



Briefing: Further advice on options to clarify section 4 of the Conservation Act

To	Minister of Conservation	Date submitted	4 February 2026
Action sought	Agree the drafting approach to section 4 for the Conservation Acts (Land Management and Other Matters) Amendment Bill	Priority	Very High
Reference	ADVB-114	DocCM	DOC-10620333
Security level	In Confidence		

Risk assessment	High – Continued uncertainty about the approach to section 4 will impact delivery of the Bill and impede engagement with Treaty partners on settlement redress	Timeframe	11 February 2025 Fast decisions are required to meet Bill drafting timeframes
Attachments	Attachment A – Draft position statements on section 4		

Contacts	
Name and position	Phone
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Executive summary – Whakarāpopoto ā kaiwhakahaere

1. In June 2025, Cabinet made decisions related to section 4 of the Conservation Act 1987 for the Conservation Acts (Land Management and Other Matters) Amendment Bill (the Bill). Cabinet agreed to retain section 4 and add a new descriptive clause to the Act. At the time, Cabinet noted that:
 - drafting would make clear that complying with the new requirements (being added elsewhere in the Act) is sufficient to comply with section 4 (i.e. 'deemed compliance'), subject to advice from Parliamentary Counsel Office (PCO) during drafting, and
 - you would liaise with the Ministerial Oversight Group for the Treaty principles provisions review on any drafting issues that arise regarding section 4 and Treaty principles.
2. s9(2)(f)(iv) [REDACTED]
3. Having done this work, we (DOC, PCO, Crown Law and DPMC) have agreed on revised options that are most likely to give effect to Cabinet's objectives while minimising risks. The revised options, from most to least recommended, are:
 - Option 1 (recommended): add a descriptive clause only.
 - Option 2: add a descriptive clause with empowering provisions for secondary legislation. This is based on your previous decisions to enable secondary legislation to provide additional clarity on section 4.
 - Option 3 (not recommended): add a descriptive clause with a deemed compliance element.
4. We recommend option 1, which involves a descriptive clause without a deemed compliance element. A descriptive clause provides significant additional certainty compared to the status quo, including on the issues that currently generate the greatest uncertainty for decision makers. This can be supplemented by operational policy and guidance to provide further clarity to Treaty partners and applicants, and increase consistency in DOC's operational practices. This option is also better aligned with other Treaty clauses on the statute book. [REDACTED]
5. Option 2 is workable and involves the same descriptive clause approach as option 1, but not recommended to the same extent as option 1. This is because option 2 potentially involves greater risks in terms of increasing system complexity and exposure to litigation. It also does not necessarily provide greater clarity and certainty than option 1.
6. While option 3 is more aligned with Cabinet's previous decisions, we do not recommend it. s9(2)(h) [REDACTED]
7. Current drafting timelines require us to issue drafting instructions to PCO on section 4 by 13 February 2026. Therefore, we seek your decision (i.e. whether the Bill should reflect option 1, 2 or 3) by 11 February 2026. This allows sufficient time to draft the

provisions, given the Bill needs to be settled by the end of February to be considered by LEG on 26 March 2026.

8. s9(2)(f)(iv) [REDACTED]
9. s9(2)(f)(iv) [REDACTED]
10. s9(2)(f)(iv) [REDACTED]

We recommend that you ... (Ngā tohutohu)

		Decision
1.	Note Cabinet made decisions in June 2025 on section 4 for the Conservation Acts (Land Management) Amendment Bill, subject to further advice during drafting.	
2.	Note we need to provide drafting instructions on the approach to section 4 for the Bill to Parliamentary Counsel Office by 13 February 2026.	
3.	Agree that in addition to retaining section 4 as currently worded, the Bill will provide clarity on section 4 by adding: EITHER - Option 1 (<u>recommended</u>): a descriptive clause only. OR - Option 2: a descriptive clause with empowering provisions for secondary legislation. OR - Option 3 (<u>not recommended</u>): a descriptive clause with a deemed compliance element.	Yes / No Yes / No Yes / No
4.	Note if you choose options 1 or 2: Agreement to this change (removing the deemed compliance element) can be sought at LEG when seeking approval to introduce the Bill.	

