area of foreshore and seabed, and central and local government decision makers. The development of the framework has been guided by the principles of Access, Regulation, Protection and Certainty, as well as the feedback received during the public consultation process, and further engagement process.

An integrated framework for rights and interests in the foreshore and seabed

3 Te Ture Whenua Māori Act was not intended to be the legal framework that applied to land in the foreshore and seabed. The government proposals set out a new framework that integrates all rights and interests in the foreshore and seabed, within the existing systems for regulating activity in those areas.

4 Current provisions in law which vest the foreshore and seabed in the Crown will be repealed and replaced with a public domain title, vesting the full legal and beneficial ownership of the land in the people of New Zealand. This vesting will apply to all foreshore and seabed areas, except those in private Land Transfer Act titles.

5 The foreshore and seabed boundary would be mean high water springs. This line is closer to the public understanding of what comprises the foreshore, and is more consistent with providing public access. It is also consistent with the Resource Management Act definition of the line between dry land and the coastal marine area. The Resource Management Act has a different approach to the management of the coastal marine area.

6 Foreshore and seabed land in the public domain title will be held in perpetuity by the people of New Zealand. It will not be able to be sold or disposed of unless that is authorised by or under an Act of Parliament.

7 The proposed public domain title, which supports the environmental management regime applying to the foreshore and seabed, will provide a clear and stable basis for the government to discharge its responsibility to ensure the sustainable management of the foreshore and seabed on behalf of all New Zealanders. As part of discharging this regulatory responsibility, and in accordance with its responsibilities under the Treaty of Waitangi, the government will work with Māori to develop effective working relationships between the government, Māori and local government. Those relationships will be built on agreed mechanisms and processes for ensuring Māori participation in relevant central and local government decision making processes, and will be tailored to the needs and capacity of each area.

Recognising and protecting Māori customary rights and interests

8 The Māori Land Court will be able to award a customary title that would sit alongside the public domain title. The title has two components:

a it recognises the mana and ancestral connection of the relevant whānau, hapū or iwi grouping over particular areas of the foreshore and seabed; and

b it identifies and recognises specific customary rights at the whānau, hapū and/or iwi level. Those rights would be annotated on the customary title.

9 The customary title would not alter reasonable and appropriate public access.

Recognising mana and ancestral connection

10 An independent statutory Commission will be created to expedite the identification of those that hold mana and ancestral connection over particular foreshore and seabed areas. The Commission will consist of 5-7 members and be appointed for a fixed term of two years. It will undertake an inquiry on a regional basis. Māori will not be compelled to participate in the process. The Commission will then make

recommendations to the Māori Land Court on where and to whom customary titles should be issued.

11 A customary title will make clear to all those involved in managing or using the foreshore and seabed, who holds mana and ancestral connection over that area. It will enhance the holders of the title's ability to participate in relevant local and central government decision making processes.

12 The government will begin work immediately on the development of practical and specific agreements to set out how particular whānau, hapū or iwi will be involved in decision making processes. The government accepts the responsibility to ensure that existing customary management or guardianship roles of Māori are able to be maintained, especially in places where Māori continue to have a strong and active ongoing association with particular foreshore and seabed areas.

13 In addition, regional working groups will be established comprising central government, local government and Māori. There will be 16 groups, formed around the regional or unitary council boundaries, as these councils have immediate practical responsibility for the management of the coastal marine area. The purpose of the working groups is to reach an agreement in each region on the ways in which Māori will participate in the management of the coastal marine area. It is expected that ways of building capacity for Māori, and central and local government, will be part of those discussions.

14 Once regional agreements are concluded, they will then be formally recognised by the Crown so that the commitments in them become legally enforceable.

Identifying and protecting specific Māori customary rights

15 The government proposes to amend Te Ture Whenua Māori Act to provide a new statutory system for the Māori Land Court to identify and recognise customary rights. The rights will be able to recognised at whānau, hapū or iwi level. The Court will apply statutory criteria to identify the rights. The criteria will incorporate the tikanga Māori test currently in the Act as well as the common law tests of continuous exercise of the rights.

16 Once recognised by the Court, specific customary rights will be annotated on the relevant customary title. The customary right will be communal, and will not be able to be sold. The holders of the right will be able to agree to limit or suspend its exercise, or to transfer part of the benefit of the right to others for a time, in accordance with tikanga. There will also be a process for the right holder to apply to the Court to have it removed from the customary title, if there is clear evidence that the holders of the right wish that step to be taken. Once removed, a right would not be able to be revived.

17 If the Court finds that a customary right existed at common law but is not able to be recognised within the new framework, the Court will refer the matter to the government for resolution. Discussions would involve the possibility of redress or some form of specific recognition.

18 The Māori Land Court customary rights declaration will provide general authority for a right holder to undertake an activity. The Resource Management Act processes will only be able to restrict the customary activity for the purposes of ensuring sustainability of the environment.

19 When other applications for coastal permits are received, the regional council or other decision maker will be required to consider whether the proposed activity would have a significant impact on a customary right. If so, the application will not be approved unless the holder of the customary right consents to it.

20 Further resourcing will be required for the Māori Land Court to carry out these new functions. The new and more developed framework for recognising Māori customary rights will replace the High Court jurisdiction, as well as the unintended Māori Land Court jurisdiction that would have resulted from the recent Court of Appeal decision. All applications currently filed with the Māori Land Court will be dealt with through the new framework. These changes will have no effect on the jurisdiction or role of the Waitangi Tribunal.

Improving systems to protect Māori customary rights

21 There are a number of legislative provisions that currently seek to protect Māori customary rights including provisions in the Resource Management Act, the Fisheries Act (including the customary fishing regulations), and the Local Government Act. There are a number of impediments to their effective operation including capacity, skills and information.

22 The regional working groups already described will be established to improve participation in decision making processes for the management of the coastal marine area.

23 A particular concern raised by many during the consultation process is the need for more focussed effort on the implementation of the customary fishing regulations. The Ministry of Fisheries will develop proposals to improve and speed their implementation, which will address concerns about capacity, provision of information and resources.

Public access in the foreshore and seabed area

24 The government will legislate to create a general public right of reasonable and appropriate access over the foreshore and seabed that is held in the public domain title. On occasions there may be reasons for public access

to parts of the foreshore and seabed may be limited or even excluded, for example around working ports, urupa and sensitive wildlife areas (eg nesting of seabirds).

Recognising public rights and interests

25 Recent work undertaken by Land Information New Zealand confirms that there are relatively few private titles over the foreshore and seabed. Consultation also suggests that the owners of those private titles often do not limit public access in practice. The government is working through these titles category by category, considering whether and how they might be brought into the public domain over time.

Overall effect of the new framework on customary rights

26 The framework has benefits for all New Zealanders, including Māori. It:

a gives Māori enhanced opportunities for greater involvement in management processes involving the foreshore and seabed

b enables the identification and protection of Māori customary rights that are not adequately recognised and protected at present; and

c provides certainty in relation to public access and to Māori customary rights generally.

Other issues

27 There are a number of other policy issues that are related to the foreshore and seabed work. Consideration will be given to the implications of the foreshore and seabed framework for the Marine Reserves Bill in early 2004. The oceans policy project will also be reconsidered next year. Aquaculture reform will be progressed separately.

28 The Department of the Prime Minister and Cabinet will continue to oversee policy development on all foreshore and seabed work, and to co-ordinate central government's role in the regional working groups. It will work closely with the Ministry of Fisheries on the project to improve implementation of the customary fishing regulations. The Department will continue to be responsible for the development of the foreshore and seabed legislation. The Bill is expected to be introduced into the House in March 2004.

29 Submissions and a full analysis of the submissions will be made publicly available. This Cabinet paper setting out the government's framework will also be released.

BACKGROUND

30 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.

31 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 under Te Ture Whenua Māori Act. The Crown and others challenged whether Te Ture Whenua Māori Act applied to the foreshore and seabed.

32 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 under appeal to the Privy Council.

33 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.

34 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.

35 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

36 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 on the issue. The 0508 Foreshore telephone line fielded over 650 calls for further information.

37 Over 60 meetings were held with the following groups:

a Māori – hui around Northland, 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 many people demonstrated an interest in the issue.

38 The information provided from these meetings has been used to assist in the refinement of the government policy proposals.

Submissions

39 2171 written submissions were received on the government proposals for consultation. An independent consultant with experience in analysing submissions was contracted to review and summarise the submissions.

40 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.

41 A copy of the final version of the analysis of submissions is attached as Appendix A.

Further dialogue / engagement process

42 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: OUTLINE OF PROPOSED NEW FRAMEWORK

43 The policy proposes:

a a new framework to provide a clear and unified system for recognising rights in the foreshore and seabed; and

b practical initiatives to develop effective working relationships between Māori, who hold mana and ancestral connection over an area of foreshore and seabed, and central and local government decision makers.

44 The development of the framework has been guided by:

a the principles of Access, Regulation, Protection and Certainty; and

b the feedback received during:

i the public consultation process and

ii the further engagement phase.

45 This paper has ten parts:

Part 1:	An integrated framework for rights and interests in the foreshore and seabed
Part 2:	Recognising and protecting Māori customary rights and interests in the foreshore and seabed
Part 3:	Recognising mana and ancestral connection
Part 4:	Recognising and protecting specific Māori customary rights and interests
Part 5:	Improving systems to protect Māori customary rights
Part 6:	Public access in the foreshore and seabed
Part 7:	Private rights and interests in the foreshore and seabed
Part 8:	Overall effect of the framework on Māori customary rights
Part 9:	Other issues
Part 10:	Recommendations

46 The issues are considered against the backdrop of some legal and factual uncertainty about the nature of Māori 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.

47 This paper therefore sets out a framework for dealing with these complex issues in the New Zealand context.

PART 1: AN INTEGRATED FRAMEWORK FOR RIGHTS AND INTERESTS IN THE FORESHORE AND SEABED

Capacity to make laws governing the foreshore and seabed

48 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 Māori customary land. The same concept is also commonly described as "sovereignty", or as general regulatory responsibility.

49 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.

50 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.

51 In recent years, however, and following the various pieces of vesting legislation, it had been assumed that ownership of the foreshore and seabed did rest with the Crown. 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.

52 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.

53 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

54 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.

55 Following the Court of Appeal decision in the *Ngati Apa* case, it is possible that applications under Te Ture Whenua Māori Act could result in the creation of private ownership in the foreshore and seabed. At present the Māori Land Court has jurisdiction to investigate the legal status of land and decide which status out of the six recognised in the Act applies 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 Māori customary land (which is defined to mean that it is held according to tikanga). If land is Māori customary land, the Māori 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 Māori Land Court creates is a form of private ownership (which is in most respects an ordinary freehold title under the Land Transfer Act, and which gives owners the same rights as other owners of land apart from very limited rights to sell the land).

56 Throughout the *Ngati Apa* hearings, the government has consistently maintained that Te Ture Whenua Māori Act was not intended to be the legal framework that applied to land in the foreshore and seabed. It is now appropriate to develop a new framework that deals explicitly with this issue.

Common law rights

57 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 jurisdiction.

58 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.

59 The legal route for asserting such rights could be an application to the High Court to seek a declaration of a particular right. The nature of any such rights is largely unexplored in the New Zealand context.

60 In general, New Zealand has approached these issues from the broader Treaty of Waitangi based point of view, which:

a focuses on the forward looking relationships between the Crown and Māori; and

b seeks to settle historical Treaty of Waitangi claims through direct negotiations between the Crown and Māori.

61 This has resulted in an approach which incorporates the broad set of interests that Māori have in natural resources as one of the factors that decision-makers must take into account in regulatory processes.

62 In Australia, the High Court has held that exclusive rights akin to fee simple title (rights of exclusive possession) 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.

63 There are other common law rights in the foreshore and seabed area. In particular, there is a common law right of public navigation although its applicability to seabed that is in private title is unclear. In the past there was probably also a common law right of fishing, although this would now be found to have been affected by the statutory regimes that govern fishing activity.

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

64 The *Ngati Apa* decision that the Māori Land Court has the jurisdiction to determine whether foreshore and seabed land is Māori customary land has created the unintended possibility that Te Ture Whenua Māori Act might provide an additional route for private ownership of the foreshore and seabed. This form of ownership 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.

65 The situation in law now is that there are several different statutory systems for creating or recognising rights in the foreshore and seabed, and potentially several different types of common law rights in these areas. It is unclear how those various rights and interests would be reconciled with one another. Steps are needed to clarify the general status of the foreshore and seabed, and the range of rights and interests that may exist in these areas.

66 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 to be clear that the new framework for recognising all rights and interests:

a is comprehensive; and

b replaces all previous common law and statutory systems for recognising rights and interests, including Māori customary rights and interests (but excluding those customary rights recognised through the Fisheries Settlement).

67 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 public domain, with open access and use for all New Zealanders (subject to reasonable and appropriate limitations imposed by the law or under powers created by Parliament);

b there must be the capacity for Māori customary rights to be recognised over the foreshore and seabed in an appropriate way; and

c Court processes for recognising customary rights must not result in effective ownership of the foreshore and seabed.

Options for clarifying the status of the foreshore and seabed

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

69 It is also proposed that the new framework provides for Māori customary rights and interests and public rights and interests to be recognised and protected in the foreshore and seabed.

Recognising public rights and interests

Status of the Foreshore and Seabed

70 Current legislation that vests the foreshore and seabed in the Crown has not provided clarity that the Crown has full legal and beneficial ownership of the foreshore and seabed. To remedy this, two options have been considered for legally defining the foreshore and seabed as public domain unable to be sold or otherwise alienated. These options 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.

71 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 may be viewed by many as provocative rather than as unifying.

72 In order to avoid this interpretation, it is proposed that the new framework provides that the foreshore and seabed should be vested in the people of New Zealand. The new system would repeal the current provisions in law that vest the foreshore and seabed in the Crown.

73 The new public domain title would apply to all foreshore and seabed areas except those in private Land Transfer Act titles. This exception would also need to cover any Māori freehold titles which have been issued but which are not yet registered under the Land Transfer Act, if they, for any reason, extend into the foreshore and seabed. Work is currently underway on options to expedite the registration of these types.

74 A diagram showing the ways in which private title might intrude into the foreshore and seabed is attached as Appendix B.

