



Te Ope Mana a Tai

Discussion Framework on Customary Rights to the Foreshore and Seabed

August 2003



Te Ope Mana a Tai

16 August 2003

E nga mana, e nga reo, me nga karangatanga
Tena koutou i roto i nga tini ahuatanga o te wa

Tena, me tangihia ratou kua wehe atu ki tua o te arai
No reira e nga mate, haere koutou, haere, haere, haere atu ra

Kapiti hono, tatai hono
Te hunga mate ki te hunga mate
Kapiti hono tatai hono, te hunga ora, ki te hunga ora
Heoi ano

Tena tatou katoa

Last week we released our draft principles on the foreshore and seabed issue for discussion amongst Iwi/hapu. We are now pleased to release this final discussion document. It is hoped that it will be a useful tool to assist Iwi and hapu in their discussions on customary rights and how those rights should be recognised, protected and enhanced.

We look forward to receiving your feedback on the contents of the attached discussion framework. We hope that the framework can assist in forming the basis for a comprehensive Iwi/hapu position to be agreed at the Omaka hui on the 29th – 30th August.

We would like to thank the Treaty of Waitangi Fisheries Commission for their contribution in facilitating and supporting the production of this document and the process overall.

Noho ora mai,

Matiu Rei
Chairperson
Te Ope Mana a Tai

Kua titia te titi

Ki te whenua

Ki te tai

Ko wai te mana

Ka uhia

Ko nga tupuna e!!

Table of Contents

1. Introduction	- 1 -
2. Customary rights and the Treaty of Waitangi	- 2 -
3. What did the Court of Appeal say?	- 3 -
4. Giving recognition to customary rights in New Zealand	- 4 -
4.1 <i>The Maori Land Court and Te Ture Whenua Maori Act</i>	- 7 -
4.2 <i>The High Court</i>	- 7 -
4.3 <i>Claims to the Waitangi Tribunal</i>	- 8 -
4.4 <i>Direct negotiation with the Crown</i>	- 8 -
4.5 <i>References to customary rights or the Treaty of Waitangi in legislation</i>	- 8 -
5. Application to inland waterways	- 9 -
6. How do other countries deal with customary rights?	- 9 -
6.1 <i>Australia</i>	- 9 -
6.2 <i>Canada</i>	- 10 -
7. Implications of the decision for coastal marine management	- 10 -
7.1 <i>Oceans Policy</i>	- 11 -
7.2 <i>Resource Management and Local Government</i>	- 12 -
7.3 <i>Aquaculture Reform and Ahu Moana</i> - <i>The Aquaculture and Marine Farming Report (Wai 953)</i>	- 13 -
7.4 <i>Marine Reserves Bill</i>	- 15 -
7.5 <i>Recreational fishing</i>	- 16 -
7.6 <i>Petroleum interests in the coastal marine area</i> - <i>The Petroleum Report (Wai 796)</i>	- 16 -
8. General Directions	- 18 -
8.1 <i>Principles for engagement with the Crown</i>	- 19 -
8.2 <i>Where to from here?</i>	- 20 -
Appendix 1	- 21 -
Appendix 2	- 23 -

1. Introduction

Tangata whenua have asserted and continue to assert that we have customary rights in the coastal marine area.¹ It was due to these rights that the Iwi of Te Tau Ihu applied to the Maori Land Court in 1997 for a declaration that the foreshore² and seabed³ of the Marlborough Sounds was Maori customary land under Te Ture Whenua Maori Act 1993, to prevent tendering of our coastal space by the Crown.

On 19 June 2003 the New Zealand Court of Appeal held that the Maori Land Court has jurisdiction to hear the claim. Aside from this narrow jurisdictional point the decision raises much wider implications about the legal recognition of customary rights, whether all property holders in New Zealand are treated equally, and how issues of constitutional importance are addressed in New Zealand.

Since the decision there has been much debate about the nature and extent of Maori customary rights to the foreshore and seabed. The Crown has said that it will pass legislation that will affect Maori customary rights to the foreshore and seabed but has yet to engage with Iwi/hapu on the nature of the legislation or more fundamentally, the nature and extent of the customary rights claimed. The Crown has also said that it will consult with all New Zealand over the legislation but has not suggested that Maori views will be accorded any greater weight than any other group in New Zealand.

On 12 July 2003, a national hui on the foreshore and seabed was held in Paeroa to discuss the Court of Appeal decision and the Crown's response. As a result, the "Hauraki Declaration" was put forward by the hui. The declaration accepted an invitation from the Iwi of Te Tau Ihu to host a second national hui to progress the efforts of Iwi/hapu to protect our customary rights.

The purpose of this document is to contribute to the discussion that is presently taking place around New Zealand on the foreshore and seabed, and to provide a focus for the second hui. The document proposes a framework within which the Crown could engage with Iwi/hapu to ensure customary rights are understood, protected and enhanced. It has been formulated through discussions with the eight Iwi of Te Tau Ihu, some of the applicants to the Waitangi Tribunal hearing on aquaculture held in 2002, the Treaty of Waitangi Fisheries Commission, other Iwi/hapu and other interested parties. This alliance of Iwi and other groups is called Te Ope Mana a Tai. We encourage Iwi/hapu to participate in the debate either by joining Te Ope Mana a Tai or providing feedback to us.

Te Ope Mana a Tai are available to come and discuss the contents of this document at any Iwi/hapu hui kanohi ki te kanohi. Other avenues of providing feedback include emailing your comments to foreshoreandseabed@tokm.co.nz or by visiting the Treaty of Waitangi Fisheries Commission website at www.tokm.co.nz which contains a dialogue box on which you can post your comments about this document.

Naturally, the views expressed in this document are not presumed to be exhaustive and have been developed on the basis of the limited information provided by the Crown about its likely legislative response. The discussion and principles contained

¹Coastal marine area in this document means everything within the coastal marine area from the high water mark to wherever customary rights can be shown to exist.

² Foreshore in this document means land between mean high water and mean low water mark.

³ Seabed in this document means land to seaward of mean low water.

in this document are without prejudice to any specific position that may be put forward by Iwi/hapu individually. However we believe that Iwi/hapu need to be active and united in developing and advocating a collective position that protects our customary rights.

Finally, Te Tau Ihu will hold the second hui at Omaka Marae, Blenheim on the 29th and 30th of August where Te Ope Mana a Tai hopes that the hui will ratify a framework in final form. Iwi/hapu participation and input into the final framework is essential. We are making the framework available in the hope that Iwi/hapu will provide us with feedback and additional ideas so that by the time we meet at Omaka, we will be ready to move forward with a set of common principles, common purpose and common process.⁴

2. Customary rights and the Treaty of Waitangi

Iwi/hapu held New Zealand under their mana in accordance with their tikanga. Tikanga is a system of governance that regulates how Maori interact and manage their environment; naturally this includes the coastal marine area. How the tikanga of Iwi/hapu are practised may vary between each Iwi/hapu and from place to place. The different expressions of mana are recognised in English common law as a series of customary rights that do not derive from, but should be recognised by, the Crown.

