

New Zealand Law Society

SUBMISSION ON THE MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL

- 1 The New Zealand Law Society (Society) welcomes the opportunity to comment on the Marine and Coastal Area (Takutai Moana) Bill (Bill). The Society refrains from comment on the policy underlying the Bill. The submission examines and comments on some of the Bill’s legal implications and suggests drafting changes to enhance the workability of the legislation.

GENERAL COMMENTS/INTRODUCTION

Clause 8 – Meaning of Accommodated Activity

- 2 Clause 8(1) defines “accommodated activity”.
- 3 This clause is poorly expressed. In particular, it treats as an “accommodated activity” an application for resource consent (8(1)(b) and (c)), an “existing concession” (8(1)(j)), and a “permit” (8(1)(k) and (l)).
- 4 What is intended is not that the application, concession or permit is an accommodated activity, but rather that what is or will be authorised by the application, concession or permit, is an accommodated activity.
- 5 Clause 8(1) defines “associated operations”. Some activities comprehended by the phrase “associated operations” require an assessment of:
- 5.1 whether upgraded infrastructure is the same or similar in character, intensity and scale – clause 8(2)(c) and (e); or
 - 5.2 whether replacement or relocated infrastructure is of “the same or similar” nature as an existing structure – clause 8(2)(d).
- 6 Similar issues arise under the Resource Management Act 1991, for example, with existing use rights. Under that Act, disputes are resolved by the Environment Court. That Court is the appropriate forum for deciding any questions which arise under clause 8.

Recommendation

7 The provisions of clause 8 be amended as follows:

7.1 Clause 8(1)(b) read: *“any activity that may be lawfully undertaken under a consent, whenever granted for a minimum impact activity ...”*

7.2 Clause 8(1)(c) read: *“any activity that may be carried out under a resource consent if the application for that consent was first lodged before the effective date”*

7.3 Clause 8(1)(j) read: *“any activity carried out under an existing concession in a conservation protected area”*

7.4 Clause 8(1)(k) read: *“any activity carried out under an existing permit issued under regulation 12 of the Marine Mammals Protection Regulations 1992”*

7.5 Clause 8(1)(l) read: *“any activity carried out under a coastal permit issued under the Resource Management Act 1991 necessary to enable aquaculture activities to continue in that area, provided there is no change to the area of the coastal space occupied by the aquaculture activity for which the coastal permit was granted”*

8 Give the Environment Court jurisdiction to decide any disputes under clause 8(2).

Clause 9 – Meaning of Deemed Accommodated Activity

9 Clause 9(2) is difficult to read and understand. It appears to mean that nothing in sub-clause (1) derogates from the powers of a consent authority to decline a resource consent or if a resource consent is granted, to impose conditions.

Recommendation

10 That clause 9(2) read:

“Nothing in subsection (1) limits the discretion of a consent authority –

(a) To decline an application for a resource consent; or

(b) To impose conditions on the resource consent, if granted.”

Clause 13 – Boundary Changes of Marine and Coastal Area

- 11 Clauses 13(2) and (3) provide that when land in the common marine and coastal area (CMCA) is moved above the line of mean high water springs (MHWS) so that the land ceases to be part of the CMCA, that land vests in the Crown, subject to the Land Act 1948.
- 12 At common law, when the boundaries of land are not fixed, imperceptible changes to land through the natural processes of accretion and erosion in turn shift legal boundaries. In short, land which was formerly foreshore becomes part of the adjacent title (the doctrine is discussed in detail in Hinde McMorland and Sim, Land Law, 9.410 and 9.413).
- 13 Under section 81 of the Land Transfer Act 1952, the adjoining owner can seek to have a new title issued to include the land added.
- 14 The effect of clauses 13(2) and (3) will be that where new coastal land is created by the natural processes of accretion (the gradual, imperceptible receding of the sea) or alluvion (the gradual, imperceptible deposition of material on the foreshore), the new land so created will be a strip of Crown land separating adjacent titles from the foreshore.
- 15 There is no principled reason to depart from the common law position. No policy basis or rationale is expressed in the explanatory material to the Bill.

Recommendation

- 16 Delete clauses 13(2) and (3).

Clause 16 – Continued Ownership of Roads in Common Marine and Coastal Area

- 17 Clause 16(1) states that existing formed roads in the CMCA continue to be owned by the current owner, whether the Crown, a local authority or another person. Clause 16(2) provides that new roads constructed in the CMCA belong to the person who commissioned them.
- 18 There are some difficulties with the expression and purpose of this clause.
- 19 First, the clause is silent on unformed or paper roads. However, clause 18(3) may apply to unformed roads. It would be preferable for all matters relating to roads to be dealt with in the same section or consecutive sections.
- 20 Secondly, “road” is defined in clause 7. As defined, “road” appears to encompass only roads owned by the Crown and local authorities.

