

- 1 **note** that the Relationship and Confidence and Supply Agreement between the National Party and the Māori Party specifies that:

*The National Party and the Māori Party will, in this term of Parliament, initiate as a priority a review of the application of the Foreshore and Seabed Act 2004 to ascertain whether it adequately maintains and enhances mana whenua*

#### MINISTERIAL PANEL'S REPORT

- 2 **note** that a Ministerial Review Panel was appointed to review the Foreshore and Seabed Act 2004 in line with a Terms of Reference [CAB (09) 6/3B) refers]
- 3 **note** that the Ministerial Review Panel delivered its report on 30 June 2009
- 4 **note** that Cabinet considered a high-level summary of the Ministerial Review Panel's report [CAB Min (09) 24/20 refers]
- 5 **note** that the majority of submitters, and the Ministerial Review Panel, recommend that the Foreshore and Seabed Act 2004 be repealed

#### NEXT STEPS

- 6 **note** that the Attorney-General's preliminary preferred option is the repeal of the Foreshore and Seabed Act 2004;
- 7 **agree** that further advice is required on the options available to Government in relation to the Foreshore and Seabed Act 2004
- 8 **invite** the Attorney-General, in consultation with the Minister of Māori Affairs, to report back to the Cabinet Committee on the Treaty of Waitangi Negotiations by 23 August 2009 on:
- 8.1 further detail on the options open to the Government in its review of the Foreshore and Seabed Act 2004, including a preferred option; and
- 8.2 proposed next steps for the government's initial response to the report of the Ministerial Review Panel.



Hon Christopher Finlayson  
Attorney-General

Date: 15 17 09.

Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

## REVIEW OF FORESHORE AND SEABED ACT 2004: FURTHER DETAIL ON OPTIONS AND NEXT STEPS

### Proposal

- 1 This paper provides further detail on the options open to the Government in its review of the Foreshore and Seabed Act 2004 (**the 2004 Act**), including my preferred option, and proposes next steps.
- 2 Cabinet's agreement is sought to:
  - repeal the 2004 Act (in principle);
  - undertake further policy work on a possible regime to replace the 2004 Act;
  - a set of principles to guide that further policy work; and
  - the Government's proposed bottom lines for its foreshore and seabed policy.

### Executive summary

- 3 On 30 June 2009, the independent Ministerial Review Panel (**the Panel**) on the review of the 2004 Act provided its report *Pākia ki uta, pākia ki tai* to me. I have been giving further consideration to the contents of that report, have commenced discussions within and across political parties represented in Government and more broadly in Parliament, and have been doing my own thinking on this important issue.
- 4 I think that there are a number of interests in the foreshore and seabed that need to be carefully balanced. These interests include recreational and conservation interests, business and development interests, local government interests and customary interests. Each set of interests is valid in its own right. I think the 2004 Act had a disproportionate impact on customary interests. This view is consistent with the Panel's view.
- 5 I consider the Government's main objective in developing a foreshore and seabed policy response to the Panel's report should be to balance the interests of all New Zealanders. Given this, I consider that:
  - a a repeal of the 2004 Act, rather than an amendment to it, is necessary to address the criticism of and grievances associated with the 2004 Act;

- b the Government should adopt a set of five principles (good faith, recognition and protection of interests, equity, certainty and efficiency) to guide further policy development; and
  - c the establishment of a set of “bottom lines” (reasonable public access for all, protection of fishing and navigation rights, protection of existing use rights and no change to Crown minerals policy) would assist further policy development.
- 6 These principles and bottom lines will form an important component of the Government’s policy response to the Panel’s report. They will go a long way to reassure all New Zealanders of the Government’s overall intent in reviewing the 2004 Act.
- 7 In moving forward, there are numerous options available to the Government to replace the 2004 Act. They can all be categorised into one or more of three models: a litigation model, a negotiation model, or a hybrid model.
- 8 I prefer a model that creates efficient litigation processes with the ability to negotiate directly (group by group) between the parties, if necessary. This means my preferred option is the hybrid model. Such a model could be implemented or provided for in the legislation that repeals the 2004 Act. I do not consider an interim regime would be desirable given the uncertainties it would create for the different interests in the foreshore and seabed.
- 9 The Minister of Māori Affairs has no specific preferred option at this stage. He is interested, however, in further work on the development of a “statutory tipuna title”, which would allow the foreshore and seabed to be vested in founding tribal ancestors for the benefit of all of their descendants. I support further work being done on this concept.
- 10 There is still some way to go in developing a comprehensive response to the Panel’s report. In order to refine my thinking and facilitate my report back to Cabinet next month I will, amongst other things, have further discussions with key stakeholders. The Minister of Māori Affairs and I are seeking a durable and comprehensive resolution to this issue that can stand the test of time.

