Regulatory Impact Statement
Review of the Foreshore and Seabed Act 2004: Post Consultation Decisions

Disclosure Statement

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1. This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice as part of the policy development process for the Review of the Foreshore and Seabed Act 2004 (the 2004 Act). It provides a summary of the regulatory impact analysis of options for the allocation of rights and obligations of ownership in the public foreshore and seabed. These options were developed as part of the policy process in reviewing the 2004 Act. Substantial policy development has taken place to address concerns the 2004 Act does not provide an equitable balance between all the interests of New Zealanders in the foreshore and seabed.

2. This is the second RIS prepared in relation to the Review of the 2004 Act. The first RIS analysed the preliminary policy options for replacing the 2004 Act as one possible outcome of the Review. Its purpose was to inform Ministerial decisions on the Government's preferred policy option which was set out in a public discussion document. This RIS only briefly addresses the status quo, problem definition and objective of the Review, which were covered in more detail in the first RIS.

3. Cabinet has set a tight timetable for completing the Review by the end of 2010 (which includes enactment of a replacement regime). This means the Ministry's ability to develop and analyse options is limited and focuses on areas with accessible evidence. If it were not for the externally set timeframe our analysis would be more comprehensive and our analysis less constrained. With respect to consultation the timetable has impacted on the depth of analysis of the public submissions. The submission period closed on the 30 April and approximately 1600 submissions were received. To date we have summarised the submissions with a focus on the 27 questions asked in the consultation document.

4. The policy process that underpins the RIS includes Cabinet decisions about assurances that must apply to all options and therefore constrain them. These assurances are the protection of public access, fishing and navigation rights and existing use rights. An example of the constraint on policy development is the options for recognising customary interests are restricted because an option which allows the holder to exclude the public is not possible.

5. The policy proposals discussed in the RIS has interdependencies and implications for other regulatory regimes and reform processes underway. These include the Aquaculture and RMA reforms as well as more established regimes such as the Crown Minerals Act and the Protected Objects Act. Changes that result from this Review could adversely impact on these regimes. For example the permission right (the right of customary title holders to permit activities requiring resource consent) will undermine the proposed improvements to the consent renewal process. This is a key element of both the aquaculture reforms and the RMA streamlining and simplifying work. If a customary interest holder exercised their right to

not permit a renewal of an aquaculture coastal permit this could compromise aquaculture development. These policy processes need to remain aligned to prevent unintended impacts and we are working with other departments to ensure this alignment.

6. We have concerns about the proposal to give businesses seeking a reclamation in the coastal marine area (eg a port company) a fee simple title because it is potentially inconsistent with the non-ownership concept. It may discriminate against customary interest holders who cannot have this property right. This proposal may be perceived by iwi as not balancing all the interests and therefore not meeting the government's overall objective for the review.

7. The RIS has some gaps in quantifying the risks, costs and benefits of the options identified. These primarily relate to the extent to which customary interests would be found in the foreshore and seabed under some of the options because it is not possible to determine with accuracy the outcome of the proposed tests because they have yet to be tested through the courts and/or negotiations. There is a lack of evidence of the number of Māori affected by the 2004 Act and the number impacted by the policy options in this RIS.

Benesia Smith
General Manager, Public Law (Acting)
Ministry of Justice Date: _____/_____/_____

Executive Summary - incorporating conclusions and recommendations

1 This RIS considers the options available to the Government to address the problems associated with the Foreshore and Seabed Act 2004 (the 2004 Act). The options are assessed using principles developed to guide the review process. While the 2004 Act provides certainty and protects some interests (such as freehold title) it is at the expense of customary interests. This has a much greater negative effect on Māori interests compared to others. The objective in addressing this problem is to rebalance the interests of all New Zealanders in the foreshore and seabed.

2 The decisions that Ministers will need to make are split into four main sets. The first looks at what should happen to the 2004 Act. The second is about the options available to the government in respect of a replacement regime. The third set addresses the issue of ownership of the foreshore and seabed. The fourth set covers options available to recognise customary interests in the foreshore and seabed including subsidiary decisions about tests and awards.

3 When the 2004 Act is assessed against the principles developed to guide the review process the Ministry concluded it will not meet the government's objective. Although it provides a certain solution because processes are already in place it is a breach of the principles of the Treaty of Waitangi, contrary to good faith, inequitable and not a fair balance of recognition of interests.

4 In terms of the options available to replace the 2004 Act, both amend or repeal of the 2004 Act provide an opportunity to balance interests and to address the negative criticism the 2004 Act has attracted. They provide an opportunity to establish a just and enduring solution that enables customary interests to be recognised. On balance the Ministry considers amending the 2004 Act will have only a limited effect in achieving the government's objective. It will not remove the negative symbolism associated with the 2004 Act and therefore will not achieve an equitable balance of all interests. Therefore repeal is our preference because it will ensure certainty around decision-making processes and the balance of interest.

5 If a new regime to recognise customary interests is preferred, we think allowing claimants the choice of entering into direct negotiations or taking their claim to court to determine their interests is a fair and reasonable approach. Prescribing tests and awards in legislation provides the greatest level of certainty and efficiency for all parties and interests.

6 Using a combination of Canadian common law and tikanga Māori to develop unique New Zealand tests and awards to determine and recognise customary interests ranks highly when assessed against the policy principles. As the awards have been developed to take into account the New Zealand context and to fit with the existing legislative environment of the coastal marine area they are likely to be functional and durable. Where customary title has been recognised the holders will be able to prevent activities from taking place within the 'title area'. The exemption for existing aquaculture permits dilutes this award but aligns with the government's priority for aquaculture development.

7 The Ministry has taken the approach of not explicitly defining the detail of its preferred approach towards replacement legislation including ownership. We note the government's preferred approach of non-ownership has benefits. We consider the proposal to give businesses seeking reclamation a fee simple title may be inconsistent with the non-ownership concept. It may discriminate against customary interest holders who cannot have this property right. This may be perceived by iwi as not balancing all the interests and will not meet the government's objective.

8 Introducing a new regime in the timeframe proposed by government will provide a level of certainty the issue is being actively addressed and allow for a process to recognise customary interests to be established and interests to be rebalanced sooner rather than later. Although the option of taking time now to consider other options may allow for the determination of a durable solution it will slow the momentum for change.

Introduction, Status Quo, Problem Definition and Objective

9 This RIS discusses problems with the Foreshore and Seabed Act 2004, the objective of the Review and options to meet this objective. The decisions that Ministers will need to make are split into four sets including further subsets:

- what should happen to the 2004 Act?
- the preferred replacement option
- ownership options for the foreshore and seabed
- options recognise customary interests in the foreshore and seabed including subsidiary decisions about tests and awards.

Status Quo

Defining the foreshore and seabed

10 The foreshore and seabed is the marine area bounded on the landward side by the line of the mean high water springs and on the seaward side by the outer limits of the territorial sea (12 nautical miles). It includes the beds of rivers that are part of the coastal marine area as defined by the Resource Management Act 1991. In practical terms it is the 'wet' part of the beach.

Value of the foreshore and seabed

11 The economic, social, cultural and environmental (biophysical) values associated with the foreshore and seabed are:

- Economic values – associated with ports, fishing, aquaculture, mining, oil and gas, electricity generation and tourism
- Cultural values – including recognition of mana based on ancestral rights and heritage values
- Environmental values- the diversity of coastal ecosystems which support biological communities
- Social values - the value to people from recreational uses such as diving and fishing.

In the 2007/8 year local authorities processed 1312 coastal permits which equates to 3 percent of all consents processed. [1] Of these 74 percent were not publically notified.

