

OFFICE OF THE DEPUTY PRIME MINISTER

Memorandum to Cabinet

FORESHORE AND SEABED BILL: APPROVAL FOR INTRODUCTION**Proposal**

1. This memorandum proposes that the Foreshore and Seabed Bill be introduced on Thursday 8 April, be referred to Fisheries and Other Sea-related Legislation Committee, and be enacted before the end of 2004. The Bill has priority 2 on the legislation programme.

Policy

2. Cabinet has recently made decisions on a range of foreshore and seabed issues, which either develop or amend the policy framework that was adopted in December 2003 (CAB Min (04) 10/6 refers).
3. As a result of further consideration by the ad hoc Ministerial group, and following consultations, we propose further amendments as follows.

Customary rights

4. The December framework provided for the recognition and protection of customary rights (CBC Min (03) 10/1 paragraphs 49 to 99), and the most recent Cabinet decisions expanded or revised them in various respects (CAB Min (04) 10/6 paragraphs 25 to 31). It is now considered necessary to provide for all New Zealanders to be able to obtain recognition and protection for any customary rights that they can demonstrate. We propose that this take place through a new jurisdiction of the High Court, that would parallel that proposed for the Māori Land Court. The limits on this jurisdiction, and the statutory test for the recognition of customary rights (CAB Min (04) 10/6 paragraphs 29 and 30) would be retained, though with references to tikanga Māori omitted.
5. Customary rights that are recognised by the High Court would have the same status under the Resource Management Act as those recognised by the Māori Land Court (CAB Min (04) 10/6 paragraphs 38 to 49).
6. The Bill will include a provision making it clear that the exercise of a customary right will not be liable to coastal occupation charges.

Territorial customary right

7. Cabinet has agreed that a group of Māori may apply to the High Court for a declaration that under common law principles they would be entitled to

hold aboriginal title over a particular area of the foreshore and seabed, had the full beneficial ownership not been vested in the Crown (CAB Min (04) 10/6 paragraph 32); and agreed that any declaration be referred to the government to enable discussion (CAB Min (04) 10/6 paragraph 36).

8. It is now proposed that:
- a. the term "aboriginal title" be replaced by "territorial customary right";
 - b. applications to the High Court may be made by any group of New Zealanders;
 - c. discussions will now be able to be held with the Crown without recourse to the High Court.

Other matters

9. Cabinet has agreed that the landward boundary of the public domain for lagoons be set at the landward boundary of the coastal marine area as defined by the regional council (CAB Min (04) 10/6 paragraph 7). Te Whaanga lagoon in the Chatham Islands falls outside the coastal marine area, but because of its unique nature and significance it is proposed that it be specifically included in the public foreshore and seabed.
10. Cabinet has agreed that the new framework that has been developed to recognise customary rights and interests in the foreshore and seabed apply to all existing and new applications before the Māori Land Court (CBC Min (03) 10/1 paragraph 79). The Bill gives effect to this by stating that the Court has no jurisdiction to consider an application, and the application is of no effect, if the application:
- a. relates to an area of the foreshore and seabed;
 - b. seeks a determination under s131 of Te Ture Whenua Māori Act, and
 - c. was made before the commencement of the new Act.
11. Cabinet has agreed to vest those areas which are owned by a local authority and become foreshore and seabed as a result of erosion, as and when they become foreshore and seabed, without any further process (CBC Min (03) 10/1 paragraph 111); and that if the vesting in the local authority was for a valuable consideration, the foreshore and seabed land should be re-vested in the Crown and that the affected public bodies should be given a period of twelve months in which to make an application for compensation (CBC Min (03) 10/1 paragraph 113). We now consider that it is inappropriate for the Bill to refer to compensation in this or any instance, and instead propose it refer to redress.

12. The Bill includes a power for the Minister of Conservation to prohibit or restrict access to any area of the public foreshore and seabed. This power can only be exercised if not inconsistent with other rights or interests. The Minister may also make exceptions to that restriction, where that is necessary to give effect to a customary right recognised by the Māori Land Court.
13. It should be noted that the Bill is consistent with the development of government proposals on aquaculture.
14. Given the contentious and complex nature of the issues involved, the Bill will not remove everyone's concerns over foreshore and seabed policy. But it does address some of the criticisms that have been made by the Waitangi Tribunal and others.

Compliance

15. Careful consideration has been given to the Treaty of Waitangi and its principles throughout the development of the foreshore and seabed policy and of this legislation. The Bill is primarily concerned with common law customary rights rather than Treaty-based obligations. Nonetheless, Treaty principles are relevant as these customary rights are potentially protected by Article II of the Treaty.
16. The Waitangi Tribunal's report of the policy framework that was announced in December 2003 concluded that the policy was inconsistent with Treaty principles. Cabinet has already considered advice on this report, which highlighted points where the Tribunal's assumptions or reasoning differed from the Crown's.
17. A number of aspects of the policy have since been revised, partly in response to the Tribunal's findings:
 - a. The government now proposes a central rather than regional consultative process.
 - b. The term "customary title" has been replaced by the term "ancestral connection order";
 - c. A residual High Court jurisdiction has been retained, to enable the investigation of whether territorial customary rights might have existed at common law..
18. The Bill is designed to create an effective mechanism for the recognition and protection of customary rights in the foreshore and seabed, and to incorporate those rights in the general regulatory framework for the foreshore and seabed. It is considered that the Bill strikes a reasonable balance between the need to clarify the law and provide a stable basis for decision-making on the foreshore and seabed, while at the same time providing for the recognition and protection of customary rights.

19. The Attorney-General will advise Cabinet as to compliance of the policy proposals with the New Zealand Bill of Rights Act 1990.
20. The Bill complies with the:
 - a. principles and guidelines set out in the Privacy Act 1993;
 - b. relevant international standards and obligations; and
 - c. the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation*.

