OFFICE OF THE DEPUTY PRIME MINISTER

CHAIR
CABINET POLICY COMMITTEE

FORESHORE AND SEABED: FURTHER POLICY DECISIONS

Proposal

1 This paper seeks confirmation of the major decisions that have been taken by the ad hoc Ministerial group, in principle, in developing the foreshore and seabed legislation. In a number of respects they involve amending or rescinding the decisions taken in December.

Executive Summary

Public domain

2 We have reconsidered whether the foreshore and seabed should be vested in the people of New Zealand, or vested in the Crown. If the latter, the legislation would include a headline provision that required reasonable and appropriate public access and stipulated that the foreshore and seabed was to be held in perpetuity.

3 The December framework directed further work on three issues around the landward boundary of the public domain: lagoons, esplanade reserves, and foreshore and seabed owned by public bodies and companies. We propose that:

a the landward boundary of the public domain for lagoons be set at the landward boundary of the coastal marine area, as determined by local authorities;

b existing provisions for esplanade reserves (on subdivision) should not be varied but on subdivison all land below mean high water springs should be vested in the public domain;

c further work needs to be undertaken on foreshore and seabed owned by public companies, and this matter will not be addressed in the forthcoming legislation.

Customary title

4 In the December framework, obtaining a customary title was to be the precondition for obtaining recognition of customary rights. We now consider that this link unnecessarily complicates the process of identifying and protecting customary rights, and should not proceed.

5 The December framework included a requirement that customary titles will be able to be recognised at whânau, hapū or iwi levels. We propose that the Māori Land Court have discretion on the level at which it recognises customary titles, by requiring that it recognise mana and ancestral connection in accordance with tikanga Māori.

6 The Court would not be able to recognise multiple titles to the same area of foreshore and seabed, though would be able to recognise overlapping titles where this was appropriate.

7 The December framework included the establishment of an independent statutory Commission, to identify who holds mana and ancestral connection to the foreshore and seabed and make recommendations to the Māori Land Court. We now consider that the Commission is not strictly necessary to the recognition of customary titles and should not be established. Instead applications for customary title would be made direct to the Court.

8 We also propose that customary titles that flow from past or future Treaty settlements, or as a result of direct discussions between the Government and Maori groups, would also be recorded without further recourse to the Maori Land Court.

The effect of a customary title

9 We propose that references to customary title holders be incorporated at appropriate points in the Resource Management Act provisions on decision making in the Coastal Marine Area, so as to recognise the standing that title holders will have. Certainty on this point will benefit all involved.

Regional working groups

10 We have reconsidered the package of initiatives that were intended to develop effective working relationships between the holders of customary titles and central and local government decision makers. We have concluded that a uniform and prescriptive approach should be replaced by one that builds on existing initiatives and best practice. This work will proceed at a national level, supplemented by specific initiatives where assistance is sought or a need is demonstrated.

Customary rights

11 The December framework included a requirement that the Māori Land Court, when examining whether a customary right in the foreshore and seabed can be identified and recognised, apply a statutory test derived from common law and based on tikanga Maori. We propose that that the Court must be satisfied that:

a having regard to tikanga, the group claiming the right is an established community, with an established and ongoing system of traditional

customs, and that the activity or practice that is the subject of the claimed customary right is integral to that group's customs and culture;

b the activity or practice was a feature of the group's customs or tikanga in 1840, and that it has continued to be undertaken, substantially uninterrupted, in accordance with tikanga from that time to the present;

c the activity or practice that forms the substance of the claimed right is not prohibited by legislation;

d the claimed right has not already been extinguished as a matter of law;

12 We now propose that if a customary right has been substantially interrupted by a conflicting RMA permit then it cannot be recognised by the Court.

13 The legislation will enable the Maori Land Court to refer any situation where it considers that there are customary rights still in existence, but it does not have the ability to recognize those rights. We consider that the referral mechanism should not include circumstances where the activity is prohibited by another statute – if the activity is illegal it is reasonable to assume that it is no longer being undertaken as a matter of legal right.

14 It is important to bear in mind that the framework for recognizing and protecting customary rights that still exist will sit alongside a framework for negotiating the settlement of historical grievances. It would be inappropriate for this new framework to blur the line between rights that still exist and those that may have been extinguished in the past.

The effect of customary rights: the Resource Management Act

15 Customary rights recognised by the Māori Land Court will constitute a new kind of right that will need to be accommodated by the Resource Management Act framework. When a customary right is recognised; decision making under the RMA will need to recognise the existence of the right.

16 We propose that a reference to customary rights be incorporated in section 6(e) of the RMA, along with other matters of national importance, to be recognised and provided for. This will provide a strong priority weighting for customary rights that will flow through all decision making under the RMA – from National Policy Statements to regional and district plan making to resource consent decision making.

17 If another party sought a resource consent for an activity that would have a significant adverse effect on the exercise of the customary right, then it would (unless the customary right holder consented) be declined.

18 We propose that a provision be included in the RMA stating that nothing in the RMA, regulation or any relevant plan could unreasonably prevent the

exercise of a customary right. This includes provisions in plans that set conditions on or prohibits the exercise of a customary right, and rules about other activities that may affect the customary right. Customary right holders would be able to challenge rules in plans that would affect the reasonable exercise of a customary right.

19 Customary rights holders will be exempt from having to obtain a resource consent to exercise their activity, even if it would otherwise be required. They will also be exempt from any rules in a plan that sets conditions on the exercise of the activity.

20 There may be occasional situations where the exercise of a customary right may have adverse environmental effects. Because the normal consent processes and plan rules would not apply to customary rights holders, a new process is proposed that allows the council to assess the exercise of a customary right on a case by case basis and for a decision to be made about imposing controls on the activity or stopping it.

The effect of the new framework on customary rights

21 As the legislation is finalised we will review whether its provisions are sufficient to make clear the government's intention that the new framework will be the only avenue for the legal recognition of the customary rights of Māori in the foreshore and seabed.

Background

22 On 17 December 2003 CBC decided on the framework for the foreshore and seabed, and authorised an ad hoc Ministerial Group (comprising the Prime Minister, Deputy Prime Minister, Attorney General and Minister of Māori Affairs) to make further detailed legislative decisions on foreshore and seabed policy, if necessary (CBC Min(03) 10/1 refers).

23 In the course of developing the detail of the foreshore and seabed legislation we have worked through some significant issues, which are described in this paper. We also propose changes to some of the individual December decisions. These are identified.

24 These proposals should be considered in conjunction with the Waitangi Tribunal's report of 8 March 2004. In some respects the changes proposed in this paper are consistent with the Tribunal's criticisms of the December framework. The Waitangi Tribunal's report has been included on the Cabinet agenda for 15 March.

25 We have been mindful throughout of the importance of the four principles that underpin our foreshore and seabed policy – access, regulation, protection and certainty – and consistency with the three objectives of the December framework:

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 customary rights to the foreshore and seabed to be identified and protected in an appropriate way that recognises the connection of whânau, hapū and iwi to the foreshore and seabed; and

c court processes for considering claims of customary rights must not result in effective ownership of the foreshore and seabed (CBC Min(03) 10/1 10).

26 We have also been mindful of the need for the foreshore and seabed legislation and processes to be as simple and straightforward as possible, bearing in mind the complexity of some of the issues.

The Public Domain

27 In the December framework the full and beneficial ownership of the foreshore and seabed was to be vested in the people of New Zealand (CBC Min(03) 10/1 11). This was intended to:

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

b 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;

c provide that the government exercises full administrative rights and management and landowner responsibilities, on behalf of all New Zealanders, that arise out of the public domain title;

d 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 1952 (CBC Min(03) 10/1 12);

28 Taking into account the comments made by the Waitangi Tribunal and other key stakeholders on this issue, we consider it necessary to re-consider this decision. The two options are:

a to continue with the December decision to vest the foreshore and seabed in the people of New Zealand; or

b to vest the foreshore and seabed in the Crown.

29 As discussed last year, vesting in the Crown is the mechanism that has been used to represent the people of New Zealand or the public interest. 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.

30 However, the vesting in the Crown is currently embedded in New Zealand's legal and regulatory framework. The new legislation could provide that the foreshore and seabed should be vested absolutely and in perpetuity in the Crown. This could be accompanied by general provisions that generally give effect to paragraph 27 above.