- 21 Roads and state highways are vested either in the Crown, under section 44 of the Government Roading Powers Act 1989, or in territorial local authorities, under section 316 of the Local Government Act 1974. Roads not owned by the Crown or local authorities are “specified freehold land” and not part of the CMCA (clause 7). Therefore reference to other persons is superfluous.
- 22 Thirdly, a road formed in the common marine and coastal area, being seaward of MHWS, will inevitably be a reclamation or a structure (for example a bridge), as discussed in paragraph 38 below. Reclamation will take the road itself outside the CMCA.
- 23 It is not clear whether new roads are excluded from the “Reclaimed land” provisions in subpart 3 of Part 2.
- 24 Fourthly, the definitions of “road” which are adopted from section 43 of the Government Roading Powers Act 1989 and section 315 of the Local Government Act 1974 include, by definition, appurtenant structures such as bridges, culverts, drains and fords and so on. Clause 16(3) is unnecessary.
- 25 In summary, clause 16 is confusing and unnecessary.
- 26 If specific provision is required for status and ownership of roads, then provision can be made more simply in clause 11(5), by excluding roads from the CMCA.

Recommendation

- 27 Add to clause 11(5):
- “The status and ownership, under any enactment or rule of law, of any road.”*
- 28 Provide that if a road is stopped, the land comprised in the former road becomes part of the CMCA.
- 29 If clause 16 is retained, delete clause 16(3) and replace with: *“For the purposes of this clause “road” includes all appurtenant structures, including the platform or embankment on which the road is built”*.
- 30 If clause 16 is retained, remove reference to “other person” and “person other than the Crown, or a local authority”.
- 31 State whether subpart 3 of Part 2 applies to new roads.

32 Group all provisions relating to roads in the same section or consecutive sections.

Clause 18 – Additions to Common Marine and Coastal Area

33 In clause 18(1), there is a deviation from the Bill’s standard terminology by referring to the “coastal marine area” in line 22.

34 Replace “*coastal marine area*” in line 22 with “*marine and coastal area*”.

35 Clause 18(3) returns to roads. The provision is difficult to understand and apply. Potentially it deals with both formed and unformed roads.

36 The explanatory note to the Bill states that parts of the marine and coastal area become part of the CMCA under certain circumstances. The note (page 8) continues “*this occurs if the Crown or local authority acquires any specified freehold land or if the use or construction of a road is discontinued*”.

37 Clause 18(3) goes beyond discontinuance of use or construction of a road. It applies if construction of a road fails to commence. Accordingly, if construction of a paper road does not begin, at some unspecified time the road becomes part of the CMCA. Likewise, if a paper road is not used, again at some unspecified time the road ceases to be road and becomes part of the CMCA.

38 If a road has been constructed and its use stops, that road becomes part of the CMCA. It is not clear how cessation of use is determined. Nor is it clear how the change in status is recorded. In addition as noted above, the constructed road will in all probability be a reclamation, above MHWS and therefore outside the CMCA.

39 No reference is made to roading legislation, in particular the provisions for stopping roads contained in the Local Government Act 1974 and Public Works Act 1981. The Bill, if enacted, will, presumably, prevail over those provisions. It would be desirable to make explicit reference to the relationship between provisions in this Bill, and the stopping procedures in other statutes. The “stopping” provisions should apply, both to achieve consistency with the treatment of roads above MHWS and to give certainty about the time when land loses its status as road and becomes part of the CMCA.

40 The relationship between clauses 16 and 18(3) is unclear.

41 Further, clause 16 envisages persons other than the Crown and local authorities owning roads. Under clause 11 it is only land of the Crown and local bodies that, under the Bill, becomes part

of the CMCA. However, under clause 18(3) privately owned land could cease to be “road” and become part of the CMCA. That outcome is inconsistent with the underlying policy and other provisions of the Bill.

- 42 The relationship between clauses 18(3) and 20 also must be clarified. If the use of a formed road is discontinued, is the “structure” that supports the road (or partially constructed road) caught by clause 20 or not?

Recommendation

- 43 The purpose and effect of clause 18(3) needs to be reconsidered. That purpose needs clearer and more precise expression in the Bill. The better course is to provide that only when a road is formally stopped (under the Public Works Act 1981 or Local Government Act 1974) then land comprised in the stopped road becomes part of the CMCA. Private “roads” should be excluded.
- 44 Clarify the relationship between clauses 16, 18 and 20.
- 45 Group all provisions relating to roads in one section or consecutive sections.

Clause 19 – Rights of Owners of Structures

- 46 Clause 19(3) preserves the rights of owners of structures.
- 47 Section 16 of the Foreshore and Seabed Act 2004 goes further. It protects the ownership not only of structures, but any “thing” fixed to or under or over the foreshore or seabed. There may be things (such as buoys, cables, wires and pipes) that may not be structures. Clause 19 is too narrow.
- 48 Clause 19 indicates that a person’s property interest in a structure continues until the person’s interest is changed by disposition or operation of law. The subclause is inelegant and perhaps unintentionally suggests that dealing with an interest extinguishes that interest. It would be better to state simply that the interest may be dealt with in the same way as any other interest in personal property.
- 49 If the structure were part of the land, the land together with its structure, would be rateable property. By providing the structure is not part of the land, the structure may not be rateable. The intended rating status of the structure should be clarified.