75 In addition, this new type of public domain title would:

a confer full legal and beneficial ownership of the foreshore and seabed (including airspace, waterspace and subsoil etc) in the people of New Zealand;

b make it clear that all New Zealanders have the right to reasonable and appropriate access across the foreshore and seabed;

c provide that the foreshore and seabed is to be held in perpetuity by the people of New Zealand, and is not able to be sold or disposed of, other than by or under an Act of Parliament;

d provide that it is the responsibility of government to ensure that the foreshore and seabed are sustainably managed in the best interests of all New Zealanders, as provided for in current law. This regulatory responsibility will involve the development of a range of effective working relationships between the government, Māori and local government. (Those relationships will be built on agreed mechanisms and processes for ensuring Māori participation that are tailored to the needs and capacity of each area);

e provide that the government has full administrative rights, so that the legislation does not need to recreate the full panoply of law relating to administration; and

f provide that the government would hold all management and landowner responsibilities on behalf of all New Zealanders (eg, pest control, nuisance management and fire control). This would include those responsibilities discharged by the Minister of Conservation under the current Foreshore and Seabed Endowment Revesting Act.

76 In terms of administration the foreshore and seabed would not be subject to the Land Act. The Minister of Conservation would, in general, retain the current roles under the Resource Management Act:

a approval of New Zealand Coastal Policy Statement;

b consent to restricted coastal activities;

c approval of regional coastal plans;

d approval of vesting of reclamations under the Resource Management Act; and

e responsibilities relating to the tendering of coastal space.

77 Further time will be required to allow for legal research and drafting to ensure that the public domain title 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 to determine what further legislative amendments may be required.

Boundaries

78 There are three landward boundaries that may require clarification within the new framework, including:

a Where the landward boundary in terms of the foreshore should be;

b Where the landward boundary in terms of rivers should be; and

c Where the landward boundary in terms of lagoons should be.

79 It is proposed that the landward boundary of the public domain title should be mean high water springs, subject to any areas where private title goes below that line. This line:

a is close to the public understanding of the foreshore;

b is consistent with providing public access; and

c is consistent with the Resource Management Act definition of the line between dry land and the coastal marine area.

80 In relation to the landward boundaries concerning rivers, it is proposed to use the coastal marine area boundary as defined by section 2 of the Resource Management Act. This will provide a boundary that is used for current coastal management.

81 In relation to landward boundaries concerning lagoons, it is proposed that officials be directed to undertake further work and report to the Ad Hoc Ministerial Group with further advice.

82 It is proposed that the seaward boundary be defined to extend as far as New Zealand has territorial jurisdiction, in international law terms.

PART 2: RECOGNISING AND PROTECTING MĀORI CUSTOMARY RIGHTS AND INTERESTS IN THE FORESHORE AND SEABED

83 Under the Māori Land Court's current jurisdiction, there is every prospect that concepts appropriate only to ownership of land above the high water mark would be applied to the foreshore and seabed. However, given that foreshore and seabed land is an important national resource, the government does not consider that the land should be either bought and sold, or be the subject of ownership, in the same way as dry land.

84 The government therefore proposes to amend Te Ture Whenua Māori Act and provide a new statutory code for the Māori Land Court to identify and recognise customary rights. It is proposed that the Māori Land Court will be able to award a customary title that would sit alongside the public domain title. The title has two components:

a It recognises the mana and ancestral connection of the relevant whanau, hapu or iwi grouping over particular areas of the foreshore and seabed; and

b It identifies and recognises specific customary rights at the whanau, hapu and/or iwi level. Those rights would be annotated on the customary title.

85 The customary title would not alter reasonable and appropriate access.

86 It is proposed to legislate that the statutory concept of 'customary title' is different from and replaces the common law concept of 'customary title'. The statutory customary title would be a new and more fully developed form of entitlement that:

a recognises the holder of the customary title has mana and ancestral connection over an area of the foreshore and seabed;

b provides the customary title holder with an enhanced ability to participate in relevant local and central government decision making processes concerning the foreshore and seabed; and

c would also be able to include annotations that identified any specific customary rights that were given legal recognition by the Māori Land Court.

87 The new framework will replace all previous common law and statutory systems for recognising rights, including customary rights, in the foreshore and seabed. It will remove the ability of the Māori Land Court to consider whether foreshore and seabed land is Māori customary land under the current provisions of Te Ture Whenua Māori Act. The changes will have no effect on the jurisdiction or role of the Waitangi Tribunal.

88 This new legal framework will be supported by a number of practical initiatives, designed to develop effective working relationships between Māori, who hold mana and ancestral connection over an area, and central and local government decision makers.

89 In terms of an appeals process, the existing system is that an appeal can be lodged with the Māori Appellate Court, then the Court of Appeal and then by leave to the Supreme Court. It is proposed that:

a the same appellate structure be available to test matters of general law arising in decisions of the new jurisdiction of the Māori Land Court; and

b Te Ture Whenua Māori Act is amended to ensure that the appeal bodies have the same tools available as for the new jurisdiction of the Māori Land Court.

PART 3: RECOGNISING MANA AND ANCESTRAL CONNECTION

The holder of a customary title

90 A key issue for consideration is whether the holder of a customary title, which will recognise mana and ancestral connection, should be at 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, there could be more than one group that held mana and ancestral connection with an area.

91 Each approach has its particular issues and risks:

a Whanau, hapu and iwi recognition – 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;

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; and

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 that its systems and processes involve all those with interests in the foreshore and seabed area.

92 It is proposed that the holder of a customary title be able to be recognised at whanau, hapu or iwi levels, although it is expected that most applications will be at the level of hapu. If a hapū or iwi obtains the customary title that recognises they hold mana and ancestral connection across the foreshore and seabed area, that group would facilitate and sponsor applications to the Māori Land Court for specific customary rights to be recognised on the customary title for any of its constituent groups.

The effect of a customary title

93 It is proposed to legislate that:

a any customary title holder has the right to an enhanced opportunity to participate in decision making processes concerning the foreshore and seabed; and

b enhanced participation opportunities will be agreed at the regional level between the relevant local authorities, Māori and central government.

94 It is proposed that 'enhanced participation opportunities' will operate in addition to existing provisions under the Resource Management Act that require decision makers to consult with tangata whenua and have regard to matters of customary interests. Those provisions will continue to apply irrespective of whether a new form of customary title has been issued for the area to which the decision relates.

95 Identifying the holder of mana and ancestral connection for a specific area has the potential to provide significant benefits for both central and local government, as well as for applicants under the Resource Management Act. Once the relevant Māori grouping for an area has been identified, along with any representative governance entity, it will provide clarity for all those involved in Resource Management Act processes about who they must work with in order to understand the customary interests/rights in a particular area.

Establishing Regional Working Groups

96 In order to improve the operation of provisions of the Resource Management Act and the Local Government Act, it is proposed that central government establish working groups with local authorities and Māori, at the regional level. The groups would be based on the 16 regional/unitary council boundaries and would be required to develop mechanisms to enhance participation opportunities and practice for Māori in decision making processes affecting the coastal marine area.

97 It is also proposed to legislate a menu of enhanced participation options that could be put in place at the regional level, including devolved management, membership on Hearing Committees, and the establishment of a iwi/hapu committee. The menu of options would not preclude agreement to other arrangements being put in place.

98 Appendix C includes an indicative description of the 'enhanced participation opportunities' that could be put in place. Officials will report by the end of January 2004 on what the menu of options would be.

Triennial agreements - the vehicle for implementing this proposal

99 The Local Government Act 2002 contains an explicit recognition that an individual local authority is one player in the achievement of community well-being, and that well-being goes beyond local authority boundaries. In essence, the local authority needs to collaborate with a variety of agencies to find solutions to local issues, including other local authorities.

100 One of the instruments for co-ordinating the work of different local authorities is the triennial agreement as set out in section 15 of the Local Government Act. The agreement requires all local authorities within a region to have agreements for communication and co-ordination by the beginning of March in the year following a triennial election. The first agreement must be in place by 31 December 2003. The agreement could be the vehicle for:

a Agreeing processes for identifying outcomes and strategies for their achievement;

b Agreeing on shared approaches to consulting with communities, undertaking research and delivering services within and between regions;

c Agreeing on joint approaches for communicating with communities and stakeholder groups and distributing information;

d Providing a mechanism for aligning policies and services and resolving differences between local authorities; and

e Ensuring gaps in services are identified and duplication addressed.

101 The triennial agreement is one of the instruments provided in the Local Government Act to encourage collaboration. It is intended to be a statutory minimum only. It was not intended that this requirement should prevent or discourage local authorities negotiating other relationships, agreements or memoranda, including with Māori organisations. The triennial agreement process provides a useful model to build on, for the agreements to be developed by the working groups.

102 It is proposed therefore, that the new framework:

a require that relevant local authorities to develop an agreement, along the lines of a triennial agreement, with relevant Māori organisations, concerning the management of the coastal marine area with a specified timeframe; and

b signal that to reflect issues of diversity, there may be a need to develop sub-agreements that are additional to the commitments made to the region as a whole.

Setting up the Working Groups

103 While the overall statutory framework governing the coastal marine area is the same across the country, matters related to how best to involve whanau, hapū and iwi need to be worked out at the local level. The aim of the Working Groups is to reach an agreement on what mechanisms are to be used in that region. The agreement would take into account the respective needs, capacity and situation of each area.

104 As the agreements will provide a framework for ensuring whanau, hapū or iwi participation, it is proposed that the agreements be referred to the government, so that they can be formally ratified and promulgated by an Order in Council. This will create the ability to judicially review decisions if there is an allegation that the agreements have not been reached in accordance with the agreed processes.

105 It is proposed that the working groups be established across the 16 Regional Council and Unitary Council boundaries[1]. The size of each working group is likely to vary across each of these regions areas due to iwi / hapū boundaries.

106 A unit would be established in the Department of the Prime Minister and Cabinet in January 2004 to provide policy and administrative support. The unit would have overall responsibility for:

a co-ordinating central government participation in Regional Working Groups; and

b preparing material on best practice and processes that could be put in place to reach agreements.

107 Further detail on the exact nature of the Working Groups and the coordinating unit is required. It is therefore proposed that the Department of the Prime Minister and Cabinet, in consultation with relevant departments, report back in January on:

a further detail about the implementation of the regional Working Groups;

[1] Northland Regional Council, Auckland Regional Council, Environment Waikato, Environment Bay of Plenty, Taranaki Regional Council, Gisborne District Council, Hawkes Bay Regional Council, Horizons, Greater Wellington, Nelson City Council, Marlborough District Council, Tasman District Council, West Coast Regional Council, Otago Regional Council, Environment Canterbury, and Environment Southland

b the support that the unit in the Department of the Prime Minister and Cabinet would require;

c the support that Māori would require to participate in the working groups; and

d the support that local government would require to participate in the Working Groups.

Work that can begin immediately to develop relationships

108 This part of the paper outlines two related initiatives designed to preserve and enhance the ability of Māori to give meaningful effect to their mana and ancestral connection, including ongoing kaitiaki responsibilities, over particular areas of the foreshore and seabed. These are the proposals to:

a formally recognise mana and ancestral connection through a customary title; and

b establish regional working groups to develop agreements between Māori, regional councils and the Crown on how Māori input and participation into the relevant decision making processes will be enhanced.

109 Both of these proposals will take some time to implement and will, in part, need to wait for the legislation to be enacted before the formal legal processes can get underway. There is a great deal of preparatory work, however, that can start immediately.

110 In relation to the work of the statutory commission that will recommend how customary titles should be issued, initial research and compiling of information can begin now. It would also be possible for some of the regional discussions and fact-finding to begin.

111 The government will also begin work immediately on the development of guidelines for the practical agreements on how particular iwi and hapu will be involved in decision making processes. In many areas, there are already reasonably developed protocols and understandings on how Māori will work with government departments on particular issues, particularly in areas where Māori continue to maintain a very strong and active association with foreshore and seabed areas and exercise significant customary management or guardianship responsibilities. In some areas discussions to develop such protocols are underway at present.

112 For example, active relationships have already been established with some iwi, and hapu and whanau within those iwi, in the Bay of Plenty and East Cape areas through the ongoing implementation of the customary fishing regulations. The government will give priority to building on and developing

these relationships, both in the fishing context and more generally. Those existing relationships and discussions can provide a constructive starting point for discussions and the development of ideas as the regional working groups are established.

113 The government accepts the responsibility to work closely with Māori, and with local government, to ensure that both central and local government find ways to ensure real and effective participation by Māori in decision making processes, and to ensure that existing customary management or guardianship roles are able to be maintained.

Inquiry process that recognises the holder of a customary title

114 It is important that the process of recognising customary titles gets underway as quickly as possible, and that the costs for applicants are minimised. It is therefore proposed to establish an independent statutory Commission to identify those who hold mana and ancestral connection over defined areas of the seabed and foreshore in accordance with tikanga. The Commission will conduct a process of inquiry to establish who holds mana and ancestral connection in particular areas, and will then report its findings to the Māori Land Court. The Commission will make recommendations to the Court so that the Court can proceed to issue customary titles in recognition of that mana and ancestral association.

115 Whanau, hapu and iwi will be able to apply to the Commission to have their status recognised in a customary title. The process is not mandatory, however, and it is possible that some may choose not to use this process. If so, it is possible that there will be no customary title issued over some areas. In this situation, any Māori group with interests in that area will be able to assert their interest through the existing Resource Management Act systems for protecting Māori customary rights and interests.

116 It is proposed that the Commission be directed to conduct a process to identify the areas where there is clear agreement as to who holds mana and ancestral connection over the seabed and foreshore. Its process should also include steps to assist the resolution of disputes where possible. If it is not possible to resolve disputes about some applications, however, the Commission will have the power to recommend to whom it considers customary title should be awarded, based on its understanding of the relevant tikanga. The Commission will be able to recommend to the Māori Land Court that several customary titles can be issued to the same area, if it considers that tikanga recognises that iwi or hapu had overlapping interests.

117 To undertake this work, the statutory commission will need:

a Expertise and experience with tikanga and its exercise;

b Legal status and authority;

c Robust and transparent processes; and

d Appropriate management of culturally sensitive information.

