MINISTRY OF JUSTICE
Tāhū o te Ture

Regulatory Impact Statement: Disclosure Statement

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1 This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice as part of the policy development process for the Review of the Foreshore and Seabed Act 2004 (the 2004 Act).

2 This RIS analyses preliminary policy options for replacing the 2004 Act as one possible outcome of the Review. The Government's preferred policy option will be set out in a public discussion document which will seek the views of the public. The policy options in this RIS focus on models of ownership and how these could apply to the (public) foreshore and seabed.[1] Ownership is the definitive issue in the Review. This is because it determines many other issues in the public foreshore and seabed. Under the 2004 Act, for instance, the Crown's ownership affected customary rights in the area.

3 Following the public consultation process, the Government will make final policy decisions on the regime that should replace the 2004 Act (if it is to be replaced at all). As the policy process continues, this RIS will likely comprise one of a suite of Regulatory Impact Statements.

4 The following should be kept in mind when reading this RIS. It:

- *assumes that the 2004 Act will be repealed and replaced by a new regime*: Cabinet has not made this decision. It is possible to retain or amend the 2004 Act or repeal it and not replace it;
- *is written with a particular purpose in mind*: its purpose is to inform preliminary decisions in order for a preferred option to be taken out for public consultation. This consultation will ask fundamental policy questions (e.g. should customary interests be tested?). A final decision on the preferred option will occur following consultation;
- *assumes that further decisions and detailed analysis will be required before final policy decisions are made*: the evidence and analysis in this RIS is not of a level required for final policy decisions;
- *incorporates two decisions already made by Cabinet (protection of public access and existing use rights):* these decisions must be applied to all policy options. This restricts the development of options for recognising customary interests (e.g. an option equivalent to fee simple title which allows the holder

[1] Section 5 of the 2004 Act defines the foreshore and seabed. Section 5 includes a definition of the "public foreshore and seabed" which is the area of the foreshore and seabed *excluding* land that is for the time being subject to a specified freehold interest.

to exclude the public is not possible) which means supplementing the options with other types of rights;

- *is constrained by the timetable for completing the Review (end of 2010 including enactment of a replacement regime)*: this means that the analysis of options has been limited and focuses on those areas where there is readily accessible evidence. Where evidence is not readily available it has either not been gathered or has not been fully utilised;

- *has interdependencies with the Aquaculture reforms*: changes in this Review such as a change to the current owner of the foreshore and seabed (the Crown) would impact the proposals in that reform process principally in relation to charging for coastal occupation (currently based on the Crown being owner). The two policy processes are aligned to prevent unintended impacts);

- *involves a range of complex interests and issues*: e.g. issues that have different meanings in different contexts such as "ownership". Consultation and agreement can be difficult when parties do not agree on key concepts (e.g. customary title); and

- *has some key gaps in quantifying the risks, costs and benefits of the options*: these are identified in the body of the RIS and include:

  i the extent to which customary interests would be found in the foreshore and seabed under three of the four options (it is not possible to determine with accuracy the outcome of the proposed tests);

  ii quantifying the actual impact of particular options on mana is problematic as it is a fluid Māori concept, it is likely inappropriate for the Crown to try;

  iii the lack of evidence of the number of Māori affected by the 2004 Act or the number impacted upon by the policy options in this RIS (there is no evidence of how many individuals comprise "Māori" or "coastal hapū/iwi"); and

  iv the lack of evidence of the actual risks and benefits of taking a novel approach to ownership. There will always be a paucity of evidence for a novel approach given that by its very definition it is untested. This can be both a benefit and a risk.

5 Some or all of the policy options in this RIS will likely impose additional costs on businesses, affect private property rights (in some options the Crown is the most affected) and could override fundamental common law principles. Subsequent RISes will focus on these matters.

Gerard McGreevy
Deputy Secretary Legal, Ministry of Justice Date:_____/_____/_____

Regulatory Impact Statement: Executive Summary

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1 This RIS considers whether a replacement regime (as opposed to an amendment of the 2004 Act) could balance the interests of all New Zealanders in the foreshore and seabed and remedy the negative effect the 2004 Act had on Māori customary interests. A replacement regime should achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed (including customary interests).

2 The four policy options for replacing the 2004 Act identified in this RIS are all based on different models of ownership of the public foreshore and seabed. The reason that ownership was chosen as the model is because it determines many other issues (and interests) in the public foreshore and seabed. The four policy options are:

- *Option one*: vesting radical or notional title in the Crown subject to claims of customary title ("Crown notional title").
- *Option two*: vesting the foreshore and seabed in the Crown as its absolute property ("Crown absolute title");
- *Option three*: vesting the foreshore and seabed with Māori as their absolute property ("Māori absolute title"); or
- *Option four*: taking a new approach to clarifying roles and responsibilities in the foreshore and seabed ("a non-ownership regime").

3 These options capture the broad range of ownership options that could be developed and analysed.

4 Based on the analysis of impacts and the indications of the consistency of the options with the guiding principles, the Ministry of Justice concludes that Options one and four appear the most likely to achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed (including customary interests). These two options appear to promote access to justice, ownership benefits, certainty of outcomes; and optimal use of foreshore and seabed resources (including social and environmental benefit).

5 This conclusion comes with the caveat that it is given on a preliminary basis. The analysis of new information, particularly information gathered in the public consultation process, and the calibrating of features of the options such as tests and awards could change the content of each option and therefore change their costs and benefits. This issue is a particularly charged issue and the solution may be a political one that essentially lies in the symbolic.

MINISTRY OF JUSTICE
Tāhū o te Ture

Regulatory Impact Statement

STATUS QUO AND PROBLEM DEFINITION

Status quo

6 The Foreshore and Seabed Act 2004 (the 2004 Act) is a relatively new piece of legislation and was enacted primarily to clarify the law relating to the foreshore and seabed and the legal status of particular interests operating within it. Generally, it deals with:

- the area of the foreshore and seabed (roughly from the wet part of the beach out to 12 nautical miles);
- the protection of private titles in the foreshore and seabed;[2]
- ownership and management of the public foreshore and seabed (the Crown is the owner by virtue of section 13);
- rights of (public) access in, on, over, or across the public foreshore and seabed;
- rights of navigation and fishing within the foreshore and seabed area;
- the jurisdiction of the High Court and Māori Land Court over the public foreshore and seabed; and
- the treatment of customary rights and interests.

7 The 2004 Act was, in part, a response to the Court of Appeal's decision *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) (the Ngāti Apa decision) which decided, amongst other things, that:

- customary title over the foreshore and seabed, if any, had not necessarily been extinguished by certain statutes, and
- the Māori Land Court had jurisdiction to determine applications that areas of the foreshore and seabed had the status of Māori customary land.

[2] In December 2003, Land Information New Zealand identified that there were (at that time) 12,499 privately owned titles either partly or wholly within the boundary of the foreshore and seabed. This included Māori freehold land and Māori owners of general land.

8 The Ngāti Apa decision did not determine whether parts of the foreshore and seabed *were* Māori customary land, merely that the Māori Land Court could investigate such claims. Up until the Ngāti Apa decision and prior to the 2004 Act it was unclear to what extent and where Māori had property interests in the foreshore and seabed.