Recommendation

50 Clause 19 be amended as follows:

“19 Rights of Owners of Structures

- (1) *This section applies to any structure or thing that is on, or after the commencement of this Part, fixed to, or under or over, any part of the common marine and coastal area.*
- (2) *Each structure or thing to which this section applies-*
 - (a) *Is to be regarded as personal property and not as land or as an interest in land; and*
 - (b) *Does not form part of the common marine and coastal area.*
- (3) *A person who, immediately before the commencement of this part, had an interest in a structure or thing to which this section applies continues to have that interest in the structure or thing as personal property.*
- (4) *Any person having an interest in a structure or thing may deal with that interest in the same manner as any interest in personal property may be dealt with”*

51 Specifically state whether the structure is to be rateable or not.

Clause 20 – Crown Deemed to be Owner of Abandoned Structures

52 Clause 20 deems the Crown to be the owner of abandoned structures in the CMCA.

53 In clause 20(3) the meaning of structure is extended to include “a vessel of any description”.

54 For the purposes of terminological consistency, the word “ship” should replace “vessel”. Ship is the term used in companion legislation, in particular the Maritime Transport Act 1994 and the Resource Management Act 1991. “Ship” is included in the definitions in clause 7 which adopts the meaning given in the Maritime Transport Act 1994.

55 Clause 20 does not go on to provide for the consequences of Crown ownership of abandoned structures.

56 Abandoned structures can create problems for navigation and may have adverse environmental effects.

57 In principle, Crown ownership should be subject to the relevant regulatory regimes under the Resource Management Act 1991, Building Act 2004, Maritime Transport Act 1994, Local Government Act 1974, including navigation bylaws made under that Act, Part 39A of the Local Government Act 1974, Submarine Cables and Pipeline Protection Act 1996, and proposed

clause 31 of the Bill. In other words, the Crown should stand on the same footing as a private owner of a structure.

Recommendation

- 58 Amend clause 20(3) by substituting “ship” for “vessel”.
- 59 Make the Crown subject to the exercise of regulatory powers under the Building Act, Resource Management Act, Maritime Transport Act, Part 39A of the Local Government Act and navigation bylaws made under the Local Government Act.

Clause 21 – Resource Consents to Continue in Effect

- 60 Clause 21 provides that nothing in the Bill limits or affects any resource consent granted before the commencement of the Act.
- 61 Sections 124 and 124C of the Resource Management Act give the holder of an expiring resource consent priority to other applicants in obtaining a replacement resource consent and a right to continue the consented activity pending final determination of an application for a replacement consent.
- 62 It should be made explicit that the Bill does not extinguish the ability of the holder of a resource consent granted before the commencement of the Marine and Coastal Area (Takutai Moana) Act to apply for a new consent in reliance on ss 124 to 124C of the Resource Management Act.
- 63 Amendments to clauses 57 and 65 may also be required (see below).

Recommendation

- 64 Add to clause 21 a new subclause:

“Nothing in this Act derogates from the rights of the holder of a resource consent granted before the commencement of this Act to apply for a new resource consent under sections 124 and 124C of the Resource Management Act 1991”

Clause 22 – Certain Proprietary Interests to Continue

- 65 Clause 22 preserves proprietary interests under leases, licences and permits. The Crown may only grant a renewal of such interests if the interest includes a right of renewal.
- 66 The scope of this clause is too limited.

67 There may be other forms of authorisation which are similar in kind to leases, licences and permits.

68 The comparative wording in the Foreshore and Seabed Act 2004 is “lease, licence, permit, consent or other authorisation”: section 17.

69 Easements should also be protected.

70 Provision should also be made for interests which are to be created under any written agreement made before the commencement of the Act.

Recommendation

71 Clause 22 be amended to read:

“22 Certain proprietary interests to continue

(1) In this section, proprietary interest—

- (a) means any interest under a lease, licence, ~~or~~ permit, easement or other authorisation (not being a resource consent) granted or to be granted under an agreement in writing in respect of any land that, on the commencement of this Part, is located within the common marine and coastal area; and*
- (b) includes any right to a renewal or an extension of that interest; but*
- (c) does not include a privilege.”*

Clauses 23-26 – Provisions Relating to Certificates of Title in the CMCA

72 These clauses use the term “certificate of title”. The term computer freehold register now appears in the Land Transfer Act 1952.

73 Consistency of terminology is desirable. Obsolete phrases should not be used.

Recommendation

74 Remove and replace references to “*certificate of title*” with “*computer freehold register*”.

Clause 23 – Titles Wholly in CMCA

75 Clause 23 requires the Registrar-General of Land, if requested by the Minister of Conservation, to cancel any freehold register of land wholly within the CMCA. Where a freehold register contains both land in the CMCA and adjacent land, clause 24 requires the Registrar-General at

the request of the Minister of Conservation or the owner of adjacent land, to cancel the existing register and issue a new freehold register for the adjacent land.

76 Under clauses 7 and 11(3) it is only the Crown and the local authorities which are divested of ownership of land in the CMCA.

77 Consequently, clauses 23 and 24 should be restricted to cancellation of computer freehold registers for land owned by the Crown or local authority.

Recommendation

78 Clause 23(1) be amended as follows:

“23 Provisions relating to ~~certificates of title~~ computer freehold registers wholly in common marine and coastal area

(1) The Registrar must, at the request of the Minister of Conservation and without further authority than this section, cancel the whole of any computer freehold register that comprises land owned by a local authority or the Crown and that is wholly within the common marine and coastal area. ...”

79 Clause 24(1) be amended as follows:

“If any computer freehold register comprises any land owned by a local authority or the Crown that is part of the common marine and coastal area as well as any adjacent land ...”