Membership of the Commission

118 It is proposed that the Commission consist of no less than five members and no more than seven members, one of whom shall be appointed as Chair. It is anticipated that the role of the Commission would require a full time commitment from members to ensure it was able to progress the process in a timely manner. It is, therefore, proposed that members be appointed for a fixed term of office not exceeding two years. It is proposed that the Commission have the ability to co-opt up to two additional members for particular purposes and that such persons be appointed for the period of time considered appropriate by the Chair of the Commission.

119 The function of the Commission is such that it would benefit from specific technical expertise in relation to effectively recording geographic data and matters relevant to identification and application of tikanga Māori. It is, therefore, proposed that the Chief Executive of Land Information New Zealand and the Chief Executive of Te Puni Kokiri be appointed as statutory advisers to the Commission. It is also proposed that the Commission have the capacity to appoint its own technical advisers to assist with matters relevant to the particular area in which it is conducting an inquiry.

Process of the Commission and the Māori Land Court

120 It is proposed that the Commission undertake an inquiry on a regional basis, as defined by the areas of association with original waka, and undertake a separate investigation for each area. As already noted, it is proposed that the process used by the Commission should focus on identifying the extent to which there is agreement amongst relevant iwi as to the identity of the holder of mana and ancestral connection for defined areas of the seabed and foreshore.

121 It is proposed that in relation to each region the Commission would, therefore, identify:

a all iwi that whakapapa to that waka;

b any iwi identified by the Customary Fishing Regulations as holding mana and ancestral connection over any area within that region;

c any iwi identified by a Treaty Settlement process as holding mana and ancestral connection over any area within that region; and

d any iwi identified by the Treaty of Waitangi Fisheries Commission as holding mana and ancestral connection over any area within that region.

122 The Commission would then notify all such iwi that it would be conducting an inquiry to identify who holds mana and ancestral connection in relation to the seabed and foreshore within that region. The Commission would also be required to provide sufficient public notification to ensure that any hapū or whanau that might wish to apply for a customary title was notified of its inquiry.

123 The Commission would then invite all iwi, hapu and whānau to make submissions as to who held mana and ancestral connection over defined areas of the foreshore and seabed in the relevant region. When requesting submissions it would request that the submissions identified any reasons why mana and ancestral connection would not be recognised on the basis of any finding made under:

a the Customary Fishing Regulations, or

b any other process conducted by the Crown that purported to recognise mana and ancestral connection, such as a statutory acknowledgement arising from a Treaty settlement.

124 Following receipt of any submissions, the Commission could, if appropriate or necessary, facilitate discussion amongst all or some parties to promote agreement about the identity of the holder of mana and ancestral connection for all areas of the seabed and foreshore within that region. Iwi could not be compelled to participate in any such process but could participate either to promote their own claim as to mana and ancestral connection or to oppose any claim made by another iwi.

125 If agreement could not be achieved, the Commission would be required to provide a recommendation on whether a contested application for

customary title should proceed, and if so in what form. The Commission would be required to provide periodic reports to the Māori Land Court setting out its recommendations to the Court on where customary titles should be issued. It would be possible for the Commission to report first on the issue of titles in an area that were agreed, and to provide a later report on issues that had been more contested. For each title, the Commission's report would need to record the identity of the recommended holder of the title and the area over which the title was to be held.

126 The Māori Land Court would be required to notify all parties in the region that it had received a report from the Commission and provide a time period for objections to be lodged. If no objections were received, the Court would proceed to issue the customary titles. If an objection were received concerning a particular proposed title, the Court would proceed to hold a hearing to enable the Court to consider whether and/or how the title should be issued. The Court's decision could be appealed on procedural and/or substantive grounds through the existing appellate structure.

PART 4: IDENTIFYING AND PROTECTING SPECIFIC MĀORI CUSTOMARY RIGHTS

Recognising customary rights

127 The government proposes to give legal recognition and protection to Māori 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 Māori Land Court from identifying linkages with the customary fishing regulations where appropriate and recording those on the customary title.

128 The new Part of Te Ture Whenua Māori Act will need to provide tests and guidance for the Māori Land Court on how it is to approach the task of identifying the range of Māori customary rights and interests. A discussion of the common law principles and current Māori Land Court test is outlined below.

Summary of common law principles relating to aboriginal / native title

129 The common law has been the vehicle for the recognition of the property rights of indigenous people in Australia, Canada and the USA. Each country has developed jurisprudence taking into account their own particular circumstances. As such, there are certain differences in approaches that have evolved in these countries. The following distils some general themes.

130 The common law generally tries to match the description of native title rights to the content of the activity actually 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 Australian common law would allow a modern dinghy 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.

131 The common law may also recognise lesser forms of property that do not depend on the holders of the right having underlying ownership of land. These may involve rights that are not dependent on underlying ownership. They may also be non-exclusive in character.

132 If the common law tests developed elsewhere were applied by the courts in this country, the group claiming the interest/activity would need to demonstrate that:

a the claimed customary right would be consistent with the common law;

b the claimed customary right was being undertaken at the time of the signing of the Treaty of Waitangi and continues to be undertaken; 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.

133 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 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 in New Zealand. This brings into question whether the Australian common law could be applicable in the New Zealand context.

134 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 may be a feature of an ownership interest but does not arise in relation to use based rights.

Current Māori Land Court Test

135 As outlined previously the Māori Land Court currently determines the status of land according to tikanga Māori. The determination that land is held in accordance with tikanga Māori is made as a result of finding that it is not land within any of the other categories of land defined by Te Ture Whenua Māori Act. The Māori Land Court then invokes tikanga to determine who owns the land.

136 Tikanga Māori is currently used to determine **who** are the owners of the customary land. The Māori Land Court has established some general jurisprudence in relation to determining who holds rights in accordance with Tikanga Māori. The established jurisprudence is that:

a the principal rights upon which Māori rely when making claim to any particular area are discovery, occupation, ancestry, conquest or gift; and

b the rights existed at the date of signing the Treaty of Waitangi.

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

Proposed new framework to identify and protect Māori customary rights

138 It is proposed that the new framework for recognising customary rights in the foreshore and seabed involves a set of statutory criteria. The criteria would build on the current tikanga Māori test augmented by factors consistent with common law principles. This type of framework could include:

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

b defining the "continuity test" to be applied in determining the existence of a specific customary 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 should be regarded as having led to the extinguishment of any potential customary right.

139 It is proposed that officials be directed to report back to the Ad Hoc Ministerial Group on the details of the statutory criteria in January 2004.

Scope of customary rights

140 As outlined above, the proposal is that the government would give legal recognition and protection to specific Māori customary rights in the foreshore and seabed. Such rights could relate to the extraction of sand, protection of access routes for fishing, temporary use of space for undertaking customary activities apart from fishing (eg waka launching).

141 There are some statutes already in place that include provisions enabling the protection of customary rights. Some statutes enable applications for customary use to be approved where that use is not clearly inconsistent with the purpose of the particular Act. It is proposed that the new framework will not interfere with these existing statutes.

142 Any claimed customary rights, therefore, that fall within the Treaty of Waitangi Fisheries Settlement will be dealt with in that regime rather than under the new framework. However, this will not preclude the Māori Land 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.

143 In addition, any applications for customary use of marine mammals and wildlife (seabirds and a few rare species) will be dealt with by the regimes that cover those issues.

Nature of the customary right

144 It is proposed that the nature of customary right:

a is communal and can be recognised at whanau, hapu and iwi levels;

b is generally inalienable, but can be limited or suspended in accordance with tikanga Māori and the consent of the customary right holder.

145 In relation to the legal effect of a customary right, the current coastal permit regime of the Resource Management Act provides a code outlining how rights and interests in the coastal marine area operate. It is therefore proposed that the legal effect of a customary right in the foreshore and seabed is spelt out in the Resource Management Act, as set out in the following sections.

Regime to protect applications for customary rights before they are determined

146 A major aim of the new framework is to provide legal recognition and protection to any customary rights in the foreshore and seabed that may still exist. It is also important, however, to do so in a way that provides certainty for those who use and administer the foreshore and seabed, in both the short and long term.

147 The proposed system for documenting customary title and specific customary rights will provide clarity over the long term about the rights that exist and the protection that the law gives to them. In the short to medium term, a transition regime needs to be developed that balances these two policy imperatives.

148 Administrative decision makers already have legal responsibilities under the Resource Management Act to consider the effect of their decisions on Māori, and on the ancestral connection between Māori and particular places. Those general obligations continue. Where customary titles have been awarded, those general procedural obligations may well be

supplemented by additional protocols to ensure the effective participation of those holding mana whenua. It is possible that in some areas, Māori may choose not to go to the Māori Land Court to recognise and protect their customary rights and may prefer to rely on being involved in decision making processes as the primary means of protecting their interests and rights.

149 It is proposed that the statutory decision maker should be able to proceed to make decisions on resource consent applications in accordance with the Act's general procedural requirements, including the requirements to consider the effect on Māori, if no customary right has been granted and there is no application before the Māori Land Court for such a right. Such decisions would not be able to be challenged later, based on a subsequent application for or awarding of a customary right.

150 If there is an application before the Māori Land Court, however, it is an indication that a group is claiming that they hold an existing legal right and are seeking to document it in order to protect it more securely. It is appropriate for statutory decision makers to take account of that claimed legal right as they consider applications for resource consents that may impinge upon the right. For example, it would be possible to provide for additional and specific notification requirements to ensure that the customary rights applicant was able to make a submission on the resource consent application. It is proposed that officials provide further advice to Ministers on how decision makers might appropriately take account of a current application for a customary right.

Interface of customary rights with statutes that prohibit activities

151 There are a number of statutes that regulate the activities that can be undertaken in the foreshore and seabed. They generally either prohibit activities of a particular type completely, or regulate the circumstances in which they can be undertaken.

152 It is proposed that the Māori Land Court would not be able to authorise an activity that was prohibited by another statute. If the Court finds that a customary right exists that includes such an activity, the Court would refer the issue to the government.

153 Under some statutes, the government can authorise exceptions to the general prohibition. For example, this is the approach taken to Mutton Birds in the Titi Island, where there is a complete prohibition on the taking of Mutton Birds unless taken pursuant to a customary right.

154 It is proposed that the government would need to consider whether an exception should be authorised for the customary right holder, taking into account the policy interests protected by the regulatory regime. In making

such decisions on a case by case basis, the government would consider the following factors:

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 Māori (the integrity of customary practice and exercise of tikanga);

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

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

Interface with the Resource Management Act

Regulating to ensure sustainability

155 The broad aim of the new framework is to protect Māori customary rights while sustainably managing natural and physical resources of the seabed and foreshore. The Resource Management Act remains the primary tool for regulating environmental effects of all activities in the foreshore and seabed. The Resource Management Act does not in general prohibit specific activities, but regulates their conduct. The Resource Management Act regulates how and where activities take place in order to manage the impact on the environment and to balance the interests of different parties.

156 Examples of customary rights that might be sought that would be controlled by the Resource Management Act include:

a The extraction of sand, shingle and other natural minerals;

b Temporary use of space for undertaking customary activities (for example, waka launching);

c Erection of cultural amenities;

d Protection of historical features and places;

e Protection of existing burial sites; and

f Use of physical characteristics or features of the seabed and foreshore (eg specific rocks or reefs).

157 The declaration of the Māori Land Court will provide general authority for a right holder to undertake an activity. It is proposed that the Resource Management Act would regulate the way in which the activity was

undertaken, in order to ensure sustainability. The way in which the Resource Management Act regulates the customary activity would need to take account of two important differences between an activity protected by a customary right and the other activities regulated by the Resource Management Act:

a The source of the authority to conduct the activity is not derived from a consent or permit granted under the Resource Management Act, but the finding of the Māori Land Court that a customary right exists; and

b The right to undertake the activity is held in perpetuity and is not confined by the time limit of any resource consent.

158 In order to ensure that customary rights can be exercised as fully as possible once recognised, it is proposed that the Resource Management Act processes should only be able to restrict or prohibit the customary activity for the purposes of ensuring sustainability. In most cases, it is expected that the customary activity would be able to be undertaken as a permitted activity, or through a resource consent which may attach some constraints.

159 In some circumstances, however, the overarching goal of sustainability might result in the activity needing to be declined, at least for a time. This could result if the activity were prohibited in a plan, or if it were a discretionary or non-complying activity in the plan and an application was subsequently refused by the relevant decision-maker.

160 Where the exercise of a customary right may be prohibited or declined, it is proposed that the government, rather than the local authority, should be the decision-maker authorising that prohibition. It is considered inappropriate for a local authority to take decisions that would overrule the recognition of a customary right by the Māori Land Court. The existing decision making processes in the Resource Management Act for the foreshore and seabed enable these decisions to be referred to the government with only minor changes, as under the Resource Management Act management of the coastal marine area is already overseen by the Minister of Conservation.

161 In situations where the rights holder was refused permission to undertake the activity, an additional test could be added to the Resource Management Act to require a check that the prohibition or declining was reasonable and required by the sustainability principles of the Resource Management Act. The Minister of Conservation in consultation with the Minister of Māori Affairs would make this final decision. If the Minister of Conservation decided that an activity was to be prohibited or declined, the government may need to discuss with the holders of the right whether any steps should be taken to provide redress, or some other acknowledgement of the right. Relevant to this consideration may be the expected length of the prohibition

or whether any review process is built in. Restrictions imposed for sustainability purposes may not be permanent, and redress may not always be appropriate for the temporary suspension of a customary right.

Protecting customary rights when other decisions are made

162 It is considered that customary rights given legal recognition by the Māori Land Court will be strong rights, different in nature to private land titles or rights issued through a resource consent. There are a number of circumstances where the Resource Management Act will need to be amended to ensure that these rights are fully recognised and protected.

163 The general principle should be that any decisions on the allocation of space, whether through zoning rules in plans or through individual permit applications, will need at the outset, to consider whether there are any customary rights in the relevant area.

164 Immediately after a customary right is declared, the existing system will need to be adjusted, so that resource management documents, including the New Zealand Coastal Policy Statement, and Regional Coastal Plans appropriately recognise the customary right. A key issue that will need to be resolved is the time lag when changing these kinds of policy documents. Officials are exploring ways to use the new legislation to remove this time lag, for example, by the use of a general deeming provision that would automatically require the plan to be read as providing for the customary right.

165 It is proposed that existing resource consents would not be affected by the newly recognised right, but that the right would inform how any future consents were granted. In many situations, the customary right may not be in material conflict with a resource consent in the same area and the two activities should be able to exercised concurrently. In situations where there is a direct conflict between the customary right and an existing consent, it is possible that the customary right holder could negotiate with the existing consent holder before the expiry of the consent to enable an earlier or partial resumption of the customary activity.

