

19 April 2023

Requesters name redacted for proactive release

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OIA 28514

Tēnā koe Requesters name redacted for proactive release

I refer to the request for information transferred to the Ministry of Foreign Affairs and Trade on 14 February 2023 Requesters name redacted for proactive release in which the following was requested under the Official Information Act 1982 (OIA):

'Copies of any and all papers, if any, submitted by any member of the Government of the Day, to any Cabinet and or Cabinet Committee, and all Cabinet and Cabinet Committee Minutes relating to any decision that agreed New Zealand's signing up to the Declaration on the Rights of Indigenous Peoples (DRIP).'

On 14 March 2023 you were advised of the need to extend the timeframes for responding to your request by 30 working days to 28 April 2023.

On 20 March 2023 you were advised that your request was transferred in part to Crown Law for response. You will hear more from them regarding information within scope of your request held by that agency.

Requesters details redacted for proactive release

The information relevant to your request is attached. We have withheld some information in these documents under the following sections of the OIA:


- 6(a): to avoid prejudicing the security or defence of New Zealand or the international relations of the New Zealand Government; and
- 9(2)(h): to maintain legal professional privilege.

Where the information has been withheld under section 9 of the OIA, we have identified no public interest in releasing the information that would override the reasons for withholding it.

Please note that we may publish this letter (with your personal details redacted) and enclosed documents on the Ministry's website.

If you have any questions about this decision, you can contact us by email at: DM-ESD@mfat.govt.nz. You have the right to seek an investigation and review by the Ombudsman of this decision by contacting www.ombudsman.parliament.nz or freephone 0800 802 602.

Nāku noa, nā

A handwritten signature in black ink, appearing to be 'SC', written in a cursive style.

Sarah Corbett
for Secretary of Foreign Affairs and Trade



Cabinet

CAB Min (09) 15/23

Copy No: 4

Minute of Decision

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Additional Item: Declaration on the Rights of Indigenous Peoples

Portfolio: Foreign Affairs

On 4 May 2009 Cabinet:

- 1 **noted** that on 13 September 2007 the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (DRIP);
- 2 **noted** that New Zealand, along with Australia, Canada and the United States, voted against the DRIP because some of its key provisions were considered to be incompatible with New Zealand's legal/constitutional arrangements and democratic processes;
- 3 **noted** that Australia has recently announced its support for the DRIP within the context of existing Australian and international law;
- 4 **invited** the Minister of Foreign Affairs, in consultation with the Prime Minister, Minister of Maori Affairs and other relevant Ministers, to prepare a paper for Cabinet on whether New Zealand should change its position in respect of the DRIP.

Martin Bell
for Secretary of the Cabinet

Distribution:

- 10 Prime Minister
- 11 Chief Executive, DPMC
- 12-13 Director PAG, DPMC
- 14 Minister of Finance
- 15-16 Secretary to the Treasury
- 17 Minister of Justice
- 18 Secretary for Justice
- 19 Attorney-General
- 20 Solicitor-General
- 21 Minister of Foreign Affairs
- 22 Secretary of Foreign Affairs and Trade
- 23 Minister for Social Development and Employment
- 24 Chief Executive, MSD
- 25 Minister of Maori Affairs
- 26 Chief Executive, Te Puni Kokiri
- 27 Secretary of the Cabinet



Cabinet

CAB Min (09) 16/18

Copy No: 4

Minute of Decision

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Declaration on the Rights of Indigenous Peoples

Portfolio: Foreign Affairs

On 11 May 2009, Cabinet:

- 1 **deferred** consideration of the submission attached to CAB (09) 254 until 18 May 2009;
- 2 **invited** the Minister of Foreign Affairs (lead) to convene a group of Ministers comprising the Prime Minister, the Minister of Energy and Resources, the Minister of Justice, Attorney-General, the Minister of Maori Affairs and the Associate Minister of Maori Affairs, with support from an inter-departmental group of officials, to give further consideration to the issues relating to possible New Zealand support for the Declaration on the Rights of Indigenous Peoples, and the options for mitigating any risks for New Zealand;
- 3 **invited** the Minister of Foreign Affairs, following the discussion by the group of Ministers, to submit further information or a revised paper for Cabinet on 18 May 2009, if required.

Rebecca Kitteridge
Secretary of the Cabinet

Reference: CAB (09) 254

Distribution (see over)

Distribution:

- 10 Prime Minister
- 11 Chief Executive, DPMC
- 2 13 Director PAG, DPMC
- 14 Minister of Finance
- 14 Secretary to the Treasury
- 5 16 Minister of Energy and Resources
- 18 Chief Executive, MED (Energy and Resources)
- 19 Minister of Justice
- 20 Secretary for Justice
- 21 Chief Executive, MED (Commerce)
- 22 Minister for the Environment
- 23 Secretary for the Environment
- 24 Attorney-General
- 25 Solicitor-General
- 26 Director, OTS
- 27 Minister of Foreign Affairs
- 28 Secretary of Foreign Affairs and Trade
- 29 Associate Minister for ACC
- 30 Minister of Maori Affairs
- 31 Chief Executive, Te Puni Kokiri

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Cabinet

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Proposal

1. This paper considers how the Government can move to a position of support for the Declaration on the Rights of Indigenous Peoples while mitigating the risks that such support might be used domestically or internationally as a basis for seeking to require fundamental change to New Zealand's existing legal arrangements and democratic processes.

Executive Summary

2. The Declaration on the Rights of Indigenous Peoples (DRIP) is intended to provide a comprehensive statement of the rights and freedoms of indigenous peoples. New Zealand, Australia, Canada and the US voted against its adoption in 2007 because of concerns about a small number of articles (notably, prior informed consent on legislative and administrative decisions affecting indigenous populations, ownership of land and resources, and rights of redress).
3. In April 2009 Australia announced its decision to support the DRIP. The Prime Minister has since indicated that he would like New Zealand to move in a similar direction.
4. This paper outlines the legal and policy risks of moving to support the DRIP. While these are hard to quantify, the move could raise expectations, both in significant new policy areas and in more general policy engagement with Māori.
5. s6(a)
6. It is proposed that New Zealand should move to support the DRIP with an inter-departmental task force being established to prepare advice by 29 June on implementation.
7. s6(a)

Background

8. The DRIP is intended to provide a comprehensive statement of the rights and freedoms of indigenous peoples. It covers a broad range of collective and individual rights and freedoms including the right to self-determination, cultural rights and identity, rights to education, health, employment, language.
9. The DRIP was adopted by the UN General Assembly in September 2007. There were 143 votes in favour. Eleven countries abstained. New Zealand, Australia, Canada and the US were the only countries to vote against. Those four countries voted against the DRIP principally because of concerns over its Articles dealing with prior informed consent on legislative and administrative decisions affecting indigenous populations, ownership of land and resources, and rights of redress.
10. A summary history of the negotiations leading to the adoption of the DRIP and New Zealand's stance in the negotiations is included as an appendix.

Change in stance by Australia

11. On 3 April 2009, the Australian Minister for Families, Housing, Community Services and Indigenous Affairs, Hon Jenny Macklin, announced the Australian Government's decision to support the DRIP. Subsequently, the Prime Minister has indicated that he would like to see New Zealand move to support the DRIP provided that New Zealand can protect the unique and advanced framework that has been developed for the resolution of issues related to indigenous rights within the context of New Zealand's existing legal arrangements and democratic processes. Minister Power has reiterated that statement during New Zealand's Universal Periodic Review by the United Nations Human Rights Council.

