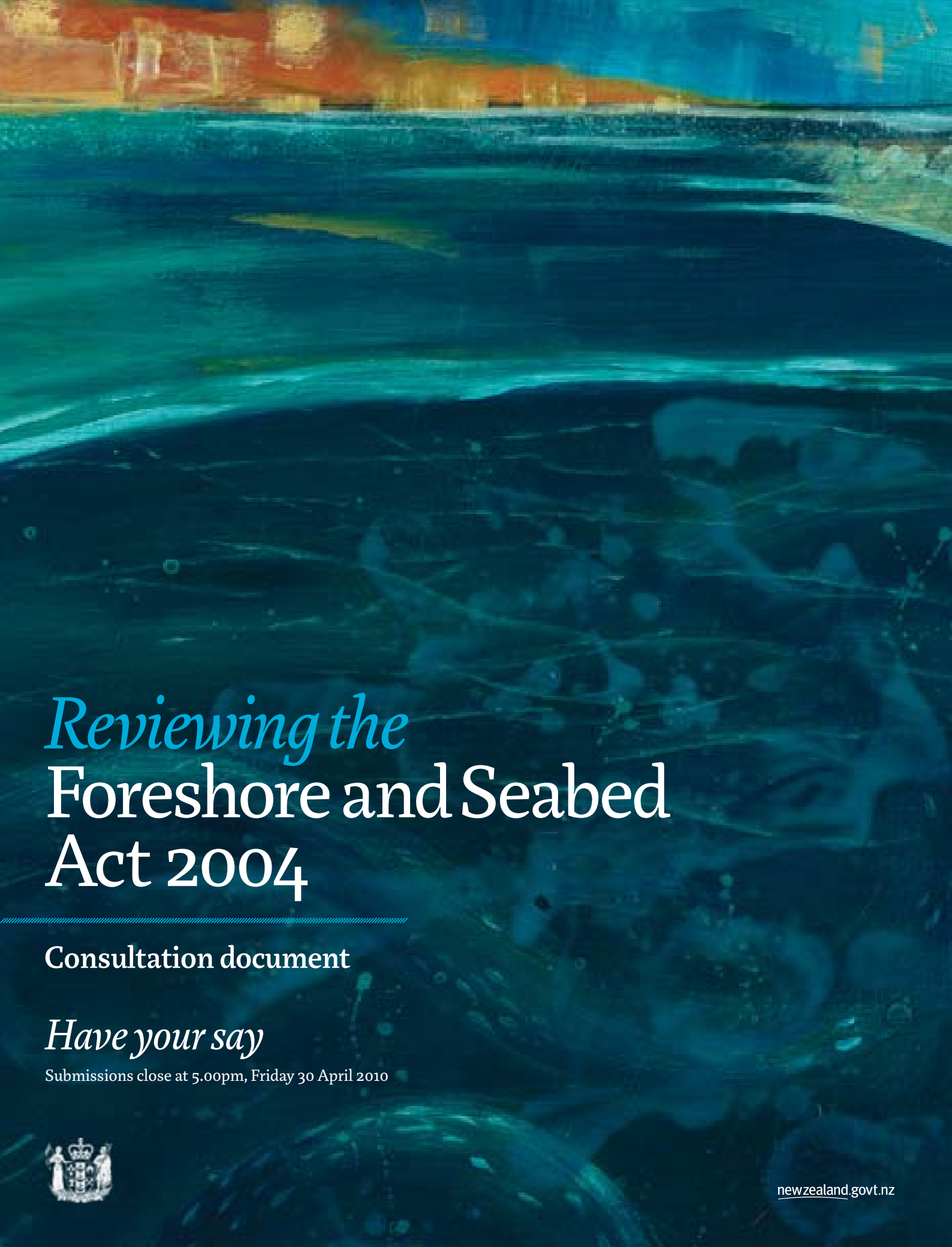


Reviewing the Foreshore and Seabed Act 2004

Consultation document

Have your say

Submissions close at 5.00pm, Friday 30 April 2010

newzealand.govt.nz

Foreword

The background to the Foreshore and Seabed Act 2004 ('the 2004 Act') is well known. It was a legislative response to the decision by the Court of Appeal in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA). The 2004 Act has proved to be anything but an enduring solution. Significant numbers of New Zealanders have complained and continue to complain that the 2004 Act is unfair and discriminatory.

The National Party and the Māori Party agreed to review the 2004 Act in their Relationship and Confidence and Supply Agreement of 16 November 2008. A distinguished Ministerial Review Panel ('the Panel') was appointed by me and reported on 30 June 2009. The Panel unanimously concluded that the 2004 Act is a failure. It advised repeal and enactment of replacement legislation. The government carefully considered the report and, in the months since the Panel reported, has been engaged in an extended conversation with iwi representatives and other interested parties to canvass options for an enduring solution. This consultation document is the fruit of that labour.

Over the next month the Minister of Māori Affairs, the Associate Minister of Māori Affairs and I will be attending numerous hui and public meetings around New Zealand. The aim of those meetings is to consult with interested parties on the government's proposals for reform. We are very interested in your views. They matter. Following that round of consultation, I shall be reporting to Cabinet. Final Cabinet decisions can be expected in late May and June 2010.

It cannot be over-emphasised that the aim of all this work is to find a just and enduring solution. A significant number of New Zealanders think the 2004 Act has been divisive and should be repealed. As we work to develop a solution, the challenge for us all will be to avoid dogmatic responses to a complex issue and, instead, to seek to reconcile various interests for the benefit of all New Zealanders.

Hon Christopher Finlayson
Attorney-General

The opinions and proposals contained in this document are for consultation purposes only and do not reflect final government policy.

Please seek specific legal advice from a qualified professional person before undertaking any action in reliance on the contents of this publication. The contents of this consultation document must not be construed as legal advice. The government does not accept any responsibility or liability whatsoever for any action taken as a result of reading, or reliance placed because of having read, any part, or all, of the information in this consultation document or for any error, inadequacy, deficiency, flaw in or omission from this consultation document.

Contents

How to make a submission

The government welcomes feedback on this consultation document, particularly on the specific questions set out in the submission form. The submission form can be found in the back of this document or downloaded from www.justice.govt.nz. The direct link to this information is: www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004

Your submissions are due by **5.00pm on Friday 30 April 2010**. Late submissions will not be considered.

To make a submission, either:

» fill in the detachable submission form at the back of this consultation document (or write your submission in a separate document) and mail it to:

FreePost Authority number 224164
Foreshore and Seabed Review
Ministry of Justice
c/- PO Box 180
WELLINGTON 6140

or

» download a copy of the submission form from www.justice.govt.nz
fill it in and send your submission as an attached document by email to
foreshoreseabedreview@justice.govt.nz

Please refer to 'Have your say' on page 53 for further information.

Overview

The Foreshore and Seabed Act 2004

The Foreshore and Seabed Act 2004 ('the 2004 Act') vested the ownership of the public foreshore and seabed in the Crown. This did not affect the parts of the foreshore and seabed held in private title.[1]

The vesting extinguished any customary title (the extent of which was unknown at the time) but had no effect on customary use rights. Only Māori were affected in this way.

The 2004 Act also prevented the Māori Land Court from investigating applications relating to the foreshore and seabed and removed the High Court's power to determine claims for customary title. Instead, the 2004 Act set up new processes for recognising two types of customary interests in the foreshore and seabed:

» *territorial customary rights*: a new form of customary title created in law by the 2004 Act; and

» *customary rights*: customary uses, activities and practices that do not require land ownership.

In practical terms, the foreshore is the 'wet' part of the beach that is covered by the ebb and flow of the tide. It does not include the dry land on the beach. It includes the beds of rivers that are part of the coastal marine area. The seabed is the bed of the sea out to 12 nautical miles (Figure 1). The foreshore and seabed includes the air space and water space above the land and the subsoil, bedrock and other matters below the land.

Figure 1: Foreshore and seabed

[1] In December 2003, Land Information New Zealand identified there were (at that time) 12,499 privately owned titles either partly or wholly within the boundary of the foreshore and seabed. The report is available at www.beehive.govt.nz/Documents/Files/ACF40B7.doc.

Why review the 2004 Act?

A significant number of New Zealanders do not support the 2004 Act. Some commentators, both here and overseas, have urged the government to reconsider the 2004 Act and talk with Māori about their rights and interests in the foreshore and seabed. In 2003 the overwhelming majority (94%) of submissions on the Foreshore and Seabed Bill opposed it. Approximately 95% of the 2009 submitters to the Ministerial Review Panel were unhappy with the 2004 Act in its current form.

On 16 November 2008, the National Party and the Māori Party agreed to review the 2004 Act in their Relationship and Confidence and Supply Agreement. The first step in the review was the appointment of an independent Ministerial Review Panel. It advised in June 2009 that the 2004 Act be repealed and urged that nothing be progressed without the 'opportunity for further input from Māori, being the most affected, and the general public'.[2]

This consultation document gives all New Zealanders the opportunity to have input into what happens next. It sets out the main options, and how progress might be made to fulfil the government's objective of achieving an equitable balance of the interests of all New Zealanders in the foreshore and seabed. These interests include recreational and conservation interests, customary interests, business and development interests, and local government interests.

Assurances and principles

The government gives all New Zealanders these assurances:

- **Public access for all** – access will be guaranteed for all New Zealanders subject to certain exceptions, for example, for health and safety reasons in port operational areas, or protection of wāhi tapu such as urupā (burial grounds);

  and

- **Respect for rights and interests**, in particular:
  - **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** – fishing rights provided under fishing legislation will be protected and rights of navigation in the foreshore and seabed will be protected, subject to certain exceptions such as in harbours; and
  - **protection of existing use rights to the end of their term** – existing use rights (eg, coastal permits and marine reserves) that operate in the foreshore and seabed will be protected to the end of their term, including any existing preferential right or rights of renewal or process right.

[2] *Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel* (Wellington, 2009), p. 151.

Any new legislation will be based on the following principles:

» **Treaty of Waitangi** – it must reflect the Treaty of Waitangi, its principles and related jurisprudence;

» **Good faith** – it must achieve a good outcome for all following fair, reasonable and honourable processes;

» **Recognition and protection of interests** – it must recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;

» **Equity** – it must provide fair and consistent treatment for all;

» **Access to justice** – it must provide an accessible framework for recognising and protecting rights in the foreshore and seabed;

» **Certainty** – there must be transparent and precise processes that provide clarity for all parties, including for investment and economic development; and

» **Efficiency** – there must be a simple, transparent and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

Government's proposal

The government's proposal is based on the longstanding belief held by most New Zealanders that everyone has a right to use and enjoy nationally iconic areas like the foreshore and seabed. The proposal recognises the range of interests and values that different parts of our community have in relation to the foreshore and seabed. These interests and values need to be accommodated and protected.