	In addition, agreement should also be sought from key Ministers (e.g. the Attorney-General, the Ministerial Oversight Group for the review of Treaty principles provisions in legislation) ahead of LEG. We can adapt this briefing for that purpose.	
5.	s9(2)(f)(iv) [Redacted] [Redacted]	
6.	s9(2)(f)(iv) [Redacted] [Redacted]	[Redacted] [Redacted] [Redacted]
7.	s9(2)(f)(iv) [Redacted] [Redacted] [Redacted] [Redacted]	

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s9(2)(a)

Date: 04/02/2026

Peter Galvin
Deputy Director-General, Policy

Date: / /

Hon Tama Potaka
Minister of Conservation

Purpose – Te aronga

1. This paper seeks your decisions on how clarity will be provided about section 4 of the Conservation Act 1987 through the Conservation Acts (Land Management and Other Matters) Amendment Bill (the Bill), and the associated next steps.
2. To enable the Bill to be considered by LEG on 26 March 2026, we need to issue final drafting instructions to PCO on section 4 by 13 February. We therefore request your decisions by 11 February. We will be available to discuss the advice with you at status on 9 February.

Background and context – Te horopaki

3. Last year, we advised you about potential approaches to Bill drafting to reflect Cabinet's decisions on section 4 [ADVB-29 refers].
4. Following that, you requested advice on how additional clarity could be provided about section 4, building on Cabinet's decisions. For example, this could address some of the matters not covered by policy approvals for the Bill, such as how section 4 applies to substantive decisions on concession applications or the content of statutory planning documents. We advised that, in broad terms, you could use primary legislation, secondary legislation, or operational policy and guidance, or some mix of those tools [ADVB-37 refers].
5. Your preference was for secondary legislation to address substantive decision-making for concessions, management planning, and land exchanges and disposals. We then provided additional advice about how this could be empowered through the Bill [ADVB-67 refers].
6. Cabinet's June 2025 decisions on section 4 were subject to further advice from the Parliamentary Counsel Office (PCO) in relation to drafting. In recent months, we have had further conversations about the overall legislative schema for section 4 with PCO, informed by advice and input from Crown Law and the Department of Prime Minister and Cabinet (DPMC). s9(2)(f)(iv)

While there is case law on the application of section 4, greater clarity is needed in practice

7. Section 4 of the Conservation Act requires conservation legislation to be "interpreted and administered as to give effect to the principles of the Treaty of Waitangi."
8. The meaning and application of section 4 has been the subject of a number of court rulings. It was most recently considered by the Supreme Court in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*.¹ The Supreme Court found that:
 - Section 4 is a powerful Treaty clause that requires more than procedural steps. Substantive outcomes for iwi may be necessary in particular cases including, in some instances, that concession applications by others be declined.
 - In applying section 4 to concession decisions, the Minister must, so far as possible, apply the relevant statutory and other legal considerations in a manner that gives effect to Treaty principles.
 - Section 4 and the Treaty principle of active protection may require, in some circumstances, considering according a degree of preference to iwi/hapū for concession opportunities where they hold mana whenua, and that economic interests are a relevant consideration.

¹ *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

- The question in each case is what is reasonably required to actively protect the relevant Treaty interest in all the circumstances of the case.
 - Section 4 does not create a power of veto for iwi/hapū over the granting of concessions. It also does not create any exclusive right to concessions in their rohe.
 - What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved to the extent that this can be done consistently with section 4 in a way that best gives effect to the relevant Treaty principles.
9. The Supreme Court also confirmed the broader application of the Court of Appeal's decision in *Ngai Tahu Maori Trust Board v Director-General of Conservation*² to concession decisions. That case found that while the conservation interest in conservation legislation remains paramount, the Crown has a positive duty to actively protect iwi-Māori interests. This is not absolute or unqualified as that would be inconsistent with the Crown's other responsibilities founded on reasonableness, mutual cooperation and trust.
 10. How Treaty principles are applied to a particular decision will depend on which Treaty principles are relevant, and what other statutory and non-statutory objectives are affected. Treaty principles do not dictate any result but require good faith and reasonable action by both the Crown and Māori in the circumstances. What is required is a process under which the meeting of other statutory and non-statutory objectives is achieved, to the extent that this can be done consistently with section 4, in a way that best gives effect to the relevant Treaty principles.
 11. We have previously advised (25-B-0170 refers) that the Government has not established a clear policy position on how *Ngāi Tai ki Tāmaki* is to be implemented. This means, for example, it is left to statutory decision makers to determine when to accord a degree of preference to Treaty partners, or how to balance Treaty partner views with other considerations in a manner that is compliant with the law.
 12. There is ongoing ambiguity about how to give effect to Treaty principles, and a range of divergent views and competing interests, in different situations. This pervades management planning and concessions decision-making, and creates tension in areas where Treaty partners consider that the current law or policy settings do not provide for their interests to be actively protected.