## Background

- 11 The Panel was appointed in March 2009 to provide advice to the Government on its review of the 2004 Act [CAB (09) 6/3B refers].
- 12 On Monday 6 July 2009, the Cabinet considered a high-level summary of the Panel’s report on the 2004 Act *Pākia ki uta, pākia ki tai*. That high-level summary noted that the majority of submitters to the Panel, and the Panel itself, considered that the 2004 Act should be repealed [CAB Min (09) 24/20 refers].
- 13 On Monday 27 July 2009, the Cabinet considered a paper that canvassed options for the Government’s response to the Panel’s report and next steps [CAB Min (09) 26/4 refers]. The Cabinet noted that my preliminary preferred option was to repeal the 2004 Act. The Cabinet also agreed that further advice

was needed on the options open to the Government in its review of the 2004 Act and invited me, in consultation with the Minister of Māori Affairs, to report back with further detail on those options and my preferred option. The Cabinet also asked me to outline the next steps the Government could take in responding to the Panel's report.

- 14 Since that Cabinet meeting, I have undertaken further work on the options open to the Government, including my preferred option, and have begun preliminary discussions with key stakeholders.

## Comment

### *Framing the issue*

- 15 I think that the Government's main objective in developing its foreshore and seabed policy response to the Panel's report should be to balance the interests of all New Zealanders in the foreshore and seabed. In undertaking this role, the Government should look to produce equitable outcomes for all interests. I outlined my initial view on the nature of these interests in my previous paper [TOW Min (09) 8/1 refers].
- 16 I think the interests of New Zealanders in the foreshore and seabed include:
- a *recreational and conservation interests* in accessing, using and enjoying the coastline and marine environment;
  - b *business and development interests*, such as the fishing, marine farming, marine transport, mining and tourism industries, and port companies, which have a significant interest in how the coastal marine area is controlled and regulated;
  - c *local government interests*, as local authorities administer much of the law that regulates use of the coastal marine area; and
  - d *customary interests*, including usage, authority and proprietary interests as an expression of the relationship between iwi/hapū and the coastal marine area.
- 17 I agree with the Panel's view that the 2004 Act had a disproportionate impact on customary interests in the foreshore and seabed. Although the 2004 Act protected some interests, such as freehold title (whether held by Māori or non-Māori),<sup>1</sup> it extinguished uninvestigated customary title in the foreshore and seabed. The uninvestigated title was replaced in the 2004 Act with prescribed litigation avenues in the Māori Land Court and High Court using new jurisdictions and new and specific tests that would likely result in limited outcomes. This situation has resulted in an ongoing sense of grievance within New Zealand, particularly amongst Māori.

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<sup>1</sup> As at December 2003, Land Information New Zealand identified that 12,499 privately owned parcels would (at least in part) be within the boundary of the foreshore.

- 18 Te Puni Kōkiri considers the fact that customary interests existed prior to other sets of interests, were affirmed by the Treaty of Waitangi and were disproportionately impacted by the 2004 Act, should be explicitly addressed in the exercise of balancing the interests of all New Zealanders.

### *Achieving a solution*

- 19 Given my view that the Government's role should be to balance the interests of all New Zealanders in the foreshore and seabed, I think a repeal of the 2004 Act, rather than an amendment to it, is necessary to mitigate the criticism of and grievances associated with the 2004 Act.

### *Guiding principles*

- 20 If Cabinet agrees to repeal the 2004 Act and that further policy work should take place, I think it will be necessary to formally adopt a set of guiding principles for the development of the Government's foreshore and seabed policy and its wider review of the 2004 Act. This will ensure the policy development process is transparent and robust and will guide the Government in its broader role of balancing the interests of all New Zealanders in the foreshore and seabed.
- 21 The guiding principles I recommend the Cabinet agree to are:
- **good faith** – to achieve a good outcome for all, following fair, reasonable and honourable processes;
  - **recognition and protection of interests** – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
  - **equity** – provide fair and consistent treatment for all;
  - **certainty** – clear and precise processes that provide clarity; and
  - **efficiency** – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.
- 22 Te Puni Kōkiri considers the guiding principles should be linked to overarching Treaty of Waitangi jurisprudence. This will provide a strong whakapapa for the principles, with an appropriate emphasis on balancing the interests of Māori and the Crown. Te Puni Kōkiri also considers that the proposed principle of "equity" should be replaced by the principle of "fairness". Te Puni Kōkiri considers the word "equity" can suggest equality, and that, in this case, equal outcomes may not be possible if a fair outcome is to be achieved.

- 23 Te Puni Kōkiri considers the following additional principles should also be included:
- a **due recognition and protection of rights and interests:** the recognition and protection to be afforded to rights and interests be commensurate with the nature of the rights or interests concerned;
  - b **prior-rights priority:** priority should be given to pre-existing and long held rights;
  - c **minimum intrusion:** if an intervention requires the restriction or the reduction of an existing right, then any intrusion should only be to the minimum extent needed to achieve the objective sought. In addition, some form of reciprocal consideration should be provided to the right holders; and
  - d **evolution and development of customary rights:** customary rights should not be limited to the situation at 1840, because custom and customary rights evolve and develop over time (this is supported by the Ministry of Fisheries).
- 24 The Ministry of Economic Development, the Ministry of Fisheries and The Treasury consider that a sixth **principle of development** should be included, so that opportunities for development (for Māori and non-Māori) are provided for. The Department of Conservation does not support this position as it does not reflect the legislative regime that controls activities in the coastal marine area. The Department of Conservation has advised that it supports the position I have reached in paragraph 26 below.
- 25 I have considered the views of these agencies. I think the principles suggested by Te Puni Kōkiri reflect concepts inherent in the notion of customary interests, For example, customary interests are pre-existing and longstanding, and they evolve and develop over time. Customary interests are expressly recognised within my description of all New Zealanders' interests in the foreshore and seabed (see paragraph 16 above). I think that other components of the principles proposed by Te Puni Kōkiri are matters of policy choice for the Government. For example, whether one or more of the different kinds of interests in the foreshore and seabed should be given "priority" or be subject to "minimum intrusion" is a matter for Government to consider when making policy decisions on what regime should replace the 2004 Act.
- 26 I think that including a principle of development would have the effect of elevating development interests above other interests (e.g. recreational and conservation interests). My explicit recognition of business and development interests within the description of interests in the foreshore and seabed ensures the appropriate balance.
- 27 I therefore recommend the Cabinet agree to the five guiding principles listed in paragraph 21 above.

