

THE MARINE AND COASTAL AREA ACT 2011

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INTRODUCTION

The passing of the Marine and Coastal Area (Takutai Moana) Act ("MCAA") by Parliament on 24 March 2011 establishes a new regime for recognition of customary rights and title over the foreshore and seabed. A Court of Appeal finding that the Maori Land Court had jurisdiction to determine claims of customary ownership of the foreshore and seabed in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 led to the previous Government's enactment of the Foreshore and Seabed Act 2004 ("FSA"). The FSA removed the ability of Maori to seek recognition of their customary or aboriginal title and vested beneficial ownership of the foreshore and seabed in the Crown, but allowed existing freehold title to remain. The perceived elimination of customary title under the FSA led to the creation of the Maori Party, and adverse reports by The Waitangi Tribunal (WAI 1071) and a United Nations Special Rapporteur (E/CN.4/2006/78/Add.3, 13 March 2006). Despite the criticism of the FSA it is worth noting that many of the provisions found under the MCAA are based on those found in the earlier enactment. This article provides some comparison of the MCAA with the FSA. The principal intention of the article, however, is to describe and comment on the key components of the new legislation, particularly those that effect decision making under the Resource Management Act 1991 ("RMA").

COMMON OWNERSHIP

PURPOSE

The purpose of the MCAA is to protect the legitimate interests of all New Zealanders, recognise the mana tuku iho exercised by iwi, hapu and whanau, provide for the

exercise of customary interests in the marine and coastal area and acknowledge the Treaty of Waitangi (s.4). It does this primarily by repealing the FSA, and establishing different categories of rights to the marine and coastal area. In particular, it restores customary interests that the FSA had extinguished and divests the Crown and local authorities of title to the marine coastal area, creating the "common marine and coastal area" ("CMCA") (s.11(3)). The commons is distinguished from existing freehold title and areas vested in the Crown as conservation areas, national parks or reserves (section 2(1) of the Conservation Act 1987 and section 2 of the Reserves Act 1977). Iwi, hapu and whanau groups are able to seek recognition of protected customary rights ("PCR") and customary marine title ("CMT") within the CMCA.

THE EXTENT OF THE MARINE AND COASTAL AREA

The CMCA means the marine and coastal area ("MCA"), excluding, as discussed, private title and conservation areas. The MCA is defined as meaning:

- “(a) ... the area that is bounded,—
 - (i) on the landward side, by the line of mean high-water springs; and
 - (ii) on the seaward side, by the outer limits of the territorial sea; and
- (b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and
- (c) includes the airspace above, and the water space (but not the water) above, the areas described in paragraphs (a) and (b); and
- (d) includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b) ...”

This is effectively the same definition as used for the "foreshore and seabed" in the FSA. However, the "coastal marine area" ("CMA") is defined under the RMA as meaning:

“[the foreshore, seabed, and coastal water, and the air space above the water]—

- (a) Of which the seaward boundary is the outer limits of the territorial sea:

- (b) Of which the landward boundary is the line of mean high water springs ...”

Clearly the definitions for the CMA and MCA are very similar. The principal difference between the two definitions is that water is included in the definition of the CMA but not in the definition of the MCA. The purpose of the RMA is the sustainable management of resources, whereas the purpose of the MCAA includes the exercise of customary interests which involves recognition of property rights. The drafters of the MCAA may have chosen to exclude water from the definition of the MCA in order to avoid any possibility that customary title to coastal water could be recognised.

Another difference is that the MCA does not expressly include the seabed, but does include “the beds of rivers”. Rather it includes under (d) “the subsoil, bedrock, and other matter under the areas” bounded by the landward side of mean high water springs and the seaward side of the territorial sea. It is likely that the seabed is supposed to be caught by “other matter under the areas”. This is not clear, however, as the areas bounded by mean high water springs and the territorial sea are not provided with any physical description. This makes it difficult to say with certainty what the word “under” is meant to refer to in any physical sense.

The MCA definition is probably intended to cover the seabed. Nevertheless, the aforementioned lack of certainty could lead to questions of who exercises jurisdiction over the seabed within the CMCA. This is because the MCAA amends section 30(1)(d)(ii) of the RMA to provide that regional councils now have jurisdiction over:

“... 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 within the common marine and coastal area.”

