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Comments on consultation document – Reviewing the Foreshore and Seabed Act 2004

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Introduction

This submission is made by the New Zealand Minerals Industry Association (NZMIA) which represents companies active in gold and silver, aggregate, industrial mineral and ironsand exploration and mining. NZMIA also has ten associate members representing service companies that provide support services to the resource sector.

Background

The mineral industry has been aptly described as a forgotten sector and the industry is greatly encouraged by the government's recognition of the potential significance of our mineral resources, and its determination to address this through RMA reforms, Crown land management changes, and by investing in new data. These changes recognise that the key to realising New Zealand's mineral potential is to increase the level of private sector investment in mineral exploration. This outcome could be defeated by the proposed changes to the Foreshore and Seabed Act as it casts a pall of uncertainty over the ownership of minerals beneath the seabed that are the focus of much of the new exploration activity in New Zealand. The consultation document makes not a single reference to *minerals* or *mineral ownership*, indicating that minerals have not been considered in this review.

The review document (page 19) lists the interests of New Zealanders in the foreshore and seabed. Business and development interests listed are fishing, marine farming, marine transport, roading and airport infrastructure, mining and tourism industries. This is the sole reference to minerals or mining in the document which, while offering assurances relating to other interests, is silent on any assurances relating to mineral ownership and access to them.

New Zealand's mineral ownership regime

All naturally occurring gold, silver, uranium and petroleum in New Zealand are owned by the Crown by statute (often referred to as statute minerals), ownership having been resumed progressively by the Crown during the 20th century. This is confirmed by section 10 of the Crown Minerals Act 1991:

10 *Petroleum, gold, silver, and uranium*

Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum, gold, silver, and uranium existing in its natural condition in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown.

Section 2 of the Crown Minerals Act defines 'Land' to include the foreshore and seabed. As long as these provisions remain unchanged, minerals on the foreshore and seabed will continue to be owned by the Crown.

The Crown Minerals Act applies only to Crown owned minerals. This is confirmed by an amendment to the Act:

25 *Grant of permit*

(1) Subject to the provisions of this Act and to section 5A(3) of the Continental Shelf Act 1964, the Minister may grant to any person a permit in respect of any specified minerals and land, on such conditions as the Minister thinks fit.

(1A) The Minister may not grant an exploration permit or a mining permit under this section in respect of minerals that are privately owned.

The Minister can grant prospecting permits over minerals that are privately owned because it is impractical to define mineral ownership over the large areas covered by this type of permit. While the statute minerals (apart from uranium) are produced on a significant scale, numerous other minerals are being produced in New Zealand. The seabed has potential for a range of both statute and non-statute minerals that include silica sand, feldspar sand, iron sand, other heavy mineral sands and a range of metals. The potential value of these is described in more detail below.

With rare exceptions, minerals under Crown land are owned by the Crown. On other classes of land, including private land, minerals other than gold, silver, uranium and petroleum, may be owned by the Crown, the owner of the land or another person, group of people or company. This mineral ownership regime, in common with many other countries (including Britain, the United States, Canada and Australia) with a British legal heritage, includes both private and public mineral ownership. In Canada and Australia difficulties, particularly with exploration, have led to the widespread resumption by the State of private mineral ownership. Public ownership (with rights of access) now prevails in almost all industrialised countries.

Private mineral ownership has been a major impediment to exploration internationally. If mineral owners of a small but critical part of a prospect or known resource refuse consent there is no solution to the resulting impasse that can have a major effect on the public interest where it frustrates access to potentially valuable mineral resources.

In Britain difficulties of this type are widespread because of the long history of settlement, and in theory legislation to rectify the problem exists in the form of the Mines (Working Facilities and Support) Acts of 1966 and 1974. These provide for compulsory acquisition of mineral rights in cases where owners cannot be found or where they refuse to deal

reasonably. They are unique in English law in allowing the compulsory acquisition of land or rights in land against one person for the private commercial gain of another. Similar legislation exists in Ireland. These acts have been used on rare occasions, but the usual tendency when an explorer or miner is confronted with these difficulties is to go elsewhere.

