

Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

REVIEW OF THE FORESHORE AND SEABED ACT 2004: PROPOSED CONSULTATION PROCESS**Purpose**

- 1 This paper seeks the Committee's agreement to a public consultation process on the government's preferred regime for replacing the Foreshore and Seabed Act 2004 (2004 Act).

Executive Summary

- 2 Cabinet is separately considering a paper seeking agreement on a preferred regime for replacing the 2004 Act to be taken out for public consultation.

- 3 I propose a four week public consultation process beginning 31 March 2010, which will include the release of a public discussion document, hui and public meetings being held, and meetings with targeted stakeholder groups.

- 4 I am cognisant that previous consultation processes on foreshore and seabed issues have been strongly criticised. [REDACTED]

s9(2)(h)

[REDACTED]. While a longer consultation process would have been ideal, it is not possible if we are to meet our target of enacting replacement legislation in 2010.

- 5 However, I think this risk is mitigated by the fact that this process represents the second in a total of three consultation rounds that will have been undertaken on the government's review of the 2004 Act, if the 2004 Act is to be repealed and replacement legislation enacted (the first being the independent Ministerial Review Panel's consultation and the final being the select committee's consideration of any proposed 'repeal and replacement' Bill).

- 6 I also propose that Cabinet delegate authority to the Prime Minister, the Deputy Prime Minister, the Minister of Māori Affairs and me, to make final decisions on the content of the public discussion document and to approve its release.

Background

- 7 On 2 November 2009, the Cabinet agreed that the Attorney-General should continue discussions with key stakeholders, including those groups negotiating under the 2004 Act [TOW Min (09) 32, CAB Min (09) 39/27].

- 8 On 25 November 2009, the Cabinet agreed to a timetable for progressing the review of the 2004 Act [TOW Min (09) 42/4, CAB Min (09) 42/4].

Proposed consultation process

Overview

- 9 I propose a four week public consultation process beginning with the release of a public discussion document setting out the government's preferred regime for replacing the 2004 Act on 31 March 2010, and ending with a due date for written submissions on 30 April 2010.
- 10 The release of a public discussion document seeking written submissions will be supported by:
 - public meetings and hui held nationwide at which I, supported by the Minister of Māori Affairs, will present the government's policy proposals; and
 - targeted meetings between key stakeholder groups and myself.
- 11 This is a short timeframe (31 days between release of discussion document and due date for written submissions) but it is necessary if we are to achieve our goal of enacting a replacement regime by the end of 2010.
- 12 The consultation period of 31 days is comparable to other recent consultation processes run by the Ministry of Justice:
 - *Legal aid review*: 39 days between release of discussion document (1 September 2009) and due date for submissions (9 October 2009); and
 - *Electoral finance reform*: 33 days between release of discussion document (28 September 2009) and due date for submissions (30 October 2009).

Consultation

DISCUSSION DOCUMENT AND WRITTEN SUBMISSIONS

- 13 I propose the release of a public discussion document. It will set out the government's preferred regime for replacing the 2004 Act and other options as appropriate. Written submissions will be sought.
- 14 I propose releasing the public discussion document on or about Wednesday 31 March 2010. The public will have until 5pm Friday 30 April 2010 to provide written submissions in response to the public discussion document.

PUBLIC MEETINGS AND HUI

15 I propose 16 public meetings and hui which will be publicly notified. I am proposing that the public meetings and hui will be held in the following centres during April 2010:

- Hawkes Bay
- Bay of Plenty
- Far North
- South Auckland/ Waikato
- New Plymouth
- Wellington
- Christchurch
- Blenheim

16 I am working with the Iwi Leaders' Group to organise hui. The proposed dates and locations for the public meetings and hui are yet to be confirmed at the time of writing this paper.

TARGETED MEETINGS WITH STAKEHOLDERS

17 Since the announcement of the review of the 2004 Act I have met with a range of stakeholders. As part of this public consultation process, I will be undertaking further meetings with 18 key stakeholder groups and groups in foreshore and seabed negotiations to discuss the contents of the government's discussion document (**Appendix 1**).