If the seabed is not part of the CMCA then regional councils will not exercise jurisdiction over such things as occupation of the seabed. Furthermore, the definition of CMCA excludes those parts of the MCA that are “specified freehold land”, or owned by the Crown as a conservation area, national park or reserve. That means section 30(1)(d)(ii) does not provide regional councils with jurisdiction over occupation and extraction of natural materials within parts of the CMA that are held in Maori, private or Crown title. It appears that there is a *lacuna* under the RMA and MCAA concerning the legislative body that is responsible for ensuring that

occupation and extraction of natural materials in those parts of the CMA are sustainably managed.

FREEDOM OF ACCESS, FISHING AND NAVIGATION

The issue of public access to the foreshore and seabed was particular contentious during progress of the MCAA through Parliament. Many expressed concerns that public access might be excluded or charged for by Maori who gained customary title to the CMCA. Section 26 provides for the rights of individuals to access and engage in recreation in the CMCA without charge. These rights are subject to any wahi tapu conditions that might be set out in a CMT order or agreement pursuant to sections 78 and 79 of the MCAA.

Navigation rights to the entire MCA are protected under section 27. Rights of navigation are also subject to wahi tapu protection conditions. There is potential for rights of access and recreation to be confused with navigation rights as navigation, recreation and access are undefined. Recreation and access rights are confined to the CMCA, whereas navigation rights extend throughout the MCA. The difference between a ship temporarily moored to load/unload passengers for recreational activities (access right) and a ship temporarily moored to load/unload cargo, crew, equipment and passengers (navigation right) may be difficult to distinguish.

Fishing rights are preserved under section 28. Section 79(2) provides that while wahi tapu conditions may affect the exercise of fishing rights, they must not do so to the extent that such conditions prevent fishers from taking their lawful entitlement under fisheries legislation.

PROTECTED CUSTOMARY RIGHTS

PCRs are a form of use right. In simple terms they convey upon the holder a right to use resources located in a particular area. PCRs can be obtained by either Court order or agreement. PCRs do not include fishing and commercial aquaculture activities, or activities relating to wildlife and marine mammals under the Wildlife Act 1953 or Marine Mammals Protection Act 1978. Activities based on spiritual or cultural associations are also excluded, unless manifested by a physical activity or resource use (s.51(2)(e)).

EXEMPTION FROM SECTIONS 9 TO 17 OF THE RMA

Section 52(1) provides that a PCR may be exercised under a protected customary rights order or an agreement “without a resource consent, despite any prohibition, restriction or imposition that would otherwise apply in or under sections 12 to 17 of the Resource Management Act 1991”.

This means *inter alia* that regional councils are not able to exercise their abatement, enforcement or prosecution powers under the RMA. Regional councils cannot, for example, take enforcement action in the event that the exercise of a customary right has an adverse effect on the environment under section 17 of the RMA.

Rather, the Minister of Conservation is empowered under section 56 to impose controls on the exercise of the customary right if it is likely to have a significant adverse effect on the environment. Section 56 is a major watering down of regional council powers in respect of compliance and enforcement under the RMA. Furthermore, it enables an increase in the scale of adverse effects than would otherwise be permitted under the RMA.

Section 56 has the potential to enable activities that are inconsistent with the legislative regime under the RMA. In particular, activities that fail “to recognise and provide for” matters of national importance listed under section 6, or to achieve the purpose of sustainable management under section 5 of the RMA. Notably one of the purposes of the MCAA is “to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand” (s.4(1)(a)). It is conceivable that this section might be resorted to in the case that a PCR has a more than minor adverse effect on the environment that does not amount to a significant adverse effect. However, the rules of statutory interpretation likely mean that the specific wording of section 56 overrides the general wording of section 4.

RESOURCE CONSENTS

Section 20 makes it clear that nothing under the MCAA is intended to have retrospective effect on resource consents granted before the commencement of the Act, or activities lawfully undertaken without a resource consent or other

authorisation. It is important to note that section 20 does not extend to cover pre-existing applications for resource consent. Nevertheless, applications for resource consents lodged prior to recognition of PCR or CMT are protected by section 55(1) and 64 (1). This is consistent with section 7 of the Interpretation Act 1999, which provides that “[a]n enactment does not have retrospective effect” (*Official Assignee v Petricevic* CIV-2009-404-6004 Duffy J (HC), paragraphs. 31 to 40; and *Re Auckland City Council* (A127/05) (EC), paragraphs 17 to 19).