9 Prior to the 2004 Act, there were two avenues open to Māori to clarify their property interests in the foreshore and seabed:

- The Māori Land Court had a statutory jurisdiction to determine whether areas of the foreshore and seabed were "Māori customary land".[3] If so, a status order could be issued which recognised property interests similar to private title holders. In order to alienate Māori customary land it would need to be converted into another form of title, such as Māori freehold title or "General land" (as defined in Te Ture Whenua Māori Act 1993). The Māori Land Court had processes for this conversion; and

- The High Court had an inherent jurisdiction to determine whether areas of the foreshore and seabed were held in "customary title" (a common law concept that allows for the continuation of indigenous systems of land law). The New Zealand courts have never been asked to make such a determination. There is no definitive authority in New Zealand as to what constitutes "customary title". International jurisprudence indicates that customary interests span a spectrum from use rights through to ownership interests. Countries differ on whether customary interests at the ownership end can exist in the foreshore and seabed (e.g. the Australian courts have held that exclusive "native title" cannot be found in the seabed).[4]

10 Aside from clarifying the jurisdiction of the Māori Land Court, another critical implication of the Ngāti Apa decision was to bring into question the Crown's long held assumption that it owned the foreshore and seabed - it had enacted legislation over parts of the foreshore and seabed and over the wider coastal marine area based on this assumption. This new "uncertainty" of the Crown's role spilled over into other issues and a number of negative (mis)perceptions took hold in New Zealand about the potential implications of a finding of customary land or customary title in the foreshore and seabed. These perceptions included that the public would be prevented from accessing the beach, which includes the dry area of sand above the foreshore and seabed, and that business and development would be frozen.

11 The 2004 Act was therefore enacted on the grounds that it would provide certainty on the rights and interests of all New Zealanders in the public foreshore and seabed including the continued operation of existing legislation, the role of the Crown, use rights such as public access, fishing, navigation and development, and the recognition of customary rights. This certainty was achieved to some extent by vesting the full legal and beneficial ownership of the foreshore and seabed in the Crown to hold as its absolute property.[5] The use of the terms "full", "legal", "beneficial" and "absolute" to describe the Crown's ownership was intended to remove the possibility that anyone else could be found to have ownership or

[3] Section 18 of Te Ture Whenua Māori Act 1993.
[4] *Commonwealth v Yarmirr* (2001) 208 CLR 1; (2001) 84 ALR 113.
[5] Section 13 2004 Act.

property interests in the public foreshore and seabed (unless those interests derived from the Crown).

12 While providing certainty, the vesting of the public foreshore and seabed in the Crown had the consequent effect of extinguishing any uninvestigated Māori property interests (whether Māori customary land in terms of the Māori Land Court's jurisdiction or customary title in terms of the High Court's jurisdiction). This is because the form of ownership adopted by the Crown precluded the existence of Māori property interests in the foreshore and seabed ("territorial" interests). This extinguishment had a much greater negative effect on Māori interests as compared to others. This negative effect was compounded by the fact that there was no provision for compensation for this extinguishment, which, under most circumstances, would be required.

13 It is difficult to estimate the total impact of this extinguishment on Māori as it is uncertain where in the foreshore and seabed the courts may have made a finding of customary title or customary land status. The extent of such findings could have ranged from the entire foreshore and seabed through to only small, discrete areas. All the judges in the Ngāti Apa decision expressed reservations about the actual extent of any findings.

14 The 2004 Act explicitly prevented the Māori Land Court from further investigating those applications before it relating to the foreshore and seabed.[6] It also removed the High Court's jurisdiction to determine claims for customary title.[7] The 2004 Act created new jurisdictions for the High Court and Māori Land Court which only allowed for the recognition of the statutory form of customary interests as set out in the 2004 Act.[8]

15 The 2004 Act recognised two types of customary interests in the foreshore and seabed:

- *territorial customary rights*: these rights are couched in the 2004 Act as a form of customary title that would have existed but for its extinguishment under the 2004 Act; and

- *non-territorial customary rights*: these rights are use rights. They recognise customary uses, activities and practices that do not require land ownership (e.g. harvesting). These rights continued despite the 2004 Act.

Territorial customary rights

16 Under the 2004 Act territorial customary rights in relation to a particular area of the public foreshore and seabed can be claimed if it can be shown that:

- the specific area was used and occupied, to the exclusion of all others, by members of the applicant group without substantial interruption; and

[6] Section 12 2004 Act.
[7] Section 10 2004 Act.
[8] Sections 12, 10 and Parts 3 and 4 of the 2004 Act.

- the applicant group, or any of its members, had continuous title to the land contiguous to the specific area of the public foreshore and seabed.[9]

17 There are two ways in which groups can have territorial customary rights recognised under the 2004 Act. They can either apply to the High Court under section 33 of the Act, or enter into direct negotiations with the Crown under section 96 of the Act. Should they choose to enter negotiations with the Crown, an agreement reached on territorial customary rights recognition must be confirmed by the High Court.

18 The outcome of any successful section 33 application provides the group with the choice of the establishment of a foreshore and seabed reserve or an order that requires the Crown to negotiate with the group to provide redress.[10] Where agreement cannot be reached, the default redress is the establishment of a foreshore and seabed reserve.[11] A foreshore and seabed reserve is subject to public access and navigation and provides the group with certain decision-making roles in respect of the area to which the foreshore and seabed reserve relates. These roles are principally membership on an administering board and the development and implementation of a management plan (sections 43-45).

19 To date, only one application has been made to the High Court under section 33. This application is in its early stages and no finding has been made. There is no available evidence as to the scope of the application of section 33.

20 To date, only one agreement has been reached under section 96 of the 2004 Act and aspects of it are yet to be confirmed by the High Court. This section 96 agreement is included within the Deed of Agreement between Ngā Hapū o Ngāti Porou and the Crown of October 2008.[12] The Deed of Agreement sets out the following instruments to recognise territorial customary rights.

- a permission right – a power to approve or withhold approval for any resource consent for an activity that is likely to have a significant adverse effect on the relationship of the hapū with the environment in a territorial customary rights area;

- an extended fisheries mechanism – which provides Ngā Hapū o Ngāti Porou with the ability to make by-laws under customary fishing regulations. The bylaws may place restrictions on fishing within territorial customary rights areas, either to preserve sustainability or for cultural reasons such as following a death by drowning in the area;

- an extended environmental covenant – which requires the Gisborne District Council, through key public documents such as the regional coastal plan, "to recognise and provide for" the approach of the hapū to the sustainable management of physical and natural resources in that area; and

[9] Section 32, 2004 Act.
[10] Section 36, 2004 Act.
[11] Section 37(4), 2004 Act.
[12] The Deed of Agreement with Ngā Hapū o Ngāti Porou provides various other instruments that would apply throughout the rohe moana of Ngā Hapū o Ngāti Porou. These are made in recognition of the mana of Ngā Hapū o Ngāti Porou. They are not made in recognition of territorial customary rights.

- an extended conservation mechanism – the right to give, or refuse to give, consent to certain conservation-related proposals, including applications for marine reserves in territorial customary rights areas.

21 These awards were negotiated specifically for Ngā Hapū o Ngāti Porou. The 2004 Act does not require these instruments to be provided to other groups that negotiate with the Crown but they could be made available to other groups through subsequent negotiation. It is unclear whether this would be the case.

Non-territorial customary rights

22 The 2004 Act provides for the recognition of non-territorial customary (use) rights through customary rights orders.[13] A customary rights order is an order by the Māori Land Court or the High Court that recognises an activity, use or practice that has been carried out continuously from 1840 to the present day (such as launching waka).

23 In determining an application for a customary rights order, the courts will consider whether:

- the activity, use or practice is and has been integral to the tikanga or distinct cultural practices of the applicant group since 1840;
- the activity has been exercised, and continues to be exercised, by the applicant group in that area of the public foreshore and seabed in a substantially uninterrupted way from 1840; and
- the activity is, or has been, prohibited by law.

24 Whānau, hapū and iwi can apply to the Māori Land Court, and any other group of New Zealanders can apply to the High Court, for a customary rights order.

25 There are specific mechanisms in the 2004 Act and in the Resource Management Act 1991 to protect customary interests that have been recognised by the courts. However, the courts cannot make a customary rights order in respect of an activity that is regulated by fisheries, wildlife, or marine mammals legislation.