The overall legislative schema for section 4

13. One of your objectives for these conservation law reforms is to provide clarity about what is required to give effect to Treaty principles under section 4.
14. In June 2025, Cabinet [CAB-25-MIN-0213.01 refers]:
 - agreed to add a new overall descriptive clause to the Conservation Act, following section 4, with signals and signposts to new requirements in various other parts of the Act
 - noted that drafting will make clear that complying with the new requirements will be sufficient to comply with section 4 (in relation to the relevant processes), subject to advice from PCO
 - agreed that the Conservation Act would specify what section 4 does not require, such as making concessions contestable, and

² *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) (the *Whales* case).

- noted that you would liaise with the Ministerial Oversight Group for the Treaty principles provisions review on any drafting issues that arise regarding section 4 and Treaty principles.

15. In addition, your Cabinet paper stated:

I do not propose changing the section 4 wording. An overall descriptive clause will be added to the Conservation Act following section 4 with signals and signposts to the new requirements in various other parts of the legislation as outlined in the table above. Drafting will make clear that complying with these requirements will be sufficient to comply with section 4 (in relation to the relevant processes), subject to advice from Parliamentary Counsel Office on drafting.

16. The Cabinet paper also described the “new requirements” that would be outlined in other parts of the legislation as follows:

Function	New requirements
<i>Management planning</i>	Consultation role for iwi in drafting the National Conservation Policy Statement (NCPS) and area plans, with associated timeframes and processes for consultation. Requirement for the Minister of Conservation to consider impact on Treaty rights and interests before approving NCPS and area plans. Existing, specific roles provided through Treaty settlements (e.g. co-drafting with Te Hiku iwi) will be maintained.
<i>Concessions</i>	No change in relation to role of Treaty partners: consultation, unless provided otherwise in settlements. If their views are sought, Treaty partners will have 20 working days to provide their views, or any longer timeframe specified by the Minister. Contribution towards Treaty partner costs to support meaningful engagement with set timeframes on consultation. (Subsequent Cabinet decisions have broadened this to third party costs, rather than only Treaty partners.)
<i>Land exchanges and disposals</i>	Requirement to consult Treaty partners on any exchange or disposal process ahead of public notification. Requirement for the Minister of Conservation to consider impact on Treaty rights and interests before approving exchange or disposal. Rights of first refusal in settlements will be upheld.

17. Following further advice from PCO and Crown Law on drafting, we have identified three drafting approaches to give effect to Cabinet’s decisions. We have assessed the options in terms of providing clarity, reducing uncertainty, and supporting better compliance. These are the same objectives as the broader review of Treaty principles provisions in legislation.
18. All options involve retaining section 4 as currently worded, with an additional descriptive clause. The options then diverge as follows:
- Option 1 comprises the additional descriptive clause only with signals and signposts to new requirements in various other parts of the Act. We recommend this option as it is best suited to providing clarity, reducing uncertainty and supporting better compliance.
 - Option 2 comprises the above descriptive clause with empowering provisions for secondary legislation (reflecting your decisions in ADVB-67). We consider this option provides slightly less clarity than option 1, due to the additional complexity added by secondary legislation. There are also particular risks associated with secondary legislation to take into consideration.

