Regulatory Impact Statement
Review of the Foreshore and Seabed Act 2004: Outstanding policy matters

Disclosure Statement

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1 This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice as part of the final policy development process for the Review of the Foreshore and Seabed Act 2004 (the 2004 Act). Cabinet has decided to repeal the 2004 Act and has made a number of general and specific policy decisions for a regime that will replace the 2004 Act. This RIS considers further proposals necessary for the completion of a draft bill to repeal and replace the 2004 Act.

2 Specifically, this RIS provides an assessment of proposals related to reclamations under the new regime and a new proposal to provide for coastal marae title. It also provides a summary of outstanding and secondary policy matters necessary for the purpose of drafting a bill to repeal and replace the 2004 Act. These secondary proposals cover matters such as the High Court's jurisdiction to consider applications for customary title and rights as well as more general matters relating to roads and structures in the foreshore and seabed.

3 This is the third RIS prepared in relation to the Review of the 2004 Act. The first RIS analysed the preliminary policy options for replacing the 2004 Act as one possible outcome of the Review. It specifically focussed on models of ownership and how these could apply to the (public) foreshore and seabed. A public discussion document set out proposals for a new foreshore and seabed regime and sought submissions. The second RIS provided a summary analysis of options for the allocation of rights and obligations of ownership in the public foreshore and seabed, taking into account the submissions received.

4 Cabinet has set a tight timetable for completing the Review by the end of 2010, including the enactment of a replacement regime. Our ability to develop and analyse options is therefore limited to core options necessary to implement key decisions that have already been made about the new regime. The analysis would be more comprehensive and less constrained were it not for the timeframe. This is somewhat mitigated by the inter-departmental work that has been undertaken with relevant departments who have an operational role in the foreshore and seabed such as LINZ and the Department of Conservation.

5 This RIS has gaps in quantifying the risks, costs and benefits of the options identified. For example there is no information or quantification of compliance costs associated with the foreshore and seabed regime. Compliance costs in this context are the value of resources expended by: applicant groups; the agencies affected by the provisions of the new legislation (principally in terms of the prescribed customary title awards); persons applying for interests in reclamations; the Crown in terms of its involvement in the court or negotiation processes and the Crown and iwi in the right of first refusal process over reclamations.

6 We have based our analysis on the assumption that where similar issues of technical detail arise in the context of the 2004 Act that the solutions in the Act have been subject to a thorough policy process and should, with appropriate modifications, be used again in the new regime.

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Date: _____ /_____ /_____

Introduction, Status Quo, Problem Definition and Objective

Introduction

1 This RIS is drafted in light of decisions recently made by Cabinet on policy proposals for repeal and replacement of the Foreshore and Seabed Act 2004. Now that general policy decisions have been made, it is necessary to determine more detailed policy in order to draft legislation for the replacement regime for the foreshore and seabed.

2 In order to provide for a comprehensive regime which satisfactorily balances all interests in the public foreshore and seabed, two matters need to be addressed: reclamations and a new proposal for coastal marae title.

3 For the many mechanical and technical matters associated with the foreshore and seabed, such as structures and roads, the change from Crown ownership to no-ownership will not materially affect the way these matters are dealt with. Therefore, the proposals are similar to provisions already contained within the 2004 Act. Likewise Cabinet has recently made policy decisions about matters such as the jurisdiction of the High Court, the proposed awards and other technical matters including public access, the definition of private titles, local authority owned land, and leases and licences. Some further secondary decisions about these matters now need to be made to provide the specific detail about how they will be managed under the new regime.

Status Quo

Foreshore and Seabed Act 2004

4 Information about the background to the Foreshore and Seabed Act 2004 (the 2004 Act), the key provisions of the 2004 Act, and the implementation of the Act to-date, are detailed comprehensively in the first RIS (11 March 2010).

5 The 2004 Act regulates the public foreshore and seabed by providing for a range of matters including: public access; private titles; reclamations; structures; local authority owned land; roads and leases and licences. The 2004 Act provides for one award for a successful finding of Territorial Customary Rights. These matters are to be addressed under the replacement regime and are referred to in more detail throughout this RIS.