Clause 27 – Rights of Access

80 Clause 27(1) gives individuals rights of access to the common marine and coastal area. Clause 27(2) states those rights of access are subject to any authorised restrictions or prohibitions imposed under clause 78 or under any other enactment. Clause 27(3) describes what a prohibition or restriction might do.

81 So far as other enactments are concerned, clause 27(3) is redundant. The scope of prohibitions or restrictions on rights of access to the CMCA which can be imposed under other enactments will be prescribed by the enactment which authorises the restriction or prohibition.

82 The position is different for restrictions or prohibitions under clause 78.

83 There is no equivalent to clause 27(3) in clause 78. If clause 27(3) serves any useful purpose, it is by elaborating the extent of the power to impose prohibitions or restrictions under clause 78.

Recommendation

84 Clause 27(3) be removed from clause 27 and included in clause 78.

Clause 28 – Rights of Navigation Within Marine and Coastal Area

85 The comments made in paragraph 81 in relation to clause 27(3) equally apply to clause 28(4) (with the qualification that clause 78 is not relevant).

Recommendation

86 Clause 28(4) be deleted.

Clause 30 – Minister of Conservation to be Manager and to Perform Management and Administrative Functions in Common Marine and Coastal Area

87 Clause 30 appoints the Minister of Conservation as manager of the CMCA.

88 Clause 30(3) gives powers to the Minister's delegates to direct any person to stop an activity in the CMCA in certain circumstances.

89 Clause 30(3) is problematic. It is potentially very wide. To keep it within limits, it needs to be made clear that any activity lawfully being carried out under this, or any other enactment, is not subject to clauses 30(3)-(8). For instance, a person who is carrying out an activity in accordance with a coastal permit or a concession, or exercising existing use rights, should be free to do so, without being in breach of clause 30.

90 Health and safety and protection of the environment (clause 30(3)(a)-(b)) are already dealt with under other legislation.

91 The scope of clause 30(3) should be limited to protecting the rights of access conferred by clause 27: clause 30(3)(c).

92 Clause 30(3)(c) should not go further to authorise the Minister's delegate to intervene with an activity that "substantially detracts from the peaceful enjoyment by members of the public of any part of the common marine and coastal area". This phrase itself may need reconsideration. Some of the activities authorised by clause 27, in particular recreation activities, are capable of annoying members of the public. There is adequate general legislation dealing with nuisances which are sufficiently grave to warrant the intervention of the criminal law. Further, for a criminal offence, the words "substantially detracts from the peaceful enjoyment by members of the public" are too broad and uncertain.

- 93 If subclauses 30(3)-(8) are retained, a requirement should be added that a person in breach of a direction given under clause 30(3) must be warned that a breach of the direction is an offence and that he or she is liable to be arrested without warrant for non-compliance if breach of the direction continues.

Recommendation

- 94 Reconsider whether subclauses 30(3)-(8) are necessary.
- 95 If retained, limit clause 30(3) to conduct which has the effect of preventing any individual exercising the rights conferred by clause 27(1).
- 96 Include an additional subsection providing that a person who fails to comply with a direction given under clause 30(3), must be warned that contravention of the direction is an offence and that he or she is liable to be arrested without warrant by a Police Officer.

Clause 31 – Notices Regarding Dangerous Structures

- 97 Clause 31 empowers an authorised delegate of the Minister to issue notices to owners of structures in the CMCA to repair or alter structures so as to eliminate or minimise the risk or adverse effect of the structure, or to demolish or remove the structure.
- 98 The need for clause 31 is not obvious. As clause 31(6) indicates, there are powers under the Resource Management Act, Building Act, Maritime Transport Act and Submarine Cables and Pipelines Act giving various regulatory authorities power to deal with structures. Duplication of these powers and the existence of parallel and potentially conflicting jurisdictions is unhelpful and unnecessary.
- 99 Further, the clause does not spell out the relationship between clause 31 (notices regarding dangerous structures) and clause 20 which deems the Crown to be the owner of abandoned structures. It is highly likely that abandoned structures will require regulatory attention.

Recommendation

- 100 Reconsider the need for clause 31. If retained, the relationship between clause 31 (and the powers held by other agencies under other statutes) in relation to Crown owned structures, including abandoned structures vested in the Crown as owner by clause 20, must be clearly stated.

Clause 33 – Certain Reclaimed Land to Vest in Crown

101 Clause 33(1) deals with “authorised” reclamations; clause 33(3) and (4) deal with “unauthorised” reclamations. The terms “authorised” and “unauthorised” are not defined.

Recommendation

102 In clause 33(1), (3) and (4), either define “authorised” and “unauthorised”, or substitute “lawful” and “unlawful” for “authorised” and “unauthorised” respectively.

Clause 38 – Eligible Applicants for Interests in Reclaimed Land Subject to this Subpart

Clause 38(1)

103 Clause 38(1) allows a developer (defined in clause 32(1) as the person who holds the resource consent for the reclamation by which the land is formed) to apply to the Minister of Conservation for the grant to the developer of an interest in the reclaimed land that “has been, or is being, formed by the reclamation”.

104 The timing of an application cannot precede the commencement of the reclamation.

105 However, a developer needs the certainty of a proprietary interest in the reclamation. This assurance will often need to be obtained in advance of physical works being undertaken. Certainty for developers is one of the purposes of this part of the Bill: clause 32(2).