26 To date, there are seven applications for customary rights orders in the Māori Land Court and none in the High Court. Of those applications in the Māori Land Court, none has been determined. It is difficult to estimate the extent of the non-territorial rights that are being exercised and how these might be affected by any changes to the status quo. This evidence has not been collated and conceivably could only be collated once the court process is exhausted.

Problem definition

27 The response to the 2004 Act and its extinguishment of potential Māori property interests, including a hīkoi of almost 50,000 people to Parliament in 2004 and the majority of submissions in 2009 to the Ministerial Review Panel, demonstrates that a large number of New Zealand citizens including non-Māori do not support the

[13] Sections 50 and 74 of the 2004 Act.

2004 Act in its current form, regardless of whether or not they were entitled to claim customary title or customary land status prior to the 2004 Act.[14]

28 Since its enactment, there have also been a number of independent international and national critiques of the 2004 Act including:

- *The United Nations' Committee on the Elimination of Racial Discrimination*:

> "the [2004 Act] appears to the Committee, on balance, to contain discriminatory aspects against Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress" (2005);[15]

- *The United Nations' Special Rapporteur:*

> "..[under the 2004 Act the] Crown extinguished all Māori extant rights to the foreshore and seabed in the name of the public interest and at the same time opened the possibility for the recognition by the Government of customary use and practices through complicated and restrictive judicial and administrative procedures" (2006);[16] and

- *The Ministerial Review Panel*:

> "[t]he Act is discriminatory as—by definition—it affects only Māori rights. While it grants to all the opportunity to bring cases, the titles that the legislation extinguishes are, exclusively, customary titles held by Māori" (2009).[17]

29 All three commentators urged the Government to reconsider the 2004 Act and to engage in a dialogue with Māori over their rights and interests in the foreshore and seabed. In particular, the Ministerial Review Panel (Panel) noted that the actions of the Government following the Ngāti Apa decision:

> "impacted significantly on the relationship between Māori and the Crown. This was not only because the Act was seen to abrogate property rights but also because of the limited extent of consultation on the [2004] Act and the speed of its enactment".[18]

30 The Panel recommended to the Government that:

> "the [2004] Act should be repealed and the process of balancing Māori property rights in the foreshore and seabed with public rights and public expectations must be started again".[19]

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[14] For the estimate of participants in the 2004 hīkoi refer to: <*http://www.stuff.co.nz/auckland/northland/local-news/northern-news/2349554/Remembering-the-hikoi*> (last accessed 22 February 2010); for the submissions to the 2009 Ministerial Review Panel refer to < http://www2.justice.govt.nz/ministerial-review/submissions.asp > (last accessed 8 March 2010).

[15] United Nations' Committee on the Elimination of Racial Discrimination "Decision on Foreshore and Seabed Act 2004" (11 March 2005) Decision 1 (66): New Zealand CERD/C/DEC/NZL/1, paragraph 6.

[16] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rudolfo Stavenhagen, on his Mission to New Zealand (16 to 25 November 2005), paragraph 79.

[17] *Pākia Ki Uta, Pākia Ki Tai*: Report of the Ministerial Review Panel (Vol 1) 2009, p. 139.

[18] *Pākia Ki Uta, Pākia Ki Tai*: Report of the Ministerial Review Panel (Vol 1) 2009, p. 25.

[19] *Pākia Ki Uta, Pākia Ki Tai*: Report of the Ministerial Review Panel (Vol 1) 2009, p 137. Approximately 85% of submitters to the Ministerial Review Panel wanted the 2004 Act repealed, p. 31.

31 Although the 2004 Act provides a greater degree of certainty as to the range of interests in the foreshore and seabed than existed before the 2004 Act was passed, this has been at the expense of potential Māori property interests in the foreshore and seabed. The 2004 Act has had a disproportionate impact on Māori as compared to other interests. It has replaced the ability of Māori to have courts investigate and determine the nature and extent of their potential property interests with prescribed litigation avenues in the Māori Land Court and High Court and two negotiation avenues that require court confirmation. This situation has resulted in an on-going sense of grievance within New Zealand, particularly amongst Māori.

32 In summary, the problem definition can be stated as:

> **Although the 2004 Act provided a greater degree of certainty as to the range and operation of interests in the foreshore and seabed, it had a much greater negative effect on Māori interests as compared to others and does not provide for a satisfactory balance of all interests in the public foreshore and seabed.**
>
> **Therefore it is necessary to see whether it is possible to balance these interests and remove or remedy the negative effect on Māori interests. This RIS considers whether a replacement regime (as opposed to an amendment of the 2004 Act) could do this.**

OBJECTIVE OF A REPLACEMENT REGIME

Objective

33 The Ministry of Justice has proposed, and the Cabinet has agreed that, if a replacement regime is to be developed, its objective should be to achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed [CAB Min (09) 42/4]. These interests include:

- *recreational and conservation interests* in accessing, using and enjoying the coastline and marine environment;
- *customary interests*, including usage, authority and proprietary interests as an expression of the relationship between hapū/iwi and the coastal marine area;
- *business and development interests*, such as the fishing, marine farming, marine transport, roading and airport infrastructure, mining and tourism industries, and port companies, which have a significant interest in how the coastal marine area is controlled and regulated; and
- *local government interests*, such as community-based interests within their areas of administration and the administration of the law that regulates use of the coastal marine area.

34 In summary, the objective can be stated as:

> **If the 2004 Act is to be replaced by a new regime, that new regime should achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed (including customary interests).**

35 The Ministry of Justice has also proposed, and Cabinet has also agreed, that if a replacement regime is to be developed it should be guided by a set of principles:

- *Treaty of Waitangi:* the development of a new regime must reflect the Treaty of Waitangi, its principles and related jurisprudence;
- *good faith:* to achieve a good outcome for all following fair, reasonable and honourable processes;
- *recognition and protection of interests*: to recognise and protect the rights and interests of all New Zealanders in the foreshore and seabed;
- *access to justice*: the new regime must provide an accessible framework for recognising and protecting rights in the foreshore and seabed;
- *equity*: to provide fair and consistent treatment for all;
- *certainty*: have transparent and precise processes that provide clarity for all parties including for investment and economic development in New Zealand; and
- *efficiency*: a simple, transparent, and affordable regime that has low compliance costs and is consistent with other natural resource management regulation and policies [CAB Min (09) 42/4].

36 Following the regulatory analysis of each option, this RIS assesses each option against the principles above to determine whether that option achieves the objective.

POLICY OPTIONS FOR A REPLACEMENT REGIME

Terminology

37 Before describing and analysing the policy options set out in this RIS, it is prudent to first clarify some of the key terms/concepts that are used. These key terms/concepts are “loaded” and can have different meanings in different contexts depending on who is using them. Table 1 sets out how they are used in this RIS.

Table 1: Meaning of key terms/concepts used in this RIS

Term/Concept	Variations in meaning	Meaning in this RIS
Ownership	Ownership is a term commonly used to indicate a set of rights and obligations relating to an asset, such as a right to exclusive use, a right to income earned from it, a right to sell, obligations to ensure safety and manage pests etc. These rights and obligations can be constructed or bundled in different form. For example, ownership of an asset can be absolute, residual or reversionary. It can have different meanings in different contexts and in different cultures.	As specifically defined in each of the policy options but also as a generic term for final or residual authority and control (and liability) over the public foreshore and seabed.
Mana (including mana whenua, mana moana)	Mana is a Māori concept has many meanings in te reo and in English. It is generally accepted as translating into English as "authority and control" [20] (which brings with it liabilities/responsibilities).	Generally, as authority and control (which brings with it liabilities/responsibilities).
Customary title	"Customary title" typically means the bundle of property rights that colonial judicial systems recognise as being held by an indigenous people immediately prior to the time of a transfer in sovereignty. In Commonwealth jurisdictions (such as Australia, Canada and new Zealand) it means the property rights in land that the common law recognises after sovereignty and which were held immediately prior to sovereignty. Within commonwealth jurisdictions, the concept goes by different names. In Australia it is referred to as "native title" – a concept that includes both territorial and non-territorial rights. Canada distinguishes between "aboriginal title" (territorial customary rights) and "aboriginal rights" (non-territorial customary rights). In New Zealand, reference is often made "customary interests", the broadest scope of both territorial and non-territorial customary rights. There is no definitive authority in New Zealand as to what "customary title" consists of but it typically refers to territorial customary rights.	The property interest that Māori had in land immediately prior to sovereignty, as opposed to use rights that do not necessarily depend on underlying ownership of the land. Also known as territorial customary rights.
Territorial customary rights	Customary property interest/s that are specific to land. These exclude uses, activities and practices.	Customary property interest/s.
Non-territorial customary rights	A customary use, activity or practice which does not necessarily depend on underlying ownership of the land.	A customary use, activity or practice which does not necessarily depend on underlying ownership of the land.