31 The December framework identified the boundaries of the public domain and directed further work on three issues around the landward boundary: lagoons, esplanade reserves, and foreshore and seabed owned by public bodies and companies.

Lagoons

32 The December framework requested further work on lagoons, namely inland waters that are occasionally or frequently open to the sea (CBC Min(03) 10/1 16). While their ownership can be unclear, local authorities determine whether or not they are within the coastal marine area for the purposes of the Resource Management Act 1991 (RMA). We propose that the landward boundary of the public domain for lagoons be set at the landward boundary of the coastal marine area. In effect local authorities would determine the landward boundary of the public domain in these areas. The Minister of Conservaton is a party to any decisions on what should be included or excluded from a coastal marine area.

33 At present there are 18 lagoons outside the coastal marine area: 9 are owned by the Crown, 4 are privately owned, while the status of 5 is unclear. A particularly complex set of issues arises in respect of the Te Whaanga lagoon in the Chatham Islands. This is large, frequently used, and has important conservation values. The lagoon has been subject to litigation since the 1930s and has been reported on by the Waitangi Tribunal. There have been preliminary discussions between the Crown and claimants. The Crown will continue to seek a negotiated solution rather than recourse to the courts.

Esplanade Reserves

34 The December framework included decisions to amend the current law to require esplanade reserves on all coastal subdivisions, and to investigate further the extent to which esplanade reserves should be required arising from resource consents on coastal properties (CBC Min(03) 10/1 109).

35 At present the RMA provides for esplanade reserves to be created:

a where any allotment of less than four hectares is created during subdivision, with exceptions possible by way of district plan rules or resource consents, and with no compensation payable;

b for allotments of four hectares or more at the discretion of territorial authorities, with compensation payable.

36 Esplanade reserves, as part of the "Queen's Chain", are an important mechanism for providing access to and along the foreshore. Any changes are best addressed in the course of related work, by the Ministry of Agriculture and Fisheries, on improving access over private land to the foreshore and seabed. We propose that the December decisions on this point be rescinded.

37 As for the proposal that esplanade reserves should be required arising from all resource consents on coastal properties (even if not involving subdivision) we consider it is not appropriate to require esplanade reserves where the change in use or activity does not limit existing available access to the foreshore and seabed. It would compromise the purpose of resource consents, which is to manage effects, and also act as a disincentive for people to apply for consents. Existing legislation already enables a consent to be refused if public access is compromised. On that basis, we propose that such a mechanism not be investigated further.

38 At present private land below mean high water springs (and therefore within the coastal marine area) is only vested in the Crown, on subdivision, if an esplanade reserve is created. Appropriate compensation is paid if the allotment size is over 4ha. There are a number of private properties where private land below mean high water springs does not adjoin an esplanade reserve and would accordingly remain in private title on subdivision. We propose that instead all parts of an allotment being subdivided, that are within the coastal marine area, be vested in the public domain. The financial implications of the compensation that would be paid would depend on the timing of coastal subdivisions and cannot be quantified at this stage.

Foreshore and seabed land owned by public bodies

39 The December framework directed further work 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 (CBC Min(03) 10/1 118).

40 From investigations to date it is apparent that:

a the circumstances in which foreshore and seabed was transferred to these bodies varied, and in some cases further research is required;

b not all these vestings are now required, and in some cases those vestings which are still needed for ongoing business purposes do not require occupation that excludes the public;

c in some cases the issue of compensation would arise if the vesting was changed.

41 In some cases, transferring these areas to the public domain and providing for any continuing business purposes through other means (e.g. the granting of occupation rights) would restore public access rights. At this stage, however, it is not possible to fully analyse the relative benefits compared to the costs of change. We propose that the Department of Conservation continues work on this issue and provide more detailed advice to Ministers by March 2005.

Customary Title

42 The December framework included enabling the Mâori Land Court 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:

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

b identification and recognition of specific customary rights of whânau, hapū or iwi that would be annotated on the title (CBC Min(03) 10/1 20).

43 In the December framework, obtaining a customary title was to be the precondition for obtaining recognition of customary rights. We now consider that this link unnecessarily complicates the process of identifying and protecting customary rights, and should not proceed. Obtaining a customary title will still result in the statutory recognition of mana and ancestral connection, but those who choose not to proceed down this route will still be able to obtain recognition for customary rights.

44 The December framework included a requirement that customary titles will be able to be recognised at whânau, hapū or iwi levels, while expecting that in most instances customary titles will be sought by hapū or iwi (CBC Min(03) 10/1 25,26). We propose that this objective can most appropriately be met e Māori Land Court have discretion on the level at which it recognises customary titles, by requiring that Māori Land Court recognise mana and ancestral connection in accordance with tikanga Māori.

45 It may not be realistic to assume that, within a kin group or iwi, the various groups will easily be able to resolve between themselves at what level title would be sought or on the allocation of roles and responsibilities. The legislation would state that for any particular area the Court could issue a title at whanau, hapū or iwi level, but that it could not issue a title to both an iwi and a hapū of that iwi, or to both a hapū and a whanau of that hapū. If necessary the choice would be for the Court to make, on the basis of its expertise and experience.

Statutory Commission

46 The December framework included the establishment of an independent statutory Commission, to identify who holds mana and ancestral connection to the foreshore and seabed and make recommendations to the Māori land Court so that the Court can proceed to issue customary titles (CBC Min(03) 10/1 40). We now consider that the Commission is not strictly necessary to the recognition of customary titles, might not expedite the process overall, would duplicate some expertise held by the Māori Land Court, and should not be established. Instead applications for customary title would be made direct to the Court.

Other routes to obtaining a title

47 We propose that, by agreement with the iwi or hāpu concerned, a schedule to the legislation will record titles that flow from past or future Treaty settlements. This will avoid iwi or hāpu, that have already had their mana and ancestral connection with areas of the coast statutorily recognised, from having to commence a further legal process to have this confirmed.

48 We also envisage that titles could be recorded on the schedule as a result of direct discussions between the Government and iwi that do not have a Treaty settlement. Officials will undertake further work on this point.

The Effect of a Customary Title

49 In the December framework it was agreed that the holders of customary titles will have an enhanced opportunity to participate in decision making processes concerning the foreshore and seabed (CBC Min(03) 10/1 28). We have given further consideration to how that can be accomplished.

50 Annex A sets out the current legislative provisions, in the Resource Management Act, for Māori to participate in decision making on the coastal marine area. We propose that references to customary title holders be incorporated at appropriate points in these provisions, so as to recognise the standing that they will have in the Coastal Marine Area. Certainty on this point will benefit all involved in decision making on the Coastal Marine Area.

Regional Working Groups

51 The December framework included a package of initiatives to develop effective working relationships between the holders of customary titles and central and local government decision makers (CBC Min(03) 10/1 22). As part of this package it was agreed that:

a the government would establish joint central government, whānau, hapū and iwi, and local authority working groups at the regional level ('regional working groups') based on the sixteen regional/unitary council boundaries (CBC Min(03) 10/1 29);

b the legislation would require local authorities to develop agreements concerning the processes by which whānau, hapū and iwi organisations will be involved in the management of the coastal marine area (CBC Min(03) 10/1 32);

c these agreements would be referred to Minister of Conservation, who in consultation the Ministers of Local Government and Māori Affairs would be formally promulgated by an Order in Council so that they were legally enforceable (CBC Min(03) 10/1 33, 34).

52 As a part of these initiatives DPMC was requested to report back to the Cabinet Business Committee by January 2004 on the range of participation mechanisms that the working groups would be able to consider, and advice on the a detailed implementation of the regional working groups (CBC Min (03) Min 10/1 31 and 39).

53 Since these decisions were made, we have reconsidered the need to introduce a uniform and prescriptive process on these lines. The Waitangi Tribunal's report on the Crown's Foreshore and Seabed policy also highlighted a number of issues and concerns relating to the regional working groups, Māori representation on the groups, timing and what enhanced participation means in practice. As a consequence we propose that decisions requiring the establishment of 16 regional working groups, and for agreements to be promulgated through an Order in Council, be rescinded.

54 The emphasis remains, however, on improving participation by Māori in decision making on the coastal marine area. This is consistent with the earlier decision that the government give priority to building on and developing 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, particular in areas where Māori continue to maintain a very strong and active association with foreshore and seabed areas (CBC Min (03) Min 10/1 36 and 37).

