Ministry for the Environment
Manatū Mō Te Taiao

PROACTIVE RELEASE COVERSHEET

Minister	Hon Chris Bishop	**Portfolio**	RM Reform
Title of paper	SAR – Fast-track approvals Bill	**Date to be published**	11/12/2024

List of documents that have been proactively released

Date	*Title*	*Author*
6 September 2024	Annex to Supplementary Analysis Report – Fast-track Approvals Bill Amendment Paper relating to policy and workability changes (SAR for CAB-460)	Ministry for the Environment

Information redacted **YES**

Any information redacted in this document is redacted in accordance with the Ministry for the Environment's policy on proactive release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Summary of reasons for redaction

S 9(2)(a)

Annex to Supplementary Analysis Report – Fast-track Approvals Bill Amendment Paper relating to policy and workability changes

Coversheet

Purpose of Document	
Decision sought:	Seeking additional policy decisions on policy and workability issues for an Amendment Paper to the Fast-track Approvals Bill
Advising agencies:	Ministry for the Environment, Department of Conservation, Ministry of Business, Innovation & Employment
Proposing Ministers:	Minister Responsible for RMA Reform and Minister for Regional Development
Date finalised:	6 September 2024

Background/Context

This is an Annex to the Supplementary Analysis Report: Fast-track Approvals Bill (updated 24 July 2024), available at: Supplementary Analysis Report: Fast-track Approvals Bill - 1 March 2024 - Ministry for the Environment (treasury.govt.nz).

This annex addresses some of the general policy and workability changes not covered in the original Supplementary Analysis report or the Departmental Report. These changes are proposed to be addressed through an Amendment Paper to the Fast-track Approvals Bill (FTA Bill). We also note that policy issues or design choices that are unlikely to materially impact on the efficacy of the Bill have not been included in the scope of this annex.

Executive Summary

This annex analyses eight distinct policy issues for inclusion in the FTA Bill to ensure its overall workability and that it aligns and delivers on the overarching objectives of the FTA Bill. The policy issues are described in Section 3 and set out the relevant subject-specific context, the problem, and analysis of options including costs and benefits. There have been significant constraints and limitations on the analysis which is detailed further below. A high-level summary of the proposed options and solution for each of the nine policy issues is as follows:

Issue 1 – Freshwater fish related approvals - broadening the scope

Option One – FTA Bill Status Quo / More complex activities will require approval outside the fast-track one-stop shop

Option Two – Expand the scope of freshwater approvals to provide for more complex activities through the fast-track one-stop shop

Preferred option – The preferred solution (Option Two) would provide for these more complex freshwater fisheries approvals via integration into the FTA Bill. Option Two

provides for several amendments to the FTA Bill that clarify and expand the scope of activities that can be approved via the one-stop shop. This option will provide greater certainty for applicants (including by providing timeframes for the approvals process) and reduces the number of decision-makers across approvals. Option Two better manages some environmental risks relative to the status quo but may introduce areas of additional risk to environmental values.

Issue 2 – Land exchanges – process and financial considerations

Option One – FTA Bill Status Quo / Minimal prescribed process

Option Two – Make amendments in the FTA Bill

Preferred option – The preferred solution (Option Two) would amend the Bill to improve the clarity and workability of the fast-track land exchange process. Option Two provides for several amendments to the Bill to improve efficiency, clarity, and ensure more robust decision making. It also aims to mitigate risks arising from the panel (a non-Crown entity) making decisions around Crown liabilities. Clarifying who covers the costs of the exchange will result in additional costs to the applicant; however, this is deemed appropriate as it will be the applicant who benefits from the land exchange and has control over what land is offered up for exchange.

Issue 3 – Priority and order of applications

Option One – Status Quo / No changes to the FTA Bill, left unclear

Option Two – FTA Bill does not reflect existing prioritisation mechanisms in the 'parent' legislation

Option Three – FTA Bill reflects existing prioritisation mechanisms in the 'parent' legislation

Option Four – FTA Bill reflects existing prioritisation mechanisms in the 'parent' legislation with exception pathways

Preferred Option – Option three is the preferred option as it addresses the policy problem and reduces the risk of challenge to the fast-track process. This option also best reflects the obligations under Te Tiriti comparatively to the other options considered. This option provides greater certainty of the investment of existing users and applicants under both parent legislation and the fast-track regime, maintaining confidence to system users.

Issue 4 – Resource allocation

Option One – FTA Bill Status Quo / Minor changes to the FTA Bill to provide for s124A-C, Bill largely left unclear

Option Two – FTA Bill partially reflects existing frameworks: applications can be approved, where they would normally not be under existing rules or limits with an exception that some specified allocation limits are retained

Option Three – FTA Bill reflects existing frameworks: applications need to comply with existing allocation rules and limits

Preferred Option – Option three is the preferred option as it best addresses the policy problem without significant changes to the proposed system. This option also best reflects the obligations under Te Tiriti comparatively to the other options considered. This option provides a low-risk intervention to enable a level of certainty for wider system users but

does not ensure allocation fully within limits as this would require an additional component which is not feasible to deliver and has not been included in the option considered.

Issue 5 – Land management decisions

Option One – FTA Bill Status Quo / Retain existing drafting with expert panel as decision maker

Option Two – Risk management amendments to reduce the risk to the Crown

Preferred Option – Option Two is the preferred option. Concessions, land access arrangements under the Crown Minerals Act 1991 (CMA), and land exchanges, are landowner permissions that reflect the Crown's property rights. These approvals differ in nature from the other approvals in the FTA Bill and expose the Crown to potential legal, financial and health and safety risks. We have proposed several changes to enable these risks to be more effectively considered and mitigated by the expert panel, as well as opportunities for relevant Ministers to have a role in decision-making. The proposed approach is likely to have minor financial costs for developers, but significant benefits for the Crown and small benefits to developers and the general public, in the form of improved risk management (e.g., financial, legal, health and safety).

Issue 6 – Recovery of third-party costs

Option One – FTA Bill Status Quo / Retain current provisions, organisations (such as iwi, hapū, and Treaty settlement entities) that have a statutory role in the process are not explicitly empowered to recover costs

Option Two – Provide the ability for organisations (such as iwi, hapū, and Treaty settlement entities) that have a statutory role in the process to have their costs recovered

Preferred Option – Option Two best mitigates the risk of Option One, that some organisations that have a statutory role are not adequately resourced or supported to participate in the process, therefore undermining the effectiveness of wider provisions.

Issue 7 – Leases and rights of first refusal

Option One – FTA Bill Status Quo / RFR holders can comment on applications

Option Two – Require written approval from RFR holders

Preferred option – Option Two is the preferred option. Several Treaty settlements include provisions that, where conservation land is to be leased for a period of 50 years or more (which may happen under fast-track for infrastructure such as dams), the relevant post-settlement governance entity has a right of first refusal (RFR) over that land, on the same terms as the person/organisation seeking to lease the land. We have proposed that when applications for such leases are made, there is a requirement to provide written approval from the RFR holder at the time of the referral application, which will ensure panels have all the relevant information to make lawful decisions on this matter. This may make the application process somewhat more complex for the applicant but is likely to reduce the risk of judicial review and unlawful, voidable approvals.

Issue 8 – Purpose clause

Option One – FTA Bill Status Quo / Retain the current purpose clause

Option Two – Update the purpose clause removing the process reference

Preferred option - Option two provides for additional benefits for the criteria of certainty and best responds to the issue.

How recommended options will be implemented and reviewed is outlined in section 4.

Limitations and Constraints on Analysis

The proposals presented in this RIS are constrained by decisions that have already been made by Ministers to progress the FTA Bill as per the coalition agreement commitment made between the National Party and the New Zealand First Party, which requires a fast-track consenting Bill to be introduced in the Government's first 100 days in office.

We have identified the following limitations and constraints:

- **Constrained timeframes** – the work to progress the FTA Bill is occurring at pace. Ministers are committed to having the FTA Bill enacted by the end of 2024.
- **Limited scope** – scope of options and assessment is constrained given the previous direction and decisions on the wider work of the FTA Bill, including the Cabinet direction [refer CAB-24-MIN-0008] to only policy options that achieve the direction for a one-stop shop. We have limited this annex to only assess options that fit within this scope. Ideally, we would have undertaken an analysis looking at the wider scope of options, impacts, benefits and risks.
- **Limited analysis** – given timeframes and availability of data and evidence the analysis undertaken across each of the issues has been limited. Each issue identifies the status quo and attempts to identify what would transpire in the absence of intervention i.e., when change is necessary to ensure workability of the FTA Bill.
- **Cost benefit** – in most cases this has been difficult to quantify. Where possible we have anticipated where costs and benefits will likely fall, however their monetary value is difficult to quantify in the time we have had available to complete this analysis. The cost benefit analysis is mainly qualitative due to the timeframe constraints, data limitations and uncertainty as to the impacts of various proposals once implemented.
- **Consultation/engagement** – many of the issues considered within this annex were the subject of public consultation through the select committee of the FTA Bill through the select committee process, but not all. The assessment of Treaty impacts and cost/benefit analysis for Māori groups throughout this annex are therefore, in some cases, not informed by engagement with affected groups. We have consulted with Ministry for Business, Innovation & Employment and the Department of Conservation through the development of this annex.

These limitations and constraints mean the full implications of decisions across the issues are, in many cases, uncertain and have limited the level of confidence we can have in the policy analysis and cost benefit sections.

Responsible Manager
Martyn Pinckard Executive Director Environmental Management and Adaptation Ministry for the Environment [redacted] *06 September 2024*

Quality Assurance	
Reviewing Agency:	Ministry for the Environment
Panel Assessment & Comment:	*The Regulatory impact analysis panel (Ministry for the Environment) has reviewed the "Annex to Supplementary Analysis Report – Fast-track Approvals Bill Amendment Paper 1 Policy Matters" (Annex to the SAR) using standard assessment criteria (complete, convincing, clear and concise, and consulted).* *The Panel notes that the original SAR for the Fast-track Approvals Bill was exempt from the requirement for quality assurance as quality assurance of regulatory impact statements was suspended for decisions relating to 100 Day Plan proposals taken within the 100 Days. The original SAR was internally peer reviewed and considered to be fit-for-purpose to inform Cabinet's consideration, given the time constraints.* *The Annex to the SAR assesses the impacts of proposals to improve the workability of the Fast-track Approvals Bill. The Panel considers that the Annex to the SAR* ***partially meets*** *the Quality Assurance criteria. The Annex to the SAR is relatively clear and concise given the range and number of proposals. It articulates the rationale for the proposals, the alternative options considered, and the key constraints and limitations. It meets the convincing criterion for its identification and assessment of options for amendments to the Fast-track Approvals Bill to improve its workability. However, while the Annex to the SAR improves on the original SAR it has been developed in compressed timeframes with limited data and evidence to inform assessment of options and impacts of proposals meaning the analysis is largely qualitative in nature.*

Section 1: Introduction

1. This document is an annex to the previous Supplementary Analysis Report: Fast-track Approvals Bill (FTA Bill) [CAB-24-Min-0066 refers]. It provides analysis of policy and workability issues for inclusion in an amendment paper to the FTA Bill and is intended to be read in conjunction with the previous Supplementary Analysis Report.

2. The problem, objectives and criteria are in line with the substantive information detailed in the original Supplementary Analysis Report, they are briefly outlined below. The document then sets out the following eight distinct policy issues for individual assessment:

    - Issue 1 – Freshwater fish related approvals - broadening the scope
    - Issue 2 – Land exchanges – process and financial considerations
    - Issue 3 – Priority and order of applications
    - Issue 4 – Resource allocation
    - Issue 5 – Land management decisions
    - Issue 6 – Recovery of third-party costs
    - Issue 7 – Leases and rights of first refusal
    - Issue 8 – Purpose clause.

Section 2: Diagnosing the policy problem

What is the policy problem?

3. The processes for seeking approvals for major projects in New Zealand are slow, costly and complex. The approval processes place insufficient value on the positive economic and social benefits of development.