A key consideration in reviewing the 2004 Act is how to deal effectively with the issue of ownership and its impact on these interests and values. Tied up with the issue of ownership is the perception of what ownership *is*. There is a wide range of views, some of them inaccurate, about what ownership means and the authority, control and liability that ownership brings. Ownership is one way of providing certainty and clarity about who can do what (ie, roles and responsibilities) in the foreshore and seabed.

Depending on how it is framed, ownership can be a polarising approach to providing such certainty and clarity. It is not the only way to provide certainty and clarity.

A new approach would see us move away from the issue of ownership and adopt a more sophisticated way of balancing New Zealanders' interests. The government proposes that, instead of identifying an owner of the foreshore and seabed, new legislation would provide that no one owns, or can own, the foreshore and seabed. The government's proposal would not affect parts of the foreshore and seabed already held in private title. The new legislation would name the foreshore and seabed (excluding land in private title) '**public domain/takiwā iwi whānui**'.

This consultation document seeks your views on this new approach.

Balancing interests

The government's objective is to achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed. To do so, it needs to remedy the discriminatory effect the 2004 Act had on customary interests as compared with other interests in the foreshore and seabed.

The possibility of establishing customary title in the foreshore and seabed was extinguished by the 2004 Act, and replaced with complicated, restrictive judicial and administrative procedures.

The government's proposal is to restore the customary title that was extinguished by the 2004 Act. New legislation would clearly set out how customary title would be recognised. This consultation document seeks your views on how this would work:

» Would customary interests be determined through direct negotiations with the Crown, or in the courts?

» Would the new legislation set out a series of tests to determine the nature and extent of customary interests, or allow the courts alone to determine the tests?

» Would the new legislation set out awards recognising proven customary interests, or allow the courts alone to determine the awards?

The government's proposal aims to balance customary interests and recreational and conservation interests, business and development interests, and local government interests. New legislation would specify the legal liabilities and enforcement responsibilities of all interests (such as responsibility for abandoned vehicles and rubbish). It would also specify responsiblities for managing new activities in different parts of the foreshore and seabed.

The consultation document seeks your views on the following specific proposals:

» **Allocation of coastal space** – regional councils would continue to have the role of allocating space in the foreshore and seabed. This would be done in conjunction with those coastal hapū/iwi whose customary interests in the area have been recognised, and who have therefore received the awards relevant to the level of their interests.

» **Structures** – there would be no impact on the ownership of existing and new structures.

» **Reclamations** – existing decision-making processes would continue in respect of reclamations although the nature of the interest granted may change.

» **Local authority-owned foreshore and seabed** – any foreshore and seabed owned by local authorities would be incorporated into the 'public domain/takiwā iwi whānui' as it is currently treated as public land.

» **Adverse possession and prescriptive title** ('squatting') – no person would be able to claim an interest in any part of the foreshore and seabed on the ground of adverse possession or prescriptive title.

Your input

With your input, the government can ensure that, if the 2004 Act is repealed and replaced, the interests of all New Zealanders in the foreshore and seabed will be equitably balanced. **Please take the opportunity to have your say by 5.00pm, Friday 30 April 2010.**

1
Context of the government's proposals

1 Context of the government's proposals

An overview of the events leading up to the Foreshore and Seabed Act 2004, its contents and the reasons for the government's review.

1.1 The *Ngāti Apa* decision

Before the June 2003 Court of Appeal decision, *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) ('the *Ngāti Apa* decision'), the Crown had assumed it owned all of the foreshore and seabed of New Zealand not already in private ownership.

The *Ngāti Apa* decision brought into question the nature and extent of the Crown's ownership of the foreshore and seabed. The *Ngāti Apa* decision determined that the Māori Land Court *could investigate* claims that areas of the foreshore and seabed had Māori customary land status under Te Ture Whenua Māori Act 1993. It did not determine whether parts of the foreshore and seabed *were* Māori customary land.

Following the *Ngāti Apa* decision, Māori could apply to either the Māori Land Court or the High Court to determine their interests in the foreshore and seabed:

» The **Māori Land Court** could determine whether areas of the foreshore and seabed had the status of 'Māori customary land' (a statutory concept in Te Ture Whenua Māori Act 1993).

» The **High Court** could determine whether areas of the foreshore and seabed were held in 'customary title' (a common law concept that allows for the continuation of indigenous systems of land law).

It is not known what these courts might have decided. The Māori Land Court had never made any such determination under Te Ture Whenua Māori Act 1993. While the High Court had considered customary use rights, it had never determined common law customary title. Theoretically, the Māori Land Court or High Court could have found that large areas of the foreshore and seabed were subject to Māori customary land status or common law customary title. Alternatively, the courts could have found that no areas of the foreshore and seabed were subject to Māori customary land status or common law customary title.

1.2 The Foreshore and Seabed Act 2004

The 2004 Act was, in part, a response to the *Ngāti Apa* decision. It was enacted to clarify the law relating to the foreshore and seabed and the legal status of interests operating within it. It did this by vesting the full legal and beneficial ownership of the 'public foreshore and seabed' in the Crown to hold as its absolute property.[3]

The Crown's 'absolute' ownership meant no other title could exist, including customary title. The 2004 Act said that the Crown's ownership had no effect on customary *use* rights.

The 2004 Act prevented the Māori Land Court from determining whether areas of the foreshore and seabed had the status of Māori customary land. It also removed the High Court's power to determine claims for common law customary title.

[3] The use of the terms 'full', 'legal', 'beneficial' and 'absolute' to describe the Crown's ownership was intended to remove the possibility that anyone else could be found to have ownership or property interests in the public foreshore and seabed (unless those interests derived from the Crown).

Instead, the 2004 Act created new powers for the High Court and Māori Land Court and allowed for the recognition of two types of customary interests in the foreshore and seabed:

» *territorial customary rights*: a new form of customary title created in law by the 2004 Act; and
» *customary rights*: customary uses, activities and practices that do not require land ownership.

1.2.1 Territorial customary rights

Under the 2004 Act an applicant group can claim territorial customary rights in relation to a particular area of the public foreshore and seabed. Applications can only be made to the High Court. Section 32 of the 2004 Act sets out the meaning of territorial customary rights:

> ***32 Meaning of territorial customary rights***
>
> *(1) In this Act, **territorial customary rights**, in relation to a group, means a customary title or an aboriginal title that could be recognised at common law and that—*
>
> *(a) is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed by the group; and*
>
> *(b) entitled the group, until the commencement of this Part, to exclusive use and occupation of that area.*
>
> *(2) For the purposes of subsection (1)(a), a group may be regarded as having had exclusive use and occupation of an area of the public foreshore and seabed only if—*
>
> *(a) that area was used and occupied, to the exclusion of all persons who did not belong to the group, by members of the group without substantial interruption in the period that commenced in 1840 and ended with the commencement of this Part; and*
>
> *(b) the group had continuous title to contiguous land.*
>
> *(3) In assessing, for the purposes of subsection (1)(b), whether a group had exclusive use and occupation of an area of the public foreshore and seabed, no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource.*
>
> *(4) For the purposes of this section, the right of a group to exclusive use and occupation of a particular area of the public foreshore and seabed is not lost merely because rights of navigation have from time to time been exercised in respect of the area.*
>
> *(5) If the area of the public foreshore and seabed over which a group claims a right to exclusive use and occupation was at any time used or occupied by persons who did not belong to the group, the right must be regarded as having been terminated unless those persons—*
>
> *(a) were expressly or impliedly permitted by members of the group to occupy or use the area; and*
>
> *(b) recognised the group's authority to exclude from the area any person who did not belong to the group.*
>
> *(6) In this section,—*
> ***contiguous land** means any land that is above the line of mean high water springs and that—*
>
> *(a) is contiguous to the area of the public foreshore and seabed in respect of which the application is made or to any significant part of that area; or*

(b) would, but for the presence of any of the following kinds of land, be contiguous to that area or to any significant part of that area:

(i) a marginal strip within the meaning of section 2(1) of the Conservation Act 1987:

(ii) an esplanade reserve within the meaning of section 2(1) of the Resource Management Act 1991:

(iii) a Māori reservation set apart under section 303 of Te Ture Whenua Māori Act 1993:

(iv) a road of any description or a road reserve:

(v) any railway line within the meaning of section 4(1) of the Railways Act 2005:

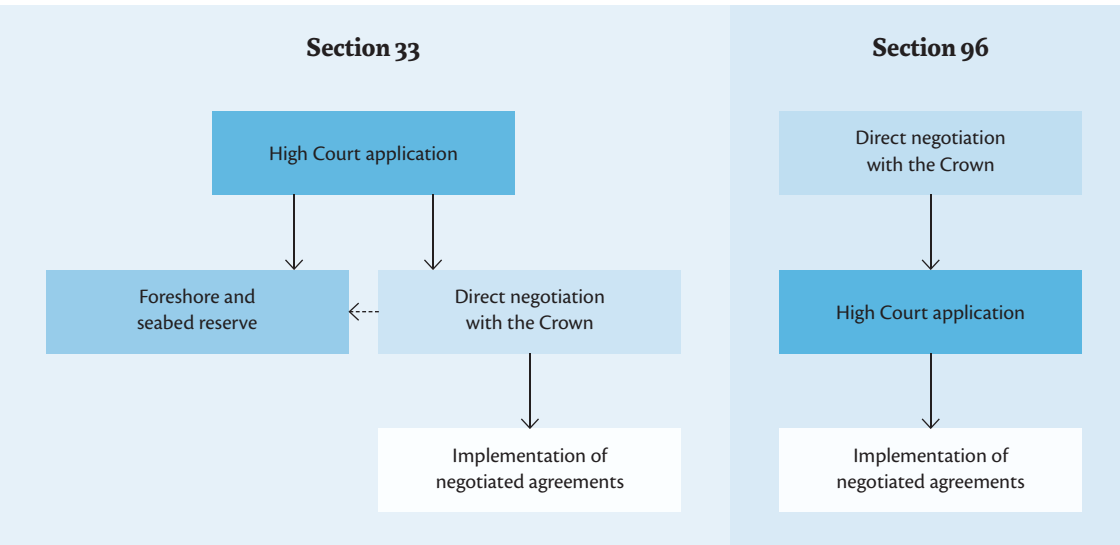
(vi) any reserve similar in nature to any land of a kind described in any of subparagraphs (i) to (v)

***continuous title** means a title to any contiguous land that has at all times, since 1840, been held by the applicant group or by any of its members (whether or not the nature or form of that title was, at any time, changed or affected by any Crown grant, certificate of title, lease, or other instrument of title).*

(7) To avoid any doubt, in this section, a reference to a member, in relation to a group, includes a past member and a deceased member of the group.

There are two ways in which groups can have their proven territorial customary rights recognised under the 2004 Act (Figure 2). The same test (section 32) applies to both processes.