55 We now propose that in order to progress this objective:

a representatives of central government, local government and Māori develop best practice and guidance that builds on existing initiatives as well as exploring any new proposals (see Annex B);

b this proceed at a national level and draw on existing processes to invite Māori representation (e.g. Māori planners forum, Oceans Policy Māori working group) and local government representation (e.g. Local Government New Zealand, Coastal Planners Group);

c we undertake targeted facilitation and brokerage in areas where assistance is specifically sought or if a need is demonstrated (current examples include discussions being held with Ngāti Porou and those regional councils - Waikato and Otago - that have indicated a desire to participate in this exercise).

56 This approach does not lead to the legally enforceable agreements that were a feature of the December framework. We consider that there is still merit in legal enforceability if all the parties to the agreement wish to do so. Officials will undertake further work on this point.

Customary Rights

57 The December framework includes jurisdiction for the Māori Land Court to identify and recognise specific customary rights of whānau, hapū or iwi in the foreshore and seabed (CBC Min(03) 10/1 20.2).

58 An implication of the proposal that holding a customary title no longer be a precondition for the recognition of customary rights is that disagreements within or between Māori groups, on the appropriate holder of a customary right, will have to be resolved in the course of the Court's hearing of an application.

59 The basic jurisdiction of the Court will be described quite broadly: it will be required to inquire into claims for customary rights that may still exist in relation to the foreshore and seabed. Some aspects of the December decisions, however, are appropriately described as limits on its jurisdiction:

a the geographical limit which confines the Court to looking at claims to rights in areas within the public domain title (CBC Min (03) Min 10/1 20).

b the limit that the Court cannot look at customary rights issues that are covered by the Wildlife or Marine Mammals Act (CBC Min (03) Min 10/1 56).

c the limit that the Court cannot look at claims that are covered by the Treaty of Waitangi Fisheries Claims Settlement Act (CBC Min (03) Min 10/1 54).

60 The test that the Māori Land Court must use, when examining whether a customary right in the foreshore and seabed can be identified and recognised, is to 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 a continuity test to be applied in determining the existence of a specific customary right;

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

d guidance on what actions in the past might have led to the extinguishment of any potential customary right (CBC Min(03) 10/1 50).

Tikanga

61 The internationally developing common law on indigenous rights sets out the following characteristics that are relevant:

a The existence of an identifiable community with adherence to an ongoing system of traditional laws and customs

b A relationship or connection with the area in question

c An activity being carried out in that area as part of the group's ongoing system of traditional customs, sometimes described as being activities that are distinctive or integral to the culture

62 We accordingly propose that the legislation on this point take the following form:

> having regard to tikanga, the group claiming the right is an established community, with an established and ongoing system of traditional customs, and that the activity or practice that is the subject of the claimed customary right is integral to that group's customs and culture.

Continuity

63 We propose that the starting point for demonstrating a customary right is that the practice must have been in existence at the time at which sovereignty was acquired and the common law of England began to apply to New

Zealand. The starting point is therefore a requirement that the activity has been undertaken since 1840.

64 The common law also consistently requires that the activity or practice continues to be undertaken today, although there are differing versions of this test. In Canada, the requirement has been described as being able to demonstrate a "reasonable degree of continuity", whereas in Australia the requirement is that the practice has continued "substantially uninterrupted". The Australian test is generally regarded as slightly stricter, as the Canadian test may accommodate rights that may have been lost for a time and then regained. In both countries, the law accommodates the situation of customary practices that only occur occasionally, such as in the event of a death.

65 We propose that the legislation on this point take the following form:

> the activity or practice was a feature of the group's customs or tikanga in 1840, and that it has continued to be undertaken, substantially uninterrupted, in accordance with tikanga from that time to the present.

66 While "substantially interrupted" follows Australian rather than Canadian practice, it is important to bear in mind that the framework for recognising and protecting customary rights that still exist will sit alongside a framework for negotiating the settlement of historical grievances. New Zealand is through the settlement process acknowledging its past, and negotiating case by case settlements to provide redress for customary and other rights that may have been lost in the past as a result of Treaty breaches by the Crown. It would be inappropriate for this new framework to blur the line between rights that still exist and those that may have been extinguished in the past.

67 The December framework required 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 remain suspended until the relevant coastal permit expired (CBC Min(03) 10/1 71).

68 We now consider that this decision would impose an undesirable level of complexity and uncertainty in the administration of the new framework. We therefore propose that it be rescinded. If a conflicting RMA permit has as a matter of fact interrupted the exercise of the customary right, then it will not be possible for the Court to revive the right. The matter will have to be assessed by the Court on a case-by-case basis.

69 One consequence of this change is that it will be more difficult for regional councils to issue new resource consents in the coastal marine area where there are current or potential applications for customary rights that might be

affected. If the effect of a new consent may be to extinguish a customary right, these decisions may become more of a focus for legal challenge.

Prohibited activities

70 Under the December framework the Māori Land Court would not be able to authorise an activity that is prohibited by another statute (CBC Min(03) 10/1 56 and 57). We propose that the question of whether the activity is prohibited by legislation should also form part of the test that the Court applies before recording a right.

Extinguishment

71 Although it is related to the continuity test, there is a separate legal question over what past actions might amount to full extinguishment of a customary right. There is some uncertainty in the existing jurisprudence over the line between suppression or temporary suspension of a right and its extinguishment. We propose that the legislation on this point identify the actions that it is relatively straightforward to describe as amounting to extinguishment, as they clearly leave no room for any other kind of legal interest in the area in question, or may result in it being physically impossible to carry out the customary activity any more. These actions include:

a reclamation of foreshore and seabed land;

b the granting of fee simple title, whether by statutory vesting, prerogative grant or under the Land Transfer Act, to another person or entity (even if that title has now returned to the Crown).

Spiritual values and wāhi tapu

72 We have examined whether the customary rights jurisdiction of the Māori Land Court can properly be applied to claims based on spiritual or cultural values, as well as claims based on tangible activities. An important example is the protection of wāhi tapu sites. There are two considerations that are relevant to this decision:

a whether a property rights mechanism of the kind being developed here is an appropriate legal means for giving protection to cultural and spiritual values, or for recognizing the spiritual significance of a place or a landmark.

b the relevance of existing legislation for the protection of sites of cultural and spiritual significance, in particular the Historic Places Act and the Resource Management Act. The former has been primarily designed with dry land in mind, with a focus on protecting the sites from use and development rather than on limiting public access.

73 We propose that the Court be able to recognise a claim based on spiritual or cultural values where it involves an activity or practice that meets the statutory tests described above. In the absence of such an activity, claimants would be able to use existing legislation for the protection of sites of cultural or spiritual significance.

74 It should be noted that these sites can involve imposing limits on public access, a matter that the Maori Land Court will not be able to require. This is an example of a matter which it would be appropriate for the Court to refer to the government.

Referral to the Government

75 In the December framework, the Māori Land Court is to have power to refer to government any situation where it considers that there are customary rights still in existence, but it does not have the ability to recognize those rights (CBC Min(03) 10/1 72). The government would hold discussions directly with those holding the customary right, with a view to providing some specific form of recognition, including the possibility of providing redress (CBC Min(03) 10/1 73).

76 It is necessary to describe the threshold that the Court must apply before concluding that a right exists that needs to be referred to government. We propose a two-stage process.

a first, in order for the Court to conclude that a right exists at all, it be required to apply the same tests that have already been proposed for other parts of this jurisdiction.

b second, the Court must be satisfied that the foreshore and seabed right that it has identified is not able to be adequately recognised and protected by the customary title and customary rights framework or by the fisheries settlement. Reasons for this conclusion may be that the right is significantly affected by the overarching limitations that affect all private rights; or that there is some aspect of the design or operation of these two existing protection systems which renders them ineffective in relation to this right.

77 Officials are considering how best to give legal effect to the latter point in particular.

78 It should be noted that the role and jurisdiction of the Waitangi Tribunal remains unaffected by the implementation of this framework. (CBC Min(03) 10/1 24). This jurisdiction would be able to be utilised by claimants if they were dissatisfied with the steps taken by the government following a referral from the Māori Land Court.