[20] *Pākia Ki Uta, Pākia Ki Tai*: Report of the Ministerial Review Panel (Vol 1) 2009 p 101.

Policy options

38 The four policy options for replacing the 2004 Act identified in this RIS are all based on different models of ownership of the public foreshore and seabed. The reason that ownership was chosen as the model is because it determines many other issues (and interests) in the public foreshore and seabed. For example, an absolute form of ownership means no other pre-existing owner can be recognised to exist. The form of ownership chosen can limit the way of recognising the range of customary interests, which could exist along a spectrum of ownership and include management and use rights, and could be exclusive or non-exclusive.

39 No evidence has been gathered as to the number of Māori potentially affected by these policy proposals. When discussing customary interests, the RIS focuses on hapū/iwi. There is no evidence as to which hapū/iwi are specifically being referred to or how many individuals these groupings would consist of.

40 The four policy options, discussed in further detail below, are:

- *Option one*: vesting radical or notional title in the Crown subject to claims of customary title ("Crown notional title"). There are two sub-options within this option (Option 1A where the courts alone determine the tests and awards for customary interests and Option 1B where the tests and awards are set out in legislation);
- *Option two*: vesting the foreshore and seabed in the Crown as its absolute property ("Crown absolute title");
- *Option three*: vesting the foreshore and seabed with Māori as their absolute property ("Māori absolute title"); or
- *Option four*: taking a new approach to clarifying roles and responsibilities in the foreshore and seabed ("a non-ownership regime").

41 These options capture the broad range of ownership options that could be developed and analysed. The four options contain a mix of who is the owner (e.g. under Option two the Crown is the owner, under Option three Māori are the owner and under Option four there is no owner) and whether the form of ownership is interim or is the start and end point (e.g. Option one is a form of interim ownership whereas options two to four are start and end points in themselves).

42 To clarify, Option two is not the status quo as it involves modified tests and awards for customary interests.

DESCRIPTION OF FOUR POLICY OPTIONS

43 A snapshot of the key elements of the four policy options is set out in the Table 2 below:

Table 2: Key elements of the four policy options

	Repeal of 2004 Act?	Form of ownership – different to status quo?	Extinguished customary title restored?	Prescribed customary tests and awards?
Option one: Crown notional title *(Two sub-options: 1A and 1B)*	Yes	Yes. Crown ownership replaced by notional title.	Yes	*Option 1A*: No - courts alone determine tests and awards
				Option 1B: Yes
Option two: Crown absolute title	Yes but could amend.	No.	No	Yes
Option three: Māori absolute title	Yes	Yes. Crown ownership replaced with Māori ownership.	Yes	No
Option four: A non-ownership regime	Yes	Yes. New regime would state foreshore and seabed incapable of being owned and is inalienable.	Yes	Yes

NO CHANGE FROM THE STATUS QUO

44 Across all four options, the following features would not change from the status quo:

- the area covered (all options cover the "public foreshore and seabed" which specifically excludes those areas subject to a specified freehold interest);
- the areas subject to an existing specified freehold interest;
- public access in, on, over and across the public foreshore and seabed (subject to certain exceptions such as health and safety);
- fishing and navigation within the foreshore and seabed;
- existing use rights (e.g. coastal permits, mining exploration permits, and marine reserves);

45 The area covered does not change from the status quo given this Review is restricted to a Review of the 2004 Act. Unless a decision is made otherwise, it is assumed that the policy options should cover the same geographical area as that covered by the 2004 Act. The retention of this feature in the four policy options should not have any impacts.

46 The last four bullet points in paragraph 44 are based on specific decisions that Cabinet has already made. The main impacts of these features remaining the same are: that the models of ownership explored in this RIS are limited from the outset in their content; the range of options that can be developed to recognise customary interests is restricted (e.g. the development of a form of customary title that prohibits public access or fishing and navigation is not available); and it provides certainty for a number of interests about how they would be treated in a new regime (e.g. the ability to fish or to continue exercising existing use rights such as a resource consent).

47 If the Government decides to replace the 2004 Act, further work would need to be undertaken on these features including how they would transition into a replacement regime.

CHANGE FROM THE STATUS QUO

48 Across all four options, the features of the status quo that would (or could) change in a replacement regime are:

- (the residual rights and obligations of) ownership (including who allocates space in the foreshore and seabed);
- regulatory processes (i.e. the matters and processes for consenting and permitting as opposed to who makes these decisions);
- customary interests (how they are recognised and what is recognised); and
- how new areas of foreshore and seabed are dealt with (e.g. reclamations).

Ownership

49 Under Option one (both 1A and 1B), the Crown's absolute ownership is removed and an interim form of ownership is adopted (radical or notional title). Under this option, the Crown would continue to act as if it were the absolute owner subject to claims by Māori that they had ownership of an area. If a claim were unsuccessful, the Crown's interim title would automatically turn into absolute title. As both interim and absolute owner, the Crown would have certain regulatory and management authority over the foreshore and seabed as well as retaining any existing liabilities (e.g. pest control).

50 Under Option three, Māori are the absolute owner – this form of ownership would mirror the status quo except that Māori would be the owner not the Crown.

51 There would be no owner of the foreshore and seabed under Option four. The replacement legislation would be explicit that the foreshore and seabed was incapable of being owned. This is a novel approach which has parallels with the Continental Shelf Act 1964 where the Crown does not own the area but still

regulates it. There is no evidence for this form of ownership (although there are parallels) given it is a new form. This can be both a benefit and a risk.

52 Options one, three and four could conceivably be uses as an interim regime before ownership is established. This approach has not been considered in this RIS.

53 Under Option 4, the public foreshore and seabed is inalienable. Under Options one to three, the foreshore and seabed could be alienated. The impacts of this are addressed in the analysis section. The ability to alienate, or not, can change within each option.

54 Ownership brings with it benefits and obligations which can be known or unknown from the outset. Only a small number of liabilities are identified in this RIS. Further work would need to be undertaken on what liabilities attach to the owner if any of these options were progressed.

55 Currently, the owner of the foreshore and seabed (the Crown) allocates space to users through the use of coastal permits. The Crown has delegated this responsibility to local government. Under Options one to three the allocation of space (or delegation of this function) would be the right of the legal owner of the public foreshore and seabed: the Crown under Options one and two (subject to the recognition of any customary interests) or Māori under Option three. Under Option four, the rationale for the Crown retaining its role of allocating space would change. In a non-ownership regime it is proposed that the rationale for the Crown continuing to manage the manage the foreshore and seabed is that it is doing so *on behalf* of all New Zealanders, rather than on the basis of being land owner.

56 Currently, no-one can claim ownership over an area of the foreshore and seabed based on adverse possession or prescriptive title (i.e. squatting). While not proposed in the options, it is conceivable that this could change if a replacement regime was implemented. The new owner, if a new owner is chosen (or the Crown if a non-ownership model), should make the decision whether or not to allow such claims.