106 The definition of developer may be too narrow. There may be cases where small-scale reclamations can be undertaken without the need for a resource consent. Under section 12(1) of the Resource Management Act a reclamation is permitted without a resource consent if expressly allowed by a national environmental standard or regional coastal plan.

Recommendation

107 Amend the definition of developer in clause 38(1) by adding:

“or the person who undertakes, or intends to undertake a reclamation in reliance on a national environmental standard, or a rule in a Regional Coastal Plan as well as a rule in a proposed Regional Plan Coastal Plan, if there is one”

108 Replace clause 38(1) in relation to a developer who intends to undertake a reclamation, so it reads:

“A developer:

(a) who intends to undertake a reclamation; or

(b) on whose behalf reclaimed land subject to this subpart has been, or is being, formed may apply to the Minister for the grant to the developer of an interest in the reclaimed land that will be, is being, or has been formed by the reclamation”

Clause 38(2)

109 There appears to be an error in clause 38(2). It states a network utility operator may apply to the Minister for the grant to the “developer” of a lesser interest in reclaimed land. It is the network utility operator who will be seeking to have an interest.

Recommendation

110 Clause 38(2) be amended:

“(2) A network utility operator may apply to the Minister for the grant to the ~~developer~~ network utility operator of a lesser interest in reclaimed land subject to this subpart ~~that has been or is being~~ that will be, is being, or has been formed by the reclamation on the ground that the lesser interest is required for the purposes of the network utility operation undertaken by the network utility operator”

Clause 39 - Determination of Application by Minister

111 Clause 39 provides for the Minister, if satisfied that an application for the grant of an interest in reclaimed land has been made by an eligible applicant, to determine whether the applicant is to be granted the interest and the terms and conditions relating to the grant. The Minister is required to take in account the matters listed in clause 39(2).

112 The term “eligible applicant” is not defined but presumably means the developer undertaking the reclamation or the network utility operator seeking an interest in the reclamation under clause 38(2).

113 Clause 39(2)(g) requires the Minister to take into account “the financial value of the reclaimed land to the Crown”. As the Crown has not paid for the reclamation, this is an inappropriate consideration and should be deleted. Under current law, the Crown’s loss would be the value of the underlying foreshore or seabed. As the Bill will divest the Crown of ownership of the CMCA, the Crown has no relevant interest in the land and therefore no financial interest.

Recommendation

114 Define “eligible applicant” as “the developer or a network utility operator”, as the case may be.

115 Delete clause 39(2)(g).

Clause 41 – Notification of Determination and Variation

116 This clause requires the Minister to make a determination on the application for an interest in reclaimed land and having made that determination, notify the applicant.

117 Clause 41(3) enables the Minister of his or her own initiative to vary a determination.

118 This power should be deleted. It creates uncertainty for the applicant who has been granted an interest.

Recommendation

119 Amend clause 41(3) by deleting the words “on the Minister’s own initiative or”.

Clause 44 – Pending Applications under Resource Management Act 1991 that Relate to Reclaimed Land

120 This clause provides for the continued processing of applications made under the Resource Management Act for an interest in reclaimed land. This clause is supported as it allows applications made under the current provisions of the Resource Management Act to be continued to completion.

121 However, this clause also gives the applicant a right to have the application considered under the Bill. The timeframe for electing to have an application determined under the new legislation is 90 days: clause 44(5). This time is unrealistically short.

Recommendation

122 Amend clause 44(5) by substituting 180 for 90 days.

Clause 44 - Agreements Relating to Reclaimed Land

123 The Bill proposes to repeal section 355AA(2)(b) of the Resource Management Act 1991. That provision provides that an agreement made before the commencement of the Foreshore and Seabed Act with the Minister of Conservation to grant an interest in reclaimed land continues in force and that pursuant to such an agreement, an application can be made to the Minister for an interest in reclaimed land to be vested in the applicant.

124 There are still some agreements made before the commencement of the Foreshore and Seabed Act which have not been given effect to because the reclamation has not been completed.

125 The transitional provisions for such agreements should be continued.

Recommendation

126 Amend clause 44(1) by adding:

“(c) that was made pursuant to a written agreement entered into by the Minister of Conservation, before the commencement of section 13(1) of the Foreshore and Seabed Act 2004, with the applicant to vest a right, title or interest in land that has been or is to be reclaimed.”

Clause 44 – Special Enactments Relating to Reclaimed Land

127 The Bill proposes to repeal section 355A(2)(c) of the Resource Management Act 1991. That provision provides that if an enactment passed before the commencement of the Foreshore and Seabed Act provided for an interest in reclaimed land to vest in a person, that person may apply to the Minister of Conservation for that interest to be vested in the applicant.

128 There are some reclamations which are the subject of special statutes which are still to be completed.

129 The transitional provisions for such enactments should be continued.

Recommendation

130 Amend clause 44(1) by adding:

“(d) that was made pursuant to any enactment in force at the commencement of section 13(1) of the Foreshore and Seabed Act 2004, which provides for a right, title or interest in the reclaimed land to be vested in the applicant.”

Clauses 46 and 47 – Restrictions on Disposition of Freehold Interest – Rights of First Refusal

131 The term “freehold interest” is not defined. There are certain forms of freehold interest which should be excluded, such as unit titles.

Recommendation

132 For the purposes of these clauses the term “freehold interest” be defined to mean “an estate in fee simple, but does not include a stratum estate in freehold or in leasehold created under the Unit Titles Act 1972 or Unit Titles Act 2010”.