Key concerns with DRIP from New Zealand perspective

12. Some elements of the DRIP are not compatible with New Zealand's constitutional arrangements or consistent with the principle of governing for the good of all citizens:

Articles 19 and 32(2): free, prior and informed consent

13. Articles 19 and 32(2) provide that States should consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them, and prior to the approval of any project affecting their lands, territories and other resources.

14. These articles could be interpreted as implying a right of veto for Māori over democratic and legislative action. This would have major implications for New Zealand's constitutional arrangements and for the implementation of domestic laws such as the Resource Management Act and the Crown Minerals Act. Such a right of veto would also constrain New Zealand's international engagement if taken to mean that Māori sign-off was required for any position that New Zealand took internationally that affected Māori interests (eg in the United Nations, in the WTO, in free trade agreement negotiations).

Article 26: right to traditionally owned lands; Article 28: right to redress

15. Article 26 states that indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Article 28 provides for the right to redress or compensation for lands, territories and resources which have been traditionally owned or otherwise occupied or used and which have been confiscated, taken, used or damaged without their free, prior and informed consent. This compensation "shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation".
16. In New Zealand, much land that was traditionally "owned, occupied or otherwise used or acquired" by indigenous peoples is now occupied and/or owned by persons who acquired it lawfully and in good faith, for value. The right of full compensation is inconsistent with Treaty settlements policy and practice. Instead the focus is on fair, durable and final settlements. New Zealand does not have the resources for full redress.

Potential Risks of Moving to Support the DRIP

17. There are both legal and policy risks in moving to support the DRIP, although these are difficult to quantify. The previous Government's vote against the DRIP was taken principally to try to contain those risks.

Legal risks

18. While the DRIP is not legally binding, it can have implications at both international and domestic law. Internationally, the risk is that the DRIP could come to be regarded as customary international law and binding on States even though not incorporated in a treaty instrument. At the domestic level, the risk is that a tribunal or court could be swayed by argument that the DRIP reflects evolving international practice that should be reflected in the interpretation and application of New Zealand law.
19. Given the history of the negotiation and adoption of the DRIP, the risks of the DRIP being taken to be customary international law are not considered

serious or imminent. There would have to be a substantial change in State practice - which would only happen over a significant period of time.

20. The chances of the DRIP being raised and given legal credence before the Waitangi Tribunal or the courts are much higher. Indeed, the DRIP and the Government's stance during its negotiation is already an issue before the Waitangi Tribunal in the WAI 262 claim in which a number of iwi have asserted exclusive rights to rights to native fauna and flora, cultural knowledge and property as taonga protected by Article 2 of the Treaty. Any change of position would be likely to influence the Tribunal's recommendations which are expected late this year. Depending on their terms, those recommendations, in turn, could well be taken up in future cases before the Tribunal or the courts.

Policy risks

21. Arguably, the policy risks inherent in supporting the DRIP are more significant than the legal risks. A move to support would be likely to raise expectations, both in significant new policy areas such as the review of the Foreshore and Seabed Act and the development of water policy and other resource management issues. Support for the DRIP could affect more general policy engagement with Māori particularly in the context of the Treaty settlement process. Arguments for "full" compensation based on the DRIP could put at risk the 2014 goal and generate anxieties in the wider community about the affordability of future settlements and the durability of settlements already made.
22. Unqualified support for the DRIP would also strengthen the case already made by some that Māori should have a final determining voice in policy processes that affect their interests. It could also lead to calls for reinterpretation of existing constitutional arrangements and reverberate in discussions on matters such as the terms of reference of the review of constitutional issues, including Māori representation, which must be agreed by early 2010. Non-Māori anxieties would also have to be managed carefully.

s6(a)

s6(a)

- 23.

24. s6(a), s9(2)(h)

25. s6(a), s9(2)(h)

s9(2)(h)

s6(a), s9(2)(h)

Issue a statement of position

26. s9(2)(h)

Because the DRIP is only a Declaration, there is no scope for formal reservations or statements of position of the kind that may be made when formally signing or ratifying a treaty. s9(2)(h)

27. Legal considerations apart, a substantive statement of position would be helpful in framing the policy debate and public expectations. It could explain positively the approach that the Government intends to bring to the implementation of the DRIP while at the same time reassuring the wider public that New Zealand's legal arrangements will remain unaffected and conditioning expectations about how support for the DRIP might influence future policy development.

Content and timing of a statement of position

28. A statement of the Government's position on DRIP is likely to influence policy, and the relationship between the Crown and Māori, for many years to come. It will be important that the statement strike an appropriate balance between the recognition of the rights and interests of Māori as tangata whenua and the rights and interests of the rest of the population. In particular, it should emphasise that support for the DRIP is not a substitute

for the Crown's commitment to the Treaty of Waitangi and the Treaty settlement process, and that the Treaty settlement process and the commitment to 2014 remain unaffected.

29. The statement will need to set out with some care how the Government intends to approach the application of the more difficult Articles. It will also need to take into account the strong likelihood that the Waitangi Tribunal's decision on WAI 262 will analyse the statement as it may apply to matters such as ownership of fauna, flora and traditional knowledge, as well as to the more general issue of the Crown's engagement with Māori, and that the Tribunal's decision may in turn influence how the statement will be interpreted in the future. The statement may also need to address how support for the DRIP may manifest in the context of the Foreshore and Seabed Review and Water Policy.
30. The preparation of such a statement will take some time and will need to be the subject of inter departmental consideration. It should, however, be ready for consideration by Ministers by the end of June.
31. While, ideally, a statement of position would accompany a statement formally announcing the Government's decision to support the DRIP, it is not necessary that the two steps be taken at the same time. If an announcement of support for DRIP is to be made in the very near future, that announcement could both declare the Government's commitment of support for the DRIP and advise that officials have been tasked with preparing a formal statement elaborating on how the Government intends to approach the application of the DRIP to New Zealand's special circumstances.

Notification to others

32. s6(a)
33. Given the direct relevance of a change of position to the WAI 262 Claim, the Waitangi Tribunal should be formally advised after the decision has been announced.

Consultation

34. The Ministry of Justice, the Crown Law Office and Te Puni Kokiri were consulted in the preparation of this paper and concur with its contents

Financial Implications

35. There are no financial implications from the Government moving to support the DRIP in the manner contemplated in this paper.

Human Rights Implications

36. Support for the DRIP will not be inconsistent with the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990.

Legislative Implications

37. There are no legislative implications.

Regulatory Impact and Business Compliance Cost Statement

38. A RIS or BCCS is not required.

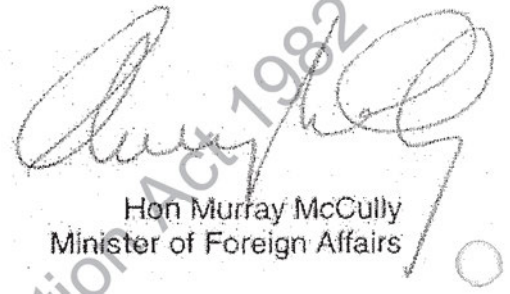
Publicity

39. It is proposed that the Prime Minister should issue a statement announcing New Zealand's support for the DRIP ^{s6(a)}

Recommendations

40. The Minister of Foreign affairs recommends that Cabinet:
1. **Agree** that New Zealand should move to support the Declaration on the Rights of Indigenous Peoples;
 2. **Agree** that an inter-departmental task force be established to prepare for consideration by Ministers by the end of June advice on the implementation of the Declaration in ways which support and protect the unique and advanced framework that has been developed in New Zealand under the Treaty of Waitangi for managing the relationship between the Crown and Maori;
 3. ^{s6(a)}
 4. **Agree** that on 18 May 2009 the Prime Minister should announce the Government's intention to support the Declaration and the decision to task officials to prepare advice on the Government's approach to the implementation of the DRIP in the context of New Zealand's unique circumstances;

5. **Direct** officials to report back to Ministers by 29 June 2009 with advice on the Government's statement about the application of the Declaration to the New Zealand context;
6. **Agree** that the Waitangi Tribunal should be informed of the Government's decisions once they have been announced.