4. There is also a range of legislation that approvals may be required for, and this can create a barrier to progressing major development projects given the complexity and inconsistency across these different statutes.

5. This document is concerned with policy and workability issues that will improve the FTA Bill and the “fast-track regime” for significant infrastructure and development projects.

What objectives are sought in relation to the policy problem?

6. There are four objectives in relation to the policy problem:

    - more rapid and less costly consenting processes for major projects
    - simpler and less burdensome application processes, across several regulatory systems
    - an increase in favourable decisions for major projects that have regionally or nationally significant benefits

- uphold all Treaty settlement and other arrangement[1] obligations.

7. In designing a policy intervention, officials are mindful of the Coalition Government's commitment to upholding redress in Treaty of Waitangi settlements, and to managing adverse impacts on the environment.

Section 3: Options identification and analysis

What criteria will be used to compare options to the status quo?

8. The Ministry has used the following criteria to compare the different options. These criteria are weighted equally.

Criteria	Description
Expediency (Objective 1)	to achieve the outcome sought in the quickest timeframe available
Reduce cost and provide savings (Objective 1)	on infrastructure developers, local communities, and future generations
Simplicity (Objective 2)	to reduce bureaucracy needed to support decision-making and minimise the number of decisions needed to achieve an outcome
Certainty (Objective 2)	to provide major projects with confidence that approvals will be granted, and the development can proceed, that they have sufficient assurance to rely on to receive funding and financing support
Effectiveness (Objective 3)	prevent major projects from being delayed by rules and broader policy objectives set by resource management national direction, regional/district planning provisions, conservation statutory documents, and the purpose for which conservation land is held
Uphold Crown obligations under Te Tiriti o Waitangi (Objective 4)	honour the Treaty and uphold Treaty settlements and other arrangements
Manage Risks	the potential of the option to result in unintended consequences

9. The following key is used across each of the options analysis tables:

Example key for qualitative judgements:	
++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

10. The options analysis tables use the status quo to refer to what is currently in place if no further changes were made to the FTA Bill. The status quo lines will always use 0 across the criteria and the other option/s will be compared against this.

[1] Cabinet agreed that, in addition to Treaty settlements, other legislative arrangements would be upheld including those under the Marine and Coastal Area (Takutai Moana) Act 2011, Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, Mana Whakahono ā Rohe and joint management agreements under the RMA.

Cost benefit tables

11. The tables that explain the costs and benefits for the preferred option uses the affected groups as was listed in the original Supplementary Analysis Report. These tables have been completed as much as possible, however timeframe constraints have limited the ability to complete this for all affected groups. Dashes are used to indicate when this hasn't been completed, whereas 'N/A' has been used when it has been assessed and impacts were found to be not applicable.

Issue 1 – Freshwater fish related approvals

What is the policy problem?

12. As introduced, the Bill provides for approval by fast-track resource consent of a range of activities in freshwater environments that would otherwise require separate approvals under the Freshwater Fisheries Regulations 1993 and/or the Conservation Act 1987. These activities are less complex, require less technical expertise to assess and generally have lower environmental effects.

13. Approval of more complex and technical structures and activities in freshwater, such as dams or other large, permanent structures that obstruct fish passage, would still need to be obtained outside the one-stop shop process. This is not consistent with the policy intent of the one-stop shop which is to allow applicants to get relevant approvals through one efficient process.

14. The objectives and criteria used are in line with the original Supplementary Analysis Report and are noted above.

15. The options below reflect what the Department of Conservation (DOC) has put to Ministers. These were still under consideration by Ministers at the time this annex was written.

What options are being considered?

Option One – Bill Status Quo / More complex activities will require approval outside the fast-track one stop shop

16. Under Option One, the following could be approved via a fast-track resource consent because they are well-understood activities that can be effectively dealt with through the fast-track resource consent processes:

    - approval of culverts and other structures to which the New Zealand Fish Passage Guidelines apply
    - temporary works for infrastructure projects in freshwater bodies that would affect fish passage or local habitat
    - possessing and killing noxious fish as specified in Schedule 3 of the Freshwater Fisheries Regulations that are encountered during fish salvage or other operations
    - fish salvage, transfer or release of live aquatic life into the same water body under sections 26ZM(2)(a) and 26ZM(3)(b) of the Conservation Act.

17. Decisions on fast-track approvals are made by the expert panel, which can place conditions on consents, considering best practice standards and the New Zealand Fish Passage Guidelines.

18. Under this option, approvals for more complex and technical freshwater activities, including permanent, large, instream structures such as dams, would need to be sought outside the FTA Bill process, using existing legislation (Freshwater Fisheries Regulations).

19. The applicant would be able to apply to the fast-track process for approvals such as resource consents and/or a concession but apply separately under normal processes for freshwater fisheries approvals. The decision-maker for such approvals would be the Director-General of Conservation. There are no statutory timeframes for freshwater fisheries approvals under regulations 42 and 43 of the Freshwater Fisheries Regulations.

Option Two – Expand the scope of freshwater approvals to provide for more complex activities through the fast-track one stop shop

20. Option Two would expand the scope of approvals within the FTA Bill, so that more complex activities within freshwater are included in the FTA Bill framework. The expert panel would be the decision-maker on these approvals.

21. Permanent, large structures may have significant effects on freshwater species and habitats. Assessment of these effects (and how to mitigate them) is technically complex so Option Two has these more complex approvals covered by a fast-track freshwater fisheries approval (rather than being dealt with under the fast-track resource consent). This would include the following provisions:

    - requirements for information that applicants must provide
    - DOC would provide a report to the expert panel
    - the expert panel would be required to consider this report and a series of matters relating to the effects of the proposed activity (including alignment with best practice and the New Zealand Fish Passage Guidelines)
    - the expert panel may recommend conditions necessary for managing effects (in relation to both consents and approvals) and an applicant must comply with conditions set.

22. Because the timeframes for decision-making under the FTA Bill would apply to freshwater fisheries authorisations, regulation 44(1) of the Freshwater Fisheries Regulations (which can require a decision from the Director-General within up to 6 months) would not apply. This will provide clarity around timeframes for decisions on applications relating to dams and diversions.

23. The New Zealand Fish Passage Guidelines have recently been updated and their scope will now include more complex structures such as dams. The Guidelines can therefore no longer be used to distinguish between what can be covered by a resource consent and what would need a separate approval (the proposal under Option 1). Option Two provides greater clarification as to what is a “more complex” activity that would need a freshwater fisheries approval under the FTA Bill by referencing existing regulations, rather than non-statutory guidelines (which may be amended over time, creating uncertainty around scope).

How do the options compare to the status quo/counterfactual?

	Option One – FTA Bil Status Quo / More complex activities will require approval outside the fast-track one-stop shop	Option Two – Expand the scope of freshwater approvals to provide for more complex activities through the fast-track one-stop shop
Expediency	0 Requires applicants for more complex activities to seek authorisation outside the one-stop shop without clear timeframes. There are no timeframes set for decision-making on approvals under Freshwater Fisheries Regulations 42 and 43	++ Provides for more complex freshwater fisheries approvals to be obtained alongside other the FTA Bill approvals and within the same timeframe
Reduce cost and provide savings	0 There are costs associated with approvals sought through the one stop shop and via separate conservation processes (for more complex activities)	0 No substantive cost difference compared to the status quo
Simplicity	0 Engagement in more than one process is required with different decision-makers	++ Reduces the number of processes and decision-makers on approvals
Certainty	0 Has some uncertainty given reference to non-statutory guidelines in defining what activities can be covered by a consent. Having different decision-makers and process for more complex activities may create uncertainty of approvals being granted	++ The greater weighting of the purpose of the FTA Bill in the fast-track process provides greater certainty of approvals being granted
Effectiveness	0 Approvals outside the one-stop shop may involve a wider range of considerations	++ The development-focussed purpose of the FTA Bill is weighed more above freshwater fisheries considerations
Uphold Crown obligations under Te Tiriti o Waitangi	0 Rights granted to use, control or divert water can impact Māori interests, including taonga species and areas of particular significance for Māori	0 No significant additional Treaty implications
Manage risks	0 Risks associated with more complex activities would be managed through conservation legislation	- - Some additional risk to freshwater fisheries given the greater weighting of the purpose of the FTA Bill may result in the allowance of greater impacts. This is

		mitigated by the provision of advice from DOC and the requirements to consider best practice standards
Overall assessment	Not recommended	Preferred option

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

24. Option Two provides for more complex, technical projects to obtain freshwater fisheries approvals through the one stop shop. This presents efficiencies for applicants and provides greater certainty to applicants that approvals will be granted. Timeframes for decision-making on complex activities are aligned with those for other approvals and the number of decision-makers is reduced relative to the status quo. Option Two retains some risk to freshwater fisheries (e.g., ensuring provision for fish passage and transfer of fish to suitable habitat), and introduces additional potential risk in relation to large, permanent structures such as dams.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Project developers	No additional costs identified	N/A	N/A
Central government departments (as regulators)	Requires DOC to provide a report to the Panel in fixed timeframes for more complex approvals but this will be cost-recoverable. DOC holds and/or could secure the expertise required to provide a report to the panel	Low	Medium
Environmental Protection Agency (EPA)	No additional costs identified	N/A	N/A
Local government	No additional costs identified	N/A	N/A
Consumers / general public as part of current generation	May result in greater impacts on freshwater fisheries may be of concern	Medium	Medium
Consumers / general public as part of future generations	May result in greater impacts on freshwater fisheries which may be of concern	Medium	Medium
Iwi/Māori	May result in greater impacts on freshwater fisheries which would concern Māori	Medium	Medium
Total monetised costs		0	
Non-monetised costs	May introduce additional environmental risk	Low-Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Project developers	Increased certainty on process, improved efficiency, and greater	Medium	Medium

	certainty of approvals being granted. Reduced number of processes developers are required to engage in		
Central government departments (as regulators)	No additional benefits identified	N/A	N/A
Environmental Protection Agency (EPA)	No additional benefits identified	N/A	N/A
Local government	No additional benefits identified	N/A	N/A
Consumers / general public as part of current generation	Reduced number of processes to engage in	N/A	N/A
Consumers / general public as part of future generations	No additional benefits identified	N/A	N/A
Iwi/Māori	No additional benefits identified	N/A	N/A
Total monetised costs		0	
Non-monetised benefits	-	Medium	Medium

Treaty impacts

25. Rights granted to use, control or divert water can impact Māori interests, including taonga species and sites of particular significance for Māori. Freshwater sites and values are recognised in some Treaty settlements and can be subject to specific management arrangements. Option 2 brings into scope of the FTA Bill additional structures that can potentially have more significant effects on freshwater species, habitats and associated values, including cultural values. While it is recognised that the preferred option may have an impact on iwi/Māori, the time and resource available to undertake this analysis has not enabled further engagement with iwi/Māori to determine the significance of these impacts.

Issue 2 – Land exchanges

What is the policy problem?

26. Land exchanges allow developers to acquire public conservation land (PCL), while providing alternative land to the Crown, which would then become PCL.

27. Land exchanges are a very different type of decision compared to other approvals in the fast-track process. They are a land transaction which requires appropriate levels of due diligence including site visits, contamination assessments, and a good understanding of what risks, costs and liabilities are being taken on by the Crown with the newly acquired land.

28. Land exchanges are currently provided for in the FTA Bill and officials have worked through many of the risks that arise from their inclusion such as conservation and Treaty implications. For example:

    - the FTA Bill currently requires the Minister of Conservation must be satisfied that an exchange will result in a net conservation benefit to approve the transaction.

- The Minister must consider (but is not bound by) Chapter 6 of the Conservation General Policy which sets considerations and restrictions on exchanges.
- DOC will prepare a report which the panel must consider that assesses both the Crown's land and the land being offered in return. The report would include assessments of conservation values, Treaty implications and ongoing management practicality.

29. However, there are several policy areas where further decisions have been necessary to improve the clarity and workability of the exchange process and to mitigate risks that arise from the inclusion of land exchanges in the fast-track process:

- progressing land exchange versus concessions/access arrangements
- alignment with the broader process
- interaction with existing users of conservation land
- approach to differing financial values
- consideration of Crown liabilities
- cost recovery for land exchange processes.