Consultation

21. Government caucuses and other parties represented in Parliament have been extensively consulted in the preparation of the Bill.
22. The following agencies were involved in the development of the policy papers that were considered by Cabinet and the Ad Hoc group of Ministers and/or have been provided with a copy of the draft Bill: Department of the Prime Minister and Cabinet, Treasury, Te Puni Kōkiri, Ministry of Economic Development, Department of Conservation, Ministry of Transport, Ministry for the Environment, Ministry of Justice, Crown Law Office, Parliamentary Counsel Office, Ministry of Foreign Affairs and Trade, Ministry for Agriculture and Forestry, Office of Treaty Settlements, Land Information New Zealand, Ministry of Fisheries, Department of Internal Affairs (local government policy).

Binding on the Crown

23. This Bill will be binding on the Crown.

Creating new agencies or amending law relating to existing agencies

24. The Bill does not create any new agency but does amend legislation administered by the Ministry of Justice, Te Puni Kōkiri and the Ministry for the Environment.

Allocation of decision-making powers

25. The Bill includes new decision-making powers for the Minister of Conservation in consultation with the Minister of Māori Affairs.

Regulations

26. The Bill includes powers of regulation covering Māori Land Court and High Court processes.

Definition of Minister

27. The Bill defines as Minister the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is responsible for the administration of the Act.

Commencement of legislation

28. It is proposed that the general commencement date for the new Act be the day after the Act receives the Royal Assent.

Parliamentary stages

29. On 29 March Cabinet noted the intention that the Bill be introduced by 8 April (CAB Min (04) 10/6 paragraph 53.2). It is proposed that the Bill be referred to the Fisheries and Other Sea-related Legislation Committee.

Recommendations

30. It is recommended that Cabinet:
1. **note** its recent policy decisions on the foreshore and seabed (CAB Min (04) 10/6 refers);

Policy amendments

2. **note** that the foreshore and seabed package includes provision for the recognition and protection of customary rights (CBC Min (03) 10/1 paragraphs 49 to 99 and CAB Min (04) 10/6 paragraphs 25 to 31);
3. **agree** that all New Zealanders should be able to obtain recognition and protection for any customary rights in the foreshore and seabed that they can demonstrate;
4. **agree** that the recognition of customary rights for all New Zealanders be given effect by a new jurisdiction of the High Court, that would parallel that agreed for the Māori Land Court;
5. **agree** that the limits on this jurisdiction, and the statutory test for the recognition of customary rights, be equivalent to those agreed for the Māori Land Court (CAB Min (04) 10/6 paragraphs 29 and 30) with references to tikanga Māori omitted;
6. **agree** that customary rights that are recognised by the High Court would have the same status under the Resource Management Act as those recognised by the Māori Land Court (CAB Min (04) 10/6 paragraphs 38 to 49);

7. **agree** that the Bill include a provision making it clear that the exercise of a customary right will not be liable to coastal occupation charges;
8. **note** its earlier decision that a group of Māori may apply to the High Court for a declaration under common law principles that they would be entitled to hold aboriginal title over a particular area of the foreshore and seabed, had the full beneficial ownership not been vested in the Crown (CAB Min (04) 10/6 paragraph 32);
9. **note** its earlier decision that any declaration be referred to the government to enable discussion (CAB Min (04) 10/6 paragraph 36);
10. **agree** that the term "aboriginal title" be replaced in the Bill by "territorial customary right";
11. **agree** that applications to the High Court for a declaration of territorial customary right may be made by any group of New Zealanders;
12. **agree** that discussions on a territorial customary right will be able to be held with the Crown without recourse to the High Court;
13. **note** its earlier decision that the landward boundary of the public domain for lagoons be set at the landward boundary of the coastal marine area (CAB Min (04) 10/6 paragraph 7);
14. **agree** that Te Whaanga lagoon in the Chatham Islands be included in the public foreshore and seabed;
15. **note** its earlier decision that the new framework to recognise customary rights and interests in the foreshore and seabed apply to all existing and new applications before the Māori Land Court (CBC Min (03) 10/1 paragraph 79);
16. **note** that the Bill gives effect to this by stating that the Court has no jurisdiction to consider an application, and the application is of no effect, if the application:
 - 16.1 relates to an area of the foreshore and seabed;
 - 16.2 seeks a determination under s131 of Te Ture Whenua Māori Act, and
 - 16.3 was made before the commencement of the new Act;
17. **note** its earlier decisions if an area was vested in a local authority for a valuable consideration, and becomes foreshore and seabed as a result of erosion, the foreshore and seabed land should be re-

vested in the Crown and that the affected public bodies should be given a period of twelve months in which to make an application for compensation (CBC Min (03) 10/1 paragraphs 111 and 113);

18. **agree** that the Bill omit any reference to compensation and instead refer in this instance to redress;
19. **agree** that the Bill include a power for the Minister of Conservation to prohibit or restrict access to any area of the public foreshore and seabed, this power can only be exercised if not inconsistent with other rights or interests;
20. **note** that the Bill is consistent with the development of government proposals on aquaculture.

Bill introduction

21. **approve** the Foreshore and Seabed Bill, which gives effect to these decisions, for introduction on 8 April 2004;
22. **agree** that the commencement of the Bill will in general be the day after the Act receives the Royal Assent;
23. **agree** that the government propose that the Bill be:
 - 23.1 referred to the Fisheries and Other Sea-related Legislation Committee; and
 - 23.2 enacted by the end of 2004;
24. **agree** that Cabinet Policy Committee have power to act on any further matters before the introduction of the Bill should that be necessary.

Hon Dr Michael Cullen
Deputy Prime Minister