The Treaty of Waitangi confirmed and guaranteed the customary rights of Iwi/hapu and established a process or relationship whereby the Crown would give effect to those rights. In particular the Treaty, in the English text, guaranteed the customary rights of Iwi/hapu to their lands, estates, forests and fisheries. In the Maori text the Treaty guaranteed the rights of Iwi/hapu to their whenua katoa and taonga katoa. There still remain areas of New Zealand that are held by Iwi/hapu under their mana in accordance with their tikanga or under their customary rights. One of these areas is the coastal marine area where customary rights have never been investigated. The members of Te Ope Mana a Tai continue to assert their respective customary rights to the coastal marine area.

Customary rights can be described as a bundle of rights, much like the different strands that make up a length of rope. Each strand of the rope is a particular customary right that collectively form a strong rope. There are several ways customary rights can be recognised within New Zealand. The different approaches are set out in Table 1 and will be discussed later in this document (see section 4).

⁴ Te Ope Mana a Tai would like to make the following exclusions:

1. The scope of customary rights cover a wider area than just the foreshore and seabed, they cover the entire coastal marine area. For this reason this document is written on the basis of our rights to the coastal marine area not just the foreshore and seabed.
2. A number of Iwi have negotiated redress in relation to the coastal marine area, including coastal tendering, as part of their Treaty settlements. Those provisions must be upheld to the satisfaction of those Iwi, nothing in this paper is intended to interfere with those Settlements in any way.
3. This paper is not intended to cut across matters currently in progress, such as applications made to the Maori Land Court by Iwi/hapu seeking confirmation that the foreshore and seabed is Maori customary land under Te Ture Whenua Maori.
4. The paper makes no assumption as to who holds the customary rights in the coastal marine area, however wherever possible we have used Iwi/hapu as a drafting preference.

We state that our customary rights in the coastal marine area include, but are not limited to, the following:

- Self-governance (ownership, control, regulation, management, and allocation),
- Development (cultural and economic benefit),
- Exclusivity (in accordance with tikanga),
- Use (in its many forms), and
- Access.

New Zealand has particular experience in recognising customary rights to the coastal marine area. One such example, which arguably enhanced New Zealand's international reputation in dealing with customary rights, is the Fisheries Settlement. Fisheries is one strand of the customary rights rope in the coastal marine area, however, it is not the only one. In the Fisheries Settlement the Courts and the Crown acknowledged that Maori customary rights have both a commercial (including existing use and future development) and a non-commercial dimension. It would be inconsistent for the Crown to acknowledge the commercial development right in respect of fishing and not in respect of other customary uses of the coastal marine area.

3. What did the Court of Appeal say?

The recent decision of the Court of Appeal is inextricably linked to any discussion on customary rights. The Court of Appeal unanimously allowed the appeal of Te Tau Ihu Iwi and found that the Maori Land Court has jurisdiction to decide whether the foreshore and seabed is Maori customary land. In reaching its decision the Court of Appeal has also overruled the earlier Court of Appeal decision in *Re Ninety Mile Beach*. Subject to appeal, the decision clears the way for all Iwi/hapu who will or have applied to the Maori Land Court for an investigation that the foreshore and seabed is Maori customary land to proceed. The reasoning of the Court may be briefly summarised as:

1. Customary rights are not derived from the Crown.
2. Before the extension of British sovereignty Iwi/hapu held the whole of New Zealand according to their customs.
3. English common law applied in New Zealand only so far as applicable to the circumstances and its modification by pre-existing Maori customary rights created an instant New Zealand common law.
4. New Zealand common law and legislation presumes the continuation of customary rights unless clearly extinguished on the facts of a particular case. Those facts could include previous investigations of the land, particular legislation and/or the terms of previous transactions affecting that land.
5. None of the legislation put forward by the Crown could be said to have extinguished Maori customary rights to the foreshore and seabed. Legislation that declared that the foreshore and seabed and territorial waters are vested in the Crown does not affect Maori customary rights that remain.

6. With the extension of sovereignty over New Zealand the Crown acquired an underlying interest to the foreshore and seabed of New Zealand but customary rights to the foreshore and seabed remain. Therefore the assumption that the Crown owns the foreshore and seabed of New Zealand is wrong in law.
7. Maori customary rights to the foreshore and seabed must be proven and further questions of law could arise. It is a matter of fact to be investigated (not of legal assumption) whether a statutory grant of title from the Maori Land Court involved an investigation and determination of title below high water mark.
8. Land, as defined in Te Ture Whenua Maori Act, includes land below the water.

4. Giving recognition to customary rights in New Zealand

As previously discussed the Court of Appeal decision clarifies that the Maori Land Court (under Te Ture Whenua Maori Act) is a mechanism through which Iwi/hapu may pursue recognition of their customary rights to the coastal marine area, currently being title to the foreshore and seabed. Additionally, there are other ways by which customary rights may be recognised in New Zealand. The various avenues for recognition of customary rights are set out in Table 1 and each will be briefly discussed.

Generally, following a common law legal approach to recognising customary rights, each time that a strand from the customary rope is removed it weakens the overall strength of the rope. However, recognition of the customary fisheries strand of the customary rights rope, as occurred in the 1992 Fisheries Settlement, will not adversely affect Iwi/hapu claims to the coastal marine area. This Settlement provided, amongst other things;

- commercial assets to enable Maori to continue to participate in the fishing industry;
- an undertaking to develop a set of regulations to allow for non-commercial take (the Fisheries (Kaimoana Customary Fishing) Regulations 1998), and
- measures to ensure enhanced input and participation by Maori in fisheries management processes.

While tangata whenua fully understand that customary rights have both commercial and non-commercial attributes, the title for the non-commercial regulations (the customary regulations) has led a number of others to believe that customary rights are only non-pecuniary rights. This is plainly wrong. Any suggestion that the remaining customary rights in the coastal marine area are only of a non-commercial nature will be an erosion of our rights and should be rejected by all Iwi/hapu.

An important consideration for Iwi/hapu will be whether any of the approaches for recognition actually provide an outcome that is an accurate reflection of the customary rights that have passed through them. Historically there has been a systemic failure to appropriately and substantively recognise, protect and enhance the customary rights of Iwi/hapu.