30. The options below reflect what DOC has put to Ministers. These were still under consideration by Ministers at the time this annex was written.

What options are being considered?

Option One – FTA Bill Status Quo / Minimal prescribed process

31. Currently, the FTA Bill lacks clarity as to how a land exchange would work within the fast-track process.

32. Under Option One, no amendments would be made to the FTA Bill to provide further information about the land exchange process. This would mean that the process was unclear for all involved parties. For example, the following things would be unclear in the FTA Bill:

- how the land transaction process fits into the fast-track expert panel process
- how existing rights holders over the land proposed for exchange would be able to influence how their rights are affected
- whether the Crown could be committed by the expert panel to find additional appropriations affecting its ability to fund other priority areas
- whether DOC and concessionaires on land proposed for exchange could recover costs associated with working through the land exchange process
- uncertainty as to whether applicants seeking a land exchange could apply for a concession/access arrangement as an alternative to a land exchange. This could result in unnecessary effort, cost and duplication for all parties involved in the fast-track process
- how the expert panel can consider Crown liabilities associated with a land exchange.

Option Two – Clarifications to process and parameters

33. This option includes changes in the following policy areas:

- progressing land exchange versus concessions/access arrangements
- alignment with the broader process

- interaction with existing users of conservation land
- approach to differing financial values
- consideration of Crown liabilities
- cost recovery for land exchange processes.

Progressing land exchange versus concessions/access arrangements

34. To ensure there is no unnecessary duplication and that the expert panel process doesn't take longer than necessary, applicants should be able to apply for either a land exchange or concession/access arrangement for a particular activity on a particular piece of land (not both).

35. If a land exchange failed, and an applicant wished to attempt a concession/access arrangement instead, applicants could submit a further substantive application for the concession/access arrangement and a panel would be convened to consider that. They would not need to be re-referred to the fast-track and would be prioritised under the broader prioritisation approach agreed by Ministers.

Alignment with the broader process

36. To ensure that the land exchange process aligns with the broader fast-track process, the expert panel decision to approve a land exchange through the fast-track process would be a 'conditional approval' that outlines legal and technical conditions to be met before the final contracts for the exchange are signed.

37. The FTA Bill would also specify that the completion of relevant steps following conditional approval is at the applicant's cost. This aligns with other cost recovery provisions in the FTA Bill which ensure that the party benefitting from the exchange (the applicant) covers costs incurred.

Interaction with existing users of conservation land

38. A land exchange may prevent any existing rights holders (e.g., concessionaries or those with easements across the land) from exercising their rights.

39. Concession holders would be granted involvement in the consideration of exchanges. In keeping with the overall architecture and policy intent of the fast-track process and approach to other affected parties:

    - existing rights holders would be included in the list of parties invited to comment on projects that involve land exchanges
    - the applicant would need to consult with existing rights holders prior to applying for referral, and to include their comments as part of their application.

40. Where existing rights holders are impacted by a proposed land exchange, it will be necessary for an agreement to be reached between the parties to the contract (DOC and the rights holder), and the land exchange applicant, or for the matter to be resolved in another way that would enable the exchange to be progressed. Any reasonable costs incurred in the negotiation process with existing rights holders would be recoverable from the applicant by DOC and the rights holder.

41. This agreement does not need to be reached prior to applying for an exchange. Where resolution is outstanding, this would be included as a condition of the approval that must be satisfied before the exchange can occur. Failure to do so would expose the Crown to substantial risk of litigation and compensation.

Approach to differing financial values

42. The FTA Bill would specify that the Crown will not absorb losses resulting from a land exchange. This would ensure that the Crown would never fund the difference in land value of an exchange, but that the applicant is required to pay the difference to the Crown to offset any Crown losses that would result from the land exchange. This will influence applicants' decisions on what land they offer as part of an exchange.

43. This is considered appropriate given the applicant has full discretion over whether they apply for an exchange (as opposed to seeking a concession or access arrangement) and over which parcel of land they offer the Crown in exchange. They are therefore able to mitigate any potential financial losses they may incur as a result of the exchange.

44. Ensuring that the Crown is not liable to pay the difference is particularly important with the expert panel as the decision-maker. Non-Crown entities making decisions involving potential loss in value for the Crown's accounts or around payments for which the Crown must then make, would create significant financial risks for the Crown.

Consideration of Crown liabilities

45. The FTA Bill currently requires the decision-maker to consider the financial implications of a land exchange but not non-financial liabilities.

46. Land to be acquired by the Crown through an exchange may have liabilities which will require consideration such as roads requiring maintenance or potential health and safety risks that must be managed.

47. The inclusion of the following provisions in the FTA Bill would ensure the panel considers the ongoing implications of the exchange to the Crown:

    - that Crown liabilities are required to be included in DOC's report
    - that Crown liabilities must be considered by the decision-maker in their assessment of the proposed exchange
    - that conditions may be applied to the conditional approval of a land exchange that protect the Crown's interests.

How do the options compare to the status quo/counterfactual?

	Option One – FTA Bill Status Quo / Minimal prescribed process	Option Two – Clarifications to process and parameters
Expediency	0 Little certainty which could mean processes are unclear and involve duplication of effort and longer timeframes	++ Ensures that a land exchange can be processed through the FTA Bill with as much certainty and speed as possible
Reduce cost and provide savings	0 Unclear where some costs will lie and may result in unforeseen costs for the Crown	- May increase the cost to applicants as changes to policy include ensuring the applicant bears the cost of the exchange process and any losses to the Crown through it. However, the applicant will only seek an exchange if beneficial to them and have control over the parcel of land they offer, so it is appropriate that they cover costs incurred
Simplicity	0 The lack of clarity in the FTA Bill under the status quo will result in significant complexity for all parties as process will remain unclear	++ Provides clarity and more workable processes that avoid duplication
Certainty	0 Little certainty as to how the land exchange process works in the Fast-track Approvals Bill	+ Increases certainty around the process and viability of land exchanges prior to the panel process. Also provides certainty as to the process if a land exchange is not deemed to be successful
Effectiveness	0 Without these mitigations and a clear process, it is unclear whether the inclusion of land exchanges in the FTA Bill will work effectively	- Additional requirements around difference in land value and consideration of Crown risks
Uphold Crown obligations under Te Tiriti o Waitangi	0 Land exchanges may be requested that could have Treaty implications, e.g., through affecting what land could be included in future Treaty settlements	0 This option does not substantially change the FTA Bill's status quo Treaty implications
Manage Risks	0 Risks are not well mitigated through the FTA Bill as it currently stands. This includes risks around making decisions about Crown land, liabilities and finances	++ Manages financial, health and safety and legal risks for the Crown
Overall assessment	Not recommended	Preferred option

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

48. Option 2 best addresses the policy problem. These amendments are required for the FTA Bill to include a workable and clear process for land exchanges.

49. The amendments in Option 2 are necessary to ensure that applicants can exchange land through the FTA Bill if they wish but that the process is efficient, robust and does not create significant risks to the Crown, both legally and financially.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Project developers	Activities reasonably necessary to effect the exchange will all be cost-recoverable from the developer. Developers will be expected to meet cost differences in land values	Low – the availability of land exchanges is likely to reduce costs in the long-run. Developers can choose what piece of land to offer the Crown for exchange	Medium
Central government departments (as regulators)	No additional costs identified	N/A	N/A
Environmental Protection Agency (EPA)	No additional costs identified	N/A	N/A
Local government	No additional costs identified	N/A	N/A
Consumers / general public as part of current generation	No additional costs identified	N/A	N/A
Consumers / general public as part of future generations	No additional costs identified	N/A	N/A
Workers	No additional costs identified	N/A	N/A
Iwi/Māori	No additional costs identified	N/A	N/A
Total monetised costs		0	
Non-monetised costs		Low	Medium
Additional benefits of the preferred option compared to taking no action			
Project developers	Provides greater clarity, allowing developers to plan for costs incurred and steps they will need to take	Medium	Medium
Central government departments (as regulators)	Ensures that financial implications, obligations and liabilities are clear before an exchange is agreed to	High	Medium
Environmental Protection Agency (EPA)	No additional benefits identified	N/A	N/A

Local government	-	-	-
Consumers / general public as part of current generation	Ensures that, where a land exchange occurs, the risks and benefits to the general public (e.g., health and safety risks associated with new PCL) are fully understood and can be properly mitigated	Low	Medium
Consumers / general public as part of future generations	As above for current generation	Low	Low
Workers	No additional benefits identified	N/A	N/A
Iwi/Māori	No additional benefits identified	N/A	N/A
Total monetised benefits		0	
Non-monetised benefits		Low - High	Low -Medium

Treaty impacts

50. While there may be further impact on iwi/Māori in addition to what is detailed above, the time and resource available to undertake this analysis has not enabled further engagement with iwi/Māori to determine if there are impacts and, if so, the likely significance of these.

Issue 3 – Priority and order of applications

What is the policy problem?

51. Issues of priority and certainty of allocation rights are very important to applicants and holders of existing approvals. In particular, the FTA Bill is currently largely silent or unclear on:

    - how the priority between applications made under the fast-track system is determined (i.e., whether a first in, first served or other approach applies)
    - whether approvals issued under the FTA Bill will be able to exceed current resource allocation limits and, if so, how any implications for existing approval holders will be considered and managed
    - whether applications for renewing existing approvals under any regime will have priority over applications for new activities under both the fast-track system and 'parent' legislation
    - how competing applications to limited resources will be prioritised under the FTA Bill and between fast-track applications and applications already made under other legislation
    - whether and how projects may be prioritised in terms of being referred to an expert panel – this is an issue for both listed and referred projects.

52. The fast-track system is likely to lead to competing applications for the same limited resources and incompatible applications for overlapping space. Limited resources such as freshwater, coastal space, conservation land, minerals and geothermal resources may be subject to a range of proposed competing applications. These uses may

include irrigation, aquaculture, critical infrastructure, mining, renewable energy production, and tourism.

53. Applications made under the fast-track regime may also compete with earlier in time applications made under the 'parent' legislation (e.g., the Resource Management Act 1991 (RMA), the Crown Minerals Act 1991 (CMA), and the Conservation Act 1987). Applications may also be made for activities that, if approved, could negatively impact the access to resources authorised by existing holders of rights allocated under 'parent' legislation.

54. The existing 'parent' legislation currently manages the prioritisation of applications for competing activities in various ways. For RMA applications, subject to specific limitations, a 'first in, first-served' approach applies as a default, with the first to file a complete application taking priority. An application with priority will be processed first and assessed as if the other applications do not exist.

55. The next application in line is then assessed taking into account the priority application (if that has been approved). The first in, first served approach to the order in which applications are processed is not explicitly stated in the RMA and has been developed by the courts over time (particularly in the context of competition for coastal space for aquaculture and for the use of freshwater).

56. While 'first in, first served' is the default for the order in which competing applications are to be processed, the RMA enables the Minister and local authorities to use alternatives in certain situations. For example, RMA plans can include allocation methods and limits on resource use, and consent authorities can impose conditions on resource consents recognising flow sharing arrangements between resource users. In respect to coastal marine space, the RMA has mechanisms which Ministers can use to deal with competing marine farm consent applications.

57. The RMA also contains some provisions preventing existing resource users on fixed term consents being gazumped by other resource users. In particular, the RMA prioritises reconsenting applications from existing resource users over other applicants (subject to certain conditions).

58. The courts have also considered whether consents can be granted that would detract from consents already granted to someone else. Again, the RMA is not explicit on this point. In Aoraki[2] the High Court found that a where a resource was already fully allocated in a physical sense to a permit holder, a consent authority could not lawfully grant another party a permit to use the same resource. That case concerned an application to extract water for irrigation from Lake Tekapo in circumstances where the water in the lake had already been fully allocated to Meridian and other users.

59. Approvals under the Conservation Act are also generally processed on a first in, first served basis, but that Act also empowers the Minister for Conservation to undertake an allocation process (for example a tender[3]).

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[2] *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC).