Clause 57 – the Effect of Protected Customary Rights on Resource Consent Applications

133 This clause prevents the granting of a resource consent for an activity within a protected customary rights area if the activity will or is likely to have adverse effects that are more than

minor on the exercise of a protected customary right, unless the protected customary rights group gives written approval or the activity is of a kind to which clause 57(3) applies.

- 134 Clause 57(3)(a) excludes the grant of a coastal permit necessary to enable aquaculture activities to continue in that area. It seems implicit that the aquaculture activity must be an existing or established aquaculture activity and therefore the application will be for a coastal permit to replace an expiring permit.
- 135 The Society notes that the Bill confers greater protection on protected customary rights than customary marine titles. Clause 57(3) contains a relatively narrow range of exclusions. It does not provide for a new nationally or regionally significant structure or infrastructure that is an essential work, to be consented, if the effects on the exercise of the protected customary right are more than minor in the absence of the written approval of the holder of the right. In contrast, that written approval is not required for accommodated activities (as listed in clauses 8 and 9 of the Bill), which include a nationally or regionally significant structure or infrastructure.
- 136 It is a matter of political judgment whether the narrowness of the exceptions in the case of protected customary rights, when compared with the breadth of the exemptions for customary marine titles, strikes the correct balance.
- 137 The exceptions in clause 57(3) do not include an application brought in accordance with sections 124 to 124C of the Resource Management Act 1991 to replace an expiring resource consent. Existing resource consents, although finite in duration, often permit significant activities in the coastal marine area and often entail significant investment by consent holders.
- 138 Clause 57(2) and (3) prevent re-consenting of such structures, unless:
- 138.1 Written approval is granted by the relevant protected customary rights group; or
- 138.2 The adverse effects of the activity on the exercise of a relevant protected customary right are no more than minor; and
- (1) The activity is an existing aquaculture activity; or
 - (2) The consent is for existing nationally or regionally significant infrastructure and its associated operations; or
 - (3) The consent is for an activity necessary for or reasonably related to prospecting, exploration or mining for petroleum.

- 139 These exclusions take no account of the scale or social and economic importance of the activity.
- 140 Refusing consent may be inconsistent with the Resource Management Act's purpose of sustainable management.
- 141 In addition, the limited nature of the exceptions in clause 57 seems at odds with the policy position of the Bill. The explanatory note seems to envisage that existing interests can continue and that resource consents can be obtained on expiry. At page 3, the explanatory note reads under the heading "*Existing interests*":

"The Bill states that resource consents in the common marine and coastal area that were in existence immediately before the commencement of the Bill are not limited or affected by the Bill. Existing leases, licences, and permits will run their course until expiry. Coastal permits will be available for the recognition of these interests after expiry."

- 142 At page 5, under the heading "*Protected customary rights*" the explanatory note states:

"Like many other activities in the common marine and coastal area, these customary rights are not exclusionary and do not stop others from legitimately carrying out activities."

- 143 Clause 4 which sets out the purposes of the Bill appears to be consistent with the policy position expressed in the explanatory note. In particular, clause 4(2)(d) states the Act "*recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area*".

Recommendation

- 144 Clause 57(2) should not apply to applications brought in accordance with sections 124 to 124C of the Resource Management Act, where the expiring consent has been given effect to.
- 145 That the word "existing" be inserted before "aquaculture activities" in clause 57(3)(a).

Clause 58 – Controls on Exercise of Protected Customary Rights

- 146 This clause enables the Minister of Conservation to impose controls on the exercise of a protected customary right, to manage any significant adverse effect on the environment.
- 147 The Bill is unclear how compliance with these controls will be monitored and enforced.
- 148 It is noted that section 322(1)(d) of the Resource Management Act which enables enforcement officers appointed by a local authority, to enter land to determine whether a control imposed on

a recognised customary activity under the Foreshore and Seabed Act is being complied with, is to be repealed, without any provision being substituted.

Recommendation

149 State by whom and how compliance with the clause 58 controls will be monitored and enforced.

Clauses 63-69: Effect of Customary Marine Titles on Resource Consent Applications

150 Clauses 63-69 deal with the scope of rights held under a customary marine title and the effect of those rights on resource consents.

151 There is some uncertainty about the relationship between the rights conferred by customary marine title and re consenting an existing activity under the Resource Management Act (RMA).

152 Clause 64(3) provides that before applying for a resource consent, a person must consult an applicant group which has applied for a recognition order or entered into negotiations for recognition of a customary interest.

153 Clause 64(4) states the functions of a customary marine title group to give or decline permission under an RMA permission right do not apply to activities for which a resource consent has been obtained before the effective date (whether or not the consent has been given effect to or exercised) or an application made before the effective date for resource consent (whether or not the application is finally determined before that date). The “effective date” is the date on which a customary marine title order is registered or an agreement recognising a customary marine title is brought into force by Order in Council: clause 7.

154 Clause 65(1) describes the activities to which an RMA permission right applies. The language used is ambiguous. It can be construed to apply only to new activities.

155 Under clause 65(2) a customary marine title group may decline permission for an activity authorised by a resource consent. Clause 65(6) states an RMA permission right does not apply to the grant or exercise of a resource consent for an “accommodated activity”. The phrase “accommodated activity” is defined in clause 8. As presently defined, in clause 8(1)(d) an “accommodated activity” includes “an existing activity that is undertaken in accordance with a resource consent”.