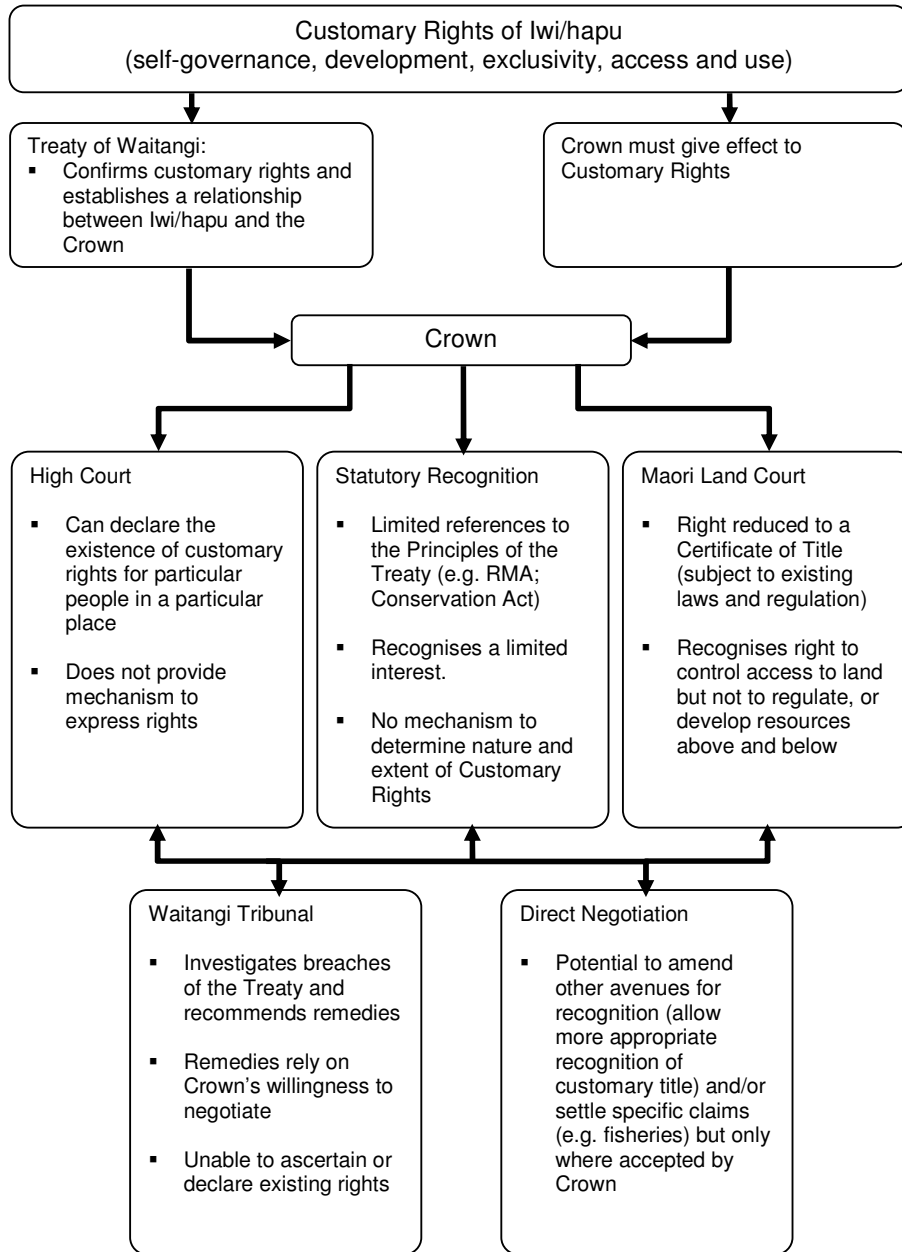
Any proposals put forward by the Crown must improve the present approaches for recognition of customary rights. Also, in light of the Crown's statements that it will ensure that exclusive title to the foreshore and seabed is not granted to any party, it is important to understand what that might mean for the current process under Te Ture Whenua Maori, and how any possible erosion of rights might affect the overall ability of Iwi/hapu to give expression to their customary rights. This discussion will take time, however Iwi/hapu have been asserting their rights to the coastal marine area for generations.

We do not agree that the short legislative time frame signalled by the Crown is sufficient to consider such a longstanding and complex issue. Furthermore the Crown should delay its current legislative agenda until an agreed open and principled process has been established between Iwi/hapu and the Crown to resolve this issue.

There may be better ways to recognise, protect and enhance the customary rights that Iwi/hapu hold in the coastal marine area than simply amending Te Ture Whenua Maori Act. In any event the present test for Maori customary land within Te Ture Whenua Maori Act, being whether the land is held in accordance with tikanga, is in our view appropriate. It recognises that tikanga is the measure upon which customary rights to an area should be tested rather than imposing concepts of ownership that may be foreign to Iwi/hapu such as continuity of exclusionary practises that are divorced from tikanga.

The Iwi Aquaculture Steering Group put forward some ideas on the relationship between tikanga and our underlying rights in their discussion document *He Maara Mataitai*. The Aquaculture Steering Group approached this question by looking at the concept of kaitiakitanga, which is practiced widely by Iwi/hapu. They concluded that kaitiakitanga can be expressed in part through the concepts of "ownership", "property", "title" or "stewardship" however they considered it to be much wider than any of these. A more complete explanation of the Aquaculture Steering Group's views is outlined in Appendix 2.

Avenues for Recognition of Customary Rights



4.1 The Maori Land Court and Te Ture Whenua Maori Act

Iwi/hapu can seek recognition of their customary rights through the Maori Land Court under Te Ture Whenua Maori Act. Provided Iwi/hapu can show sufficient evidence that they hold the land in accordance with tikanga Maori and no certificate of title has been issued, the land will have the status of Maori customary land. What “held in accordance with tikanga” means is still an open legal question.

It is also possible to apply to the Court for a determination as to what rights Iwi/hapu hold in the coastal marine area but a declaration of those rights could presently only culminate in Maori freehold title.

Passing the customary rights of Iwi/hapu through the mechanism of the Maori Land Court would:

- if successful, extinguish any customary rights to the claimed area as they are transformed (and in some cases reduced) to Maori freehold title;
- if successful, provide a means of controlling access to resources beneath the surface (for example minerals) but may not provide an immediate interest in those resources;
- if successful, still mean that Iwi/hapu are subject to all legislation and regulations which cover either the activity being carried out or the coastal marine area generally, such as the Resource Management Act 1991, and
- extinguish any rights to the foreshore and seabed if the Maori Land Court upon investigation refuses to recognise the customary rights within a particular area or determines that the rights are insufficient to amount to “land being held in accordance with tikanga Maori” (this may however create a Treaty grievance).

A fundamental question is whether reducing all customary rights in the claimed area down to a certificate of title is an appropriate recognition of customary rights to the coastal marine area (such as the right of self-governance that includes the ability to manage and control resources in the coastal marine area). A possible alternative could be to seek legislative recognition of the rights themselves and substantive inclusion of customary rights in all legislation and policy that affects the coastal marine area while not removing, extinguishing, or replacing the rights themselves.

A detailed explanation of the process in Te Ture Whenua Maori Act is set out in Appendix 1.

4.2 The High Court

Iwi/hapu can seek a declaratory order in the High Court, which if successful would declare that they have particular rights to particular areas. However it is unlikely that a successful declaratory order application would itself be sufficient to give practical effect to those rights. While a successful declaratory application could create some leverage to negotiate or seek legislative amendment it is not the complete answer that is required.

4.3 Claims to the Waitangi Tribunal

The Waitangi Tribunal is able to investigate whether tangata whenua have been prejudiced by actions or omissions of the Crown in breach of the principles of the Treaty of Waitangi. As part of their investigation, they can identify the nature of any rights (and therefore any customary rights affirmed by the Treaty) held by Iwi/hapu that have been infringed by the Crown.

Except in the case of Crown Forest lands, State Owned Enterprise lands and memorialised lands, the Tribunal only has the power to make recommendations to the Crown. Ultimately, the Crown can choose whether or not to negotiate a settlement with the relevant Iwi/hapu (see sections on Petroleum Report, and Ahu Moana later in this document). Recommendations in favour of customary rights from the Tribunal coupled with legal action through the Courts have in the past brought about the recognition and settlement of customary rights issues as occurred in the case of customary commercial and non commercial fisheries (the Fisheries Settlement). This Settlement only concerned fisheries and does not affect the customary rights of Iwi/hapu to the coastal marine area or its uses.

Where areas of foreshore and seabed have been taken by legislative action or otherwise unfairly acquired by the Crown, any loss of customary rights that has resulted may be a Treaty grievance that the Crown should move to address as a matter of urgency through the Treaty settlement process. We are concerned that the Tribunal itself is presently so under resourced that it is not able to respond in a timely fashion when customary rights have been or are likely to be infringed.