[3] For example, DOC has used a tender to manage excess demand in relation to landing rights at the Milford Aerodrome.

60. The fast-track approvals system provides a separate pathway, potentially enabling competing applications for limited resources to avoid queues, and other processes which determine the order applications are considered and to be progressed more rapidly.

61. In particular, the FTA Bill allows applications for approvals not previously able to be applied for such as prohibited activities, land exchanges for various categories of conservation land, and approvals inconsistent with water conservation orders. Existing frameworks, such as water allocation in regional plans, or rules relating to marine farms, are considerations in the FTA Bill but do not carry as much weight compared to its purpose of facilitating the delivery of infrastructure and development projects with significant regional or national benefits.

62. The objectives and criteria for this issue are outlined in para 8 and 10 above and are in line with the original Supplementary Analysis Report.

63. The issues of priority and the issues on the allocation of a limited resource are related but separate issues and have been considered separately below.

64. The focus of the options relate to primary legislation interventions and no options have been included that relate to spatial planning, flexible licensing, better allocation framework/principles and ensure equitable outcomes as these are broader system options that are not within scope at this stage of the FTA Bill development.

What options are being considered?

Option One – Status Quo / No changes to the FTA Bill, left unclear

65. This option would see no changes to the FTA Bill. As noted above, the FTA Bill does not contain complete direction on issue of priority. Therefore, this option is difficult to assess as the outcome of leaving the FTA Bill without explicit direction is unknown. However, the FTA Bill does contain some priority features:

    - existing activities to continue to operate while renewal approvals are sought. The FTA Bill does apply sections 124 and 165ZH of the RMA, and section 17ZAA of the Conservation Act
    - under clause 6 of Schedule 12, relating to the Fisheries Act 1996, the Chief Executive of the Ministry of Primary Industries must give higher priority to processing a request made by a panel for a recommendation on an aquaculture decision than a request made because of consents granted under the RMA
    - clause 3 of Schedule 9 enables consideration of additional matters, including alternative uses of space in the Exclusive Economic Zone that may have better strategic, economic, environmental purposes than the activity being applied for. The referral minister may consider these factors when deciding to refer a project.

66. The FTA Bill would remain unclear on whether fast-track applications for new activities could proceed ahead of competing applications lodged first under ‘parent’ legislation. The FTA Bill also has limited mechanisms to determine where there are competing or conflicting uses or to manage situations where multiple fast-track applications are received at approximately the same time for the same limited resource.

Option Two – FTA Bill does not reflect existing prioritisation mechanisms in the ‘parent’ legislation

67. Under this option, fast-track applications operate entirely separately to existing frameworks. In terms of priority, fast-track applications themselves are organised ‘first in, first served’. This means the first applicant to lodge a complete substantive application at the panel stage would be first in the queue and be assessed ahead of other applications within the fast-track system.

68. There are no links to ‘parent’ legislation, so fast-track consents are considered entirely separately from existing frameworks. This means existing users do not have priority when the renewed use of a resource is being considered. Those who have applications under existing legislation which seek to use the same limited resource as a fast-track project are bypassed.

69. This option is similar to option one although amendments are made to avoid any doubt that existing frameworks are not binding on fast-track decisions.

70. That prioritisation of applications for new activities within the fast-track system is determined by a ‘first in, first-served’ approach. This approach would apply only to the substantive decisions in determining the order of substantive applications to be heard by expert panels.

71. This option recognises that fast-track projects have a higher priority than applications under usual approvals processes.

Option Three – FTA Bill reflects existing prioritisation mechanisms in the ‘parent’ legislation

72. This option gives established activities and existing approval holders a level of protection over new applications for the same resource. This reflects Section 124B of the RMA and its related provisions by giving priority to an existing approval holder to have their new application determined ahead of anyone else competing for the same resource.

73. This option would require further amendments to the FTA Bill to clarify that any applications being progressed under parent legislation will retain their priority order in relation to competing applications made later under either that parent legislation, or the fast-track process. This would give people confidence to submit applications under existing ‘parent’ legislation if this is the most appropriate or preferred pathway, without the risk that their application is gazumped by an application made later under the fast-track process.

74. For fast-track applications themselves, competing applications would continue to be treated first in, first served. This means the first applicant to lodge a complete substantive application at the panel stage would continue be first in the queue and be assessed ahead of other applications within the fast-track system.

75. For concessions under the Conservation Act, this option prevents the panel from agreeing to grant a concession over land where the new concession would not be compatible with the existing one, for example if one is for exclusive occupation. For exchanges under the Conservation Act this option prevents the panel from agreeing to authorise an exchange over land where there is an existing agreement to exchange in place.

76. Implementing this option could require the FTA Bill be amended, providing appropriate links in each of the ‘parent’ legislation schedules, so that applications which are not first in the queue are suspended from processing.

Option Four – FTA Bill reflects existing prioritisation mechanisms in the 'parent' legislation although includes exception pathways

77. This option adds to Option 3, so would include clarifying the FTA Bill that competing applications would continue to be treated first in, first served.

78. This option provides exception pathways to enable the order of applications to be reprioritised. The exception pathway may vary depending on whether there are competing applications for the same resource and if a first in, first served ordering applies. Any exception pathway increases the complexity of the option and would likely be contentious. When considering the appropriateness of this option, this includes the possibility of exception pathways.

How do the options compare to the status quo / counterfactual?

	Option One – Status Quo / No changes to the FTA Bill, left unclear	Option Two – FTA Bill does not reflect existing frameworks	Option Three – FTA Bill reflects existing frameworks	Option Four – FTA Bill reflects existing frameworks with exception pathways
Expediency	0 Without clarification, decision-making more likely to be subject to challenge, and slowed down	++ Fast-track applications given priority for use of limited resources	-- Fast-track decision-making may require further assessment of allocation issues, and applications may be queued pending decisions on earlier applications for the same resource	-- Decision-making using an exception pathway would be more likely to be subject to challenge, and slowed down
Reduce cost and provide savings	0 Increased likelihood of legal challenge may increase costs on Crown where required to defend decisions	-- Flow on costs for other users and uses of limited resources. Existing users could lose investment in resource use	+ Limited change to the way limited resources are currently managed	-- Increased likelihood of challenge may increase costs on Crown where required to defend decisions
Simplicity	0 Less complex in legislation, as further amendments are not provided. However, this leaves gaps which will likely cause complexity in implementation	-- The risk that prioritising fast-track approvals over 'parent' legislation approvals would create uncertainty for investment decisions for the wider system. This would result in complexity as granted approval holders would need to be mindful of any relevant new applications	- Fast track decision-making would need to reflect any existing allocation frameworks when weighing up the application outcomes sought to reconcile any inconsistencies	-- The risk that reprioritising an application over other applications would create uncertainty for investment decisions for the wider system. This would result in complexity
Certainty	0 Little certainty as there a gap around how issues of priority are addressed	- Fast-track applications have a clear enabling pathway, although the impact on other system users would then need to be considered at the substantive application stage and weighed by the panel in their decision-making	++ First in, first served and ensuring that allocation limits are upheld would provide a clear sequencing of applications. These are well established principles in caselaw and would provide increased certainty to system users of their place in the queue and their likelihood to access a particular limited resource	-- The Fast-track application that is being prioritised would have a clear pathway, although this would likely be subject to challenge. This would also create uncertainty for other system users

Effectiveness	0 Without clarification, decision-making less likely to achieve the policy intent	- Fast-track applications are not restricted by applications for limited resources in the 'parent' legislation. Although future applications are also not restricted by the applicant's granted application which may diminish the value of the approval received	- Some applications not able to be progressed in the fast-track process, despite their regional or national significance	- Decision-making is less likely to achieve the policy intent as the complexity that including exception pathways add to the FTA Bill would likely slow down the system
Uphold Crown obligations under Te Tiriti o Waitangi	0 Giving priority to applications under the fast-track process is likely to have significant impacts from a Treaty perspective	-- Giving priority to applications under the fast-track process is likely to have significant impacts from a Treaty perspective	++ Relatively low impact with limited change to how Māori rights and interests are currently provided for	-- Giving priority to applications under the fast-track process is likely to have significant impacts from a Treaty perspective
Manage risks	0 Increases risk that the fast-track legislation fails to achieve intent as well as intended	-- If the resource at issue is limited, it may not be able to be used by both applicants. By prioritising fast-track approvals over approvals in the 'parent' legislation, it is likely to have impacts on the confidence of system users of the 'parent' legislation	++ Limited change to the way limited resources are currently managed	-- Increases risk that the fast-track legislation fails to achieve intent as well as intended
Overall assessment	Not recommended	Not recommended	Preferred option	Not recommended

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

79. The Policy Options for Issue 3, including the amendments in Option 3, will also closely interact with Options proposed under Issue 4 – Resource Allocation.

80. Option 3 is the preferred as it addresses the policy problem and reduces the risk of challenge to the fast-track process. This option also best reflects the obligations under Te Tiriti comparatively to the other options considered. This option provides greater certainty of the investment of existing users and applicants under both parent legislation and the fast-track regime, maintaining confidence to system users.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Project developers (public and private)	Fast -track applications may face prioritisation barriers when competing for limited resources with existing users, although these are the same barriers that already exist in the parent legislation. Higher costs may be incurred due to the time taken to wait for their turn in the queue, although costs incurred due to challenge arising from the competition of limited resources would likely be reduced	Low- there is an expectation that fast-track applications be able to proceed quickly, and implementing this system may result in delays for some fast-track users	High
Central government departments (as regulators)	It is anticipated that ensuring that the first in, first served system operates across both the fast-track system and the parent legislations would require additional administration from the central government. However, this will be structured so the costs can be estimated and provided to the central government to cover this function	Medium – to accurately categorise applications with their place in the 'first in, first served' queue will have time and cost implications for implementation	Medium
Environmental Protection Authority (EPA)	It is anticipated that ensuring that the first in, first served system operates across both the fast-track system and the parent legislations would require additional administration from the EPA. However, this will be	Medium – to accurately categorise applications with their place in the 'first in, first served' queue will have time and cost implications for implementation	Medium

	structured so the costs can be estimated and provided to the EPA to cover this function		
Local Government	It is anticipated that ensuring that the first in, first served system operates across both the fast-track system and the parent legislations would require additional administration from the local government. However, this will be structured so the costs can be estimated and provided to the local government to cover this function	Medium – to accurately categorise applications with their place in the 'first in, first served' queue will have time and cost implications for implementation	Medium
Consumers/general public as part of current generation	No additional costs identified	N/A	N/A
Consumers/general public as part of future generation	No additional costs identified	N/A	N/A
Workers	No additional costs identified	N/A	N/A
Iwi/Māori	Draws through the prioritisation approach in the RMA, including the same barriers that may exist in the 'parent' legislation already	Medium	Low
Total monetised costs		-	-
Non-monetised costs	-	Medium	-
Additional benefits of the preferred option compared to taking no action			
Project developers (public and private)	Provides developers certainty and confidence in the system	High - Existing and new developers can have confidence in the process and their ongoing investments knowing that they won't be unknowingly gazumped	High
Central government departments (as regulators)	Reduces the risk of challenge and provides confidence in the system. Assists to uphold the Crowns Treaty obligations	High - Reduce the risk of challenge to the system which can delay applications and be costly, including where fast track applicants feel they may have been treated differently compared to other applicants due to inconsistency of prioritisation	High
Environmental Protection Authority (EPA)	Provides certainty of the processes to follow when prioritising applications	High - Provides consistency and certainty	Medium

		for assessment of applications	
Local Government	Provides certainty of the processes to follow when prioritising applications	High - Provides consistency and certainty for assessment of applications	Medium
Consumers/general public as part of current generation	The general public benefits from long term investment by developers because of the certainty and confidence in the system and that the Crowns liabilities are reduced	Low	High
Consumers/general public as part of future generation	The general public benefits from long term investment by developers because of the certainty and confidence in the system and future generations are spared cost of a system without clear prioritisation processes	High	Medium
Workers	No additional benefits identified	N/A	N/A
Iwi/Māori	Does not fundamentally change how Māori rights and interests are provided for under the current system	Medium	Low
Total monetised benefits	-	-	-
Non-monetised benefits	-	High	-
Affected groups	**Comment**	**Impact**	**Evidence Certainty**

Treaty impacts

81. The pace of policy development and the lack of engagement on the specific proposals mean it is difficult to assess their potential impacts from a Te Tiriti perspective, or how they may be perceived by Treaty partners. However, the Crown has undertaken engagement with iwi/Māori during recent years on Māori rights and interests in the allocation of natural resources, including freshwater and geothermal resources, and that engagement has informed this analysis.