In this country section 37 of the Mining Act 1971 contained similar provisions. Following its repeal in 1991, New Zealand may now be the only industrialised country in the world with widespread private mineral ownership and no statutory mechanism to overcome intractable problems arising from a refusal to deal reasonably where the interests of others are affected. The compulsory arbitration provisions of the Crown Minerals Act apply only to access to Crown owned petroleum.

The mineral ownership regime is an obstacle for exploration for minerals other than the statute minerals onshore. If the ownership of offshore minerals or access to them becomes uncertain and disputes arise, there is no mechanism to resolve them.

Crown-owned minerals are explored for and mined under permits granted by the Crown. The law in New Zealand and most other countries requires exploration results to be reported, and these reports are made public at the conclusion of the exploration programme or after a period of time (5 years in New Zealand). More than 3,000 such reports are available on the Crown Minerals website. These published reports are a crucial component of the minerals search, as they allow data to be accumulated progressively. Where minerals are privately owned there is no requirement to report the results, and the data is lost, or held by one company, and the mineral owner. Exploration is impeded as a result.

Access to minerals

Where the Crown retains ownership of seabed minerals (i.e. the statute minerals and non statute minerals) the Crown Minerals Act will continue to apply. However permits under the Crown Minerals Act carry no rights of access (Section 47) which is by negotiation:

47 *Permit does not give right of access to land*

Subject to section 49, the granting of a permit under this Part does not confer on the permit holder a right of access to any land

(Section 49 applies to minimum impact activities only)

If a land owner or occupier refuses to act reasonably the access arbitration provisions of the Crown Minerals Act apply only to petroleum, so there is no mechanism to resolve such a dispute for other mineral resources.

If the amendments to the Foreshore and Seabed Act create occupier rights, such occupiers would have a right of veto over access to all minerals on the seabed, regardless of ownership. This right would not be open to appeal under the Crown Minerals Act.

A footnote on page 6 of the discussion document refers to a 2003 LINZ report that identified 12,499 privately owned titles partly or wholly within the foreshore and seabed. However the report shows that just 16 of these are surveyed to below mean high water mark and a further 32 seabed parcels are covered by the sea. The seabed parcels include both Maori and general land and cover a total area of 2.6 square km. Therefore at present the seabed is owned almost entirely by the Crown. The link to the report is:

<http://www.beehive.govt.nz/Documents/Files/ACF40B7.doc>

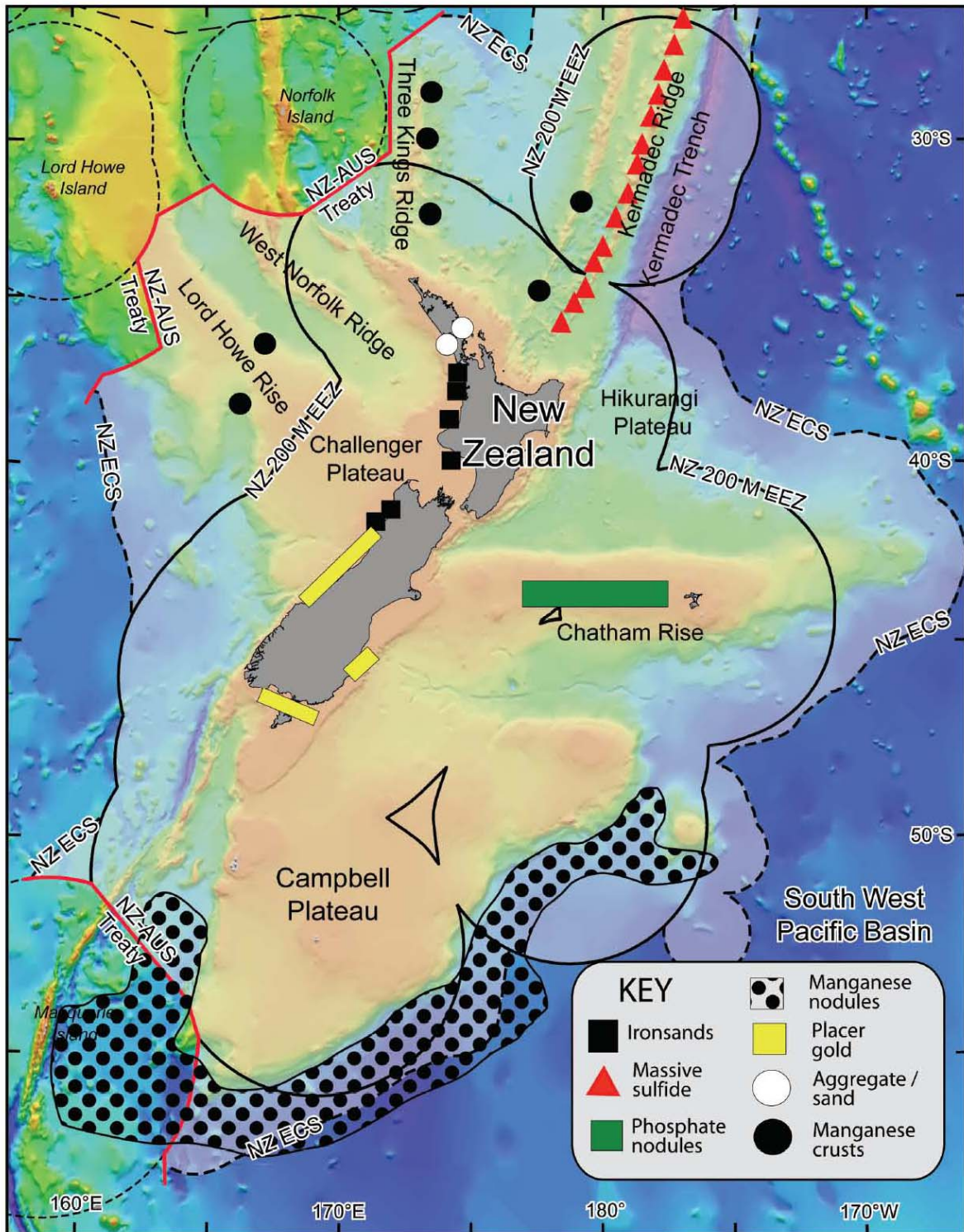


Figure 1 Mineral occurrences in New Zealand's offshore area

Source: I C Wright, 2005. Ocean mapping for a geologic and legal framework of New Zealand's marine estate. 2005 New Zealand Minerals Conference, AusIMM and Crown Minerals, Ministry of Economic Development, Auckland 2005.

Mineral potential of the seabed

Minerals recorded within the area defined as seabed include:

- Statute minerals gold (and silver) off the coast of Westland, Southland and Otago, and the Coromandel Peninsula
- Ironsand off the west coast of the North Island between Wellington and the Kaipara Harbour, and off the coast of Nelson
- Titanium and iron bearing sands in the Bay of Plenty and off the West Coast of the South Island
- Silica sand and feldspar sand - Northland
- Building sand – Auckland
- Aggregate

Figure 1 shows some of the occurrences of minerals along the foreshore and seabed, and within the Exclusive Economic Zone.

Published resource estimates for onshore titanomagnetite resources total between 874¹ and 1444 million tonnes of titanomagnetite. A nominal value of \$US 60 per tonne would give these resources alone a gross potential value of between \$52 and \$86 billion². Published data for limited offshore sampling has given potential economic grades, which explains the current exploration interest. Preliminary geophysical and drilling results for a small part of the area under current offshore exploration have been modelled giving a resource estimate between 360 million and 1,200 million tonnes of concentrate at 60% iron for that area. Substantial additional investment will be needed to confirm whether or not this resource is economic to develop, followed by a comprehensive assessment and approval process if results are positive.

Current Exploration interest

At 21 April 2010 there were 7 permits granted under the Crown Minerals Act and one application current over the seabed within 12 nautical miles of the coast. These involve a total of 7 companies and cover an area of 30,000 square kilometres of seabed. Details for these permits are listed in the table below and are shown on Figure 2. In addition, more than 70 exploration and mining permits and applications under the Crown Minerals Act and mining licences granted under the Mining Act 1971 cover parts of the foreshore and seabed, mainly along the West Coast of the South Island. These cover areas that are too small to be shown clearly on Figure 2. Details of these permits are available from the public permit database maintained by the Ministry of Economic Development:

<http://www.crownminerals.govt.nz/cms/minerals/permits>.