4.4 Direct negotiation with the Crown

The Crown, through the Office of Treaty settlements, has established processes for negotiating with Iwi/hapu to settle historical grievances that are found to have substance by the Waitangi Tribunal, or, which are otherwise acknowledged as being grievances. A contemporary example of the Crown recognising both a customary right and a breach of the Treaty principles is the Fisheries Settlement.

A central problem with attempting to follow a direct negotiation path is that it relies upon the Crown accepting that there has been a breach of the principles of the Treaty without which no relief will be provided. Iwi/hapu have repeatedly asked the Crown to protect and enhance their customary rights to the coastal marine area. We state that a failure to do so now will be a breach of the Treaty of Waitangi and its guarantees to Iwi/hapu.

4.5 References to customary rights or the Treaty of Waitangi in legislation

There is only limited legislative recognition of customary rights. Examples include the limited recognition of the Treaty of Waitangi in statutes such as the Resource Management Act 1991 and the Conservation Act 1987. The full extent of the guarantees contained in the Treaty are not recognised as applying to customary rights as the statutes only refer to the principles of the Treaty and not the customary rights which underpin the Treaty. Also recognition of the Treaty is constrained because the provisions have been read down in practice and limited to the purpose

of the particular statutes. Achieving substantive recognition of customary rights in all relevant legislation is fundamental.

5. Application to inland waterways

It should be noted that while this document does not specifically consider the implications of the Court of Appeal decision on inland waterways (including lakes and rivers), many the matters set out in this document will be relevant. The Court of Appeal had in fact held as early as 1912 that the Maori Land Court has jurisdiction to declare whether the bed of any lake is Maori customary land, and there appears to be no dispute that the Maori Land Court also has jurisdiction over rivers. There are however specific legislative provisions and common law principles that apply only to inland waterways. The result is that the legal regime is not the same and needs to be considered separately from issues in the coastal marine area, although the debate generated by the foreshore and seabed issue will no doubt be important in achieving substantive progress in recognising customary rights over inland waterways.

6. How do other countries deal with customary rights?

The customary rights of tangata whenua are not new to New Zealand and the customary rights of other first nation peoples are also well known internationally. Australia and Canada both recognise customary rights but deal with them in different ways, largely as a result of their different social, constitutional, and political backgrounds. A brief analysis of how both countries treat customary rights can inform and contrast the approach that could be taken in New Zealand.

6.1 Australia

In Australia there is generally only one way that customary rights can be recognised and that is through the Native Title Tribunal (“NTA”). The process is lengthy and imposes a number of tests that are very difficult to meet. In particular, where there is an inconsistency between a customary right and some other public or private right the customary right must give way.

The full scope of customary rights as we understand them is not recognised under this regime. Therefore, when the NTA process is applied to the foreshore and seabed and there is an inconsistency between a customary right to exclusive possession and the right of navigation and fishing, the customary right in Australia under the Native Title Act will give way. Accordingly, non-exclusive customary rights have been recognised, but clearly such rights do not include:

- an exclusive right to fish;
- an exclusive right to occupy, use and enjoy those waters to the exclusion of all others;
- an exclusive right to possess those waters to the exclusion of all others, or,
- a development right of their interests in the coastal marine area.

This approach, if applied in the New Zealand context, would be unacceptable to us. It would abrogate the Crown as our equal Treaty partner and impose a restrictive regime that would fail to appropriately recognise customary rights. We would oppose any move by the Crown to weaken or extinguish the present mechanisms by which

tangata whenua customary rights are recognised. We will support a Treaty based process that recognises, protects and enhances the customary rights that Iwi/hapu hold in the coastal marine area and the development rights that flow from those customary rights, such as aquaculture.

6.2 Canada

The first nation peoples of Canada have their customary rights recognised and affirmed in the Canadian constitution. This provision limits the capacity to extinguish native rights unless there is a compelling purpose (i.e. resource conservation), where regulation is non-discriminatory, and where the impact on the exercise of customary rights is minimised.

As a result of the constitutional recognition of customary rights, the Canadian courts are able to strike down legislation that is inconsistent with the constitution. This provides a protective and enabling framework for the recognition and affirmation of customary rights.

Clearly the constitutional position in New Zealand is vastly different from Canada and it is highly unlikely that New Zealand will adopt a constitution on the basis of this issue alone. However in contrast to Australia, the Canadian approach offers real scope for recognition of the full range of customary rights as we understand them (including self-governance and management). We believe this is an approach that warrants further investigation.

7. Implications of the decision for coastal marine management

The Crown has begun a series of reforms that concern the management of the coastal marine area beginning with the Marine Reserves Act 1971, the management of aquaculture and the development of an Oceans Policy. In respect of the reforms the decision reinforces the following key points that have been made by Iwi/hapu:

- the Crown should only allocate resources that belong to it;
- customary rights of Iwi/hapu continue unless clearly extinguished, and
- no legislation has yet extinguished customary rights to the foreshore and seabed.

Together, the reforms have the potential to reflect all aspects of Maori customary rights, including self-governance, development, exclusivity, use and access. However to date that has not occurred. The Court of Appeal decision places greater pressure on the Crown to work with Iwi/hapu to ensure that customary rights are addressed in all marine decision-making.

A primary concern for Iwi/hapu is the current “race for space” that is occurring in the marine environment. This race involves increasing pressure for marine reserves, marine farms and recreational fishing areas, and is being played out with no clear provision for the priority of Iwi/hapu customary rights over other rights and interests. This lack of clear provision is apparent in:

- the unwillingness on the part of Crown to recognise the full extent of the guarantees made in the Treaty of Waitangi – especially where ownership and control of natural resources is concerned;
- inconsistent recognition of the Treaty in legislation – even those references that do exist have different weightings;
- poor application of Treaty principles where they are referred to in legislation;
- inconsistent goals, objectives and priorities in different legislation that concerns the coastal marine area (e.g. the Fisheries Act 1996 which provides for utilisation within sustainable limits and the Marine Reserves Act 1971 which seeks to “lock up” marine resources from extractive use, however both Acts seek to achieve a conservation outcome), and
- unclear priorities between different uses and values – different weighting is given to different values in legislation without any clear overall priority for customary rights.

The impacts of the race for space on customary rights are compounded by the problems that have occurred in implementing the Customary Fishing Regulations (which provide for the appointment of kaitiaki and the establishment of mataitai reserves), so that it is highly likely that the areas that Iwi/hapu wish to establish as mataitai will already be taken up by other uses by the time these problems have been addressed. This race also has the potential to devalue the currency of the commercial component of the fisheries settlement, where areas that are available for harvesting quota are reduced.

Another issue of major significance for Iwi/hapu is the role of local government in the coastal marine area. Although local authorities are statutory delegates of the Crown, they are not accountable in Treaty terms and through their administration of the Resource Management Act and Local Government Act are responsible for ongoing erosion of customary rights within the coastal marine area.

A summary of each of the issues is provided below.