166 Once a customary right is recognised, all new policy documents (or changes to policy documents) and subsequent resource consents will need to ensure that the customary right is fully taken into account when making decisions under the Resource Management Act. Should there be a circumstance where the customary right might be significantly constrained or prevented, then once again, it would be up to the Minister of Conservation, in consultation with the Minister of Māori Affairs, to make a choice about whether the change is acceptable or not, in consultation with all involved.

167 The Minister of Conservation will need new guidance when making these decisions. Tests will also need to be developed to determine whether a new activity/plan is likely to restrict or significantly constrain the exercise of a customary right. If the decision taken by the Minister of Conservation significantly affects a customary right recognised by the Māori Land Court, it is proposed that the government would enter into discussions about how this issue. These discussions would include the possibility of redress or some form of recognition. In most cases, however, the criteria proposed should mean that new plans and policies will ensure that the customary right can still be adequately exercised.

168 When another person seeks a consent for a new activity, it is proposed that the decision maker (either the Minister of Conservation or the relevant local authority) must assess:

a whether the new activity would have a significant impact on the customary right; and

b whether the new activity is consistent with the general goals of environmental sustainability.

169 If the new activity would have a significant impact on the customary right, the decision maker would decline it. It would be possible, however, for the customary right holder to agree to limit or suspend the customary activity in order to enable the new activity to proceed.

170 The protection of a customary right may however be impacted upon where the government wished to provide an essential public work (eg a public bridge) or infrastructure development (eg, a port). Such activities may have an undue adverse effect on a customary right. In such situations, the government would need to enter discussions with the holder of the customary right as to what form of recognition, including the potential for redress, could be provided in that circumstance.

Transition issues relating to recognising customary rights

171 As outlined in the consultation paper published in August, it is proposed that the statutory framework that has been developed to recognise customary rights and interests in the foreshore and seabed apply to all existing and new applications before the Māori Land Court. This step is necessary to ensure that such rights are able to be recognised and given legal effect in a way that is appropriate to the nature of the rights and is effectively integrated with the rest of the legal system governing the foreshore and seabed.

172 A further transition issue relates to current applications before the Minister of Conservation for the vesting of reclaimed land. If the Minister proceeds to vest such land in private title it is possible that customary rights might be

subsequently found to relate to those areas of land. If the Minister has vested such land in private title any customary rights would be extinguished.

173 It is proposed that the legislation enable the Minister of Conservation to proceed to consider existing and future applications, but that the Māori Land Court be provided with jurisdiction to notify the government if any customary rights are subsequently identified in relation to that land. The government could then undertake discussions with the customary rights holder to identify any redress that may be appropriate.

Process to identify customary rights

Application to identify customary rights

174 It is proposed that any group that hold a customary title may apply to the Māori Land Court for a declaration as to the customary rights held by that group, including constituent elements of that group. It is proposed that the Court may only recognise a right held collectively and cannot recognise any rights as being held by an individual.

175 It is proposed that the application for a Declaration must identify:

a the identity of the group claiming the rights;

b the area to which the application relates;

c the nature of the customary rights asserted;

d what the rights relate to; and

e the activities covered by the right.

176 It is also proposed that once an application has been filed with the Māori Land Court the Court must:

a publicly notify the details of the application;

b specifically notify any other iwi and/or customary title holder(s) in the area to which the application relates;

c provide specific notification to any third parties likely to be affected by the claimed right; and

d invite any party likely to be affected by the application to file a Notice of Objection, setting out the basis for such objection, within the timeframe provided by the Court.

177 Such notification would provide details of the application and would entitle those parties to appear at the hearing conducted by the Māori Land Court.

Those parties "likely to be affected by the application" would include the Crown, any other rights holders (such as anyone having a coastal consent), a regulatory authority or any other party able to establish an interest greater than that of a member of the general public.

178 If no objections were filed to any notified application the Court would conduct a "pro forma" hearing to be satisfied that the rights claimed were within the jurisdiction of the Court and met the criteria to be recognised. If it were so satisfied it would then identify those specific rights that were held and annotate the relevant customary title accordingly.

179 If objections to the application were filed, the Court would be required to conduct a hearing in relation to the application. The applicant must then present evidence to the Māori Land Court to support the claim for the right. Although the regime does not provide for the Court to grant a Declaration for a customary right relating to fishing, it is proposed that applicants could present evidence of customary fishing activity in the area in support of their claim for additional customary rights. This may require minor amendments to the Treaty of Waitangi (Fisheries Claims) Settlement Act as its current wording may restrict the ability to introduce evidence of this kind.

Conduct of a Hearing

180 It is proposed that the Māori Land Court conduct a hearing of any application for a declaration as to customary rights in the same way it conducts other hearings within its jurisdiction. While the Court still conducts proceedings on an adversarial basis this is done with regard to tikanga. It is required to conduct proceedings in such a way as, in the opinion of the presiding Judge, will best avoid unnecessary formality.

181 The Court is able to act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter that, in the opinion of the Court, may assist it to deal effectively with the matters before it, whether or not legally admissible in evidence. It may also initiate inquiries itself, call witnesses (including expert witnesses) of its own volition, and seek and receive such evidence as it considers may assist it to deal effectively with the matters before it.

182 Any party or other person entitled to appear in any proceeding in the Māori Land Court may appear personally, or be represented by a barrister or solicitor, or, with the leave of the Court, be represented by any other agent or representative. In addition, the Court has power to appoint a barrister or solicitor to represent any person or class of person who may be affected by any order that might be made in the proceeding.

183 The majority of hearings in the Māori Land Court are conducted by the parties, themselves, without counsel. A feature of the process is that it is

not uncommon in hearings before the Māori Land Court for kaumātua to address the Court from the body of the Court without being sworn and without being subject to cross-examination.

184 In more contentious or complex matters, and matters involving counsel, the degree of formality, particularly in relation to the giving of sworn evidence and cross-examination, tends to increase. This flexibility allows for formal evidence to be given in a formal way and traditional evidence to be given in a traditional way. It is considered appropriate for all of these existing provisions to apply to proceedings relating to an application for a declaration of customary rights.

Result of the hearing

185 At the completion of the hearing the Court must record its findings as to the nature and extent of the customary right. The content of the declaration would be recorded on the relevant customary title. The declaration must:

a describe the area over which the customary right applies. This will need to be mapped, or described in such a way that it could be mapped;

b identify the rights holder and describe the descent group associated with the right;

c describe the nature and extent of the customary right, including specifying key features of the customary right; and

d the Court should also have the power to refer any other issue to the government for consideration, that may have arisen in the course of a hearing.

Promulgation and Registration of Orders

186 It is proposed that the Māori Land Court be required to notify:

a any party provided with notification of the application from which the Declaration arose;

b relevant local authorities, who will be required to attach the orders to the relevant district plans, and to notify any consent holders that may be affected when their consents expiry; and

c relevant government departments.

187 It is also necessary to ensure formal public notification of the order for a customary right made by the Māori Land Court. It is proposed that this be

done through Gazette notice, which is the general procedure used to notify Māori Reservations and Maitaitai.

188 The Māori Land Court is currently required to keep a record of all its Orders and make such record available for public inspection.

189 The Māori Land Court would be required to manage a public register that records:

a all Customary Titles issued;

b the identity of the holder of any such Customary Title;

c the area to which the Customary Title relates;

d the details of any customary rights identified in relation to the area to which the title relates; and

e the details of any Order that removes customary rights from a Customary Title.

190 It is proposed that the register be open to public inspection and provide a complete and accurate record of all Customary Titles issued by the Māori Land Court. Officials have undertaken a very preliminary assessment of the cost of developing such a register based on recent experience in developing similar geo-spatial data bases. It is estimated that the time required to establish such a registry system would be 9 – 12 months and initial set up costs would be approximately $1m. It is estimated that the continuing maintenance and operating costs for the system would be approximately $0.25m.

191 If the right is to be held and managed collectively it will be necessary to clearly identify and describe the group or entity entitled to hold the right. It is proposed that a customary right could be recognised for any whanau, hapu or iwi, so long as the group was able to describe itself clearly. If the holders of the customary right wished to deal with the right in a way that required interaction with third parties (for example, by agreeing to forgo or suspend the right for a period to enable a conflicting activity to proceed), then the group would be required to establish itself in a form that provided sufficient legal personality to enable others to interact with the right holder with certainty.

192 It is proposed that the Māori Land Court have the authority to amend the identity of the holder of customary right, on the application of the rights holder. This power is not intended to enable the right to be alienated, but does enable the rights holder to adopt a different legal form in the future. It might also allow a right initially held at hapu level to be transferred to a

whanau, or vice versa, if that change better reflected the relevant iwi or hapu's internal organisation.

193 There may be circumstances where the holder of a customary right wishes to remove it from a particular customary title. In such circumstances, the customary right holder could apply to the Māori Land Court for its removal from the customary title. The Māori Land Court would need to be satisfied that the customary right holder, in deciding whether it was appropriate to remove the customary right from the customary title, had undertaken a transparent and accountable process. The effect of removing the customary right from the customary title would mean that the customary right could not be revived at some later stage. It is therefore proposed that:

a notification of the Order for a customary right to be removed from a customary title be done through Gazette notice; and

b the Māori Land Court be required to keep a record of such an Order and make such record available for public inspection.

Operational Issues relating to the Māori Land Court

Judicial Resourcing

194 It is considered that there will be significant ongoing costs for the Crown in maintaining the capacity to support the expanded jurisdiction of the Court and the infrastructure necessary to implement the regime.

195 Once policy decisions have been made relating to the scope and format of the Customary Rights regime, it will be possible to fully quantify resource demands for the Māori Land Court resulting from the expanded jurisdiction. A possible impact on Court resourcing is the current trend for Māori Land Court Judges to be rostered as Presiding Officers in the Waitangi Tribunal. This commitment takes up much of the time Judges are not required in their primary jurisdiction.

196 Currently seven of the eight Māori Land Court Judges are rostered to the Waitangi Tribunal and the scope and timeframes for this commitment may take some years to complete. Therefore it is likely that Judge numbers will need to be increased so that the new jurisdiction of the Court under the new framework and the proposed extension of jurisdiction in relation to Te Ohu Kai Moana can function efficiently and without undue delays.

197 Presently Te Puni Kökiri manages the appointment process for Māori Land Court Judges under Part I of *Te Ture Whenua Māori Act*. The cap on the number of Māori Land Court Judges is eight, including the Chief Judge and the Deputy Chief Judge. Additional temporary Judges and acting Judges may be appointed. At present there is a full complement of eight Māori Land Court Judges and there is one acting Judge.

198 It is also proposed that the Māori Land Court Judges would need a special Warrant to be able to exercise this jurisdiction.

Administrative Resourcing

199 The staffing configuration for the new jurisdiction of the Māori Land Court under the new framework would need to be supported by:

a a Registrar;

b two case managers;

c two hearing managers (who would travel with the Court);

d one administration support person;

e one legal and research counsel; and

f one Judges' personal assistant (or more, depending on whether or not new Judges are co-located).

200 Each new Judge would also need accommodation, IT equipment, and a normal range of judicial support resources (eg, access to libraries etc).

201 As well as the direct costs associated with hearings, experience in the Māori Land Court suggests that there will be a need to supply a range of support services to enhance the success of the hearings. Such support includes providing advisory and information services to participants before, during and after the hearings. It is also anticipated that hearings support will need to include provision for licensed interpreters.

PART 5: IMPROVING SYSTEMS TO PROTECT MĀORI CUSTOMARY RIGHTS AND INTERESTS

Existing Systems

202 The government recognises that there are a number of legislative provisions that currently seek to protect Māori 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 Fisheries Act requiring provision for the input and participation of tangata whenua. More specifically customary fishing regulations recognise and provide for tangata whenua authority to manage customary harvesting of fish and other forms of aquatic life; and

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

203 The table in Appendix C briefly sets out the current regulatory framework across the foreshore and seabed. That table shows that central and local government are involved at various levels on matters related to the coastal marine area. Throughout the consultation and further engagement phase, a lot of comment centred on the need to improve systems for protecting Māori customary rights.

What are some of the impediments?

204 For a number of years Māori have expressed concerns about the inability of the statutory systems to adequately consider Māori views related to the coastal marine area. Māori have most recently voiced these concerns during the foreshore and seabed consultation hui in September 2003, aquaculture hui in April 2003 and the Oceans Policy consultation in 2001.

205 In summary, some of the impediments relating to the Resource Management provisions include:

a Capacity, skills and resources - the quality of relationships between councils and iwi and hapu is often dependent on the capacity of councils and iwi to fund participation;

b Lack of knowledge and appreciation of Māori customary rights;

c Information availability and delivery - iwi and hapu regard access to information as a key factor in enabling greater participation in local government decision-making;

d Lack of use of existing mechanisms such as provisions in the Resource Management Act and Local Government Act 2002. Māori commonly reported that although Māori resource management issues are often included in plans and policy statements, the implementation of the provisions is variable;

e Local government confusion about its obligations under the Treaty of Waitangi - local government does not see itself as the Treaty partner and therefore does not have a clear sense of its role in meeting Treaty obligations under the Resource Management Act and the Local Government Act; and

f Difficulty in identifying iwi and hapu representatives

206 Impediments to implementing customary fishing regulations, can be grouped into three categories: tangata whenua capacity; Crown capacity; and problems with the regulations themselves. Improved capacity will facilitate the resolution of disputes between tangata whenua and accelerate implementation. Officials consider impediments with the regulations themselves are not as significant as the impediments of Māori and officials capacity.

How to improve the existing systems

207 Improvements cannot be undertaken by central government alone. Local government plays a significant decision making and administrative roles across the coastal marine area and must be party to discussion in these areas. Māori too have an important role because it is their customary rights that the government is seeking to protect. Robust and enduring solutions require input from central government, relevant local authorities (including regional and unitary councils) and Māori.

208 The regional working groups will provide a forum for working through these issues, in relation to the coastal marine area. The agreements developed in these groups may well inform practice elsewhere.

