

New Zealand's Foreshore and Seabed Legislative Framework and Synopsis

The Foreshore and Seabed Bill: Legislative Framework

The framework constitutes the government's response to the possibility, created by the Court of Appeal decision on Ngati Apa, that the Te Ture Whenua Māori Act might lead to further private ownership of the foreshore and seabed. This was not anticipated by, and therefore is not accommodated in, the other statutes controlling activity in the coastal marine area, in particular the Resource Management Act.

Purpose of Bill

The government's guiding principles are:

- the principle of access: the foreshore and seabed should be public domain, with open access and use for all New Zealanders;
- the principle of regulation: the Crown is responsible for regulating the use of the foreshore and seabed, on behalf of all present and future generations of New Zealanders;
- the principle of protection: processes should exist to enable customary interests in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected;
- the principle of certainty: there should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.

Main elements of Bill

The legislation:

- ensures that the foreshore and seabed is preserved for the people of New Zealand by vesting the full ownership in the Crown in perpetuity;
- makes provision for the expression of kaitiakitanga by recognising the ancestral connection of Māori with particular areas of the foreshore and seabed;
- provides for recognition and protection of existing customary rights to undertake particular activities, uses and practices;

- enables redress after application to the High Court or through direct approach to the government for groups that can prove territorial customary rights which would have amounted to exclusive possession but for this legislation;
- provides for a general right of public access and navigation along and over the foreshore and seabed.

Vesting in the Crown

The full legal and beneficial ownership of the foreshore and seabed will be vested in the Crown, to preserve it as public domain for the people of New Zealand. The Bill provides that the foreshore and seabed is to be held in perpetuity, and is not able to be sold or disposed of, other than by or under an Act of Parliament.

The vesting will apply across all foreshore and seabed areas except those covered by private titles that have been or are in the process of being registered under the Land Transfer Act 1952. The government will exercise full administrative rights and management and landowner responsibilities, on behalf of all New Zealanders, to the foreshore and seabed that is vested in the Crown.

Recognition of ancestral connection

The Bill creates a new jurisdiction for the Māori Land Court to recognise the ancestral connection of Māori groups with particular areas of the foreshore and seabed. The Court would be required to recognise ancestral connection in accordance with tikanga Māori. Where there are overlapping ancestral connections the Court will be able to recognise them both.

Ancestral connection will also be able to be recognised by agreement between Māori and the government. Circumstances could include: following a Māori Treaty of Waitangi settlement or where a Māori group holds customary or freehold land abutting the foreshore.

Recognition of ancestral connection will bring with it a strengthened ability to participate in decision-making processes over the relevant coastal area.

Recognition of customary rights

The Bill creates a new jurisdiction for the Māori Land Court and the High Court to identify and recognise customary rights in the foreshore and seabed. This jurisdiction will not extend to areas in private title, or to matters covered by the Wildlife Act 1953, the Marine Mammals Protection Act 1978, or the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

The Court must be satisfied that:

- the application is made on behalf of an established and identifiable group;
- the activity, use or practice has been integral to the culture of the group, has been exercised substantially uninterrupted since 1840 and continues to be exercised; and
- has not already been extinguished as a matter of law.

Customary rights accepted by the court will need to be recognised in decision-making on the Coastal Marine Area. The Bill includes amendments to the Resource Management Act 1991 to protect these rights:

- they will be included among the matters of national importance that all decision-making under the Act has to have regard to, from National Policy Statements to regional and district plans and resource consents;
- neither the Act, regulation nor any relevant plan can unreasonably prevent the exercise of a customary right;
- the Act will require that if another party seeks a resource consent for an activity that would have a significant adverse effect on the exercise of the customary right, then it would [unless the customary right holder consented] be declined;
- customary rights holders will be able to continue the customary activity without obtaining a consent under the Act.

Where the exercise of a customary right may have adverse environmental effects, the Bill establishes a new process that allows a local authority to assess the impact of the exercise of the right on a case by case basis. The onus will be on local decision makers to demonstrate that there is a risk to the environment rather than on the right holder to demonstrate that there is not. Any decision to impose restrictions on a customary right would be taken by the Minister of Conservation with the Minister of Maori Affairs.

The role of the High Court

The Bill includes a new jurisdiction for the High Court. An applicant group may seek a declaration by the Court that the cumulative bundle of rights to which they would have been entitled over an area of the foreshore and seabed would have amounted to a full territorial customary right had the legislation not vested the full beneficial ownership in the Crown. The Court would apply the common law, and would be able to look at the full set of rights and interests in the claimed area [including customary fishing rights.] Any declarations would be referred to the government for discussion with the group about redress.

To provide as much simplicity of process as possible, groups will also have the option of approaching the government directly on the matter. Should such an approach be unsuccessful, they would retain the opportunity to pursue their claim in the High Court.

New Zealand's Foreshore and Seabed: Policy Refinements since December 2003

Ownership of the foreshore and seabed

The December framework proposed a new 'public domain' title vesting in the Crown is preferable because it is the mechanism that has previously been used to represent the people of New Zealand or the public interest. Accordingly, the Foreshore and Seabed Bill will provide that full and beneficial ownership of the foreshore and seabed will be vested in the Crown in perpetuity for the people of New Zealand.