- Option 3 comprises the above descriptive clause with a deemed compliance element. This would provide that complying with the signposted provisions is sufficient to comply with section 4 in relation to concessions, management planning, and land exchanges and disposals for all steps leading up to (but excluding) final decisions. We do not recommend this option due to the risks associated with a deemed compliance approach (described further at paragraphs 38 – 47 below).
19. We recommend you proceed with option 1 (or option 2 as an alternative), for the reasons set out below. Option 3 is consistent with Cabinet's previous decisions, but options 1 and 2 are less so given they do not involve a deemed compliance element.
20. If you want to proceed with either options 1 or 2, this change can be covered in your LEG paper seeking approval to introduce the Bill. s9(2)(g)(i)
21. There is another possible interpretation of Cabinet's previous decisions, which we have discarded. This is similar to option 3, but with the deemed compliance element applying to all aspects of concessions, management planning, and land exchanges and disposals (including final decisions). This would be an extreme reading of Cabinet's decisions that carries the same risks as option 3, but to a significantly greater extent.

Option 1: Descriptive clause only (recommended)

22. This option comprises adding a descriptive clause after section 4. There would be no deemed compliance element.

A descriptive clause can provide significant additional certainty and clarity

23. A descriptive clause provides significant additional certainty compared to the status quo by listing particular process obligations for management planning, concessions, and land exchanges and disposals. These new procedural obligations address the issues that result in the greatest uncertainty for decision makers in practice, such as the role of Treaty partners in management planning processes, and how long to provide for informed comments from Treaty partners on concession applications.³
- 24.
- 25.
26. Of the available options, this option is the most aligned with other Treaty clauses on the statute book.

³ To some extent – the Minister will have discretion to extend the timeframe, and some settlements (or other agreements with Treaty partners) specify timeframes.

27.

[REDACTED]

28. This option is also more aligned with the broader review into Treaty principles provisions in legislation. While Cabinet is yet to make final policy decisions, decisions to date indicate that:

- deemed compliance provisions are unlikely to be used, and
- most descriptive clauses that are not exhaustive are likely to be retained. These link to specific obligations on decision makers in other parts of the legislation.

However, a descriptive clause is not exhaustive

29. Generally, the level of certainty that can be provided by a descriptive clause depends on how comprehensively it addresses the associated Treaty rights and interests. The provisions signposted by a descriptive clause are not exhaustive in that respect. While this option can provide significant certainty on the matters where there are specific obligations, it leaves open the possibility that the courts may consider additional matters are required.

30. For example, the only requirements being added to the Bill in relation to concessions are that:⁵

- if Treaty partners are consulted on a concession application, they will have 20 working days to provide any comments (unless the Minister exercises their discretion to extent this timeframe), and
- section 4 does not require concessions to be contestable.

31. In practice, despite not being exhaustive, a descriptive clause will still provide significantly more certainty compared to the status quo. It is not necessary to be exhaustive in legislation to achieve the objectives of providing clarity, reducing uncertainty and supporting better compliance. This option can also be supplemented by operational policy, s9(2)(f)(iv)

Option 2: Descriptive clause with empowering provisions for secondary legislation

32. This option allows for the creation of secondary legislation providing additional detail about how to implement section 4 for concessions, management planning, and land exchanges and disposals. As previously advised, this option cannot include a deemed compliance element (ADVB-67 refers). You have also decided that the Minister must consult Treaty partners when developing secondary legislation.

⁴ s9(2)(h)

⁵ Cabinet decisions about financial contributions during consultation on concession applications are that these provisions will be generic, rather than specifically referring to Treaty partners. This means the financial contribution provisions cannot be directly linked to section 4 and any descriptive clause.

This option could improve certainty if secondary legislation is done well

33. Making secondary legislation to provide further specification about how to implement section 4 could provide more clarity to decision makers – but this largely depends on how well the secondary legislation addresses areas of uncertainty.
34. Enabling secondary legislation in this manner allows for matters not addressed in primary legislation to be included in the overall legislative framework, even after the Bill is passed. This could be beneficial in allowing for changes over time, given how time consuming it can be to amend primary legislation and the value of engaging with Treaty partners on any new provisions in secondary legislation.