In the North Island, granted permits cover the entire seabed from Cape Reinga south to a point west of Palmerston North – along more than 700 kilometres of coastline, and a second area off the coast of Tauranga. The South Island permit covers most of the West Coast seabed extending from Karamea south to Haast, a distance of about 400 kilometres. The permits in Figure 2 cover the seabed along more than 1,300 kilometres of coastline.

¹ *Mineral commodity report -15 – Iron*. AB Christie and RL Brathwaite, New Zealand Mining Vol 22 July 1997. Crown Minerals, Ministry of Economic Development.

² *Stepping up: Options for developing the potential of New Zealand's oil, gas and minerals sector*. Report prepared for Ministry of Economic Development by McDouall Stuart, Wellington, June 2009

Status of mineral permits on the foreshore and seabed, April 2010

Location	Company	Permit type	Number	Status	Area km ²
North Island West coast	FMG Pacific Ltd	PP	50960	Granted	8,704
	Rio Tinto Mining and Exploration Ltd and Iron Ore NZ Ltd	EP	51496	Granted	548
	Trans-Tasman Resources Ltd	PP	50383	Granted	6,319
	Rio Tinto Mining and Exploration Ltd and Iron Ore NZ Ltd	EP	51498	Granted	736
	FMG Pacific Ltd	PP	50874	Granted	650
	Ironsands Offshore Mining Ltd	PP	51536	Granted	2,361
East Coast	Pacific Offshore Mining	PPA	52474	Application	2,157
South Island	Seafield Resources Ltd	PP	51979	Granted	8,704
				Total	30,179
In addition more than 70 permits and licences covering smaller areas overlap the foreshore and seabed near the coast.					

PP = prospecting permit, EP = exploration permit

Source: Crown Minerals, Ministry of Economic Development

The permits are seeking both statute (gold) and non-statute minerals. Non-statute minerals are the iron mineral titanomagnetite, titanium bearing minerals ilmenite and rutile, as well as possible accompanying minerals that include vanadium, zircon, platinum group metals and rare earth metals.