6 Under the 2004 Act, it is not possible to obtain fee simple title for a reclamation.

Recent Cabinet decisions

7 In June 2010 Cabinet agreed to repeal and replace the 2004 Act with new legislation. The new legislation will specify that the foreshore and seabed cannot be owned or alienated. Cabinet agreed that the new regime will specify a court process for the recognition of both customary rights and customary title. As an alternative to the Court process it will be open for groups to enter direct negotiations with the Crown to recognise customary rights and customary title.

Problem definition

8 The following problem statement has been developed during the course of the Review and was used in the previous two RIS as the basis for analysis:

Although the 2004 Act provided a greater degree of certainty about the range and operation of interests in the foreshore and seabed compared to the situation immediately before its enactment, it had a much greater negative effect on Māori interests compared to others and therefore does not provide for a satisfactory balance of all interests in the public foreshore and seabed.

9 This problem definition is applicable to the proposal for coastal marae title.

10 For reclamations a new problem definition has been developed as the basis for the analysis in this RIS as follows:

There is a lack of certainty for those with interests in reclamations and this lack of certainty puts at risk financial investment in reclamations.

Objective

11 The previous two RIS documents described how the government objective for the Review was developed. The objective is:

Any regime should achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed (including customary interests).

12 The previous RIS also contained a number of principles and government assurances by which the earlier proposals were assessed. The proposals considered in this RIS also need to fulfil the overall objective for the Review. The proposals considered in this RIS which represent a departure from the status quo and may require substantial regulatory change are those relating to the reclamations and marae customary title.

13 We consider it is important to ensure the new policies described in this RIS, which ultimately underpin the new regime, are certain, effective and enable a balance of the interests of all New Zealanders in the foreshore and seabed.

Regulatory impact analysis

Reclamations

14 A reclamation is the construction of dry land where previously there was land covered by water. Reclamations can be constructed in the foreshore and seabed or in lakes and rivers. Reclamations are constructed by a range of entitles including port companies, airports, yacht clubs and private developers.

15 Currently there are three regimes for dealing with reclamations, as follows:

a **Reclamations since the 2004 Act (effected through the Resource Management Act 1991)**: The maximum interest that can be obtained for a reclamation under this regime is a leasehold interest. Port companies can obtain a leasehold interest for up to 50 years, including a perpetual right of renewal on the same terms as the original lease, to the extent that the land continues to be used for port facilities;

b **Reclamations under the RMA (1991-2004)**: Fee simple title is the maximum interest that can be obtained in a reclamation governed this regime; and

c **Reclamations under the Land Act 1948**: Fee simple title is the maximum interest that can be obtained for reclamations governed by this regime.

16 Central and local government both have decision-making roles regarding reclamations. Regional councils decide whether a proposal to reclaim is in accordance with the purpose of the Resource Management Act 1991 (RMA) and how environmental effects can be minimised. The Ministers of Conservation and Land Information are empowered to decide whether to vest a legal interest in a reclamation in a person and, if so, at what price.

17 The rationale for reclamations being an exception no-ownership regime is to provide the certainty necessary for business and development interests in the foreshore and seabed to undertake their activities, which in turn provides economic benefit to the whole country.

18 Cabinet has decided that in relation to reclamations, the new legislation will provide:

a for fee simple title in reclamations as the maximum available interest. This does not mean that every application will receive fee simple title; some may receive a leasehold interest;

b that existing and future applications will continue to be dealt with as though the Crown were the owner of the underlying land, with the Crown deciding whether or not to vest an interest in the reclamation;

c for existing and future applications, local authorities will continue to perform their role of considering the environmental effects of a proposed reclamation;

d that, unless a reclamation has been abandoned, only the person who constructs a reclamation can apply for an interest in that reclamation;

e that a reclamation will be deemed to be abandoned if no application in respect of that reclamation has been made for ten years after the date of completion of the reclamation;

f that a person who did not construct a reclamation can apply for an interest in a reclamation that has been abandoned;

g that on transfer of a fee simple title in a reclamation the Crown will have a right of first refusal over the reclamation and the relevant coastal iwi or hapū will have a right of second refusal. If neither the Crown nor a group elects to purchase the reclamation, the owner will be able to sell the reclamation to a third party; and

h that all extant applications for an interest in a reclamation will be considered under the provisions of the new legislation.

19 A number of issues flow from these decisions about reclamations and also a number of separate specific matters need to be addressed. These matters represent a shift from the status quo, they are set out in the table below. We note that the impacts of these decisions will largely be economic and to a lesser degree have cultural impacts. These are addressed in the table. The environmental impacts will continue to be managed under the RMA consenting process and will not change. We do not consider that the shift from lease-hold to fee simple ownership will have any social impacts.