However, secondary legislation adds complexity to the overall schema

35. Making secondary legislation will, in practice, introduce an additional layer of complexity compared to having a descriptive clause only. The rights and obligations provided for in secondary legislation need to be clear. At present, we have not identified any content suitable for this secondary legislation (see paragraph 51 onwards), though that does not preclude its future use. The range of decisions within the system and inherent case-by-case variation means that secondary legislation is likely to still require operational policy and guidance to support it in practice. As a consequence, decision makers will be required to work between three layers of legislation and guidance on section 4 (primary legislation, secondary legislation, and operational policy and guidance).
36. We have not explored the specific drafting for empowering provisions for secondary legislation in detail – for example, whether the secondary legislation should be confined to matters relating to concessions, management planning, and land exchanges and disposals. There is a chance that the resulting empowering provisions may not interface well with the rest of the legislative schema for section 4 (e.g. the descriptive clause).
37. While secondary legislation is easier to amend than primary legislation, it is still significantly harder to amend than operational policy and guidance. s9(2)(h)

Option 3: Descriptive clause with deemed compliance element (not recommended)

38. This option comprises adding a descriptive clause with a deemed compliance element. This would provide that complying with the signposted provisions is sufficient to comply with section 4 in relation to concessions, management planning, and land exchanges and disposals for all steps leading up to (but excluding) final decisions.

This option may give a higher degree of certainty at the outset

39. This option may give decision makers a higher degree of confidence at the outset that they know all that is required to comply with section 4. However, this certainty is likely to be illusory, and undermined over the medium term for the reasons described below.

The risks associated with this option outweigh the perceived up-front certainty it provides

40. As part of the drafting process and with the benefit of advice from other agencies, the risks associated with a deemed compliance approach have become clearer.

41. [REDACTED]
42. [REDACTED]
43. [REDACTED]

The boundary between ‘substance’ and ‘process’ may not work in practice

44. The deemed compliance element distinguishes between pre-decision steps and final decision-making, so that section 4 can continue to operate as it does for substantive decisions.⁶ [REDACTED]
45. The interaction with Treaty settlements, which provide different frameworks for exercising some of these discretions, is also likely to be complex and uncertain.

This option is also likely to be a controversial way of providing clarity

46. Any codification of section 4 for processes relating to concessions, management planning, and land exchanges and disposals will result in a narrowing of section 4 and how it currently operates in the conservation system. This could be seen as undermining the Treaty relationship, and would likely affect post-settlement governance entities’ (PSGE) willingness to continue engaging on options to uphold their settlement redress (and there may be wider impacts on PSGE engagement on other law reforms). ^{s9(2)(h)} [REDACTED]
47. As a result, this option involves risks not raised by options 1 or 2. Our view is the risks are not outweighed by the benefits, which are likely to be illusory or short-lived.

⁶ This is how we currently consider the boundary between ‘process’ and ‘substance’ can be drawn in drafting. There is also one exception to this boundary: section 4 will not apply to decisions about whether a concession should be contestable.

We recommend option 1; option 3 poses the greatest risks

48. For the reasons above, we recommend option 1 (adding a descriptive clause only with signposting to specific provisions only). This option best supports clarity and certainty, without the associated legal and wider risks of a deemed compliance provision.
49. s9(2)(h)
50. Option 2 (adding a descriptive clause with empowering provisions for secondary legislation) is also workable, but not recommended to the same extent as option 1. It potentially involves greater risks in terms of increasing system complexity and exposure to litigation. It also does not necessarily provide greater clarity and certainty than option 1.
51. Option 3 is not recommended. While it can be drafted in the Bill, it is our least preferred option given the attendant risks. Any certainty a deemed compliance clause may seem to provide at the outset is highly likely to be undermined in the medium term, leading to no improvement over the status quo.

s9(2)(f)(iv)

s9(2)(f)(iv)

Consultation – Kōrero whakawhiti

61. We have consulted PCO, Crown Law, DPMC, the Ministry of Justice, and the Ministry of Business, Innovation and Employment in preparing this advice. Te Puni Kōkiri and Te Tari Whakatau have also been informed.

Next steps – Ngā tāwhaitanga

62. We will seek to discuss this advice with you in the week beginning Monday, 9 February 2026. Officials from PCO and Crown Law are on standby to support this discussion.

s9(2)(g)(i)

63.

s9(2)(g)(i)

s9(2)(f)(iv)

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s9(2)(f)(iv)



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