82. It is important to note options regarding prioritisation are likely to be viewed in the context of the FTA Bill as a whole. The FTA Bill includes some protections for Māori rights and interests outside of Treaty settlements and customary rights but there are elements of it that may be perceived to diminish existing protections for Māori rights and interests in underlying legislation.

83. To the extent the options retain existing prioritisation regimes, the proposals do not fundamentally change how Māori rights and interests are provided for under the current system, although could be perceived to exacerbate existing challenges for Māori

groups in accessing resource use permissions, particularly for freshwater.[4] If applications are prioritised at the discretion of the Minister, affected (non-applicant) Māori groups will have a limited or no role in this decision-making, depending on the policy options agreed to. However, impact compared to the status quo will be limited as the existing 'first-in, first-served' model also does not, by itself, provide for Māori to have a role in decision-making or specific recognition of Māori rights and interests beyond that of other applicants/users.

Issue 4 – Resource allocation

What is the policy problem?

84. Note that the policy problem described below is largely the same content as outlined in issue three above as the two issues share the same problem.

85. Issues of priority and certainty of allocation rights are very important to applicants and holders of existing approvals. In particular, the FTA Bill is currently largely silent or unclear on:

- how the priority between applications made under the fast-track system is determined (i.e. whether a first in, first served or other approach applies)
- whether approvals issued under the FTA Bill will be able to exceed current resource allocation limits and, if so, how any implications for existing approval holders will be considered and managed
- whether applications for renewing existing approvals under any regime will have priority over applications for new activities under both the fast-track system and 'parent' legislation
- how competing applications to limited resources will be prioritised under the FTA Bill and between fast-track applications and applications already made under other legislation
- whether and how projects may be prioritised in terms of being referred to an expert panel – this is an issue for both listed and referred projects.

86. The fast-track system is likely to lead to competing applications for the same limited resources and incompatible applications for overlapping space. Limited resources such as freshwater, coastal space, conservation land, minerals and geothermal resources may be subject to a range of proposed competing applications. These uses may include irrigation, aquaculture, critical infrastructure, mining, renewable energy production, and tourism.

87. Applications made under the fast-track regime may also compete with earlier applications made under the 'parent' legislation (e.g., the RMA, the CMA, and the Conservation Act 1987). Applications may also be made for activities that, if approved, could negatively impact the access to resources authorised by existing holders of rights allocated under 'parent' legislation.

88. The existing 'parent' legislation currently manages the prioritisation of applications for competing activities in various ways. For RMA applications, subject to specific

[4] The 'first-in, first-served' approach to prioritising applications under the RMA has been regarded as disproportionately disadvantaging Māori in accessing freshwater resources, see for example the Waitangi Tribunal's *Stage 2 Report on the National Freshwater and Geothermal Resources Claims, Wai 2358*.

limitations, a ‘first in, first-served’ approach applies as a default, with the first to file a complete application taking priority. An application with priority will be processed first and assessed as if the other applications do not exist. The next application in line is then assessed considering the priority application (if that has been approved). The first in, first served approach to the order in which applications are processed is not explicitly stated in the RMA and has been developed by the courts over time (particularly in the context of competition for coastal space for aquaculture and for the use of freshwater).

89. While ‘first in, first served’ is the default for the order in which competing applications are to be processed, the RMA enables the Minister and local authorities to use alternatives in certain situations. For example, RMA plans can include allocation methods and limits on resource use, and consent authorities can impose conditions on resource consents recognising flow sharing arrangements between resource users. In respect to coastal marine space, the RMA has mechanisms which Ministers can use to deal with competing marine farm consent applications.

90. The RMA also contains some provisions preventing existing resource users on fixed term consents being gazumped by other resource users. In particular, the RMA prioritises reconsenting applications from existing resource users over other applicants (subject to certain conditions).

91. The courts have also considered whether consents can be granted that would detract from consents already granted to someone else. Again, the RMA is not explicit on this point. In Aoraki[5] the High Court found that where a resource was already fully allocated in a physical sense to a permit holder, a consent authority could not lawfully grant another party a permit to use the same resource. That case concerned an application to extract water for irrigation from Lake Tekapo in circumstances where the water in the lake had already been fully allocated to Meridian and other users.

92. Approvals under the Conservation Act are also generally processed on a first in, first served basis, but that Act also empowers the Minister for Conservation to undertake an allocation process (for example a tender[6]).

93. The fast-track approvals system provides a separate pathway, potentially enabling competing applications for limited resources to avoid queues, and other processes which determine the order applications are considered, to be progressed more rapidly.

94. In particular, the FTA Bill allows applications for approvals not previously able to be applied for such as prohibited activities, land exchanges for various categories of conservation land, and approvals inconsistent with water conservation orders. Existing frameworks, such as water allocation in regional plans, or rules relating to marine farms, are considerations in the FTA Bill but do not carry as much weight compared to its purpose of facilitating the delivery of infrastructure and development projects with significant regional or national benefits.

95. The focus of the options relate to primary legislation interventions and no options have been included that relate to spatial planning, flexible licensing, better allocation

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[5] *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC).

[6] For example, DOC has used a tender to manage excess demand in relation to landing rights at the Milford Aerodrome.

framework/principles and ensure equitable outcomes as these are broader system options that are not within scope at this stage of the FTA Bill development.

96. The objectives and criteria for this issue are outlined above and are in line with the original Supplementary Analysis Report.

97. The focus of the options relate to primary legislation interventions and no options have been included that relate to spatial planning, flexible licensing, better allocation framework/principles and ensure equitable outcomes as these are broader system options that are not within scope at this stage of the FTA Bill development.

What options are being considered?

Option One – FTA Bill Status Quo / Minor changes to the FTA Bill to provide for s124A-C, Bill largely left unclear

98. This option would see only minor changes to the FTA Bill to provide for s124A-C of the RMA. As noted above, the FTA Bill does not contain complete direction on issues of allocation of limited resources. Therefore, this option is difficult to assess as the outcome of leaving the FTA Bill without explicit direction is unknown. However, the FTA Bill does contain some allocation features:

    - approvals that breach current allocation limits could be approved or declined under the fast-track system. The FTA Bill does not require the allocation of limited resources to accord with existing allocation frameworks and limits, including under RMA plans and policy statements, and this would be tested by the expert panel at the decision-making stage
    - existing activities to continue to operate while renewal approvals are sought. The FTA Bill does apply sections 124 and 165ZH of the RMA, and section 17ZAA of the Conservation Act. It is proposed to amend the FTA Bill to also include s124A-C of the RMA
    - clause 3 of Schedule 9 enables consideration of additional matters, including alternative uses of space in the Exclusive Economic Zone that may have better strategic, economic, environmental purposes than the activity being applied for. The referral minister may consider these factors when deciding to refer a project.

99. There are no links to ‘parent’ legislation, so fast-track consents are considered entirely separately from existing frameworks. In terms of allocation, the use of a limited resource is considered at the substantive assessment stage, where the panel considers the effects of a project. This assessment is made giving greatest weight to the purpose of the FTA Bill.

100. Effects on existing users and existing allocation limits are relevant at the substantive assessment stage, but they don’t bind the decision-maker. The referral minister and the expert panel are not required to invite comment from existing users, though they may do so at their discretion.

101. This option enables approvals that breach current allocation limits to be granted. However, this option also includes an amendment, to avoid any doubt, that existing users are provided protection for their operation to continue through the inclusion of s124A-C of the RMA.

Option Two – FTA Bill partially reflects existing frameworks: applications can be approved, where they would normally not be under existing rules or limits with an exception that some specified allocation limits are retained

102. In this option, the FTA Bill is amended to prescribe limits that are intended to be retained. This will provide system users with certainty on the allocation limits that they need to meet in this application to be approved.

103. Setting these allocation limits out in a secondary legislation function also provides flexibility for the schedule to be updated through an order in council, without changes needed to the primary legislation. This option could draw through the specific allocation regimes that have been developed by councils to manage competing interest for a limited resource.

104. In terms of allocation, the use of a limited resource is considered at the substantive assessment stage, where the panel considers the effects of a project. This assessment is made giving greatest weight to the purpose of the fast-track legislation. The allocation limits contained on the secondary legislation tool would inform the panel's assessment of the application.

105. The challenge with this option is that due to the prescriptive nature of the secondary legislation, the list would need to be regularly maintained and updated when the allocation regime changes (particularly if the regime is set out in a plan or policy statement and that document is updated).

106. This option recognises that fast-track projects have a higher priority than applications under usual approvals processes. This option allows allocation for fast-track approvals beyond resource allocation limits, except for specified allocation limits that must be met.

Option Three – FTA Bill reflects existing frameworks: applications need to comply with existing allocation rules and limits as much as is feasible to achieve

107. This option would require amendments to the FTA Bill to make it clear that fast-track applications and approvals are required to stay within existing allocation limits. This would likely result in some new activities not being able to be progressed in the fast-track process if they are unable to show that there is allocation available for their activity under the relevant allocation framework in the 'parent' legislation.

108. For concessions under the Conservation Act, this option prevents the panel from agreeing to grant a concession over land where the new concession would not be compatible with the existing one, for example if one is for exclusive occupation. For exchanges under the Conservation Act this option prevents the panel from agreeing to authorise an exchange over land where there is an existing agreement to exchange in place.

109. Implementing this option could require new ineligibility criteria to be included in the FTA Bill, to limit applications for resources that are nearly or already fully allocated or providing appropriate links in each of the 'parent' legislation schedules. The most appropriate change would be to make prohibited activities in the RMA ineligible activities in the FTA Bill.

110. To provide certainty that FTA Bill will operate within existing allocation rules and limits, another amendment would be to change the weighting of planning documents under the 'parent' legislation, in relation to the purpose of the Bill. As this is key design matter of the FTA Bill, it is not feasible to include this in the option due to the constraints to make such a significant change at this point in the legislative process. Therefore, amending the weighting of the planning documents in the parent legislation has not been included as part of this option.

How do the options compare to the status quo / counterfactual?