Reclamations proposals

Issue/status quo	Options	Analysis (costs, benefits, impacts on defined groups, risks and in terms of meeting the objective)	Conclusion
Costs for the right to occupy S355 of the RMA provides the Minister of Conservation may vest a right, title or interest in land that has been reclaimed or is proposed to be reclaimed, in the foreshore and seabed to an applicant after determining an appropriate price (if any) to be paid by the applicant.	1 Retain the status quo i.e. ability for responsible Minister to charge applicant for the right to occupy reclamations in the foreshore and seabed. OR 2 Not allow for responsible Minister to charge in respect of reclamations.	Option 1 is appropriate, as a person (applying for an interest in a reclamation) who gains economic benefit from utilising space in the foreshore and seabed (and therefore excludes the public) should be charged for use of that space. The current system, which allows flexibility and allows the decision maker to determine appropriate costs on a case by case basis is working well and should be retained.	We prefer option 1
Competing applications RMA currently provides that anyone can apply for an interest in a reclamation (s 355). It has been decided that unless a reclamation has been abandoned, only the person who constructs a reclamation can apply for an interest in that reclamation. This requires consideration of how current competing applications (and any future competing applications over old reclamations) should be dealt with. The Department of Conservation (DOC) is currently considering 2 sets of competing applications where a port company reclaimed land, applied for an interest, and	1 Apply a limit on competing applications over new reclamations only (that, is, reclamations developed after new legislation). OR 2 Apply limit on competing applications to all old and new reclamations, irrespective of when constructed and what extant applications may exist over them. OR 3 Apply limit to all	The probable identity of any future competing applicants is iwi or hapū who have a close link to reclaimed land and surrounding area. Therefore, the decision to limit competing rights is likely to impact primarily on iwi or hapū. LINZ considers that if competing applications are extinguished (option 2), it would be a retrospective removal of rights. Te Puni Kōkiri (TPK) prefers option 4: have no limit on competing applications, so that the interests of iwi or hapū are not overridden. A prohibition on future competing applications (options 1, 2 and 3) will be a limit on current available rights (RMA provides that anyone can apply for an interest in a reclamation – this proposal would	We prefer option 3:

Issue/status quo	Options	Analysis (costs, benefits, impacts on defined groups, risks and in terms of meeting the objective)	Conclusion
is now competing for the interest with iwi. Iwi have filed applications in areas where they have a Treaty claim in the area where the reclamation has been constructed.	applications over old and new reclamations, EXCEPT those that have existing applications at date new legislation comes into force. OR 4 Have no limits on competing applications.	extinguish future potential rights, probably of iwi). Option 3 is a compromise between recognising existing rights (i.e. not extinguishing current applications) and giving effect to the decision that only the person who constructs a reclamation can apply for an interest in it (under the new regime)	
Definition of reclamation "Reclamation' is not currently defined in the Foreshore and Seabed Act 2004 or the RMA.	1 Include a definition OR 2 Do not include a definition.	It would be beneficial to include a definition for certainty and clarity, especially given that reclamations are an exception to the no-ownership regime. Consideration also needs to be give to whether to include an amended definition of 'structure' in the RMA. Providing a definition will help avoid perverse incentives to apply for an interest in a reclamation that is actually a structure and vice versa. This is because under the new regime an applicant can potentially obtain fee simple title in a reclamation, whereas they could not obtain fee simple title in the land in the coastal marine area where a structure is situated.	We prefer option 1
Decision maker in respect of reclamations The Minister of Conservation is currently the decision maker for all coastal reclamation applications, other than pre-1991 unlawful reclamations which are decided by the Minister of Land Information. The Minister of Land Information is currently responsible	1 Minister of Conservation OR 2 Minister for Land Information	LINZ prefers option 2: the Minister of Land Information to perform the reclamation vesting role for all coastal reclamations. An existing core role of the Minister for Land Information and LINZ is to manage land of the Crown. This preference is supported by some interest groups, including port companies who believe the Minister of Conservation takes too long to process	We prefer option 1