Foreshore and Seabed Act

12 Information about the background to the Foreshore and Seabed Act 2004 (the 2004 Act), the key provisions of the 2004 Act and the implementation of the Act to-date are laid out in full in the previous Regulatory Impact Statement 11 March 2010 (the previous RIS).

Problem definition

13 The previous RIS canvassed the problem definition in detail. In summary there is a body of opinion focused on the 2004 Act's creation of an inequitable and discriminatory regime that treats customary interests differently to the interests of other New Zealanders. Despite the benefits of the 2004 Act (including certainty of ownership and public access), the Act treats Māori rights differently to non-Maori. The Act removed the legal rights of Māori to have the nature and extent of their customary title interests determined by the Courts in accordance with established principles of New Zealand law.

14 The faults of the 2004 Act have come to symbolise systemic race-relations issues. For Māori, the 2004 Act represents a range of issues, from the role of Māori in managing natural resources to the meaning of 'one law for all'. It is not expected that all these issues will be resolved through the development of new foreshore and seabed policy. The negative symbolism of the 2004 Act needs to

[1] Ministry for the Environment RMA Two-yearly Survey of Local Authorities 2007/08

be acknowledged as polarising New Zealanders' views, not only on the foreshore and seabed, but on many other issues of which customary interests are part. As highlighted in the consultation process, many New Zealanders define the foreshore and seabed problem as one about 'access to beaches' rather than extinguishment of customary rights.

15 The following problem statement has been developed during the course of the Review:

Although the 2004 Act provided a greater degree of certainty about the range and operation of interests in the foreshore and seabed compared to the situation immediately before its enactment, it had a much greater negative effect on Māori interests compared to others and therefore does not provide for a satisfactory balance of all interests in the public foreshore and seabed.

Objective

16 The previous RIS described how the government objective for the Review was developed. The objective is:

Any regime should achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed (including customary interests).

17 The policy work has highlighted the need to find a solution that will prove durable and robust over the long-term. To help achieve this goal we have ran an inclusive and robust policy characterised by on-going consultation (with a range of people and groups etc) since the review commenced in early 2009. We have used the views to understand the interests of all new Zealanders to consensus build on the options under development. We acknowledge that the outcome of the Review will involve important trade-offs between the various interest represented in the foreshore and seabed.

18 Generally public policy analysis assesses the impacts of policy proposals on net national well being. Under this review additional assurances and principles have been developed that act as constraints on the options being considered. The review and policy development process has been underpinned by those principles which have also been used in this RIS to determine if the objective has been achieved:

- ***Treaty of Waitangi*****:** the development of a new regime must reflect the Treaty of Waitangi, its principles and related jurisprudence;
- ***good faith*****:** to achieve a good outcome for all following fair, reasonable and honourable processes;
- ***recognition and protection of interests*****:** to recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed (recreational and conservation interests, customary interests, business and development interests, and local government interests);
- ***access to justice*****:** the new regime must provide an accessible framework for recognising and protecting rights in the foreshore and seabed;
- ***equity*****:** to provide fair and consistent treatment for all;
- ***certainty*****:** have transparent and precise processes that provide clarity for all parties including for investment and economic development in New Zealand; and
- ***efficiency*****:** a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

Assurances

19 The replacement regime will apply to the foreshore and seabed (excluding private titles). The replacement regime needs to provide for the following assurances:

- **public access** in, on, over and across the public foreshore and seabed for all (subject to certain exceptions such as health and safety reasons);
- **recognition of customary rights and interests** – any new legislation will include recognition of customary rights and interests in order to address the disproportionate impact of the 2004 Act on customary interests
- **protection of fishing and navigation rights** within the foreshore and seabed; and
- **protection of existing use rights** to the end of their term (e.g. coastal permits, mining exploration permits, and marine reserves).

20 We note that the assurances are already provided for in the status quo (either explicitly or implicitly in the 2004 Act) and will not conflict with the objective. The consultation process has not brought to light any obvious objection to these assurances. Many submitters, particularly those with business interests in the foreshore and seabed seek the certainty which these assurances provide.

Regulatory impact analysis

What should happen to the 2004 Act?

21 The 2004 Act has taken on symbolic significance for many New Zealanders. As described in the problem definition, the symbolism is on the whole, negative. Addressing this negative symbolism has therefore been included in our analysis which considers:

- what options are available to the Government to address the problems of the 2004 Act?
- which of these options best achieves the objective?

22 When the Status Quo is assessed against the principles the Ministry concluded it provides a relatively certain solution. It is efficient because processes are already in place. However it has been regarded as breach of the Treaty of Waitangi, contrary to good faith, inequitable and not a fair balance of recognition and protection of interests and therefore will not meet the government's objective.

23 The public response to the 2004 Act demonstrates that most people do not support it. In 2004, approximately 94% of 3,946 submissions made to the Select Committee opposed the then Foreshore and Seabed Bill 2003. Of the 358 submitters to the Ministerial Review Panel who expressed an opinion on what should happen to the 2004 Act, approximately 85% wanted it repealed.

24 This contrasts with the results from the public consultation process in April 2010 where of the 1234 submitters that addressed the question of repealing the 2004 Act, 21% supported the repeal of the 2004 Act and 77% opposed repealing the 2004 Act. Generally reasons were the Act is working well "in the best interests of all", repeal would have a negative impact on society and that rights should not be conferred according to race.

25 The following A3 diagram set out the options available when considering what to do with the 2004 Act. It outlines the elements of each option to consider and the impacts that each option may encompass.

Table 1: Review of the Foreshore and Seabed Act 2004: Options available to meet the objective

OBJECTIVE

Achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed

- Business and development interests
- Customary interests
- Recreational and conservation interests
- Local government Interests

CABINET-AGREED PRINCIPLES

- Treaty of Waitangi
- Good faith
- Recognition and protection of interests
- Equity
- Access to justice
- Certainty
- Efficiency

Options for change and next steps assessed against Cabinet-agreed principles

1ST DECISION – OPTIONS FOR CHANGE TO 2004 ACT

AMEND 2004 ACT

- May not fully address Treaty principles because inhibits fundamental change
- Lacks good faith because does not address negative symbolism
- Tests can be recalibrated to recognise customary interests
- Provides a limited framework for recognising customary interests
- Equitable
- Certain
- Efficient

STATUS QUO

- Does not reflect principles of the Treaty
- Lacks good faith because does not address negative symbolism
- Does not fully recognise customary interests
- Inequitable-discriminates against Māori
- Provides a limited framework for recognising customary interests
- Certain
- Efficient

REPEAL 2004 ACT

- Provides opportunity to be fully aligned with the principle of the Treaty
- Good faith – removes negative symbolism- supported by many at hui and public meetings
- Recognises and protects customary interests
- Equitable - opportunity to find a just and durable solution
- Provides for access to justice
- Greater level of uncertainty
- Moderately efficient

(IF DECIDE TO REPEAL 2004 ACT) 2ND DECISION – NEXT STEPS

DO MORE WORK

- Addresses Waitangi Tribunal's call for a "longer conversation"
- Good faith- responds to majority of submitters
- Opportunity to develop a framework for recognising and protecting rights
- Designed to balance interest of all NZers
- Certain - opportunity to build consensus on the solution

REVERT TO POST-NGĀTI APA

- Aligns with Treaty principles
- Good faith – removes negative symbolism Allows Court based determination of titles and rights
- Pure form of access to justice
- Level of uncertainty as to how Courts would determine customary interests
- Inefficient -Ministerial Review Panel said it would lead it a "unmanageable patchwork of litigation"

NEW REGIME

- Provides an opportunity to be fully aligned with the principle of the Treaty
- Good faith – an opportunity to find a just and durable solution
- Recognises and protects customary interests
- Equitable
- Provides for access to justice
- Greater level of uncertainty
- Moderately efficient

Amend or repeal?