Regulatory processes

57 Under Options one, two and four the Crown retains regulatory powers. It is assumed for the purposes of this RIS that existing regulatory processes, including legislative frameworks and decision-makers would not fundamentally change unless otherwise stated (e.g. the Resource Management Act 1991 would remain as the primary piece of regulatory legislation in the foreshore and seabed and local authorities would remain the decision-maker). The impacts are covered in the next section of this RIS.

58 Under Option three, Māori would be responsible for regulating the public foreshore and seabed including acting as decision-maker in the place of local government, implementing new consenting or permitting processes (unless a fundamentally new type of process was implemented) and new criteria for decision-making. The status quo could not be presumed to stay in place if this option were adopted. No evidence or information has been gathered as to what new regulatory processes would be implemented, if at all, and their impacts. Time constraints have meant that the analysis undertaken in the next section assumes that for all four options existing regulatory processes would not change.

Customary interests

59 The problem with the 2004 Act was its extinguishment, without compensation, of uninvestigated Māori property interests. No other interests were affected this way. The objective of a replacement regime is to balance the interests of all New Zealanders in the foreshore and seabed including customary interests. This problem and objective should be kept in mind when considering this particular section.

60 The Government is considering consulting the public on fundamental policy questions relating to recognising customary interests in a replacement regime, including:

- should customary interests be tested?
- if so, what should the tests be?

61 If customary interests are to be tested, there are options as to what those tests should be (three options are listed below). These options represent the broad range available although the combinations are almost limitless.

62 Across Options one, two and four, there are varying estimations as to their potential impacts compared with the status quo. As stated above, there is no evidence as to the extent of the status quo as no determinations have been made on where customary interests (both territorial and non-territorial) exist. Under Option 1A the tests are determined over time by the courts. The impacts of this approach cannot be assessed as there is no existing information on what the courts would decide. The Canadian experience is that a single case can take in excess of 18 years without any determination as to tests.

63 For the analysis section, a judgement has been made for the purposes of this RIS that the New Zealand courts would find that only small areas of the foreshore and seabed were subject to customary interests.[21] This should be compared with Option three where the whole area would be held by Māori.

64 If tests are to be prescribed in the replacement regime, within Options 1B, two and four the tests themselves could be calibrated as either “hard” (so findings could be made only over small areas) or “easy” (so findings could be made over large areas of the foreshore and seabed). No assumption has been made as to whether a hard or easy test would be applied under these options. The Ministry of Justice’s view is that these types of outcomes should not be determined on the basis of their likely geographical scope/extent but on a principled basis of recognising those interests extinguished by the 2004 Act and balancing customary interests alongside other interests. In saying that, Table 5 in the analysis section of this RIS assumes the outcome of the tests will be limited.

[21] This judgement could change in subsequent RISes if a judgment is issued by the courts which indicates the outcome is otherwise.

65 The Crown has the ability to undertake negotiations with Māori at any time and on any subject and, by virtue of Parliamentary Sovereignty, propose and enact legislation to give effect to these negotiations. Accordingly, it is impossible to assess the impacts of the extent of possible Crown-Māori negotiations. Negotiations for recognising customary interests could be costly and time consuming and produce ad hoc, inconsistent outcomes. Equally, negotiations could be cost and time efficient and produce outcomes that are nationally consistent at a high level but differ in some areas in order to meet local needs. It is noted that the Crown currently undertakes historical Treaty settlement negotiations with Māori and implements these through legislation.

66 For Options 1B, two and four, two types of customary interests are recognised: territorial and non-territorial. This is the same as the status quo. There are other options (e.g. combining both into a "package") which are not considered here due to time constraints.

67 If these two types of interests are to be tested, the three options for tests are (noting that none of these have been applied in the foreshore and seabed and there is no evidence of what their potential scope is):

- a test based on Canadian jurisprudence (common law only);
- a test based on Te Ture Whenua Māori Act 1993 (TTWMA) (tikanga Māori only); and
- a test that combines tikanga Māori and Commonwealth common law.

68 A test based on Canadian common law could include the following elements:

- the relevant land was occupied at sovereignty; and
- occupation was exclusive to the group at sovereignty; and
    - i there is an "intention and capacity to retain control"
    - ii "positive acts" of exclusion would not be necessary; and
- the connection between the people and the land remains substantial.

69 A test based on TTWMA would be solely based on tikanga Māori (i.e. not in conjunction with the common law). In order to meet this test, a group would need to show that the relevant area of the foreshore and seabed is "held by Māori in accordance with tikanga Māori" (section 129(2)(a) of TTWMA).

70 A test that combines tikanga Māori and common law could include the following elements (all of which could change as these are only preliminary proposals):

Table 3: Testing customary interests using tikanga Māori and the common law under options 1B, two and four

Customary interest	Elements of tests
Non-territorial *(activity based)* (to apply to areas of the foreshore and seabed where non-territorial interests have been recognised - either in the courts or through negotiation)	• *Date of existence*: The customary interests must have been generally in existence in 1840. • *Continued existence of an identifiable community*: The customary interests must be carried out by an identifiable community within traditional laws and customs (tikanga Māori). • *Connection with the area*: There must be proof the right connects to the area claimed by the applicant group (coastal hapū or iwi). • *Continuous exercise*: The right must have been carried out in a continuous manner since the date of its existence. To be clear, the question of continuity should be determined according to tikanga Māori. • *Extinguishment*: The non-territorial interests must not have been extinguished (a question of law not fact)
Territorial *(similar to ownership-type interests)* (to apply to areas of the foreshore and seabed where territorial interests have been recognised - either in the courts or through negotiation)	• *Recognition of territorial interests:* Explicit direction in the statute that territorial interests exist where the elements of the test are proven (this is a precursor to the actual test). This would remove uncertainty about whether New Zealand should recognise territorial interests in the foreshore and seabed. • *Demonstrating the exercise of territorial interests:* The applicant group must provide proof of its connections, acts and practices which equate with the nature of "territorial" interests in accordance with tikanga Māori. Two elements should be required to demonstrate proof: i) "exclusive use and occupation"; this should be interpreted in accordance with tikanga Māori; fishing and navigation by third parties would not prevent a finding of "exclusive use and occupation"; and ii) "continuity" of "exclusive use and occupation" from 1840 to the present. • *Demonstrating the content and extent of the territorial interests:* Whether the area is held by the applicant group according to its own customs and usages, i.e., in accordance with tikanga Māori. This may include where hapū and iwi have "shared" exclusive interests as against other third parties. • *Extinguishment:* The territorial interests must not have been extinguished (a question of law not fact).

71 Under options 1B, two and four, customary interests could be recognised by providing the following awards (all of which could change as these are only preliminary proposals):

Table 4: Recognising customary interests under options 1B, two and four

Type of customary interest being recognised	Awards	Description
Non-territorial interests *(activity based)* (to apply to areas of the foreshore and seabed where non-territorial interests have been recognised - either in the courts or through negotiation)	Protection of customary activities	Supports the continued exercise of customary activities without the need to comply with an RMA plan or obtain a resource consent
	Placement of rāhui over wāhi tapu	Allows coastal hapū/iwi to restrict or prohibit access to wāhi tapu
	Planning (regulatory) document	Outlines objectives and policies of coastal iwi that decision-making bodies with responsibilities in the foreshore and seabed will have to consider in relation to their relevant processes[22]
Territorial interests *(similar to ownership-type interests)* (to apply to areas of the foreshore and seabed where territorial interests have been recognised - either in the courts or through negotiation)	Right to permit (or not) activities	Provides coastal hapū/iwi with the right to make an initial decision on whether a consent authority can process and determine an application for an activity requiring a resource consent
	Participation in conservation processes	Provides coastal hapū/iwi with the right to give, or refuse to give, its consent to conservation proposals and applications
	Planning (regulatory) document	Decision-making bodies with responsibilities in the foreshore and seabed will have to have "higher" regard to the objectives and policies in the planning document in relation to the discrete areas where territorial interests have been recognised[23]

72 These awards draw on those instruments developed in the foreshore and seabed negotiations between Ngā Hapū o Ngāti Porou and the Crown.[24] They are also shaped by the Ministry of Justice's consultation with other government departments. The awards have the overarching aim of providing for the following outcomes for Māori:

- *authority* – providing a level of authority over resources and activities in the foreshore and seabed; and

[22] The weight of "consider" is to be determined in the next policy phase. This RIS assumes it will be similar to the level of "take into account" used in existing regulatory decision-making.
[23] The weight of "higher" is to be determined in the next policy phase. This RIS assumes it will be similar to the level of "recognise and provide for" used in existing regulatory decision-making.
[24] The Deed of Agreement with Ngā Hapū o Ngāti Porou provides various other instruments that would apply throughout the rohe moana of Ngā Hapū o Ngāti Porou. These are made in recognition of the mana of Ngā Hapū o Ngāti Porou. They are not made in recognition of territorial customary rights.