Hon Murray McCully
Minister of Foreign Affairs

8 MAY 2009

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APPENDIX

SUMMARY HISTORY OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

1. The Declaration on The Rights of Indigenous Peoples DRIP was the product of over 20 years of negotiations, first in the Working Group on Indigenous Populations (WGIP) established by the Commission on Human Rights, then in the Sub-Commission on the Promotion and Protection of Human Rights, then in an inter-sessional working group established by the Commission on Human Rights, then in the Human Rights Council (the successor to the Commission on Human Rights) and, lastly, in the Third Committee of the General Assembly.
2. The DRIP builds upon existing international human rights instruments, notably the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These Covenants, which New Zealand ratified in December 1978, give binding effect to the Universal Declaration of Human Rights.

New Zealand stance in negotiations

3. New Zealand supported the aspirations behind the DRIP and was actively engaged throughout the negotiations. It sought a Declaration that would represent a real and on-going standard of achievement and believed the DRIP should contain provisions that States were able to implement and be collectively committed to implementing.
4. New Zealand's position, determined by Cabinet and reviewed by Cabinet on several occasions, was that the DRIP must satisfy several fundamental requirements: it must, among other things, be consistent with international law, and New Zealand law and policy, protect the rights of all citizens, and safeguard territorial integrity and political unity as well as the responsibility of all democratically elected governments to govern for the welfare of all their citizens. New Zealand worked hard throughout the negotiations to find solutions to difficulties in the draft text that made it problematic for democratic States with significant indigenous populations. The objective was a text that New Zealand could support.
5. Despite those efforts and the efforts of others such as Australia, Canada, US, Norway, Russia and some Latin American countries, the text referred to and adopted by the Human Rights Council in 2006 caused New Zealand and other countries with significant indigenous minorities considerable difficulties. It was adopted by a vote of 30 votes for, 2 against (Canada, Russia) and 12 abstentions. The most acute difficulties were in the areas of self determination, prior informed consent on

legislative and administrative decisions affecting indigenous populations, ownership of land and resources, and rights of redress.

s6(a)

6. s6(a)

7.

s6(a)

8. s6(a)

9.

10.

Advice to Ministers prior to adoption of DRIP / key articles of concern

11. Officials' advice to Ministers prior to the adoption of the DRIP in September 2007 was that the changes made to the text had dealt adequately if imperfectly with the issue of self determination, having regard to Cabinet's decision that any articulation of the right of self-determination could not be construed as encouraging any action which might threaten the territorial integrity or political unity of New Zealand. However, the advice noted that the outcome on the other issues of key concern had not been as positive. In particular, no changes had been made to the substantive articles dealing with free, prior and informed consent, lands and resources, and redress.
12. The advice then canvassed the legal and policy considerations relevant to the exercise of New Zealand's vote if the DRIP was put up for adoption without further change.
13. With respect to legal considerations, the advice to Ministers in September 2007 stated:

"While a Declaration is not legally binding on States, it can have implications at both international and domestic law. Some will assert that the Declaration is declaratory of customary international law and is binding on all States accordingly. Given the history of the negotiation and adoption of the Declaration, we do not consider that there is any serious risk of such an argument succeeding before an international tribunal without a substantial change in State practice - which will only happen over a significant period of time. However, to the extent that this is a risk, a "No" vote on the Declaration as a whole would help generally in countering the acceptance of such a view and, were such a view to be accepted, would best insulate New Zealand from being found to be under an obligation at international law to give effect to the rights in the Declaration.

"It can be argued that the same legal insulation on the issues of most concern to New Zealand can be achieved by voting against the relevant articles dealing with those issues, while abstaining on the Declaration as a whole. To some extent, that is true but there is a risk that an abstention overall would be taken as signifying reservations with but not outright opposition to the Declaration. It would also carry the risk of New Zealand being taken to have accepted those provisions on which it did not cast a separate "No" vote whereas, in fact, we have a number of reservations with some of those other Articles (e.g. Article 31 on intellectual property).

"However, while there is a risk of an international tribunal (eg the Human Rights Committee or CERD) holding that New Zealand has an obligation at international law to give effect to the Declaration, perhaps the greater risk is that a New Zealand tribunal or court will hold that the rights in the Declaration are declaratory of law or principle that should be recognised in New Zealand's domestic arrangements. There must be a reasonably high chance of such an argument being made by a claimant before the Waitangi Tribunal or by a litigant before a New Zealand court.

"A "No" vote on the Declaration as a whole would best protect against a New Zealand tribunal or court accepting such an argument. However, it would not be a guarantee. There would still be a risk that a tribunal or court would hold that the Government/Crown has an obligation at New Zealand law to give effect to rights recognised internationally (i.e. in the Declaration), notwithstanding a negative vote on the Declaration's adoption. Indeed, a "No" vote of itself might even be regarded as evidence of the failure of the Government/Crown to recognise Māori rights.

"Nonetheless, officials consider that the lesser risk in legal terms lies in voting "No" on the resolution as a whole rather than voting against the relevant articles dealing with those issues, while abstaining on the Declaration as a whole. However, it is not possible to be precise about the degree of difference between the two sets of risk. Accordingly, officials consider that the New Zealand voting position should be determined more by reference to policy rather than to legal considerations."

14. The advice also noted and weighed various the policy considerations for and against a negative vote or an abstention (supporting the Declaration was not considered) including consistency with past positions on the DRIP, maintaining company with Australia, Canada and the US which would likely vote against the adoption of the DRIP, New Zealand's traditionally more forward leaning stance on other international human rights instruments, ^{s6(a)}

The advice concluded:

"Neither set of considerations is conclusive and a choice either way is defensible. However, because neither side of the ledger is conclusive, we think that the better option is to stay with the position that was decided last year – i.e. to vote "No" on the

Declaration as a whole. The basis of this recommendation is that, despite the improvement on self determination, the changes made to the text do not address the other major concerns that New Zealand had with the text which bear on some of New Zealand's basic constitutional and legal arrangements and which New Zealand signalled clearly last year."

15. In the light of this advice, the Ministers of the day decided that New Zealand should vote against the adoption of the DRIP.

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Cabinet

CAB Min (09) 17/12

Copy No: 6

Minute of Decision

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Declaration on the Rights of Indigenous Peoples

Portfolio: Foreign Affairs

On 18 May 2009 Cabinet:

- 1 **noted** the contents of:
 - 1.1 the submission under CAB (09) 254 on how the government can move to a position of support for the Declaration on the Rights of Indigenous Peoples;
 - 1.2 the supplementary paper attached to CAB (09) 267 providing additional information on the potential legal and policy risks;
- 2 **invited** the Minister of Foreign Affairs and Minister of Justice, in consultation with the Prime Minister, the Attorney-General, and the Minister of Maori Affairs, to submit a new consolidated paper for Cabinet which includes:
 - 2.1 further advice on the implications and risks for New Zealand of supporting the Declaration, including the implications for Resource Management Act processes, and mineral, water or other resources;
 - 2.2 advice on the extent to which the proposed risks can be mitigated, and how;
 - 2.3 advice on the steps New Zealand would need to take to make a formal statement of support and to indicate its caveats;
 - 2.4 a draft of a proposed formal statement of New Zealand's support for the Declaration and the proposed caveats.