26 The choice of whether to amend or repeal the 2004 Act depends on:

- the degree to which amendment or repeal will address the problems associated with the 2004 Act; and
- whether fundamental changes are necessary to the regime (i.e. to better recognise customary interests and to correct the operational deficiencies of the 2004 Act).

27 We consider that amending the 2004 Act will have only a limited effect in achieving the government's objective. The negativity associated with the development and enactment of the 2004 Act is entrenched and unlikely to be ameliorated by amendment. The 2004 Act itself has become a representation of New Zealand-wide disharmony.

28 In our view amendment would not comply with the advice the government received from the Ministerial Review Panel in 2009 which recommended the Act be repealed. We also consider that amendment would not satisfy the concerns raised by the United Nations or the Waitangi Tribunal.

29 Of the two options (amend or repeal), repeal goes considerably further towards mitigating the negative symbolism of the 2004 Act. If it was not for the symbolic value of repeal and a desire to address the Crown ownership aspect of the Act, then amendment could be an appropriate solution to recalibrate the tests or potentially establish new litigation processes

30 Any replacement regime will require a substantial rewrite of the Act. For example, if Crown ownership was to be replaced with a new ownership model, it would require substantial amendment throughout the Act to the point where it would be more efficient to repeal and start afresh. If an amendment takes an Act beyond its original purpose in a fundamental way then the preference is to simply repeal and replace it.

Repeal the Act

31 If repeal is preferable to amendment, we have identified two repeal sub-options. Either:

- repeal and revert to the post-Ngati Apa situation; or
- repeal and replace the 2004 Act with a new legislated solution.

32 Repealing and remaining silent is not a viable option because it would not restore the original position and would create a vacuum a as it would not necessarily change the Crown's absolute ownership of the foreshore and seabed. It is preferable to repeal and replace the 2004 Act with a new regime immediately rather than repeal and then develop a new regime over time..

Reverting to the post-Ngati Apa situation

33 The sub option of repeal and revert to the post-Ngati Apa will require legislation because the repeal of an Act does not necessarily revive anything from the past and therefore the Crown's absolute ownership of the foreshore and seabed would remain.

34 If the Act were repealed and the post-Ngāti Apa situation positively restored the Māori Land Court would have jurisdiction to hear and determine claims that areas of the foreshore and seabed have the status of Māori customary land. The High Court would have the jurisdiction to hear and determine claims of customary title.

35 There would be a number of complex issues to be resolved associated with ownership, collateral matters and how to integrate court-derived title into wider frameworks. These issues are dealt with later in this RIS we when discuss the ownership models, recognising customary rights and collateral matters.

Replacing the 2004 Act with a new legislated solution

36 The Ministry of Justice considers that new legislation should be enacted to establish a new regime for ownership and management of the foreshore and seabed. This would allow the negative symbolism associated with the 2004 Act to be removed and replaced with a more balanced regime. If new legislation was put in place at a minimum it would need to include:

- an ownership regime
- a process to allow for customary interests
- public access
- protection of fishing rights and navigation rights
- protection of existing use rights
- a process for dealing with other matters affected by repeal of the 2004 Act (eg reclamations).

Ownership options for the replacement regime

37 The 2004 Act vested the full legal and beneficial ownership of the public foreshore and seabed in the Crown as its absolute property. The Act also extinguished all potential Māori customary title in the foreshore and seabed and instead provided a prescribed form of customary title that recognises customary interests akin to exclusive rights (territorial customary rights orders). Ongoing customary rights (activity based rights) were not affected by the vesting of the public foreshore and seabed in the Crown. The Act provided mechanisms for their recognition and protection under the RMA if certain requirements were met.

38 Ownership of the foreshore and seabed is a fundamental issue in the context of the review of the 2004 Act. Decisions made about ownership will shape the government's response to a range of flow-on issues and interests in the public foreshore and seabed. For example, the form of ownership chosen can limit the nature of customary interests that could be recognised.

39 To achieve certainty and clarity for the management of the foreshore and seabed, it is necessary to specify clear roles and responsibilities in respect of it. The 2004 Act did this by specifying the Crown as its owner. There are alternative mechanisms for achieving certainty which involve specifying particular roles and responsibilities in legislation for management and responsibility of the resource including when, how and by whom they are to be exercised.

40 Any ownership option will need to accommodate the government's assurance such as public access and the business interests that exist in the foreshore and seabed will need statutory protection. The Government's assurance of public access for all in, on and over the foreshore and seabed will protect the social and recreational values of the foreshore and seabed and these values are are unlikely to be changed by the policy proposals.

41 Under any of the ownership options, the following features of the status quo *would not change*:

- treatment of areas in private title;
- public access (subject to certain exceptions such as for health and safety reasons);
- fishing and navigation within the foreshore and seabed (subject to certain exceptions such as in harbours); and
- existing use rights (eg, coastal permits and marine reserves) until the end of their term.

42 Under any of the ownership options, the following features of the status quo *could change*:

- the residual rights and obligations of ownership, including who allocates space;
- regulatory processes (eg, public participation and the mechanics of how coastal permits are decided); and
- customary interests - how they are recognised and what is recognised.

Five feasible options

43 The review process identified five feasible options for 'ownership' as described in **Table 2**.

Assessment of options

44 Our analysis has been informed by feedback from the latest consultation round. The vast majority of submitters that responded to this question (91%) disagreed with the Government's proposal for a non- ownership approach but the reasons for that disagreement varied widely. Reasons included submitters:

- did not understand the proposal and did not feel informed enough to support it;
- were concerned that changes to ownership would impact on their rights (such as access or fishing);
- thought the foreshore and seabed should be in Crown ownership for the good of all New Zealanders;
- thought it promotes racism or is discriminatory (either in favour of Māori or against Māori);
- thought it does not deliver justice for Māori;
- supported Māori ownership;
- considered that the 'no-owner' proposal was contradictory to tikanga; and
- want more time to explore other options (a "longer conversation").

45 A small minority of submitters that responded to this question (7%) agreed with the government's preferred non-ownership approach. Reasons and comments focused on support of the concept that the foreshore and seabed should belong to everyone and that the approach has the potential to deal pragmatically and flexibly with a complex and contentious issue.

46 All the ownership options carry levels of risk. The option of absolute Māori ownership appears to carry the greatest level of risk given the levels of uncertainty it creates for most of the interests in the foreshore and seabed (i.e, business and development and local government). This option also conflicts with the government's aim of creating a balance of interests in the foreshore and seabed as it is weighted too heavily in favour of customary interests. The detail of how it could be given effect, the length and nature of any transition, and why it is assumed that this extinguishes the need to recognise the customary rights of particular groups of Maori in particular areas of the foreshore and seabed have yet to be determined.

47 The option of absolute Crown ownership provides certainty for most interests in the foreshore and seabed, although it does carry risks similar to those associated with absolute Māori ownership. There is no proper balance of interests given that customary interests must be extinguished to accommodate absolute Crown ownership and it does not accord with most of the principles (excluding certainty). Absolute ownership (either Crown or Māori differs from the rights and responsibilities of current private owners because the assurances do not apply to private owners.

48 Crown Notional title could lead to uncertainty in that it could affect the Crown's ability or willingness to exercise the rights and obligations of ownership in locations where it has identified that customary title is likely to be recognised later. Some submitters consider that Crown Notional and the non-ownership option will have similar impacts (For example the Seafood Industry Council).