Figure 2: Recognition of territorial customary rights under the 2004 Act



The first way is to apply directly to the High Court. To date, only one such application has been made and it is in its early stages.[4] The outcome of any successful application provides the applicant group with the choice of either a foreshore and seabed reserve or an order requiring the Crown to negotiate with the group to provide redress. Where negotiations are unsuccessful, the establishment of a foreshore and seabed reserve is the default outcome. A group awarded a foreshore and seabed reserve has input to certain decision-making processes in relation to the reserve.

The second way is to enter into direct negotiations with the Crown. Any resulting agreement is subject to the High Court confirming that the test for territorial customary rights set out in the 2004 Act has been met.

Only one agreement has been reached through direct negotiations with the Crown. It is yet to be confirmed by the High Court. This agreement forms part of the Deed of Agreement between Ngā Hapū o Ngāti Porou and the Crown, signed on 31 October 2008. The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Bill was introduced to Parliament in September 2008 to give effect to the Deed of Agreement and awaits its first reading.

1.2.2 Customary rights

A customary rights order is a court order that recognises an activity, use or practice that has been carried out continuously from 1840 to the present day. The kinds of customary activity that might be recognised through customary rights orders could include waka launching or collecting certain resources (such as driftwood, stones for use in hāngi, materials such as red ochre dye, and sand for use in gardens).

Under the 2004 Act, whānau, hapū and iwi can apply to the Māori Land Court, and any other group of New Zealanders can apply to the High Court, for a customary rights order. Section 50 sets out the test to be met in the Māori Land Court before a customary rights order can be made:

> ***50 Determination of applications for customary rights orders***
>
> *(1) The Māori Land Court may make a customary rights order, but only if it is satisfied that, in accordance with the provisions of section 51,—*
>
> *(a) the order applies to a whānau, hapū, or iwi; and*
>
> *(b) the activity, use, or practice for which the applicant seeks a customary rights order—*
>
> *(i) is, and has been since 1840, integral to tikanga Māori; and*
>
> *(ii) has been carried on, exercised, or followed in accordance with tikanga Māori in a substantially uninterrupted manner since 1840, in the area of the public foreshore and seabed specified in the application; and*
>
> *(iii) continues to be carried on, exercised, or followed in the same area of the public foreshore and seabed in accordance with tikanga Māori; and*
>
> *(iv) is not prohibited by any enactment or rule of law; and*
>
> *(c) the right to carry on, exercise, or follow the activity, use, or practice has not been extinguished as a matter of law.*

[4] Te Uri o Hau Settlement Trust applied under section 33 of the 2004 Act to the High Court for a finding of territorial customary rights in the Kaipara Harbour, on 14 April 2009. These proceedings have been adjourned until 30 April 2010.

(2) *A prohibition referred to in subsection (1)(b)(iv) does not include a prohibition or restriction imposed by a rule in a plan or proposed plan.*

(3) *The Māori Land Court may, in respect of the whole or part of the same area of the public foreshore and seabed, grant customary rights orders to—*

(a) more than 1 whānau, hapū, or iwi:

(b) any combination of 1 or more whānau, hapū, and iwi.

The effect of a customary rights order is that the applicant group can carry out a recognised customary activity without the need for a coastal permit (if a coastal permit would normally be required under the Resource Management Act 1991 (RMA)). Coastal permits that would have a significant adverse effect on the recognised customary activity cannot be granted.

To date, there have been only seven applications for customary rights orders in the Māori Land Court, and no determinations have been made.

1.3 Response to the 2004 Act

The public response to the 2004 Act demonstrates that a significant number of New Zealanders do not support it. In 2004, approximately 94% of 3,946 submissions made to the Fisheries and Other Sea-Related Legislation Committee opposed the Foreshore and Seabed Bill.

Independent international commentators have also criticised the 2004 Act, including:

» the United Nations' Committee on the Elimination of Racial Discrimination:

the [2004 Act] appears to the Committee, on balance, to contain discriminatory aspects against Māori, in particular in its extinguishment of the possibility of establishing Māori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress;[5] and

» the United Nations' Special Rapporteur:

[under the 2004 Act the] Crown extinguished all Māori extant rights to the foreshore and seabed in the name of the public interest and at the same time opened the possibility for the recognition by the Government of customary use and practices through complicated and restrictive judicial and administrative procedures.[6]

These commentators urged the government to reconsider the 2004 Act and talk with Māori about their rights and interests in the foreshore and seabed.

[5] United Nations' Committee on the Elimination of Racial Discrimination 'Decision on Foreshore and Seabed Act 2004' (11 March 2005) Decision 1 (66): New Zealand CERD/C/DEC/NZL/1, paragraph 6.

[6] 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rudolfo Stavenhagen, on his Mission to New Zealand' (16 to 25 November 2005), paragraph 79.

1.4 Reviewing the 2004 Act

The National Party and the Māori Party agreed to review the 2004 Act in their Relationship and Confidence and Supply Agreement of 16 November 2008.

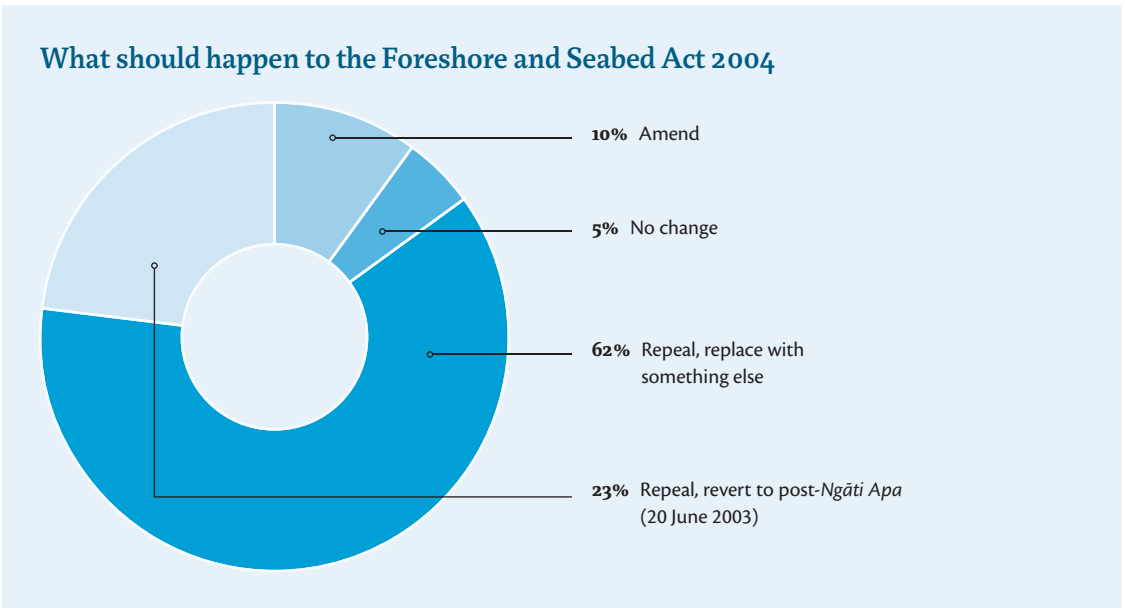
1.4.1 Ministerial Review Panel

The first stage in the review was the appointment of an independent Ministerial Review Panel ('the Panel') in March 2009 to review the 2004 Act.

The Panel comprised The Honourable Sir Edward Taihākurei Durie KNZM (Panel Chair), Richard Boast, then Associate Professor in Law at Victoria University of Wellington, and Hana O'Regan, Director of Māori and Dean of the Māori Faculty at Christchurch Polytechnic Institute of Technology and board member of the Māori Language Commission Te Taura Whiri i te Reo Māori.

The Panel undertook an extensive public consultation process (including 21 public meetings and hui) and received 580 submissions. Approximately 85% of the 358 submitters who expressed an opinion on what should happen to the 2004 Act wanted it repealed (Figure 3). The Panel also noted that the majority of submitters sought a legislated outcome: 'provided the outcome is fair and principled, that is plainly what most people prefer'.[7]

Figure 3: Submissions made to the Ministerial Review Panel in 2009 on what should happen to the 2004 Act



[7] *Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel*, p. 148.

The Panel submitted its report, *Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel*, to the Attorney-General on 30 June 2009. In summary, the Panel concluded that:

» the 2004 Act did not effectively recognise and provide for customary or aboriginal title; and

» the 2004 Act should be repealed and 'the process of balancing Māori property rights in the foreshore and seabed with public rights and expectations should be started again'.

The Panel presented four options for this process. The option favoured by the Panel 'combines a national settlement, mechanisms for allocating rights and interests to groups who would then be entitled to particular rights of consultation and input into coastal management, provision for co-management at a local level, and ability to gain more specific access and use rights'.[8]

1.4.2 Public consultation

The second stage of the review has been the development of policy proposals which are outlined in this document. The development of policy proposals has included careful consideration of the Panel's report as well as engagement with interested parties.

The government is now in a position to consult with New Zealanders on a possible solution that lets us share the foreshore and seabed in a way that reflects who we are as a nation. Please take this opportunity to have a say by sending in a submission. Your views will assist the government to make its final decision on the review of the 2004 Act.

[8] *Pākia ki uta pākia ki tai: Report of the Ministerial Review Panel*, p. 150.

2

A foundation for the future

2 A foundation for the future

A foundation for the future will be built on balancing the interests of all New Zealanders in the foreshore and seabed and maintaining the government's assurances and principles.

2.1 Balancing interests

The interests of New Zealanders in the foreshore and seabed include:

- **Recreational and conservation interests** in accessing, using and enjoying the coastline and marine environment;
- **Customary interests** including usage, authority and proprietary interests as an expression of the longstanding relationship between hapū and iwi and the coastal marine area;
- **Business and development interests** such as fishing, marine farming, marine transport, roading and airport infrastructure, mining and tourism industries, and companies which have a significant interest in how the coastal marine area is controlled and regulated; and
- **Local government interests** as local authorities represent community-wide interests and administer much of the law that regulates use of the coastal marine area.

These interests overlap. The government has a role in balancing all these interests and intends that any new legislation will do this.

2.2 Assurances and principles

In considering how to balance these complex and interwoven interests, the government assures all New Zealanders that there will be:

- **Public access for all** – access will be guaranteed for all New Zealanders subject to certain exceptions, for example, for health and safety reasons in port operational areas, or protection of wāhi tapu such as urupā (burial grounds);

  and

- **Respect for rights and interests**, in particular:
  - **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** – fishing rights provided under fishing legislation will be protected and rights of navigation in the foreshore and seabed will be protected, subject to certain exceptions such as in harbours; and
  - **protection of existing use rights to the end of their term** – existing use rights (eg, coastal permits and marine reserves) that operate in the foreshore and seabed will be protected to the end of their term, including any existing preferential right or rights of renewal or process right.

These assurances would be set out in any new legislation. For example, a provision concerning the protection of fishing rights could read:

Nothing in this Act affects any rights of fishing recognised by or under an enactment or a rule of law.