Rebecca Kitteridge
Secretary of the Cabinet

Reference: CAB (09) 254; CAB (09) 267

Distribution: (see over)

Distribution:

Prime Minister

Chief Executive, DPMC

Director PAG, DPMC

Minister of Finance

Secretary to the Treasury

Minister of Energy and Resources

Chief Executive, MED (Energy and Resources)

Minister of Justice

Secretary for Justice

Chief Executive, MED (Commerce)

Minister for the Environment

Secretary for the Environment

Attorney-General

Solicitor-General

Director, OTS

Minister of Foreign Affairs

Secretary of Foreign Affairs and Trade

Minister of Conservation

Director-General of Conservation

Minister of Maori Affairs

Chief Executive, Te Puni Kokiri

Secretary of the Cabinet

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Note to Cabinet

**Subject: Declaration on the Rights of Indigenous Peoples
(DRIP)**

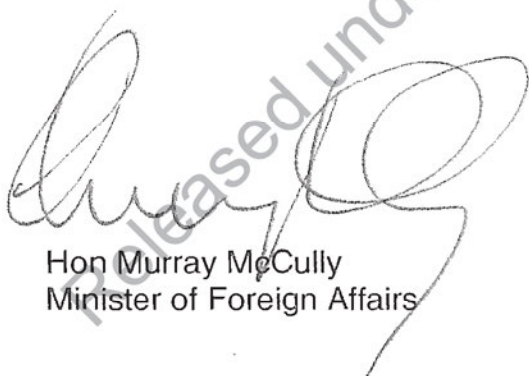
With reference to the Cabinet Minute
(CAB Min (09) 16/18)

On 11 May Cabinet deferred consideration of the submission attached to CAB
(09) 254 until 18 May 2009.

Cabinet invited me to convene a group of Ministers to give further consideration to the issues relating to possible New Zealand support for the Declaration on the Rights of Indigenous Peoples (DRIP) and the options for mitigating any risks for New Zealand. Cabinet also invited me to submit further information or a revised paper for Cabinet on 18 May, if required.

Ministers McCully, Power, Finlayson and Sharples met on Wednesday 13 May to discuss the risk assessment developed by officials for consideration, see attached.

I recommend that Cabinet note this paper.



Hon Murray McCully
Minister of Foreign Affairs

14 MAY 2009

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ADDITIONAL INFORMATION

Issue: Free, prior and informed consent on legislative and administrative measures

Declaration: Article 19

States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Risk for New Zealand:

- s9(2)(h)
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Examples of current practice that give effect to this article

Treaty settlement agreements are achieved with the consent of Māori, and implemented through legislation that in many cases involves a co-drafting process.

- Specific engagement processes that do not go as far as consent, are in place for some legislative and policy proposals that have a significant, but not exclusive, impact on Māori, for example, Emissions Trading and Fresh Water. The Resource Management Act (RMA) provides for specific participation processes to recognise and protect Māori customary interests.

Proposed caveat and comments:

- New Zealand already gives effect to this Article in a limited number of circumstances. However, it is not possible to give the Article full effect as New Zealand's constitutional and parliamentary arrangements do not afford any

group in society a right of veto over all proposals.

- The Government recognises that Māori have an interest in all legislative proposals that impact on their interests.. It utilises a range of consultative mechanisms to afford Māori the opportunity for input, from early policy design through to the rights of citizens to participation in select committee processes, and co-drafting of some legislative proposals.

Issue: Free, prior and informed consent on resource development

Declaration: Article 32

- (1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories or other resources.
- (2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Risk for New Zealand:

• s9(2)(h)

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Examples of current practice that give effect to this article

- With regard to article 32(1), Māori can, and do, determine priorities for the use of lands and resources that they own
- Current practice that illustrates steps towards implementation of Article 32(2) includes co-management arrangements: These are not new in New Zealand, and provide mechanisms for shared decision making in respect of natural resources of

interest to Māori. Co-management arrangements are designed to the specifics of individual circumstances. These arrangements include processes and funding for remedying adverse effects on water quality.

- Customary fishing regulations provide for cultural authority over some aspects of New Zealand fisheries management. Regulation of non-commercial fishing by iwi and hapū also allows for the establishment of mataitai reserves which cover traditional fishing grounds. Iwi and hapū appointed guardians can make bylaws relating to customary and recreational fishing.
- There are existing mechanisms in the RMA for a level of consideration of Māori interests, eg, in achieving the purpose of the RMA, decision makers must recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and also the protection of recognised customary activities. Decision makers must also have particular regard to kaitiakitanga and take into account the principles of the Treaty of Waitangi. Regional policy statements are prepared by regional councils and must state the resource management issues of significance to iwi authorities; regional councils must also take into account any relevant planning document recognised by an iwi authority and lodged with the regional council.
- The RMA also affords specific recognition and protection to Māori recognised customary activities in the coastal marine area.
- Ngāti Tuwharetoa have a vested interest in any decision which may impact upon Māori land in their area of customary interest. In January 2009, the Taupō District Council and Ngāti Tūwharetoa signed a Joint Management Agreement which provides for joint consideration of notified resource consents or proposed private plan changes by both Councillors and iwi appointees.

Proposed caveat and comments:

- Māori can and do determine development priorities over their own lands and resources, although on-going dialogue continues over rights and interests over natural resources, and Māori participation in natural resource management, allocation and decision making processes (notably fresh water).
- As with Article 19 it is not possible to give the Article full effect as New Zealand constitutional and parliamentary arrangements do not afford any group in society a right of veto over, or conversely approval of, development projects, regardless of location and land ownership status.
- The Declaration would not displace in any way New Zealand's fundamental framework of democratic principles, and the practical need to foster Crown-Māori engagement to reach positive agreements within that framework.

Issue: Ownership of lands, territories and resources

Declaration: Article 26

- 1 Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- 2 Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- 3 States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Risk for New Zealand:

s9(2)(h)

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Examples of current practice that gives effect to this article

- The principles of the Treaty of Waitangi, as articulated by the Waitangi Tribunal and the Courts, require the Crown to actively protect Māori interests, including their interests in lands, territories and resources.
- The Treaty settlement process provides for the transfer of agreed resources, including in some cases, the transfer of lands, territories and resources traditionally owned or occupied by Māori, and generally of special cultural significance to Māori where those lands and resources are now in Crown ownership.
- Under New Zealand's resource management legislation decision-makers must recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, and also the protection of recognised customary activities, regardless of whether they legally own those resources today.

<ul style="list-style-type: none"> • Māori have the right to use, develop and control lands and resources they own.
<p>Proposed caveat and comments:</p> <ul style="list-style-type: none"> • Māori currently have the right to use, develop, and control lands and resources that they own. New Zealand's policy and legislative framework also affords special rights to Māori to be consulted over potential impacts on lands and resources of special significance to them. • Support for the Declaration does not override or in anyway impinge on the Crown's commitment to the Treaty of Waitangi or the Treaty settlement process. • Support for the Declaration also does not signal an intention to change New Zealand laws relating to property ownership, including intellectual property. • In balancing the interests between Māori and all New Zealanders, it is not possible for Māori to resume possession of all lands they traditionally owned or occupied where such lands have been legitimately acquired by their existing owners. Such a commitment could potentially, and clearly cannot, extend to all of the New Zealand land mass.