156 Clauses 64(4) and 65(1) and (6) can be read as applying to existing activities that must be reconcented. However, these exemptions can also be construed as being limited to existing resource consents and not to any existing activity that continues under a replacement consent.

157 The policy position recorded at page 3 of the explanatory note is that on expiry of existing resource consents, coastal permits will be available to recognise existing interests. It is doubtful that the wording achieves this policy's objective. At the very least there is ambiguity in the drafting.

Recommendation

158 If the policy position is correctly recorded at page 3 of the explanatory note, then the Bill should expressly state that an RMA permission right does not apply to the grant or exercise of a resource consent where an application has been brought in accordance with sections 124 and 124C of the Resource Management Act to replace a consent which has been given effect to but which has expired.

159 If however RMA permission rights are to apply to reconcented activities, the Bill should expressly state so.

Clause 68 – Offence and Penalty Provision

160 This clause will impose criminal sanctions on persons who begin an activity in a customary title area without first having obtained the permission of the relevant customary marine title group.

161 Offenders are liable to penalties of the same order of magnitude as breaches of the Resource Management Act 1991.

162 90% of any fine imposed is payable to the relevant customary marine title group.

163 In addition, a person convicted of an offence may be divested of "revenue or profits earned by, or accruing to, the offender as a result of the offence" or "any revenue or profits lost by the customary marine title group as a result of the offence".

164 The words "any revenue or profits" are too wide. Their effect may be draconian. It is submitted that the policy objectives can be achieved by limiting liability to "net revenue or net profits".

165 The penalties in clause 68(2) can be imposed on summary conviction.

166 However, in clause 68(4) the term “the Court” is used. Clause 7 defines “the Court” to mean the High Court.

Recommendation

167 In clause 68(1) limit to “net revenue” or “net profits”.

168 In clause 68(4) the words “the Court” be replaced with “the sentencing Judge”.

Clause 69 – Court May Make Orders

169 This clause provides that a customary marine title group may apply to the Court for orders “prohibiting a person from continuing the activity”, requiring a person to remove a structure, work or other materials, or requiring a person to rectify any adverse effects “of the activity”.

170 If the clause is read on its own, it is unclear what “the activity” is.

171 There is no description of the circumstances which create jurisdiction.

172 There is no statement of the time when jurisdiction arises.

173 It is unclear whether a conviction is required, or whether the jurisdiction may be exercised whether or not a person is prosecuted.

Recommendation

174 That clause 69 be amended to commence:

“if a person commences an activity in a customary marine title area to which an RMA permission right applies, without first having obtained the permission under section 65(2) of the relevant customary marine title group, the relevant marine title group may apply ...”.

175 State whether the jurisdiction in clause 69 arises:

175.1 Only on conviction, or

175.2 Whether or not a person is convicted.

175.3 Whether the sentencing Judge may make a order under section 69 or the High Court (as the clause is presently expressed) has sole jurisdiction.

Part 4, Subpart 1 – Procedure for Recognition of Customary Interests

- 176 The Bill contains two mechanisms for recognition of customary interests. One is by court order, and the other is by agreement between an applicant group and the Crown: clause 92.
- 177 There are some potential issues with this dual mechanism for recognising and giving effect to customary interests.
- 178 Firstly, if the Court process is followed, an application is made to the High Court. The application must contain the information set out in clause 99. The application must be served on local authorities, the Solicitor-General, the Chief Executive of the Ministry of Economic Development and any other person whom the Court considers is likely to be directly affected by the application: clause 101. In addition, the applicant group must give public notice of the application. The application must include as a minimum the information set out in clause 102(2). Any interested person may, within 20 working days after first publication of the notice, give notice in support of or in opposition to the application. An interested person may appear and be heard on the application: clause 103.
- 179 Through these mechanisms, persons interested in or affected by an application for a recognition order have an opportunity of being heard.
- 180 There is no parallel protection for third parties if the applicant group and the Crown enter into negotiations for recognition of a customary interest.
- 181 It is important that third parties be protected. Third parties should be given the opportunity of participating in the negotiation process before agreements are concluded.
- 182 To provide an appropriate safeguard, before negotiations begin between the Crown and the applicant group, public notice should be given. The public notice should include the information described in clause 102(2)(a)-(e), together with a statement that persons who have an interest in the subject matter may give notice of that interest to the Crown within a specified time.
- 183 Secondly, agreements and orders recognising customary interests need to meet the same statutory tests: clause 93(4). If an application is made to the High Court, the Court will give a judgment containing reasons for its decision. There is a right of appeal to the Court of Appeal on both matters of fact and law: clause 112.

- 184 In contrast, there is no requirement that reasons be given for the making of an agreement and there is no right of appeal. The entry into an agreement, and the making of an Order in Council giving effect to an agreement, could be the subject of judicial review proceedings.
- 185 To give transparency to this decision making, and to ensure that the right of judicial review is meaningful, the Minister should be required to give reasons for recognising (or not recognising) the customary interest for which recognition is sought. Those reasons should identify the parties who participated, or sought to participate, in the negotiations.
- 186 Finally, both agreements and orders are to be registered. The content of an order is specified: clause 108. The contents of an agreement are not prescribed. Because the register is notice to the world of customary interests, an agreement which is registered should include the same information as an order.