	Option One – Status Quo / Minor changes to the FTA Bill, left largely unclear	Option Two – FTA Bill does not reflect existing frameworks, except where limits are specified	Option Three – FTA Bill reflects existing frameworks
Expediency	0 Without clarification, decision-making more likely to be subject to challenge, and slowed down	- Fast-track applications given priority for use of limited resources, except for specified allocation limits. The complexity of adding a schedule for specified allocation limits would likely slow down the fast-track regime	+ Fast-track decision-making would only receive applications that are not prohibited under the 'parent' legislation. This would make the eligibility criteria stronger
Reduce cost and provide savings	0 Increased likelihood of challenge may increase costs on Crown where required to defend decisions	-- Flow on costs for other users and uses of limited resources. Existing users could lose investment in resource use, unless it has been included on the schedule. There are also significant costs to implement a specific allocation limits schedule as limits are integrated throughout the parent regimes. The time and cost associated with developing and maintaining the schedule is likely to be significant	+ Limited change to the way limited resources are currently managed
Simplicity	0 Less complex in legislation, as further amendments are not provided. However, this leaves gaps which will likely cause complexity in implementation	-- This would result in complexity as granted approval holders would need to be mindful of any relevant new applications for allocation limits not on the schedule	- Fast track decision-making would still need to reflect any existing allocation frameworks (except for prohibited activities) when weighing up the application outcomes sought to reconcile any inconsistencies
Certainty	0 Little certainty as there a gap around how issues of priority are addressed	- Fast-track applications largely have a clear enabling pathway, although the impact on other system users would then need to be considered at the substantive application stage and weighed by the panel in their decision-	++ There is no clear single or overarching 'parent' legislative mechanism to link to, and this option would use the prohibited activities as the most definitive tool

		making. This would also add another consideration matter for the panel	
Effectiveness	0 Without clarification, decision-making less likely to achieve the policy intent	- Fast-track applications are largely not restricted by applications for limited resources in the 'parent' legislation. Although future applications are also not restricted by the applicant's granted application which may diminish the value of the approval received. The use of a schedule to hold to specific limits is a complex tool to implement	- Some applications not able to be progressed in the fast-track process, despite their regional or national significance
Uphold Crown obligations under Te Tiriti o Waitangi	0 Providing for, or being unclear on whether allocation beyond allocation limits is provided for, could have significant impacts from a Treaty perspective if there are insufficient safeguards in place to account for Māori rights and interests	-- Providing for allocation beyond allocation limits could have significant impacts from a Treaty perspective if there are insufficient safeguards in place to account for Māori rights and interests	++ Relatively low impact with limited change to how Māori rights and interests are currently provided for
Manage risks	0 Increases risk that the fast-track legislation fails to achieve intent as well as intended	-- Providing for allocation beyond these fixed allocation limits could have significant impacts on other system users, who may have (longstanding) existing use rights and may have made significant investments on that basis	++ Limited change to the way limited resources are currently managed
Overall assessment	Not recommended	Not recommended	Preferred option

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

111. The Policy Options for Issue 4, including the amendments in Option 3, will also closely interact with Options proposed under Issue 3 – Priority and order of applications.

112. Option 3 is the preferred as it best addresses the policy problem without significant changes to the proposed system. This option also best reflects the obligations under Te Tiriti comparatively to the other options considered. This option provides a low-risk intervention to enable a level of certainty for wider system users, but does not ensure allocation fully within limits as this would require an additional component which is not feasible to deliver and has not been included in the option considered.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Project developers (public and private)	An applicant may not be able to progress the development they had intended through the fast-track process, despite their regional or national significance	Low – The developer would have certainty at the start of the process if their project was eligible or not. This is a lost opportunity cost, rather than loss of investment	High
Central government departments (as regulators)	Ministerial discretion on activities that can be referred based on the eligibility criteria would be reduced	Low – There is reduced flexibility on what is appropriate to be referred	High
Environmental Protection Authority (EPA)	No additional costs identified	N/A	N/A
Local Government	No additional costs identified	N/A	N/A
Consumers/general public as part of current generation	This may delay a major project if they are not able to identify another way of achieving the same outcome without a prohibited activity being included in their application	Low	Low
Consumers/general public as part of future generation	This may delay a major project if they are not able to identify another way of achieving the same outcome without a prohibited activity being included in their application	Low	Low
Workers	No additional costs identified	N/A	N/A
Iwi/Māori	No additional costs identified	N/A	N/A
Total monetised costs	-	-	-

Non-monetised costs	-	(High, medium or low)	-
Additional benefits of the preferred option compared to taking no action			
Project developers (public and private)	Increased certainty as the ability to apply or not is established by the ineligibility criteria	Low	Low
Central government departments (as regulators)	No additional benefits identified	N/A	N/A
Environmental Protection Authority (EPA)	No additional benefits identified	N/A	N/A
Local Government	The fast-track system would be more consistent with the allocation frameworks in the 'parent' legislation that are administered by local government (ie the RMA). This may also better provide for local voice made by communities through existing national direction and regional/district plan provisions about prohibited activities to be retained	High – there are few risk mitigations in the current model to address overallocation of limited resources, and this option proposes to add a safeguard for the most high-risk activities	Medium
Consumers/general public as part of current generation	The general public benefits from improved management practices to respond to overallocation of limited resources, including environmental bottom line where these have been reflected in prohibited activities	Low	Low – the benefits may vary significantly depending on the resource and the level of protection that the prohibited activity categorisation has been developed to provide
Consumers/general public as part of future generation	Future generations may be spared costs associated with downstream liabilities of fast-track projects	Low	Low – as above for the general public, but with less certainty over a longer time horizon
Workers	No additional benefits identified	N/A	N/A
Iwi/Māori	-	-	-
Total monetised benefits	-	-	-
Non-monetised benefits	-	(High, medium or low)	-

Treaty impacts

113. To the extent the options retain existing allocation limits, the proposals do not fundamentally change how Māori rights and interests are provided for under the current system. However, providing or allowing for existing conditions or use limits to be exceeded has the potential to affect ongoing Treaty arguments regarding claims to

limited resources, impacts on the health of resources, and the relationship of Māori with the environment. Accordingly, doing so may create risks that could require additional measures to ensure the system as a whole, and individual decisions, are consistent with Treaty obligations, particularly the principles of partnership and active protection.

Issue 5 – Land Management Decisions

What is the policy problem?

114. Concessions, land access arrangements under the CMA, and land exchanges, are landowner permissions that reflect the Crown's property rights. These approvals differ in nature from the other approvals in the FTA Bill and expose the Crown to potential legal, financial and health and safety risks.

115. Concessions under the Conservation Act 1987 and Reserves Act 1977, and land access arrangements under the CMA provide an authority from the landowner (the Crown) to carry out an activity on Crown land. Some types of these approvals are given effect through a binding contract, such as a lease, that provides the applicant with a property right on Crown land.

116. In these circumstances, the Crown retains ownership of the land during the project and after it has ended. The Crown, as landowner, also owns the structures built on the land for the project, during the life of the project in many cases (and consequently, may have liability for a structure if a company were to go out of business during the life of a project).

117. Land exchanges provide authority from the landowner (the Crown) to dispose of and acquire conservation land (swapping land with the applicant). For this process, the Crown gives up ownership of an existing piece of conservation land and acquires ownership of a new piece of land the applicant has identified. It is possible that the piece of land acquired by the Crown may present risks or liabilities, such as a natural hazard risk.

118. There is no framework in the FTA Bill to support decision makers to consider these Crown risks and liabilities when land is leased or exchanged, which creates significant uncertainty for whether the risks or liabilities could be effectively managed.

119. For the purposes of this analysis, we have not included a third possible policy option which is for Ministers to be decision-makers. This would have been DOC's preferred option, because it would best enable Ministers to manage risks within their portfolio. On principle, this is Crown property, the risks are the Crown's to manage, so the Crown should make decisions.

120. The options below reflect what DOC has put to Ministers. These were still under consideration by Ministers at the time this annex was written.

What options are being considered?

Option One – FTA Bill Status Quo /Retain existing drafting with expert panel as decision maker

121. The expert panel is the decision-maker on land management decisions with no framework in the FTA Bill to support them to consider Crown risks and liabilities that arise as landowner/manager.

Option Two – Risk management amendments

122. Several amendments could be made to the FTA Bill to ensure Crown risks and liabilities are appropriately considered.

Amendments to support the expert panel to manage Crown risks

123. This option includes an express requirement that the expert panel ensures the Crown's interest in the land/resources of the Crown is protected as far as practicable when it makes decisions (including in the setting of conditions) and that the expert panel must decline the project if this cannot be achieved. This would strengthen the incentive for the panel to appropriately address Crown risks and liabilities.

124. The FTA Bill would also be clarified to state that the expert panel may decline a land management approval on the basis that it creates unacceptable risk for the Crown. This is because while conditions on an approval will usually appropriately mitigate Crown risks, there may be some proposals where the risks remain unacceptable despite conditions that may be set. In this case the expert panel should be able to protect the Crown's interests through declining the approval.

Amendments to ensure the expert panel has adequate information to make an informed decision

125. The FTA Bill would require that the relevant agency (such as DOC or Land Information New Zealand) provides a report to the expert panel that:

    - describes any relevant issues, risks, liabilities, including a description of the Crown's interest in the land/resources which needs to be protected
    - outlines mitigating conditions that may be applied and whether these adequately address any relevant issues
    - makes a recommendation to the expert panel on which conditions should be put in place to mitigate Crown risk and liabilities.

126. This would ensure that the expert panel has access to the same project-specific information that DOC would under normal decision-making processes.

127. Applicants would also be required to provide proof of an audited health and safety plan to the expert panel with their substantive application. This is required by DOC under normal decision-making processes and would also be required by the expert panel to help manage health and safety risks for the Crown.

128. A provision would be added to the FTA Bill so the expert panel can extend timeframes or "stop the clock" to seek independent expert advice on the viability, risks and potential liabilities of a project. This is because in some cases, the expert panel may wish to get independent, expert advice on a project that appears to be particularly risky. However, sourcing expert advice with sufficient robustness to be useful to the expert panel is unlikely to be possible within the expert panel's timeframes and may require an extension or for the "clock to be stopped" while such advice is sought. Allowing the expert panel to "stop the clock" may prevent the expert panel from being forced to decline projects based on a lack of information resulting from timeframe constraints. Allowing sufficient time for further information to be acquired may enable the expert panel to approve the project.

Amendments to grant the responsible Minister the ability to influence decisions

129. The land-owning Minister would be enabled to set mandatory non-environmental terms and conditions as a matter of policy that would apply to all fast-track contracts, given the risks and liabilities that could fall to the Crown. This could include fees, terms, and risk management conditions. The expert panel would have no discretion to alter these. This would allow the Crown to set standard terms and conditions that should apply

across projects, ensuring that frequently occurring risks could be managed as a matter of Government policy. There would still be project-specific risks or issues that would need to be addressed by the expert panel through bespoke conditions.

130. As part of the process of developing the standard terms and conditions, an assessment would be made of how proportionate they are to ensure they protect the Crown's interests but are not prohibitively onerous on applicants.

131. Standard terms and conditions would make the process more efficient, reduce the time the expert panel must spend on non-environmental matters and give applicants certainty about what to expect for their contracts.

132. The FTA Bill would also require the expert panel to consult the land-owning Minister on its decisions impacting the Crown's interest in land/resources prior to finalising decisions. This would assist in providing wider Crown context, and may also allow the Minister to consult with their colleagues where the risks are particularly high (which is in line with the expectations of Ministers set out in the Cabinet Manual). The information provided through this consultation will help the expert panel assess and decide whether that is a reasonable risk for the Crown to take on, in the context of what liabilities already exist in relation to public conservation land (including inherited contaminated sites such as abandoned fuel storage sites, landfills, asbestos contamination).

Options for the responsible Minister to intervene for significant risks

133. The land-owning Minister would have the discretion to 'call-in' the decision, if the risks for the Crown reach a certain threshold. The intention is for the expert panel to make most of the decisions, but the following criteria provide discretion for Ministers to make the decision where the level of risk is such that a Crown decision is considered most appropriate.

134. Projects requiring concessions and access arrangements could be called in if they satisfy any of the following criteria:

- novel infrastructure projects (i.e., with less understood effects and risks)
- projects with significant potential for public health and safety consequences
- projects with large downstream liabilities (e.g., significant costs for the Crown at the end of its life or if the project fails).

135. Projects seeking land exchanges could be called in if they satisfy any of the following criteria:

- where displacing existing users/operators could have significant financial or legal implications (e.g., someone's multi-million-dollar concession is required to cease, and DOC might be liable)
- where the Crown would be accepting a financial loss (in cases where the requirement for the applicant to absorb costs may not apply)
- where land proposed to be acquired by the Crown may result in significant ongoing costs to manage (e.g., subject to known natural hazard risks or contamination issues).

Options for the expert panel if they cannot mitigate Crown risks

136. The expert panel could refer the decision to the Minister responsible for the land if they are not satisfied they have adequate information to assess Crown risk for a particular

project, or if they are not satisfied they can adequately mitigate Crown liability in the given case. This would help manage risks for both the expert panel and the Crown.

How do the options compare to the status quo/counterfactual?