*Government bottom lines*

- 28 As well as principles to guide the policy development process, I would like to establish “bottom lines”, or non-negotiable matters, in respect of decision-making on the Government’s foreshore and seabed policy. I consider that the public release of these bottom lines will provide certainty in respect of key interests in the foreshore and seabed (such as public access) and will seek to manage any expectations that may have been created following the release of the Panel’s report.
- 29 I think that a public statement framing the bottom lines (or non-negotiable elements), in addition to information about each bottom line, should go a long way to reassure all New Zealanders of the Government’s overall intent in reviewing the 2004 Act.
- 30 I propose that the Cabinet agree to the following statement for framing the Government’s bottom lines:
- the 2004 Act did not strike an appropriate balance of the rights and interests in the foreshore and seabed;
  - by reviewing the 2004 Act, the Government intends to achieve a better balance; and
  - the Government will consider all options, but the end result will be fair, just and will include certain non-negotiable elements.
- 31 The proposed bottom lines that I recommend the Cabinet agree to are:
- a reasonable public access for all;
  - b protection of fishing and navigation rights;
  - c protection of existing use rights; and
  - d no change to Crown minerals policy.

REASONABLE PUBLIC ACCESS FOR ALL

- 32 Until the passage of the 2004 Act, there was no legal right of public access in, on, over and across the public foreshore and seabed. This situation is inconsistent with the public’s perception that there is a legal right of public access that predates the 2004 Act.
- 33 The Panel stated in its report that Māori were not opposed to a right of public access, subject to recognition of customary rights and interests. The Panel supported a principle of “reasonable” public access. The Panel noted that exclusion of the general public may be reasonable in some circumstances. For example, from port operational areas and reserves for customary harvesting.

- 34 I propose that the Cabinet agree that the Government's bottom line on public access is reasonable public access for all.

#### PROTECTION OF FISHING AND NAVIGATION RIGHTS

- 35 General fishing rights are provided for under the Fisheries Act 1996. Māori commercial fishing rights were settled and claims extinguished under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. As part of the settlement, section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act requires that non-commercial customary rights can only be explored through regulations made under section 186 of the Fisheries Act. Section 9 of the 2004 Act preserved existing fishing rights. Common law navigation rights were replaced by the 2004 Act.
- 36 I propose that the Cabinet agree that fishing and navigation rights, including any fishing that can be carried out lawfully under fisheries legislation, be protected as a bottom line.

#### PROTECTION OF EXISTING USE RIGHTS

- 37 Use rights in respect of the foreshore and seabed can be issued under a range of legislative regimes, including the Resource Management Act 1991 and conservation legislation. Coastal permits issued under the Resource Management Act 1991 are required for activities undertaken in the foreshore and seabed, unless provided for by a rule in a regional coastal plan or allowed by the Resource Management Act 1991. Concessions and other approvals issued under conservation legislation may be required to legally undertake certain activities (e.g. for certain activities within the foreshore and seabed and marine reserves, marine mammal sanctuaries, national parks and reserves). For example, there is a concession to allow a commercial operator to run a glass bottomed boat at Goat Island Marine Reserve.
- 38 I propose that the Cabinet agree that the protection of existing use rights in the foreshore and seabed as a bottom line.

#### NO CHANGE TO CROWN MINERALS POLICY

- 39 Minerals in the foreshore and seabed are dealt with under the Crown Minerals Act 1991. There are four nationalised minerals (petroleum, gold, silver and uranium) that are owned by the Crown irrespective of the ownership of the land in which they are found. The Crown's ownership of other minerals is related to the Crown's current or past ownership of the relevant land and the date of transfer. Thus some minerals in the foreshore and seabed are privately owned because the transfer of land occurred prior to the statute retaining mineral ownership in the Crown. By statute if the Crown transfers land ownership, all minerals remain in Crown ownership.
- 40 A number of submitters to the Panel asserted their belief that the 2004 Act was passed so that the Crown could solely derive benefit from the exploitation of

minerals. Although this was not the reason, if the Crown had not prior to the 2004 Act owned minerals in the foreshore and seabed, this was an effect.

- 41 I propose that the Cabinet agree, as a bottom line, that minerals that are presently Crown minerals remain as such, regardless of whether the Crown ever had land ownership. All mineral related matters would therefore continue to be dealt with according to the Crown Minerals Act 1991.