<p>Issue: Redress and compensation</p>
<p>Declaration: Article 28(1)-(2)</p> <ol style="list-style-type: none"> 1 Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2 Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
<p>Risk for New Zealand:</p> <ul style="list-style-type: none"> • s9(2)(h) •

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Examples of current practice that give effect to this article

- The Treaty of Waitangi provides the foundation for the relationship between the Crown and Māori, and the Treaty settlements process provides for the reconciliation and redress for past breaches.
- The current Treaty settlements process provides for redress for lands, territories and resources traditionally owned or occupied that are now owned by the Crown.

Proposed caveat and comments:

- New Zealand has developed a unique process through the Waitangi Tribunal and through Crown Māori negotiation which have achieved the settlement of historical grievances relating to land and resource loss.
- The Declaration will not affect existing Treaty settlements, nor the Crown's approach to settlements yet to be completed.
- The Treaty settlements process provides for redress for the confiscation or acquisition of lands, territories and other resources in breach of Treaty principles, and involves negotiated political agreements between the Government and Māori. The process can not provide for the guaranteed return of lands traditionally owned or occupied by claimant groups, nor can it always take the form of "equal in quality, size and legal status" or equivalent monetary compensation.

Issue: Self-determination**Declaration provisions:**

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 46(1): Nothing in this Declaration may be interpreted as implying for any State, people, group or person the right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action that would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.

Risk for New Zealand:

s9(2)(h)

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Proposed caveat and comments:

- The Treaty is a commitment to the rule of law including a single government and legal system. The Government tries to strike a balance between the three articles of the Treaty, none being absolute. Māori are able to exercise co-management and self-management within that legal system.
- Support for the Declaration should not be seen as encouraging any action which might threaten the territorial integrity or political unity of New Zealand.

Cabinet

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Proposal

1. This paper responds to Cabinet's invitation to the Minister of Foreign Affairs and the Minister of Justice to submit:
 - 1.1. further advice on the implications and risks for New Zealand of supporting the Declaration on the Rights of Indigenous Peoples ('the Declaration'), including the implications for Resource Management Act processes, and mineral, water or other resources;
 - 1.2. advice on the extent to which the proposed risks can be mitigated, and how;
 - 1.3. advice on the steps New Zealand would need to take to make a formal statement of support and to indicate its caveats; and
 - 1.4. a draft of a proposed formal statement of New Zealand's support for the Declaration and the proposed caveats [CAB Min (09) 17/12 refers].
2. We recommend that New Zealand move to support the Declaration in accordance with the proposals set out in this paper.

Executive summary

3. This paper notes the benefits that may be expected to come from supporting the Declaration and includes advice on the implications and risks of doing so.
s9(2)(h)

In accordance with the proposals set out below, we recommend that New Zealand should move to support the Declaration in qualified terms.

4. The Declaration, adopted by the United Nations (UN) General Assembly in September 2007 seeks to establish recognition of specified rights to be enjoyed by indigenous peoples, collectively and individually. The Declaration has a dual character. It comprises both a restatement of established and legally binding principles as well as new principles which have yet to gain broad international acceptance. In those areas, the Declaration is an aspirational document that is intended to establish "a standard of achievement

to be pursued in a spirit of partnership and mutual respect".¹ Insofar as it restates rights and responsibilities set out in human rights treaties that New Zealand has already accepted, the Declaration is broadly consistent with New Zealand's legal, policy and constitutional parameters. New Zealand has been subject to these rights and responsibilities for many years.

5. Support for the Declaration would be consistent with the Government's commitment to human rights and indigenous rights in particular and would enhance the Crown-Māori relationship by demonstrating that commitment. The existing principles stated by the Declaration are broadly in line with Treaty responsibilities and many policy areas. Support will also be well received by the UN human rights bodies responsible for considering New Zealand's periodic reports.
6. The new principles contained in the Declaration articulate indigenous peoples' rights to free, prior and informed consent in decision-making affecting their interests and full compensation for wrongfully taken land and resources. These principles are primarily expressed in four articles (19, 26, 28 and 32) but also recur in other parts of the Declaration. ^{s9(2)(h)}
- 7.
- 8.
9. We recommend that the Government could express such support for the Declaration through a statement of the Government's position, which could then be announced by the Prime Minister and the Minister of Māori Affairs in Parliament, or another public forum, and introduced at a later date by a New Zealand representative at the UN General Assembly.
10. A draft statement of support for the Declaration is attached. We recommend that Cabinet authorise the Prime Minister, the Minister of Justice, the Minister of Māori Affairs, the Minister of Foreign Affairs, the Minister of Energy and Resources and the Attorney-General to approve the final content and timing of the statement of support for the Declaration.

¹ Final preambular paragraph of the Declaration

11. s6(a)

Background

12. On 13 September 2007, the UN General Assembly adopted the Declaration by 143 votes to four, with 11 abstentions. New Zealand, Australia, Canada and the United States voted against the adoption of the Declaration. A number of states that voted in favour of the Declaration or abstained did so subject to express or implicit caveats as to its non-binding character or on the basis that it did not apply to their particular national circumstances.
13. The Declaration is intended to be a comprehensive statement of both the current rights and freedoms of indigenous peoples and of new and emerging principles. It covers a broad range of collective and individual rights and freedoms including the right to self-determination, cultural rights and identity, rights to education, religious customs, health and language. Many of these are found in other human rights instruments to which New Zealand is a party, such as the International Covenant on Civil and Political Rights and so are legally binding principles. A small number of rights or principles asserted by the Declaration are, however, new and open to possible interpretations with which New Zealand could not agree.
14. New Zealand voted against the adoption of the Declaration in 2007 primarily because of concerns about the Declaration's reference to the new and ambiguous, expression of "rights" of free prior and informed consent of indigenous peoples in decision-making and full compensation or restitution for loss of land and resources. These principles are articulated in four articles (19, 26, 28 and 32) but also recur in other parts of the Declaration.

Benefits for New Zealand of supporting the Declaration

15. The bulk of the Declaration is broadly consistent with New Zealand's legal, policy and constitutional parameters, insofar as the Declaration is a restatement of rights and responsibilities set out in other human rights treaties. Even in respect of the new and ambiguous principles, New Zealand has a record of achievement. For example, its approach to settlement of Treaty claims can be seen as positive even though it does not amount to full restitution of indigenous lands and resources. It follows that New Zealand is well placed to publicly support the Declaration, provided risks associated with the principles open to differing interpretations, can be adequately mitigated.
16. A clearly and carefully articulated statement, if framed positively, would:
 - 16.1. affirm and strengthen the view that New Zealand is a responsible state with an ongoing commitment to human rights and indigenous rights in particular;

- 16.2. enhance the Crown-Māori relationship by demonstrating the importance the Government places on acknowledging the distinct and unique status of Māori as the indigenous people of New Zealand;
 - 16.3. restate the primary position of the Treaty of Waitangi in Crown-Māori relationships and note the complementary (but non-binding) role of the Declaration;
 - 16.4. be broadly consistent with current rights and obligations under the Treaty of Waitangi; and
 - 16.5. assist in mitigating the risks identified in this paper.
17. Support for the Declaration is consistent with New Zealand's reputation as a strong advocate for human rights. The Declaration is raised regularly in international fora and support for the Declaration would be likely to enhance New Zealand's international reputation in this area.
 18. Support will also be well received by the UN bodies responsible for considering New Zealand's periodic reports under core human rights treaties as well as the Human Rights Council under the Universal Periodic Review (UPR).² New Zealand recently presented its first report under the UPR and support for the Declaration will meet three of the recommendations made by the Human Rights Council in response to that report.

