

Replacing the Foreshore and Seabed Act

- The Marine and Coastal Area (Takutai Moana Act) 2011 (“the Act”)

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Purpose of the new Act

The purpose of the Act is to restore and protect legitimate, customary interests and recognise the *mana tuku iho* exercised by iwi, hapū, and whānau as tangata whenua. The new Act is an attempt to acknowledge Te Tiriti o Waitangi, which the former Act did not.

Whānau, hapū or iwi groups have until March 2017 to seek Customary Marine Title. This can be done through specific negotiations with the Crown or through an application to the High Court.

Differences from Foreshore and Seabed Act 2004 (“the old Act”)

The Act is innovative but does retain the same structure as the old Act. There are however a few differences, the main ones being that the new Act:

- a) Acknowledges the Treaty of Waitangi;
- b) Restores native title, which was extinguished under the old Act; and
- c) Limits the ability to obtain title through fulfilment of the statutory legal test.

The “common marine and coastal area”

The Act creates a common space in the marine and coastal area called the “common marine and coastal area”. This was previously referred to as the “foreshore and seabed” under the old Act. The new Act guarantees free public access in that area, but it does not affect private titles.

The Crown does not own the common marine and coastal area, nor is it capable of being owned by anyone else (including iwi, hapū or whānau groups).

Protections

PROTECTED CUSTOMARY RIGHTS

The Act also provides for the protection of “customary rights”, meaning longstanding rights that continue to be exercised. The Act protects these rights through affording them the status of *mana tuku iho*, which formalises existing best practice in coastal management and will allow Māori to take part in conservation processes in the area. Customary rights include the collection of hāngi stones and the launching of waka.

Customary rights are not territorial (and therefore the public cannot be excluded). This is because the recognition of customary rights relates primarily to an activity and not an area of marine and coastal space.

Customary rights holders have to give written permission in relation to third party applications for resource consents for activities that will have an adverse impact (more than minor) on the customary activity.

Legal test for obtaining Protected Customary Rights

Under the Act, a “Protected Customary Right” is a right that an applicant group can show that they have exercised since 1840, and continues to do so in accordance with the tikanga of the area.

CUSTOMARY MARINE TITLE

Under the Act, Māori can also apply for recognition of “customary marine title” for areas within which whānau, iwi or hapū have a longstanding and exclusive history of use and occupation. Customary marine titles will be subject to the right of public access and they cannot be sold.

Customary marine title is the “stronger” of the two forms of protections available under the Act. It will, among other things, give holders:

- a) the right to permit/withhold permission for activities requiring a resource consent;
- b) the right to permit/withhold permission for certain conservation processes; and
- c) prima facie ownership of newly found taonga tuturu (historical artefacts).

Legal test for obtaining customary marine title

To gain customary marine title, applicants will have to fulfil the statutory test of showing that they have exclusively used and occupied the area without substantial interruption since 1840.

The “without substantial interruption” test has been altered slightly when compared to the old Act. The new Act allows recognition of a right “whether it continues to be exercised in exactly the same way or a similar way, or evolves over time.” This is an important change, as it allows applicant groups to show that the right has evolved or progressed since 1840. Importantly, there is no longer a need for the

right to be exercised in precisely the same way as it was in 1840.

Applying for recognition of customary marine title or protected customary rights

As referred to above, an applicant group can seek recognition of its rights either through:

- a) notifying the Crown that the applicant group has an intention to seek an agreement with the Crown (i.e. through direct negotiations); or
- b) by filing an application for a recognition order with the High Court.

The notification or application (as desired) must be presented or filed in Court no later than March 2017.

If you would like more information about your rights under the new Act, please contact Aidan or Eloise at:

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