

Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

**REVIEW OF THE FORESHORE AND SEABED ACT 2004: TIMETABLE OPTIONS****Proposal**

- 1 This paper seeks agreement to my preferred timing option to both repeal the Foreshore and Seabed Act 2004 (the 2004 Act) and enact its replacement regime.

**Background**

- 2 On Monday 27 July 2009, the Cabinet considered a paper that canvassed options for the government's response to the Panel's report and next steps [CAB Min (09) 26/4 refers]. The Cabinet noted that my preliminary preferred option was to repeal the 2004 Act. The Cabinet invited me, in consultation with the Minister of Māori Affairs, to report back with further detail on those options for a replacement regime.
- 3 On Monday 2 November 2009, the Cabinet considered a paper and noted that it is likely that the 2004 Act will be repealed. Cabinet agreed to the establishment of a Foreshore and Seabed Ministers' Group to progress the review of the 2004 Act. The Cabinet invited me, in consultation with the Minister of Maori Affairs and other Ministers on the Foreshore and Seabed Ministers Group, to report to TOW by 25 November 2009 on the details of what regime should replace the 2004 Act and the further development of the next steps [CAB Min (09) 39/27 refers].

**Options for timing**

- 4 I have assessed three broad timing options for repeal of the 2004 Act and enactment of its replacement regime. These options are depicted on the attached A3 (**Appendix 1**).

*Option one - No consultation and a four month select committee process*

- 5 This option provides for the replacement regime (the Bill) to be enacted in October 2010. It does not include a consultation phase, other than the select committee process, prior to the Bill being introduced. It has a truncated four month select committee process.
- 6 The Department of Conservation have advised that they do not support option one because they support the need for consultation to occur and inform the policy decisions and drafting of the Bill. Likewise the Department of Internal Affairs do not support option one. They consider that the lack of consultation on the government's preferred policy direction prior to introducing legislation misses an opportunity for valuable input into the policy process by those

concerned about the impacts on local government. They consider that the option is unhelpful in gaining understanding and buy-in from the public and sector groups, including local government.

*Option two- Consultation of government policy proposals and a four month select committee process*

- 7 This option provides for the replacement regime to be enacted in December 2010. It provides for a six week consultation phase to occur in February and March 2010 before final Cabinet policy decisions are made and the Bill is drafted. This option requires both the consultation process and the policy decisions to be undertaken in a timely fashion in order to avoid any slippage in the timeframe.
- 8 The proposed consultation process comprises three components. First it is proposed that consultation including 10-12 regional hui and a national hui be hosted by the Iwi Leaders with an invitation to the relevant government officials to attend and present the government's policy proposals to the hui. The Iwi Leaders suggested this focussed approach to me when we met on 4 November 2009. The second component would be a series of targeted meetings that my officials or myself would hold with national sector interest groups. The third component would be a written submission process for the general public. A discussion document could be drafted to assist in this process.
- 9 After the consultation is completed, time would need to be set aside to collate and analyse the findings and submissions obtained through the consultation process before final Cabinet policy decisions are made. The option allows for a four month truncated select committee process.
- 10 The Department of Internal Affairs understands the benefits of Option two, but are concerned about the practicality of getting informed and coordinated input from the local government sector within the timeframe. They note the proposal allows six weeks at the most for local government to respond to the discussion document, yet most councils only meet monthly to endorse submissions.
- 11 The Ministry of Economic Development considers there is a risk in attempting to resolve the issues in 2010 as this timetable is too challenging. In attempting to meet this timeframe, important parts of the policy development process will have to be truncated. They note that if the desire is to have in place a regime that is durable and highly unlikely to be amended in the near-term it is important that the process is not rushed. Option 2 is both ambitious and the bare minimum.

*Option three- Consultation of government policy proposals, a longer policy development process and a five month select committee process*

- 12 This option provides for the replacement regime to be enacted in May 2011. It provides for a consultation phase to occur before a Bill is drafted. It proposes the same consultation format as option two. The option allows for a longer policy development process to adequately incorporate the findings of the consultation. It also provides for a five month select committee process.

- 13 The Department of Internal Affairs supports option three because it provides time for a good process, with time to build a coalition of support for a preferred approach. However, they appreciate the need to provide certainty to iwi, the wider public and stakeholders as soon as possible.