7.1 Oceans Policy

The Oceans Policy is proposed to establish an overarching framework for management of the coastal marine area. Any existing or future legislation should be consistent with this overarching framework. The Crown has completed a first stage of the policy which aims to establish goals and principles for the management of the Oceans. Four primary goals were confirmed as a result of that exercise, including:

“A framework to allow current and future issues arising in relation to the marine environment to be managed in the context of the overall responsibilities of the Crown as Treaty partner” (Ministry for the Environment, presentation to Oceans Hui, Wellington, 22 March 2003)

The Oceans Policy should provide one avenue by which the Crown ensures that the customary rights, affirmed in the Treaty of Waitangi, are understood, protected and given effect in a consistent way across all marine legislation and policy.

The following Treaty-based principles for marine decision-making have been put forward in various submissions on marine reforms.

High Level Treaty Principles:

Decision-makers must not:

- Prevent Iwi/hapu from exercising their customary relationship with Tangaroa (the Oceans)
- Erode or prevent the full implementation of existing and future settlements
- Prejudice the settlement of outstanding claims.

Operational Treaty Based Decision-Making principles:

The Crown must balance the rights and obligations contained within the separate Articles of the Treaty when exercising its powers. The Treaty operates as a whole – taking action under any of the Articles can only be undertaken in a manner that best supports the other two Articles. The following are principles that govern the negotiation of decisions between Treaty partners. They should guide all decision-making under marine related legislation.

- Under Article I of the Treaty, the Government has the right to make laws. This includes the right to make laws for resource conservation. However in finding the most appropriate options, Articles II and III must be taken into account and the Government should choose the option that effectively provides for its solutions but which has least impact on the exercise of Articles II and III.
- Under Article II, Iwi/hapu are guaranteed their tino rangatiratanga – tribal authority over tribal resources. This includes a right to manage and develop resources in accordance with tribal practices subject to Article I (that is, they are practiced within sustainable limits).
- In accordance with Article II, the Crown has a duty to protect the integrity of any Treaty Settlements involving natural resources as a priority before re-allocating access or use to citizens under Article III for public use and enjoyment.
- Under Article III, Iwi/hapu hold rights of citizenship. These include rights to be treated equitably and fairly.

We believe these principles could help provide a consistent basis for the Crown to give effect to customary rights within the framework of the Treaty.

7.2 Resource Management and Local Government

Since the first local government legislation was passed in New Zealand, there has been no accountability to Iwi/hapu in Treaty terms, despite local authorities being statutory delegates of the Crown. The Resource Management Act, which plays a pivotal role in the management of the coastal marine area, is no exception.

Ever since the Resource Management Act was enacted, inadequacies with the Maori protection provisions (sections 6(e), 7(a) and 8 of the Act) and variable performance in their implementation by local authorities have been highlighted by Iwi/hapu, the

Waitangi Tribunal and the Parliamentary Commissioner for the Environment⁵. Many of these concerns emphasise the point that Iwi/hapu “are not just another interest group”, whose views are to be balanced against those of everyone else. Rather, the interests of Iwi/hapu should be given greater priority against those of the general public on the basis of the Treaty relationship between Iwi/hapu and the Crown.

The ability of the Resource Management Act to recognise Maori rights in the coastal marine area is further restricted through the emphasis in the Act on “*management*” as opposed to “*ownership*” within the coastal marine area. Regional Councils and the Environment Court have consistently maintained that the Resource Management Act cannot deal with issues of ownership, which is a fundamental barrier to Maori, given the nature of their interests within the coastal marine area.⁶ Therefore while the Act does recognise in limited form the interests that Iwi/hapu have in the environment it does not take the next necessary step of giving effect to those rights.

These issues signal the need to strengthen the provisions of the Act as they relate to tikanga Maori and the Treaty of Waitangi, and the need for greater guidance to local authorities by the Crown.

7.3 Aquaculture Reform and Ahu Moana – The Aquaculture and Marine Farming Report (Wai 953)

The marine farming industry has undergone significant and rapid growth since its earliest days (in the 1970s), and increasing growth is predicted in the near future, with approximately 18,000 acres of marine farming space currently under application, as compared to the 4,500 currently farmed.

The growth in demand for water space for marine farming purposes has been an issue of concern to the Iwi of Te Tau Ihu and other Iwi/hapu. Those concerns have been recognised by the Waitangi Tribunal and given further weight by the decision of the Court of Appeal.

The need for reform of the Marine Farming Act and Resource Management Act/Fisheries Act regimes was first identified some time ago. Consequently the Crown published a consultation document entitled *Aquaculture – Join the Discussion* in mid-late 2000. The focus of Crown consultation at that time was on better integration of the Resource Management Act and Fisheries Act processes.

It was hoped that through its reform of the regime for managing aquaculture, the Crown would have addressed customary interests in marine farming. That did not occur. In late 2001, the Crown announced its proposed reforms (including a moratorium), which showed a dramatic shift in Crown thinking that would impose far-reaching changes, including Resource Management Act planning by designation of Aquaculture Management Areas (AMAs) and the potential to tender areas of the coastal marine area.

The moratorium was ultimately reduced to allow more applications to proceed, largely due to pressure from Iwi/hapu interests. However, none of the Aquaculture

⁵ For example, see: Waitangi Tribunal: Ngawha Geothermal Resources Report (1993); Parliamentary Commissioner for the Environment (1998): Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management. In the Ngawha Report the Waitangi Tribunal found that Resource Management Act 1991 was fatally flawed because it does not go far enough to ensure that decision makers act in conformity with Treaty principles.

⁶ See, for example, Haddon v Auckland Regional Council [1994] NZRMA 49 at 56-57

Reforms proposed by the Crown to date make provision for Iwi/hapu customary rights and do not include sufficiently robust mechanisms to protect those rights once recognised by the Crown. Upon the basis that there was no provision made for Maori interests, several Iwi filed urgent claims before the Waitangi Tribunal. The claims alleged that the actions of the Crown would prejudicially affect Iwi interests in the coastal marine area.

In its Ahu Moana Report, released in December 2002, the Waitangi Tribunal found (independently of the decision of the Court of Appeal) that “*Maori have an interest in aquaculture and marine farming*” (page 59). The Tribunal said in relation to the rights of Iwi/hapu in the coastal marine area that:

“...**Maori have a broad relationship with the coastal marine area** and that, as an incident of that relationship, **Maori have an interest in aquaculture**, or more particularly marine farming. We also find that the **Maori interest in marine farming forms part of the bundle of Maori rights in the coastal marine area that represent a taonga protected by the Treaty of Waitangi.**”
(page 76, *Ahu Moana, Waitangi Tribunal*)

The Tribunal accordingly recommended that the substantive reforms in respect of aquaculture be postponed pending negotiations and consultation between the Crown and Maori on a:

- process for investigating the nature and extent of the Maori interest in marine farming;
- process for agreeing on the mechanism needed to protect the Maori interest in marine farming...
- process for ensuring an appropriate level of Maori participation in the development of AMA areas and tendering process; and
- mechanism for preserving the Crown’s capacity to meet its Treaty obligations in the short term, until such time as longer planning issues are dealt with (pages 76 – 77, *Ahu Moana*).

Although the Crown has attempted some limited consultation, to date no negotiations have yet been initiated and the Crown has refused to confirm whether such negotiations will take place or whether any substantive recognition has been given to Iwi/hapu interests in the proposed reforms.

As a result of the recommendations made by the Waitangi Tribunal, the Treaty of Waitangi Fisheries Commission facilitated an Iwi Aquaculture Steering Group to develop a discussion document, *He Maara Mataitai*, to enable Iwi/hapu to respond to consultation by the Crown. The discussion document was released prior to the recent decision from the Court of Appeal.