- *environmental management* – providing for a role in environmental management in the foreshore and seabed.

73 These outcomes are intended to align with the extent and nature of customary interests prior to the 2004 Act.

74 Although the impacts of these tests and awards as compared to the status quo are difficult to assess based on the lack of evidence available, the next section attempts an impact assessment.

New areas of foreshore and seabed and other matters

75 If the Crown is no longer the owner of the foreshore and seabed, provision will need to be made for how new areas of the foreshore and seabed are dealt with as well as other collateral matters. These new areas include reclamations, subdivisions and local authority land acquired after the 2004 Act.

76 A reclamation is the construction of dry land where there was previously land covered by salt water. In respect of reclamations the RMA empowers:

- regional councils to decide whether a proposal to reclaim is in accordance with the purpose of the RMA; and

- the Minister of Conservation to decide whether to vest an interest in the reclaimed land in a person and, if so, at what price.

77 The 2004 Act provides that fee simple title is not available in reclamations. In lieu of fee simple title, port companies can obtain potentially renewable 50 year leasehold interests in reclamations. The Department of Conservation (on behalf of the Minister) is currently dealing with 22 formal vesting applications for reclamations under two different regimes in the RMA. Land Information New Zealand is dealing with pre-1991 reclamations under a third regime, the Lands Act 1948.

78 Options one and two propose that the rules in the status quo relating to reclamations would be retained, with the possibility of recognised customary rights holders being granted enhanced involvement in decision making on whether new structures could be built. It is conceivable that these options could also provide for fee simple title to be granted in reclamations. Under these options, and if there were no change to the status quo, there would be little impact.

79 Under Option three, decisions about whether to grant reclamations would be made by Māori through a representative body. There is the potential for this to have significant impacts, including on port companies should Māori be granted fee simple title. There is no evidence to support this analysis.

80 Under Option four, if the Crown is not the owner of the foreshore and seabed it will not be possible for the Crown to grant a 50-year leasehold interest in reclamations to port companies. It is proposed that port companies could obtain a permit (similar to a coastal permit under the RMA) that would provide for an interest akin to a leasehold interest in a reclamation for up to 50-years (compared with a maximum of 35 years for a resource consent). This interest would be able to be easily renewed for additional 50 year terms provided the applicant has observed

the terms of the permit and proposes to continue using the reclamation for relevant activities. This would be similar to the status quo (or at least the end point of the status quo where all new reclamations are dealt with in this way).

REGULATORY IMPACT ANALYSIS

81 This section analyses the impacts (including social, cultural and environmental impacts and costs and benefits) of each of the four options. The Ministry of Justice is cognisant that whichever option is chosen as the preliminary preferred option, this is an issue in which perception matters. In that sense, the solution to the problem may lie in the symbolic and is therefore inherently political.

82 Following analysis of the impacts, the options are briefly gauged against the guiding principles set out earlier to see which option, if any, could achieve the objective. This analysis and assessment are preliminary and at a high level. It is expected that further and more detailed analysis and assessment will be undertaken to take into account the views of the public expressed during the consultation process.

Impacts of each policy option

83 Repealing the 2004 Act and replacing it with one of the four policy options would generate a number of impacts. These impacts can be grouped into two broad categories:

- transitional (one-off) effects that are related to the change in legislation; and
- ongoing effects related to the operation of the legislation once in place.

84 The four options are analysed under a number of different categories. Initial estimates of the relative magnitude of each impact of each of the options are outlined in the tables set out in this section. Note that these tables do not provide an indication of the relative size of different impact types. For instance, without further evidence it is not possible to determine whether, say, any costs imposed by uncertainty over customary title under Option 1A are likely to be outweighed by the benefits of greater perceived access to justice stemming from this option. Additionally, a number of assumptions have been relied on to carry out the analysis. These include:

- Option 1A would be likely to result in only a small proportion of the foreshore and seabed being found to be subject to customary title. Whether this is likely to be more or less than other options (except Option three) is not possible to determine.
- The tests for recognition of customary interests and consequent awards that would be used in Options 1B, two and four are identical. This RIS assumes the total amount of foreshore and seabed that will ultimately come under customary interests is identical under Options 1B, two and four.
- It is not obvious whether the ownership value placed on allowing the courts full flexibility to determine customary interests (Option 1A) would be greater or lesser than having the courts follow specified tests but not have jurisdiction

to designate Crown ownership where no customary title is found to exist (Option four).

- All options would allow for some degree of continued public access (e.g. for recreational activities) to areas found to be subject to customary title or territorial customary rights.

TRANSITIONAL EFFECTS

85 The one-off impacts of reform are summarised in Table 5 (set out at pages 25-26). The (non-exhaustive) categories are described in more detail below.

Cost of legislative changes

86 When carrying out changes to legislation, there are a number of administrative costs incurred by Government, including time and resources used by officials in the process of providing advice to decision makers and drafting legislation. Costs are also incurred by private individuals and groups who become involved in the consultation process or who carry out lobbying activity. This RIS assumes that the greater the proposed legislative change and greater the scope for consultation, the larger the resource costs that may be incurred.

87 Reverting to the legal situation prior to the 2004 Act (Option 1A) would be expected to have low costs; as would the minor changes to the status quo of Option two. Both Options three and four require a new Act, and legislative costs would be expected to be higher; a moderate rather than a high legislative cost has been assumed because much of the legislation could be retained. Option 1B costs may be higher than Options 1A and two, because as opposed to merely repealing or retaining the 2004 Act, new tests and awards would need to be explicitly legislated for.

Governance systems for holders of customary title/territorial customary rights

88 Customary groups whose customary title or territorial customary rights were recognised would need to establish governance structures to allow effective and transparent decision-making regarding the use or access to these areas by others. Decisions would need to made whether the tests and awards applied to Māori generally, hapū/iwi or coastal hapū/iwi (i.e. only those hapū/iwi whose rohe encompasses the foreshore and seabed).

89 The highest costs are under Option three as an entirely new body would need to be established to represent certain members of the population awarded ownership rights in the foreshore and seabed, e.g. Māori and/or coastal hapū/iwi. The other option that could potentially give rise to greater costs is option 1A, depending on what decisions the courts made in relation to tests and awards for customary title.

90 Established governance bodies will also have ongoing costs. This can have higher costs if the new governance bodies have functions that could otherwise be done by existing bodies.

91 It is not known to what extent existing hapū/iwi governance bodies could undertake the planning functions that might result from Options one, two (both 1A and 1B) and four.