The following principles have guided the development of the government's proposals. These principles will also guide the final decision the government makes after New Zealanders have had their say on the proposals:

- **Treaty of Waitangi** – it must reflect the Treaty of Waitangi, its principles and related jurisprudence;
- **Good faith** – it must achieve a good outcome for all following fair, reasonable and honourable processes;
- **Recognition and protection of interests** – it must recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
- **Equity** – it must provide fair and consistent treatment for all;
- **Access to justice** – it must provide an accessible framework for recognising and protecting rights in the foreshore and seabed;
- **Certainty** – there must be transparent and precise processes that provide clarity for all parties, including for investment and economic development; and
- **Efficiency** – there must be a simple, transparent and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies.

2.3 Should the 2004 Act be repealed?

The government thinks that the 2004 Act should be repealed if the interests of New Zealanders in the foreshore and seabed are to be reconciled for the benefit of all. The discriminatory effect of the 2004 Act on Māori, extinguishing of uninvestigated customary title, can only be remedied by repealing the 2004 Act.

Most submitters to the Ministerial Review Panel in 2009 who expressed an opinion on what should happen to the 2004 Act, wanted it repealed. The Panel itself thought the 2004 Act should be repealed.

What is your view?

Question

1. Should the Foreshore and Seabed Act 2004 be repealed?

3
The government's proposal

A new approach

3 The government's proposal – a new approach

The government thinks that the 2004 Act should be repealed if the interests of New Zealanders in the foreshore and seabed are to be reconciled for the benefit of all. If the 2004 Act is repealed, new legislation must set out how interests in the foreshore and seabed can be exercised. This is because repeal alone (without new legislation) would not provide clarity as to how these interests can be exercised. The Crown's absolute ownership of the foreshore and seabed, for example, would remain even if the 2004 Act were repealed. New legislation needs to be clear about how interests in the foreshore and seabed, including the Crown's, would operate.

It is the government's view that the best approach is to specify clear roles and responsibilities in the foreshore and seabed. Having a specified owner of the foreshore and seabed is one way of achieving certainty and clarity about who has roles and responsibilities. This is what the 2004 Act did. Another way of achieving certainty and clarity is by stating (in legislation) particular roles and responsibilities and when, how and by whom they are exercised.

In seeking to reconcile interests and ensure clarity of roles and responsibilities, the government has carefully considered the submissions made to the Panel in 2009 and investigated each of the options suggested by the Panel. It has also investigated various options for 'ownership', each of which has implications for who would have particular roles and responsibilities in the foreshore and seabed. The government has discussed these options with iwi representatives and other interested parties.

3.1 Options considered

Broadly stated, the four options the government has considered are:

Option one: Crown notional title

The Crown's absolute title would be replaced with a notional title (also referred to as radical title). Any customary title that was extinguished by the 2004 Act would be restored. Where customary interests are investigated and found not to amount to customary title, the Crown's notional title would become absolute ownership.

Option two: Crown absolute title

The Crown would continue to hold its absolute title. There would be tests for the recognition of (former) territorial and non-territorial customary interests of coastal hapū/iwi. If either test were met, the Crown's title would remain unaffected. Proven customary interests could be recognised through certain statutory awards. The tests and awards could be set out in legislation and applied either by the courts or through negotiation. The tests and awards could be the same as those proposed in Option four below.

Option three: Māori absolute title

Ownership of the foreshore and seabed (except land in private title) would be vested in Māori. There would need to be a process for determining who would hold ownership in any given area, and the rights of others.

Option four: A new approach – 'public domain/takiwā iwi whānui'

No one would own (ie, by freehold title) the foreshore and seabed (except existing land held in private title). Instead of identifying an owner of the public foreshore and seabed, legislation would specify roles and responsibilities within it. The Crown and local government would continue to have regulatory responsibility. The area would be named 'public domain/takiwā iwi whānui'.

A brief comparison of the four options is set out in Table 1 below.

Table 1: Comparison of the four options

	One: Crown notional title	**Two: Crown absolute title**	**Three: Māori absolute title**	**Four: A new approach 'public domain/ takiwā iwi whānui'**
Repeal of 2004 Act?	Yes	Yes (but also could be achieved through amendment of 2004 Act)	Yes	Yes
Form of ownership – different from status quo?	Yes Crown ownership replaced by notional title	No	Yes Crown ownership replaced with Māori ownership	Yes Foreshore and seabed incapable of being owned and is therefore inalienable
Extinguished customary title restored?	Yes	No	Yes	Yes
Legislated tests and awards for recognition of customary interests?	Possibly – could either state in legislation or leave courts to determine tests and awards	Yes	No	Yes

Under any of the options, the following features of the current situation *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.

Under any of the options, the following features of the current situation *could change*:

» the residual rights and obligations of ownership, including who allocates space in the foreshore and seabed;

» regulatory processes (eg, how coastal permits are granted); and

» customary interests (how they are recognised and what is recognised).

The government has carefully considered these ownership options. Absolute ownership (either by the Crown or by Māori) means there can be no other owner of the foreshore or seabed. This means that any kind of absolute ownership is unlikely to allow the interests of all New Zealanders to be balanced. For this reason, the government does not favour Crown absolute title (Option two) or Māori absolute title (Option three).

Crown notional title (Option one) recognises that ownership of the foreshore and seabed could change, because the Crown would act as an interim owner until customary interests were investigated. In areas where customary interests were investigated and found not to amount to customary title, the Crown's notional title would become absolute ownership. Interim ownership could impact on how decisions are made in the foreshore and seabed. Decisions affecting development might be delayed, for example, until the final owner is determined. The government does not favour this option.

3.2 What is the new approach?

The government thinks that a new, sophisticated approach provides the best opportunity to achieve an equitable balance of the interests of all New Zealanders. Instead of identifying an owner, new legislation would explicitly provide that no one can own (ie, by freehold title) the foreshore and seabed.

So that it is clear who can do what in the foreshore and seabed, the new legislation would specify roles and responsibilities. The Crown and local government, for example, would continue to have regulatory responsibility. Regional councils would continue to develop regional coastal plans and the Minister of Conservation would continue to prepare the New Zealand coastal policy statement in accordance with the RMA.

The name for the area of foreshore and seabed would reflect the government's proposed new approach to the area. The government proposes the name 'public domain/takiwā iwi whānui' to express the essence of this new approach.

If the government's proposal were adopted, any new legislation would:

» repeal the 2004 Act;
» remove Crown ownership of the public foreshore and seabed;
» declare that no one owns or may own the foreshore and seabed (except areas already privately owned);
» declare that privately owned foreshore and seabed would not be affected;
» restore any uninvestigated customary title extinguished by the 2004 Act;
» provide that any customary title over the foreshore and seabed would be recognised;
» provide for public access; and
» provide for the continued operation of other existing property rights (eg, fishing quota).

The government's proposal is not unprecedented. The Continental Shelf Act 1964 provides for a management and regulatory regime similar to the government's proposal. That Act does not vest title to the continental shelf in the Crown, but specifies that all rights that are exercisable by New Zealand are vested in the Crown.[9]

[9] Continental Shelf Act 1964, section 3.

Any new legislation would need to fit with the more than 40 pieces of legislation that apply in the foreshore and seabed (including fisheries, conservation and resource management legislation) and preserve the integrity of those regimes.

The government's intention is that its proposal would not affect the Fisheries and Aquaculture Settlements.

Figure 4: Comparison between post-*Ngāti Apa* situation, the 2004 Act and a new approach

Post-*Ngāti Apa* *(20 June 2003)*	2004 Act *(The current situation)*	New approach *(Government's proposal)*
The Crown had notional title to the foreshore and seabed, subject to claims to customary title Customary interests in the foreshore and seabed could exist (a case-by-case analysis required to determine this)	Vested absolute ownership in the Crown Extinguished customary title	Repeals Crown ownership Restores uninvestigated customary title Foreshore and seabed not owned New statutory classification to prescribe roles and responsibilities
Claims that areas of foreshore and seabed had the status of Māori customary land could be made to the Māori Land Court under Te Ture Whenua Māori Act 1993 Claims that areas of foreshore and seabed were subject to customary title could be made to the High Court	Claims to customary land status under Te Ture Whenua Māori Act 1993 prevented from being pursued in the Māori Land Court (replaced with processes for recognising customary rights) Claims to customary title prevented from being pursued in the High Court	New processes to determine and recognise non-territorial and territorial interests (either negotiations or claims made to Māori Land Court or High Court) Enhanced hapū/iwi input into decision making
No explicit statutory right of public access	Created an explicit statutory right of public access	Protects the explicit statutory right of public access
Private titles existed; Future private title possible if Crown legislated or Māori Land Court made determination (Māori customary land could be converted into Māori freehold land)	Existing private title protected; Future private title prevented (but possible if Crown legislates)	Existing private title protected; Future private title prevented (but possible if Crown legislates)

3.3 Do you support the new approach?

The government believes its proposal is a pragmatic and flexible way of dealing with a complex and contentious issue. The government believes that the 'public domain/takiwā iwi whānui' approach would enable all interests to be reconciled.

Question

2 The government proposes the following approach to ownership of the foreshore and seabed:

- » the 2004 Act would be repealed and Crown ownership removed;
- » customary title extinguished by the 2004 Act would be restored;
- » no one owns, or can own the foreshore and seabed (except land in existing private titles);
- » instead of identifying an owner of the foreshore and seabed, legislation would specify roles and responsibilities;
- » customary interests of hapū/iwi would be tested and, if proven, recognised through awards; and
- » the Crown and local government would continue to have regulatory responsibility (subject to awards recognising customary interests).

Do you support this approach?

3 The government suggests the name 'public domain/takiwā iwi whānui' for its proposed new approach. Do you agree with the name, or do you suggest another name for the area?

4
Determining customary interests

4 Determining customary interests

Under the government's proposed new approach—a 'public domain/takiwā iwi whānui'—the 2004 Act would be repealed and uninvestigated customary title (extinguished by the 2004 Act) restored. Customary rights would continue under new legislation.

A coastal hapū/iwi could make a claim for recognition of their customary interests by either:

» negotiating directly with the Crown; or

» accessing the courts.

4.1 Direct negotiations

Direct negotiation between the Crown and coastal hapū/iwi reflects the Treaty partnership. It respects the mana of the negotiating group and recognises the ability of the government to address their issues, rather than relying on the courts to set the rules and outcomes. It also allows for solutions to be tailored to meet the issues facing the negotiating group.

It is always open to parties to enter into direct negotiations when it comes to reconciling issues and interests that might otherwise be determined by the courts. 'Out of court' solutions are commonplace in New Zealand.

Under the government's proposal, comprehensive agreements would be negotiated between the Crown and coastal hapū/iwi to recognise their customary interests in the foreshore and seabed.

