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Marine and Coastal Area (Takutai Moana) Bill 2010

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Purpose

The aim of the Bill is to reform the law relating to ownership of the foreshore and seabed in the Foreshore and Seabed Act 2004 (the 2004 Act) which was passed in response to the Court of Appeal judgement in the case of *Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa Manawhenua Ki te Tau Ihu Trust v. the Attorney General and others*[1] (the case), and to repeal the 2004 Act. The Bill seeks to "restore the customary interests extinguished by that Act"[2].

Background

The case held that, on the face of it, there was no legislative or other legal reason why particular land on the foreshore and seabed not “subject to a specific freehold interest” was not Maori customary land and that the Maori Land Court could therefore proceed to investigate title to it under Te Ture Whenua

[1]The Court of Appeal of New Zealand [2003] 3 NZLR 642 (CA).

[2] Marine and Coastal Area Bill, 2010 No XX - 1, Explanatory note, General policy statement, p. 1.

Maori Act 1993[3] with the possibility that such areas of the foreshore and seabed found by that Court to be Maori Customary Land could be vested in Maori in fee simple as Maori Freehold Land (i.e. private ownership) .

Main Provisions

Customary marine title rights and exemptions overriding those rights

Customary marine title

The Bill provides that customary marine title exists in a particular part of the common marine and coastal area if the applicant group:

- holds the specified area in accordance with tikanga;
- has exclusively used and occupied the specified area from 1840 to the present day without substantial interruption.

The Bill provides that customary marine title provides only for the exercise of rights listed in Clause 64 and described in sections 65 to 91 (and described immediately below) and provides an interest in land, but does not include a right to alienate or otherwise dispose of any part of a customary marine title area *(Part 1, Clause 63)*.

The Bill sets out the criteria by which the High Court grants a customary marine title. Alternatively, such customary marine title may be obtained by agreement with the Crown *(Part 3, Clauses 60-62)*.

Comment
Bill provides only for jurisidiction in its subject matters to the High Court. Except in respect of the determination of ownership of Ngā taonga tūturu under Clause 81 0f the Bill, the Maori Land Court has no jurisidiction under this Bill as it has under the Foreshore and Seabed Act 2004 .

Customary marine title rights

The Bill provides that the following rights are conferred by, and may be exercised under, a customary marine title order or an agreement (see below):

- a Resource Management Act 1991 permission right;
- a conservation permission right; a right to protect wahi tapu and wahi tapu areas;
- rights in relation to marine mammal watching permits;
- rights in relation to the process for preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement;
- the prima facie ownership of newly found taonga tuturu;
- the ownership of minerals other than minerals within the meaning of Section 10 of the Crown Minerals Act 1991 or pounamu to which Section 3 of the Ngai Tahu (Pounamu Vesting) Act 1997 applies;

[3] Under Section 129 of Te Ture Whenua Maori Act 1993, all land in New Zealand has a particular status for purposes of that Act. Two of these statuses are Maori customary land (i.e. land held by Maori in accordance with tikanga Maori) and Maori freehold land (i.e. land the beneficial ownership of which of which has been determined by the Maori Land Court by freehold order – i.e. a fee simple). Under Section 132 of that Act the Maori Land Court has exclusive jurisdiction to investigate the title of Maori customary land, to determine the relative interests of the owners of the land (according to tikanga Maori) and to change Maori customary land into Maori freehold land by a vesting order. Section 139 of the Act provides that the land to which any vesting order made under Section 132 applies shall, on the making of the order, become subject to the Land Transfer Act 1952.

- the right to create a planning document *(Part X, Subpart 3, Clauses 63-91)*.

The Bill goes on to describe in detail RMA permission rights, Conservation permission rights, the meaning of "protection purposes"", marine mammal watching permits, consultation requirements in respect of the New Zealand coastal policy statement, wahi tapu protection rights, nga taonga tuturu, status of minerals, customary marine title planning documents and their recognition and the responsibilities of regional councils in respect of them *(Part X, Subpart 3, Clauses 63-91)*.

Comment
All these rights may be overridden by "accommodated activities" and by "deemed accommodated activities" (all described below). The term "accommodated activities" includes an existing structure or existing infrastructure that is nationally or regionally significant, and its "associated operations").