49 In a practical sense the proposed regime is similar to Crown notional title as the roles and responsibilities for managing the foreshore and seabed are likely to be the same and the potential awards and tests for customary interests would be the same.

50 Under the no-owner option the normal rights of ownership will not exist. For example fee simple title could not be granted. Possible interests that could be recognised in a non–ownership regime are management and use rights.

TABLE 2

OBJECTIVE
Achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed

- Business and development interests
- Customary interests
- Recreational and conservation interests
- Local government Interests

CABINET-AGREED PRINCIPLES

- Treaty of Waitangi
- Good faith
- Recognition and protection of interests
- Equity
- Access to justice
- Certainty
- Efficiency

Options for ownership assessed against impacts on types of interests

(IF DECIDE ON NEW REGIME) 3RD DECISION – OWNERSHIP OPTIONS

CROWN ABSOLUTE TITLE

Crown holds absolute title despite customary interests being proved

- Doubtful whether meets principles of Treaty
- Does not demonstrate good faith towards Maori
- Does not restore customary title
- Inequitable- for customary interests
- Does not adequately provide for access to justice
- Certainty- status quo largely maintained
- Efficient
- Supported by written submissions
- Positive impact on business interests
- Negative impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

CROWN NOTIONAL TITLE

A form of statutory title that recognises pre-existing customary ownership

- Generally consistent with Treaty principles
- Demonstrates good faith
- Restores customary title extinguished by the 2004 Act
- Equitable in the long terms as will rebalance interests over time
- Provides for access to justice
- Uncertainty over ownership until all claims resolved
- Relatively inefficient
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

JOINT MĀORI/CROWN TITLE

Maori and the Crown have equal ownership and joint decision-making

- Generally consistent with Treaty principles
- Demonstrates good faith
- Recognises and protects all interests
- Likely to provide access to Justice
- Equitable
- Less efficient
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

MĀORI ABSOLUTE TITLE

Ownership is vested in Māori as absolute property

- Generally consistent with Treaty principles
- Does not align with principle of good faith
- Uncertainty - reduced role for government
- Inequitable- prioritises customary interests
- Would not provide for a wide range of interests
- Uncertain
- Inefficient
- Supported by oral submission made ay hui
- Negative impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Negative impact on local government

NEW ZEALAND MARINE COASTAL ACCESS AREA

No-one owns foreshore and seabed; instead specified roles and responsibilities

- Generally consistent with Treaty principles
- Demonstrates good faith
- Restores customary title,
- Provides for access to justice as includes a framework to recognise customary interests
- Equitable as seeks to balance of all interests
- Less certain
- Neutral impact on business interests
- Positive impact on customary interests
- Neutral impact on recreational interests
- Neutral impact on local government

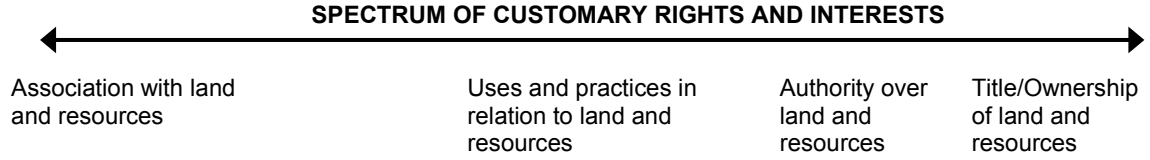
Government's preferred approach

Recognising customary interests

51 This section of the RIS discusses options available to determine and recognise customary interests in the foreshore and seabed. Three key decisions need to be made in this area. The first is what process (or 'engagement model') should be used for determining and recognising customary rights. The second is what tests should be used to determine if customary interests exist (and the nature of those interests). Finally, decisions need to be made regarding awards for customary interests that have been proven.

Types of customary interests

52 There is a range of customary interests that exist in the foreshore and seabed which sit along a continuum. This range includes use interests (which do not rely on control of the underlying land) or property-type interests (that do rely on control of the underlying land).



53 The customary interests in the foreshore and seabed that are proposed to be recognised reflect this range and are grouped into three types:

- the customary relationship of tangata whenua with the foreshore and seabed, such as is expressed in kaitiakitanga;
- customary uses, activities and practices ('customary rights'); and
- customary interests that are territorial in nature and extent ('customary title').

54 Recognising this range of customary interests is consistent with previous recognition in New Zealand (eg, fishing) and other Commonwealth countries to date (eg, Canada).

Options for processes to determine and recognise customary interests (engagement models)

55 A key component within the new regime will be a clear process for determining and recognising customary interests. Negotiations and court processes are provided for under the 2004 Act. Claims for recognition of both territorial and non-territorial customary interests can be made by either Māori or non-Māori groups through the High Court. Alternatively, groups can enter into direct negotiations with the Crown and, once agreement is reached, have the High Court confirm that the legislative tests have been met.

56 If the preference were to repeal the 2004 Act and return to a post-Ngāti Apa situation, the process could be solely court based. Post-Ngati Apa, both the High Court and the Māori Land Court had jurisdiction to receive and determine applications concerning customary interests in the foreshore and seabed. These 'dual jurisdictions' were able to make decisions on the same (or similar) issues but each had different tests and different corresponding outcomes.

57 The Ministry of Justice has identified four other options to determine and recognise customary interests in the foreshore and seabed: negotiations alone; using the courts alone; providing a choice of either negotiations or accessing the courts; and establishment of a specialist commission or tribunal to consider claims. All the process/engagement model options can be applied to all the ownership options currently under consideration by government except Option

4: Māori absolute title. Under that option Māori themselves would determine the processes for defining a new customary interests regime and any tests for determining differing types of interests.

58 The tables below provide an overview of the options. Each option is assessed as to how strongly it meets the seven principles for the development of policy for the foreshore and seabed review. For example, if an option provides little or no reflection of a particular principle it is indicated as 'low'.

NEGOTIATION-BASED PROCESS

Reflects Treaty of Waitangi	**High**- relational approach reflects Treaty partnership
Good faith	**Moderate to high** – lacks transparency but can be collaborative process
Recognises all interests	**Moderate to low** – third/other parties may have less opportunity to be involved
Access to justice	**Moderate** – claimants have no 'day in court' but accessible as costs can be reimbursed
Equity	**Moderate** – treatment of claims may not be consistent however tailored solutions are allowed for. Clear guidelines with parameters for negotiations would assist consistency.
Certainty	**Low to moderate**–various outcomes available through negotiations. Clear guidelines and parameters for awards would increase certainty.
Efficiency	**Moderate**–pre-existing process however can be expensive & time consuming

COURT-BASED PROCESS

Reflects Treaty of Waitangi	**Dependant** on particular Court used, eg High Court (HC) or Māori Land Court (MLC).
Good faith	**High** – considered, transparent & objective process
Recognises all interests	**Moderate to high** – third/other parties able to be involved
Access to justice	**Moderate**– claimants have 'day in court. MLC has special aid fund available. No legal aid available if HC.
Equity	**High**- consistent treatment for all
Certainty	**Moderate to high** – outcomes determined in consistent manner based on precedent.
Efficiency	**Moderate**– pre-existing process however can be complex, costly & prone to delays. Prescription of tests and awards in legislation would increase efficiency.