79 The December framework specified that if the Māori Land Court finds that a customary right exists that includes an activity prohibited by another statute, the Court would refer the issue to the government for the government to consider whether an exception to the general prohibition is possible or appropriate (CBC Min(03) 10/1 58).

80 The general referral mechanism was initially extended in this way to take account of the possibility that a Court would find that customary rights continued in relation to activities covered by the Marine Mammals and Wildlife Acts. However any customary rights covered by those Acts are to be excluded from this jurisdiction (CBC Min(03) 10/1 56). The issues dealt with by those Acts are only partly and indirectly related to foreshore and seabed questions. We therefore propose that this particular referral mechanism be rescinded.

The Effect of Customary Rights: the Resource Management Act

81 The broad aim of the new foreshore and seabed framework is to protect the customary rights of whânau, hapū and iwi while sustainably managing natural and physical resources of the foreshore and seabed (CBC Min(03) 10/1 65). Resource Management Act (RMA) processes should only be able to restrict or completely prohibit the customary activity for the purposes of ensuring sustainability (CBC Min(03) 10/1 66). In particular, if the Māori Land Court gives legal recognition to an activity where the RMA regulates the conduct of the activity and how it can be exercised:

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

b no further authority to undertake that activity would be required under the RMA;

c the RMA 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 (CBC Min(03) 10/1 70).

82 This means that customary rights recognised by the Māori Land Court differ from those that are currently accommodated by the RMA framework. When a customary right is recognised, decision making under the RMA will need to recognise the existence of the right. The following changes to the RMA are proposed to achieve this.

Applications for the recognition of customary rights

83 The December framework directed further work on how applications before the Maori Land Court would be taken into account by decision-making under the RMA (CBC Min(03) 10/1 64). We propose that applications that are

before the Māori Land Court (but have yet to be recognised by the Court under the new legislation) would be treated according to the current provisions of the RMA. Councils have the discretion to identify affected parties and notify them of any plan changes or third party resource consent applications accordingly.

Information to be held on customary title and customary rights by councils

84 The December framework included the requirement that all recognised customary rights should be attached to the relevant district plan, and notified to any consent holders that may be affected when their consents expire (CBC Min(03) 10/1 88.2).

85 On further consideration, there does not appear to be a need to require information on customary rights to be attached in a formal way to plans. Instead, it is proposed that the relevant local authorities must hold information on the customary rights in their areas, once notified by the Māori Land Court. The information must be publicly available and will provide a public resource that can be used by potential applicants for resource consent to alert them of the existence of the Customary Rights holder may have.

Recognising and protecting customary rights

86 To ensure that all decision making under the RMA recognises the strength of the new customary rights, we propose that a reference to customary rights be incorporated in section 6(e) of the RMA, along with other matters of national importance, to be recognised and provided for. This will provide a priority weighting for customary rights that will flow through all decision making under the RMA – from National Policy Statements to regional and district plan making and resource consent decision making.

87 If another party sought a resource consent for an activity that would have a significant adverse effect on the exercise of the customary right, then – unless the customary right holder agreed to the activity in writing – it would be declined. (The language of 'significant adverse effect' replaces the wording 'significant impact' in the December framework as this is the recognised language of the RMA.) A new process to accommodate this policy has been designed as follows:

a the customary right holder will be deemed to be an adversely affected party for the purposes of notification. This ensures that the customary right holder participates in the consent process;

b in accordance with the current practice for notified parties, the third party consent applicant would first seek written approval for the resource consent application before lodging the application. If written approval is not forthcoming the applicant should be required to undertake an assessment of alternative sites, routes and methods for undertaking the

activity. The onus on establishing that there is no significant adverse effect on the customary right or no viable alternative should rest with the third party consent applicant;

c if the holder of the customary right has not provided written approval to the application it is proposed that the consent authority must determine that the new activity will not have a significant adverse effect on the customary right before it can grant approval;

d this means that the consent authority would be required to consider whether the new activity, subject to any conditions imposed, would stop, preclude or displace the right from being exercised. If the consent authority determined that it would, the application would be declined. In determining this, we propose that the consent authority be directed to consider criteria in Annex C.

88 Ministers should note that the normal rights for resource consent applicants and submitters to appeal a decision to the Environment Court would be unfettered. But the Environment Court would have to also recognise customary rights as a matter of national importance, in line with the proposed amendment to s6(e) of RMA.

89 It is possible that these new tests might conflict with the construction of network utilities (such as pipelines and cables) or other infrasructure (such as ports). We propose that this matter be referred to the current review of the Public Works Act.

Ensuring that the RMA cannot unreasonably prevent the exercise of a customary right

90 For the coastal marine area the RMA provides a list of damaging activities that require a resource consent unless a local plan makes an explicit exception. Resource consents are usually required in the coastal marine area for activities with those adverse effects, for exclusive occupation of space, and for extraction of sand and shingle. In effect, consent authorities can assume that there is a baseline of damaging activities for which the national legislation requires a resource consent, while giving them the power to make exceptions.

91 As no further authority will be needed to exercise a customary right in the coastal marine area (once recognised by the Māori Land Court), different arrangements will apply to customary right holders:

a a provision will be included stating that nothing in the RMA, regulation or any relevant plan could unreasonably prevent the exercise of a customary right. This includes provisions in plans that set conditions on, or prohibit the exercise of, a customary right and rules about other activities that may affect the customary right;

b customary rights holders will be exempt from having to obtain a resource consent to exercise their activity, even if it would otherwise be required. They will also be exempt from any rules in a plan that sets conditions on the exercise of the activity; and will also be able to challenge the inclusion of those rules in a plan.

Managing the effects of a customary right

92 There may be occasional situations where the exercise of a customary right has adverse effects: for example, where the Maori Land Court has allocated a quantum of sand for extraction that is higher than that normally allowed by a rule in a plan to prevent erosion, or where the environment changes (e.g. where a storm removes all the sand from the beach), and the exercise of a customary right becomes unsustainable.

93 Because the normal consent processes and plan rules would not apply to customary rights holders, we are developing a new process that allows the council to assess the exercise of a customary right on a case by case basis and for decisions to be made about controls on the activity or stopping it. Decisions would be made applying the sustainable management decision-making criteria contained in Part 2 of the RMA and including the broad definition of "environment". This proposed new process (whose details are still being developed) is described in Annex D.

94 The key difference between the proposed new process and normal processes under the RMA is that the onus is on decision makers to prove that the exercise of the customary right would have an adverse effect on the environment. The process includes discretionary public involvement, and does it allow recourse to the Environment Court (for anyone, including the customary rights holder) to challenge decisions. Ministers consider that the strong nature of the customary rights warrants a departure from the normal RMA framework.

Effect of the New Framework on Customary Rights

95 The December framework included a decision that further consideration be given, as the legislation is drafted, to whether its provisions are sufficient to make clear the government's intention that the new framework will be the only avenue for the legal recognition of the customary rights of Māori groups in the foreshore and seabed (CBC Min(03) 10/1 121). We will review this important issue as the legislation is finalised.

Consultation

96 This paper has been prepared by DPMC. The following agencies have contributed to its development and have been consulted on it in draft: Ministry of Justice, Treasury, Crown Law Office, Ministry for the Environment,

Department of Conservation, Ministry of Fisheries, Te Puni Kokiri, Department of Internal Affairs.

Financial Implications

97 The financial implications of the foreshore and seabed legislation extend over a range of departments, including the Ministry of Justice (for the Maori Land Court), Te Puni Kōkiri, and the Ministry of Fisheries. These are being addressed separately within the current Budget round.

Legislative Implications

98 The proposals in this paper are to be implemented in the Foreshore and Seabed Bill, which has priority 2 on the 2004 Legislation Programme.

Regulatory Impact and Compliance Cost Statement

99 A regulatory impact statement accompanied the paper on the foreshore and seabed framework in December 2003.

Human Rights/Treaty Implications

100 The foreshore and seabed legislation, once drafted, will be reviewed for consistency with the Bill of Rights Act.

101 The Treaty issues to which these these proposals give rise are addressed in the separate paper on the Waitangi Tribunal's report.

Publicity

102 I will co-ordinate any communications on these issues with the communications surrounding the introduction of the foreshore and seabed legislation.