Regulatory costs for local authorities

92 Under each option, local councils would continue to be responsible for ensuring that existing resource consent processes incorporate any rights over access or use for areas of the foreshore and seabed which would be held by groups found to have customary title or territorial customary rights. To the extent that there are changes to the current legislation, additional costs may be generated for local councils by way of adapting their existing consent processes. As Option three would lead to the greatest legislative change this would lead to the greatest increase in costs (i.e. more councils would be affected). In contrast, the lowest level of additional costs would be generated if the status quo were largely maintained under Option two.

Adjustment costs

93 Any change in foreshore and seabed ownership, or in the provision of use or access rights, may result in changes to existing activities or planned activities, e.g. commercial activities in an affected area of foreshore or seabed. Adjustment costs will include investments that are brought forward in time, with associated stranding of assets.[25] There may be a requirement for shifts in labour also, e.g. different skills might be required in new areas such that employees may need to shift location.

94 Because Option three would have the greatest change in foreshore and seabed ownership from the status quo, this option may generate the largest adjustment costs. However, to the extent that the private ownership and use of structures in areas found to be subject to customary title or territorial customary rights is not changed by any of these options, this impact may be relatively minor.

Ownership benefits (Mana)

95 Some groups, and particularly some iwi, or Māori more generally, may place value on ownership itself as opposed to the benefits that arise from rights of access or use (although the reverse may be true). If that were the case, Option three would generate the largest ownership benefits because it provides the greatest level of ownership of the foreshore and seabed. Option two would provide the lowest ownership benefits.

Access to justice benefits

96 Similar to ownership benefits, some individuals or groups may place value on having access to a process that allows, or is perceived to allow, a just outcome in the determination of customary title or territorial customary rights. This is consistent with the assertion that wellbeing is maximised by freedom and justice.[26]

97 Although all options except Option three would provide some form of access to justice, Option 1A would provide the courts with the greatest discretion as to how to decide claims of customary title, as was the situation prior to the 2004 Act.

[25] Stranding of assets is not a cost itself – the costs are already spent. The cost is that there is new capital expenditure whereas under the status quo, new investment would not be required until the end of the life of the current asset.
[26] See, e.g. Armatya Sen (2000) *Development as Freedom*.

Consequently, this analysis considers this option to provide the greatest access to justice benefits.

Certainty of outcomes benefits

98 Unless explicitly decided in legislation, ownership of an area of foreshore or seabed may be uncertain until the outcome of legal action or the completion of negotiated settlement is clear. As a result, there may be reduced investment in certain activities or opportunities, e.g. some commercial endeavours may be delayed.

99 Because Option 1A provides the courts with the most discretion over determining customary title, this option would give rise to the greatest uncertainty until findings were made and appeals decided. In contrast, Options two and three would provide the greatest certainty as foreshore and seabed ownership would be determined by legislation.

Summary of transitional impacts

100 The transitional impacts identified in this section are summarised in Table 5 below.

Table 5: Transitional impacts of the four policy options

Impact type	Option 1A	Option 1B	Option 2	Option 3	Option 4
Legislative costs	Low Reverting to pre-2004 law	Low to moderate Reverting to pre-2004 with minor changes	Low Status quo with minor changes	Moderate New Act	Moderate New Act
Governance costs	Low to high Could raise complexity, depends on court rulings	Low to moderate Specification of tests likely to limit affected areas/councils	Low to moderate Status quo largely maintained	High Entirely new representative body to be established	Low to moderate Specification of tests likely to limit affected areas/councils
Regulatory costs	Moderate to high Until legal claims resolved, councils uncertain over process	Low to moderate Specification of tests likely to limit affected areas/councils	Low to moderate Status quo largely maintained	High Many councils would need to adapt to new Māori body	Low to moderate Specification of tests likely to limit affected areas/councils

Impact type	Option 1A	Option 1B	Option 2	Option 3	Option 4
Adjustment costs	Low to moderate Only plans and activities in customary title areas affected	Low to moderate Only plans and activities in customary title areas affected	Low to moderate Status quo largely maintained	High Potentially all plans or activities affected	Low to moderate Only plans and activities in customary title areas affected
Ownership benefits (Mana)	Low to moderate Ownership depends on courts	Low to moderate Ownership depends on tests	Low Owned by Government	High Owned by Māori	Low to moderate Ownership depends on tests
Access to justice benefits	High Reverting to pre-2004 situation	Moderate to high Reverting to pre-2004 with minor changes	Moderate Access to govt negotiation or limited legal action	Low Public ownership lost with no right of legal action	Moderate to high Reverting to pre-2004 with minor changes
Certainty benefits	Low Little certainty courts discretion	Moderate Some certainty provided by tests	Moderate Some certainty provided by tests	High Certain, all owned by Māori	Moderate to high Some certainty provided by tests

ONGOING EFFECTS

101 The choice of reform option may also generate impacts that continue over time. These are summarised in Table 6 below.

Decision costs

102 There are costs associated with the process for determining the existence of customary title or customary rights. These include negotiation, litigation and court costs incurred by both private groups (title claimants) and the public sector (e.g. the judicial system).

103 This analysis assumes that because Option two allows for direct negotiation with the Crown it would allow for lower decision costs than options that only allow for litigation. This is because litigation is not required in order to determine tests and outcomes, issues can be resolved as they arise and at a rate determined by the parties to the negotiations rather than subject to a court's assessment of the issues and its timing. This assumption could be seen as a judgement. Because Option 1A allows courts full discretion over customary title decisions, this option is more likely to lead to protracted litigation and, therefore, greater decision costs.

Transaction (negotiating) costs

104 Any persons or organisations wishing to access an area of foreshore and seabed for either commercial or recreational activities may need to apply to, or negotiate with, customary title or territorial customary rights holders. Undertaking such applications and negotiations may incur time and resources. The greater the area over which customary title or territorial customary rights applies, the greater the likelihood that additional negotiating costs will be incurred. For this reason, Option three would be expected to generate the greatest transactions costs as it is assumed that applications or negotiations to enter particular areas of the foreshore and seabed would occur at the local rather than national level (thereby multiplying the number of interactions).

105 In contrast, any charges, fees, royalties or conditions that are paid by access seekers to title or rights holders do not constitute either costs or benefits to society. Rather, any such payments are merely transfers from one group within society to another, e.g. from access seekers to title holders.

Optimal use of foreshore and seabed resources (including social and environmental impacts)

106 Under certain circumstances, ownership of an asset is not necessary in order to achieve the optimal use of a resource. If the asset is tradable, it may be sold to the person(s) who values it most highly.[27] Alternatively, use rights will be sold (or leased) to those who value it most highly. In general, such trades are possible.

107 However, an optimal outcome might not result where there are values that cannot be expressed by a market price. These are the external impacts of use and relate particularly to impacts on the environment, but might also include cultural factors.

108 The Government regulates the effects of these external impacts via the Resource Management Act 1991 (RMA). The extent to which the different reform options would ensure optimal use of foreshore and seabed resources is likely to depend on the ability for access and use rights to be traded and/or the extent to which the RMA accurately accounts for all external effects. If there are practical or legislative limits to the ability to trade these rights and/or the RMA would not necessarily account for all potential externalities or social values arising from use of the foreshore and seabed, private ownership of these areas may be less likely to result in optimal outcomes for New Zealand as a whole. Instead, the total social wellbeing of the wider community may be more likely to be maximised if these areas were publicly owned as the Government is likely to be better placed, and face stronger incentives, to account for all of the impacts of use. In contrast, private owners, including customary title holders are likely to be focused on the impacts from any uses or activities on a smaller group of people.

[27] Whilst a pure cost benefit analysis does not factor in payments that are merely transfers from one group to another, these types of transfers may be important for a broader impacts analysis for example to the extent that it results in a significant redistribution of resources or wealth or decision-making rights. Moreover, central and local government charges and fees are generally required to be set on a cost recovery basis. The extent to which any other decision-making body would be constrained in how it sets fees and charges could potentially have significant implications for applicants and therefore for future business and economic activity.