	Option One – FTA Bill Status Quo / Retain existing drafting with expert panel as decision maker	Option Two – Risk management amendments
Expediency	0 Prescribed timeframes for the expert panel process	- Some mitigation measures may slow down the process (e.g., "stopping the clock" to seek independent advice on risks or the Ministerial call-in). Process will still be significantly faster than outside of the fast-track process
Reduce cost and provide savings	0 Likely to be relatively inexpensive for applicants at the outset, but costs could fall to the Crown later through financial liabilities or obligations	+ Likely to reduce costs to the Crown in the long run, through ensuring financial liabilities, and health and safety risks, are adequately managed. Enables public health and safety risks to be appropriately addressed
Simplicity	0 The process for applicants remains as set out in the FTA Bill	- In some circumstances there will be additional process (e.g., "stopping the clock" to seek independent advice on risks or the Ministerial call-in)
Certainty	0 The expert panel is not required to address Crown liabilities or risks	0 Adding further considerations and matters for decline reduces certainty on achieving approval but this is mitigated by the greater weighting of the purpose of the FTA Bill. Standard terms and conditions would provide applicants certainty about what to expect for their contracts
Effectiveness	0 The status quo prioritises development, even where there is a high level of risk to the Crown	- May result in some projects being declined that could potentially have been approved under the status quo, as the expert panel may decline a land management approval if it creates unacceptable risks for the Crown
Uphold Crown obligations under Te Tiriti o Waitangi	0 Under the status quo, it is possible that risks relating to Treaty obligations may not be appropriately addressed	+ An improved risk management framework may provide the opportunity to identify any relevant risks that relate to Treaty obligations
Manage Risks	0 Under the status quo, there are potentially significant risks to the Crown that the Crown and the expert panel will not be able to effectively control or mitigate	++ Provides for risk management for the Crown

Overall assessment	Not recommended	Preferred option

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

137. Option Two is significantly preferable to Option One, despite the potential for somewhat higher costs and longer timeframes for applicants. Applicants will still benefit from the one-stop shop model and quicker timeframes under the FTA Bill than under the existing land management processes.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Project developers	Application costs may be increased, through having to provide audited health and safety plans and consider Crown liabilities but this is likely to be only a small proportion of a project's total costs and likely still cheaper and faster than existing processes	Low	High
Central government departments (as regulators)	No additional costs identified	N/A	N/A
Environmental Protection Agency	No additional costs identified	N/A	N/A
Local government	No additional costs identified	N/A	N/A
Consumers / general public as part of current generation	No additional costs identified	N/A	N/A
Consumers / general public as part of future generations	No additional costs identified	N/A	N/A
Workers	No additional costs identified	N/A	N/A
Iwi/Māori	No additional costs identified	N/A	N/A
Total monetised costs		0	
Non-monetised costs		Low	
Additional benefits of the preferred option compared to taking no action			
Project developers	Improves certainty if standard terms and conditions are set up for particular types of activities	Low	Medium
Central government departments (as regulators)	Significantly improves the Crown's ability to manage risks and liabilities reducing the chances of downstream legal, financial and health and safety issues	High – there are few risk mitigations in the current model, and this option proposes to add several safeguards and opportunities to intervene or provide advice on matters that will impact on Crown land	High

Environmental Protection Agency	-	-	-
Local government	-	-	-
Consumers / general public as part of current generation	The general public benefits from improved Crown risk management, such as through reduced health and safety risks where a project has significant interface with the public	Low	Low – the benefits may vary significantly e.g., a neighbour to a project site may benefit a great deal from hazard management, for example, but for others the changes proposed will have no impact
Consumers / general public as part of future generations	Future generations may be spared costs associated with downstream liabilities of fast-track projects	Low	Low – as above for the general public, but with less certainty over a longer time horizon
Workers	-	-	-
Iwi/Māori	-	-	-
Total monetised benefits		0	
Non-monetised benefits		High for the Crown, low for other parties	

Treaty impacts

138. Officials have not identified further Treaty impacts beyond those set out above.

Issue 6 – Recovery of third-party costs

What is the policy problem?

139. The FTA Bill includes provisions for government agencies and local authorities to recover their costs associated with participating in the system: administering the approvals process, considering applications, providing advice, and conducting monitoring and enforcement activities, etc.

140. The FTA Bill includes a number of provisions which require consultation with Māori groups, variously by the applicant, Ministers, and/or the expert panel. These provisions support compliance with the overarching obligation on persons exercising functions, powers and duties to act consistently with settlements and customary rights.

141. However, the FTA Bill does not currently include the ability for Māori groups to be funded to participate, and the costs associated with their involvement may, in some cases, inhibit their ability to participate, particularly for smaller groups or groups who have only received recently settlement redress. Under the status quo – the current provisions in the FTA Bill – there is a risk that Māori groups are not adequately resourced or supported to participate in the consultation processes that the FTA Bill provides for, undermining the effectiveness of these consultation requirements.

142. The Ministry's earlier Supplementary Analysis Report (page 40) noted "iwi/Māori will face costs to participate in the fast-track regime. This participation could include

iwi/Māori as parties being asked to provide comments." This was analysed alongside other costs for iwi/Māori as 'medium' impact and 'high' evidence certainty.

143. A key theme that came through some of the submissions from local government and Māori groups on the FTA Bill was the need for cost recovery or support to enable engagement with relevant iwi, hapū and Treaty settlement entities (PSGEs), and local authorities. A number of business and industry groups expressed similar concerns.

144. In other circumstances, the Crown has taken the view that it is not appropriate to expect PSGEs to draw on settlement redress to fund their participation in processes the Crown has established to ensure it is upholding Treaty settlements (e.g., by providing contributions to costs incurred by PSGEs when the Crown has proposed amendments to settlements).

What options are being considered?

Option One – Status Quo / Retain current provisions, organisations (such as iwi, hapū, and Treaty settlement entities) that have a statutory role in the process are not explicitly empowered to recover costs

145. This option would retain the current provisions in the FTA Bill meaning that there is a statutory role for organisations such as PSGEs, iwi, and hapū, but these organisations are not explicitly empowered to recover their costs associated with participating.

146. As noted above, under the status quo there is a risk these groups are not adequately resourced or supported to participate in the processes that the FTA Bill provides for, undermining the effectiveness of these wider provisions.

Option Two – Provide the ability for organisations (such as iwi, hapū, and Treaty settlement entities) that have a statutory role in the process to have their costs recovered

147. Option Two is to explicitly provide that the costs to Māori groups that have a statutory role in the process are recoverable from applicants, consistent with the ability for others to recover their costs (including, for example, agencies providing advice to Ministers on referral applications). This would include at the following stages:
    - when consulted by prospective applicants prior to the lodgement of a referral application
    - responding to invitations to comment to inform a Ministerial decision whether to refer an application
    - responding to invitations to comment from an expert panel as part of the substantive application process.

How do the options compare to the status quo/counterfactual?

	Option One – Status Quo / Retain current provisions, organisations (such as iwi, hapū, and Treaty settlement entities) that have a statutory role in the process are not explicitly empowered to recover costs	Option Two – Provide the ability for organisations (such as iwi, hapū, and Treaty settlement entities) that have a statutory role in the process to have their costs recovered
Expediency	0 The legislation includes statutory timeframes for consultation	0 This option would not change expediency relative to the status quo, but would improve the quality of the outcomes
Reduce cost and provide savings	0 Reduces costs to applicants but imposes costs on third parties with a statutory role in the process	0 Costs to applicants would be increased relative to the status quo, but costs to third parties would be lower as the costs of their participation would be recoverable
Simplicity	0 Not providing the ability for third parties' costs to be recovered is administratively simple	- Depending on the mechanism used to recover costs, complexity may be increased
Certainty	0 There is potential ambiguity associated with the status quo about whether third party costs may be able to be recovered	++ Explicitly providing that these third-party costs are recoverable provides certainty to both applicants and the organisations incurring the costs
Effectiveness	0 The status quo may not be effective in providing the ability for iwi, hapū and Treaty settlement entities to engage in the process as intended in the legislation	++ Providing for third party costs to be recovered increases the effectiveness of the processes under the legislation
Uphold Crown obligations under Te Tiriti o Waitangi	0 The status quo risks impacting on PSGEs' ability to participate in processes as intended in the legislation if they are inadequately resourced or supported to do so	++ Enhances the ability to uphold the Crown's obligations under Te Tiriti
Manage Risks	0 There are risks associated with the ability for iwi, hapū and Treaty settlement entities to engage in the process as intended in the legislation if they are inadequately resourced or supported to do so	++ Reduces risks associated with the status quo
Overall assessment	Not recommended	Preferred option

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

148. Option Two best addresses the problem and mitigates the risks associated with the status quo.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence
Additional costs of the preferred option compared to taking no action			
Project developers (public and private)	Higher costs associated with the application process if the costs of third parties' involvement is recoverable from applicants	Low – The scale of additional costs will be case-specific (for example, the number of groups eligible to comment on a fast-track approval application will vary). However, compared to the existing costs able to be recovered (e.g. central government and local government), the option is unlikely to significantly increase the overall cost of the fast-track process	Low
Central government departments (as regulators)	Potentially higher administrative costs if central government is involved in recovering costs on behalf of third parties	Low	Low
Environmental Protection Authority (EPA)	Potentially higher administrative costs if the EPA is involved in recovering costs on behalf of third parties	Low	Low
Local Government	No costs anticipated	N/A	N/A
Consumers/general public as part of current generation	No costs anticipated	N/A	N/A
Consumers/general public as part of future generation	No costs anticipated	N/A	N/A
Workers	No costs anticipated	N/A	N/A
Iwi/Māori	No costs anticipated	N/A	N/A
Total monetised costs		0	

Non-monetised costs	Low	Low	Low
Additional benefits of the preferred option compared to taking no action			
Project developers (public and private)	Ensuring that Māori groups can participate will ensure a more robust process that has considered input from affected parties and projects are more likely to have a social licence as a result. It may reduce the risk of a challenge later in the process compared to the counterfactual where Māori groups with statutory roles may not be able to participate due to resourcing limitations	Low	Low
Central government departments (as regulators)	Ensures Māori groups can recover their costs for their statutory involvement, reducing the changes central government will be asked to fund their involvement	Low	Low
Environmental Protection Authority (EPA)	Ensures Māori groups can recover their costs for their statutory involvement, reducing the changes central government will be asked to fund their involvement	Low	Low
Local Government	No benefits anticipated	N/A	N/A
Consumers/general public as part of current generation	No benefits anticipated	N/A	N/A
Consumers/general public as part of future generation	No benefits anticipated	N/A	N/A
Workers	No benefits anticipated	N/A	N/A
Iwi/Māori	Provides a resourcing avenue for groups to participate in the statutory process	Medium	Medium

Total monetised benefits		0	
Non-monetised benefits	Medium	Medium	Medium

Treaty impacts

149. As noted above, the preferred option enhances the Crown's ability to uphold its obligations under Te Tiriti by providing resourcing support for iwi, hapū, and Treaty settlement entities to participate in statutory processes. This means that PSGEs would not be expected to draw on settlement redress to fund their participation in processes the Crown has established to ensure it is upholding Treaty settlements.

Issue 7 – Leases and rights of first refusal

What is the policy problem?

150. Rights of first refusal (RFR) in Treaty settlement legislation often apply to conservation land. If conservation land subject to an RFR is being disposed of to a private party, the RFR is triggered, in which case the Crown needs to offer the land to the Treaty partner on the same terms as the offer being made to the private party.

151. Disposal is often defined in Treaty settlement legislation as including the Crown granting a lease if the term of the lease (including rights of renewal or extensions, whether in the lease or granted separately) is, or could be, for 50 years or longer. Concessions for significant infrastructure projects (dams, mines, etc.) could require exclusive occupation and so be seeking concessions or access arrangements as leases, and they will presumably be for more than 50 years (especially including renewal rights or extensions).

152. If 50+ year leases were granted despite RFR obligations and without RFR holder's consent, waiving their right for the disposal, the decisions to approve those leases would be vulnerable to judicial review and voidable. Alternatively, the panel may be forced to decline a proposal because they have no means of offering a lease to an RFR holder, or seeking a waiver from them, so a Panel could not act consistently with a Treaty settlement other than by declining the approval. This would be the case even where the RFR holder would have been comfortable to waive their RFR in the circumstances.