He Maara Mataitai proposed that Iwi/hapu and the Crown seek clarification of the nature and extent of Maori rights and interests in marine farming through an agreed process. The following proposals were put forward as a means of protecting those rights in the interim, as well as in the longer term.

- ***Treaty partnership in planning***: stronger provisions for Iwi/hapu involvement in decision-making under the Resource Management Act. This could involve Crown support for Iwi/hapu to establish their own objectives for the management of the coastal marine environment (e.g. through capacity building assistance; planning/facilitation services etc)

- **Interim access:** an interim allocation of water space to Iwi/hapu for marine farming. Pending clarification of the “nature and extent” issue, space could be allocated as a percentage of Aquaculture Management Areas. The Iwi Steering Group did not identify a specific percentage, but identified the principle of interim access, which could be delivered and managed in a number of ways, including use of regional Iwi Collectives established for the benefit of Iwi/hapu within regional council boundaries.
- **Protection mechanisms:** the Crown must ensure that it can deliver a final “settlement” to Iwi/Maori. It could do this by:
 - giving itself a first right to purchase marine farms that come up for sale.
 - strengthening the right of marine farmers to renew their permits at the end of their term, but subject to a caveat making them subject to renegotiation if necessary for the resolution of Treaty rights issues. Any Crown “resumption” for the purpose of settling a claim would attract compensation⁷.
 - tender proceeds obtained by the Crown to be held in a Crown/Iwi trust, pending resolution of wider issues.
- **Delivery:** an “intervention” mechanism that enables the Crown to effect a settlement.

The findings of the Court of Appeal that Iwi/hapu are able to pursue recognition that the foreshore and seabed is Maori customary land, in our view, strengthens the conclusions of the Waitangi Tribunal and the proposals put forward by the Aquaculture Steering Group. Together, these findings put further pressure on the Crown to negotiate with Iwi/hapu over the nature and extent of their rights and interests in marine farming.

7.4 Marine Reserves Bill

The Crown’s reform of the existing legislation that governs the establishment of marine reserves is embodied in the Marine Reserves Bill which is currently being considered by the Local Government and Environment Committee. The Bill attracted many submissions from Iwi/hapu, and a submission from the Treaty of Waitangi Fisheries Commission. These submissions identified many problems with the Bill, including:

- its unclear purpose (it appears to be as much about allocating use rights in the marine environment, as it is about appropriate protection of biodiversity from identified threats)
- its adverse effect on the Fisheries Settlement (which settled claims to the commercial and non-commercial aspects of customary rights as they relate to fishing).

⁷ Participants in the marine farming industry do not support the caveat approach however they are willing to work with the Iwi Steering Group to identify alternative approaches that might protect the interests of Iwi/hapu while issues concerning the nature and extent of their rights are clarified.

In saying that the Crown cannot assume that it owns the foreshore and seabed, the Court of Appeal decision supports calls being made by Iwi/hapu for the Crown to demonstrate:

- why marine reserves are the most appropriate environmental tool in any given situation,
- why customary rights should be affected,
- why other more appropriate tools (such as mataitai reserves) which are more consistent with Maori customary rights wouldn't be more appropriate, and
- how any adverse effects on Maori customary rights will be redressed.

7.5 Recreational fishing

The Crown is endeavouring to improve the management of and basis for recreational fishing. There is debate over what recreational right to fishing exists in New Zealand, whether it is simply a practice that has now become an expectation, whether it exists as common law right or, as the Treaty of Waitangi Fisheries Commission maintains, as a privilege that takes second place to the customary rights of Iwi/hapu, including commercial fishing rights.

Recent proposals by the Ministry of Fisheries to introduce kingfish into the QMS on the basis of a "utility approach" have the effect of giving recreational interests a greater priority than Maori customary (commercial and non-commercial) interests. Submissions to the Ministry on behalf of Iwi/hapu point out that:

The QMS contained no such priority in 1992 when the Deed of Settlement was negotiated and no such priority has been inserted into the QMS with Maori agreement since that date (Treaty of Waitangi Fisheries Commission, submission to the Ministry of Fisheries, 20 June 2003).

That being the case, both Maori customary commercial and non-commercial rights should be protected against any desire by recreational fishers or the Crown to enhance the recreational entitlement at the expense of Maori fisheries rights. Such an action would devalue the currency of the Fisheries Settlement and would be inconsistent with the Settlement.

As Iwi/hapu assess the Crown's response to the Court of Appeal decision, we believe it is important to reflect on the overall priority that customary rights have in relation to other rights and interests, and whether they are adequately reflected in statutes, policies and operational decision-making.

7.6 Petroleum interests in the coastal marine area - The Petroleum Report (Wai 796)

In the Petroleum Report, the Tribunal held that Maori continued to have a Treaty interest in petroleum resources and that the Crown and affected Maori groups should negotiate a settlement of petroleum grievances. In its conclusion the Tribunal commented on the issue of petroleum resources within the coastal marine area:

“There remains the unresolved issue of Maori rights in the seabed which was not argued before us. That is a matter before the Courts and it would be quite inappropriate for us to express any view about those proceedings. We can make two points, however. The first is that Maori access to offshore petroleum remedies does not depend upon the claim to customary title in that area being upheld. Offshore petroleum remedies can be made available for historic breach above or below high water mark. **The second point is that if the Maori applicants in the seabed litigation are successful, that may reinforce the conclusions we have reached in this report.**” *(at page 80)*

While, following release of the report, the Crown has indicated that it does not intend to revisit the question of the ownership of petroleum resources or the royalties’ regime, those seeking to exploit petroleum resources must generally negotiate an access agreement with the owner of the land being explored or exploited.

The ultimate resolution of the foreshore and seabed claims will accordingly have a direct bearing on claims to petroleum and other resources in the coastal marine area in terms of the issue of access. However the issue of access should only be one of a number of issues to be dealt with in negotiation with the Crown. In combination, the findings of the Waitangi Tribunal and the favourable decision of the Court of Appeal reinforce the view that customary rights are broad in nature and that they include a development right to the resources located throughout the coastal marine area. The development rights would include a right to exploit the resource.

The concept of a development right has been consistently recognised by the Waitangi Tribunal since the Muriwhenua Fishing Report and Ngai Tahu Sea Fisheries Report. It has also been recognised and acknowledged by the Crown through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