Improving the implementation of the customary fishing regulations

209 A range of options to address impediments to the customary fishing regulations has been developed. Officials consider that resource is needed to enable hapū/iwi representatives (who may include kaitiaki) to have effective input and participation in fisheries management processes and to assist hapū/iwi to implement the customary fishing regulations.

210 Possible proposals to improve the implementation of the Customary Fishing regulations include:

a For tangata whenua capacity:

i develop guidelines on what has and has not worked in different regions;

ii resources (eg, contribution to travel and hui costs) to enable iwi/hapu representatives to participate in the regional fisheries forums on a face-to-face basis;

iii fund iwi extension officers to help iwi develop a common policy and management approach to fisheries matters in their region; and

iv provide training and better information about fishing practices and fisheries management processes relevant to their regions to enable kaitiaki and hapü/iwi representatives to better manage customary fishing locally and contribute to wider fisheries management responsibilities;

b for government agencies:

i establish regional fisheries forums to facilitate better relationships and more effective hapü/iwi involvement in fisheries matters;

ii appoint a dedicated project manager who will be accountable for progressing the implementation of the regulations; and

iii establish Treaty relationship facilitator positions. Their role would involve facilitating the appointment of kaitiaki and the notification of boundaries, organising and administrating the regional fisheries forums and acting as facilitators for the relationship.

c The customary fishing regulations:

i develop guidelines to assist tangata whenua to work through disputes;

ii encourage tangata whenua to progress the appointment of kaitiaki (and mataitai reserves) in those parts of their notified area that are not under dispute, eg as Ngai Tai (Eastern Bay of Plenty) have done; and

iii make independent mediation available where tangata whenua have not been able to reach an agreed solution.

211 It is proposed that the Ministry of Fisheries develop a budget bid for consideration by Ministers.

PART 6: PUBLIC ACCESS ACROSS THE FORESHORE AND SEABED

Public Access

212 At present there is, arguably, no legal "right of public access" over foreshore and seabed land that is vested in the Crown. Yet the current law provides a range of avenues that demonstrate the importance of public access to the foreshore and seabed:

a section 6(d) of the Resource Management Act provides that public access is a matter of national importance which must be provided for; and

b section 122(5) of the same Act provides that resource consents may only give a right to "occupy" part of the coastal marine area to the exclusion of others to the extent necessary to achieve the purpose of the consent.

213 The Ministry of Agriculture and Forestry and the Department of Conservation both consider that section 6(d) of the Resource Management is not implemented effectively at the local level. Many submissions highlighted the importance accorded to public access over the foreshore and seabed, and some argued that the protection of this value should be strengthened by the creation of a clear legal right of access.

214 The ability of the public to have access to the foreshore and seabed is presumed, because of the absence of restrictions. The closest the law comes to creating a **right** of access is section 354(3) of the Resource Management Act. This provision provides that an activity on foreshore and seabed land vested in the Crown is allowed, so long as it:

a does not contravene a rule in a regional coastal plan;

b does not interfere with the provisions of a coastal permit;

c does not require a coastal permit; and

d is not contrary to other legislation (eg Defence) or bylaws under the Local Government Act.

215 It is considered, however, that section 354(3) of the Resource Management Act is vague and ambiguous in what it means.

216 It is proposed that the new framework recognises that all New Zealanders have the right to reasonable and appropriate access across foreshore and seabed within the public domain title, subject to the limitations imposed by the law or under powers created by Parliament.

217 It is acknowledged that there may on occasions be reasons that public access to parts of the foreshore or seabed may be limited or even excluded. For example:

a around a working port, safety and biosecurity may dictate that there should be no general public access;

b around an urupa (burial site), cultural sensitivities may dictate that there should be no general public access; and

c the need to protect sensitive wildlife (eg nesting seabirds), and to prevent poaching of rare species such as tuatara, may dictate that there should be no general public access to a particular area.

218 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 deal with this issue. The Resource Management Act has a strong presumption in favour of public access, but also recognises that there may be valid reasons to limit public access. It 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, amongst other things, 'protect Māori cultural values'.

219 It is proposed therefore that public access (both generally and in relation to recognising a customary right) may be limited only to the extent that it is consistent with the Resource Management Act and the New Zealand Coastal Policy Statement.

Navigation

220 The current law allows a right of navigation over foreshore and seabed land that is vested in the Crown. Navigation is allowed except insofar as it is restricted by:

a a regional coastal plan;

b bylaws under the Local Government Act;

c an existing consent; or

d the provisions of other Acts.

221 Restrictions on navigation can be imposed where this is necessary, for example to:

a Protect the interests of the landowner;

b Protect public interests;

c Protect Māori cultural interests;

d Protect the interests of public safety;

e Resolve conflicts between alternative forms of navigation and public access (eg between waterskiing and swimming, jet skis and everyone else);

f Allow an activity to occur that has a resource consent, where restrictions on navigation are essential for security, safety or because vessels would interfere with the activity; and

g Protect pipelines and cables from anchors.

222 In relation to navigation over privately owned foreshore and seabed land, there is legal uncertainty as to whether people have a right to navigate over that land. A Scottish Law Commission study concluded that there is a common law right of navigation on the sea and tidal lochs and rivers, but this has never been confirmed conclusively in New Zealand.

223 "Navigate", in common law, includes anchoring, but does not include carrying out activities such as swimming, or stopping a boat in order to undertake such activities. "Navigation" is passage over water, rather than passage over land. For example, navigation may include sailing on the water over privately owned seabed, but not towing a boat over privately owned foreshore at low tide (because, in the latter case, the activity is over land rather than water).

224 In general, New Zealanders appear to believe that the free right of navigation exists. No concerns have been expressed about private landowners attempting to prevent navigation. However, conflicts over navigation are increasing, with the development of jet skis and other more intrusive recreational craft. There is a clear potential for future conflicts in which landowners attempt to exclude jet skis and other craft from operating over their foreshore and seabed.

225 It is proposed therefore to:

a clarify the law relating to navigation, in order to remove legal doubt; and

b legislate that the law be clarified to provide a right of navigation, except where a regional coastal plan or other legal instrument restricts that right.

226 How navigation should be defined (ie the scope of the right to navigate) requires further analysis. It is proposed that officials be directed to report back to the Ad Hoc Ministerial Group on this issue.

227 It is proposed that the right to navigation would be limited by provisions in regional coastal plans or consents, or by any other provision outlined in other relevant law. If a private landowner wished to restrict navigation they would need to seek a resource consent or a provision in a regulatory instrument.

228 It is also proposed that regional coastal plans should not be prevented from imposing controls on commercial navigation activities where this is appropriate, for example to control commercial tourist operations.

PART 7: PRIVATE RIGHTS AND INTERESTS IN THE FORESHORE AND SEABED

229 Under the proposed new framework, neither the public domain title nor customary titles will affect areas covered by private titles. The public domain title is defined to go around areas in private title, and customary title can only be awarded over areas within the public domain title.

230 Work undertaken by Land Information New Zealand has recently confirmed that there are relatively few private titles over foreshore and seabed. Where they do exist they can be categorised as either titles that are privately owned or titles that are owned by local authorities or similar public bodies. A diagram showing the different ways in which title can intrude into the foreshore and seabed is attached as Appendix B.

Land held by private citizens

231 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. The current areas in private title, although small, do have some impact on public access, and on the ability of government to manage the coastal marine area effectively.

232 There are four categories of foreshore and seabed land that could be privately owned:

a Squatters' rights;

b Areas between mean high water mark and mean high water springs;

c Areas below mean water mark as a result of a Crown grant or survey; and

d Areas below mean high water mark as a result of erosion.

Squatters' rights

233 There is a category of land where property rights may be established by 'squatting' otherwise known as adverse possession. It is not clear whether a person may acquire title over foreshore and seabed land by this means, but it may be possible.

234 In relation to squatters' rights it is proposed to augment the principle of bringing privately owned foreshore and seabed into the public domain on a case-by-case basis, over time by:

a the law being clarified to exclude any possibility of claims for adverse possession over the foreshore and seabed[2]; and

b the new law outlining there will be no provision for compensation in these circumstances.

Areas between high water mark and mean high water springs

235 Currently there is foreshore and seabed land which lies between mean high water mark, which is the normal boundary for titles subject to the Crown Grants Act 1908, and mean high water springs, which is now the common boundary for foreshore and seabed management and regulatory regimes. The size of that area will vary from negligible where the coast is vertical to extensive where there is a large tidal range and a very shelving coast (eg the Tasman Bay side of Farewell Spit). The latest figures from Land Information New Zealand indicate that approximately 12,000 properties have title to mean high water mark. This may include Māori customary land and Māori freehold land.

236 It is proposed that, as this issue raises general access issues to and across the foreshore and seabed in relation to private land, this issue be referred to the Ministry of Agriculture and Forestry for consideration as part of their project on Public Access.

Areas below the mean high water mark issued by Crown grant

237 Land Information New Zealand indicates that there are 32 privately owned seabed parcels, and 16 privately owned foreshore parcels, where survey rather than erosion has created the titles. Over time these properties will be added to the public domain through existing Resource Management subdivision procedures.

238 At present the current law requires that the esplanade reserves provisions will only apply to properties over a certain size. To expedite this process it is proposed to amend the current law to require the creation of esplanade reserves on all coastal subdivisions and on all resource consents for coastal properties.

[2] Law Commission Report no.6, para 358, recommended that adverse title be abolished.

Areas below mean high water mark as a result of erosion

239 Currently there is foreshore and seabed land that falls within areas below the high water mark as a result of erosion. This has occurred in situations where the dry land portion of the title has a fixed seaward boundary that has subsequently eroded. Land Information New Zealand estimate that there are many instances where this may occur. In particular there are 208 privately owned parcels now completely in the seabed as a result of erosion. There are, however, a greater number of privately owned parcels, which will be partially on the foreshore and seabed through erosion, possibly covering up to 670 lineal kilometres.

240 It is proposed to examine these titles over time, to see if any action is warranted to bring them into the public domain.

Land owned by local authorities and similar public bodies

241 Foreshore and seabed land was originally vested in local authorities, often Harbour Boards, for public purposes through a specific Act of Parliament. In 1991, this category of land was generally revested in the Crown through the Foreshore and Seabed Endowment Revesting Act[3]. There were, however, some areas that were not revested.

242 There are five categories of land that fall within this category that require consideration:

a Areas which become foreshore and seabed as a result of erosion;

b Endowments vested for a consideration;

c Roads and road reserves owned by local authorities;

d Reclamations; and

e Land owned by port companies, Lambton Harbour Limited and other public bodies such as Auckland International Airport or Contact Energy.

Areas which become foreshore and seabed as a result of erosion

243 There are some situations where reserves owned by local authorities have become foreshore and seabed as a result of erosion. Any such land that was foreshore and seabed as at 1991 was revested in the Crown by the Foreshore and Seabed Endowment Revesting Act. In the future, through erosion other land may come into this category.

[3] Under the Foreshore and Seabed Endowment Revesting Act 1991, all foreshore and seabed vested in local authorities was revested in the Crown, with a few very limited exceptions. Ownership now lies with the Crown, but this is not always reflected on the certificate of title.

244 It is proposed to legislate to vest those areas which are owned by a local authority, and which become foreshore and seabed as a result of erosion, in the public domain title. This will occur automatically as and when they become foreshore and seabed, without any further process.

Endowments vested for a consideration

245 In 1991, the Foreshore and Seabed Endowment Revesting Act exempted endowments, which had been granted for a "consideration" from being revested in the Crown. In some cases the payment by the local authority was nominal (in one case it was set at one shilling). In other cases it may have been more substantial, although no such cases are known at this stage.

246 It is proposed therefore to legislate that:

a where the vesting was for a nominal consideration, the appropriate foreshore and seabed land would be revested in the public domain title. It is considered that the current holders of the land would not be more affected by the revesting than were those public bodies which had paid nothing, and whose land was revested in 1991; and

b where the vesting was for a valuable consideration, it is appropriate to allow affected public bodies to identify the nature of their interest, in order to trigger a possible compensation process. This could be done after the enactment of the legislation. A similar process was used in 1991 for reclamations, where public bodies had 12 months after the Act came into force in which to seek continuation of the reclamation authority before it was automatically repealed. No applications were received in that case.

Roads and Road Reserves owned by local authorities

247 It seems likely that some roads were deliberately laid out on foreshore or across tidal inlets, and many more paper roads have in fact become foreshore or seabed by erosion (but still retain their status of road). In addition, most roads that run along the immediate coastal fringe will have a seaward boundary of mean high water mark, and therefore will extend into what is now considered foreshore. In general, roads (formed or unformed) belong to the relevant territorial local authority, and are under their control, with the exception of state highways and government roads.

248 It is proposed to legislate that all roads and road reserves in the foreshore and seabed should be "stopped", with the areas becoming public domain. Formed roads and bridges should be granted occupation rights for as long as the land continued to be used for road purposes.

249 The Ministry of Agriculture and Forestry access work is considering roads on dry land, but has not reached the stage of proposals. At this stage, the Ministry of Agriculture and Forestry advise that the solution chosen for foreshore and seabed does not need to be that chosen for dry land, given the difference in circumstances and effects of road stopping.

250 Any existing motor vehicle use on foreshore and seabed that was not a formed road would be able to continue, unless a regional coastal plan restricted it. For example, Ninety Mile Beach is not a surveyed road registered in the land register system as a road (although it is a road in terms of the definition in the Land Transport Act), and this has not caused any problems for users.

251 This approach may be seen by some public access interest groups as a threat to public access. It is considered that some public access interest groups and Māori will generally support this approach as it will remove any potential limitations on the ability for regional coastal plans to restrict the use of motor vehicles on beaches – an activity opposed in many submissions and public statements.

Reclamations

252 Reclamations in the coastal marine area are, for some legal purposes, considered to be foreshore and seabed, despite the fact they are now dry land, or are subject to special legislative provisions that do not apply to normal dry land. This is particularly the case for illegal reclamations.

253 Reclamations may be vested by agreement of the Minister of Conservation under section 355 of the RM Act. That vesting may be in the form of any right, title or interest (although the common types are lease or fee simple title). In the absence of a vesting, the reclaiming body has occupancy rights in perpetuity unless the consent provides otherwise. Many reclaiming bodies are satisfied with that occupation right, and do not seek to have the land vested in them, but others feel that vesting is required (for example to allow the land to be used to provide security for loans or to allow sub-leases to be issued).