Issue/status quo	Options	Analysis (costs, benefits, impacts on defined groups, risks and in terms of meeting the objective)	Conclusion
for reclamations in lakes and rivers.		applications. To a certain extent delays are due to uncertainties about foreshore and seabed ownership, Treaty claims and competing applications by iwi. The Department of Conservation believes that the responsibility should remain with their Minister (option 1), as the Minister of Conservation has the institutional knowledge (including a Standard Operating Procedure) and systems to process applications for interests in reclamations. This knowledge and experience will allow for efficient processing of reclamations applications under the new regime and avoid administrative problems of transferring current applications. Furthermore, decisions about reclamations are not just decisions about economic development; they also require consideration of other interests (including conservation, recreational and customary interests). If the responsibility is transferred to the Minister for Land Information, significant capacity building at Land Information New Zealand is required. This could result in delays in processing applications. Land Information New Zealand believes the Minister for Land Information should be the decision maker.	
Granting an interest in old and new reclamations: Timing of reclamation decision (whether or not to allow conditional vestings) While conditional vestings are able to be made under s355 of the RMA, in practice most reclamations are consented to and	1 Retain status quo (in practice) i.e. no conditional vestings; OR 2 Allow for conditional vestings (i.e. the interest in	DOC prefers option 1 the retention of a practice whereby the Minister does not grant an interest until after the reclamation is complete and has complied with the relevant coastal permits for its construction. This approach avoids legal and practical difficulties associated with a conditional vesting (vesting an interest before the reclamation is consented and	We prefer option 1.

Issue/status quo	Options	Analysis (costs, benefits, impacts on defined groups, risks and in terms of meeting the objective)	Conclusion
constructed before an interest is granted by the Minister. Therefore, the process in practice is as follows: Regional councils first decide whether a proposal to reclaim is in accordance with the purpose of the RMA and how environmental effects can be minimised and, if satisfied, grant a coastal permit(s) for the reclamation. The Minister of Conservation then decides whether to vest a legal interest in a reclamation in a person and, if so, at what price (for most coastal reclamations under the regime).	the reclamation being granted before the reclamation is consented and built)	built). These difficulties include the fact that consent conditions may be relevant to the later vesting decision. LINZ favours the ability to make conditional vestings (option 2) as it believes it is important that private infrastructure owners have the certainty of property rights and future costs that they need to invest.	
Extant applications Minister of Conservation is considering 21 current applications for an interest in a reclamation. Should these applications be considered under the current regime or under the regime in the new legislation?	1 Applications considered under current applicable regimes; OR 2 All applications considered under new regime but with a choice.	Option 1 provides certainty for all current applicants and would mean they will not have to re-apply for their interest under the new regime. Option 2 may have a negative impact on applicants who can obtain a fee simple title at present (as they fall under a pre-2004 Act regime) and whose application has nearly been determined. If these applicants have to start application process again under new legislation, could have negative impact as will take further time and resources. This can be ameliorated by consulting with the affected applicants to determine how they would like their applications to proceed given the pending legislative change. However, option 2 is likely to be of benefit to most current applicants (as those with a current leasehold interest will be able to apply for a freehold interest)	We prefer option 2:

Issue/status quo	Options	Analysis (costs, benefits, impacts on defined groups, risks and in terms of meeting the objective)	Conclusion
		and simplifies the application process for the decision maker.	
Rights of first and second refusal – issue 1 It has been agreed by Cabinet that where fee simple title is granted in a reclamation, the Crown will have a right of first refusal over reclamations and the relevant coastal iwi or hapū will have a right of second refusal. This raises the question about whether the right of first refusal process should apply to new reclamations (those that have been physically completed after the new legislation comes into force), or to all reclamations (old and new).	1 Limit the right of first refusal process to new reclamations only OR 2 Apply the right of first refusal to all (old and new) reclamations.	Option 2 (applying the right of first refusal process to reclamations that have been physically completed prior to the new legislation coming into force) would mean a retrospective application which could impede development and create unintended outcomes. For example large areas of Wellington and Auckland CBDs are situated on reclaimed land. If the rights of first and second refusal are granted over these old reclamations, it would mean the owners would have to offer them back to the Crown and possibly iwi before they could dispose of them to a third party. A right of first refusal devalues a piece of land. By retrospectively applying a right of first refusal to old reclamations, this would effectively devalue these old reclamations. Option 2 is the preferred option of TPK because it believes that the rationale for providing a right of first refusal applies equally to both categories of reclamation, that is: to balance interests in the foreshore and seabed (including the potential resumption of those areas in the foreshore and seabed for the public and the interests of iwi). Option 1 (a prospective application of the right of first refusal process to reclamations developed under the new regime) is fairer, as anyone developing a reclamation under the new regime will be aware of the right of first refusal before they undertake the project.	We prefer option 1