8. General Directions

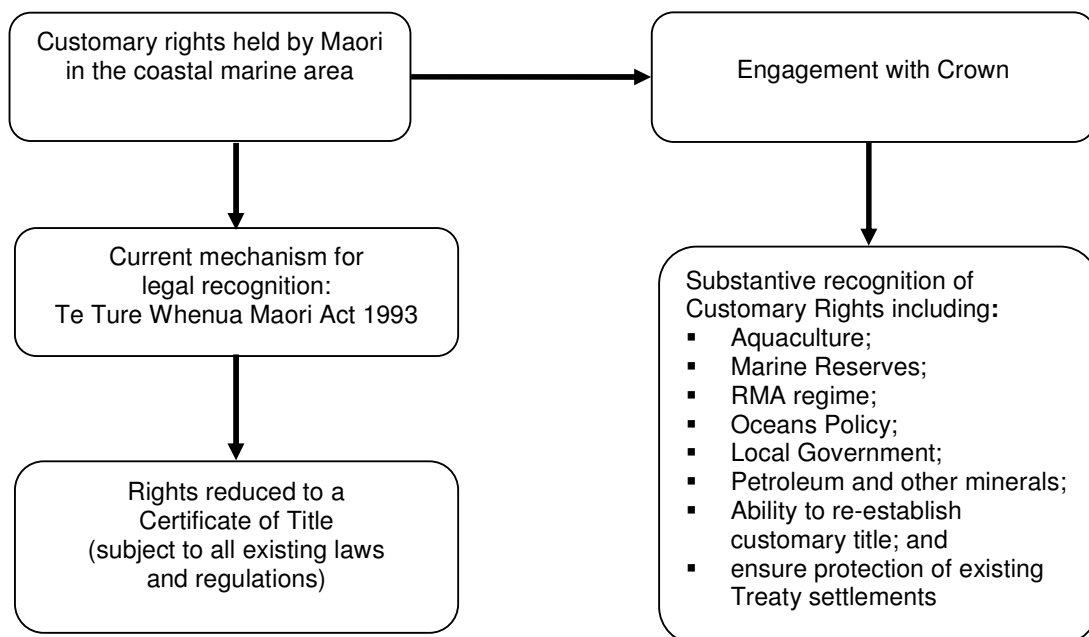
The matters set out in this discussion paper raise fundamental constitutional issues for New Zealand. Given the Crown's intention to make some form of legislative change to provide for public access to the foreshore and seabed, we believe it is vital that the overall system for recognising and protecting customary rights is improved immediately. Any move to extinguish the ability of Iwi/hapu to exclude on the basis of tikanga will create a Treaty grievance. Should the Crown act to remove the right to exclude, Iwi/hapu need to consider what form of redress is appropriate.

Direct negotiations, that result in settlements which extinguish or suspend customary rights, may have a weakening effect on the ability of Iwi/hapu to assert to a sufficient level the extent of their customary rights. Therefore Te Ope Mana a Tai recommends that there is legislative protection of customary rights which recognises and affirms all customary rights of Iwi/hapu, as has occurred in Canada.

Both the Courts and the Crown have recognised that Maori customary rights contain a commercial and non-commercial component. It would be inconsistent for the Crown to acknowledge the commercial development right in respect of fishing and not in respect of other customary rights in the coastal marine area. New Zealand is known internationally for its recognition of the developmental component of customary rights, as shown through the Fisheries Settlement.

It would be entirely insufficient if the Crown, in its efforts to resolve this matter, merely tinkered with Te Ture Whenua Maori Act without amending any of the reforms that we have discussed to better reflect and incorporate the customary rights of Iwi/hapu.

Iwi/hapu need to consider how best to give effect to their rights either through the Maori Land Court process, through direct engagement with the Crown or a mixture of both (see below).



A fundamental question is whether reducing all customary rights in the claimed area down to a certificate of title, as currently provided for in Te Ture Whenua Maori Act, is an appropriate recognition of customary rights to the coastal marine area (such as the right of self-governance that includes the ability to manage and control resources in the coastal marine area). A possible alternative could be to seek legislative recognition of the rights themselves and substantive inclusion of customary rights in all legislation and policy that affects the coastal marine area while not removing, extinguishing, or replacing the rights themselves.

We believe that a principled process for engagement with the Crown is essential. It will be necessary for Iwi/hapu to be informed, proactive and united. The principles that follow provide a basis for Iwi/hapu to work together to engage on this issue.

8.1 Principles for engagement with the Crown

We the members of Te Ope Mana a Tai state that our customary rights in respect of the coastal marine area include, but are not limited to:

- Self-governance (ownership, control, regulation, management, and allocation),
- Development (cultural and economic benefit),
- Exclusivity (in accordance with tikanga),
- Use (in its many forms), and
- Access.

These rights are derived from mana and are expressed through tikanga. They give rise to the following principles upon which we wish to engage with the Crown.

1. It is not for the Crown to determine the nature and extent of customary rights but rather it must respect those rights held by Iwi/hapu.
2. New Zealand was held by Iwi/hapu under their mana according to their tikanga. The Treaty confirmed their rights to all New Zealand and established a relationship between Iwi/hapu and the Crown to give effect to those rights.
3. Historically there has been a systemic failure to appropriately and substantively recognise, protect and enhance the customary rights of Iwi/hapu. We would oppose any move by the Crown to weaken or extinguish the present mechanisms by which tangata whenua customary rights are recognised.
4. We will support a Treaty based process that recognises, protects and enhances the customary rights that Iwi/hapu hold in the coastal marine area and the development rights that flow from those customary rights, such as aquaculture.
5. We believe that customary rights should be recognised, protected and provided for in all legislation and policy that applies to the coastal marine area.
6. Any redress, reform or policy initiative that recognises, protects, and enhances customary rights should not undermine any existing settlement that relates to the coastal marine area.

7. We will continue to allow public access to the beach for private recreational use. Statements have been made by the Crown that it will take away the customary right of Iwi/hapu to control access. We believe such an act would amount to an extinguishment of the right of Iwi/hapu to exclude on the basis of tikanga. The removal of a customary right requires the agreement of Iwi/hapu.
8. Iwi/hapu customary rights, both commercial and non-commercial include a developmental component, which must be recognised and given effect to.
9. Customary rights have priority over all other uses in the coastal marine area.
10. We do not agree that the short legislative timeframe signalled by the Crown is sufficient to consider such a longstanding and complex issue.
11. The Crown should delay its current legislative agenda until an agreed open and principled process has been established between Iwi/hapu and the Crown.
12. Where areas of foreshore and seabed have been taken by legislative action or otherwise unfairly acquired by the Crown, any loss of customary rights that has resulted may be a Treaty grievance that the Crown should move to address as matter of urgency through the Treaty settlement process.
13. A pre-emptive move by the Crown to curtail the scope of Iwi/hapu rights in the coastal marine area will create a significant Treaty grievance.

8.2 Where to from here?

- This discussion document will be made available on www.tokm.co.nz.
- We would like to discuss and hear your views on the discussion document. Should Iwi/hapu have feedback, views or ideas that they think Te Ope Mana a Tai should hear we are happy to come and talk “kanohi ki te kanohi” at Iwi/hapu hui. We can also receive your feedback via email at foreshoreandseabed@tokm.co.nz and a dialogue box has been set up on www.tokm.co.nz.
- A summary and analysis of the Crown’s proposals will be prepared shortly after they are released and will be distributed widely.
- Te Ope Mana a Tai also asks that Iwi/hapu consider what your particular rights and tikanga are in relation to the coastal marine area so that you can develop an appropriate response to the Crown’s proposals when they are released.
- Prior to the Omaka Hui, Te Ope Mana a Tai will circulate a set of draft options for consideration at the hui.
- The hui will be held at Omaka Marae in Blenheim on the 29th to the 30th of August. At the hui, this paper, Crown proposals and the draft options will be discussed, with a view to presenting a coordinated response to the Crown.