"Accommodated activities" override customary marine title

The Bill provides that certain activities and rights override the exercise of rights arising under a customary marine title. These are called "accommodated activities". These activities and rights are:

- an activity that can be lawfully undertaken without a resource consent;
- an application for a resource consent, whenever it is lodged, for a minimum impact activity (as defined in Section 2(1) of the Crown Minerals Act 1991)[4];
- an application for a resource consent first lodged before the effective date (the effective date means the date on which the marine title order was granted by the High Court or was established by agreement with the Crown);
- an application for a resource consent or other lawful approval granted under an enactment that was replaced by the Resource Management Act 1991;
- an activity for which there is an existing use right under the Resource Management Act 1991;
- an existing structure or existing infrastructure that is nationally or regionally significant, and its "associated operations" (see below);
- an existing marine reserve and the activities necessary to manage the reserve;
- an existing conservation protected area and the activities necessary to manage the area;
- an existing marine mammal sanctuary and the activities necessary to manage the sanctuary;
- an existing concession in a conservation protected area;
- an existing permit issued under Regulation 12 of the Marine Mammals Protection Regulations 1992;
- a coastal permit issued under the Resource Management Act 1991 (the RMA) 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;

[4] i.e. generally, geological, geochemical, and geophysical surveying; taking samples by hand or hand held methods; aerial and land, surveying, any activity prescribed (in regulations) as a minimum impact activity; any lawful act incidental to any of these activities activity to the extent that it does not involve any activity that results in impacts of greater than minimum scale and in no circumstances shall include activities involving cutting, destroying, removing, or injury of any vegetation on greater than a minimum scale, the use of explosives, damage to improvements, stock, or chattels on any land, any breach of the provisions of any Act including provisions in relation to protected native plants, water, noise, and historic sites, the use of more persons for any particular activity than is reasonably necessary, or any impacts prescribed (in regulations) as prohibited impacts.

- an emergency activity (see below);
- scientific research or monitoring that is undertaken or funded by the Crown, a Crown agent (under Section 10(1) of the Crown Entities Act 2004 or the appropriate regional council;
- a deemed accommodated activity (see below) *(Part 1, Clause 8(1) ("Meaning of accommodated activity"); Schedule 1 ("Process by which certain activities in customary marine title become accommodated activities,) Part 1 ("New nationally or regionally significant structure or infrastructure") and Part 2 (New minerals-related activities" - this sets out the process by which activity necessary for, or reasonably related to, prospecting, exploration, mining operations, or mining for petroleum or under existing privilege becomes accommodated").*

"Associated operations" which override a customary marine title

One of the above listed accommodated activities which override a customary marine title order is "an existing structure[5] or existing infrastructure[6] that is nationally or regionally significant", "and its "associated operations". The term "associated operations" means operations "that are essential to the function of the structure or infrastructure" including:

- the renewal of any existing resource consent;
- maintenance, remedial restoration, and minor upgrading work of an existing structure or existing infrastructure;
- the upgrading of existing infrastructure, provided the effects on the environment of the upgraded infrastructure, assessed at the date when an application is made to upgrade the existing infrastructure, are the same or similar in character, intensity, and scale as the effects of the infrastructure that is upgraded;

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[5] The term "structure" is defined in Section 2(1) of the Resource Management Act 1991 as " ... any building, equipment, device, or other facility made by people and which is fixed to land and includes any raft".

[6] The term "infrastructure" is defined under Section 2(1) of the Resource Management Act 1991 as:

- pipelines that distribute or transmit natural or manufactured gas, petroleum, [biofuel,] or geothermal energy;
- a network for the purpose of telecommunication as defined in section 5 of the Telecommunications Act 2001;
- a network for the purpose of radiocommunication as defined in section 2(1) of the Radiocommunications Act 1989;
- facilities for the generation of electricity, lines used or intended to be used to convey electricity, and support structures for lines used or intended to be used to convey electricity, excluding facilities, lines, and support structures if a person uses them in connection with the generation of electricity for the person's use and does not use them to generate any electricity for supply to any other person;
- a water supply distribution system, including a system for irrigation;
- a drainage or sewerage system;
- structures for transport on land by cycleways, rail, roads, walkways, or any other means;
- facilities for the loading or unloading of cargo or passengers transported on land by any means;
- an airport as defined in Section 2 of the Airport Authorities Act 1966;
- a navigation installation as defined in Section 2 of the Civil Aviation Act 1990;
- facilities for the loading or unloading of cargo or passengers carried by sea, including a port related commercial undertaking as defined in Section 2(1) of the Port Companies Act 1988;
- anything described as a network utility operation in regulations made for the purposes of the definition of network utility operator in Section 166 of the Resource Management Act 1991.