The outcome of negotiations would depend on the particular group, the area and local circumstances. Awards would be negotiated and would need to align with the nature of customary interests recognised and the particular circumstances of the coastal hapū/iwi. Cabinet would set the parameters for these negotiations and sign off any final agreement. The outcome of negotiations would be implemented through legislation.

If negotiations were unsuccessful, the coastal hapū/iwi would be able to take their claims to court.

Questions

4. Do you think coastal hapū/iwi should be able to negotiate with the Crown for recognition of their customary interests?

5. If customary interests are recognised through negotiation, should the awards be negotiated, or should the awards be the same as those the government proposes to set out in legislation?

4.2 Access to the courts

A coastal hapū/iwi could go to court to get the court's decision on the nature and extent of their customary interests in the foreshore and seabed. If successful, that group would receive certain awards in recognition of their proven customary interests in the relevant area.

Question

6. Do you think coastal hapū/iwi should be able to claim recognition of their customary interests through the courts?

4.2.1 Which court would hear and determine claims?

The High Court is the court of general jurisdiction in New Zealand. This means that it has authority over a wide range of (statutory and non-statutory) matters and over lower courts such as the District and Environment Courts and also Tribunals and Authorities. Over the last quarter of a century, all the major issues affecting the Crown–Māori relationship under the Treaty of Waitangi have stemmed from decisions made in the High Court.[10] An example is the case of *Te Weehi v Regional Fisheries Officer*. This was a significant decision as the High Court clearly recognised Māori customary rights in fishing, the ability of those rights to run alongside other statutory rights and that such rights continued unless they were expressly extinguished. *Te Weehi* was the precursor to the 1992 Fisheries Settlement.[11]

The High Court can engage specialist assistance where it sees fit and often sits with experts (eg, in commercial cases).

The Māori Land Court has a distinguished pedigree and an extensive history which has focused on Māori land tenure issues. The Māori Land Court is recognised as a specialist court with specialist expertise in matters of tikanga. Its powers derive from statute (it does not have any inherent powers). The Māori Land Court has the ability to refer to the High Court for determinations on particular issues (eg, commercial issues).

Generally, litigation can be very expensive and time consuming particularly where a matter is appealed. The High Court and Māori Land Court have different appellate structures (Figure 5). These different appellate structures would have a practical effect on how long a case may take to be appealed through to the final appellate court (and therefore to have a final decision). This could be compounded by the fact that the Māori Land Court can also be judicially reviewed.

This is not an either/or decision. The High Court could hear and determine applications with assistance from the Māori Land Court.

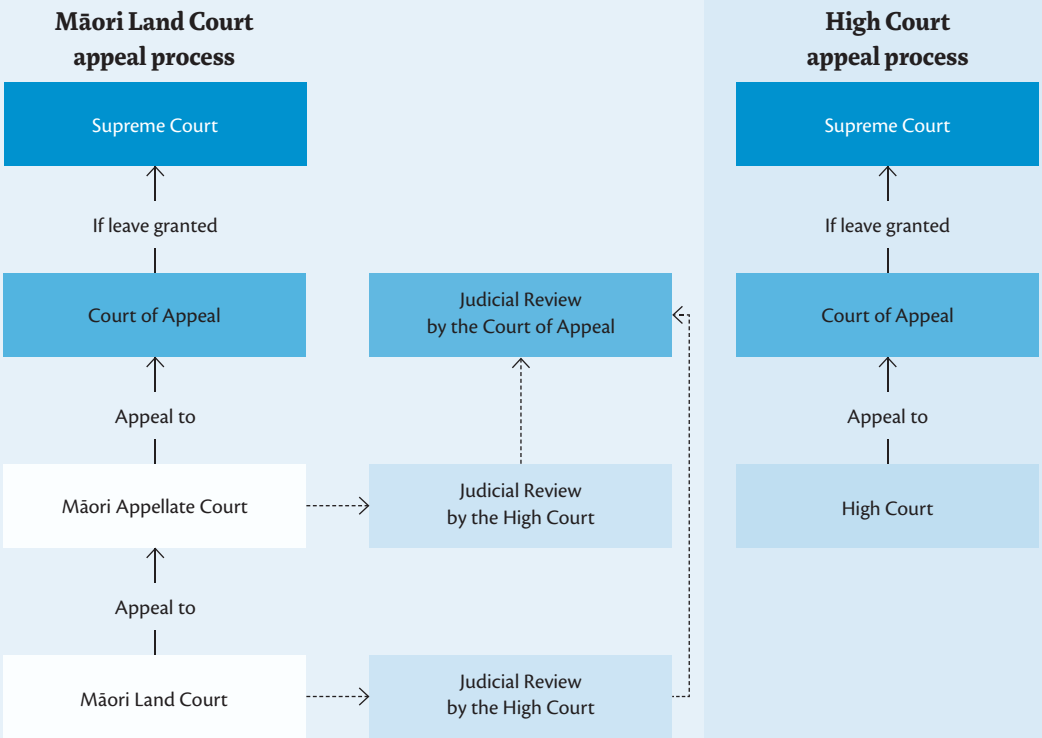
The government wants to ensure that, so far as possible, any court proceedings would be speedy and inexpensive and deliver a just result. It does not want to see a claim result in decades of litigation, as has happened in Canada in similar cases.

Your views are sought on which court would hear and determine claims.

[10] For example: *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 *(Lands)*; *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 *(Whales)*; *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 147 *(Radio frequencies No. 2)*; *Te Rūnanga o Wharekauri Rekohu Incorporated v Attorney-General* [1993] 2 NZLR 301 *(Sealords)*; *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 13 *(Broadcasting assets)*; and *Te Rūnanga o Te Ikawhenua Incorporated Society v Attorney-General & Ors* [1994] 2 NZLR 20 *(Dams)*.

[11] For more information on the Fisheries Settlement see <http://www.teara.govt.nz/en/te-hi-ika-Māori-fishing/6> (last accessed 25 March 2010).

Figure 5: Appeal structure for the Māori Land Court and the High Court



Questions

7. Should the Māori Land Court hear and determine claims?
8. Should the High Court hear and determine claims?

4.2.2 Who should be responsible in court for proving a test is met?

There is a need to decide which party in a court process (the applicant or the Crown) is responsible for proving any tests. Under the 2004 Act, it is the responsibility of the applicant to prove all the elements of a test have been met. This is consistent with the current procedures for the High Court and Māori Land Court.

The government is considering whether the Crown should share this responsibility. Sharing this responsibility would benefit both the Crown and the applicant as it would reduce the cost and time spent in the court process. This would mean the applicant would be responsible for proving those elements of the test that it was in the best position to prove. The Crown would be responsible for proving those elements it was in the best position to prove.

Questions

9. Should the applicant alone be responsible in court for proving a test for customary interests is met?
10. Should the applicant and the Crown share the responsibility in court for proving a test for customary interests is met?

4.3 Should any new legislation set out tests and awards?

Your views are sought on whether the new legislation (if any) would set out tests and awards or whether this should be left to the courts to develop over time.

If new legislation sets out the tests and awards, this could reduce both time spent in court and costs. Leaving the tests and awards to the courts to determine could result in uncertainty until final decisions were made. A court process could take years. On the other hand, leaving it to the courts to determine tests and awards could provide space for innovative judicial decision making over time.

The government favours having legislation which sets out explicitly how customary interests are to be determined and recognised (ie, the tests and awards to be applied). This would assist the courts to make efficient and timely decisions.

Question

11. Should any new legislation set out the tests and awards or should these be left to the courts to develop?

4.4 Types of customary interests

Customary interests in the foreshore and seabed can be understood as sitting along a continuum. This continuum recognises the relationship that all coastal hapū/iwi have with the foreshore and seabed which includes uses, activities and practices and property-type interests. Some of these interests require recognition in law while others do not. The relationship of coastal hapū/iwi with the foreshore and seabed has been recognised in law (eg, RMA, Conservation Act 1987).

The government's proposal is that new legislation would recognise two types of customary interests:

» **Non-territorial** – customary uses, activities and practices
» **Territorial** –customary interests that are territorial in nature and extent (otherwise known as 'customary title').[12]

Question

12. Do you agree that any new legislation should recognise two types of customary interests (non-territorial and territorial)?

[12] These two types of interests continue New Zealand's legal tradition of demarcating between customary use rights and proprietary interests (as in the Fisheries and Aquaculture Settlements and in the 2004 Act), and cover commercial and non-commercial interests.

4.5 Tests to recognise customary interests

Tests are the criteria that must be met by a coastal hapū/iwi to have their customary interests recognised and therefore to receive awards. There would be a different test for each type of interest (territorial and non-territorial).

4.5.1 Tests for non-territorial interests

In developing the proposed test for non-territorial interests the government has considered Canadian common law and Te Ture Whenua Māori Act 1993.

Canadian common law

Based on Canadian common law, a group would need to show:

» the claimed interest has been in existence since pre-sovereignty;

» the continued existence of an identifiable community;

» the connection between the right and the area claimed;

» the continuous exercise of the claimed right;

» that the right was integral to the culture of the group prior to contact; and

» whether the claimed right had been extinguished.

The government believes it is inappropriate to use a test based entirely on another country's legal experience.

Te Ture Whenua Māori Act 1993

There is no express test for non-territorial interests. This Act deals with the status of land and does not enquire into whether interests are territorial or non-territorial.

For this reason, the government has developed a test that will expressly recognise non-territorial interests.

4.5.2 Proposed test for non-territorial interests

Tikanga Māori and common law as the source

The traditional practices and customs of Māori are enduring. They pre-date the Crown. Therefore, it is important that tikanga Māori be used in any test.

At the same time, common law and statute have provided the legal basis for much of what has happened in the foreshore and seabed. This includes the High Court's recognition (in *Te Weehi*) of customary fishing rights and the Court of Appeal's recognition (in the *Ngāti Apa* decision) of the possibility of Māori customary land status and customary title in the foreshore and seabed.

The government's view is that its approach must accommodate these two sources of authority in line with the Treaty of Waitangi, its principles and associated jurisprudence. The government's approach applies aspects of tikanga Māori while also using aspects of the common law.

Using tikanga Māori for the tests would:

» acknowledge tikanga as the traditional Māori system of authority over, and management of, the foreshore and seabed; and

» allow for differences in tikanga from group to group.

Using common law (from both New Zealand and overseas) for the tests would:

» recognise the contributions of the common law to developing New Zealand's understanding of and provision for customary interests (eg, *Te Weehi*); and

» continue New Zealand's legal heritage in looking to other jurisdictions for insight into how to give recognition and protection to customary interests.

There are some good reasons for considering aspects of overseas common law precedents:

» they have developed in a considered manner over a long period of time; and

» they provide valuable insights into how to give legal recognition and protection to customary interests.

The government believes that overseas common law, so far as it relates to the New Zealand context, could be used in addition to tikanga Māori to develop tests which clearly set out the requirements for recognising customary interests.