Recommendations

103 It is recommended that Ministers:

Public domain

1 **note** the earlier decision to vest the full and beneficial ownership of the foreshore and seabed in the people of New Zealand (CBC Min(03) 10/1 11);

2 **note** that the new form of public domain title vesting the foreshore and seabed in the people of New Zealand is intended to:

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

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

2.3 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;

2.4 provide that the government exercises full administrative rights and management and landowner responsibilities, on behalf of all New Zealanders;

2.5 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 1952 (CBC Min(03) 10/1 12);

3 **agree** to **either**:

3.1 confirm the earlier decision to vest the full and beneficial ownership of the foreshore and seabed in the people of New Zealand; **or**

3.2 vest the foreshore and seabed in the Crown, the legislation to include general provisions that generally give effect to 2.1 to 2.5 above, modified to align with vesting in the Crown;

4 **note** the earlier decision to undertake further work on the public domain's landward boundaries concerning lagoons (CBC Min(03) 10/1 16);

5 **agree** that the landward boundary of the public domain for lagoons be set at the landward boundary of the coastal marine area;

6 **rescind** the earlier decisions to amend the current law to require esplanade reserves on all coastal subdivisions, and to investigate further the extent to which esplanade reserves should be required arising from resource consents on coastal properties (CBC Min(03) 10/1 109);

7 **direct** the Ministry for Agriculture and Forestry, in consultation with the Ministry for the Environment and the Department of Conservation, in the context of the ongoing policy work on public access over private land to consider the best mechanism(s) to enable access to the foreshore and seabed from private land;

8 **agree** that all parts of an allotment being subdivided, that are within the coastal marine area (not just those adjoining an esplanade reserve) are to be vested in the public domain;

9 **note** that the financial implications of the compensation that would be paid under recommendation 8 will depend on the timing of coastal subdivisions and are uncertain at this stage;

10 **note** the earlier decision requiring the Department of Conservation to report back by April 2004 on the 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 (CBC Min(03) 10/1 118);

11 **agree** that the Department of Conservation report back on the issue by March 2005

Customary title

12 **note** the earlier decision that customary titles will be able to be recognised at whânau, hapū or iwi levels (CBC Min(03) 10/1 25);

13 **agree** that the Māori Land Court have discretion on the level at which it recognises customary titles, by requiring that it recognise mana and ancestral conection in accordance with tikanga Māori;

14 **agree** that for any particular area of foreshore and seabed the Court will not be able to issue a title to both an iwi and a hapū of that iwi, or to both a hapū and a whanau of that hapū.

15 **note** the earlier decision to establish a statutory Commission to identify who holds mana and ancestral connection to the foreshore and seabed and make recommendations to the Court (CBC Min(03) 10/1 40);

16 **rescind** that decision and related decisions(CBC Min(03) 10/1 41 to 45);

17 **agree** that customary titles that flow from past or future Treaty settlements would (by agreement with the iwi or hāpu concerned) also be recorded without further recourse to the Maori Land Court;

18 **agree** that further work be undertaken on the proposal that titles could also be recorded, without further recourse to the Maori Land Court, as a result of direct discussions between the Government and Maori groups that had not reached a Treaty setllement;

Effect of a customary title

19 **note** that in the December framework it was agreed that the holders of customary titles will have an enhanced opportunity to participate in decision making processes concerning the foreshore and seabed (CBC Min(03) 10/1 28);

20 **note** the current legislative provisions set out in Annex A, for Māori to participate in decision making on the coastal marine area.

21 **agree** that references to customary title holders be incorporated at appropriate points in the Resource Management Act;

Regional Working Groups

22 **note** that the December framework included a package of initiatives to develop effective working relationships between the holders of customary titles and central and local government decision makers (CBC Min(03) 10/1 22).

23 **rescind** the decisions that the package include:

23.1 the establishment of joint central government, whānau, hapū and iwi, and local authority working groups at the regional level ('regional working groups') based on the sixteen regional/unitary council boundaries (CBC Min(03) 10/1 29);

23.2 the legislation would require local authorities to develop agreements concerning the processes by which whānau, hapū and iwi organisations will be involved in the management of the coastal marine area (CBC Min(03) 10/1 32);

23.3 these agreements would be referred to Minister of Conservation, who in consultation the Ministers of Local Government and Māori Affairs would be formally promulgated by an Order in Council so that they were legally enforceable (CBC Min(03) 10/1 33, 34).

24 **agree** that instead Government initiatives focus on the following components:

24.1 representatives of central government, local government and Māori develop best practice and guidance that builds on existing initiatives as well as exploring any new proposals (summarised in Annex B);

24.2 this proceeed at a national level and draw on existing processes to invite Māori and local government representation;

24.3 the Government undertake targeted facilitation and brokerage in areas where assistance is specifically sought or if a need is demonstrated.

25 **agree** that further work be undertaken by DPMC on the proposal that agreements resulting from this process could be legally enforceable if the parties agree;

Customary rights

26 **note** the earlier decision that the specific customary rights of whânau, hapū or iwi would be annotated on customary title over areas of the foreshore and seabed (CBC Min(03) 10/1 20(2));

27 **agree** that specific customary rights can be recognised independently of the award of a customary title;

28 **agree** that consequential changes be made to related decisions linking titles and rights (CBC Min(03) 10/1 81, 85, 88, 94, 96 to 99);

29 **note** that the December framework includes jurisdiction for the Māori Land Court to identify and recognise specific customary rights of whânau, hapū or iwi in the foreshore and seabed, in accordance with a statutory test (CBC Min(03) 10/1 49);

30 **agree** to the following limits on the Court's jurisdiction that are consistent with earlier decisions (CBC Min (03) Min 10/1 20, 54, 56):

30.1 the geographical limit which confines the Court to looking at claims to rights in areas within the public domain title;

30.2 the limit that the Court cannot look at customary rights issues that are covered by the Wildlife or Marine Mammals Act;

30.3 the limit that the Court cannot look at claims that are covered by the Treaty of Waitangi Fisheries Claims Settlement Act;

31 **agree** that in order to recognise a customary right, the Māori Land Court must be satisfied that:

31.1 having regard to tikanga, the group claiming the right is an established community, with an established and ongoing system of traditional customs, and that the activity or practice that is the subject of the claimed customary right is integral to that group's customs and culture;

31.2 the activity or practice was a feature of the group's customs or tikanga in 1840, and that it has continued to be undertaken, substantially uninterrupted, in accordance with tikanga from that time to the present;

31.3 the activity or practice that forms the substance of the claimed right is not prohibited by legislation;

31.4 the claimed right has not already been extinguished as a matter of law;

32 **rescind** the earlier decision 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 remain suspended until the relevant coastal permit expired (CBC Min(03) 10/1 71);

33 **agree** that If an RMA permit has as a matter of fact interrupted the exercise of the customary right, then it will not be possible for the Court to revive the right;

34 **agree** that the Maori Land Court would be able to recognise a claim based on spiritual and cultural values that involves an activity or practice that meets the statutory tests described in recommendation 31 above;

35 **note** that the Māori Land Court is to have power to refer to government any situation where it considers that there are customary rights still in existence, but it does not have the ability to recognize those rights (CBC Min(03) 10/1 72);

36 **agree** that before concluding that a right exists that needs to be referred by the Maori Land Court, Court must:

36.1 apply the tests in recommendation 31 above;

36.2 satisfy itself that the customary right that it has identified is not able to be adequately recognised and protected by the customary title and customary rights framework or by the fisheries settlement;

37 **rescind** the earlier decision that if the Māori Land Court finds that a customary right exists that includes an activity prohibited by another statute, the Court would refer the issue to the government for the government to consider whether an exception to the general prohibition is possible or appropriate (CBC Min(03) 10/1 58);

Resource Management Act

38 **note** the earlier decision for further work on how decision making under the RMA might appropriately take account of a current application for a customary right (CBC Min(03) 10/1 64).

39 **agree** that all applicants to the Maori Land Court, for the recognition of customary rights, will continue to be treated in accordance with the current notification and consultation requirements under the RMA;

40 **rescind** the earlier decision requiring information on Customary Rights to be attached to plans under the RMA (CBC Min(03) 10/188.2);

41 **agree** that relevant Local Authorities, once notified of Customary Rights by the Maori Land Court, be required to hold information on the Customary Rights. This information will be publicly available.