254 Since 1991, 25 reclamation vestings have been approved, 10 applications are expected to be submitted shortly, and 36 are under discussion.

255 It is proposed that the status quo should continue to apply to reclamation vestings in the coastal marine area, with two exceptions:

a Any necessary modifications to incorporate effects of the change in the underlying ownership regime for foreshore and seabed; and

b Either the public domain concept and/or the public access work by MAF should provide clearer policies guiding decisions on the vesting of reclamations in order to:

i protect public access along the coastal margin over the long term;

ii ensure that reclamations continue to be used for activities that need to be adjacent to the foreshore, in order to reduce pressure for further reclamations to provide for those uses; and

iii protect any other public interests that are identified during the consent processes that authorised the reclamation.

256 Unless any "public domain" changes resolve the matter directly by making the land no longer Crown land, it would also be desirable to clarify whether the marginal strip provisions apply to reclamations. The Registrar General of Land continues to notate these lands, [redacted] It is proposed that the law be clarified to reflect [redacted] that the marginal strip provisions of the Conservation Act do not apply to reclamations.

s9(2)(h)

257 The Westhaven marina case illustrates the issues that can arise where land is vested in fee simple, and is then subsequently transferred for another purpose. There is considerable public concern in Auckland about the effect on public access (only protected through a covenant) and on future provision of marina related services (not protected).

Land owned by port companies, Lambton Harbour Limited and other public bodies such as Auckland International Airport or Contact Energy

258 This category of land includes:

a Land that was exempted from the Foreshore and Seabed Endowment Revesting Act land and was subsequently sold to another public body, not those which were sold to a private individual or company. It is possible that seabed owned by Auckland International Airport and Contact Energy comes into this category;

b Lambton Harbour Ltd which holds foreshore and seabed which was endowed to it under special legislation, and this land was not revested in 1991; and

c Land which port companies hold as a result of foreshore and seabed being transferred to them.

259 It is proposed that land that falls within this category should in principle be vested in the public domain. It is proposed that officials be directed to report back to Cabinet by April 2004 on the implications of this proposed policy.

PART 8: OVERALL EFFECT OF THE NEW FRAMEWORK ON MĀORI CUSTOMARY RIGHTS

Replacing the current mixed system to give clarity

260 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 debate is also complicated by uncertainty about whether some customary rights might be found to have been extinguished by past government actions, or merely suspended or limited in their operation.

261 The intention with the new framework is to provide a clear and unified system that sets out:

a How customary rights in the foreshore and seabed are able to be established or recognised;

b What the consequences are of any customary rights that might be recognised through the Māori Land Court; and

c How customary rights are integrated with other systems for allocating and regulating activity in the foreshore and seabed.

262 That goal of a clear and unified system can only be achieved by implementing a new statutory framework that completely replaces the two existing routes by which the High Court or the Māori Land Court may be asked to explore customary rights issues in the foreshore and seabed.

263 The intention with the proposed new court jurisdiction just outlined is to create a system that enables the Māori Land Court to examine all aspects of customary rights, and translate them into the new framework for recognition. If the Court identifies rights that cannot be recognised by the new framework, it will have the ability to refer those to the government for consideration.

Implications of the new framework

264 The new framework for the foreshore and seabed has real benefits for all New Zealanders, both Māori and Pakeha. As compared to the current position, the new framework:

a gives enhanced opportunities to Māori for greater involvement in management processes involving the foreshore and seabed, through

the issue of customary titles and the associated development of agreements on how Māori will participate in relevant decision making processes;

b enables the identification and protection of Māori customary rights, which have not been adequately recognised and protected in the past; and

c provides certainty in relation to public access, and in relation to Māori customary rights generally.

265 Some may argue that the new framework involves some extinguishment of customary rights because:

a it will not be possible to obtain a fee simple title in respect of a customary right; or

b the tests, which will have to be met to establish a customary right, will involve common law criteria.

266 In addition, the High Court will no longer have general jurisdiction to consider issues of customary rights in relation to foreshore and seabed.

267 However, it is considered that any extinguishment is of limited practical effect, and is outweighed by the benefits accruing to Māori generally from the new framework. In particular:

a The Court of Appeal suggested that the occasions on which a customary right could justify the issue of a fee simple title are likely to be rare, and that any such title would likely be subject to restrictions in terms of public rights (eg access and navigation) and of existing regulatory regimes (eg Resource Management Act). The removal of that possibility, therefore, has little practical significance in terms of the bundle of rights that could be acquired under the new framework;

b The Māori Land Court will have power to draw the Government's attention to any case where the new framework does not adequately take account of the particular customary right, which it has identified. The Government will then deal directly with the affected group; and

c The incorporation of common law criteria into the statutory tests for customary rights is consistent with the principles that operate in comparable jurisdictions and should not be seen as an extinguishment.

The replacement system and the current mixed systems – do they correlate?

268 The proposals outlined in this paper enable mana and ancestral connection to be recognised through a customary title, which strengthens the foundation for Māori participation in decision-making processes. The proposals also enable particular customary rights in an area, that are not already protected by the fisheries regime, to be protected through the Māori Land Court. These are to be identified according to a set of statutory criteria that includes tikanga Māori and common law criteria.

269 It is possible that there are other types of rights that may be found to have existed until now. In particular, it is possible that a good case for exclusive occupancy may be identified 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 customary rights, according to the common law, are found to have existed up until this reform that are not able to be recognised in the new framework, the new framework clearly outlines that those situations would be drawn to the attention of the government for direct discussion about redress and/or some specific form of recognition.

270 The provision for any lost rights to be the subject of further discussion with the government is an important backstop for these proposals. It ensures that any gap in the new system can be identified and addressed on a case by case basis, informed by the Court's factual findings. The government then has the ability, in discussion with the relevant group, to consider what action it might be able to take to recognise the lost right in some way, or to provide redress.

Implementation of the replacement system

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

272 Legal clarity for the future requires the new legislation to state that:

a full legal and beneficial ownership to foreshore and seabed not subject to a certificate of title, issued or in the process of being issued under the Land Transfer Act, is vested in the people of New Zealand;

b the High Court will no longer have the jurisdiction to hear claims based on common law customary rights in the foreshore and seabed;

c the Māori Land Court will not have jurisdiction to consider claims that foreshore and seabed is customary land within the meaning of section 129 of Te Ture Whenua Māori Act;

d both these jurisdictions are replaced by the new jurisdiction of the Māori Land Court established by the new legislation; and

e private rights and interests in the foreshore and seabed may now only be granted or recognised under the Resource Management Act or Te Ture Whenua Māori Act, or by an Act of Parliament.

273 It is proposed that further consideration be given, as the legislation is drafted, to whether these provisions are sufficient to make clear the government's intention that the new framework for recognising Māori customary rights in foreshore and seabed will replace any common law rights. If further clarity is needed in the legislation, section 10(d) of the Treaty of Waitangi (Fisheries Claims) Settlement Act provides a precedent that could be adapted to the present context.

PART 9: OTHER ISSUES

Confirmation of legislative priority

274 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 a priority 2 (to be passed in 2004) on the government's legislation programme for 2004.

Ad hoc Ministerial Group

275 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 is established and authorised to make further legislative detailed decisions where necessary. It is proposed that the ad hoc group comprise the Prime Minister, Deputy Prime Minister (lead), Attorney General and the Minister of Māori Affairs.

Release of submissions and submissions analysis

276 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. The analysis of submissions would also be made available.

Public release of government policy decisions

277 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 paper, 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 this Cabinet paper outlining the government's policy on foreshore and seabed be made publicly available and provided to the Waitangi Tribunal, 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

278 There are a number of other policy issues that have been put on hold awaiting final policy decisions on foreshore and seabed policy, namely:

a the Oceans policy,

b Marine Reserves Bill; and

c Aquaculture;

279 In addition, this section outlines further work to be completed on the implications of navigable riverbeds as a result of foreshore and seabed decisions.

Oceans policy

280 It is proposed that the Oceans policy consultation should be delayed until after foreshore and seabed issues are more clearly resolved. In the meantime, the Ministry for the Environment will continue to resource a small team of officials to maintain readiness for consultation and undertake further in-house work on key aspects of the draft policy.

Marine Reserves Bill

281 The Marine Reserves Bill, presently being considered by the Local Government and Environment Select Committee, includes provisions for the consideration of Māori customary rights and interests in making decisions on marine reserves and the participation of affected iwi and hapu in the management of reserves.

282 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 reviewed in order to ensure that they are appropriately aligned with the decisions taken over foreshore and seabed. 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.

Aquaculture

283 Aquaculture reform is considered to be a separate issue from foreshore and seabed policy and will therefore be progressed in due course.

Navigable Riverbeds

284 A related issue is the Crown's ownership of the beds of navigable rivers. These river beds were vested in the Crown initially by the Coal Mines Act Amendment Act 1903, which was repeated in various amendment Acts, and is now saved under the Resource Management Act 1991. These statutory provisions vest beneficial property in the beds of navigable rivers in the Crown, subject to any express grants since made. However there are many legal difficulties with the concept of navigability, which have been recognised for many years. It is proposed that Ministers direct officials to undertake further work on the issue of ownership of navigable riverbeds, and report back by December 2004 on options for clarifying the law. The report should also address the administration of the riverbeds, and the implications of the repeal in 1991 of section 150 of the Harbours Act (which prevented the alienation of riverbeds).

285 A further related issue is access along riverbeds. It is proposed that this issue be left for resolution though the MAF access work.

Establishment of a unit in DPMC

286 This paper has already proposed that a unit be established in the Department of the Prime Minister and Cabinet to co-ordinate central government's input into the proposed regional working groups. It is also proposed that this unit develop the legislation required to give effect to these proposals and to support its passage through the House.

287 It is proposed that the Department of the Prime Minister and Cabinet report to the Cabinet Policy Committee by the end of January 2004 on any administrative and financial matters associated with establishing this unit.

Consultation

288 The following departments have been consulted on earlier drafts of this paper: The 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, Department of Internal Affairs (Local Government Policy), Ministry of Economic Development and the Crown Law Office.

Financial Implications

289 Financial implications will be addressed in a later paper.

Human Rights

290 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

291 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 a single bill be drafted with a range of schedules that consequentially amend other legislation as necessary;

b the Foreshore and Seabed Bill receive a priority 2 (must be passed in 2004) on the government's legislation programme for 2004.

Regulatory Impact and Compliance Cost Statement

292 A regulatory impact statement is attached as Appendix D.

Treaty Implications

293 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 are affirmed by the Treaty of Waitangi. These proposals also integrate those rights with the more general regulatory framework for managing this important national resource.

294 The government considers that the proposals set out in this paper represent a framework that will enable a reasonable balance to be struck between the need to clarify the law in this area whilst at the same time making provision for the recognition and protection of Māori customary rights.

295 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

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

PART 10: RECOMMENDATIONS

297 It is recommended that Cabinet:

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, meetings with interest/sector groups, and public meetings which were organised by government Members of Parliament;

2 **note** that, as at 9 December 2003, over 2100 submissions were received on the government proposals for consultation;

3 **note** that the analysis of submissions is attached as 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 recognising rights and interests in the foreshore and seabed;

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

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

9 **note** that the possibility of the Maori Land Court creating private ownership in the foreshore and seabed through the issue of a Maori customary land title is inconsistent with the government's general policy outlined in recommendation 8;

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

10.1 the foreshore and seabed should generally be public domain, with open access and use for all New Zealanders (subject to reasonable and appropriate limitations imposed by the law or under powers created by Parliament);

10.2 there must be the capacity for customary rights to the foreshore and seabed to be identified and protected in an appropriate way; and

10.3 Court processes for considering claims of customary rights must not result in effective ownership of the foreshore and seabed;

Recognising public interests/rights

11 **agree** to repeal the current provisions in law which vest the foreshore and seabed in the Crown and replace them with provisions vesting the full beneficial ownership of the foreshore and seabed in the people of New Zealand;

12 **agree** that the new form of public domain title vesting the foreshore and seabed in the people of New Zealand will:

12.1 confer full legal and beneficial ownership in the foreshore and seabed;

12.2 make it clear that all New Zealanders have the right to reasonable and appropriate access across the foreshore and seabed;

12.3 provide that the foreshore and seabed is to be held in perpetuity by the people of New Zealand, and is not able to be sold or disposed of, other than by or under an Act of Parliament;

12.4 provide that the government has full administrative rights and holds all management and landowner responsibilities on behalf of all New Zealanders;

12.5 apply across all foreshore and seabed areas except those covered by private titles that have been or are in the process of being registered under the Land Transfer Act;

13 **agree** that the new legislation should confirm that it is the responsibility of government to ensure that the foreshore and seabed is sustainably managed in the best interests of all New Zealanders;

Boundaries of the public domain title

14 **agree** that the landward boundary of the public domain title will be mean high water springs, unless a private title extends below that line, as this line:

14.1 is close to the public understanding of the foreshore,

14.2 is consistent with providing public access; and

14.3 is consistent with the Resource Management Act definition of the line between dry land and the coastal marine area;

15 **agree** that the coastal marine area boundary as defined by section 2 of the Resource Management Act be used as the boundary of the public domain title at river mouths;

16 **direct** officials to undertake further work on landward boundaries concerning lagoons and report to the ad hoc Ministerial Group by the end of January 2004;

Recognising and protecting Maori customary interests / rights

17 **agree** to amend Te Ture Whenua Māori Act to provide a new statutory code for the Māori Land Court to identify and recognise Māori customary rights;

18 **agree** that the Māori Land Court be able to award a customary title over areas of the foreshore and seabed in the public domain title, that would sit alongside the public domain title, and would have two components:

18.1 recognition of the mana and ancestral connection of the relevant whānau, hapū or iwi over particular areas of foreshore and seabed; and

18.2 identification and recognition of specific customary rights of whānau, hapū or iwi that would be annotated on the title;

19 **agree** that the awarding of a customary title over an area will not affect the rights of all New Zealanders to appropriate and reasonable access across the foreshore and seabed;

20 **agree** that the new framework will need to be supported by practical initiatives to develop effective working relationships between the holders of customary titles and central and local government decision makers;

21 **agree** that the new framework for recognising and protecting Maori customary interests / rights under Te Ture Whenua Māori Act will replace all previous common law and statutory systems for recognising rights, including customary rights, in the foreshore and seabed;