Issues that may arise

18 I appreciate that some individuals or groups may raise criticisms about the public consultation process concerning, for example, the number and location of hui and public meetings, perceptions of limited timeframes, preferential treatment of some interest groups, and the discussion document being either too general or too detailed.

19 I think the proposed public consultation on the government's preferred regime will be a robust and thorough process, which will provide sufficient opportunities for those who wish to participate to do so. This consultation process is the second of three opportunities the public will have to participate in the review of the 2004 Act. The first opportunity was the consultation undertaken by the independent Ministerial Review Panel in early 2009. The third opportunity will be during the select committee's consideration of any proposed 'repeal and replacement' Bill.

Next steps

20 Subject to the Cabinet decisions in the Cabinet paper: *Review of the Foreshore and Seabed Act 2004 - Proposals for Public Discussion Document*, the discussion document will be finalised and published on or about Wednesday 31 March 2010.

- 21 Given the timeframe available, I propose the Cabinet delegates authority to the Prime Minister, the Deputy Prime Minister, the Attorney-General and the Minister of Māori Affairs to make final decisions on the content of the public discussion document and to approve its release.
- 22 I propose reporting to the TOW Cabinet Committee on the outcome of the public consultation process on Wednesday 19 May 2010 along with my recommended amendments (if any) to the government's policy proposals.

Consultation

- 23 The Ministry of Justice prepared this paper. The following departments were consulted in the development of this paper: the Department of Conservation, Ministry of Fisheries, Ministry for the Environment, Ministry of Economic Development, Ministry for Culture and Heritage, Department of Internal Affairs, Ministry of Transport, Te Puni Kōkiri, Crown Law Office, Office of Treaty Settlements and the Treasury.
- 24 The Department of the Prime Minister and Cabinet was informed.

Financial implications

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

Human rights

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

Treaty of Waitangi Implications

s9(2)(h)

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[REDACTED]

■

[REDACTED]

■

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

s9(2)(h)

Legislative implications

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

Regulatory Impact Analysis

- 32 A Regulatory Impact Analysis section is not required for this paper as a separate Regulatory Impact Analysis has already been undertaken for the policy proposals in the Cabinet paper: *Review of the Foreshore and Seabed Act 2004 - Proposals for Public Discussion Document*.

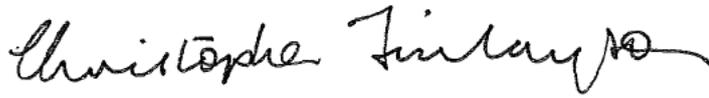
Publicity

- 33 I propose to issue a media statement, in conjunction with the release of the discussion document on or about Wednesday 31 March, inviting the public to make written submissions.

Recommendations

- 34 I recommend the Committee:
- 1 **agree** to a four week public consultation process (31 March - 30 April 2010) on the government's preferred regime for replacing the Foreshore and Seabed Act 2004;
 - 2 **agree** that the public consultation process will include the release of a public discussion document seeking written submissions, supported by:
 - 2.1 public meetings and hui held nationwide, at which the Attorney-General will present the government's policy proposals; and
 - 2.2 meetings between the Attorney-General and key stakeholder groups.
 - 3 **agree** that Cabinet delegate authority to the Prime Minister, Deputy Prime Minister, Attorney-General and the Minister of Māori Affairs to approve the contents of the public discussion document on the government's preferred regime for replacing the Foreshore and Seabed Act 2004;
 - 4 **agree** that the Attorney-General issue a media statement when the public discussion document is released to the public on or about 31 March 2010; and

- 5 **invite** the Attorney-General to report back to TOW on Wednesday 19 May 2010 on the outcome of the public consultation process.



Hon Christopher Finlayson
Attorney-General

Date: 10 / 13 / 2010.