42 **agree** that Customary Rights will be incorporated into section 6(e) of the RMA, along with other matters of national importance to be recognized and provided for;

43 **note** the earlier decision that a new third party resource consent application made after the declaration of the Customary Right would be declined if it would have a significant impact on a Customary Right (CBC Min(03) 10/1 76);

44 **agree** that the following process would apply to such applications:

44.1 the Customary Rights holder will be deemed an adversely affected party for the purposes of notification

44.2 in accordance with current practice for notified parties, the third party consent applicant would first seek written approval from the Customary Rights holder for the resource consent application before lodging the application

44.3 if written approval from the Customary Rights holder is not forthcoming, the third party consent applicant must undertake an assessment of alternative sites, routes and methods for undertaking the activity.

44.4 if written approval is still not forthcoming from the Customary Rights holder, the consent authority must determine, in accordance with the criteria in Annex C, that the new activity will not have a significant adverse effect on the exercise of the Customary Right before it can grant approval;

45 agree that the implications of the preceding recommendation for the construction of network utilities or other infrasructure be referred to the current review of the Public Works Act;

46 **note** the earlier decision that there should be no further authority required under the RMA to conduct a customary right once notified by the Māori Land Court (CBC Min(03) 10/1 70.1 and 70.2);

47 **agree** to the following amendments to the RMA to give effect to this decision:

47.1 a provision to the effect that nothing in the Act, regulation or any relevant plan could unreasonably prevent the exercise of a customary rights;

47.2 a provision exempting Customary Rights holders from having to obtain a new resource consent to exercise their Customary Right, and from any rules in a plan that sets conditions on the exercise of the activity, or prohibits the activity;

48 **note** the earlier decision that the Act will regulate the exercise of a Customary Right to ensure that it is carried out in accordance with sustainable management (CBC Min(03) 10/1 70.3);

49 **note** that the details of a process to give effect to this decision are still being developed (Annex D refers) but that the key elements of it are that:

49.1 the onus is on decision makers to prove that the exercise of the customary right is unsustainable;

49.2 it would involve the criteria for sustainable management of natural and physical resources that are incorporated in Part 2 of the RMA;

49.3 the process does not include mandatory public involvement;

49.4 the process does not allow recourse to the Environment Court to challenge the Minister's decisions;

Other

50 **note** that the Treaty issues to which these these proposals give rise are addressed in the separate Cabinet paper on the Waitangi Tribunal's report;

51 **note** that as the legislation is finalised the ad hoc Ministerial group will consider whether its provisions are sufficient to make clear the government's intention that the new framework will be the only avenue for the legal recognition of the customary rights of Māori in the foreshore and seabed;

52 note that the financial implications of the foreshore and seabed legislation are being addressed separately within the current Budget round;

53 note that the Deputy Prime Minister will co-ordinate any communications on these issues with the communications surrounding the introduction of the foreshore and seabed legislation.

Hon Dr Michael Cullen
Deputy Prime Minister

Annex A: Current Participation Mechanisms for Maori in the Coastal Marine Area under the Resource Management Act

s 6(e)	In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance - (e)The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
s 7 (a)	Other matters— In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to — (a)Kaitiakitanga:
s 8	Treaty of Waitangi— In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
s 33 (1), (2)	Transfer of powers— (1)A local authority may transfer any one or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section. (2)For the purposes of this section, "public authority" includes any local authority, iwi authority, Government department, statutory authority, and joint committee set up for the purposes of section 80.
39 (2) (b)	Hearings to be public and without unnecessary formality— In determining an appropriate procedure for the purposes of subsection (1), the authority shall— (b)Recognise tikanga Maori where appropriate, and receive evidence written or spoken in Maori and the Maori Language Act 1987 shall apply accordingly
s 45 (2) (h)	Purpose of national policy statements (other than New Zealand coastal policy statements)— (2)In determining whether it is desirable to prepare a national policy statement, the Minister may have regard to— (h)Anything which is significant in terms of section 8 (Treaty of Waitangi):
s 58 (b)	Contents of New Zealand coastal policy statements— (b)The protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga maataitai, and taonga raranga
s 61 (2A)	(2A) A regional council must, when preparing or changing a regional policy statement, take into account any relevant planning document recognised by an iwi authority, and lodged with the council, to the extent that its content has a bearing on resource management issues of the region
s 62 (1) (b)	A regional policy statement must state— (b)the resource management issues of significance to iwi authorities in the region
s 65 (3) (e)	Preparation and change of other regional plans—(e)Any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources
s 66 (2A)	(2A) A regional council must, when preparing or changing a regional plan, take into account any relevant planning document recognised by an iwi authority, and lodged with the council, to the extent that its content has a bearing on resource management issues of the region.
s 74 (2A)	(2A) A territorial authority must, when preparing or changing a district plan, take into account any relevant planning document recognised by an iwi authority, and lodged with the authority, to the extent that its content has a bearing on resource management issues of the district
s 140 (2) (h)	Minister's power to call in applications of national significance— (2)In considering whether a proposal is of national significance, the Minister may have regard to any relevant factor including whether the proposal— (h)Is or is likely to be significant in terms of section 8 (Treaty of Waitangi).
1st Schedule	
cl 2 (2)	A proposed regional coastal plan shall be prepared by the regional council concerned in consultation with the Minister of Conservation and iwi authorities of the region.
cl 3 (1)(d)	During the preparation of a proposed policy statement or plan, the local authority concerned shall consult— (d)The tangata whenua of the area who may be so affected, through iwi authorities and tribal runanga.
cl 5 (4) (f)	Public notice and provision of document to public bodies — (4)A local authority shall provide one copy of its proposed policy statement or plan without charge to — (f)The tangata whenua of the area, through iwi authorities and tribal runanga.
cl 20 (4) (f)	Operative date — (4)The local authority shall provide one copy of its operative policy statement or plan without charge to— (f)The tangata whenua of the area, through iwi authorities and tribal runanga.

(Paragraph 50 and recommendation 20 refer.)

Annex B: Opportunities to improve participation by Māori in local government decision making processes

Description	How it works	Current Barriers	Proposed improvements	Effect of improvements
Iwi Management Plans (IMP) RMA - s 61 (2A), s 66 (2A), s74 (2A).	Under the Resource Management Act (s 61- 2A, s 66 -2A, s74-2A) councils are required to 'take into account' any relevant planning documents recognised by an iwi authority when preparing or changing plans/policies.	A limited number of plans exist of variable quality Resource and capacity constraints for Local Authorities and Maori Limited expertise and capacity by Maori to develop Iwi Management Plans	Target resources (funding / access to expertise) for the development of Iwi Management Plans. Specific workshops and seminars to assist Maori in the development of iwi management plans. Process for renewing, improving utilisation of existing IMPs and reviewing of process to get IMP	The ability for Maori to participate and influence the planning process. Local Authorities will gain an improved understanding of Maori interests and concerns. Improved resources (funding / access to expertise) for the development of Iwi Management Plans.
Transfer and Delegation of Local Authority Powers RMA - s 33 (1), (2)	Under the Resource Management Act (s 33 -1,2) Local Authorities may transfer any power, function or duty to an 'iwi authority' and/or delegate any power, function or duty except the approval of a plan	No current examples on which to base experience Limited capacity and resources for both Local Authorities and Maori Variable relationships between Local Authorities and Maori Statutory barriers	Develop new criteria and guidance for Local Authority consideration of transfers and delegations Develop funding support to aid/facilitate transfers/delegations	If delegation occurs, ability for Maori to manage a designated area – or activity.
Memorandums of Understanding (or other types of agreements)	Local Authorities may have non-statutory agreements with Maori A range of agreements exist but no formal monitoring of the effectiveness of agreements	Limited capacity and resources for both councils and Maori to enter into agreements. Variable relationships between Local Authorities and Maori. Mandating Issues	Central Government to facilitate and broker relationship between councils and Maori. Monitor and reporting on agreements Update guidelines as to what constitutes "best practice" Further encouraging sharing of knowledge and experience. Legally enforceable agreements	Develops relationships between Central Government, Local Government and Maori Creates certainty for Local Authorities and Maori
Targeted funding towards promoting collaborative relationships between Councils and Maori	Proposal to assist in building and improving relationships between Local Authorities and Maori.	No current specified funds	Central Government to work directly with councils and Maori to progress relationships and agreements. Specific funds established (TPK Budget Bid)	Potential to establish and improve relationships between Maori and councils.