Recognising mana and ancestral connection

The holder of a customary title

22 **agree** that a customary title will be able to be recognised at whānau, hapu or iwi levels;

23 **note** that it is expected that in most instances customary titles will be sought by hapū or iwi;

24 **direct** Te Puni Kokiri, in consultation with the Department of the Prime Minister and Cabinet, to report on which type of governance entity could hold a customary title by late January 2004;

The effect of a customary title

25 **agree** that the holders of customary titles will have an enhanced opportunity to participate in decision making processes concerning the foreshore and seabed;

Establishing regional working groups

26 **agree** that joint central government, local authority and Maori working groups be established at the regional level, based on the sixteen regional / unitary council boundaries;

27 **agree** that the working groups will be required to examine how to enhance participation opportunities and practice for Maori in decision making practices affecting the coastal marine area can be enhanced;

28 **direct** the Department of the Prime Minister and Cabinet to report to Cabinet Policy Committee by the end of January 2004 with proposals on the range of participation mechanisms that the working groups would be able to consider;

29 **agree** that the new legislation should require relevant local authorities to develop an agreement with relevant iwi or hapu organisations, similar to the triennial agreement that local authorities must develop under the Local Government Act 2002, concerning the processes by which iwi and hapu will be involved in the management of the coastal marine area;

30 **agree** that the legislation will require these agreements to be referred to the Minister of Conservation, who will consider them in consultation with the Ministers of Local Government and of Maori Affairs;

31 **agree** that, following Ministerial consideration, the agreements be formally promulgated by an Order in Council so that they are legally enforceable;

Taking immediate steps to develop effective relationships

32 **note** that in many areas there are already reasonably developed protocols and understandings in place or under discussion on how Maori will work with government departments on particular issues, such as the implementation of the customary fishing regulations;

33 **agree** that the government should begin work immediately on the development of practical agreements on how particular iwi and hapu will be involved in decision making processes, drawing on the relationships already established or under development between government agencies and iwi and hapu;

34 **agree** that the government will give priority to building on and developing those existing relationships and protocols, both in the fishing context and more generally, to ensure that existing levels of customary management or guardianship responsibilities are maintained, particularly in areas where Maori continue to maintain a very strong and active association with foreshore and seabed areas.

35 **agree** that a unit be established in the Department of the Prime Minister and Cabinet in early 2004 to:

35.1 provide any policy and administrative support required for the regional working groups;

35.2 co-ordinate central government participation in the regional working groups; and

35.3 prepare material on best practice and procedural options to assist the working groups;

36 **direct** the Department of the Prime Minister and Cabinet, in consultation with relevant departments, to provide further advice to Cabinet Policy Committee in January 2004 on the detailed implementation of the regional working groups, including the establishment of the unit and the support that may need to be provided to enable Maori and local authorities to participate effectively;

Statutory Commission to identify customary titles

37 **agree** to establish an independent statutory Commission to identify who holds mana and ancestral connection to the foreshore and seabed and make recommendations to the Maori Land Court so that the Court can proceed to issue customary titles;

38 **agree** that the independent statutory Commission will undertake an inquiry on a regional basis as defined by the areas of association with original waka;

39 **agree** that the independent statutory Commission consist of no less than five members and no more than seven members, one of whom should be appointed as Chair;

40 **agree** that members be appointed for a fixed term of office, not exceeding two years;

41 **agree** that the Commission be able to co-opt up to two additional members for particular purposes;

Role of the Maori Land Court in protecting Maori customary rights

42 **agree** to amend Te Ture Whenua Maori Act 1993 to remove the ability to obtain an order that foreshore and seabed land is Maori customary land;

43 **agree** that the:

43.1 existing appellate structure from Maori Land Court decisions should apply to this new jurisdiction;

43.2 appeal bodies have the same tools available to them as the new division of the Maori Land Court;

Recognising and protecting specific Maori customary rights

44 **agree** that the test the Maori Land Court must use, when examining whether a customary right in the foreshore and seabed should be identified and recognised, be based on the current 'held in accordance with tikanga Maori' test, augmented by factors consistent with the common law;

45 **agree** that the new test outlined in recommendation 44 include:

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

45.2 a continuity test to be applied in determining the existence of a specific customary right;

45.3 guidance on the limits to the way in which a customary right may be exercised in a contemporary context;

45.4 guidance on what actions in the past might have led to the extinguishment of any potential customary right;;

46 **direct** officials to report as soon as possible on the details of the statutory criteria to be legislated;

Scope of Maori customary rights

47 **note** that there are some statutes already in place enabling the protection of customary rights;

48 **agree** that the new framework will not interfere with these existing statutes;

49 **agree** that any existing rights that fall within the Treaty of Waitangi Fisheries Settlement be dealt with in that regime, rather than under the new framework;

50 **note** that this will not preclude the Maori Land Court from making linkages with the customary fishing regulations, and that any rights obtained through the customary fishing regulations could be recorded on a customary title;

51 **agree** that any customary rights concerning marine mammals and wildlife be dealt with by the regimes that cover those issues;

52 **agree** that some customary rights may not be able to be given full expression and protection:

52.1 due to the Crown's territorial jurisdiction being governed by international law;

52.2 if they interfere with the national interest, including defence and infrastructure requirements;

The nature of the customary right

53 **agree** that the customary rights will be able to be held at whānau, hapū and iwi level and will be communal;

54 **agree** that the customary rights are generally inalienable, but can be limited or suspended in accordance with tikanga Māori and the consent of the customary right holder;

The protection of customary rights prior to their determination

55 **agree** that statutory decisions are able to be proceeded with in respect of resource consent applications, including the requirement to consider the effect on Maori, if no customary right has been granted and there is no application before the Maori Land Court for such a right;

56 **agree** that where there is an application before the Maori Land Court, it is appropriate for statutory decision makers to take account of that claimed legal right as they consider applications for resource consents that may impinge upon that right;

57 **agree** that officials provide further advice on how decision makers might appropriately take account of a current application for a customary right;

Interface of customary rights with statutes that prohibit activities

58 **agree** that the Maori Land Court not be able to authorise an activity that is prohibited by another statute;

59 **agree** that if the Maori Land Court finds that a customary right exists that includes such an activity as set out in recommendation 63, the Court would refer the issue to the government;

60 **note** that under some statutes, the government can authorise exceptions to the general prohibition;

61 **note** that the government will need to consider whether an exception should be authorised for the customary right holder, taking into account the policy interest protected by the regulatory regime;

62 **agree** that in making a decision on exceptions the government would consider the following factors:

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

62.2 the impact of the loss of the customary right on the integrity of customary practice and exercise of tikanga;

62.3 the public policy arguments and any international obligations that have led to the enactment of the general prohibition; and

62.4 the impact on other interests as defined by the relevant regulatory regime.

Interface with the Resource Management Act

63 **note** that the broad aim of the new framework is to protect Maori customary rights while sustainably managing natural and physical resources of the foreshore and seabed;

64 **agree** that the Resource Management Act processes should only be able to restrict or completely prohibit the customary activity for the purposes of ensuring sustainability;

65 **agree** that where the exercise of a customary right may be completely prohibited or declined, the government, rather than the local authority, should be the decision maker;

66 **agree** that where the customary rights holder was refused permission to undertake the activity, an additional test be added to the Resource Management Act to require a check that the refusal was reasonable and required by the sustainability principles of the Resource Management Act;

67 **agree** that the Minister of Conservation, in consultation with the Minister of Maori Affairs, make the final decision in respect of recommendation 70;

68 **agree** that if the Maori Land Court gives legal recognition to an activity where the Resource Management Act regulates the conduct of the activity and how it can be exercised:

68.1 the finding of the Maori Land Court that a specific customary right exists will provide the legal authority to conduct that activity;

68.2 no further authority to undertake that activity would be required under the Resource Management Act;

68.3 the Resource Management Act would regulate the conduct of the activity to ensure that it was carried out in a manner that did not impact on the sustainable management of this country's natural and physical resources;

69 **agree** that if the activity associated with a customary right has been fully allocated by the relevant local authority or other authorised decision maker under the Resource Management Act, the customary right holder's rights would be suspended until the relevant coastal permit expired;

70 **agree** that where the Maori Land Court is not able to recognise a customary right, as outlined above, the Maori Land Court will notify the government of the situation;

71 **agree** that as a consequence of recommendation 66, the government would:

71.1 acknowledge the Maori Land Court's findings;

71.2 move to discuss the situation directly with those holding the customary right, including the possibility of providing redress and/or some specific form of recognition;

72 **agree** that the general principle guiding the amendments to the Resource Management Act should be that any decisions on the allocation of space, whether through zoning rules in plans or through individual permit applications, will need to consider at the outset the effect on any customary rights in the area;

73 **agree** that when another person seeks a consent for a new activity, the consent authority must assess whether the new activity would have a significant impact on a customary right;

74 **agree** that an application for a new activity which would have a significant impact on a customary right should be declined, unless the holder of the customary right agrees to support the application;

Protecting customary rights when other decisions are made

75 **agree** that existing resource consents would not be affected by a newly recognised customary right;

76 **note** that tests will need to be developed to determine whether a new activity / plan is likely to restrict or significantly constrain the exercise of a customary right;

Transition issues to recognising customary rights

77 **agree** that the new framework that has been developed to recognise customary rights and interests in the foreshore and seabed apply to all existing new applications before the Maori Land Court;

78 **agree** that the new legislation include provisions to ensure that the Minister of Conservation is able to proceed to consider existing and future applications with respect to the revesting of reclaimed foreshore and seabed land, but that the Maori Land Court be provided with jurisdiction to notify the government if any customary rights are subsequently identified in relation to that land;

Process to identify customary rights

79 **agree** that any group, which holds a customary title, claiming a customary right may apply to the Maori Land Court;

80 **agree** that the Maori Land Court may only recognise a customary right held collectively;

81 **agree** that applicants could present evidence of a customary fishing activity in the area in support of their claim for additional customary use rights;

82 **agree** that the Maori Land Court be required to notify:

82.1 any party provided with notification of the application from which the declaration arose;

82.2 relevant local authorities who will be required to attach the orders to the relevant district plans and to notify any consent holders that may be affected when their consents expire;

82.3 relevant government departments;

83 **agree** that it will be necessary to ensure formal public notification of the order for a customary right made by the Maori Land Court;

84 **agree** that this be set through Gazette notice;

85 **agree** that the Maori Land Court be required to manage a public register that records:

85.1 all customary titles issued;

85.2 the identity of the holder of any such customary title;

85.3 the area to which the customary title relates; and

85.4 the details of any customary rights identified in relation to the area to which the title relates;

86 **agree** that the public register be open for public inspection and provide a complete and accurate record of all customary titles issued by the Maori Land Court;

87 **agree** that the Māori Land Court have the power to refer to government for consideration any additional issue arising in the course of the hearing;

88 **agree** that the Maori Land Court have the authority to amend the identity of the holder of a customary right on the application of the rights holder;

89 **agree** that the power to amend the identity of the holder of a customary right is not intended to enable the right to be alienated;

90 **agree** that a customary right holder should be able to apply to the Māori Land Court to remove a specific right from a customary title;

91 **agree** that the Māori Land Court would need to be satisfied that the customary right holder had made the decision to remove the right through a transparent and accountable process;

92 **agree** that an Order from the Court to remove a customary right from a title would need to be publicly notified;

93 **agree** that a customary right that had been formally removed from a customary title would not be able to be reinstated at some later stage;

Improving existing systems to protect Maori customary rights

94 **note** that consultation on the foreshore and seabed issues, and other consultation processes, have highlighted concerns with the effectiveness of legislative provisions designed to protect Māori customary rights and ancestral association;

95 **note** that the regional working groups to be established to develop agreements on the way in which Māori will participate in decision making processes concerned with the coastal marine area will need to examine some of these issues;

96 **note** that the Ministry of Fisheries is developing a budget bid for consideration by Ministers, to enable it to address the key capacity issues that it considers are hindering the implementation of the customary fishing regulations;

Public Access

97 **note** that there is no clear legal right of public access at present over areas of foreshore and seabed vested in the Crown;

98 **agree** that the new legislation should recognise that all New Zealanders have the right to reasonable and appropriate access across the foreshore and seabed, subject to limitations imposed by the law or under powers created by Parliament;

99 **agree** to legislate to provide for a right of navigation, except where a regional coastal plan or other legal instrument restricts that right;

Addressing private interests in the foreshore and seabed

100 **note** there are four categories of foreshore and seabed land that could be held in private title:

100.1 squatters' rights;

100.2 areas between mean high water mark and mean high water springs;

100.3 areas below mean high water mark as a result of a Crown grant or survey; and

100.4 areas below mean high water mark as a result of erosion;

101 **agree**, in relation to squatters' rights, to augment the principle of bringing privately-owned foreshore and seabed into the public domain on a case-by-case basis by:

101.1 the law being clarified to exclude any possibility of any claims for adverse possession over the foreshore and seabed;

101.2 the new law outlining there will be no provision for compensation in these circumstances;

102 **agree** that the question of foreshore and seabed areas between high water mark and mean high water springs be referred to the Ministry of Agriculture and Forestry, for further consideration in the context of the ongoing policy work on public access over private land;

103 **agree** to amend the current law to require esplanade reserves on all coastal subdivisions and on all resource consents for coastal properties;

104 **agree** that, in relation to areas of the foreshore and seabed land that are below the mean high water mark as a result of erosion, the government will consider whether these areas need to be brought into the public domain on a case by case basis, over time;

Land owned by local authorities and similar public bodies

105 **agree** to vest those areas which are owned by a local authority and become foreshore and seabed as a result of erosion in the public domain title, as and when they become foreshore and seabed, without any further process;

106 **agree** that foreshore and seabed be vested in public domain title if its vesting in a local authority was for nominal consideration;

107 **agree** that, if the vesting in the local authority was for a valuable consideration, the foreshore and seabed land should be re-vested in the public domain title and that the affected public bodies should be given a period of twelve months in which to make an application for compensation;

108 **agree** that all roads and roads reserves in foreshore and seabed should become part of the public domain title and that formed roads and bridges should be granted occupation rights for as long as the land is being used as a road;

109 **agree** that reclamation vestings in the coastal marine area should continue to operate in accordance with the current system, subject to any modifications necessary to reflect the change in the underlying status of the foreshore and seabed to public domain title;