Recommendation

- 187 Add a clause requiring the Crown to give public notice of its intention to enter into negotiations with an applicant group for recognition of a customary interest; require public notice to include, as a minimum, the matters in clause 102(2)(a)-(e), and to state that any person who has an interest in the subject matter may give notice of that interest to the Crown by a specified date, being a date not less than 20 working days after first publication of the public notice.
- 188 Provide that the Minister give reasons for recognising the customary interest which is the subject of an agreement entered into under clause 93.
- 189 Provide in clause 95 that an agreement include information of the kind listed for a recognition order in clause 108(2).

Part 4, Subpart 2 – Marine and Coastal Area Register

- 190 The Bill provides for a register of interests.
- 191 Under the Bill, the Ministry of Justice is entrusted with administration of the interests recognised under the Act in the marine and coastal area.
- 192 As these interests relate to land, it is suggested that Land Information New Zealand is the more appropriate administrative agency.

Recommendation

- 193 Substitute Land Information New Zealand for the Ministry of Justice as the agency responsible for record keeping and maintenance of the register of orders, agreements and related information to be kept under the Act.

Clauses 119 and 120

- 194 Clause 119 enables regulations to be made for the management of the CMCA. Clause 120 enables the Minister of Conservation to make bylaws for any specified part of the CMCA.
- 195 Clause 119(2) prohibits the Minister recommending the making of regulations unless satisfied the proposed regulations are necessary for proper management of the CMCA and the objectives of the proposed regulations cannot be or are not being achieved under an existing enactment. Clause 120(2) contains a similar constraint on the bylaw-making power of the Minister.
- 196 As clauses 119(2) and 120(2) acknowledge, there is a raft of legislation which directly, or through subordinate instruments, such as rules in regional plans, maritime rules and Regional Council bylaws, regulates activities in the CMCA.
- 197 If regulations are promulgated or bylaws are made, then despite the injunctions in clauses 119(2) and 120(2), there can be inconsistent legislation governing these activities. This creates an unsatisfactory and confusing situation. Overlap of controls, possibly inconsistent, must be avoided.
- 198 For example, clause 119(1)(c) provides for regulations to prohibit or regulate the construction and use of structures in the CMCA. Already, section 12 of the Resource Management Act 1991 and rules in Regional Coastal Plans do so. Similarly, there is an overlap between clause 119(1)(d) and section 12 of the Resource Management Act 1991. It would be an undesirable outcome for an activity that is permitted by a Regional Coastal Plan to be regulated or prohibited by regulations made under clause 119.
- 199 Likewise, the by-law making powers set out in clause 120 will, if enacted, duplicate controls that exist under the Maritime Transport Act 1994 and the Local Government Act 2002, and other enactments.
- 200 The desirability of additional controls is questionable.
- 201 Preferably, where there is existing legislation which can be used to manage activities, there should be no duplication under the Bill.

Recommendation

202 Reconsider whether clauses 119 and 120 are necessary.

203 If retained, remove the provisions which govern activities already subject to control by or under existing enactments.

Schedule 1

204 In this schedule “deemed accommodated activities” are referred to as “deemed accommodated matters”. This is inconsistent with the terminology elsewhere in the Bill and should be corrected.

Recommendation

205 In Schedule 1 replace “deemed accommodated matter” with “deemed accommodated activity”.

Schedule 3

206 Schedule 3 contains amendments to other enactments.

207 At page 113 of the Bill, it is proposed to amend section 30(1)(d)(ii) of the Resource Management Act 1991. Section 30 sets out the functions of a Regional Council under the Resource Management Act. Section 30(1)(d) currently reads:

“in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of—

(ii) the occupation of space on land of the Crown or land vested in the regional council, that is foreshore or seabed, and the extraction of sand, shingle, shell, or other natural material from that land:”

208 The replacement wording for paragraph (ii) is:

*“(ii) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is **not** within the common marine and coastal area.” [Emphasis added]*

209 Under this drafting, Regional Councils will exercise control over the occupation of the coastal marine area that is not within the CMCA.

210 However, the coastal marine area and the CMCA are, for all practicable purposes, coextensive. Effectively, Regional Councils will have no control over the occupation and extraction in the CMCA.

211 This outcome seems surprising, and is not discussed in the explanatory note. It also seems inconsistent with the proposed amendment to section 12(2) of the Resource Management Act 1991, also set out on page 113. Section 12 of the Resource Management Act 1991 controls the use of the coastal marine area. It is proposed to repeal Section 12(2) and replace it with:

“(2) Unless expressly allowed by a national environmental standard, a rule in a regional coastal plan, or in any proposed regional coastal plan for the same region, or a resource consent, no person may –

(a) Occupy any part of the common marine and coastal area or

(b) Remove sand, shingle, shell or other natural material from that area.”

212 If occupation or extraction can be governed by a rule in a regional coastal plan, then those matters should be part of the functions of Regional Councils in section 30. Correspondingly, resource consents for the same activities should be within the jurisdiction of a Regional Council.

213 There appears to have been a drafting error.

Recommendation

214 Remove “not” from the intended amendment to section 30(1)(d)(ii) of the Resource Management Act 1991.

Conclusion

215 The Society wishes to appear in support of this submission.


Jonathan Temm

President

24 November 2010