(Paragraph 55(a) and recommendation 24.1 refer.)

Annex C: Recognising and Protecting Customary Rights

In determining whether a new or renewed resource consent that was sought by another party for an activity should be declined, the consent authority should apply the following criteria:

a the actual or potential adverse effects of the proposed activity on the customary right;

b the placement of the proposed activity in relation to the customary right, including:

- degree of exclusivity required by any proposed activity and by the customary right;
- the proportion of an area effectively removed by any proposed activity from the ability to utilise the customary right;
- the dependency of the customary right on a given location;

c the extent to which the ability to exercise the customary right will be adversely affected by any proposed activity; and

d the extent that the location of any proposed activity is reasonably necessary to undertake the new activity, including whether alternative locations or methods could be utilised by the proposed activity.

(Paragraph 87(d) and recommendation 44.4 refer.)

Annex D: Managing the Effects of Customary Rights

Note that this proposed new process is still under development. Further it is expected that most customary rights would not require an assessment for environmental effects.

- The Maori Land Court notifies its decision on the customary right. There is a 2-month period in which an affected party can appeal the Court's decision.
- Upon notification from the Maori Land Court (and potentially within the 2-month appeal period) the relevant regional council considers whether the activity is likely to have an adverse effect on the environment and should be assessed against RMA sustainable management provisions.
- If a customary right is identified as likely to have adverse effects which may require regulation, then the customary right holder is notified of the intention to undertake a more detailed assessment of the activity under the RMA.
- The assessment and final decision, must be done within a 4-month timeframe – one month to notify of intention to assess the activity; one month to assess the activity; one month to prepare the report; and one month for the decision to be made. However, the power of waiver and extension of time limits in the RMA would apply.
- An activity can be suspended during this period to avoid damage to the environment.
- The Council has the discretion to seek information to inform its assessment, including calling for submissions and holding a hearing.
- The Council's report may recommend controls, or that the activity should be prohibited. (The Council or the Minister of Conservation would make a decision on controls – still under development.)
- The Minister of Conservation would decide whether a customary right should be prohibited in order to achieve the purpose of the RMA. The Minister may also seek information, and would consult with the Minister of Maori Affairs before making his decision.
- Either the Minister, the right holder or the council may seek another assessment if environmental conditions change.
- Judicial review provisions would remain. There would be no ability to appeal a decision.
- If the customary right cannot be exercised, the government may enter into discussions with the customary right holder with a view to providing some specific form of recognition, including the possibility of providing redress. (This is still under development.)

(Paragraph 93 and recommendation 49 refer.)

Strictly confidential

Amendments to the recommendations of the Cabinet Policy Committee paper entitled: "Foreshore and Seabed – Further Policy decisions"

The new set of recommendations, attached to this paper, reflect changes to two main policy areas. This follows further discussion and consideration of the policy package. The two areas relate to:

A) *The use of the term 'customary title'*

It is recommended that the term 'customary title' be replaced with the term 'an order recognising ancestral connection' [recommendation 13 refers]. The use of the term 'customary title' has caused some confusion amongst the public about its effect. Removing the term 'customary title' from the policy package will provide the public with a better understanding of what is being recognised (i.e., ancestral connection). It is also necessary in light of the second issue, which uses the term customary or aboriginal title in quite a different sense.

B) *The jurisdiction of the Courts to investigate aboriginal title and the appeal structure*

This issue covers the following matters:
(i) jurisdiction of the High Court to consider claims;
(ii) appeal structure.

It is recommended that the High Court be able to consider applications as to whether a group of Māori held full territorial aboriginal title over a particular area of the foreshore and seabed, had the new foreshore and seabed legislation not been passed. As part of this process, if the High Court finds that an aboriginal title would have existed except for the new law, it will refer the issue to the government. It is recognised that the High Court's inherent jurisdiction to consider common law customary rights enables it to be best placed to consider these issues generally. This will therefore replace an earlier decision that the High Court's jurisdiction to consider these issues be removed.

In relation to the appeal structure, it is recommended that appeals from the Maori Land Court decisions to recognise customary rights in the foreshore and seabed should be made to the High Court, and then should go to the Court of Appeal and Supreme Court. Although first appeals usually go to the Māori Appellate Court, this change will enable the High Court to maintain an overall oversight of the development of the law on customary rights.

Hon Dr Michael Cullen
Deputy Prime Minister

Recommendations

1 It is recommended that Ministers:

Public domain

1 **note** the earlier decision to vest the full and beneficial ownership of the foreshore and seabed in the people of New Zealand (CBC Min(03) 10/1 11);

2 **note** that the new form of public domain title vesting the foreshore and seabed in the people of New Zealand is intended to:

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

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

2.3 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;

2.4 provide that the government exercises full administrative rights and management and landowner responsibilities, on behalf of all New Zealanders, that arise out of the public domain title and will be requiring local authorities to work with whânau, hapū and iwi to enhance participation opportunities in decision making practices affecting the coastal marine area;

2.5 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 1952 (CBC Min(03) 10/1 12);

3 **agree** to **either**:

3.1 confirm the earlier decision to vest the full and beneficial ownership of the foreshore and seabed in the people of New Zealand; **or**

3.2 vest the foreshore and seabed in the Crown, the legislation to include general provisions that generally give effect to 2.1 to 2.5 above, modified to align with vesting in the Crown;

4 **note** the earlier decision to undertake further work on the public domain's landward boundaries concerning lagoons (CBC Min(03) 10/1 16);

5 **agree** that the landward boundary of the public domain for lagoons be set at the landward boundary of the coastal marine area;

6 **rescind** the earlier decisions to amend the current law to require esplanade reserves on all coastal subdivisions, and to investigate further the extent to which esplanade reserves should be required arising from resource consents on coastal properties (CBC Min(03) 10/1 109);

7 **direct** the Ministry for Agriculture and Forestry, in consultation with the Ministry for the Environment and the Department of Conservation, in the context of the ongoing policy work on public access over private land to consider the best mechanism(s) to enable access to the foreshore and seabed from private land;

8 **agree** that all parts of an allotment being subdivided, that are within the coastal marine area (not just those adjoining an esplanade reserve) are to be vested in the public domain;

9 **note** that the financial implications of the compensation that would be paid under recommendation 8 will depend on the timing of coastal subdivisions and are uncertain at this stage;

10 **note** the earlier decision requiring a report back by April 2004 on the 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 (CBC Min(03) 10/1 118);

11 **agree** that the Department of Conservation report back on the issue by March 2005

Customary title

12 **note** the earlier decision that customary titles will be able to be recognised at whânau, hapū or iwi levels (CBC Min(03) 10/1 25);

13 **agree** that the term customary title be replaced with the term an order recognising ancestral connection;

14 **agree** that the Māori Land Court have discretion on the level at which it recognises ancestral connection in accordance with tikanga Māori;

15 **agree** that for any particular area of foreshore and seabed the Maori Land Court will not be able to recognise ancestral connection in relation to both an iwi and a hapū of that iwi, or to both a hapū and a whanau of that hapū;

16 **note** the earlier decision to establish a statutory Commission to identify who holds mana and ancestral connection to the foreshore and seabed and make recommendations to the Court (CBC Min(03) 10/1 40);

17 **rescind** that decision and related decisions(CBC Min(03) 10/1 41 to 45);

18 **agree** that the recognition of ancestral connection on the foreshore and seabed that flows from past or future Treaty settlements would (by agreement with the iwi or hāpu concerned) also be recorded without further recourse to the Maori Land Court;

19 **agree** that ancestral connection could also be recorded, without further recourse to the Maori Land Court, as a result of direct discussions between the Government and Maori groups that had not reached a Treaty settlement and direct the Department of Prime Minister and Cabinet to undertake further work and report back to the ad hoc Ministers group on how this can be achieved;

Effect of an ancestral connection

20 **note** that in the December framework it was agreed that the holders of customary titles will have an enhanced opportunity to participate in decision making processes concerning the foreshore and seabed (CBC Min(03) 10/1 28);

21 **note** the current legislative provisions set out in Annex A, for Māori to participate in decision making on the coastal marine area.

22 **agree** that references to the holder of ancestral connection be incorporated at appropriate points in the Resource Management Act;

Regional Working Groups

23 **note** that the December framework included a package of initiatives to develop effective working relationships between the holders of customary titles and central and local government decision makers (CBC Min(03) 10/1 22).