Legal and policy risks of supporting the Declaration

19. Crown Law and MFAT have prepared an opinion on the legal and policy risks of supporting the Declaration a copy of which can be made available to Ministers. A summary of the opinion follows.

20. s9(2)(h) - 1 page redacted

21.

² The UPR is the new human rights mechanism of the Human Rights Council. It involves a review of the human rights records of all 192 UN Member States once every four years.

Released under the Official Information Act 1982

25. The particular legal and policy areas in which the new principles could give rise to risks in New Zealand, and which would need to be specifically mitigated against, are set out below.

Risks arising from new principles articulated in articles 19, 26, 28 & 32

Articles 19: Free prior and informed consent

26. Article 19 refers to States consulting and cooperating in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative and administrative measures that may affect them (emphasis added).
27. Article 19 implies that the Government has to obtain approval by Māori for all legislative and administrative measures affecting Māori before the adoption and implementation of those measures. New Zealand has developed a practice of significant engagement with Māori about a wide range of legislative and policy issues which affect Māori. It is likely that this practice will continue and possibly evolve further to reflect our unique circumstances. However, this practice would not necessarily meet the consent standard of obligation implied in article 19, which on its face suggests – and, at least in some areas, would be interpreted to suggest – that Māori may be entitled to veto law and policy that affects them. Such an entitlement is incompatible with democratic principles and New Zealand's constitutional arrangements, as no group exercises this level of general control over legislative or administrative decisions in New Zealand. Such an entitlement would also constrain New Zealand's capacity to engage internationally in accordance with the broad national interest if Māori consent were required for every position that New Zealand took internationally that affected Māori.

Article 32 Free prior and informed consent relating to mineral, water or other resources

28. Article 32 refers to States consulting and cooperating with indigenous people in order to obtain their free prior and informed consent before the approval of any project affecting their lands or territories and other resources, particularly in connection with the *development, utilisation or exploitation of mineral, water or other resources* (emphasis added).
29. This principle, on its face, would place an obligation on the Government to obtain permission from Māori before measures - relating to water, mineral or other resources "affecting their lands or territories and other resources" - are taken by Government. Where, in relation to "mineral, water or other resources", consultation processes and policy frameworks fall short of the standard articulated in article 32, reference to this principle raises the risk of predetermining those policy areas or processes, specifically as follows:

29.1. Ownership and management of water

Māori have made claims to water and water bodies, based on customary or aboriginal rights and rights under Article 2 of the Treaty. In New Zealand law, however, no one can own water, except in narrowly defined circumstances and it is generally managed through local government processes in accordance with the Resource Management Act. The Government is in the process of developing a comprehensive strategy ("A Fresh Start for Fresh Water") for the allocation and management of water, for the benefit of all New Zealanders. It has agreed a specific process for consulting with Māori on the strategy.

29.2. Biological Resources

The Government is in the process of developing national policy for the accessing of New Zealand's biological resources and associated traditional knowledge ('bioprospecting'), and for the sharing of resulting benefits. The timing of this policy development is closely linked to the Wai 262 claim (discussed below), as a core part of the Wai 262 claim focuses on the nature of rights associated with biological resources and traditional knowledge. While awaiting outcomes of the Wai 262 claim, officials are engaging broadly with iwi and others in developing options for bioprospecting policy.

29.3. Treaty settlement framework

The Government's policy in Treaty settlement negotiations is that natural resources, including geothermal and mineral resources, are not generally available in settlements because of the existing statutory arrangements for allocating and managing those resources, the difficulty in valuing them and the fact that the Crown owns and manages nationalised minerals under the Crown Minerals Act 1991 for the national interest.

30. The article 32 obligation on the Government to obtain prior consent from Māori in matters relating to water, mineral or other resources is inconsistent with and, if invoked, could affect the interpretation and application of the following legislation:

30.1. Resource Management Act 1991 (the RMA)

The purpose of the RMA is to “promote the sustainable management of natural and physical resources”. The RMA contains provisions which encourage Māori involvement in the management of those resources and which require consideration of Māori values, culture and traditions in resource management decision making. However, these provisions do not amount to an obligation to obtain *prior consent* over resource management processes (emphasis added).

30.2. Crown Minerals Act 1991 (the CMA)

The CMA records that all petroleum, gold, silver and uranium existing in its natural condition in land is property of the Crown. The Crown retains ownership in all minerals in land alienated from the Crown since 1948. The only exception to this is in relation to pounamu rights granted to Ngāi Tahu under the Ngāi Tahu (Pounamu Vesting) Act 1997. Provision is made for engagement with Māori in terms of the application of the CMA (on the request of an iwi, a minerals programme may provide that defined areas of land of particular importance are excluded from the operation of the minerals programme or shall not be included in a permit). However, these provisions do not affect mineral ownership rights or amount to an obligation to obtain *prior consent* from Māori for decisions made under the CMA (emphasis added).

31. In addition, there is a risk that New Zealand support for the Declaration, including these articles in particular, could influence Waitangi Tribunal findings in terms of the Tribunal's recommendations in the following claims:

31.1. Wai 262: The Wai 262 claim includes but is not limited to, issues to do with the control of flora and fauna, cultural intellectual property, te reo policy, health/rongoā policies. The claim also contends that the Crown's position on the Declaration was itself a breach of Treaty principles. The Tribunal's report is expected later this year.

31.2. Wai 796 Petroleum Claim (Part 2). The Waitangi Tribunal is in the process of deliberating on Māori participation in the management of petroleum resources, which since 1937 have been exclusively administered by the Crown as a nationalised resource for the benefit of all New Zealanders. In 2003 the then Government did not accept the finding of the Waitangi Tribunal in its Wai 796 Petroleum Report that some Māori had a Treaty interest in petroleum. The government rejected the Tribunal's recommendations that it should negotiate with affected Māori groups for the settlement of petroleum grievances and withhold mining licences in the meantime.

32. While the Government needs to respond to the findings of the Waitangi Tribunal in good faith, it is not bound by the findings and recommendations. Unqualified acceptance of the Declaration, including article 32, may however lead to greater criticism of the Government should it choose to decline recommendations that are consistent with that article. Mitigation of this risk is discussed further below.

Article 26: right to lands and resources traditionally owned

33. Article 26 provides for the right of indigenous peoples to the lands, territories and resources they have traditionally owned, occupied or otherwise acquired. It also states they have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
34. The principle inherent in article 26 would appear to endorse Māori ownership claims to land which they traditionally owned at any time. This could amount to the whole of New Zealand (by reason of traditional ownership), most of which is legitimately owned or occupied by non-Māori. The Crown has recognised legal land sales by Māori and protects current private property rights over land, even where that land was unfairly acquired by the Crown and on-sold historically. The Treaty settlement process seeks to redress land loss experienced by Māori.
35. The right as advanced in article 26 is inconsistent with New Zealand's position that existing legal rights, including private property rights recognised under the Land Transfer Act and elsewhere, are to be respected in Treaty settlements and that the Treaty settlement process provides negotiated redress.
36. Article 26's specific reference to resources "traditionally owned" could also raise a risk that this principle influences the Waitangi Tribunal findings in terms of its recommendations in its Wai 262 report, as referred to above.