#### *Collateral matters*

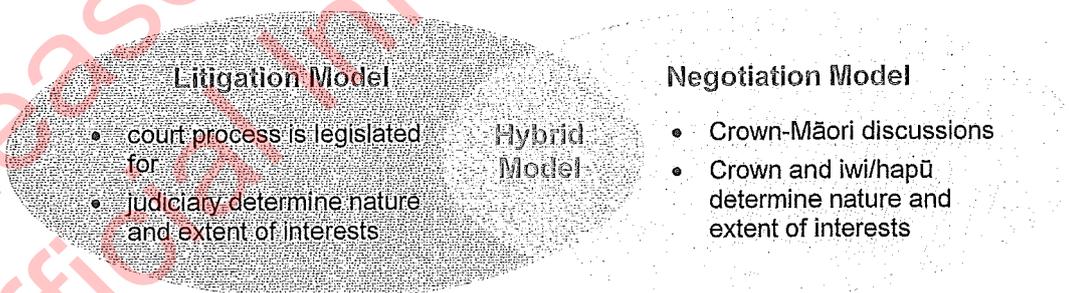
- 42 As part of the policy development process the following matters will need to be considered and will ultimately require Cabinet decisions:

- a ownership-related issues, including reclamations, deklamations, roads, fixtures, structures and other transitional matters;
- b the applications and negotiations under the 2004 Act (including those before the courts); and
- c related legislation that may be affected (e.g. the Foreshore and Seabed Endowment Revesting Act 1991).

- 43 I will report back to the Cabinet Committee on Treaty of Waitangi Negotiations on 16 September 2009 with proposals in respect of these collateral matters.

#### ***Possible options to replace the 2004 Act***

- 44 In my view, there are a number of options to replace the 2004 Act. These options can all be categorised as falling into one or more of the following three models, which broadly align with the models set out in the Panel's report: a litigation model, a negotiation model, or a hybrid model.



#### *Litigation model*

- 45 The litigation model means that the judiciary will determine the nature and extent of customary interests in the foreshore and seabed.

- 46 There are two possible options within this model:
- a repealing the 2004 Act and reverting back to the post-*Ngāti Apa* legal position; or
  - b repealing the 2004 Act and legislating for a new court process.

REPEAL AND REVERT TO POST-NGĀTI APA LEGAL POSITION

- 47 This option requires recapturing the legal situation that existed immediately after the *Ngāti Apa* decision, which was that:
- a the Māori Land Court had jurisdiction to determine applications by Māori that areas of the foreshore and seabed had the status of Māori customary land (although there was no certainty as to whether a title might result from a successful application);
  - b the High Court also had jurisdiction to determine claims by Māori that areas of the foreshore and seabed were subject to extant customary title under the common law;
  - c generally speaking, the Crown's title to the foreshore and seabed was not inconsistent with the recognition of customary rights and title;
  - d there was no common law right of access in, on, over or across the foreshore and seabed;
  - e there was a common law right of navigation in the foreshore and seabed. There was uncertainty, however, as to the extent to which privately held titles to the foreshore and seabed would have been subject to that right. There was also uncertainty about the extent to which land, determined to have the status of customary title, would have been subject to the common law right of navigation;
  - f historically, there was a common law right to fishing, but this has largely been subsumed and incorporated into legislation. Current fisheries legislation does not, however, provide for access to fish;
  - g there is scope to exercise non-commercial customary aquaculture rights, however commercial aquaculture rights have been settled by way of the Māori Commercial Aquaculture Claims Settlement Act 2004; and
  - h management of the coastal marine area was governed by legislation that (in part) presumed Crown ownership of the foreshore and seabed.

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- 49 The post-*Ngāti Apa* legal situation could be reinstated by one piece of legislation, that would:
- a repeal the 2004 Act;
  - b where necessary, positively reinstate the post-*Ngāti Apa* legal situation that customary rights are not extinguished;
  - c expressly repeal the Crown's full legal and beneficial ownership of the public foreshore and seabed and replace it with language providing for something akin to the application of a Crown "radical" title<sup>2</sup> over the foreshore and seabed subject to the recognition of customary title and rights;
  - d provide for public access and other Government "bottom lines"; and
  - e provide for transitional provisions relating to ownership and management of the foreshore and seabed, including extant applications and negotiations under the 2004 Act.
- 50 To ensure certainty, it would be necessary to include in legislation the right of the Crown and local authorities to continue to manage aspects of the foreshore and seabed under the Resource Management Act 1991, subject to mechanisms recognising and protecting either customary title or rights.