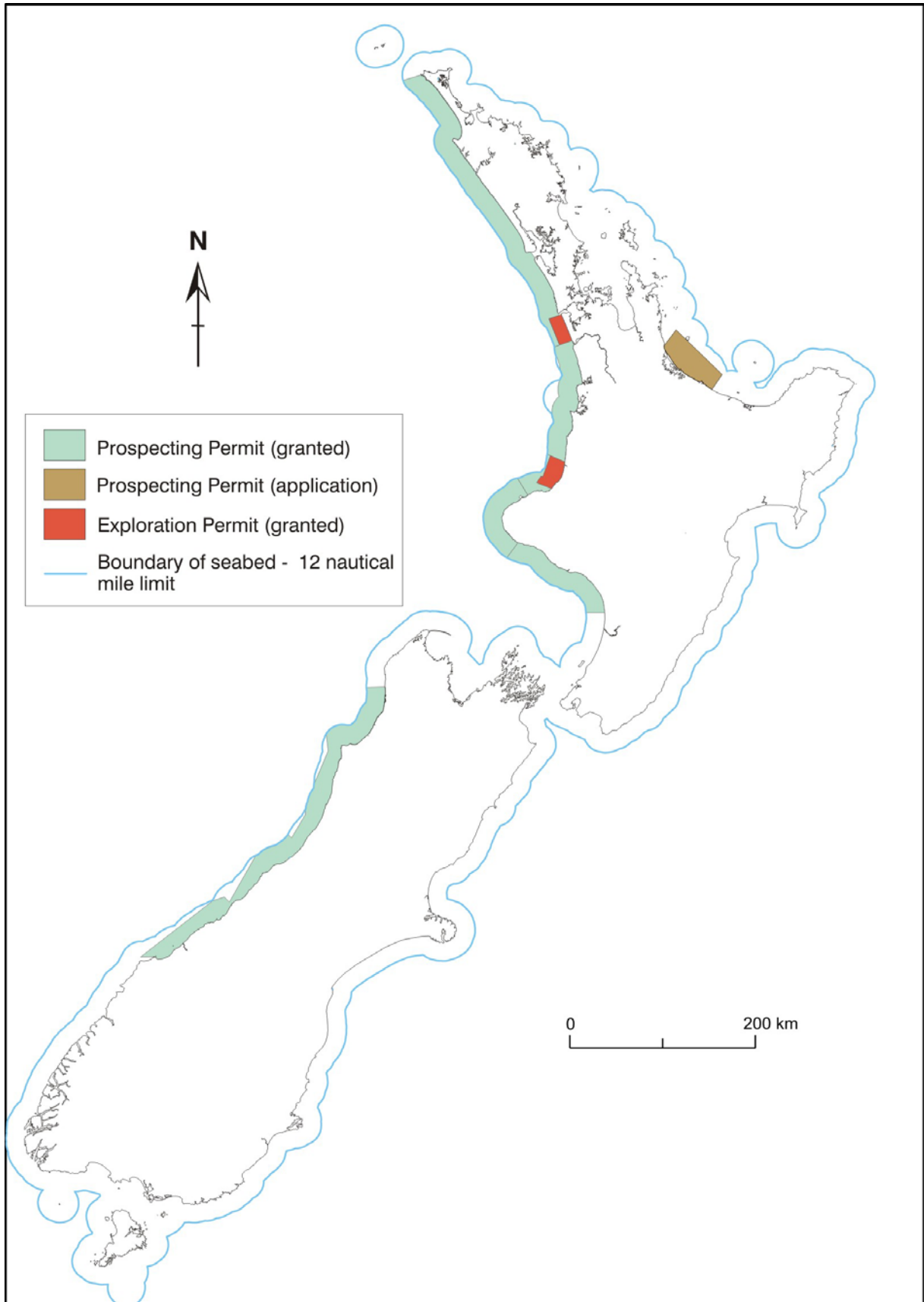


Figure 2: Prospecting and exploration permits over the seabed, April 2010

Conclusions

- The seabed contains significant mineral resources. Preliminary exploration results suggest they have a potential value of tens of billions of dollars.
- These resources are at present being actively explored by 7 companies over an area of 30,000 square km of seabed within the 12 nautical mile limit from the shore in the North and South Islands. In addition, more than 70 permits and licences affect the foreshore and seabed adjacent to the coast.
- The seabed offshore from more than 1300 kilometres of coastline is directly affected by these exploration and mining rights.
- At present virtually all seabed minerals are owned by the Crown, but their value is dominated by non-statute minerals that would not be subject to the Crown Minerals Act if the Crown ceases to own them.
- Mineral development here would face a number of technical and environmental challenges.
- Existing rights could be protected by an exclusion in any new legislation along the lines of that suggested for fishing rights on page 20 of the consultation document.
- To protect the public interest, provisions would need to extend beyond just protecting existing rights. Offshore minerals are poorly known and continuing exploration will be needed to realise their potential
- Privatising mineral rights would lead to the loss of information and impede exploration offshore, as they have onshore.
- Mineral explorers are unable to commit to lengthy, costly litigation or negotiation to determine rights of ownership and access as the resources are poorly defined or unknown at the exploration stage. Their confirmed value is inadequate to justify costly processes for securing rights.
- Uncertainties resulting from any change to the ownership of the land and minerals, or the creation of occupier rights could make the risk of continuing to evaluate the resources unacceptable whether or not the ownership of the minerals remains with the Crown.

NZMIA's submission

NZMIA has been unable in the time available to evaluate the possible effects of the ownership proposals contained in the consultation document in detail. The fact that the review document fails entirely to include the word "mineral" even once shows that these resources and the ownership and access issues that affect them have not been considered in the review process to date.

To maintain investment in these assessments and to keep open the possibility of significant economic benefits, we urge that the review does now consider the implications of any ownership change or creation of new rights on the exploration and possible development of these resources. The review needs to accommodate the peculiarities of the New Zealand system of mineral ownership and access that we have briefly outlined above, and to provide the certainty needed for investment in mineral exploration to continue.

NZMIA supports option 2 on page 23 of the discussion document, providing it would maintain Crown ownership and existing rights of access to minerals within the foreshore and seabed.

DB Gordon, CEO
NZ Minerals Industry Association