Test based on tikanga Māori and common law

The government proposes a test for determining non-territorial interests. The purpose of the test is to recognise ongoing and existing customary uses, activities and practices (which may have evolved over time) rather than those which have been extinguished.[13]

It would include the following elements:

» state that a non-territorial interest (customary use, activity or practice) carried out by a coastal hapū/iwi in the relevant foreshore and seabed area is recognised where it:
  › has been in existence since 1840; and
  › continues to be carried out in accordance with tikanga Māori in the area specified by the applicant; and
  › has not been extinguished.

Question

13. Do you agree with each of the elements of the test for determining **non-territorial** interests proposed by the government?

[13] Any acts or omissions by the Crown in breach of the Treaty of Waitangi prior to September 1992 are dealt with either by claims to the Waitangi Tribunal or through direct negotiations with the Crown.

4.5.3 Tests for territorial interests ('customary title')

In developing the proposed test for territorial interests the government has considered Canadian common law and Te Ture Whenua Māori Act 1993.

Canadian common law

The Canadian courts have extensive experience in considering claims to aboriginal title (customary title). In order to meet a test for territorial interests based on Canadian common law a group would need to show that:

- the relevant area was occupied prior to sovereignty;
- occupation was exclusive to the group at sovereignty;
  - there is an 'intention and capacity to retain control';
  - 'positive acts' of exclusion would not be necessary; and
- the connection between the people and the land remains substantial.

As with the test for non-territorial interests, the government believes using a test based entirely on another country's legal experience is inappropriate.

Te Ture Whenua Māori Act 1993

To meet a test solely based on Te Ture Whenua Māori Act 1993 a group would need to show that the relevant foreshore and seabed is 'land that is held by Māori in accordance with tikanga Māori' (section 129(2)(a)).

Such a test may not provide the certainty of process the government is seeking. Following the *Ngāti Apa* decision, for example, there would have been uncertainty as to how the Māori Land Court would have applied the 'held in accordance with tikanga Māori' test. There was no clear authority about how the test should be applied in the foreshore and seabed. There were various approaches the Māori Land Court could have taken, had the 2004 Act not been enacted.

The government wants to ensure that any test clearly sets out the necessary requirements to ensure the customary interest being tested aligns with the recognition to be provided, and that this test is clear from the outset of the court process.

The goverment believes that a test based soley on the test inTe Ture Whenua Māori Act 1993 lacks the necessary clarity.

4.5.4 Proposed test for territorial interests ('customary title')

Test based on tikanga Māori and common law

For the reasons set out earlier, the government's view is that both tikanga Māori and common law should be used, in line with the Treaty of Waitangi, its principles and associated jurisprudence. It proposes a test for determining territorial interests based on tikanga Māori and common law.

Any new legislation would state that territorial interests exist where the elements of the test are proven. It would also state that a territorial interest is recognised where the following elements are proven:

- in order to establish the necessary connection/interest the relevant foreshore and seabed area must be held in accordance with tikanga Māori;
- this connection/interest must be of a level that accords with the applicant group having 'exclusive use and occupation' of the relevant foreshore and seabed area; and
- this 'exclusive use and occupation' must date from 1840 until the present without substantial interruption.

In assessing exclusive use and occupation the following points will be clarified in any new legislation:

- the court may take into account (but not require):
  - ownership of abutting land;
  - customary fishing;
- fishing and navigation by third parties does not preclude a finding that a group has had exclusive use and occupation from 1840 until the present without substantial interruption;
- customary transfers of territorial interests between hapū and iwi post-1840 (eg, tuku or gifting) will be recognised; and
- 'shared' exclusivity between coastal hapū/iwi as against third parties will be allowed for.

Although the elements of this test are similar to the elements in the 2004 Act, there are five significant differences. The proposed test:

- uses tikanga Māori;
- removes 'continuous title to contiguous land' as a requirement that must be met;
- clarifies that fishing (in addition to rights of navigation) by third parties does not prevent a finding of 'exclusive use and occupation';
- ensures that customary transfers of territorial interests between hapū and iwi post-1840 are recognised as legitimate; and
- allows for 'shared' exclusivity between coastal hapū/iwi as against other third party interruptions.

Question

14. Do you agree with each of the elements of the test for determining **territorial** interests proposed by the government?

4.6 Awards

The awards proposed are designed to provide those coastal hapū/iwi whose customary interests have been recognised with meaningful and tangible recognition of those interests and recognition in law of the unbroken, inalienable and enduring exercise of their mana.

The government proposes that the awards would be a combination of property rights (eg, the right to permit activities) and the ability to have input into environmental management processes (eg, the right to influence coastal planning processes). The awards would be subject to the government's agreed assurances (eg, public access) and could not be sold.

Question

15. Do you agree that the awards to recognise proven customary interests should be a combination of property rights and input to environmental management processes?

The government wants to ensure that coastal hapū/iwi with proven customary interests will have a greater role in environmental management processes relating to the relevant area of the foreshore and seabed. The government's proposed awards aim to provide a:

» **level of authority** over resources and activities in the foreshore and seabed; and

» **role in environmental management** processes in the foreshore and seabed.

Coastal hapū/iwi will have the right to obtain commercial benefit from use of the area in which their customary interests have been recognised.

4.6.1 Awards for proven non-territorial interests

These awards would offer protection to customary uses, activities and practices and ensure that these are provided for within existing environmental management regimes.

As well as its proposed awards (see below), the government has considered awards based on Canadian common law and awards based on Te Ture Whenua Māori Act 1993.

Canadian common law

Canadian common law has recognised rights to engage in particular activities which are integral to the customs and traditions of aboriginal cultures.

The government believes that awards developed in Canadian common law do not provide for input to environmental management processes and would be an inadequate source of awards for non-territorial interests.

Te Ture Whenua Māori Act 1993

There is no express test for non-territorial interests. This Act deals with the status of land and does not enquire into whether interests are territorial or non-territorial.

For this reason, the government has developed awards that will expressly recognise non-territorial interests.

4.6.2 Proposed awards for proven non-territorial interests

The government proposes three awards for proven non-territorial interests. The awards would apply only within the area where the interest has been proven.

Customary activities to have a protected status

This award would protect and regulate (under the RMA) customary activities which have been recognised. The activities would not be subject to sections 9–17 of the RMA, or rules in plans or proposed plans, including coastal permit requirements. A third party coastal permit would not be granted if it would adversely affect that customary activity (this is similar to section 107A of the RMA).

The Minister of Conservation, in consultation with the Minister of Māori Affairs and taking account of the views of the relevant coastal hapū/iwi, could impose controls on the exercise of a customary activity if it were having significant adverse effects on the environment.

Placement of rāhui over wāhi tapu

This award would allow coastal hapū/iwi to restrict or prohibit access to wāhi tapu (eg, burial grounds) and wāhi tapu areas (eg, an area of the sea after a drowning), if necessary to protect the wāhi tapu. The Minister of Conservation and the Minister of Māori Affairs would restrict or prohibit access by issuing a *Gazette* notice. The Minister of Conservation could also release a public notice of the wāhi tapu and wāhi tapu area(s).

Planning document

This award would allow (but not require) coastal hapū/iwi to develop a planning document which sets out their objectives and policies according to their world view, including sustainable management and the protection of cultural and spiritual identity. The planning document would need to be prepared in accordance with Part 2 of the RMA. The coastal hapū/iwi could collate their existing planning documents (eg, iwi management plans under the RMA) to save time and other resources.

Local authorities would have to take the document into account as it relates to resource management issues. To ensure this, they would have to review the provisions in their regional policy statements, and regional plans that cover the area where non-territorial interests have been recognised. This review would be done as part of the local authorities' scheduled review of policy and planning documents. Until such reviews are completed, a local authority would:

» attach the coastal hapū/iwi planning document to its relevant documents; and

» when considering a coastal permit application wholly or partly within, or directly affecting, the area where non-territorial interests have been recognised, have particular regard to the matters within the coastal hapū/iwi planning document that relate to resource management issues.

This would give immediate effect to the coastal hapū/iwi planning document. It would allow local authorities to change their policies and plans to incorporate the planning document effectively, and it also ensures public involvement.

The planning document would also require:

» the New Zealand Historic Places Trust to have particular regard to the document when considering an application for an authority to destroy, damage, or modify an archaeological site within the area where non-territorial interests have been recognised;

» local authorities to consider the document under relevant sections of the Local Government Act 2002 where the relevant decision relates to the area where non-territorial interests have been recognised;

» the Department of Conservation to consider the document in relation to conservation management strategies covering the area where non-territorial interests have been recognised; and

» the Ministry of Fisheries to consider the document in relation to fisheries plans covering the area where non-territorial interests have been recognised.

Question

16. Do you agree with each of the elements of the awards for **non-territorial** interests proposed by the government?

4.6.3 Awards for proven territorial interests ('customary title')

The government believes that, in order to accurately reflect the nature of territorial interests and to contribute to the ongoing expression of mana, any award for territorial interests should:

» draw on **property rights** (akin to the rights of a land owner); and

» provide for **input to environmental management processes.**

As well as its proposed award (see below), the government has considered awards based on Canadian common law and awards based on Te Ture Whenua Māori Act 1993.

Canadian common law

Awards based on Canadian common law would provide:

» an exclusive right to use and possess the relevant area as a group sees fit, including in a non-traditional way (but not in a manner irreconcilable with the fundamental nature of its own connection with the land);

» the right to approve or withhold consent to activities; and

» the right to obtain a commercial benefit from land use subject to relevant legislative frameworks (eg, the RMA).

These rights are held collectively and are only alienable to the Crown.

The government does not support these awards because they do not provide for a role in environmental management processes.

Te Ture Whenua Māori Act 1993

Under this Act, land that has the status of Māori customary land:

» provides the holder with the right to approve or withhold consent to activities;

» can be deemed to be Crown land for some purposes (eg, trespass);

» provides the holder with the right to obtain a commercial benefit from land use subject to relevant legislative frameworks (eg, the RMA); and

» can be potentially changed to Māori freehold or general land (both of which are alienable).

Māori customary land is held collectively and is inalienable.

As with the Canadian-based awards, this Act does not provide for input to environmental management processes. For this reason the government does not support awards based on this Act.

4.6.4 Proposed award for proven territorial interests ('customary title')

The government proposes an award to recognise proven territorial interests. This award would apply only in the area where territorial interests have been proven and would be held collectively by the coastal hapū/iwi. The new legislation would create a new form of recognition not currently accommodated in our land law system. This would be called 'Customary title' and would include: a right to permit activities; participation in conservation processes; and a planning document. This would allow for commercial benefits but could not be sold or brought within the Torrens system for land (ie, converted to fee simple).

Right to permit activities

The coastal hapū/iwi would have the right to decide whether an activity requiring a coastal permit could be progressed by the consent authority (eg, the regional council). They would:

» be required to give, or decline to give, their permission in writing within a set time period; and

» be able to request that the consent authority seek further information from the applicant.