CHOICE OF NEGOTIATION OR COURT

Reflects Treaty of Waitangi	**Dependant** on particular process/court chosen.
Good faith	**High–** provision of choice is a fair & reasonable approach
Recognises all interests	**Dependant on process chosen**
Access to justice	**High**- groups can choose process most suitable for them. Accessibility may encourage more groups to seek recognition of interests (regardless of size/wealth)
Equity	**Moderate**- outcomes may be different for similar claims depending on which process chosen
Certainty	**Moderate to high**- clear parameters for negotiations and prescribed tests and awards increase certainty.
Efficiency	**Moderate-** enables flexibility so if negotiations falter can transfer into court process but two requires two processes to be provided

SPECIALIST TRIBUNAL

Reflects Treaty of Waitangi	**Moderate to high**- more inquisitorial/less adversarial than courts, can adapt procedures & protocol to suit
Good faith	**Moderate to high-** hearings can be open to public
Recognises all interests	**Moderate**– third parties can be involved. Inquisitorial approach can allow broad interests and issues to be considered.
Access to justice	**Moderate to high–** claimants can cover costs through legal aid regime
Equity	**Moderate to high –**consistent procedures and processes for investigating claims
Certainty	**Moderate** - recommendations only not binding decisions
Efficiency	**Moderate to low**- substantial investment required if new tribunal established or ongoing investment if existing Waitangi Tribunal was expanded.

59 The two options that involve the use of Courts require subsequent decisions to be made regarding the appropriate jurisdiction for the hearing of claims for recognition of customary interests, provisions relating to evidence and the appeal process. The table below provides a high level summary of analysis of the decisions required. The two options are the Māori Land Court or High Court and are set out below.

ANALYSIS OF OPTIONS RELATED TO COURT-BASED PROCESS

	Advantages	*Disadvantages*
Māori Land Court	• **Expertise:** specialist jurisdiction and expertise in tikanga and Māori land tenure, and representation of Māori groups • **Procedure:** traditional framework, flexible rules of evidence and less adversarial • **Special Aid Fund:** funding for applicant groups available	• **Expertise**: traditionally limited to land and not the foreshore and seabed • **Appeal structure** could affect the **timeliness** of decisions • **Only Māori** can apply (although this could be amended)
High Court	• **Expertise:** has considered major issues affecting Crown–Māori relations • **Timely appeal structure:** decisions cannot be judicially reviewed • **Symbolic & practical:** may be perceived by some as a more appropriate court to consider cases that will affect the interests of all New Zealanders	• **Symbolic:** May not be viewed by Maori as the appropriate court to consider customary interest claims • **Legal Aid:** no legal aid funding available for applicant groups (although this could be changed)

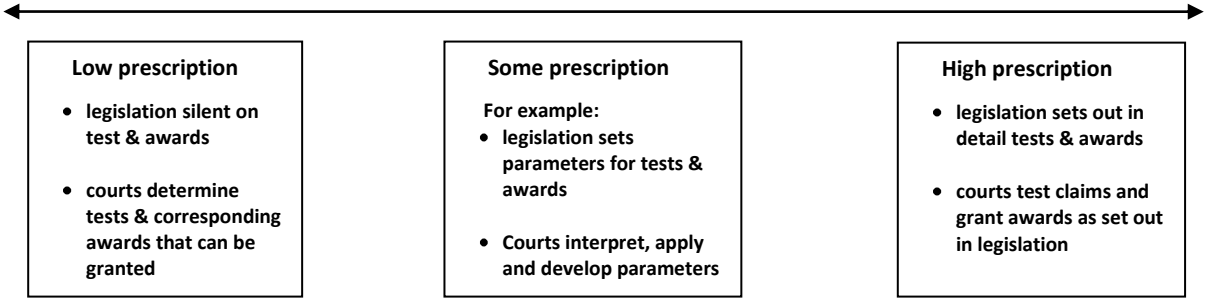
Analysis/conclusions

60 Overall, the option of **providing claimants with a choice of entering into direct negotiations or taking their claim to court most closely reflects the policy principles** of the foreshore and seabed review. The **High Court and Māori Land Court jurisdiction options both have merit** and where each may have shortcomings they can be mitigated in some way.

Prescribing tests and awards for customary interests in legislation

61 Consideration must be given to the level of prescription for the tests and awards used to determine and recognise customary interests. In other words, whether tests to determine customary interests and corresponding awards for proven interests should be left to the courts to develop over time or if they should be set out in legislation. The scope of possible prescription is set out below.

SCALE OF PRESCRIBING TESTS AND AWARDS



62 Tests are prescribed in the 2004 Act. The corresponding awards are also prescribed although the awards developed in foreshore and seabed negotiations to date were not prescribed in the 2004 Act. An overview of the analysis of the three options relating to prescribing tests and awards for any new regime is set out in the tables on the following page.

LEAVE TO COURTS

Reflects Treaty of Waitangi	**Moderate to high-** allows unique New Zealand common law to develop
Good faith	**Moderate to low–** not as transparent as setting out in legislation
Recognises all interests	**Moderate-** other interests can be involved but still discretion of judge as to weighting of interests in decision-making
Access to justice	**High**- allows dialogue of rights takes place solely between the applicant and the courts
Equity	**Moderate to low**- more room for discretion in judicial decision-making. No parameters for negotiations
Certainty	**Low**- long period of uncertainty likely until common law established
Efficiency	**Low-** protracted litigation and appeals likely. No parameters or basis for negotiations provided.

PROVIDE GUIDENCE IN LEGISLATION

Reflects Treaty of Waitangi	**Moderate-** allows for unique New Zealand common law to develop to a certain extent
Good faith	**Moderate–** not as transparent as setting out in full in legislation but provides some indication of parameters
Recognises all interests	**Moderate to high**-can test interests in way that recognises other existing interests and rights
Access to justice	**Moderate**- allows restricted dialogue of rights to take place between the applicant and courts
Equity	**Moderate**- allows some judicial discretion but provides parameters for consistency of process
Certainty	**Moderate**- narrows scope of possible outcomes
Efficiency	**Moderate**– will take time for courts to interpret and develop tests however parameters provided for negotiations

PRESCRIBE ACTUAL TESTS AND AWARDS IN LEGISLATION

Reflects Treaty of Waitangi	**Moderate to low-** less flexibility for New Zealand common law to develop
Good faith	**Moderate to high**- transparent but may be perceived that restricts or limits rights, or alternatively
Recognises all interests	**High**- ensures that all interests protected and recognised
Access to justice	**Moderate to low**- as Legislative determines not judiciary alone
Equity	**Moderate to high –** prescription ensures consistency in process
Certainty	**High**- provides significant level of certainty of process and outcome for both negotiation & litigation
Efficiency	**High**– prescription in legislation saves time and money for all involved

Analysis/conclusions

63 Overall, the **prescription of tests and awards in legislation is the most efficient option**. This option would also provide clarity and **the greatest level of certainty and transparency** because the way customary interests will be determined and correspondingly recognised would be made explicit. A risk with prescribing tests and awards in legislation is that Māori may feel that they have not been adequately involved in the process to develop them. However, Māori may equally be dissatisfied with outcomes that are determined through the court process.

Options for determining customary interests (tests)

64 The tests in the 2004 Act have been heavily criticised. The Ministerial Review Panel found the tests relied too heavily on aspects of other countries' common law and did not reflect New Zealand's legal experience. The Panel also found in combining the strictest aspects of both Australian and Canadian common law, the tests are set too high. The Panel's findings are consistent with broader national and international criticism of the 2004 Act.

65 The objective of establishing new tests is to address the flaws in the 2004 Act's test while at the same time ensuring clarity and consistency with common law customary title in the New Zealand context. Three options for determining and testing customary interests have been considered:

- Canadian common law;
- Te Ture Whenua Māori Act 1993; and
- a combination of both Canadian common law and Te Ture Whenua Māori Act 1993.