109 If the RMA is able to take account of all external effects and if use rights, if not title, are tradable, then, under these assumptions, there is no difference between the options. However, if either of these assumptions does not hold, optimal use of foreshore and seabed resources is more likely the greater the extent of public ownership. This would suggest that Option three generates the greatest risk that areas of the foreshore and seabed may be used in a manner that does not create the largest benefits for New Zealand as a whole.

110 Even if the RMA does not fully account for all externalities, and use rights are not fully tradable, the problems arising from external impacts are better addressed through other legislative reforms, e.g. by ensuring that the RMA takes account of all external effects, and by ensuring that all potential users of the foreshore and seabed have the ability to express their willingness to pay and to obtain access or use rights in a way that ensures optimal use.

Summary of ongoing impacts

111 The ongoing impacts of the four policy options identified in this section are summarised in Table 6 below.

Table 6: Ongoing impacts of the four policy options

Impact type	Option 1A	Option 1B	Option 2	Option 3	Option 4
Decision costs	High Extensive litigation possible	Moderate Litigation but tests defined	Low to moderate Scope for negotiation and litigation	None No scope for litigation	Moderate Litigation but tests defined
Transaction costs	Low to moderate Negotiation required only where customary title	Low to moderate Negotiation required only where customary title	Low to moderate Negotiation required only where territorial customary rights	High Negotiation required for all foreshore and seabed	Low to moderate Negotiation required only where customary title
Optimal use of foreshore and seabed [28]	Likely, but more uncertainty	Likely	Likely	Least likely	Likely

Consistency of options with guiding principles

112 Based on the impacts set out above, the following table summarises the Ministry of Justice's view on whether the policy options are consistent with the guiding policy principles set out at page 11. Four measures are used: meets; can be developed to meet; does not meet; and not yet certain. These four measures reflect where

[28] Note this assessment here is uncertain. The effects could be the same under all options if the RMA is deemed to be effective at managing all external costs and if all use and access rights are fully tradable under all options.

the policy development process is at and the expectation that further information is required to inform final decisions.

113 The Ministry of Justice's conclusions and recommendations are set out at page 31.

Table 7: Guiding principles applied to the four policy options

		Options 1A and 1B	Option 2	Option 3	Option 4
PRINCIPLES	Treaty of Waitangi	Generally consistent	Real doubt as to whether this would be consistent	Generally consistent	Generally consistent
	Good faith	✓✓	Unlikely to meet good faith given submissions and critiques of retaining the status quo	Further work needed	✓✓
	Recognition and protection of interests	✓✓	✗	✗	✓✓
	Access to justice	✓✓	Could meet✓	Could meet ✓	Could meet ✓
	Equity	✓✓	✗	Further work needed	✓✓
	Certainty	✗	✓✓	✓	✓✓
	Efficiency	Further work needed	✓✓	Further work needed	✓✓
OBJECTIVES	Achieves an equitable balance of the interests of New Zealanders in the foreshore and seabed	✓✓	✗	✗	✓✓
	Ensures certainty and clarity of roles and responsibilities in the foreshore and seabed	✓✓	✓✓	Could meet ✓	✓✓
	Cost effective, efficient and durable	✓✓durable	✗durable	Further work needed	Could meet✓
		✗cost effective and efficient	✓✓cost effective and efficient		
	Addresses grievances associated with the 2004 Act	✓✓	✗	✓✓	✓✓

CONSULTATION

114 The following government departments were consulted in the development of this RIS and in the policy development process to date which started in early 2009: 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 Treasury. The Department of the Prime Minister and Cabinet was informed. A summary of the main feedback from departments is below.

Issues raised by departments

115 Not all of the issues identified by departments are set out here given the length of the consultation process.

116 *Te Puni Kōkiri* considers that that the primary policy objective should be mitigating prejudice to Māori arising from 2004 Act. It also stated that there is too great a focus in the options on private, business and local government interests and that the assessment of the possible effects on those interests is overstated. On the other hand, it considers that the possible effect of vesting in Māori is overstated. The Ministry of Justice is confident that the correct objective has been identified and that the analysis in this RIS is at the correct level given the constraints and the preliminary nature of the decisions being made.

117 *Te Puni Kōkiri* has also proposed a "fifth option": notional title to the foreshore and seabed being vested in Māori. A description and analysis of this option is included in the description of Option three in the Cabinet paper.

118 A number of departments stated not all costs/benefits have been assessed. For example, the *Department of Conservation* (DoC) referred to impacts on recreational and conservational values and the *Ministry for the Environment* (MfE) stated costs to other agencies. While the impacts on some interests, such as potential customary rights holders and business, have been assessed, there has not been time to assess impacts on all interests. This assessment will be done for the RIS that accompanies the Cabinet paper with final policy proposals on a regime to replace the 2004 Act.

119 *MfE* considers that it was difficult to assess the cost and benefits of Option three as there is not a lot of detail in the RIS as to how the option would work. Further information has been gathered in the time available to supplement the analysis of Option three.

120 *DoC* and the *Ministry of Fisheries* (MFish) also consider that the likely geographical extent of the proposed awards needs to be included in the RIS (and the Cabinet paper). This has already been dealt with in the RIS where the Ministry of Justice has stated that decisions on the tests and awards should be based on a principled basis rather than a geographic basis. In any case, this extent would be very difficult to estimate and it is considered that this uncertain estimation could be potentially misleading.

121 *The Treasury* considers that economic incentives are misaligned as those receiving customary title would not have the same rights as holders of fee simple

title. Customary title under a non-ownership regime would be subject to the Cabinet-agreed common understandings or assurances (e.g. public access), so would not be the same as fee simple title. Therefore the proposed awards incorporate regulatory rights to compensate for the diminished bundle of rights coastal hapū/iwi would receive.

CONCLUSION AND RECOMMENDATIONS

Conclusion

122 The objective is:

> **If the 2004 Act is to be replaced by a new regime, that new regime should achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed (including customary interests).**

123 Based on the analysis of impacts and the indications of the consistency of the options with the guiding principles, the Ministry of Justice concludes that Options one and four appear the most likely to achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed (including customary interests). These two options appear to promote:

- access to justice;
- ownership benefits;
- certainty of outcomes; and
- optimal use of foreshore and seabed resources (including social and environmental benefit).

124 However, this conclusion comes with the caveat that it is given on a preliminary basis. The analysis of new information, including information gathered in the consultation process, and the calibrating of features of the options such as tests and awards could change the content of each option and therefore change their impacts and costs and benefits. The views of the public will be particularly important in assessing whether an option meets the guiding principles. As observed earlier in this RIS, this issue is a particularly charged issue in New Zealand and the solution may be a political one that essentially lies in the symbolic.

Recommendations

125 Whichever policy option is progressed after the public consultation round, further evidence will need to be gathered and analysed in order to develop a subsequent RIS. That subsequent RIS will inform final decisions about whether a replacement regime (which could potentially be a model that is not included in this RIS) is necessary or desirable to achieve the objective. The timetable for the Review, which is that if a replacement regime were to be enacted it must be enacted by December 2010, will reduce the time available to the Ministry of Justice to both collate and analyse such evidence.

126 At a minimum, the further work that would need to be undertaken if a replacement regime were to be progressed includes:

- the attributes or incidents of any form of ownership or title utilised in a replacement regime;
- the procedures for Crown action and Crown or local control or management over activities in the foreshore and seabed including areas subject to claims of customary title;
- clarity of legal rights, processes and avenues for disputes; and
- transitional and implementation matters.

IMPLEMENTATION ISSUES

127 This section is not relevant given the stage of the policy development process but will completed for the RIS that informs final policy decisions.

ARRANGEMENTS FOR MONITORING, EVALUATION AND REVIEW

128 This section is not relevant given the stage of the policy development process but will completed for the RIS that informs final policy decisions.