Section 55(3) further provides that the existence of a PCR does not affect certain grants of rights under the RMA. In particular, the existence of a PCR does not affect the grant of a coastal permit to enable existing aquaculture activities or existing nationally or regionally significant infrastructure (and associated operations under section 63). However, while section 55(3)(d) provides that the existence of a PCR does not limit or otherwise affect the grant of a resource consent for specific infrastructure activities (prospecting, exploration or mining), section 55(4) states that the consent authority must have particular regard to the nature of the PCR when considering an application for these activities.

COMMERCIAL USE OF RIGHTS

The FSA test for determining whether a customary rights order could be made was whether:

- “(b) the activity, *use*, or practice for which the applicant seeks a customary rights order –
...
(ii) has been carried on, exercised, or followed in accordance with *tikanga* Maori in a *substantially uninterrupted* manner since 1840 ...”

(s.50(1)(b)(ii) and 74(1)(b)(ii)) [*Emphasis added*]

Significantly, section 51(1) under the MCAA provides that a PCR is a right that:

- “(a) has been exercised since 1840; and
- (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with *tikanga* ... *whether it continues to*

be exercised in exactly the same way or a similar way, or evolves over time ..."

[Emphasis added]

Section 51(1)(b) is a marked step away from the provision for customary rights orders under the FSA insofar as those rights are allowed to change over time. In contrast the FSA required such rights to be continued "to be carried on, exercised, or followed ... in accordance with tikanga Maori" (s.50(1)(b)(iii)) or "the distinctive cultural practices of the group ..." (s.74(1)(b)(iii)). Section 51(1)(b) opens up the possibility for PCR groups to argue that they exercise a much wider set of rights than those that might otherwise be associated with traditional practices. In particular, there is scope for the traditional form of a right to be exercised on a grander commercial scale. This view is supported by section 52(4)(b) which enables a PCR group to "derive commercial benefit from exercising its protected customary rights".

Further, the particular privileges and exemptions from the general law which are conferred by the MCAA on claimant groups, are able to be transferred to and enjoyed by any other group or person identified in a PCR order or agreement. Under sections 52(4)(a) and 53 a protected customary rights group may delegate or transfer the rights order or agreement in accordance with tikanga. The delegation or transfer must be notified and registered in accordance with sections 110 and 114.

CUSTOMARY MARINE TITLE

The MCAA makes provision for the recognition of CMT that has not been extinguished. This may be recognised through either a "recognition agreement" with the Crown, which can only be brought into effect by an Act of Parliament, or through a "recognition order" made by the High Court. The criteria for recognition of CMT are set out in section 58.

Section 58(1) provides that CMT exists in a specified area of the CMCA if the applicant group:

- “(a) holds the specified area in accordance with *tikanga*, and
- (b) has, in relation to the specified area, -

- (i) *exclusively used and occupied* it from 1840 to the present day without *substantial interruption*; or
- (ii) received it, at any time after 1840, through a customary transfer [in accordance with tikanga...].”

[Emphasis added]

Tikanga is defined under the MCAA as “Maori customary values and practices” (s.9). The terms “exclusively used and occupied” and “substantial interruption” are not defined.

This test is the crux of much of the political debate – how extensive might such title be and what might be the implications? A key distinction between the MCAA and the FSA is that the FSA required “the group had continuous title to contiguous land” (s.32(2)(b)) for exclusive use and occupancy to be proven. The MCAA weakens this test substantially. The ownership of land abutting all or part of the area for which CMT is sought is a matter that may be taken into account. Furthermore, the definition of “abutting” makes it clear the land does not have to be contiguous (s.59(4)).

The new test lends considerably from the decision of the Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010. In that decision the Supreme Court made the following findings:

(a) Occupation:

“... the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained.” (para. 154)

(b) Exclusive use and occupation:

“The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the

lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right.

...