66 These options represent the broad range of tests available although the combinations are almost limitless. All three options could involve higher or lower thresholds than those required in the 2004 Act depending on how they are calibrated. The result of lower thresholds is that claimant groups would be more likely to be able to prove their customary interests; therefore, the areas in which those interests could be recognised would be more extensive than could be recognised under the 2004 Act. The result of higher thresholds would be the converse. An overview of the analysis of each option is provided on the following page as **Table 3**.

Canadian jurisprudence (common law only)

67 Canadian courts have extensive experience in considering claims to aboriginal title (customary title) and a body of law that developed over a long period of time. As this option is based on established Canadian common law, a level of certainty is provided as to how tests will likely be interpreted in New Zealand. This option would not mitigate criticism regarding reliance on overseas case law to develop tests to determine Māori interests. A test based entirely on another country's legal experience is not the most appropriate means of testing Māori customary interests given the cultural, historical and constitutional divergence between the two countries.

Te Ture Whenua Māori Act 1993 (tikanga Māori only)

68 Under this option, a claimant group would need to prove that the relevant foreshore and seabed is 'land that is held by Māori in accordance with tikanga Māori (section 129(2)(a)) to meet a test for territorial customary interest. This option provides the same threshold as would have been applied by the Māori Land Court post-Ngāti Apa however this option does not provide a great deal of certainty.

Tikanga Māori and common law combined (government's preferred option)

69 This option would draw on both tikanga Māori and overseas common law (so far as it relates to the New Zealand context) to develop the tests. This approach accommodates both sources of authority in line with the Treaty of Waitangi, its principles and associated jurisprudence.

Views from submissions on tests

70 Submitters were asked whether they agreed with each of the elements of the test for determining non-territorial customary interests (customary rights) proposed by the Government. A majority of submitters who addressed this question disagreed with the proposed test. Of those who commented, there was a wide range of reasons for disagreement. Many submitters thought that there should be no recognition of customary interests at all. Other reasons for disagreement included that there should be no reference to tikanga Māori (eg, because it is uncertain); the test is too high and unsympathetic to Māori; and the common law tests from overseas jurisdictions should be used. Of the minority who agreed with the proposed test, reasons given included that the test was reasonable and fair and that it was appropriate to include tikanga Māori.

Analysis/conclusions

71 On balance, the option of tikanga Māori and common law combined ranks highest when assessed against the principles. This option allows for the recognition of the full spectrum of customary interests. It provides consistency with New Zealand's legal heritage and context as well as some level of certainty as to how tests will likely be interpreted here.

TABLE 3: DETERMINING CUSTOMARY INTERESTS - OPTIONS FOR TESTS

OPTION 1: CANADIAN JURISPRUDENCE (COMMON LAW ONLY)

TESTS FOR CUSTOMARY RIGHTS

- Has been in **existence since pre-sovereignty**
- **Continued existence** of an identifiable community
- **Connection of right to area** where claimed
- **Continuous exercise**
- **Integral to culture** of group prior to contact, and
- Whether the **right was extinguished**

TESTS FOR CUSTOMARY TITLE

- **Land occupied prior to sovereignty**
- Show **occupation was exclusive at sovereignty**, and
  - "intention and capacity to retain control"
  - need not be "positive acts" of exclusion
- Show substantial **maintenance of connection between the people and the land**

Reflects Treaty of Waitangi	**Low** – fails to recognise New Zealand's own approach to recognising customary interests within the Treaty framework or the validity of tikanga Māori
Good faith	**Moderate to low-** may be perceived as unfair and inappropriate to apply overseas model only
Recognises all interests	**Moderate to low**- unique New Zealand common law unable to develop but consistent with common law of comparable jurisdictions
Access to justice	**Moderate**-allows for customary use and proprietary type interests to be considered and recognised but not full spectrum of interests
Equity	**Moderate to high**-upholds common law principle of recognising property rights
Certainty	**Moderate to low**- uncertainty as to how Canadian common law tests might be applied in New Zealand
Efficiency	**Moderate-** uncertainty about aspects of common law tests in Canada remains, will take time to apply and develop related common law in New Zealand

OPTION 2: TE TURE WHENUA MĀORI ACT 1993 (TIKANGA MĀORI ONLY)

TESTS FOR CUSTOMARY RIGHTS

- **No test** – Te Ture Whenua Māori Act 1993 deals with Māori land tenure not use rights

TESTS FOR CUSTOMARY TITLE

- **"land that is held by Māori in accordance with tikanga Māori"** (section 129(2)(a) of Te Ture Whenua Māori Act 1993)

Reflects Treaty of Waitangi	**High**- acknowledges tikanga as traditional Māori system of authority and management
Good faith	**High**- same test that would have been applied had 2004 Act not been introduced
Recognises all interests	**Moderate to low**- allows for differences in tikanga from group to group but may not recognise other valid interests in foreshore and seabed
Access to justice	**Moderate to low**- no express test for customary rights so may restrict groups from making these sorts of claims
Equity	**Moderate** - potential for customary interests to be recognised in a way that fails to provide for other interests
Certainty	**Low**- unclear how 'held in accordance with tikanga Māori' might be applied in the foreshore and seabed
Efficiency	**Moderate to low**- will take time to determine how test will be applied in foreshore and seabed

OPTION 3: TIKANGA MĀORI AND COMMON LAW COMBINED

TESTS FOR CUSTOMARY RIGHTS

- Has been **in existence since 1840**
- **Continues to be carried out** in the area in accordance with **tikanga Māori**
- **Has not been extinguished**

TESTS FOR CUSTOMARY TITLE

- Held in accordance with **tikanga Māori**
- **Exclusive use and occupation** of area (without substantial interruption) since 1840
- "Exclusive use and occupation" allows for:
  - shared exclusivity
  - customary transfers since 1840
  - ownership of abutting land relevant (but not required)
  - fishing and navigation by 3rd parties does not necessarily preclude exclusivity

Reflects Treaty of Waitangi	**Moderate to high**- acknowledges tikanga as traditional Māori system of authority and management and role of common law in determining customary interests
Good faith	**Moderate**- Māori may perceive as unfair& unreasonable to not use test that Māori Land Court would have applied
Recognises all interests	**Moderate to high-** allows for recognition of customary interests in a way that does not displace other valid interests in the foreshore and seabed
Access to justice	**Moderate to high**- acknowledges full spectrum of customary interests
Equity	**Moderate to high-** allows for recognition of customary interests in a way that does not displace other valid interests in the foreshore and seabed
Certainty	**Moderate to high-** prescription of tests in legislation will increase certainty
Efficiency	**Moderate to high**- prescription of tests in legislation will increase efficiency

TABLE 4: RECOGNISING PROVEN CUSTOMARY INTERESTS - OPTIONS FOR AWARDS

OPTION 1: CANADIAN JURISPRUDENCE (COMMON LAW ONLY)

AWARDS FOR CUSTOMARY RIGHTS

- **Dependant on right claimed** and established case law:
  - Rights generally **not capable of evolving**
  - **"right to development" tied to individual right** and whether right integral to culture of group prior to contact

AWARDS FOR CUSTOMARY TITLE

- **Exclusive right to use and possess** as groups see fit, including in a non-traditional way (but unable to use land in a manner irreconcilable with fundamental nature of groups' connection with land)
- **Right to permit activities**
- Can obtain **commercial benefit** from land use