Issue/status quo	Options	Analysis (costs, benefits, impacts on defined groups, risks and in terms of meeting the objective)	Conclusion
Rights of first and second refusal – issue 2 A further question arises: should a transfer of a fee simple interest in a reclamation by an owner company to another company within the same group (as defined in the Financial Reporting Act 1993) or to a related company of the owner company (as defined in the Companies Act 1993) be permitted or should any alienation from the owner company trigger the right of first refusal process?	1 Allow the transfer of a reclamation within a group of companies or from an owner company to a related company (without triggering the right of first refusal process) OR 2 Provide that any alienation from an owner company will trigger the right of refusal process.	A right of first refusal in any instance is intended to apply where a company disposes of a reclamation in an arm's length transaction. Option 2 would effectively fetter the business operations of a reclamation owner by obliging it to put a reclamation through the right of refusal process when it still needed to utilise the reclamation, albeit by another part of its business. Accordingly, option 1 is appropriate.	We prefer option 1.
What criteria, if any, should apply to the decision maker? DOC currently applies criteria from its Standard Operating Procedure when making decisions about reclamations. It is proposed that criteria for the new regime are based on the criteria applied under DOC's Standard Operating Procedure. The proposed criteria are: a the minimum interest necessary for the development to proceed; b the public interest in the reclamation, including existing or proposed public use for the land and any infrastructure benefit from the proposed use of the reclamation;	1 Have no criteria; OR 2 Apply proposed criteria based on DOC criteria (and expressly provide that the purpose of the RMA is not relevant to reclamation vesting decisions); OR 3 Apply other criteria	The proposal to set out criteria in respect of a reclamation (options 2 and 3) is appropriate because the granting of fee simple title in reclamations as an exception to the New Zealand marine coastal access area should only be made in certain circumstances. The criteria will define these circumstances and will aid the decision making process. The criteria will ensure that that the interests of all New Zealanders can be considered in making reclamation decisions. The criteria that are currently utilised in DOC's Standard Operating Procedure for vesting reclamations work satisfactorily (option 2). Some of these criteria, which take into account the interests of Māori, are consistent with the RMA, i.e.: a the principles of the Treaty of Waitangi; and b the cultural value of the land and surrounding area	We prefer option 2

Issue/status quo	Options	Analysis (costs, benefits, impacts on defined groups, risks and in terms of meeting the objective)	Conclusion
c any constraints and conditions imposed by the resource consent relevant to the reclaimed land; d the principles of the Treaty of Waitangi; e the cultural value of the land and surrounding area to iwi, including any extant Treaty claim or customary interests; and f the value of the land to the Crown, including any natural or historic values associated with the reclaimed land.		to tangata whenua.	
What conditions can be imposed on the interest granted in the reclamation? There is no current clear statutory power to impose conditions on an interest in a reclamation, though this is implicit. Propose inclusion of a clear statutory power for responsible Minister to impose conditions when vesting an interest under s355 of the RMA, including the restrictions and encumbrances in s355(4).	1 Include statutory power for responsible Minister to impose conditions when vesting an interest under s355 (including the restrictions and encumbrances in s355(4)) OR 2 Do not include a statutory power	In the interests of clarity, it is advisable to ensure the Minister can, if necessary, exercise discretion and be able to impose conditions on an interest in a reclamation (option 1). The scope of what conditions can be imposed will be linked to, and limited by, the nature of the statutory decision; for example it will be unlikely for any restrictions to be placed on a fee simple vesting due to the strong nature of that interest.	We prefer option 1
Granting an interest in old and new reclamations: how reclaimed land can be alienated The three regimes outlined above (Land Act, RMA pre-2004 and RMA post-2004) have different rules on how reclaimed land can be	1 Retain provisions from the three regimes; OR 2 Provide that all applications are dealt with in the new regime (RMA or	Providing that all applications are dealt with in the new regime is more efficient and consistent with the preferred approach to land status set out above.	We prefer option 2.