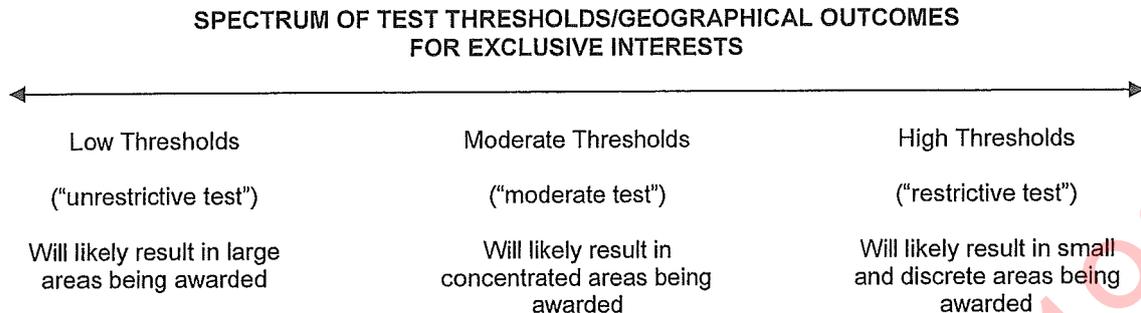
#### REPEAL AND LEGISLATE FOR A COURT PROCESS

- 51 This option involves legislating for a new court process to determine Māori interests in the foreshore and seabed. The Government could determine, by proposing legislation to repeal the 2004 Act, the parameters under which that court process will operate.
- 52 The parameters that may be covered are:
- a who owns the foreshore and seabed?
  - b what court or courts will consider applications?
  - c who bears the onus (burden of proof)?
  - d who can be an applicant?
  - e what tests should the courts use in considering applications? and
  - f what is the scope and content of a successful application?

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<sup>2</sup> The concept of radical title is that on the acquisition of sovereignty the Crown obtained a notional title to all New Zealand. That title was not a full title. The title was "burdened by" (or subject to) aboriginal or customary title, if any existed.

- 53 A key consideration in the setting of those parameters is how prescribed each element will be. The level of prescription will be determinative of the outcome. An example of this is set out below in relation to the tests that might apply:



- 54 Depending on the nature of the right granted through the court process, decisions might also need to be made about how an award would integrate into the wider regulatory frameworks that operate in the coastal marine area such as the Resource Management Act 1991 and conservation protection legislation.

#### *Negotiation model*

- 55 The negotiation model means that the Crown and Māori reach a political solution on the nature and extent of customary interests in the foreshore and seabed.

- 56 There are two broad options that could be used to undertake negotiations with iwi/hapū in order to recognise interests:

- a a nationwide solution; or
- b group by group solutions at a regional or tribal level.

- 57 The nationwide solution option requires the Crown to engage in discussions with iwi/hapū at a national level with a view to reaching a comprehensive agreement of all iwi/hapū interests in the foreshore and seabed at the same time.

- 58 The group by group option, allows the Government to engage in discussions with iwi/hapū at a tribal or regional level with a view to reaching tailored responses to groups' interests in a sequential manner.

#### *Hybrid model*

- 59 The hybrid model would blend elements or options of the litigation model and the negotiation model. The hybrid model would enable sufficient flexibility in achieving efficiencies from blending the most relevant components of the litigation and negotiation models.

***My preliminary preferred option***

60 I considered the negotiation model, in particular the nationwide agreement option, but I am not yet persuaded that this model alone could achieve the outcomes the Government is seeking. I think a nationwide agreement would require clear incentives to negotiate, leadership on both sides of the negotiating table and immediate and potentially significant resourcing to fund the Crown and Māori. At this stage these issues appear to rule out a nationwide agreement.

61 I also considered the litigation model and whether we could just put in place a regime that reverted back to the post-*Ngāti Apa* legal position. One of the major issues with this option is the perception that it is a relatively straightforward solution. This is not the case. Reverting to the post-*Ngāti Apa* legal situation is not straightforward because:

- a there is legal complexity in attempting to recapture a legal situation;
- b reverting to the legal situation post-*Ngāti Apa* would only be step one in the solution, as recognition of customary title and rights will only be resolved when all claims have been decided;
- c there will be a long period of uncertainty about ownership and management of the foreshore and seabed until all customary rights claims are heard and decided; and
- d there could be uncertainty after the court process (depending on the nature of the award and its effect) about how it will operate with the existing legislative framework.

62 I prefer a model that creates efficient litigation processes with the ability to negotiate directly (group by group) between the parties, if necessary. I think there are efficiencies to be gained from the combination of these two models, including a timely and pragmatic resolution of customary interests in the foreshore and seabed. For that reason, my preliminary preferred option is to use a court process in combination with a group by group negotiations process. This means that my preferred option is the hybrid model outlined above.

63 My initial view is that the parameters of a court process that would need to be provided for in legislation proposed by the Government could be:

- a the Crown owns the foreshore and seabed, subject to the resolution of claims;
- b the High Court has jurisdiction to consider applications with assistance from a specialist advisor (possibly a Judge from the Māori Land Court);
- c the applicant will bear the onus (burden of proof);
- d only Māori can apply to the court to have their customary interests determined;

- e the test that the courts must use in considering applications would be based on the common law doctrine of customary title with a tikanga Māori element; and
  - f the result of a successful application would be a specialised customary title that would be specifically developed, including the recognition of territorial and non-territorial rights where appropriate.
- 64 My initial view is that the parameters of a group by group negotiation process could be:
- a negotiations occur at a group by group or regional level; and
  - b local solutions tailored to the group or region cognisant of the other interests in that region.
- 65 Decisions would also need to be made about how the outcome of the hybrid model would integrate into the wider regulatory frameworks that operate in the coastal marine area such as the Resource Management Act 1991 and conservation legislation.
- 66 This hybrid model could be implemented or provided for in the legislation that repeals the 2004 Act. I do not think an interim regime would be desirable given the uncertainties it could create for recreational and conservation, customary, business and local government interests.
- 67 I think further work is required to evaluate what is the best option to replace the 2004 Act, including more detailed policy development on implications of the hybrid model I have suggested.
- 68 In the next month, I will continue to have discussions within and across political parties represented in Government and more broadly in Parliament. I am seeking a durable and comprehensive resolution to this issue that can stand the test of time.