24 **rescind** the decisions that the package include:

24.1 the establishment of joint central government, whānau, hapū and iwi, and local authority working groups at the regional level ('regional working groups') based on the sixteen regional/unitary council boundaries (CBC Min(03) 10/1 29);

24.2 these regional working groups would develop agreements concerning the processes by which whānau, hapū and iwi organisations will be involved in the management of the coastal marine area (CBC Min(03) 10/1 32);

24.3 these agreements would be referred to Minister of Conservation, who in consultation the Ministers of Local Government and Māori Affairs would be formally promulgated by an Order in Council so that they were legally enforceable (CBC Min(03) 10/1 33, 34).

25. **agree** that instead Government initiatives focus on the following components:

    25.1 representatives of central government, local government and Māori develop best practice and guidance that builds on existing initiatives as well as exploring any new proposals (summarised in Annex B);

    25.2 this proceed at a national level and draw on existing processes to invite Māori and local government representation;

    25.3 the Government undertakes targeted facilitation and brokerage in areas where assistance is specifically sought or if a need is demonstrated.

26 **agree** that further work be undertaken by DPMC on the proposal that agreements resulting from this process could be legally enforceable if the parties agree;

Customary rights

27 **note** the earlier decision that the specific customary rights of whānau, hapū or iwi would be annotated on customary title over areas of the foreshore and seabed (CBC Min(03) 10/1 20(2));

28 **agree** that specific customary rights can be recognised independently of the award of a customary title;

29 **agree** that consequential changes be made to related decisions linking titles and rights (CBC Min(03) 10/1 81, 85, 88, 94, 96 to 99);

30 **note** that the December framework includes jurisdiction for the Māori Land Court to identify and recognise specific customary rights of whānau, hapū or iwi in the foreshore and seabed, in accordance with a statutory test (CBC Min(03) 10/1 49);

31 **agree** to the following limits on the Court's jurisdiction that are consistent with earlier decisions (CBC Min (03) Min 10/1 20, 54, 56):

    31.1 the geographical limit which confines the Court to looking at claims to rights in areas within the public domain title;

    31.2 the limit that the Court cannot look at customary rights issues that are covered by the Wildlife or Marine Mammals Act;

    31.3 the limit that the Court cannot look at claims that are covered by the Treaty of Waitangi Fisheries Claims Settlement Act;

32 **agree** that in order to recognise a customary right, the Māori Land Court must be satisfied that:

32.1 having regard to tikanga, the group claiming the right is an established community, with an established and ongoing system of traditional customs, and that the activity or practice that is the subject of the claimed customary right is integral to that group's customs and culture;

32.2 the activity or practice was a feature of the group's customs or tikanga in 1840, and that it has continued to be undertaken, substantially uninterrupted, in accordance with tikanga from that time to the present;

32.3 the activity or practice that forms the substance of the claimed right is not prohibited by legislation;

32.4 the claimed right has not already been extinguished as a matter of law;

33 **rescind** the earlier decision 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 remain suspended until the relevant coastal permit expired (CBC Min(03) 10/1 71);

34 **agree** that if an RMA permit has as a matter of fact interrupted the exercise of the customary right, then it will not be possible for the Court to revive the right;

35 **agree** that the Maori Land Court would be able to recognise a claim based on spiritual and cultural values that involves an activity or practice that meets the statutory tests described in recommendation 32;

36 **agree** that a group of Maori may apply to the High Court for a declaration that they would be entitled to hold aboriginal title over a particular area of foreshore and seabed, had the full beneficial ownership not been vested in the Crown;

37 **agree** that an application could be made directly to the High Court, based on evidence of customary use and association, or could be made to the High Court based on Maori Land Court orders that recognised individual customary rights in relation to particular activities;

38 **direct** the Department of the Prime Minister and Cabinet to report to the ad-hoc Ministers group on whether the High Court should apply the same statutory test as the Maori Land Court (incorporating the common law requirements that the right is integral to the culture of the group, that it has been substantially uninterrupted since 1840 and that it is not prohibited by law or otherwise extinguished);

39 **agree** that the High Court would be able to look at the full set of rights and interests in the claimed area (including customary fishing rights) as it made an overall assessment of whether the cumulative bundle of rights in that area amounted to full aboriginal title;

40 **agree** that, if the High Court makes a declaration that a group holds aboriginal title, it be required to refer the declaration to the government, to enable discussion between the group and the government;

Appeals

41 **rescind** the earlier decision that the existing appellate structure from Maori Land Court decisions should apply to the new jurisdiction (CBC (03) 10/1, para 47);

42 **agree** that appeals from Maori Land Court decisions to recognise customary rights in the foreshore and seabed should be made to the High Court, and should then go to the Court of Appeal and Supreme Court;

Resource Management Act

43 **note** the earlier decision for further work on how decision making under the RMA might appropriately take account of a current application for a customary right (CBC Min(03) 10/1 64).

44 **agree** that all applicants to the Maori Land Court, for the recognition of customary rights, will continue to be treated in accordance with the current notification and consultation requirements under the RMA;

45 **rescind** the earlier decision requiring information on Customary Rights to be attached to plans under the RMA (CBC Min(03) 10/188.2);

46 **agree** that relevant Local Authorities, once notified of Customary Rights by the Maori Land Court, be required to hold information on the Customary Rights. This information will be publicly available.

47 **agree** that Customary Rights will be incorporated into section 6(e) of the RMA, along with other matters of national importance to be recognised and provided for;

48 **note** the earlier decision that new third party resource consent applications made after the declaration of the Customary Right would be declined if it would have a significant impact on a Customary Right (CBC Min(03) 10/1 76);

49 **agree** that the following process would apply to such applications:

49.1 the Customary Rights holder will be deemed an adversely affected party for the purposes of notification

49.2 in accordance with current practice for notified parties, the third party consent applicant would first seek written approval from the Customary Rights holder for the resource consent application before lodging the application

49.3 if written approval from the Customary Rights holder is not forthcoming, the third party consent applicant must undertake an assessment of alternative sites, routes and methods for undertaking the activity.

49.4 if written approval is still not forthcoming from the Customary Rights holder, the consent authority must determine, in accordance with the criteria in Annex C, that the new activity will not have a significant adverse effect on the exercise of the Customary Right before it can grant approval;

50 **agree** that the implications of the preceding recommendation for the construction of network utilities or other infrastructure be referred to the current review of the Public Works Act;

51 **note** the earlier decision that there should be no further authority required under the RMA to conduct a customary right once notified by the Māori Land Court (CBC Min(03) 10/1 70.1 and 70.2);

52 **agree** to the following amendments to the RMA to give effect to this decision:

52.1 a provision to the effect that nothing in the Act, regulation or any relevant plan could unreasonably prevent the exercise of a customary rights;

52.2 a provision exempting Customary Rights holders from having to obtain a new resource consent to exercise their Customary Right, and from any rules in a plan that sets conditions on the exercise of the activity, or prohibits the activity;

53 **note** the earlier decision that the Act will regulate the exercise of a Customary Right to ensure that it is carried out in accordance with sustainable management (CBC Min(03) 10/1 70.3);

54 **note** that the details of a process to give effect to this decision are still being developed (Annex D refers) but that the key elements of it are that:

54.1 the onus is on decision makers to prove that the exercise of the customary right is unsustainable;

54.2 it would involve the criteria for the sustainable management of natural and physical resources that are incorporated in Part 2 of the RMA;

54.3 the process does not include mandatory public involvement;

54.4 the process does not allow recourse to the Environment Court to challenge the Minister's decisions;

Other

55 **note** that the Treaty issues to which these proposals give rise are addressed in the separate Cabinet paper on the Waitangi Tribunal's report;

56 **note** that as the legislation is finalised the ad hoc Ministerial group will consider whether its provisions are sufficient to make clear the government's intention that the new framework will be the only avenue for the legal recognition of the customary rights of Māori in the foreshore and seabed;

57 **note** that the financial implications of the foreshore and seabed legislation are being addressed separately within the current Budget round;

58 **note** that the Deputy Prime Minister will co-ordinate any communications on these issues with the communications surrounding the introduction of the foreshore and seabed legislation.

Hon Dr Michael Cullen
Deputy Prime Minister