Issue/status quo	Options	Analysis (costs, benefits, impacts on defined groups, risks and in terms of meeting the objective)	Conclusion
alienated.	special Act of Parliament)		
Granting an interest in old and new reclamations: should Crown have discretion about which interest which can be granted It has been agreed that fee simple title will be available in reclamations. Fee simple title is not available under the 2004 Act.	1 Give the Crown the discretion to grant the appropriate interest (i.e. fee simple, leasehold or easement etc); OR 2 Provide that the Crown must grant fee simple title to an applicant who meets the criteria	Interests in reclamations are sought by a range of parties including port companies, airports and marinas. Given the range of interests, it is not necessary or appropriate that fee simple will automatically granted to a successful applicant for an interest in a reclamation (option 2). Also, applying the criteria is largely a balancing exercise, so it is appropriate that the Crown is provided with discretion to grant the interest (option 1). This will vary on a case by case basis.	We prefer option 1

New policy proposal: coastal marae and customary title

20 Since the last RIS, further work has been undertaken to assess the concept of providing for customary title to coastal marae located in areas adjacent to the foreshore and seabed. The purpose of the proposal is to recognise the longstanding and culturally intense connections of marae with their adjacent areas of the foreshore and seabed. The Cabinet paper noted any proposal will need to effectively accommodate the various interests at stake.

Options

21 The following four options have been identified to give effect to this proposal:

- *Option one: Customary title awarded automatically to all 'coastal marae'*

  Customary title would be awarded automatically to all coastal marae. 'Coastal marae' would need to be defined and the area to which customary title would apply would need to be resolved. Criteria could be developed on the basis of the marae's historic association with, and level of exclusivity in, the area (i.e. if third party use and occupation of the area is demonstrated).

- *Option two: Changing the customary title test so that customary title can be claimed (through court or negotiations) by applicants with coastal marae*

  The Cabinet agreed test could be 'relaxed' in areas where coastal marae exist. The test for customary title could include provision that where a longstanding coastal marae exists the requirement for exclusive use and occupation is met.

- *Option three: Recognition of the relationship of coastal marae with foreshore and seabed through direct negotiations with the Crown*

  The existence of coastal marae could be considered in the negotiations process as part of the overall recognition of an applicant group's relationship with the foreshore and seabed. This means that there would be flexibility to award customary title or rights on the basis of the existence of a longstanding coastal marae in negotiations without the need for that applicant group to meet the Cabinet agreed tests. Cabinet approval to any negotiated foreshore and seabed agreement (including for example the recognition of coastal marae) would be required.

- *Option four: Status quo – use of existing provisions for recognition of coastal marae*

  The Cabinet approved test for customary title will enable applicant groups (in court or in negotiations) to use coastal marae as evidence that the relevant foreshore and seabed area is held in accordance with tikanga. Applicants with coastal marae could also apply for customary rights. The mana tuku iho award along with existing tangata whenua provisions in the RMA offer broad recognition of the relationship of the tangata whenua with the foreshore and seabed.

Analysis/conclusions

22 Options one and two offer significant rights to coastal marae that may otherwise not meet tests for customary title or rights. These rights would support the policy objective of the recognition of the longstanding and culturally intense connections of marae with their adjacent areas of the foreshore and seabed.

23 Option one would not, however, effectively accommodate the other various interests at stake as it would lead to awards of customary title in busy and easily-accessible areas, for example popular beaches and harbours.

24 Option two would give applicants a valid claim to customary title where they meet the proposed criteria in the revised test for customary title - either through court or in negotiations. There would be no flexibility to reflect the interests at stake and take into account other interest holders. There would be significant costs and time involved in both court and negotiation processes for the potentially large number of customary title applications. The effects on other users would potentially be significant due to the increase in numbers of customary title awards. This could be mitigated by the development of criteria that would limit customary title to relatively discrete areas.

25 Option three offers flexibility in terms of recognising the relationship of coastal marae with the foreshore and seabed in negotiations. This would allow for the accommodation of other interest holders and for the development of other awards which may better reflect the nature of the interest in that area eg, increased status in resource management processes.

26 Risks include the significant costs of negotiating with all applicant groups with coastal marae and the increased uncertainty for other interest holders of significant numbers of customary title awards (including business development) in the foreshore and seabed.