*Criteria for assessing options*

- 14 Given the criticism levelled at the development of the 2004 Act for being hasty and not sufficiently open and engaging, I think it is crucial to ensure the process for the development of the replacement regime is managed well so that it is, and is perceived as, an inclusive process. In order to manage the risk of the same criticism of the development of the 2004 Act being levelled at this process, it will be necessary to ensure that there are meaningful opportunities for New Zealanders to participate. It is important that the replacement regime is not seen to be a fait accompli when consultation is taking place.
- 15 It will be necessary to provide for consultation prior to final policy decisions being determined. This consultation needs to have a specific targeted focus on key stakeholders. If the process prior to the enactment of the Bill is perceived as being too short or inadequate, there is a risk of not eliciting the buy-in the government seeks for the replacement regime.
- 16 The Department of Conservation supports a targeted consultation approach with groups (outside of iwi) with interests in the foreshore and seabed.
- 17 Another important criterion to assess when evaluating the options is the timeliness of government announcements. It will be important for the government to announce publicly the key policy decisions arising from the review in a timely fashion. I am aware of criticism that has already been directed at the government for not making any further announcements since the receipt of the Ministerial Panel's report. For this reason I think the government needs to adopt a process that delivers a result in 2010 while allowing for a period of consultation.

**Comment from Iwi Technical Advisory Group**

- 18 The Iwi Technical Advisory Group (on behalf of Iwi Leaders) is tentatively supportive of Option two. Option one would be unacceptable to Iwi Leaders as it does not provide for engagement between the Crown and Iwi/hapū. While Option three is attractive, in that it allows more time for policy development, having the process roll into 2011 is obviously not desirable as it is an election year. If 2011 was not an election year, the Iwi Technical Advisory Group advises that Option three would be the strong preference of Iwi Leaders.
- 19 The Iwi Technical Advisory Group are concerned that Option two does not allow a great deal of time for public engagement or for policy development. The Waitangi Tribunal and Ministerial Review Panel both signalled that what is required on this subject is a "longer conversation" between the Crown and Iwi/hapū. As the time available will not allow for a long conversation, every effort must be made to ensure that what occurs is a quality and meaningful conversation.

## Comment

- 20 I think that Option two best meets the criteria described above. This option allows for legislation to be enacted before the end of 2010. I think the process will provide good opportunities to make decisions in a timely fashion while providing for an efficient, targeted consultation process at the hui organised by the Iwi Leaders and with sector interest groups. Overall, the consultation process will be directed at those New Zealanders with interests in the foreshore and seabed.
- 21 My preferred option allows me to meet my aim of a Bill to be introduced into the House and receive its first reading in mid-2010, with the enactment of the Bill occurring before the end of 2010.
- 22 The Treasury and Ministry of Fisheries acknowledge the preference for resolving foreshore and seabed issues in 2010, but note there is also a risk with condensing timelines to achieve this goal. Treasury note that the process may be perceived as resulting in a rushed, exclusionary process that undermines the credibility and durability of the resulting legislation. This could potentially make the process itself a political issue that continues into 2011 and affect the implementation process. Treasury note that a result in 2010 that is not regarded as durable may be the worst of all outcomes. They suggest adopting option two at a minimum and note there would be robust grounds for selecting option three.

## Relationship with other regulatory reform processes

- 23 Under my preferred option, final Cabinet policy decisions will need to be made in mid May 2010. I understand consultation on the aquaculture reforms is due to be completed in mid December 2009 and final Cabinet decisions on the reforms were proposed to be sought in February 2010. I think it is essential for final decisions on aquaculture reform to take into account foreshore and seabed decisions, particularly with respect to roles and responsibilities for managing the coastal marine area. Accordingly, decisions on foreshore and seabed policy will need to be made before decisions on aquaculture reform.

## Next Steps

- 24 Cabinet agreed to the establishment of a Foreshore and Seabed Ministers' Group to progress the review of the 2004 Act [CAB Min (09) 39/27 refers]. I intend to keep the Foreshore and Seabed Ministers' Group informed of the progress made towards meeting the timetable and co-ordinate regular meetings as appropriate.

## Consultation

- 25 The Foreshore and Seabed Unit within the Ministry of Justice prepared this paper. The following departments were consulted in the development of this paper: the Department of Conservation, the Ministry of Fisheries, the Ministry for the Environment, the Ministry of Economic Development, Department of

Internal Affairs, Ministry of Transport, Te Puni Kōkiri, the Crown Law Office, the Office of Treaty Settlements and The Treasury.