Article 28: Rights to compensation for lands and resources traditionally owned

37. Article 28 provides that indigenous peoples have the right to just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
38. The right of redress "equal in value to land that was confiscated or otherwise acquired" raises a risk in terms of its inconsistency with Treaty settlement policy, and the potential for that policy to be undermined. New Zealand has developed its own framework for the redress of historic grievances derived from breaches of the Treaty of Waitangi. Financial redress offered in Treaty settlements is heavily constrained by both the difficulty of fairly assessing

historical losses, and what the country as a whole can afford to pay in redress of those losses. For these reasons, parties to settlement negotiations agree that financial redress is not calculated on a damages approach, but is based on the nature and extent of the Crown's breaches of the Treaty, and is intended to contribute to the re-establishment of an economic base as a platform for future development. This has been generally accepted by Māori as a practical approach to reparations.

Foreshore and Seabed Act 2004 Review

39. The Foreshore and Seabed Act 2004 is currently under review. The Independent Foreshore and Seabed Review panel reported to the Attorney-General on 30 June 2009 and the Government is currently analysing their report. The Government is due to make public announcements in response, later this year.
40. Due to the ongoing nature of the Foreshore review, there is a risk that an unqualified statement of support for the Declaration would be perceived by Māori and by international human rights bodies as an acceptance that the outcomes of the Foreshore review will be designed to be consistent with the principles of the Declaration. This perception could lead to pressure to implement a new regime that treats the foreshore and seabed as 'traditional land' for the purposes of Article 26 and Article 28, and/or a regime that is consistent with the 'free and prior informed consent' principles contained in Articles 19 and 32.

Support for Declaration

41. We recommend that the Government move to a position of support for the Declaration on the following basis. First, the litigation and policy risks of support for the Declaration can be substantially mitigated by a statement that reflects the qualifications noted in paragraph 24 above.
42. Secondly, the Declaration is a non-binding and aspirational instrument, so while it holds moral obligations it has no direct legal application in New Zealand. Claims that the Declaration represents International customary law, which is binding on states, are unlikely to be successful in New Zealand courts. In deciding whether a practice has that status, the courts will consider whether a) it is the general practice of states; and b) it is accepted as law by states. There is no evidence of this in the case of the Declaration.
43. ^{s9(2)(h)}

44. It is important to note that the Declaration describes "a standard of achievement to be pursued in a spirit of partnership and mutual respect" and

emphasises "consultation and co-operation" between States and indigenous people and the right of indigenous people to participate in decision-making processes. This broadly follows recognised Treaty of Waitangi obligations on the Crown to consult in good faith with Māori on decisions that affect them. The Government has a comprehensive negotiations process for settling historical land and resource grievances and provides extensively for Māori participation in decision-making through engagement on specific policy development, through consultation mechanisms in legislation and through wider democratic processes.

Mitigation of Risk

45. As noted above the legal and policy risks can be mitigated by a statement of support that reflects the terms set out in paragraph 24.

46. ^{s9(2)(h)}

47.

48.

The statement would also help manage expectations about how support for the Declaration might influence future policy development and reassure the wider public that New Zealand's legal arrangements will remain unaffected.

49. ^{s9(2)(h)}

Accordingly, we propose that the statement would set out the principles stated at paragraphs 24.1-24.3 above and:

49.1. state support for the Declaration;

49.2. acknowledge Māori as holding a distinct and unique status as the indigenous people of New Zealand, and reaffirm the importance of the Treaty of Waitangi as a unique feature of indigenous rights and constitutional arrangements in New Zealand;

49.3. affirm the Government's commitment to the common objectives of the Declaration and the Treaty, such as operating in the spirit of partnership and mutual respect;

49.4. acknowledge the long involvement of Māori in the elaboration of the Declaration, the extent of their investment in its development, and the significance they accord to it;

49.5. s9(2)(h)

49.6.

49.7. acknowledge the important relationship Māori have with their lands and resources currently and historically and recognise that Māori have an interest in many policy and legislative matters;

49.8. s9(2)(h)

50. A draft statement of New Zealand's support for the Declaration, including and elaborating on these points, is attached. It is proposed that Cabinet authorise the Prime Minister, the Minister of Justice, the Minister of Māori Affairs, the Minister of Foreign Affairs, the Minister of Energy and Resources and the Attorney-General to approve the final content and timing of the statement of support for the Declaration.

Formal statement of support

51. It is appropriate that the statement is made in a positive manner, reflecting the importance of the rights affirmed in the Declaration. The Australian Government announced support for the Declaration on 3 April 2009 with a statement made by Indigenous Affairs Minister, Hon Jenny Macklin, at a public event in the Parliament buildings.
52. The Prime Minister and the Minister of Māori Affairs could announce support for the Declaration in Parliament or at another public forum. Provided that it is made in formal terms, the statement is likely to be taken into account by courts and tribunals.
53. It would also be appropriate, and would further bolster the standing of the statement in terms of the international audience, for the statement to be introduced at a subsequent date by a New Zealand representative to the UN General Assembly.

s6(a)

54.

s6(a)

55.

56.

Consultation

Departments

57. The Ministry of Justice and the Ministry of Foreign Affairs and Trade, have consulted Te Puni Kōkiri, the Ministry for the Environment, the Ministry of Economic Development, the Ministry of Fisheries, the Ministry of Social Development, the Ministry of Education, the Ministry of Health, the Department of Conservation, the Department of Labour, Land Information New Zealand, Treasury, the New Zealand Defence Force, and the Crown Law Office. The Department of the Prime Minister and Cabinet has been informed.

Māori

58. No specific consultation has been undertaken with Māori in respect of this paper. Māori have expressed consistent and overwhelming support for the Declaration since the beginning of the international negotiations process and have articulated a clear desire for the New Zealand government to endorse it. However, there have been indications that a heavily qualified statement of support for the Declaration would be unacceptable to Māori, as it would negate the purpose and intention of support. In light of these well known views, we consider that further consultation with Māori is not necessary.

Financial implications

59. There are no direct financial implications from the Government moving to support the Declaration in the manner contemplated in this paper. While the proposed statement would substantially mitigate legal risks, it is not possible to rule out the possibility of the Declaration being used in a way that would result in costs to the Crown.

Human rights

60. Qualified support for the Declaration is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative implications

61. There are no legislative implications.

Regulatory impact analysis

62. A RIS or BCCS is not required.

Publicity

63. It is proposed that the Prime Minister and Minister of Māori Affairs make a statement of support for the Declaration in Parliament. A statement could also be introduced by a New Zealand representative at the UN General Assembly.