27 Further risks associated with options one to three include:

- the lack of clear rationale for determining 'coastal marae' and the area in which customary title or rights should be awarded; any definition of a 'coastal marae' would rely on factors such as a certain distance or ownership of abutting land – these can give rise to further issues of fairness when used as the basis of rights recognition; there is a lack of rationale for using marae as the basis of rights recognition in that some areas where customary interests are strong would be excluded from this particular award;

- the inconsistency between the lack of a test for marae-based recognition and the test for customary title to demonstrate the existence of those rights;

- the possible effect on other interest holders of increased numbers of customary title or rights in potentially busy, non-discrete areas;

- the difficulty in identifying who would be accountable or responsible for exercising any right or title provided; and

- a potential Treaty of Waitangi issue could arise by elevating the interests of groups with coastal marae above those groups without coastal marae but who nevertheless claim customary title.

28 Option three and four (status quo) avoid the significant difficulties involved in providing customary title or rights automatically to coastal marae or developing criteria for other awards (i.e. co-management). In addition, coastal marae can utilise the proposed mana tuku iho level of recognition and customary title and rights provisions where they meet the tests. Under those tests, although not explicit, the existence of a coastal marae will be a relevant factor in any applications for customary title or customary rights. However, this option does not offer any recognition of coastal marae beyond what was already agreed to by Cabinet, i.e. any awards of customary title or rights would require the group to meet the legislative tests in negotiations.

29 On balance, we prefer option three, on the basis that it will allow for recognition of the coastal marae in a flexible case by case way which will not compromise other interests or result in customary title being awarded in appropriate places.

30 Te Puni Kōkiri also prefers option three, provided that the ability for such an award to be negotiated is provided for in the new legislation.

Secondary matters

31 A set of awards to recognise customary interests to be prescribed in the new legislation have been developed and were the subject of the previous RIS. There are a number of secondary policy matters proposed in relation to the awards that are the subject of the Cabinet paper that accompanies this RIS.

32 It has been determined that the High Court will have jurisdiction for hearing customary title and rights applications and the general matters such expert advice for the High Court, evidence in the High Court, awards through the courts, and the burden of proof. There are a number of secondary policy matters proposed in relation to the jurisdiction of the High Court.

33 The new legislation needs to be clear about how interests in the foreshore and seabed, including the Crown's, will operate. It is important that the new legislation provides certainty and clarity by stating particular roles and responsibilities including when, how and by whom they are exercised. Some of the proposals were provided for in the 2004 Act and in most instances there is sound policy rationale for continuing the same approach in the new legislation. This is because they are either operational type functions that are necessary to ensure certainty for the management of the foreshore and seabed or they are government assurances which replicated provisions in the 2004 Act such as public access or private title.

Consultation

34 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.

35 The Department of Conservation, Te Puni Kōkiri and LINZ had specific concerns about the proposals contained in this RIS. Their concerns have been included in paper where relevant along with what we have done to address these concerns.

36 In March 2010 the government called for submission on a public consultation document. 1593 written submissions were received on the Government's proposals. Two specific questions were asked in relation to reclamations:

- *Do you agree with the government's proposals regarding reclamations?; and*

- *Do you agree with the length of time proposed for the new form of coastal permit for port companies (50 years or more, renewable)?*

37 18% (294 submitters) of the total of 1593 submitters explicitly answered the first question. Just over half of the respondents to this question agreed with the government's proposals regarding reclamations. The main reason given was the Crown should continue to own the land/act as owner; decisions must be made in line with the RMA/by the Environment Court; all future reclamations should be Crown owned or subject to lease.

38 In respect of the second question, 9% (306 submitters) of the total of 1593 submitters explicitly answered this question. The main reasons given by those who agreed (41%) with this proposal were: because 50 years allows a degree of commercial certainty/viability/stability for port companies; and it is necessary as an incentive to investment and to recoup investment made.

39 Just over one-third of respondents to this question disagreed with the proposed 50-year permit. The reasons given were: the term should be longer; it will not provide certainty/protection/opportunity for critical port infrastructure; there is a need to secure an adequate return on investment for major developments (such as ports, roads, tourism, recreational facilities); all key infrastructure providers should be able to secure either a fee simple title or long-term rights (i.e. 100–150 years, or in perpetuity).

40 The 15 port company CEOs considered that where an area is required for port operations, coastal permits should be available for 100 years, renewable in perpetuity. Where the coastal permit was for non-port-related operations (such as waterfront recreational development) the term should be limited to 100 years.