Appendix 1

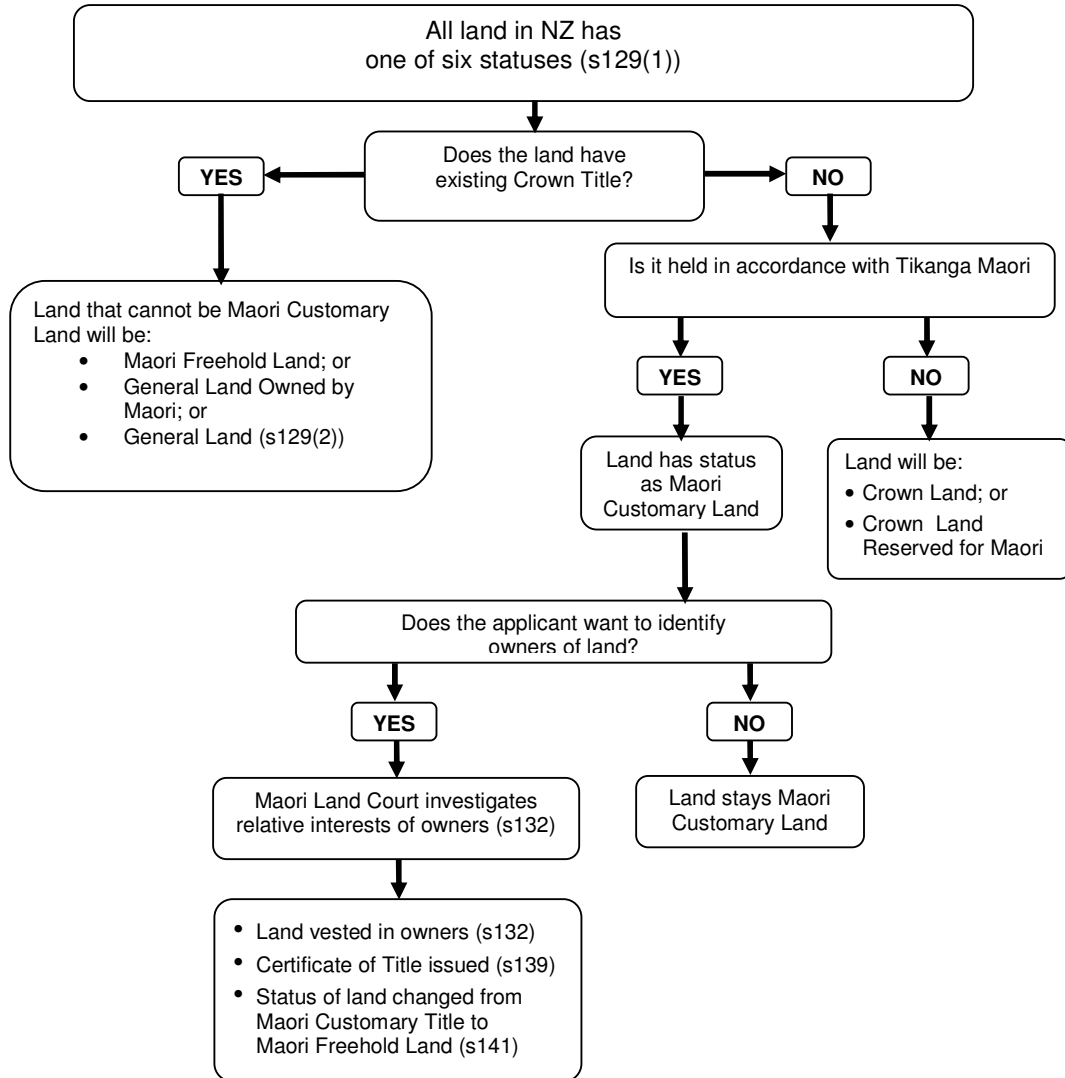
The process for investigating Maori Customary Land under Te Ture Whenua Maori

1. All land in New Zealand (including the foreshore and seabed within the Territorial Sea) will be recognised as being one of the following categories or statuses of land:
 - Maori Customary Land
 - Maori freehold land
 - General land owned by Maori
 - General land
 - Crown land
 - Crown land reserved for Maori.
2. If the land has a certificate of title it can no longer be Maori customary land and must be either Maori Freehold land, General land owned by Maori or General land.
3. If there is no title, land which is “held in accordance with Tikanga Maori”, has the status of Maori customary land. Land without a certificate of title and not held in accordance with tikanga Maori will be Crown land.
4. Land recognised as being Maori customary land can then be investigated to determine the owners. Once the owners have been determined (and can include Maori Trust Board or Maori Incorporations) a title is issued in favour of the owners and the status of the land changes from Maori customary land to Maori freehold land.

The process for determining whether land is Maori customary land is set out in Figure One.

Figure One

Process for investigation under Te Ture Whenua Maori



Appendix 2

Kaitiakitanga as a basis for solutions

(adapted from *He Maara Mataitai*, Iwi Aquaculture Steering Group, April 2003)

The customary rights of Iwi/hapu are derived from mana and are expressed through their individual tikanga. Members of the Aquaculture Steering Group have considered which common tikanga provide the most secure expression of Iwi/hapu mana over the coastal marine area in their rohe. They believe that kaitiakitanga is one such common tikanga that is practiced widely amongst all Iwi/hapu.

Kaitiakitanga is to a limited extent acknowledged in legislation and is defined as follows:

“...the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources, and includes the ethic of stewardship” (section 2, Resource Management Act 1991); and

“...the exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the resources, as exercised by the appropriate tangata whenua in accordance with tikanga Maori” (section 2, Fisheries Act 1992)

However, concern has often been expressed by Iwi/hapu that present legal definitions do not fully express what kaitiakitanga is about and any attempt to define it in anything other than te reo Maori will always be insufficient. The Group offered the following ideas in order to generate discussion on the concept of kaitiakitanga, which is a pivotal tikanga in relation to the marine environment. Kaitiakitanga contains many elements that can be described as:

- mahi tapu – god given and handed down through our tipuna
- founded in whakapapa - the relationship between everything and everybody in the natural world – there is no distinction between people and their environment
- exercised on behalf of, and for the benefit of all who are related through whakapapa
- a set of inalienable responsibilities, duties and obligations that are not able to be delegated or abrogated
- a web of obligations: to the taonga, to the atua and to ourselves and our uri. Kaitiaki have a responsibility to provide for everyone and ensure everyone benefits
- independent of “ownership” in a European sense. As on land, kaitiaki responsibilities are independent of others who hold “ownership” or use rights under the law. For example, although as kaitiaki, Iwi/hapu may “own” only a percentage of the total marine farming space in a region under existing law, they still hold kaitiaki responsibilities over the whole area in accordance with tikanga
- seamless and all encompassing – making no distinction between moana and whenua
- given effect at whanau and hapu level

- expressed in ways that are appropriate to the place and to the circumstances, according to tikanga
- wider and more complex than existing legal definitions
- given practical effect by:
 - exercising control over access to resources,
 - sharing the benefits of the use of those resources
- enabled through rangatiratanga (the exercise of mana), which includes the authority that is needed to control access to and use of resources, and to determine how the benefits will be shared. This means that it can be expressed in part through the concepts of “ownership”, “property”, “title” or “stewardship” - however it is much wider than any of these.

Kaitiakitanga has been exercised since before the Treaty. Article II of the Treaty guaranteed that Iwi/hapu would retain the authority they needed – that is rangatiratanga - to continue to exercise kaitiakitanga.

While the Crown gained the right to govern and to make laws (including for the purpose of resource conservation) under Article I of the Treaty, the Crown must heed the guarantees it made under Article II when designing and implementing its policies and laws.