- the replacement or relocation of an existing structure that is part of existing infrastructure by a new structure of the same or similar nature (whether or not a resource consent is required);

- the relocation of existing infrastructure, if,

    - that is essential to the continuing operation of the infrastructure and
    - the effect on the environment of the new location, assessed at the date when an application is made to relocate the existing infrastructure, are the same or similar in character, intensity, and scale as the effects of the infrastructure in its previous location; and

- dredging that is essential to the ongoing operation of a port *(Part 1, Clause 8(2) ("Meaning of associated operations")*.

"Nationally or regionally significant"

The Bill provides that the term "nationally or regionally significant", in relation to an existing structure or infrastructure, means a structure or infrastructure and its "associated operations" (set out above) that are:

- not unlawful; and

- owned, operated, or carried out by one or more of,

    - the Crown, including a Crown entity;

    - a local authority, including a council-controlled organisation;

    - a network utility operator (within the meaning of Section 166 of the RMA);

    - an electricity generator as defined in Section 2(1) of the Electricity Act 1992;

    - a port company as defined in the Port Companies Act 1988;

    - a port operator (as defined in Section 650J(6) of the Local Government Act 1974);

    - Maritime New Zealand (within the meaning of Section 429 of the Maritime Transport Act 1994);

    - the Auckland Regional Transport Authority (as established under Section 7 of the Local Government (Auckland) Amendment Act 2004) *(Part 1, Clause 8(2) (Meaning of "nationally or regionally significant")*.

Deemed accommodated activities override a customary marine title

The Bill provides that a "deemed accommodated activity" is:

- a nationally or regionally significant structure or infrastructure and its associated operations that is an "essential work" (i.e. "a nationally or regionally significant structure or infrastructure that is essential ... to the wellbeing of the region in which it is located ... or ... to the national interest") the construction of which is, at any time after the commencement of Part 3 of this Bill ("Customary interests" (subject to all necessary consents being obtained) either,

    - agreed to by the group holding a customary marine title in the relevant area; or

    - classified by the Minister for Land Information as a deemed accommodated activity; or

- any activity that at the time of the commencement of Part 3 of the Bill is necessary for, or reasonably related to, "prospecting, exploration, mining operations or mining[7] for petroleum" under a privilege and for which an agreement or arbitral award has been made[8]; or

- any activity that, after the commencement of Part 3 of the Bill, is required for the exercise of a privilege in existence immediately before the effective date and of the rights associated with that privilege[9] *(Part 1, Clause 9 ("Meaning of deemed accommodated activity")*.

Common marine and coastal area

The Bill provides a special status for the common coastal marine and coastal area which means the marine and coastal area other than specified freehold land (i.e. land already in private ownership) and conservation areas and reserves and "the bed of Te Whaanga Lagoon in the Chatham Islands" and provides that "neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of [Part 2 of the Bill]" *(Part 2, Subpart 1, Clauses 11 and 14; Part 1, Clause 7, definition of "common marine and coastal area")*. The Bill details various public rights and powers over the common marine and coastal area such as rights of public access *(Part 2, Clause 27)*, rights of navigation *(Part 2, Clause 28),* rights of fishing *(Part 2, Clause 29*), the powers of the Minister of Conservation with respect to the management of the common marine and coastal area *(Part 2, Clauses 30 and 31)*, and detailed provisions relating to reclaimed land (to vest in the Crown, grants of freehold rights to private owners, right of first refusal on sale to the Crown and any iwi and hapu that exercise customary authority in the area *(Part 2, Clause 32-47).*

Protected customary rights

The Bill provides a process by which customary rights ("such as launching waka and gathering hangi stones"[10]) that were exercised in 1840 and continue to be exercised in accordance with tikanga may be given effect to and protected *(Part 3, Subpart 2, Clauses 53-59)*.

Repeal of Foreshore and Seabed Act 2004

The Bill repeals the Foreshore and Seabed Act 2004 *(Part 2, Subpart 1, Clause 14)*.

[7] as those terms are defined in Section 2 of the Crown Minerals Act 1991.

[8] under Schedule1, Part 2, of the Bill.

[9] as provided for in Clause 80A(1) of the Bill.

[10] Marine and Coastal Area (Takutai Moana) Bill, 2010 No 201-1, Explanatory note, General policy statement, p. 5.