***Minister of Māori Affairs' preferred option***

- 69 The Minister of Māori Affairs notes the complexity of the issue and the available options, and has no specific preferred option at this stage. The preliminary view of the Minister of Māori Affairs is that any final arrangements must have universal and consistent application across any and all sets of interests.
- 70 The Minister of Māori Affairs has identified that the concept of some form of "statutory tipuna title" could be considered. The concept of *tipuna title* is premised on the notion that the foreshore and seabed can be vested in founding tribal ancestors for the benefit of all their descendents (that is, all tribal members). The Minister of Māori Affairs considers that this approach would provide a mechanism to recognise Māori ownership aspirations, while ensuring that the foreshore and seabed remains inalienable. This concept could be applied at a number of levels, for example, it could be applied to the foreshore and seabed in its entirety (rather than vesting in the Crown), or it could be

applied to specific sections of the foreshore and seabed as an award through the litigation or hybrid models described above.

- 71 A number of submitters to the Panel supported the development of a *tipuna title* that recognises the inherent nature of rangatiratanga and mana whenua mana moana. The submitters stated that the idea is to provide a greater level of iwi autonomy than current models. I attach a briefing I have received from the Māori Party on the concept of a *tipuna title*.
- 72 The Minister of Māori Affairs proposes that the Cabinet directs further policy development work on the concept of a statutory *tipuna title*. I support further policy work being done on this concept.
- 73 The Minister of Māori Affairs has also stressed the importance of engagement with Māori and other New Zealanders about the Government's preferred option before any enabling legislation is introduced. I agree that further work is required to consider how the Government might engage with New Zealanders about the Government's preferred approach.

### Next steps

- 74 I recommend that the next steps in the development of the Government's foreshore and seabed policy response to the Panel's report and the Government's wider review of the 2004 Act be:
- a further policy development work (including work on the concept of statutory *tipuna title*) should be done on what is the best option to replace the 2004 Act;
  - b further work should be done on how the Government might engage with New Zealanders about this issue;
  - c I, in consultation with the Minister of Māori Affairs, should report back to the Cabinet Committee on Treaty of Waitangi Negotiations on 16 September 2009 on the outcome of that further work;
  - d the media strategy in place remains in place, with a fuller response to the Panel's report occurring in September; and
  - e I should continue my discussions with key stakeholders, including those groups negotiating under the 2004 Act.

### Consultation

- 75 The Foreshore and Seabed Unit within the Ministry of Justice prepared this paper. The following departments were consulted in the development of this paper: the Department of Conservation, the Ministry of Fisheries, the Ministry for the Environment, the Ministry of Economic Development, Te Puni Kōkiri, the Crown Law Office, the Office of Treaty Settlements and The Treasury.
- 76 The Department of the Prime Minister and Cabinet was informed.

### **Financial implications**

77 There are no financial implications that arise directly from this paper.

### **Human rights**

78 There are no human rights implications that arise directly from this paper.

### **Treaty of Waitangi Implications**

79 There are no Treaty of Waitangi implications that arise directly from this paper.

### **Legislative implications**

80 Any legislative implications arising out of this proposal will be addressed in future detailed policy papers.

### **Regulatory Impact Analysis**

81 A regulatory impact statement is not required at this time. As the review of the 2004 Act is part of the Government's regulatory reform programme, I will ensure I keep relevant Ministers apprised of issues as they arise.

### **Publicity**

82 I consider that it is too early in the development of the Government's response to make any public announcements.

83 I propose that the Prime Minister or I, in response to media enquiries, could make brief public announcements that are consistent with the media strategy that is currently in place. These announcements would be limited to statements that the Government is still considering its response to the Panel's report and that a fuller response can be expected in mid September 2009.

84 Until that time, the media strategy currently in place will remain until a new strategy is agreed by Cabinet.

## Recommendations

85 I recommend that the Committee:

### BACKGROUND

- 1 **note** that the Government is reviewing the Foreshore and Seabed Act 2004;
- 2 **note** that as part of this review the Government appointed a Ministerial Review Panel to advise the Government on aspects of the 2004 Act [CAB (09) 6/3B refers];
- 3 **note** that the Ministerial Review Panel recommended that the 2004 Act be repealed [CAB Min (09) 24/20, CAB Min (09) 26/4 refers];