The Waitangi Tribunal on this issue: *We note that we do not attach any importance to the distinction drawn in the policy between the ownership of the foreshore and seabed by the people of New Zealand and ownership by the Crown. The difference is symbolic only, and is most unlikely to have any significant legal implications.*

Ancestral connection

The term 'customary title' envisaged in the December framework was widely misunderstood and has been replaced by 'ancestral connection.' Ancestral connection provides for the expression of kaitiakitanga and may be recognised by application to the Māori Land Court or as a result of direct discussions with the government. It will bring with it a strengthened ability to participate in decision-making processes over the relevant coastal area.

The Waitangi Tribunal: *'Customary title' is a misnomer, because it is clear that the policy intends that ownership [which is the value to which title usually refers in relation to land] will lie with the people of New Zealand, which for practical purposes is probably indistinguishable from Crown ownership... Māori will obtain legal recognition of a lesser order.*

Redress for territorial customary rights established through common law but inaccessible because of the vesting provisions in the Bill

Applicant groups will be able to go to the High Court for a declaration that under common law their bundle of rights over a particular area of the foreshore and seabed would have amounted to a territorial customary right but for the fact that the legislation vests full and beneficial ownership in the Crown.

The opportunity is not restricted to Māori but applications will have to provide evidence of customary use and association dating back to 1840 and amounting to exclusive occupation and possession.

A declaration from the High Court would be referred to the government as a basis for discussion with the group concerning redress.

Applicants will also be able to approach the government directly without recourse to the High Court and without losing the option of an application to the court.

Similarly, local authorities will have the capacity to seek redress from the government should the Crown re-vest foreshore and seabed held, and paid for, by the authority in question. The December framework provided they could apply for compensation.

The Waitangi Tribunal: *Following Marlborough Sounds, Māori have the right to go to the High Court and the Māori Land Court for declaration of their property rights in the foreshore and seabed.*

Roving commission and the 16 regional working groups dropped

The commission was to identify who held mana and ancestral connection and make recommendations to the Māori Land Court but this layer of bureaucracy will now be avoided by allowing applications to be made direct to the Court.

The Waitangi Tribunal: *There is no detail on appointment criteria, reporting lines, status of its [the commission's] recommendations; review or appeal rights or their scope; the matter of overlapping boundaries; or whether the two-year term (which many regard as extremely optimistic for what we apprehend to be their task) can be extended.*

The 16 working groups, comprising central government, local authorities and Māori, to develop legally-binding agreements on Māori involvement in the management of the coastal marine area will also not now go ahead. Instead the government will give priority to building on and developing established relationships and protocols, both in the fishing context and more generally. Work will proceed at a national and regional level. The objective will be to ensure that existing levels of customary management or guardianship responsibilities are maintained at a minimum and, where appropriate, increased.

The Waitangi Tribunal on the proposed working groups: *The processes for securing enhanced Māori participation in decision-making concerning the coastal marine area are ill-conceived. They do not engage realistically with the profound difficulties of securing Māori representation that works, the numbers of people who would need to be involved for any agreements to be useful, and the consequences of the level of Māori disaffection with the government's plans.*

New provisions relating to customary use and activity-based rights

Available through the High Court as well as the Māori Land Court

Customary use or activity-based rights can no longer be applied for only by Māori. Non-Māori will also be able to apply for recognition of these rights through the High Court.

Applicants must be an established and identifiable group and the activity, use or practice must be integral to the group's culture and must have been exercised substantially uninterrupted since 1840.

Recognition entitles the holder to prevent any action by a third party which would thwart or significantly impair the exercise of the right.

Customary rights no longer dependent on establishing ancestral connection

The two have been decoupled as the link unnecessarily complicated the process. It will now be possible to establish customary rights without first having to establish ancestral connection.

Customary rights and the Resource Management Act

Holders will not need to seek a consent under the RMA. Should the local regional authority consider the exercise of the right would create an environmental hazard, it must refer the issue to central government. The onus will be on local decision makers to demonstrate that there is a risk to the environment rather than on the right holder to demonstrate that there is not. Any decision to impose restrictions on a customary right would be taken by the Minister of Conservation with the Minister of Māori Affairs.

The proposal that all recognised customary rights should be attached to the relevant district plan is on further consideration unnecessary. Instead, the relevant local authorities will be required to hold information on the customary rights in their areas, once notified by the Māori Land Court or the High Court. This must be publicly available and can be used by potential applicants for resource consents.

The December framework required that if the activity associated with a customary right had been fully allocated under the RMA, the customary right holder's rights would remain suspended until the relevant coastal permit expired. This requirement has been dropped as it would have created administrative complexity and uncertainty. If a conflicting RMA permit has as a matter of fact interrupted the exercise of the customary right, then it will not be possible for the Māori Land Court to revive the right.

Appeals to the High Court and Court of Appeal

Appeals from the Māori Land Court on tikanga will be made to the Māori Appellate Court but appeals on questions of law or fact will now be heard in the High Court. All appeals may then be heard by the Court of Appeal and the Supreme Court.

Esplanade reserves

The legislation will not require that esplanade reserves should be established in the event of resource consents for coastal properties that do not involve subdivision and where the change in use or activity does not limit existing access to the foreshore and seabed.

In addition, there are a number of private properties where private land below mean high water springs does not adjoin an esplanade reserve and would accordingly remain in private title on subdivision. All parts of an allotment being subdivided, that are below mean high water springs, will have to be vested in the Crown.

Reclamations

The December framework left unchanged the current legislation on the vesting of reclamations into private title. A legislative change will now require vesting to take place on a leasehold basis, which can also be subject to conditions to protect public access. This will provide an effective way of managing the long term use of the reclamation and will ensure that areas currently held by the Crown will not pass into private ownership.