110 **direct** officials from the Department of Conservation and Ministry of Agriculture and Forestry to provide further advice on the need for statutory or policy guidance to inform decisions on reclamation vestings;

111 **agree** to amend the Conservation Act to clarify that the marginal strip provisions in that Act do not apply to reclamations;

112 **direct** officials from the Department of Conservation to report to Cabinet by April 2004 with advice on steps that might be taken to vest in the public domain title foreshore and seabed land that is currently owned by port companies, Lambton Harbour Ltd, and other public bodies such as Auckland International Airport and Contact Energy;

Effect of the new framework on customary rights

113 **agree** that it is necessary for the new framework to provide a clear and unified system for establishing rights in the foreshore and seabed;

114 **agree** that the new legislation should state that:

114.1 full legal and beneficial ownership is vested in the people of New Zealand;

114.2 the High Court will no longer have jurisdiction to hear claims based on common law customary rights in the foreshore and seabed;

114.3 the Maori Land Court does not have jurisdiction to consider claims that the foreshore and seabed is customary land;

114.4 both these jurisdictions are replaced by the new jurisdiction of the Maori Land Court established by the new legislation;

114.5 private rights and interests in the foreshore and seabed may now only be granted or recognised under the Resource Management Act or Te Ture Whenua Maori Act, or by an Act of Parliament;

115 **agree** that further consideration be given, as the legislation is drafted, to whether these provisions are sufficient to make clear the government's intention that the new framework will replace any relevant common law rights;

116 **note** that, if further clarification is required in the legislation, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act provides a precedent that could be adapted for this legislation;

Foreshore and Seabed: Other issues

Riverbeds

117 **direct** officials from the Department of Conservation, Ministry for the Environment and Crown Law Office to undertake further work on the question of the ownership of navigable riverbeds and to report to Cabinet Policy Committee by December 2004 on options for clarifying the law;

Legislation

118 **note** that to give effect to any policy decisions on foreshore and seabed that a Bill will need to be drafted in a timely fashion to enable it to be introduced in March 2004;

119 **agree** that the Foreshore and Seabed Bill receive a priority 2 (must be passed in 2004) on the government's legislation programme for 2004;

Ad Hoc Ministerial Group

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

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

Release of submissions, submissions analysis and Cabinet papers

122 **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;

123 **agree** that the analysis of submissions be made generally available;

124 **agree** that the final 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;

Publicity

125 **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

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

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

128 **note** that aquaculture reform is being progressed separately from the foreshore and seabed issues;

Establishment of a unit in DPMC

129 **agree** that the Department of the Prime Minister and Cabinet should establish a unit to:

129.1 co-ordinate central government's input into the regional working groups;

129.2 develop the legislation required to give effect to the foreshore and seabed policy proposals and to support its passage through the House;

130 **direct** the Department of the Prime Minister and Cabinet to report to Cabinet Policy Committee by the end of January 2004 on any administrative and financial matters associated with establishing a new unit on foreshore and seabed issues

Hon Dr Michael Cullen
Deputy Prime Minister

APPENDIX C

DECISION MAKER	POLICY/IMPLEMENTATION	PROCESSS OR RELATED ACTIVITIES	POSSIBLE IMPROVEMENTS
Minister of Conservation	NZ Coastal Policy Statement	Statement drafted by DoC Draft policy publicly notified Submissions heard by a Board of Inquiry Board makes recommendations Minister approves	Statutory right to be involved in drafting Membership on Board of Inquiry
Iwi Authority	Related to CMA policy	Iwi management plans	Resources for iwi to develop plans
Minister of Fisheries	Related to CMA policy	Taiapure/Mataitai	Take up of Kaitiaki roles
Regional Council	Regional Policy Statements	Draft policy publicly notified Submissions Council redrafts Recommendations to Council Council approves	Hapū/Iwi technical committee for input Active round of dialogue
Minister of Conservation (prepared by Regional Council)	Regional Coastal Plans	Draft coastal plan Draft plan publicly notified Submissions heard by Hearing Committee Recommendations to Council Council refers to Minister for approval	Hapū/Iwi technical committee for input Active round of dialogue Membership on Hearing Committee
Minister of Conservation	Resource Consents (RC) RC: Restricted Coastal Activities	Listing of restricted activities Notify affected parties, including iwi Mandatory Hearing Committee Minister appoints person to Hearing Comm	Add customary rights/interests Membership on Hearing Committees Specific report on Māori interests Could appoint Māori to Committee
Regional Council	RC: Other Consents	Notify affected parties, including iwi Hearing Committee; OR Regional Council Committee; OR Commissioner	Membership on Hearing Committees Membership on or advice to Committee Māori Commissioner(s)

APPENDIX D

REGULATORY IMPACT STATEMENT

STATEMENT OF THE NATURE AND MAGNITUDE OF THE PROBLEM AND THE NEED FOR GOVERNMENT ACTION

The Crown has for many years operated on the basis that both the foreshore and seabed were in general vested in, or owned by, the Crown.

In 1997 some iwi from the top of the South Island were concerned about the way in which the marine farming, or aquaculture, was developing in the Marlborough Sounds. They brought a test case to the Maori Land Court, asking the Court to determine that areas of the foreshore and seabed were Maori customary land.

On 19 June 2003, the Court of Appeal decided that the Maori Land Court has the jurisdiction to hear claims, and to investigate the status of "land" in the foreshore and seabed. The Court did not make any decision about whether the particular claim would succeed.

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 unintended possibility that Te Ture Whenua Māori Act might provide an additional route for private ownership of the foreshore and seabed. This form of ownership 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.

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.

The government considers that the Court of Appeal decision has highlighted that Te Ture Whenua Maori Act as currently written is not adequate for dealing with these issues. In particular, the lack of adequate tools for recognising Maori customary rights and interests, and the potential for private title to be issued over the foreshore and seabed which has come about as a result, has the potential to destabilise the assumptions which have underpinned other legislation and activity for many years.

STATEMENT OF THE PUBLIC POLICY OBJECTIVES

The following principles form the basis upon which legislation to resolve the foreshore and seabed issue can be based upon:

- The foreshore and seabed should be public domain, with open access and use for all New Zealanders (Principle of Access)
- The Crown is responsible for regulating the use of the foreshore and seabed, on behalf of all present and future generations of New Zealanders (Principle of Regulation)
- Processes should exist to enable the customary interests of whanau, hapu and iwi in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected (Principle of Protection)
- There should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions (Principle of Certainty)

STATEMENT OF FEASIBLE OPTIONS THAT MAY CONSTITUTE A VIABLE MEANS FOR ACHIEVING THE DESIRED OBJECTIVES

Status Quo

This option would involve:

- No changes to current law that vests the foreshore and seabed in the Crown. This would mean that it would be perceived that the Crown only has a radical title over the foreshore and seabed, and that title was encumbered by a Maori customary title;
- Public access across and along foreshore and seabed that was assumed to be in Crown ownership would remain as a general rule than as a legal right;
- The common law right of navigation across private title in the foreshore and seabed would remain unclear;
- Resource consents for the use of the foreshore and seabed would proceed amongst some administrative confusion and uncertainty, because it is not clear how private ownership of the foreshore and seabed would affect development and activity in the sea itself, and other legal rights;
- Allow applications to proceed before the High Court to investigate the nature and extent of Maori customary rights, based on the common law, to proceed. This could result in several different types of common law rights being developed in these areas. In addition, under the status quo, applications before the Maori Land Court would continue to proceed to an inquiry to determine whether the foreshore and seabed land in question is Maori customary land. This leaves it potentially open for the Maori Land Court to issue a private title over the foreshore and seabed. This is an unintended consequence of Te Ture Whenua Maori Act. At this stage it is unclear how those various rights would be reconciled with one another and with the current regulatory systems in place.

Preferred option

This option involves the development of a new framework to provide a clear and unified system for establishing rights in the foreshore and seabed. The intention with the new framework is to provide a clear and unified system:

- for establishing rights and interests in the foreshore and seabed;
- which works through the consequences of any customary rights that might be recognised through the Maori Land Court; and
- which works through how Maori customary rights and interests correlate with other systems for allocating and regulating activity in the foreshore and seabed.

As a result, the government's framework has several inter-related components:

1 In relation to the establishment of a framework that integrates all rights/interests in the foreshore and seabed this would involve:

   a Current provisions in law which vest the foreshore and seabed in the Crown would be repealed and replaced with a public domain title which vests the full legal and beneficial ownership of the land in the people of New Zealand. This vesting will apply to all foreshore and seabed areas except those in private Land Transfer Act titles.

   b The Resource Management Act remaining as the current system for regulating the use of the foreshore and seabed.

2 In relation to recognising and protecting Māori customary rights/interests, this would involve:

   a The Maori Land Court will be able to award a customary title that would sit alongside the public domain title. The title has two components:

      i it recognises the mana and ancestral connection of the relevant whānau, hapū or iwi grouping over particular areas of the foreshore and seabed; and

      ii it identifies and recognises specific customary rights at the whānau, hapū and/or iwi level. Those rights would be annotated on the customary title.

   b The customary title would not alter reasonable and appropriate public access over that area.

   c An independent statutory Commission would be created to expedite the identification of those that hold mana and ancestral connection of the foreshore and seabed areas. The Commission would consist of 5-7 members and be appointed for a fixed term of two years. It would undertake an inquiry on a regional basis. Iwi would not be compelled to

participate in the process. The Commission then makes recommendations to the Māori Land Court on where customary titles should be issued.

d amending Te Ture Whenua Māori Act to provide a new statutory code for the Māori Land Court to identify and recognise customary rights. A set of statutory criteria which build on the current tikanga Māori test and incorporates common law tests would be used by the Māori Land Court.

e The nature of the customary right to be recognised is communal and inalienable. It can be recognised at whānau, hapū and iwi levels, and can be limited or suspended.

f The Māori Land Court will not be able to authorise an activity that was prohibited by an Act of Parliament. If the Court finds that such a customary right exists that is covered by such an Act, the Court would refer the issue to the government.

g While that investigation proceeds, statutory decision makers will continue to make decisions on resource consent applications. Considerations ought to consider the effect on Māori, particularly if a claim is before the Māori Land Court.

h The Māori Land Court customary rights declaration will provide general authority for a right holder to undertake an activity. The Resource Management Act processes should only be able to restrict or prohibit the customary activity for the purposes of ensuring sustainability.

3 In relation to improving systems to protect Maori customary rights, this would involve:

a The government would begin work immediately on the development of practical agreements on how particular hapū/iwi will be involved in decision making processes. The focus would be on ensuring that existing management/guardianship roles are maintained.

b at least 16 Working Groups comprising central government, local government and Māori will be established at the Regional/Unitary Council level. The purpose of the Working Groups is to reach an agreement on what mechanisms are to be used to improve Māori participation in the management of the coastal marina area.

c The Ministry of Fisheries will develop proposals to implement the Customary Fishing regulations. The proposals would include improving capacity, provision of information and resources.

4 Access across the foreshore and seabed

a The government will legislate for reasonable and appropriate access over the foreshore and seabed. There may on occasions be reasons that public access to parts of the foreshore and seabed may be limited or even excluded, for example working ports, urupa and sensitive wildlife areas (e.g. nesting of seabirds).

5 Private rights and interests

a Work undertaken by Land Information New Zealand recently confirmed that there are relatively few private titles over the foreshore and seabed. The government is working through these titles category by category, considering whether and how they might be brought into the public domain over time.

STATEMENT OF THE NET BENEFIT OF THIS PROPOSAL

The preferred option:

- Establishes a new framework for integrating all rights and interests in the foreshore and seabed;
- Provides all New Zealanders with the legal right to reasonable and appropriate access across the foreshore and seabed vested in the people of New Zealand;
- Provides certainty to private property holders that their rights and interests in the foreshore and seabed will generally be upheld;
- provides certainty for relevant local government and central government decision makers that they can continue to proceed to make decisions concerning the use of the foreshore and seabed;
- gives enhanced opportunities to Maori for greater involvement in management processes involving the foreshore and seabed through the issue of customary titles;
- enables the identification and protection of Maori customary rights that are not adequately recognised and protected at present;
- provides certainty that all New Zealanders will have the right to access the foreshore and seabed that is held in the public domain title;
- provides certainty to all New Zealanders about what will happen once a Maori customary right has been identified and protected by the Maori Land Court;
- provides an opportunity for local solutions to local issues to be developed collaboratively between Maori, central and local government;

It is considered that there will be no material impact on business.

Consultation

The development of a consultation document outlining the issues and principles that could form the basis of legislation involved work between officials from the Department of Prime Minister & Cabinet, Te Puni Kokiri, and other Government departments. On 18 August 2003, a consultation document was released entitled "Protecting Public Access and Customary Rights: Government Proposals for Consultation", for public comment. That document was open for submissions for 6 weeks until 3 October 2003.

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. The 0508 Foreshore telephone line fielded over 650 calls for further information.

Over 60 meetings were held with the following groups:

- 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;
- Interest/sector groups - which represented a wide range of recreational, sports, fishing interests and local government; and
- Public meetings organised by government Members of Parliament, where people demonstrated an interest in the issue.

The information provided from these meetings has been used to assist in the refinement of the government policy proposals.

2171 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.

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.

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.

The following departments have participated in the development of the proposals outlined in the Cabinet paper:

Department of Prime Minister and Cabinet, Te Puni Kokiri, Ministry of Justice, Department of Conservation, Ministry of Fisheries, Ministry for the Environment, The Treasury, Ministry of Economic Development, Department of Internal Affairs, and Crown Law.

Ownership of the foreshore and seabed

① Private title with council owned esplanade reserve surveyed to MHWS mark under RM Act

② Private title surveyed to MHWS mark, under RM Act

③ Private title surveyed to MLW mark or other line below MHW mark – very rare

④ Private title surveyed to MHW mark, so a narrow strip of the foreshore is privately owned even when erosion occurs

⑤ Private title with boundary fixed to an esplanade reserve. When erosion occurs, the boundary does not move (because it's fixed), so title now includes foreshore (and possibly some seabed)

⑥ Private title with boundary fixed to a legal road. When erosion occurs, and the road parcel has been eroded away, then erosion of the private title occurs. That part of the foreshore or seabed is privately owned.

⑦ Council owned legal road has a fixed boundary, so foreshore or seabed becomes Council owned when erosion occurs.