What options are being considered?

Option One – FTA Bill Status Quo / RFR holders can provide comment on relevant applications

153. Under the status quo in the FTA Bill, expert panels have access to information on rights of first refusal through the clause 13 "Treaty settlements and other obligations" report, the invited comments, and the report from DOC. This approach may provide expert panels with sufficient information to avoid granting unlawful concessions. However, it carries some legal risk if holders RFR holders consider that their rights have been impinged. The Panel would also be unable to do anything lawful other than decline an approval where it would be inconsistent with an RFR, regardless of the opinion of the RFR holder.

Option Two – Require written approval from RFR holders

154. The FTA Bill would be amended to require the applicant to obtain written approval of the RFR holder when applying for leases where the term is likely to (including if any

rights of renewal or extension are exercised) extend beyond 50 years. This would take the form of an information requirement for referral for their application to be considered complete, the applicant would need to provide confirmation of the right holder's waiver for their RFR for the purposes of the approval in question. The waiver from the applicant would not extinguish the RFR, so if the same land were leased again later, the RFR holder would have the opportunity to exercise their right.

How do the options compare to the status quo / counterfactual?

	Option One – FTA Bill Status Quo / RFR holders can provide comment on relevant applications	Option Two – Require written approval from RFR holders
Expediency	0 Standard fast-track processes apply	- Adds an additional step for the applicant to get written waiver although they would be expected to be engaging with Māori interests prior to applying anyway
Reduce cost and provide savings	0 Potentially lower initial costs, but may involve higher costs (e.g., through judicial review) later on	- Any additional cost of getting written approval from RFR holders is likely to be minor
Simplicity	0 No additional process steps at the outset but may involve complications later on	- Creates an extra step in the process for applicants
Certainty	0 Carries a high level of uncertainty as to whether projects would be enduring	+ Increases certainty in the long-term that decisions will be enduring without judicial review or decisions found to be unlawful
Effectiveness	0 May enable some projects to proceed that would not if written permission were required, however such projects would be at risk of judicial review and potentially voidable	- Some projects may not progress if written permission is not obtained.
Uphold Crown obligations under Te Tiriti o Waitangi	0 While the expert panel may have sufficient information to ensure the Crown's obligations are upheld, this is not certain	++ Ensures that projects triggering an RFR can go ahead only with the waiver of the right from the RFR holder
Manage Risks	0 This option is relatively high risk, as the expert panel may waste time processing an approval for a lease that may be unlawful, and carries risk of judicial review if they approve without RFR holder permission	++ This option reduces risk of unlawful decisions, and consequently the risk of judicial review
Overall assessment	Not recommended	Preferred option

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

155. Option Two is preferable as it reduces risk and improves the Crown's ability to uphold its Treaty obligations compared to the status quo.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty.
Additional costs of the preferred option compared to taking no action			
Project developers	Application costs may be somewhat increased, through having to provide written approval from the RFR holder, but this is likely to be only a tiny proportion of a project's total costs and likely still cheaper and faster than existing processes. Some projects may be blocked by not having permission	Low - High	High
Central government departments (as regulators)	No additional costs identified	N/A	N/A
Environmental Protection Agency	No additional costs identified	N/A	N/A
Local government	No additional costs identified	N/A	N/A
Consumers / general public as part of current generation	No additional costs identified	N/A	N/A
Consumers / general public as part of future generations	No additional costs identified	N/A	N/A
Workers	No additional costs identified	N/A	N/A
Iwi/Māori	Risks that the relevant Treaty settlement group is perceived to be blocking a particular development activity if written approval is not given	Low	Low
Total monetised costs		0	
Non-monetised costs		Low	
Additional benefits of the preferred option compared to taking no action			
Project developers	Improves long-term certainty as risk of judicial review is reduced	Low	Medium
Central government departments (as regulators)	Improves Crown's ability to uphold its Treaty obligations	High – under the current model it is plausible that the expert panel may not have sufficient information	Medium

		to avoid making unlawful decisions	
Environmental Protection Agency	No additional benefits identified	N/A	N/A
Local government	No additional benefits identified	N/A	N/A
Consumers / general public as part of current generation	No additional benefits identified	N/A	N/A
Consumers / general public as part of future generations	No additional benefits identified	N/A	N/A
Workers	No additional benefits identified	N/A	N/A
Iwi/Māori	Ensures RFR holders have the opportunity to meaningfully engage with relevant project applications	Medium	Medium
Total monetised benefits		0	
Non-monetised benefits		Medium	

Treaty impacts

156. Officials have not identified further Treaty issues in addition to those outlined above.

Issue 8 – Purpose Clause

What is the policy problem?

157. Currently the FTA Bill has the purpose clause drafted as "… to provide a fast-track decision making process that facilitate the delivery of infrastructure and development projects with significant regional or national benefits."

158. The purpose of the FTA Bill is to provide a fast-track process to approve infrastructure and other development that is of significant regional or national benefit. The current drafting however also refers to a process, rather than the focus being on the policy intent of the FTA Bill.

159. Ministerial direction has indicated a change to the purpose of the FTA Bill to move away from a process-focused approach and instead focus on the policy intent of the FTA Bill to facilitate delivery of projects with significant regional or national benefits. Given ministerial direction additional options have not been explored.

160. Ministers previously agreed to weight first the purpose of the FTA Bill, above relevant matters in the underlying legislation. The way that the criteria applied by the expert panel is framed, with the highest weighting for the FTA Bill purpose, is intended to provide clear legislative direction on how decisions are made and to set a high bar for decline.

161. The objectives and criteria for this issue are outlined in para 8 and 10 above and are in line with the original Supplementary Analysis Report.

What options are being considered?

Option One – FTA Bill Status Quo / Retain the current purpose clause

162. This option would retain the current purpose clause as "… to provide a fast-track decision-making process that facilitates the delivery of infrastructure and development projects with significant regional or national benefits."

Option Two – Update the purpose clause removing the process reference

163. This option would involve removing the process reference from the purpose clause to read "The purpose of this Act is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits." We note that final drafting is subject to Parliamentary Counsel Office discretion.

164. Through the public consultation process the Electricity Sector Environment Group raised concerned that the purpose as drafted is more focused on the provision of a 'fast-track' process, than the significant regional or national benefits of the infrastructure and other projects themselves. Similarly, Chorus suggested that the purpose needs to be strengthened to give weight to the delivery of infrastructure projects rather than simply the process.

165. There is a balance between the role of the purpose clause in signalling how the legislation should operate and providing clear guidance to decision makers. Legislation Design and Advisory Committee (LDAC) guidelines also indicate that purpose clauses should not go beyond what the substantive provisions can realistically deliver as this may result in unrealistic expectations (and disillusion with the legislation). For instance, the legislation itself cannot ensure such projects are delivered in a timely manner. At the same time, decision makers need clear criteria for their decisions.

166. In response to submissions that raised a concern that the purpose of the FTA Bill was constrained by its reference to providing a process for regulatory approvals, this is not the policy intent. This option would enable the FTA Bill to clearly signal, through a combination of the purpose and subsequent provisions as appropriate for drafting purposes, that the policy intent is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits and that decision makers should take this into account.

How do the options compare to the status quo/counterfactual?

	Option One – FTA Bill Status Quo / Retain the current purpose clause	Option Two – Update the purpose clause removing the process reference
Expediency	0 The status quo signals the intent of the Fast-track Approvals Bill to provide expediency through a one-stop shop that will create a more streamlined process to consenting for applications for infrastructure and development projects that have 'significant and/or regional benefits'	0 This option is not expected to impact expediency further than the status quo
Reduce cost and provide savings	0 The status quo signals an expediated process to consenting applications for infrastructure and development projects that have 'significant and/or regional benefits'. It is intended that this will result in reduced costs and provide savings for applicants as they navigate this process	0 This option is unlikely to have any significant further fiscal impact from the status quo
Simplicity	0 The status quo signals the intent that the Bill will simplify decision-making and reduce levels of bureaucracy	0 This option is unlikely to impact further on decision-making or levels of bureaucracy
Certainty	0 Submissions indicated that this option does not provide as much certainty as Option Two given its focus on the 'fast-track process' in comparison to the delivery of infrastructure and development projects	+ This option resolves the concerns of submitters by providing more clarity and certainty on the purpose and intent of the Bill with clearer weighting of the value of the delivery of infrastructure and development projects
Effectiveness	0 The status quo affirms the fast-track one-stop shop as achieving a more effective consenting process	0 This option is unlikely to achieve further effectiveness from the status quo
Uphold Crown obligations under Te Tiriti o Waitangi	0 The purpose clause may impact on Crown obligations (see Treaty Impact Analysis)	0 This option is unlikely to cause any significant additional Treaty implications
Manage Risks	0 Risks that exist related to the fast-track legislation if it fails to achieve intent as well as intended has been traversed in the original supplementary risk analysis	0 This option is unlikely to create any additional risks from the status quo

Overall assessment	Not recommended	Preferred option

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

167. Option two is the preferred option as it provides additional benefits for the criteria of certainty compared with the status quo.

What are the marginal costs and benefits of the option?

Affected groups	Comment.	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Project developers (public and private)	There will be no additional costs	Low	High – a project developer can chose whether to use the fast-track process and the change of wording in the purpose clause will not alter the costs of doing so
Central government departments (as regulators)	There will be no additional costs	Low	High – no additional costs should be incurred by government agencies with the purpose clause change
Environmental Protection Authority (EPA)	No additional costs are anticipated	N/A	N/A
Local Government	No additional costs are anticipated	N/A	N/A
Consumers/general public as part of current generation	No additional costs are anticipated	N/A	N/A
Consumers/general public as part of future generation	No additional costs are anticipated	N/A	N/A
Workers	No additional costs are anticipated	N/A	N/A
Iwi/Māori	No additional costs are anticipated	N/A	N/A
Total monetised costs		0	
Non-monetised costs		Low	
Additional benefits of the preferred option compared to taking no action			
Project developers (public and private)	Somewhat improves certainty and clarity of the purpose intent for using the fast-track process	Low	Medium
Central government departments (as regulators)	Somewhat improves certainty and clarity of the purpose intent for using the fast-track process	Low	Medium

Environmental Protection Authority (EPA)	Somewhat improves certainty and clarity of the purpose intent for using the fast-track process	Low	Low
Local Government	Somewhat improves certainty and clarity of the purpose intent for using the fast-track process	Low	Low
Consumers/general public as part of current generation	-	-	-
Consumers/general public as part of future generation	-	-	-
Workers	-	-	-
Iwi/Māori	-	-	-
Total monetised benefits		0	
Non-monetised benefits		Low	

Treaty impacts

168. While there may be further impact on iwi/Māori in addition to what is detailed above, the time and resource available to undertake this analysis has not enabled further engagement with iwi/Māori to determine if there are impacts and, if so, the likely significance of these.

Section 4: Implementation and evaluation

How will the new arrangements be implemented?

169. These additional changes to the FTA Bill will be implemented as per the detail provided in the original Supplementary Analysis Report.

170. It is envisaged that these changes will support the implementation and improve workability of the new fast-track system to process new applications from commencement.

How will the new arrangements be monitored, evaluated, and reviewed?

171. As advised in the original Supplementary Analysis Report, a post-implementation assessment will be undertaken jointly by Ministry for the Environment (MfE) and Ministry for Business, Innovation & Employment one year after enactment of the legislation. The additional changes proposed in this Supplementary Analysis Report annex will also be included in the post-implementation assessment.

172. Monitoring agencies will establish appropriate system indicators to integrate into their regulatory stewardship obligations. These system indicators are not intended to measure every aspect of the fast-track legislation but should enable the performance of the legislation to be traced in a tangible way.[7]

[7] A list of initial system indicators for quarterly reporting prior to the post-implementation assessment is available in the original Supplementary Analysis Report.

173. Environmental impacts arising from the implementation of the FTA Bill will be monitored through established environmental monitoring programmes which both MfE and DOC undertake to measure baseline environmental outcomes. This monitoring will likely only show trends although more direct monitoring will be established through the post-implementation assessment.