Assurances

Held collectively and inalienable except to the Crown

PRINCIPLES

Reflects Treaty of Waitangi	**Low**- no recognition of 'customary relationship' of tangata whenua with foreshore & seabed or of tikanga Māori
Good faith	**Moderate to low**- may be perceived as unfair and inappropriate to use overseas model
Recognises all interests	**Moderate to low**-does not allow for unique New Zealand context to be taken into account
Access to justice	**Moderate to low**-allows for customary use and proprietary type interests to be recognised but not full spectrum of interests
Equity	**Low**- allows for exclusive possession
Certainty	**Moderate-** right to permit activities may increase uncertainty
Efficiency	**Low-** right to permit activities may decrease efficiency and awards not aligned with other New Zealand legislation

IMPACTS

Stakeholder	Possible impact
Maori	Potential for increased control over resources, can gain commercial benefit
Recreational	No change
Business	Greater uncertainty and potential for loss of access to resources
Local Government	No significant change likely, additional decision makers (consent approval) may slow consent process
Conservation	Environmental impacts largely controlled by RMA but some increased Māori input into the process may have environmental benefits

OPTION 2: TE TURE WHENUA MĀORI ACT 1993 (TIKANGA MĀORI ONLY)

AWARDS FOR CUSTOMARY RIGHTS

- No award provided for in Te Ture Whenua Māori Act 1993

AWARDS FOR CUSTOMARY TITLE

- **"land that is held by Māori in accordance with tikanga Māori"** Property rights
- Declaration that land has **"Māori customary land" status**
- **Right to permit activities**
- Deemed to be **Crown land for some purposes**, e.g. trespass (section 144(1))
- Can obtain **commercial benefit** from land use

Assurances

Held collectively and inalienable (as Māori customary land) but status can change to Māori freehold or General land (which are alienable)

PRINCIPLES

Reflects Treaty of Waitangi	**Moderate to high** - tikanga recognised as traditional Māori system of authority and management
Good faith	**Moderate to high**- same awards that would have been available had 2004 Act not been introduced
Recognises all interests	**Moderate to low-** potential for customary interests to be recognised in a way that fails to provide for other interests
Access to justice	**Low**- only allows for proprietary type interests to be recognised
Equity	**Moderate to low**- potential for customary interests to be recognised in a way that fails to provide for other interests
Certainty	**Moderate-** right to permit activities may increase uncertainty
Efficiency	**Moderate to low**- right to say no to consents may decrease efficiency

IMPACTS

Stakeholder	Possible impact
Maori	Potential for increased control over resources, can gain commercial benefit
Recreational	No change
Business	Greater uncertainty & potential for loss of access to resources
Local Government	No significant change likely, additional decision makers (consent input) may slow consent process
Conservation	Environmental impacts largely controlled by RMA but some increased Māori input into process may have environmental benefits

OPTION 3: TIKANGA MĀORI AND COMMON LAW COMBINED

AWARD FOR CUSTOMARY RELATIONSHIP

- **Participation in conservation processes**

AWARDS FOR CUSTOMARY RIGHTS

- **Protection of customary activities**:
  - can carry out activities without resource consent
  - activities do not need to comply with an RMA plan
- Placement of **prohibition or restriction over wāhi tapu**

AWARDS FOR CUSTOMARY TITLE

- **Planning document** (Input into conservation & environmental management & planning in coastal marine area)
- **right to permit activities** requiring RMA consent (excluding renewals for aquaculture) & some specific conservation authorisations (eg marine mammal watching permits but not marine mammal sanctuaries
- **Prima facie ownership** of newly found **taonga tūturu (protected objects)**
- Can obtain **commercial benefit** from land use

Assurances

Held collectively and inalienable

PRINCIPLES

Reflects Treaty of Waitangi	**High**- recognition of 'customary relationship' of tangata whenua with foreshore & seabed
Good faith	**Moderate–**uses similar awards that would have been available had 2004 Act not been introduced and provides additional benefits
Recognises all interests	**Moderate to high–** awards developed specifically to ensure all interests can be provided for
Access to justice	**High**- allows for full spectrum of customary interests to be recognised
Equity	**Moderate to high–** awards developed specifically to ensure all interests can be provided for
Certainty	**Moderate-** right to permit activities may increase uncertainty
Efficiency	**Moderate–** recognition of their planning document and the permission right may decrease efficiency & increase costs for departments but awards align well with other legislation

IMPACTS

Stakeholder	Possible impact
Maori	Full spectrum of customary interests recognised, potential for significant level of input into resources management plus ability to gain commercial benefit
Recreational	No change
Business	Potential for uncertainty and for loss of access to resources
Local Government	Additional time & resource may be required to consider and provide for planning document
Conservation	Environmental impacts largely controlled by RMA but increased Māori input into decision making may have environmental benefits

Options for recognition of proven customary interests (awards)

72 When developing options for awards, both Canadian common law and Te Ture Whenua Māori Act 1993 were considered. Instruments developed in the foreshore and seabed negotiations between Ngā Hapū o Ngāti Porou and the Crown were also drawn on, for example, territorial rights orders, customary rights orders).2 Three options were identified and considered. All three provide for property rights including the right to permit activities and the right to obtain commercial benefit from land use. An overview of the analysis and impact of each option is provided as Table 4 on the previous page.

Views from submissions regarding awards

73 Submitters were asked whether they agreed with each of the elements of the awards for customary interests proposed by the government. Submissions were divided. A number of submitters thought that iwi/hapū should receive more or different recognition, or did not agree with a particular aspect of the proposed awards (eg, because they may cause uncertainty for development). Other submitters did not support any type of customary interest/right or award.

Analysis/conclusions

74 **All three options are likely to cause uncertainty** for business and development interests as all three involve the right to permit activities. On balance, the option **combining tikanga Māori and common law ranks highest when assessed against the policy principles**. Although this option may involve some negative impacts for local government (and some central government departments) relating to the proposed planning document, it entails **significant positive impacts for Māori and balances other interests** in the foreshore and seabed much the same way the alternative award options do.

75 The awards in this option have been s**pecifically developed to take into account the New Zealand context and to fit with the existing legislative environment of the coastal marine area**. Because there are over 40 statutes that operate in the coastal marine area, the awards under this option connect at a high level to the Resource Management Act 1991 (RMA). The RMA is the predominant legislation in the area and connects with approximately 35 of the 40 statutes in operation. The Conservation Act 1987, the Marine Reserves Act 1971, the Protected Objects Act, and the Marine Mammals Protection Act 1978 have also been accommodated in the development of this option. This option also allows for bundles of rights to be compensated for the constraints of Cabinet's agreed assurances, such as public access. **These are elements are critical if the award is to be functional and desirable**.

Award options relating to minerals within customary title areas

76 Prior to the 2004 Act, "non-nationalised" minerals in the foreshore and seabed (all minerals other than petroleum, gold, silver and uranium) were either owned by the Crown, privately owned or the ownership was undetermined because of claims by Māori that the land was Māori customary land. As the 2004 Act vested the full and beneficial ownership of the public foreshore and seabed in the Crown, any non-nationalised minerals within the public foreshore and seabed that were not privately owned were vested in the Crown. There is no policy intention to change Crown ownership of nationalised minerals (petroleum, gold, silver and uranium)

77 As some private title holders own non-nationalised minerals in their land within the foreshore and seabed an equitable regime would provide some recognition of the interest in non-nationalised minerals that holders of customary titles have in their land. The following three options represent

[2] The Deed of Agreement with Ngā Hapū o Ngāti Porou provides various other instruments that would apply throughout the rohe moana of Ngā Hapū o Ngāti Porou. These are made in recognition of the mana of Ngā Hapū o Ngāti Porou. They are not made in recognition of territorial customary rights.

the broad range of options for recognising proven customary title interests in non-nationalised minerals considered and all three can be applied to any of the above award options:

- **maintain the status quo**– the Crown would continue to own all non-nationalised minerals in the foreshore and seabed;
- **provide customary title holders with an increased role** in relation to non-nationalised minerals allowing them to control access and gain commercial benefit in customary title areas; or
- **vest non-nationalised minerals in customary title holders**- allowing them to control access and gain commercial benefit from those minerals.