26 The Department of the Prime Minister and Cabinet was informed.

### **Financial implications**

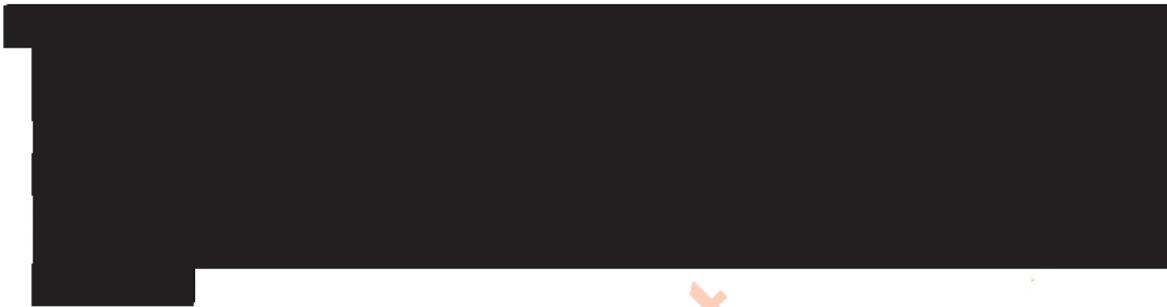
27 There are no financial implications that arise directly from this paper.

### **Human rights**

28 There are no human rights implications that arise directly from this paper.

### **Treaty of Waitangi Implications**

29



### **Legislative implications**

s9(2)(h)

30 Any legislative implications arising out of this proposal will be addressed in future detailed policy papers.

### **Regulatory Impact Analysis**

31 A Regulatory Impact Statement is attached to the paper: Review of the Foreshore and Seabed Act 2004: Issue one: Clarifying roles and responsibilities in the foreshore and seabed.

- 33 No announcements are planned based on this paper. If media queries are made about timing matters I will outline at a high level Cabinet's decision on the proposed timetable.

## Recommendations

- 34 I recommend the Cabinet:

### BACKGROUND

- 1 **note** that Cabinet has previously noted that it is likely that the Foreshore and Seabed Act 2004 (the 2004 Act) will be repealed as a result of the review [CAB Min (09) 39/27 refers];

### TIMING

- 2 **note** that the government's intention is to develop legislation that will repeal the 2004 Act and establish a new regime to be introduced into the House and receive its first reading in mid-2010, with the enactment of the Bill occurring before the end of 2010;
- 3 **note** that the Attorney-General has assessed three timing options for enactment of the replacement regime:
- 3.1 Option One - no consultation and a four month select committee process;
- 3.2 Option Two – consultation on government policy proposals, a constrained policy development process, and a four month select committee process; or
- 3.3 Option Three- consultation on government policy proposals, a longer policy development process, and a five month select committee process.
- 4 **agree** to recommendation 3.2 in order for both repeal of the Foreshore and Seabed Act 2004 and enactment of a replacement regime in December 2010.



Hon Christopher Finlayson  
**Attorney-General**

Date: 18, 11, 09

	<b>Option 1</b> No consultation outside select committee Four month select committee process	<b>Option 2</b> Consultation on govt policy proposals, constrained policy development process + 4 month select committee process	<b>Option 3</b> Consultation on govt policy proposals, longer policy development process + 5 month select committee process
<b>Oct 09</b>	Cabinet Paper – Repeal, principles, bottom lines	Cabinet Paper – Repeal, principles, bottom	Cabinet Paper – Repeal, principles, bottom
Nov	9 Nov - Iwi leaders group engagement process commences  25 Nov TOW Paper – Principles, common starting points, roles and responsibilities for managing the foreshore and seabed	9 Nov - Iwi leaders group engagement process commences  25 Nov TOW Paper – Principles, common starting points, roles and responsibilities for managing the foreshore and seabed	9 Nov - Iwi leaders group engagement process commences  25 Nov TOW Paper – Principles, common starting points, roles and responsibilities for managing the foreshore and seabed
Dec	Iwi leaders group engagement process continues  16 Dec TOW paper - Engagement options and recognising customary interests	Iwi leaders group engagement process continues  16 Dec – TOW paper - Engagement options and recognising customary interests	Iwi leaders group engagement process continues  16 Dec – TOW paper - roles and responsibilities for managing the foreshore and seabed, Engagement options and recognising customary
<b>Jan 2011</b>			Select committee - Hearings
Feb			Select committee - Hearings
March			Select committee - Consideration
April			Select committee – Consideration & Report back to the House
May			Early May - Second reading, third reading <b>Legislation enacted</b>

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