Recommendations

64. The Minister of Justice and the Minister of Foreign Affairs recommend that Cabinet:
1. **Note** that the Declaration on the Rights of Indigenous Peoples (the Declaration) is an aspirational document that is intended be a comprehensive statement of the rights and freedoms of indigenous peoples comprising both established and legally binding principles and new principles that do not have legal force;
 2. **Note** that insofar as it restates rights and responsibilities set out in other human rights treaties, the Declaration is broadly consistent with New Zealand's legal, policy and constitutional parameters;

3. **Note** the benefits of moving to a position of support for the Declaration:
 - 3.1. the achievement of consistency with the Government's commitment to human rights and indigenous rights in particular;
 - 3.2. the enhancement of the Crown-Māori relationship; and
 - 3.3. the fulfilment of some of the recommendations that followed New Zealand's recent Universal Periodic Review before the UN Human Rights Council;
4. **Note** that new principles, articulated in four articles but which also recur in other parts of the Declaration, advocate prior and informed consent of indigenous peoples in decision-making and full reparation for wrongfully taken land and resources and that these principles are inconsistent with New Zealand legal and policy settings;
5. **Note** that these principles present risks in the following domestic law and policy areas: legislative processes; the Resource Management Act 1991; water policy; the Crown Minerals Act 1991; the Treaty settlement framework; property ownership laws; the Foreshore and Seabed Act Review and the outcome of Waitangi Tribunal claims Wai 262 (flora and fauna) and Wai 796 (petroleum);
6. ^{s9(2)(h)}
- 7.
8. **Agree** that New Zealand should move to support the Declaration;
9. **Note** the attached draft statement of support, which positions New Zealand's support for the Declaration within the context of New Zealand's unique constitutional, legal and policy frameworks and seeks to minimise associated risks;
10. **Authorise** the Prime Minister, Minister of Justice, Minister of Foreign Affairs, Minister of Resources and Energy, Minister of Māori Affairs and the Attorney-General to approve the final content and timing of the statement of support for the Declaration;

11. **Note** that the statement of support could be made by the Prime Minister and the Minister of Māori Affairs in Parliament, or at another public forum, and introduced at a later date by a New Zealand representative at the UN General Assembly; and

12. s6(a)

Minister of Justice
Date signed:



Minister of Foreign Affairs
Date signed: 26 August 2009

Released under the Official Information Act 1982

**Announcement of New Zealand's Support for the Declaration on the
Rights of Indigenous Peoples**

Hei te tini... hei te mano...e rau rangatira ma... (to the many distinguished people in this place and beyond)

tena koutou, tena koutou, tena koutou katoa (greetings...and welcome)

In September 2007, at the United Nations, 143 countries voted in favour of the Declaration on the Rights of Indigenous Peoples. New Zealand was one of four countries who voted against the Declaration. Today, we are pleased to express support for the Declaration.

In keeping with our strong commitment to human rights, and indigenous rights in particular, New Zealand now adds its support to the Declaration both as an affirmation of fundamental rights and, in its expression of new principles, as an important statement of widely supported aspirations.

Māori hold a distinct and special status as the indigenous people of New Zealand. Indigenous rights and indigenous culture are of profound importance to New Zealand and fundamental to our identity as a nation. A unique feature of our constitutional arrangements is the Treaty of Waitangi, signed between representatives of the Crown and Māori in 1840. It is a founding document of New Zealand and marks the beginning of our rich cultural heritage. The Treaty establishes a foundation of mutual respect, co-operation and good faith between Māori and the Crown. It holds great importance in our laws, our constitutional arrangements and the work of successive governments.

The Declaration contains principles that are consistent with the duties and principles inherent in the Treaty, such as operating in the spirit of partnership and mutual respect. We affirm this objective, and affirm the Government's commitment to build and maintain constructive relationships with Māori to achieve better results for Māori, which will benefit New Zealand as a whole.

The Declaration is an historic achievement: the result of many years of

discussions - 22 years in fact – and of hard work and perseverance by many people. I acknowledge the long involvement of Māori in the elaboration of the Declaration, the extent of their investment in its development and the significance they accord to it.

The Declaration acknowledges the distinctive and important status of indigenous peoples and their common historical experiences. The Declaration restates established and legally binding international human rights principles, and it also expresses new principles and aspirations, specific to indigenous people, that do not have binding legal force.

The established principles restated in the Declaration - such as non-discrimination, security of the person and cultural practice - are well reflected in New Zealand's legal frameworks, and we will continue to make every effort to uphold them. A small number of rights or principles asserted by the Declaration are, however, new and are open to possible interpretations with which New Zealand could not agree. New Zealand's endorsement does not mean altering existing legal frameworks that have been developed and accepted over time, and should be read within the context of those frameworks.

The Declaration includes, in Articles 26 and 28, the principle that indigenous peoples are entitled to lands and resources they have traditionally owned, and to full redress for lands and resources that have been taken. We respect the important relationship Māori, as tangata whenua, have with their lands and resources: currently and historically, and the complementary principles of rangatiratanga and kaitiakitanga that underpin that relationship.

The Government recognises that loss of land and resources have held back the potential economic development of Māori. New Zealand has developed unique processes for addressing historical and contemporary grievances, through the Waitangi Tribunal and through Māori – Crown negotiations to achieve the settlement of those grievances relating to land and resource loss. Many Māori groups have already benefited from the transfer of considerable land, forest and fisheries assets through Treaty settlements; many more are in

the process of negotiations with the Government towards settling their claims. These settlements contribute to the re-establishment of an economic base as a platform for future development.

Redress offered in Treaty settlements is, however, constrained by the need to be fair to everyone and by what the country as a whole can afford to pay in remedying those losses. In negotiations, the Crown seeks to provide a fair level of redress, taking all the circumstances into account, but this does not amount to full compensation for the loss of resources.

We will continue the conversation with Māori as to the best and most effective way to negotiate and conclude settlements, for the benefit of Māori, and for the country as a whole. New Zealand's support for the Declaration does not mean altering laws relating to the ownership of land or the well established approach for addressing grievances.

The Declaration also includes, in articles 19 and 32, the principle of prior and informed consent in the context of the implementation of measures that may affect indigenous people, or in relation to the approval of projects affecting their lands and resources, particularly in connection with mineral, water or other resources.

The Government recognises that Māori have an interest in all policy and legislative matters. Māori have been, and continue to be, active in developing innovative responses to issues with a strong indigenous perspective. The Government acknowledges the determination of Māori that custom, worldviews and cultural heritage should be reflected in the laws and policies of New Zealand.

These practices do not extend to requiring consent to all Government decisions. New Zealand's support for the Declaration will not therefore mean altering its established and well regarded approaches to participation of Māori in policy development and decision-making. Nor will it, and nor is it intended to, alter laws relating to the ownership and management of natural resources and nationalised minerals, for the benefit of all New Zealanders.

Support for the Declaration will be consistent with the Government's Treaty commitment to work with Māori, in a good faith and co-operative manner, on issues which affect them and in which they have an interest, including natural and mineral resources. Support for the Declaration will not limit our on-going national dialogue about Crown-Māori relationships that derive from the Treaty of Waitangi.

The Government welcomes and appreciates engagement with Māori across the broad spectrum of its activities, nationally and internationally. We undertake to work in international arenas to promote the human rights of indigenous peoples.

New Zealand's support for the Declaration represents an opportunity to acknowledge and restate the special cultural and historical position of Māori as the original inhabitants - the tangata whenua - of New Zealand. It reflects our endeavours to work in a co-operative manner in order to find solutions and our commitment to the relationship we already have under the Treaty of Waitangi.

No reira, tena koutou, tena koutou, tena koutou katoa.



Cabinet

CAB Min (09) 32/1

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Minute of Decision

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Declaration on the Rights of Indigenous Peoples

Portfolio: Justice / Foreign Affairs

On 7 September 2009, Cabinet **deferred** consideration of the of the submission under CAB (09) 494 until the meeting of Cabinet on 14 September 2009, to allow further discussions between the Prime Minister, the Minister of Justice, the Minister of Foreign Affairs, the Minister of Energy and Resources, the Minister of Maori Affairs, and the Attorney-General on the final wording of the statement of support for the Declaration on the Rights of Indigenous Peoples.

Rebecca Kitteridge

Secretary of the Cabinet

Reference: CAB (09) 494

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