Released under the
Official Information Act 1982

Appendix 1 –List of targeted meetings

Groups in foreshore and seabed negotiations

Te Rūnanga o Te Whānau (on behalf of the hapū of Te Whānau a Apanui)
Te Rūnanga o Ngāti Porou (on behalf of the hapū of Ngāti Porou)
Te Rūnanga o Te Rarawa (on behalf of the participating hapū of Te Rarawa)
Ngāti Porou ki Hauraki Trust (on behalf of the iwi of Ngāti Porou ki Hauraki)
Ngāti Pahauwera Development Trust (on behalf of the hapū of Ngāti Pahauwera)

Key Stakeholder Groups

Local Government New Zealand
Port Companies
Council of Outdoor Recreation Associations New Zealand
Seafood Industry Council Ltd
Te Ohu Kaimoana
Fish and Game New Zealand
Federated Farmers
New Zealand Business Roundtable
Business New Zealand
Petroleum Exploration Association of New Zealand
Recreational Fishing Council
Aquaculture New Zealand
Federation of Māori Authorities
New Zealand Council of Trade Unions
Human Rights Commission
Law Society
State Owned Enterprises (Mighty River Power, Contact Energy, Meridian Energy, Genesis Energy and TrustPower)
Forest and Bird New Zealand



B Review of the Foreshore and Seabed Act 2004: Proposed consultation process

1 PURPOSE

- Seeking public submissions on Government's preferred option – open mind
- Increase understanding of the interests of New Zealanders:



- Ensure that replacement regime will balance all interests
- Ensure that the replacement regime gains broad acceptance

2 OVERVIEW

- Consultation period – 31 March-30 April 2010
- 2nd of 3 consultation rounds on foreshore and seabed:
 - 1 Ministerial Review Panel process
 - 2 This process
 - 3 Upcoming select committee process

3 COMPONENTS OF CONSULTATION PROCESS

CONSULTATION DOCUMENT

- Written submissions open 31 March–30 April (30 days)
- **Principal** way New Zealanders can make their views known

HUI AND PUBLIC MEETINGS

- 10 hui and 10 public meetings nationwide
- Presentation on Government's preferred option
- Discussion

MEETINGS WITH STAKEHOLDER AND NEGOTIATING GROUPS

- Attorney-General meeting with:
 - 18 stakeholder groups
 - 5 groups in foreshore and seabed negotiations
- Officials meeting with other stakeholders/groups
- Discussion on Government's preferred option



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CONTENT OF CONSULTATION DOCUMENT

Clarifying roles and responsibilities

Four options for clarifying roles and responsibilities in foreshore and seabed:

- Option 1: Crown notional title (subject to recognition of customary interests)
- Option 2: Absolute Crown ownership
- Option 3: Absolute Māori ownership
- Option 4: New approach – Non-ownership regime

The Government's preference is a non-ownership regime.

Route for determining customary interests

Customary interests could be determined through:

- Direct negotiations, or
- Accessing the courts

The Government's preference is that customary interests can be determined through negotiations and accessing the courts.

Court route: jurisdiction

The High Court or the Māori Land Court could hear and determine applications for recognition of customary interests.

The Government's preference is the High Court.

Court route: burden of proof

The burden of proof could lie with the applicant or be shared with the Crown.

The Government's preference is a shared burden of proof.

Determining customary interests

Two thresholds for customary interests:

- Territorial (interest in land, exclusive use and occupation)
- Non-territorial (customary activities, uses and practices)

Tests and awards for customary interests could be specified in legislation or left to the courts to develop.

The Government's preference is that tests and awards are specified in legislation.

Recognising customary interests

Each threshold (territorial and non-territorial) will have a set of tests, based on:

- Canadian jurisprudence, or
- Te Ture Whenua Māori Act 1993, or
- Combination of common law and tikanga Māori

The Government's preference is that the tests are a combination of common law and tikanga Māori.

Each threshold (territorial and non-territorial) will have a set of awards, based on:

- Canadian jurisprudence, or
- Te Ture Whenua Māori Act 1993, or
- Combination of property and regulatory rights

The Government's preference is that the awards are a combination of property and regulatory rights.

Other issues to clarify

How these will work in a non-ownership regime:

- Allocation of coastal space
- Status of structures
- Status of local authority owned foreshore and seabed
- Adverse possession and private title
- Reclamations

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TIMETABLE / NEXT STEPS