However, as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control"..." (paras. 155 and 156)

(c) Interruption:

"I agree that there is no need to establish an unbroken chain of continuity and that interruptions in occupancy or use do not necessarily preclude a finding of "title". I would go further, however, and suggest that the presence of two or more aboriginal groups in a territory may also have an impact on continuity of use. For instance, one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange. In these circumstances, continuity of use and occupation, extending back to the relevant time, may very well be established." (para. 198)

If New Zealand courts decide to adopt the approach taken by the Supreme Court in the *Delgamuukw* decision it is likely that "exclusive use and occupation" would be demonstrated by a "substantial connection" between the people and the land, together with both the intention and capacity to retain exclusive control notwithstanding the presence of another tribe. This may include persons without a tribal affiliation (s.59(3)). Moreover section 59(3) states that the use of a specified area for fishing or navigation by non-applicants does not of itself preclude the applicant group from establishing CMT exists.

Furthermore, "substantial interruption" is likely to be treated as a fairly strong test requiring something more than the cession of possession from one group to another. Indeed the MCAA envisages transfers in accordance with tikanga from one group to another and continues the FSA provision for a binding opinion to be sought from the Maori Appellate Court as to whether tikanga has been followed (s.99).

The *Delgamuukw* decision does not discount the possibility of shared exclusive occupation. In particular, the Supreme Court observed that:

"The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's." (para. 158)

The provisions under the MCAA for recognition of CMT are not as restrictive as the tests that were provided for under the FSA. It is possible that significantly greater areas of the CMCA will have CMT recognized under the MCAA than the equivalent territorial customary right formerly available under the FSA. It is important therefore to understand the nature of the rights and the degree to which they might constrain others.

RMA PERMISSION RIGHTS

Recognition of CMT may significantly impact on new applications for coastal permits other than for renewal of existing permits or use rights. Resource consents for activities within CMT areas will require an "RMA permission right" from the CMT group (s.66). The group has complete discretion as to whether to grant the right. However, once granted a permission right cannot be revoked. In granting a permission the group must specify the activity permitted, "the applicant who is to have the benefit of the permission" and the duration of the permission. The permission does not have to be for the same period as the consent, and there do not appear to be any provisions for transfer of a permission once granted. This could pose significant difficulties to a consent holder seeking to transfer a resource consent to another person. Applicants cannot exercise a resource consent until they have obtained a permission right. The CMT group has 40 working days within which to

grant or decline the application. If there has been no decision within that timeframe the permission is deemed to have been granted for the duration of the consent (s.67).

CONSERVATION PERMISSION RIGHT

Conservation permission rights enable CMT groups to give or decline permission, on any grounds, for the Minister or Director-General of Conservation to consider an application or proposal for specified conservation activities within a CMT area (s.71). Those activities are the declaration or extension of a marine reserve or a conservation protected area, or an application for a concession. However, if the Minister or Director-General is satisfied that a proposal for protecting an area is for a purpose of national importance then they may proceed without permission from the group. The power to override a CMT group's decision does not extend to concessions (s.74).

ACCOMMODATED ACTIVITIES

Accommodated activities are activities that are expressly excluded from needing an RMA permission right or a conservation permission right (s.63). Section 64 (2) defines accommodated activities as meaning *inter alia*:

- any activity authorised by resource consent if the application for consent is made prior to recognition of CMT;
- resource consents, whenever granted, for a minimum impact activity (under section 2(1) of the Crown Minerals Act 1991) related to petroleum;
- infrastructure that is lawfully established and is reasonably necessary to national social or economic well-being, or the wellbeing of the region in which it is located (accommodated infrastructure);
- resource consents required for management of existing reserves, sanctuaries or concessions;
- a coastal permit to continue an existing aquaculture activity;
- activities undertaken to prevent, remove or reduce danger to human health, the environment or property (emergency activity); and
- scientific research or monitoring by the Crown or a regional council.

With the exception of accommodated infrastructure, emergency activities and scientific research or monitoring all of the accommodated activities listed under section 64(2) involve resource consents. It is not immediately clear what kinds of conservation activities might come within the definition of an accommodated activity.

PLANNING DOCUMENTS

Among the rights conferred under section 62 for CMT areas is the right to create a planning document (s.62(1)(g)). Planning documents could have significant ramifications for the preparation and contents of regional planning documents under the RMA. No right of objection or appeal rights to the Environment Court apply to the preparation of planning documents.

Section 85(2) of the MCAA provides that a planning document can only make provision for issues, objectives and policies. Rule making is therefore retained as the preserve of regional councils. The objectives and policies that can be provided for under section 85(3) include those that relate to (a) sustainable management of the CMT area, and (b) protection of cultural identity and historic heritage of the group (s.85(2)(a) and (b)). Sections 85(3)(a) and (b), on the face of it, appear to indicate that planning documents principally are intended to address matters of cultural and heritage value.