Analysis/conclusions

78 Providing customary title holders with an increased role in relation to non-nationalised minerals to control access and gain commercial benefit in customary title areas and vesting non-nationalised minerals in customary title holders are effectively the same. However vesting the minerals in customary title holders may be perceived as more fair and equitable as customary title holders will own the minerals in their land the same way private title holders do.

79 Both options reflect the policy principles well with the exception of 'certainty' and 'efficiency' because both options increase the number of decision makers involved in non-nationalised mineral management, regulation and (for the vesting option) investment. Conversely, the status quo option ranks high against these two principles but low against the remaining five ('Reflects Treaty of Waitangi', 'Good Faith', 'Recognises all interests', 'Access to justice' and 'Equity').

80 An overview of the impacts on key stakeholders for each option is outlined in the table below.

	Status quo (Crown owns)	Provide customary title holders with increased role	Vest in customary title holders
Maori	**No compensation for reduced property rights** - no opportunity for role in management or regulation or to gain commercial benefit	**Some recognition of property rights**- Increased decision making role & ability to gain commercial benefit	**Property rights equitable to private title holders** who own minerals
Business	**No change**– status quo provides certainty for business and investment	**Increased number of decision makers** may cause uncertainty for business & investment	Fracturing of mineral ownership **may increase transaction costs** for mineral explorers and developers
Environment	**No change**	**Greater influence of Maori** over decision making has **potential to positively affect environmental outcomes**	**Maori ownership** has **potential to positively affect environmental outcomes**

Implementation

81 There are a number of matters that will need to be considered as part of implementation of a new foreshore and seabed regime. There will not need to be any substantive change to the way these matters are dealt with in under any of the five ownership options. These matters are allocation of space (although the rationale for Crown, decision-making would change in a non-ownership regime); coastal permits; coastal occupation charges; leases and licences; structures and roads; local authority administrative functions and local authority-owned land; and the preservation of Māori reservations.

Reclamations

82 With respect to reclamations there are a number of decisions to be in respect of how they should be managed under a new regime based on the non-ownership concept. Three options have been identified for providing for reclamations under the new regime.

83 The options are:

- fee simple title;
- a leasehold interest; or
- a coastal permit.

84 The fee simple option and the leasehold option are inconsistent with the no-ownership option. Although a fee simple title would give applicants certainty it does not fairly balance all interests in the coastal marine area. Customary interests are unable to be recognised as fee simple titles. The coastal permit option is consistent with all ownership options as it relies on a use right permission (rather than an ownership interest). Furthermore a coastal permit allows for input from the wider community to ensure that all interests are considered when decisions are being made about the scale and location of the activity.

85 Decisions need to be made about who can apply for a reclamation. To avoid dealing with competing applications in respect of the same reclamation (eg: the person who constructed the reclamation and a local iwi) we propose that unless a reclamation has been abandoned, only the person who constructed a reclamation will be able to claim an interest in it. Decisions also need to be made about whether a reclamation can have alternative uses? There are two options - either reclamations will or will not be able to have alternative uses to the purposes for which they were constructed. We consider that it is a sustainable use of resources to allow for alternative uses if the original use is no longer viable. We note that declamations rarely happen.

86 There are several transitional options for dealing with applications for an interest in a reclamation. These are:

- All applications considered under the provisions of the new foreshore and seabed regime; or
- the new regime will contain transitional provisions so that applications are considered under the relevant regime that was applicable when the application was made; or
- the new regime will contain transitional provisions to simplify the processes for granting interests in extant and future applications.

87 There is unlikely to be opposition to the first option if the new regime provides for fee simple title as this is considered the most desirable interest by applicants. If all applications are dealt with under one regime, this will improve efficiency compared to the current three or four. However if reclamation receive a coastal permit (rather than fee simple title) this will have negative effects for older reclamations where a leasehold or freehold interest can currently be obtained.

Consultation

88 Consultation on the review of the 2004 Act has been underway since March 2009. In addition to the iterative interdepartmental policy development processes consultation has been undertaken in a number of forums as set out below.

Iwi Leaders Group

89 A group of eight leaders from across New Zealand was appointed by the Attorney-General in to operate as a 'sounding-board' for the government's proposals. The iwi leaders are generally very supportive of repeal and removal of Crown ownership. They are supportive of recognition of the three levels of customary interests

Ministerial Review Panel [2009]

90 The Terms of Reference for the Ministerial Review required the Panel to undertake consultation with Māori and the general public through a series of public meetings and hui. The y undertook a series of 21 consultation hui and public meetings from which 580 submissions were received. The Panel also met with 30 significant interest groups and the five groups who had been in

negotiations with the under the 2004 Act as well as other key commentators and members of the judiciary.

91 The primary grievance articulated by submitters to the Ministerial Review Panel related to the Act's extinguishment of (potential) Māori customary title and the vesting of ownership of the in the Crown. The Panel concluded that the Foreshore and Seabed Act 2004 failed to balance the interests of all New Zealanders in the foreshore and seabed, and was discriminatory and unfair. It advised repealing the law and replacing it with new legislation.

Consultation with targeted stakeholders

92 The Attorney-General met with sixteen stakeholders (eg local government, port companies, recreational, conservational, farming, aquaculture, energy and human rights groups) who were considered to be affected by the legislation more than the general public. The Attorney-General used this process to explain his preference and to hear concerns from stakeholders. Some specific feedback received from Local Government advised the views of councils across the country were very diverse. Port Companies were looking for certainty so they can run business without interruption. The Council of Trade Unions thought the 2004 Act should be replaced or repealed and that was a need for greater dialogue.

Consultation with negotiating groups

93 The Attorney-General met with the five iwi groups in foreshore and seabed negotiations with the Crown. The meetings were an opportunity for the Attorney-General to explain his preference and to gather feedback on issues such as the workability of the proposed tests.

Government's public consultation

94 In March 2010 Cabinet agreed to a four week public consultation process (31 March to 30 April 2010) on the government's preferred regime for replacing the 2004 Act. The process consisted of preparation and distribution of a consultation document that included a detailed submission form for feedback on questions about the proposals. For example submitters were asked to comment on whether the 2004 Act should be repealed or not and whether they support government's preferred approach to ownership of the foreshore and seabed.

95 Hui and public meetings were held during April 2010. At the hui there was a clear theme of support for the repeal of the 2004 Act. This was in contrast to the public meetings where there was generally support for retention of the status quo.

96 Approximately 1600 written submissions were received on the Government's proposals. The written submissions reflect a wide range of views. Most submitters felt that the foreshore and seabed should remain in Crown ownership, and many of those did not support any form of recognition of Maori customary interests. This outcome is in stark contrast to the submissions on the then Bill in 2003 (including a hīkoi over of 50,000 people), the very unfavourable critiques of two United Nations bodies and the recommendations of the Ministerial Review Panel last year.

97 The overall nature of written submissions indicated that a lot of submitters are still focussed on the fundamental issues that are seen to be associated with the foreshore and seabed issue, rather than on the detail of the government's proposals. In many cases, submitters did not appear to fully appreciate some of the issues being canvassed, which is understandable given the complexity of the subject matter. It is also evident that there are many common misunderstandings about this issue, ranging from the geographic area of the foreshore and seabed to the administration of the 2004 Act.

98 People are likely to have another chance to participate in the review when a Select Committee considers the replacement legislation.