### FRAMING THE ISSUE

- 4 **note** that there are a range of interests in the foreshore and seabed including:
  - 4.1 recreational and conservation interests in accessing, using and enjoying the coastline and marine environment;
  - 4.2 business and development interests, such as the fishing, marine farming, marine transport, mining and tourism industries, and port companies, which have a significant interest in how the coastal marine area is controlled and regulated;
  - 4.3 local government interests, as local authorities administer much of the law that regulates use of the coastal marine area; and
  - 4.4 customary interests, including usage, authority and proprietary interests as an expression of the relationship between iwi/hapū and the coastal marine area.
- 5 **agree** that the Government has a role in balancing the interests of all New Zealanders in the foreshore and seabed;
- 6 **note** the Attorney-General's view is that the 2004 Act should be repealed because it disproportionately affects customary interests;

### ACHIEVING A SOLUTION

- 7 **agree**, in principle, that the 2004 Act be repealed;

- 8 **agree** that the following principles be adopted to guide the next stage of the Government's review:
- 8.1 good faith – to achieve a good outcome for all following fair, reasonable and honourable processes;
  - 8.2 recognition and protection of interests – recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
  - 8.3 equity – provide fair and consistent treatment for all;
  - 8.4 certainty – clear and precise processes that provide clarity; and
  - 8.5 efficiency – a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies;
- 9 **agree** to the following statement for framing the Government's bottom lines (non-negotiable elements):
- 9.1 the 2004 Act did not strike an appropriate balance of the rights and interests in the foreshore and seabed
  - 9.2 by reviewing the 2004 Act, the Government intends to achieve a better balance; and
  - 9.3 the Government will consider all options, but the end result will be fair, just and will include certain non-negotiable elements;
- 10 **agree** that the following bottom lines will also guide the next stage of the Government's review:
- 10.1 reasonable public access for all;
  - 10.2 the protection of fishing and navigation rights;
  - 10.3 the protection of existing use rights;
  - 10.4 no change to Crown minerals policy; and
- 11 **note** that there are three broad models that cover the options open to the Government in deciding what regime should replace the 2004 Act:
- 11.1 a litigation model (the judiciary decides the nature and extent of Māori customary interests);

- 11.2 a negotiation model (the Crown and Māori reach a political settlement on the nature and extent of Māori customary interests); and
  - 11.3 a hybrid model (a combination of elements or options in the litigation and negotiation model);
- 12 **note** that:
- 12.1 the Attorney-General prefers a hybrid model because of the efficiencies that may be gained, in particular the timely resolution of customary interests; and
  - 12.2 the Minister of Māori Affairs has no preference at this time; and

NEXT STEPS

- 13 **note** that further policy development work (including work on the concept of a statutory tipuna title) should be done on what is the best option to replace the 2004 Act;
- 14 **note** that further work should be done on how the Government might engage with New Zealanders about the Government's proposals;
- 15 **agree** that the Attorney-General should continue discussions with key stakeholders, including those groups negotiating under the 2004 Act;
- 16 **invite** the Attorney-General, in consultation with the Minister of Māori Affairs, to report back to the Cabinet Committee on Treaty of Waitangi Negotiations by 16 September 2009 on the issues outlined in recommendations 13-15, including further details on what regime should replace the Foreshore and Seabed Act 2004; and

COMMUNICATIONS

**agree** that the current media strategy stays in place until Cabinet has made decisions to ensure a fuller response to the Panel's report in September.



Hon Christopher Finlayson  
Attorney-General

Date: 21 / 8 / 09.

Released under the  
Official Information Act 1982

## **BRIEFING FOR THE ATTORNEY GENERAL**

### **Re: The Concept of Tipuna Title**

The attached Brief explains the concept of Tipuna Title as it derives from Māori law and applies to the foreshore and seabed.

It stresses the uniquely Māori context from which the idea of tipuna title derives and now needs to be considered. It is prepared in the Treaty-based hope that tipuna title will be seen as a construct that needs to be accommodated and respected by the Crown rather than co-opted, redefined or subordinated within a non-Māori framework.

The three essential baselines which underpin tipuna title in Māori terms are –

- 1. It is a concept sourced within tikanga and has no exact equivalent in Pākehā common law.*
- 2. As a concept of title it naturally presupposes a set of subsequent rights or entitlements – title without recognised and enforceable entitlements is a contradiction in terms.*
- 3. The integrity of the title presupposes and was always dependent upon the fact that the foreshore and seabed belongs to Māori.*

### **Tipuna Title As A Tikanga Concept**

Tipuna title may be described as the physical and spiritual interests that collectively vested in Iwi or Hapū as part of their mana or rangatiratanga in regard to the whenua.

It is a title that exists within what may be termed “relational interests,” that is the interests that inhered in the relationships of a particular whakapapa and the willingness of our people to develop existing or potential relationships with others.

It is an absolute title in the sense that rangatiratanga and whakapapa create inalienable ties to the land. Being tangata whenua implies having whenua to be tangata upon, and “tipuna title” presupposes a continuing authority in relation to it. In that context a mokopuna was born into the collective title through his or her whakapapa.

Tipuna title did *not* depend upon a “radical title” as understood in Pākehā law nor on what the last government called an “ancestral connection” based upon “continuous occupation”. Instead it depends upon the fact of birth and the presumed permanence of whakapapa.

Because the title inhered through whakapapa in this way it was defined through an understanding of whakapapa as a concept and a reality. For example if an Iwi or Hapū was defeated in battle or a mokopuna with an

interest moved away the ability to practically enforce the title would slip into abeyance but the notional title would remain as long as the whakapapa endured.