If the applicant did not receive permission from the coastal hapū/iwi, the consent authority (or any other person, including the Minister for the Environment and Minister of Conservation in relation to calling in an application as a matter of national importance under the RMA) would not be able to act on the application until coastal hapū/iwi permission had been received.

If the coastal hapū/iwi gave permission, the consent authority could process the application but would still need to decide whether it satisfied the statutory criteria of the RMA before granting consent. The consent authority would be unable to grant a coastal permit beyond the scope of the application that was permitted by the coastal hapū/iwi.

There would be no obligation on a coastal hapū/iwi to comply with the requirements of the RMA when giving, or declining, permission for a coastal permit. The decision of the coastal hapū/iwi could be made according to a Māori world view, on grounds which are not covered by the RMA.

This award has been developed to be similar to the rights that a land owner would have. However, this award is unable to be sold and is subject to public access, fishing and navigation, and existing use rights for the balance of their term. To redress this inconsistency, the customary title holder would have the right to permit activities (a modification of usual coastal permit processes).

Participation in conservation processes

The coastal hapū/iwi would have the right to give, or refuse to give, its consent to conservation proposals and applications, subject to the government's ability to achieve essential conservation outcomes. The relevant conservation proposals and applications are:

» applications to establish or extend marine reserves (under the Marine Reserves Act 1971);

» proposals to establish or extend conservation protected areas (under conservation legislation); and

» applications for concessions (under conservation legislation).

The Minister of Conservation or Director-General of Conservation would be required to forward to the coastal hapū/iwi any such proposal or application. The coastal hapū/iwi would be required to give, or refuse, their consent in writing within a set time period.

The Minister of Conservation or Director-General of Conservation would not be able to progress a proposal or application until approval had been given by the coastal hapū/iwi. With that approval:

» the Minister of Conservation or Director-General of Conservation would not be able to approve a proposal or application beyond the scope of the application or proposal that was provided to the coastal hapū/iwi;

» in the case of a marine reserve application, the Director-General of Conservation would be required to process the application in accordance with the Marine Reserves Act, provided that:
  › consent would be deemed to include consent for signs, boundary markers and management activities that were disclosed to the coastal hapū/iwi when their consent was sought; and
  › where the Minister intended to recommend boundaries that include parts of the area where territorial interests have been recognised, but which were not included in the original application, further consent would need to be obtained from that coastal hapū/iwi.

When giving, or refusing to give, consent there would be no obligation on the coastal hapū/iwi to make a decision based on criteria or restrictions set out in the relevant legislation. As with the 'right to permit activities' award, the decision of the coastal hapū/iwi to give or refuse consent could be made according to a Māori world view, on grounds which are not covered by the relevant legislation.

Planning document

This would be the same document as the award for proven non-territorial interests. The difference would be that the document would have a 'higher status' (ie, be recognised and provided for) in relation to areas where territorial interests have been recognised.

In these areas:

» local authorities would recognise and provide for the coastal hapū/iwi planning document in relation to their own planning documents under the RMA; and

» until the relevant local authority documents have been updated to recognise and provide for the coastal hapū/iwi planning document, local authorities would recognise and provide for that document when considering an application for a coastal permit.

Question

17. Do you agree with the customary title award for **territorial** interests proposed by the government?

5

Dealing with other matters

5 Dealing with other matters

Any new legislation would need to deal with the following matters:

» legal liability (eg, for abandoned vehicles);
» enforcement responsibilities;
» who may charge for use of resources and on what basis; and
» who would be responsible for managing new activities (eg, carbon storage).

The government has developed proposals on the following specific matters for your consideration:

» who can use areas of the foreshore and seabed (allocation of space);
» structures;
» reclamations;
» local authority-owned land; and
» adverse possession and prescriptive title ('squatting').

This is not an exhaustive list of the matters that would need to be addressed in any new legislation. The government welcomes your views on other matters in the foreshore and seabed whether they are explicitly referred to in this consultation document or not. If the decision is made to repeal the 2004 Act and enact new legislation, you will have the opportunity to provide input into the proposed legislation during the Select Committee process.

5.1 Who can use areas of the foreshore and seabed – allocation of coastal space

Having a clear and well-defined system for allocating space in the foreshore and seabed is important for economic development and prosperity. It provides a way to address potential conflicts arising from the range of interests in the foreshore and seabed.

Currently, decisions about the allocation of space are made on the basis that the Crown owns the public foreshore and seabed. The Crown (as owner) delegates to regional councils the role of allocating space. A successful applicant for coastal space receives a coastal permit. This permit allows someone to occupy, but not own, that space. The holder of a coastal permit is given occupation to the extent provided for in the permit (ie, with minimal impact on the interests of others in that space).

Allocation of space is particularly important for the development of aquaculture activities. The growth of this sector will depend on the efficient allocation of currently unused space.

RMA processes are ideally suited to the government's proposal as those processes can operate on a 'no-owner' basis and they already provide for the occupation of space while accommodating competing interests.

The government's proposal is that the existing processes for allocation of space would be retained on the basis that it is the Crown's role to regulate and manage resources in the foreshore and seabed. The Crown would continue to delegate the role of allocating space to regional councils. This would be done in conjunction with those coastal hapū/iwi whose customary interests in the area have been recognised.

Question

18. Do you agree with the government's proposals for the allocation of coastal space? These are:
    - » the existing processes for the allocation of space would be retained on the basis that it is the Crown's role to regulate and manage resources in the foreshore and seabed;
    - » the Crown would continue to delegate the role of allocating space to regional councils; and
    - » this would be done in conjunction with those coastal hapū/iwi whose customary interests in the area have been recognised.

5.2 Structures

The ownership of structures (eg, a jetty, pipeline or wharf) is fundamental to development and recreation interests in the foreshore and seabed.

Currently, ownership of a structure in the foreshore and seabed does not relate to who owns the land on which the structure sits (or to which the structure is connected). Building a new structure requires a coastal permit from a regional council for the occupation of the space in which the structure will sit (or to which it will be connected).

The government's proposal is that ownership of existing structures will not change. It will be possible for new structures to be privately owned. Liabilities in respect of existing and new structures will remain with the owner. Owners of structures will be able to lease and license them.

In summary, the government proposes that:

- » ownership of existing structures will remain with existing owners;
- » new structures will be owned by those who own the material in the structures; and
- » coastal hapū/iwi whose customary interests have been recognised will have an enhanced role in decision-making processes in relation to new structures (through the planning document described earlier).

Question

19. Do you agree with the government's proposals regarding structures? These are:
    - » ownership of existing structures will remain with existing owners;
    - » new structures will be owned by those who own the material in the structures; and
    - » coastal hapū/iwi whose customary interests have been recognised will have an enhanced role in decision-making processes in relation to new structures (through the planning document described earlier).

5.3 Reclamations

A reclamation is the construction of dry land where previously the area was covered by water.

Currently, there are three regimes for dealing with reclamations:

» *Reclamations since the 2004 Act (under the RMA):* A reclamation cannot be owned (ie, fee simple title) unless an exception applies. Port companies can obtain a (potentially renewable) leasehold interest in a reclamation for 50 years;

» *Reclamations under the RMA:* A right, title or interest may be vested in an applicant; and

» *Reclamations under the Land Act 1948*.

The primary criterion for determining which regime applies is the date of the application for a reclamation.

The RMA provides for the following two powers in respect of reclamations:

» to decide whether a reclamation is desirable; and

» to decide whether to vest an interest in the dry land to a person and, if so, at what price (for reclamation applications made before the 2004 Act).

The decision regarding the desirability of a reclamation is currently delegated by the Crown, as owner, to regional councils. Regional councils set out rules relating to reclamations in their regional coastal plans. The decision about whether to vest an interest in the dry land and at what price is undertaken on behalf of the Crown by the Minister of Conservation.[14]

Under the government's proposal, existing decision-making processes would continue in respect of reclamations although the nature of the interest granted may change. Existing applications would continue to be dealt with as though the Crown were the owner of the underlying land. For new applications, local authorities would continue to perform their current role of considering the environmental effects of a proposed reclamation.

Port companies are involved with reclamations, and they have a particular need for certainty. The government is considering how to provide this certainty. At this time, the government proposes that port companies would be able to obtain a permit (based on the same concept as coastal permits for occupation under section 12(2) of the RMA) that would provide for an interest akin to a leasehold interest in a reclamation for 50 years or more (compared with a maximum of 35 years for a coastal permit). This interest would be easily renewable for additional terms of 50 years or more, provided the applicant has observed the terms of the permit and proposes to continue using the reclamation for relevant activities.

[14] Applicants for reclamations could include port companies (for building and maintaining port infrastructure), local authorities (eg, for building and maintaining structures) and private developers (eg, for developing marinas).

Questions

20. Do you agree with the government's proposals regarding reclamations? These are:
    - » existing decision-making processes would continue in respect of reclamations although the nature of the interest granted may change;
    - » existing applications would continue to be dealt with as though the Crown were the owner of the underlying land; and
    - » for new applications, local authorities would continue to perform their current role of considering the environmental effects of a proposed reclamation.
21. Do you agree with the length of time proposed for the new form of coastal permit for port companies (50 years or more, renewable)?

5.4 Local authority-owned land

The government proposes that any existing local authority-owned land within the foreshore and seabed (ie, purchased subsequent to the 2004 Act) would be incorporated into the 'public domain/takiwā iwi whānui'. The Crown would pay compensation for that land (if there is any) to the local authority. This will provide assurance of public access and protect recreational and conservation interests.

Question

22. Do you agree with the government's proposals regarding local authority-owned land? These are:
    - » any existing local authority-owned land within the foreshore and seabed would be incorporated into the 'public domain/takiwā iwi whānui'; and
    - » the Crown would pay compensation for that land (if there is any) to the local authority.

5.5 Adverse possession and prescriptive title ('squatting')

The 2004 Act provides that no person may claim an interest in any part of the foreshore and seabed on the ground of adverse possession or prescriptive title.

Adverse possession means possession of property by dispossessing the owner without his or her consent. An example of adverse possession is where a person who does not own a building 'squats' in that building when the owner is absent. If the adverse possession continues for over 60 years in relation to land of the Crown, the person in possession obtains a prescriptive title which extinguishes the Crown's title.

Under the 2004 Act, no person can claim an interest in any part of the foreshore and seabed on either basis.

The government proposes that any new legislation would contain similar provisions.

Question

23. Do you agree with the government's proposals that any new law on the foreshore and seabed would contain provisions on adverse possession and prescriptive title similar to those in the 2004 Act?

5.6 Other matters

Policy has yet to be determined on a number of specific issues. In addition to the matters contained in this consultation document, the government welcomes your views on:

» leases and licences;
» coastal occupation charges;
» roads; and
» local Acts.