However, the use of the words "may include" in section 85(3) indicate that the matters under paragraphs (a) and (b) are not definitive and that there are other matters that might be addressed in a planning document. This may be appropriate insofar as a planning document is intended to be taken into account or regarded by agencies subject to different legislation to the RMA (s.88 to 91). The breadth of the word "include" under section 85(3) of the MCAA, however, lends itself to the possibility that CMT groups could set out objectives and policies in their planning documents on a range of matters that extend beyond those commonly understood as ones of cultural or heritage concern. It is not inconceivable that a planning document could make provision for a more liberal set of objectives and policies governing the use and development of resources in a CMT area than those found in the applicable regional planning documents.

Regional councils must in turn initiate a process to determine whether to alter their regional documents (regional policy statements and plans) in order to "recognise and

provide for" any matters in the planning document relevant to the CMT area, if and to the extent that it would achieve the purpose of the RMA (s.93(6)). In making a determination a regional council must consider the extent to which alterations must be made to its regional documents to "recognise and provide for the matters" in a planning document relevant to the CMT. This is a weighty requirement.

It requires regional councils to do something more than "have regard to" or "take into account". Positive action is necessary - provision must be made for the matters included in a planning document. The courts have found that the duty to "recognise and provide for" matters creates a significant priority for those matters subject to the duty. They cannot be merely an equal part of a general balancing exercise (*Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC), *Harrison v Tasman District Council* [1994] NZRMA 193 and *EDS v Mangonui County* (1989) 3 NZLR 257 (CA)).

It is questionable whether such weight should be placed on a planning document that has not been subject to the public participation procedures of the RMA. The requirement to make provision for planning documents contrasts with the requirement for regional councils and territorial authorities to simply "take into account" planning documents recognised by iwi authorities under sections 61(2A)(a), 66(2A)(a) and 74(2A) of the RMA. This difference reflects recognition of the CMT underpinning the related planning document, but seems inconsistent with the weight accorded to other iwi planning documents with a terrestrial or freshwater focus that may also encompass lands to which Maori hold title.

Finally, it is noted that applications for private plan changes in CMT areas, if not rejected or considered as resource consents, must be adopted by councils (s.93(12)). This clearly shifts the costs to the council and it is unclear whether funds will be provided from central government to meet such costs. Arguably the MCAA is a Treaty based settlement and the costs of promulgating plans if adopted should be met by central government.

COMMERCIAL USE OF TITLE

CMT groups are entitled under section 60(2)(a) to exercise the rights conferred under a CMT in order to derive commercial benefit. The holder of a CMT would presumably also apply for the lesser entitlements of a PCR. Together these rights could provide

their holders with a significant level of autonomy over the use and development of resources within the CMCA.

Furthermore, like customary rights groups, CMT groups have the power to delegate rights, or transfer CMT, in accordance with tikanga (s.60(3)). However, the transfer may only be to persons who belong to the same iwi or hapu as the CMT group (s.61(1)(a)). The person taking the transfer will have the same benefits and exemptions as the group in respect of future activities within the scope of the CMT. These rights include RMA and conservation permissions rights, the ownership of minerals (other than minerals reserved under the Crown Minerals Act 1991 and pounamu) and the creation of planning documents.

CONCLUSION

The MCAA protects existing rights of resource consent holders and provides significantly greater scope for Maori groups to gain customary use and property rights than was available under the FSA. It weakens tests that applied under the FSA. When combined with MCAA planning documents it is apparent that tangata whenua have considerably greater potential to influence the future of coastal and marine planning and management than in the past.

The MCAA effectively creates two parallel but separate sets of laws governing resource use and development in CMT areas. One set is applicable by CMT groups, while another would be applicable to anybody else wishing to undertake an activity in a CMT area. The statutory regime under the MCAA provides an alternative approach to that of Maori freehold land outside the CMCA. It is considered hard to justify the application of local authority powers and functions in respect of Maori freehold land above mean high water springs but not within the CMCA. It will be interesting to see whether the acquisition of new property rights and planning powers will result in positive outcomes for coastal management.

* Robert Makgill was legal counsel to Local Government New Zealand in respect of its submissions to the Maori Affairs Select Committee on the Marine and Coastal Area Bill 2010.