An analogy may be drawn with the pēpeha of the people of Whanganui, “E rere kau mai te awa nui mai te kahui maunga ki Tangaroa ko au te awa, ko te awa ko au”. In that case the people are part of the river because of their whakapapa and they have “tipuna title” because of their relationship with it. If they move away they may not be able to fully participate in everything that that means in a practical sense but their notional title remains because moving does not extinguish their whakapapa.

In a very real sense the people can never give up or give away their river, and so an Iwi or Hapū cannot give away its tipuna title.

### **The Rights Or Entitlements That Flow from Tipuna Title**

The rights or entitlements that flow from tipuna title are naturally sourced in the same whakapapa as the title itself. The rites of birth affirmed the tipuna rights derived from the title that were then exercised within a tikanga of reciprocal obligations to manaaki the land and the moana.

Thus in 1886 the Ngāti Kahungunu rangatira Te Ataria defined the origin of rights in terms of our whakapapa with the land and our place as tangata whenua – “Ko te putake o o tātou tikanga, tēnei tonu i te rākau kauri. I whānau tonu i kōnei, i tipu ake tātou i kōnei, ko tātou te tangata whenua”.

The rights were real and enforceable and included an absolute right to permit or restrict access by others in appropriate circumstances. In Ngāti Kahungunu a notion of kauhanga or “passageways” developed as the means to facilitate access on approved and negotiated terms by others.

It is important to stress that the entitlements are akin to but not the same as “property rights” simply because they are derived from a quite different cultural and legal paradigm. They were originally defined within Māori specific terms and can more accurately be called “relational rights”.

In certain circumstances access or use rights might therefore be granted to others with whom Iwi sought a relationship, while in other cases they might be developed in new ways without diminishing the mana or integrity of the tipuna title itself.

### **The Integrity Of The Title**

The integrity of every Māori concept to do with the land and waters was premised on the fact that if the earth is indeed Papatuanuku, the Mother, then like the people of Whanganui we belong to her and she belongs to us.

In that context the foreshore and seabed clearly belongs to Māori.

## Questions

Responses to some of the questions are covered above but others require further and direct response. The order of questions has been changed to more accurately reflect the whakapapa of the title.

*1. Is it intended that Māori would hold tipuna title across the whole of the foreshore and seabed?*

Yes, in the sense that all of the foreshore and seabed lies contiguous to, and is part of the whenua of Iwi and Hapū.

*4. What are the characteristics of tipuna title? Is it intended to be held individually or communally? Could it be alienated? Can it coexist with other types of title on the foreshore and seabed?*

The characteristics are outlined above. Specifically it cannot be alienated and it can co-exist with other interests provided that the other interests do not impinge upon the reasonable use of Iwi and Hapū nor restrict a development right exercised according to tikanga.

*3. What is the nature and extent of the rights and responsibilities that would flow from holding a tipuna title? Would all holders of tipuna title have the same rights and responsibilities?*  
Outlined above.

*5. If tipuna title is derived from a whakapapa connection, how would the connection be assessed? Would urban Māori or Iwi, Hapū and whānau with inland rohe be able to state a whakapapa connection?*

(a) It is suggested that the term "whakapapa connection" not be used partly because of the negative association with the "phantom rights" of the orders offered in the existing legislation. More importantly our people only speak of whakapapa and it is from our understanding of its relationships that the title and rights derive.

(b) Tradition shows that because all Māori have whakapapa and because we never created an artificial distinction between the foreshore and the rest of the whenua or sea all Māori have tipuna title. How inland Iwi and Hapū might then exercise the attendant rights in relation to the coast was a practical matter of negotiation and political compromise. Thus tradition also shows a long history of inland collectives having access to the foreshore and seabed, and that such access was negotiated upon the basis of a whakapapa relationship with the coastal Iwi. Kauhanga were always granted in Kahungunu to those with whom a relationship was desired or deemed necessary in the circumstances.

(c) On the basis of those precedents urban Māori have title through their whakapapa. In regard to the effective exercise of their attendant rights in the rohe they now reside in there are perhaps two possibilities

(i) they might access kauhanga through negotiation with mana whenua

(ii) consideration could be given to creating a new adaptive tipuna title to acknowledge their residence based on long association with ancillary rights negotiated with mana whenua. Our law never stood still but adapted and this may be a case where a change can be negotiated that remains consistent with tikanga.

Questions 6 and 2 could profitably be considered together.

*6. Is it envisaged that holders of tipuna title would be involved in decision-making, management and administration within the area covered by tipuna title? How would that involvement work in practice?*

*2. If tipuna title is intended to recognise the exercise of mana of Iwi, Hapū and whānau, how would the exercise of mana be demonstrated?*

Tipuna title necessarily involves decision-making. The power to decide is fundamental to the proper exercise of mana and rangatiratanga.

How that would actually work in practice could be negotiated with say the Crown and appropriate local bodies provided that the title itself is neither compromised nor subordinated to other interests – the title implies more than a right to be consulted. At the very least Iwi and Hapū must retain the right to decide rights of reasonable access and development consistent with tikanga.