Questions

24. What are your views on leases and licences within the foreshore and seabed in view of the government's proposals?
25. What are your views on coastal occupation charges within the foreshore and seabed in view of the government's proposals?
26. What are your views on roads within the foreshore and seabed in view of the government's proposals?
27. What are your views on local Acts in relation to the foreshore and seabed in view of the government's proposals?

This is not an exhaustive list of the other matters that would need to be addressed. The government welcomes your views on other matters concerning the foreshore and seabed whether they are referred to in this consultation document or not. If the decision is made to repeal the 2004 Act and enact new legislation, you will have the opportunity to provide input into the proposed legislation during the Select Committee process.

Glossary

access rights

This is defined in section 5 of in the Foreshore and Seabed Act 2004 as the right to: be in or on the public foreshore and seabed; enter, remain in and leave it; pass and repass in, on, over or across it; and engage in recreational activities in or on it.

Everyone has access rights in, on, over or across the public foreshore and seabed.

award

This is what a coastal hapū/iwi would receive once they had proven their non-territorial or territorial interests in a specific area of the foreshore and seabed. Through the proposed awards the government has aimed to provide coastal hapū/iwi with a level of authority over resources and activities, and a role in environmental management.

coastal marine area

This is defined in section 2 of the Resource Management Act 1991. It includes the foreshore and seabed as well as the coastal water and the air space above the water. See section 2 of the Resource Management Act 1991 for the exhaustive definition (which also addresses the seaward and landward boundaries of the coastal marine area).

customary interests

This phrase is used broadly in this document to refer to both non-territorial *and* territorial interests (see the explanation of these terms in 'customary title' below).

customary title (native or aboriginal title)

Customary title is a common law concept (ie, developed by judges). It typically recognises property rights held by indigenous people(s) prior to the acquisition of Crown sovereignty which have not been extinguished or lapsed.

In Commonwealth jurisdictions the concept has different names. In Australia it is referred to as 'native title' while in Canada it is 'aboriginal title'. In New Zealand (and in this document) customary title refers only to territorial interests (ie, property interests in land generally akin to ownership rights). It does not refer to non-territorial interests which are customary uses, activities and practices.

foreshore and seabed

In section 5 of the Foreshore and Seabed Act 2004, the foreshore and seabed means the area between the line of mean high water springs on its landward side and the outer limits of the territorial sea (12 nautical miles) on its seaward side. The foreshore and seabed includes the air space and water space above the land, and the subsoil, bedrock and other matters below.

In practical terms, it is the seabed and the 'wet' part of the beach that is covered by the ebb and flow of the tide. It does not include the dry land on the beach next to the intertidal zone. It includes the beds of rivers that are part of the coastal marine area.

Māori customary land

This means land in Māori ownership which has been investigated and determined to be such by the Māori Land Court.

Māori freehold land

Māori freehold land is defined in section 129(2)(b) of Te Ture Whenua Māori Act 1993 as land 'the beneficial ownership of which has been determined by the Māori Land Court by freehold order'.

mean high water springs (MHWS)

This is the inland boundary of the 'foreshore and seabed' as defined in the Foreshore and Seabed Act 2004. The 2004 Act does not define MHWS. 'Spring' tides are the highest tides and occur twice a month.

notional title ('radical title')

This is an interim form of ownership whereby the Crown's title is notional – it is subject to claims of ownership based on customary title. Where customary title is investigated and found to exist, the Crown's notional title ends and final ownership would reside with the customary title holder. Where customary title is investigated and found not to exist, the Crown's notional title would become absolute ownership.

Kupu Māori

hapū	sub-tribe/clan
hui	meeting/gathering
iwi	tribe
mana	pride, control, power, authority over
Māori	person(s) of Māori descent
rāhui	place under restriction
rohe	area of interest
tikanga	custom/cultural practice
tipuna/tupuna	ancestor(s)/grandparent(s)
wāhi tapu	sacred place(s)
whānau	family group

Have your say

Submissions close at 5.00pm, Friday 30 April 2010

Submission form

Have your say

The government welcomes your feedback on this consultation document, particularly on the specific questions set out in this submission form. This submission form can also be downloaded from www.justice.govt.nz. The direct link to this information is: www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004.

Submissions are due by **5.00pm on Friday 30 April 2010**. Late submissions will not be considered.

To make a submission fill in the submission form or write your submission in a separate document and either:

» send your submission as an attached document by email to foreshoreseabedreview@justice.govt.nz; or

» mail a hard copy to the following address:

FreePost Authority number 224164
Foreshore and Seabed Review
Ministry of Justice
c/- PO BOX 180
WELLINGTON 6140

All submissions will be publicly available.

The Ministry of Justice will publicly release your submission, a summary of submissions and a list of names of submitters on its website: www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004.

Your name will be made publicly available as part of your submission when it is released.
Your contact details will be removed from your submission before it is posted on the website, recorded in the summary of submissions or released under the Official Information Act 1982 (OIA).

If you do **not** wish your name in your submission to be released, please clearly state this in your submission or tick the option below:

☐ I request that my name be removed from my submission before it is released and that it is recorded as 'anonymous' in the summary of submissions.

If there is particular information in your submission that you wish to remain confidential, please clearly indicate this and explain your reasons for wanting the information kept confidential.

The Ministry is subject to the OIA and copies of submissions sent to the Ministry will normally be released in response to an OIA request from a member of the public. If your submission is subject to an OIA request, the Ministry will consider your confidentiality request in accordance with the grounds for withholding information outlined in the OIA. You can view a copy of the OIA on the New Zealand Legislation website: www.legislation.govt.nz.

The Privacy Act 1993 governs how the Ministry collects, holds, uses and discloses personal information about you which is contained in your submission. You have the right to access and correct this personal information.

REVIEWING THE FORESHORE AND SEABED ACT 2004

I am responding as (please tick one):

☐ **An individual**

Name

Email

Address

or

☐ **On behalf of a group or organisation**

Name of group or organisation:

Email

Address

1. *Should the Foreshore and Seabed Act 2004 be repealed?*

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

REVIEWING THE FORESHORE AND SEABED ACT 2004

2. *The government proposes the following approach to ownership of the foreshore and seabed:*

- » the 2004 Act would be repealed and Crown ownership removed;
- » customary title extinguished by the 2004 Act would be restored;
- » no one owns, or can own the foreshore and seabed (except land in existing private titles);
- » instead of identifying an owner of the foreshore and seabed, legislation would specify roles and responsibilities;
- » customary interests of hapū/iwi would be tested and, if proven, recognised through awards; and
- » the Crown and local government would continue to have regulatory responsibility (subject to awards recognising customary interests).

Do you support this approach?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

3. *The government suggests the name 'public domain/takiwā iwi whānui' for its proposed new approach. Do you agree with the name, or do you suggest another name for the area?*

Please give the reasons for your response.

☐ Yes, I agree with the name 'public domain/takiwā iwi whānui'

☐ No, I don't agree with the name 'public domain/takiwā iwi whānui'

☐ I suggest another name for the area:

☐ I/We have no view or preference

Comment:

4. Do you think coastal hapū/iwi should be able to negotiate with the Crown for recognition of their customary interests?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

5. If customary interests are recognised through negotiation, should the awards be negotiated, or should the awards be the same as those the government proposes to set out in legislation?

Please give the reasons for your response.

☐ Awards should be negotiated

☐ Awards should be as proposed to be set out in legislation

☐ I/We have no view or preference

Comment:

6. Do you think coastal hapū/iwi should be able to claim recognition of their customary interests through the courts?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

7. Should the Māori Land Court hear and determine claims?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

8. Should the High Court hear and determine claims?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

9. Should the applicant alone be responsible in court for proving a test for customary interests is met?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

REVIEWING THE FORESHORE AND SEABED ACT 2004

10. Should the applicant and the Crown share the responsibility in court for proving a test for customary interests is met?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

11. Should any new legislation set out the tests and awards or should these be left to the courts to develop?

Please give the reasons for your response.

☐ Legislation should set out the tests and awards

☐ The courts should be left to develop the tests and awards

☐ I/We have no view or preference

Comment:

12. Do you agree that any new legislation should recognise two types of customary interests (non-territorial and territorial)?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

13. Do you agree with each of the elements of the test for determining ***non-territorial*** *interests proposed by the government?*

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

14. Do you agree with each of the elements of the test for determining ***territorial*** *interests proposed by the government?*

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

15. Do you agree that the awards to recognise proven customary interests should be a combination of property rights and input to environmental management processes?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

REVIEWING THE FORESHORE AND SEABED ACT 2004

*16. Do you agree with each of the elements of the awards for **non-territorial** interests proposed by the government?*

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

*17. Do you agree with the customary title award for **territorial** interests proposed by the government?*

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

REVIEWING THE FORESHORE AND SEABED ACT 2004

18. Do you agree with the government's proposals for the allocation of coastal space? These are:

- » the existing processes for the allocation of space would be retained on the basis that it is the Crown's role to regulate and manage resources in the foreshore and seabed;
- » the Crown would continue to delegate the role of allocating space to regional councils; and
- » this would be done in conjunction with those coastal hapū/iwi whose customary interests in the area have been recognised.

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

19. Do you agree with the government's proposals regarding structures? These are:

- » ownership of existing structures will remain with existing owners;
- » new structures will be owned by those who own the material in the structures; and
- » coastal hapū/iwi whose customary interests have been recognised will have an enhanced role in decision-making processes in relation to new structures (through the planning document described).

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

REVIEWING THE FORESHORE AND SEABED ACT 2004

20. Do you agree with the government's proposals regarding reclamations? These are:

- » existing decision-making processes would continue in respect of reclamations although the nature of the interest granted may change;
- » existing applications would continue to be dealt with as though the Crown were the owner of the underlying land; and
- » for new applications, local authorities would continue to perform their current role of considering the environmental effects of a proposed reclamation.

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

21. Do you agree with the length of time proposed for the new form of coastal permit for port companies (50 years or more, renewable)?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

REVIEWING THE FORESHORE AND SEABED ACT 2004

22. Do you agree with the government's proposals regarding local authority-owned land? These are:

» any existing local authority-owned land within the foreshore and seabed would be incorporated into the 'public domain/takiwā iwi whānui'; and

» the Crown would pay compensation for that land (if there is any) to the local authority.

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

23. Do you agree with the government's proposals that any new law on the foreshore and seabed would contain provisions on adverse possession and prescriptive title similar to those in the 2004 Act?

Please give the reasons for your response.

☐ Yes ☐ No

☐ I/We have no view or preference

Comment:

24. What are your views on leases and licences within the foreshore and seabed in view of the government's proposals?

Comment:

REVIEWING THE FORESHORE AND SEABED ACT 2004

25. What are your views on coastal occupation charges within the foreshore and seabed in view of the government's proposals?

Comment:

26. What are your views on roads within the foreshore and seabed in view of the government's proposals?

Comment:

27. What are your views on local Acts in relation to the foreshore and seabed in view of the government's proposals?

Comment: