7. COUNCIL SUBMISSION ON MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL

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PURPOSE OF REPORT

1. The purpose of this report is to set out the background to the Marine and Coastal Area (Takutai Moana) Bill and ask the Council to approve the attached draft submission on the Bill (**Attachment 1**). Submissions must be lodged with the Māori Affairs Select Committee by 19 November 2010.

EXECUTIVE SUMMARY

Terms of the Bill

2. The Government has introduced the Marine and Coastal Area (Takutai Moana) Bill. A copy of the explanatory note to the Bill is attached (**Attachment 2**). The general policy statement to the Bill notes as follows:

> *The Marine and Coastal Area (Takutai Moana) Bill (the Bill) repeals the Foreshore and Seabed Act 2004 … and restores the customary interests extinguished by that Act. It recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area for its intrinsic worth for the benefit, use, and enjoyment of all New Zealanders. The Bill recognises the mana tuku iho of iwi and hapū, as tangata whenua, over the foreshore and seabed of New Zealand, and it contributes to the continuing exercise of that mana by giving legal recognition, protection, and expression to the customary interests of Māori in the area.*

3. Under the Foreshore and Seabed Act 2004 (the FSA), the public foreshore and seabed (excepting private titles) was vested in the Crown. The FSA also had the effect of extinguishing any uninvestigated Māori customary title (a common law concept that allows for the continuation of indigenous systems of law and rights) to the foreshore and seabed. In the FSA the foreshore and seabed is the area from the high-water mark at mean high-water spring tides extending seawards for 12 nautical miles (the territorial sea). This area includes the subsoil and the waterspace and airspace above this area (but not the air or water itself).

4. As alluded to in the Government's consultation document earlier this year, this Bill removes Crown ownership of the public foreshore and seabed by repealing the FSA, stating that this area (to be known as the common marine and coastal area) is not owned, and cannot be owned, by any person. This area now has a "special status".

5. The Bill continues the rights of public access in, on, over, and across the common marine and coastal area. It also provides that nothing in the Bill affects existing commercial, recreational, and customary fishing rights and it preserves rights of navigation in the area. These rights of public access, fishing, and navigation are subject only to restrictions authorised by legislation.

6. The Bill states that the Minister of Conservation is responsible for managing the common marine and coastal area. This role does not override the roles and responsibilities of other Ministers, local authorities, or other people who are specified in the Bill or other legislation.

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7. 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. There is also some protection for nationally or regionally significant structures and infrastructure and their associated operations.

8. The Crown retains ownership of petroleum, gold, silver, and uranium.

9. The Bill provides that, while there is no owner of the common marine and coastal area, existing ownership of structures and roads in the area will continue. New structures can be privately owned. Structures that have been abandoned will vest in the Crown.

10. The Bill sets out a new regime for reclamations.

11. The Bill also sets out a regime for the recognition of Māori customary interests in the common marine and coastal area. There are three types of interest that may be recognised being mana tuku iho, protected customary rights, and customary marine title. There are various "rights" that are linked to these interests.

History of Council submissions on this issue

12. In 2004, the Council made a submission on the Foreshore and Seabed Bill. The Council supported the Local Government New Zealand (LGNZ) submission for the most part but also made some other submissions. The Council's submission was also aligned with Ngāi Tahu. The key aspect of the Council's submission was that it did not support the introduction of the Foreshore and Seabed Bill. The Council argued that the Bill should not proceed any further and that the government embark upon a comprehensive consultation process of the issues arising out of the *Ngati Apa* case. The Council also submitted that that process have as its primary goal an aim to seek to achieve a consensus amongst the New Zealand community on the issues in that case. The council believed that if there was informed and considered discussion on those issues between Māori and Pakeha, then such consensus would be feasible.

13. The Council also made a series of technical submissions including that the Bill should clarify the legal status of services owned by local authorities (eg water mains, sewers) and other infrastructure operators in the land to be transferred to the Crown. The Council also asked that clause 13 dealing with roads be clarified.

14. In 2009, the Council made a submission to the Ministerial Review Panel, stating that it had not changed its position from its 2004 submission. The Council supported a full review of the FSA. The Council submitted that any changes to the law relating to the foreshore and seabed needed to be made in a way that provided an opportunity for full and meaningful consultation and implemented a consensus solution which meets the concerns of both Māori and Pakeha. The Council argued that such consultation should not be rushed. It was important to find the right solution for all New Zealanders, not a hasty solution as was the case in 2004.

15. In April this year, the Council made a submission on the Foreshore and Seabed Consultation document (the precursor to the Bill). A copy of that submission is attached to this report (**Attachment 3**).

16. Given the Council's prior involvement with this issue, it is considered appropriate for the Council to make a submission on the Marine and Coastal Area (Takutai Moana) Bill.

Proposed submission

17. A draft submission is attached to this report. The key aspects of the draft submission are that the Council supports the introduction of the Bill but it has some concerns about the way in which certain clauses will apply. The key concerns relate to:

- The definition of "common marine and coastal area" and "deemed accommodated activity".
- Clause 13 and the way in which the Bill deals with land accretions.
- Clause 18 and what happens when roads are no longer in use or their construction is stopped.
- The management and administration powers of the Minister of Conservation in clauses 30, 119 and 120.
- The treatment of future Council infrastructure should it be located within a customary rights protected area or a customary marine title.
- The effect of a planning document.

Impact of FSA on the Council

18. In approving the submission, the Council should also take into account the impact of the FSA on the Council in the last six years.

19. From a practical perspective, the FSA did not have a significant effect on the Council as a territorial authority. The council's district boundary extends to mean low water springs so the "foreshore" as such is included in the district as are the various harbours.

20. The Council retained ownership of any formed roads situated in the foreshore and seabed under section 15. Unformed roads in the foreshore and seabed were vested in the Crown. Under section 16, the Council retained ownership of its "fixtures" on, under or over the foreshore and seabed such as pipelines, wharves, jetties, buildings etc.

21. There was an impact in terms of the Council as a landowner. Approximately 50 parcels of land that were vested in the Council before the FSA came into force, and were situated in the foreshore and seabed, were subsequently vested in the Crown. The Council, under section 25 of the act was permitted to apply to the minister of conservation for redress. The Council did apply and received redress (i.e. compensation of $238,000) for two parcels of land. One parcel was the beach area containing the lifeboat sheds in Sumner along Heberden Avenue. The other was a piece of land containing the Christchurch yacht club fronting the main road in Redcliffs.

22. The Council under the RMA has to comply with any customary rights orders and the provisions relating to any foreshore and seabed reserves if such a reserve is established in the district. However, no foreshore and seabed reserves have been established yet via the territorial customary rights process in the High Court or through negotiations with the Crown.

FINANCIAL IMPLICATIONS

23. It appears that the Council has not acquired any further land located in the public foreshore and seabed since the FSA came into force. Consequently, it doe not stand to be divested of any additional parcels of land as a result of the new Bill.

Do the Recommendations of this Report Align with 2009-19 LTCCP budgets?

24. This is not a matter that would normally be provided for the LTCCP budgets.

LEGAL CONSIDERATIONS

25. A discussion of the clauses of the Bill are set out in the background to this report.

Have you considered the legal implications of the issue under consideration?

26. The draft submission addresses the legal implications for the Council.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

27. This matter is not normally provided for in the LTCCP or Activity Management Plans.

Do the recommendations of this report support a level of service or project in the 2009-19 LTCCP?

28. Not applicable.

ALIGNMENT WITH STRATEGIES

29. In August 2010, the Council adopted the Public Open Space Strategy 2010-2040. The strategy sets out a vision for public open space over the next 30 years. The vision has two aspects which are:

    - To provide, develop and maintain a publicly accessible network of open space to enhance and protect health, recreation and liveability for residents and visitors to Christchurch and Banks Peninsula.

    - To contribute to maintaining and enhancing the district's environmental quality, landscape character, cultural values and cultural heritage through the public open space system.

30. The Open Space Strategy divides public open space into three categories. These are green spaces, blue spaces and grey spaces. Green Spaces are land areas that are largely covered in vegetation, including parks, conservation land, cemeteries *and margins of water bodies*. Blue Spaces are surface water bodies or waterways occurring on the surface of the land, such as lakes, rivers and streams. *Public land adjoining or providing access to beaches is also included*. Grey spaces primarily refers to the street network.

Do the recommendations align with the Council's strategies?

31. Yes, the submission advocates for a publicly accessible marine and coastal area.

CONSULTATION FULFILMENT

32. Given the time available to prepare the submission and the fact of the local authority elections, the Council has not sought the view of any external party about the terms of this submission. However, internally, staff from the Legal Services Unit, Strategy and Planning and Transport and Greenspace have discussed the Bill and the terms of the draft submission.

33. In the case of the two recent submissions on the foreshore and seabed consultation (May 2009 and April 2010), the Council provided a copy of its submissions to Te Runanga O Ngāi Tahu after the submissions had been approved by the Submissions Panel.

34. LGNZ are preparing a submission on the Bill and in late September asked for comments on three matters associated with the Bill. LGNZ required feedback by 22 October 2010. Staff has not provided feedback to LGNZ at this stage. A copy of the LGNZ memorandum is attached to this report (**Attachment 4**).

STAFF RECOMMENDATION

It is recommended that the Council:

(a) Notes the terms of this report and approves the draft submission (to be signed by the Mayor and the Chief Executive) for lodging with the Māori Affairs Select Committee.

BACKGROUND (THE ISSUES)

35. When the National Party and the Māori Party entered into a Confidence and Supply Agreement, the National Party agreed that it would initiate as a priority a review of the application of the FSA to ascertain whether it adequately maintained and enhanced mana whenua. In the event of the repeal of the FSA, the National-led Government also agreed that it would ensure that there would be appropriate protection in place to ensure that all New Zealanders enjoy access to the foreshore and seabed, through existing and potentially new legislation.

36. In 2009, the Ministerial Review Panel subsequently concluded that the FSA was discriminatory and recommended that new legislation be enacted to reflect the principles of the Treaty of Waitangi and to recognise and provide for the interest of whanau, hapu, and iwi and for public interests in the foreshore and seabed.

37. The Government then issued a discussion paper on its preliminary proposals and options for a possible replacement of the FSA. A key aspect of the Government's proposals was that no one would own the foreshore and seabed, and that the foreshore and seabed would reside in the "public domain". The Government also proposed that Māori would be able to protect their customary interests, both territorial and non-territorial, either by negotiating with the Crown or going through a Court process.

38. The Government has now introduced the Bill.

Purpose of Bill

39. The purpose of the Bill is set out in clause 4. It is to:

    (a) Establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand;
    (b) Recognise the mana tuku iho exercised in the marine and coastal area by iwi and hapū as tangata whenua;
    (c) Provide for the exercise of customary interests in the common marine and coastal area; and
    (d) Acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

Definition of marine and coastal area

40. The Bill dispenses with the phrase "foreshore and seabed", and introduces the term "marine and coastal area". Broadly speaking the marine and coastal area covers the area that is bounded on the landward side by the line of mean high-water springs, and on the seaward side by the outer limits of the territorial sea. The "common marine and coastal area" specifically excludes land that is in private ownership, or land that is owned by the Crown with the status of conservation area, national park and reserve, or wildlife management reserve, wildlife reserve, or wildlife sanctuary. This follows the same approach in the FSA.

Special status

41. Part 2 of the Bill sets out the provisions dealing with the creation of the common marine and coastal area. The new and different status of the common marine and coastal area is set out in clause 11. Subclauses (1) to (4) provide as follows:

    (1) The common marine and coastal area is accorded a special status by this section.
    (2) 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 this Part.
    (3) On the commencement of this Part, the Crown and every local authority are divested of every title as owner, whether under any enactment or otherwise, of any part of the common marine and coastal area.

(4) Whenever, after the commencement of this Part, whether as a result of erosion or other natural occurrence, any land owned by the Crown or a local authority becomes part of the common marine and coastal area, the title of the Crown or the local authority as owner of that land is, by this section, divested.

42. Clause 13 of the Bill deals with the boundary changes of the marine and coastal area. Under clause 13(3), when land in the common marine and coastal area is, as a result of natural processes, such as accretion, moved above the line of mean high-water springs, the land ceases to be part of the common marine and coastal area and subsequently vests in the Crown.

43. Clause 14 repeals the FSA, and clause 15 restores any customary interests in the common marine and coastal area that were extinguished by the FSA. Clause 16 deals specifically with roads. Formed roads in the marine and coastal area will continue to be owned by the Crown, local authorities, or other persons. Ownership of new roads formed in that area can be acquired. However, under clause 18(3), any road within the marine and coastal area becomes part of the common marine and coastal area if its use or construction as a road has been stopped or failed to commence.

44. Clause 19 provides that structures that are fixed to or under or over, any part of the common marine and coastal area are to be regarded as personal property and not as land or an interest in land. These structures do not form part of the common marine and coastal area. The ownership of these structures is not affected by the Bill. However, under clause 20(1), the Crown is deemed to be the owner of any structure that is abandoned in the common marine and coastal area.

45. Clause 21 provides that resource consents granted before the commencement of the Bill are not affected.

46. Under clause 22, proprietary interests in the common marine and coastal area continue to exist and apply in the normal way. This includes interests under leases, licences or permits.

47. Rights of access, rights of navigation and fishing rights are preserved under clauses 27, 28 and 29. In terms of access, under clause 27(1), every individual has the right:

(a) To enter, stay in or on, and leave the common marine and coastal area;
(b) To pass and repass in, on, over, and across the common marine and coastal area; and
(c) To engage in recreational activities in or on the common marine and coastal area.

48. However, the rights conferred by clause 27(1) are subject to any authorised prohibitions or restrictions that are imposed under clause 78 (relates to the protection of wahi tapu), or by or under any other enactment. An enactment is defined to include bylaws, regional plans, and district plans.

49. The Minister of Conservation will be the manager of the common marine and coastal area and will have the necessary administrative and management powers. This includes the powers to make bylaws in relation to the marine and coastal area. The bylaw making powers are set out in clause 120 of the Bill and provide that the Minister may make bylaws:

(a) Prohibiting or regulating the use or parking of vehicles in a specified part of the common marine and coastal area.
(b) Regulating the use or mooring of vessels in the specified part of a common marine and coastal area.
(c) Prohibiting the hovering or landing of any aircraft over or in a specified part of the common marine and coastal area.
(d) Prescribing fines, not exceeding $500 in any one case, for the breach of any bylaws made under this section.

Reclaimed land

50. Under the FSA, the ability to apply for freehold title to new reclamations was removed. The Bill will create a new regime for the ownership of reclamations in the coastal marine area, so that:

- Land reclaimed from the coastal marine area for which no separate title has issued will be owned by the Crown (and is thus excluded from the common marine and coastal area).
- Responsibility for the issuing of title for such reclamations will lie with the Minister of Lands, rather than the Minister of Conservation.
- It will be possible to apply for freehold title, subject to limitations (clauses 37-42).

51. The issuing of title in reclamations for river beds or lake beds will remain in the RMA. If a reclamation in the coastal marine area is already underway, the applicant will be able to choose whether to continue under the RMA process or under the new Act. (In all cases, a resource consent under the RMA will still be required to undertake the reclamation works.)

52. The Bill provides that developers of reclamations may apply to the Minister of Lands for an interest in that reclaimed land. A network utility operator may also apply for an interest. If land has been reclaimed for more than 10 years and no interest has been granted, then anyone may apply to the Minister for an interest.

53. While it will be possible for any developer to obtain freehold title, the Bill refers to the "minimum interest" that is reasonably needed for the purpose of the grant. This suggests that in general the presumption is that a lesser interest will be granted, for example, leasehold title. The holder of a lesser interest will be able to apply for a renewal of that interest at the end of the term, and will also be able to apply for the grant of a freehold interest at that time. However the Bill does not appear to envisage automatic rights of renewal.

54. On the other hand, for certain applicants there will be a presumption that they will be granted a freehold interest in reclaimed land. This will apply to port companies and port operators, the airport companies for Auckland International Airport and Wellington International Airport, and any group holding customary marine title for the relevant area.

55. The Bill will allow an application for title to be made while the reclamation is being carried out. Under the current RMA regime, it is not possible to apply for an interest or a title until the reclamation has been completed.

56. Where a freehold interest in reclaimed land has been granted, the Minister of Lands will have the right of first refusal if the land is sold. If the Minister does not exercise that right, the iwi or hapū exercising customary authority over the area will have the right of first refusal. If the land is not sold under that process, the owner will be able to sell the land by public tender.

Customary interests

57. The Bill introduces a new regime to protect Māori interests in the common marine and coastal area. The three elements of this are mana tuku iho, customary rights, and customary marine title.

Mana tuku iho

58. The first part of this regime is known as mana tuku iho. Affected iwi or hapu will have the right to participate in conservation processes in the common marine and coastal area. Conservation processes include the establishment of marine reserves and conservation areas, and the management of stranded marine mammals. (Clauses 49 -52).

Protected customary rights

59. The second part of this regime is a mechanism to determine and protect customary rights. A customary right is one that has been exercised since 1840 and continues to be exercised in a particular part of the common marine and coastal area in accordance with the tikanga of the applicant group (whether it continues to be exercised in exactly the same or similar way, or evolves over time). Examples of these sorts of rights are launching waka or gathering hangi stones. These rights are protected through a customary rights order from the High Court or an agreement with the Crown.

60. Under clause 54(1), a protected customary right 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 9 to 17 of the Resource Management Act 1991. With respect to the right, a protected customary rights group may do any of the following:

    (a) Delegate the rights conferred by a protected customary rights order or an agreement in accordance with tikanga.
    (b) Transfer a protected customary rights order or an agreement in accordance with tikanga.
    (c) Derive a commercial benefit from exercising its protected customary rights.
    (d) Determine who may carry out any particular activity, use, or practice in reliance on a protected customary rights order or agreement.
    (e) Limit or suspend, in whole or in part, the exercise of a protected customary right.

61. However, the Bill specifically provides that a protected customary right does not include any right or title over the part of the common marine and coastal area where the protected customary right is exercised, other than the rights provided for in clause 54.

62. What is the position when a person applies for a resource consent for an activity that is undertaken wholly or in part within a protected customary rights area? Under clause 57, the consent authority will not be able to grant a resource consent for an activity in a protected customary rights area if the activity will have more than a minor adverse effect on the exercise of protected customary rights, unless:

    (a) The relevant protected customary rights group gives its written approval for the proposed activity; or
    (b) The activity is one to which subsection (3) applies.

63. Note that this is a stronger limitation on a consent authority than that currently under section 107A of the RMA, which prevents a consent authority from granting a resource consent if an activity will have a significant adverse effect on a recognised customary activity.

64. Subsection (3) covers:

    - Coastal permits to enable an existing aquaculture activity to continue;
    - Resource consents necessary for an existing nationally or regionally significant infrastructure and its associated operations (as defined in clause 8(2));
    - Resource consents for deemed accommodated activities;
    - Resource consents for activities relating to the exercise of any petroleum privilege (as referred to in section 9(1)(b)); and
    - Emergency activities (as defined in clause 8(2)).

65. Part 1 of Schedule 2 of the Bill sets out various matters that that relevant to determining resource consent applications 57.

Customary Marine Title

66. The third part of the regime is a mechanism to determine and protect customary marine title. Customary marine title may exist if the common marine and coastal area has been used and occupied by a group according to tikanga and to the exclusion of others without substantial interruption from 1840 to the present day. In clause 61, the Bill sets out various factors that may be taken into account in determining whether customary marine title exists in a specified part of the common marine and coastal area.

67. As with customary rights, customary marine title may only be recognised by a High Court order or through an agreement with the Crown.

68. The Bill sets out the nature of the interest in land created by a customary marine title and what rights are conferred by that title. Clause 63(1) provides that customary marine title:

    (a) 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;
    (b) Provides only for the exercise of the rights listed in section 64 and described in sections 65 to 91; and
    (c) Has effect on and from the effective date.

69. The rights conferred by, and that may be exercised under a customary marine title order or agreement are set out in clause 64 as follows:

    (a) A Resource Management Act 1991 (RMA) permission right (see sections 65 to 69);
    (b) A conservation permission right (see sections 70 to 74);
    (c) A right to protect wāhi tapu and wāhi tapu areas (see sections 77 to 80);
    (d) Rights in relation to:
        (i) Marine mammal watching permits (see section 75);
        (ii) The process for preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement (see section 76);
    (e) The prima facie ownership of newly found taonga tūturu (see section 81); and
    (f) Despite section 63(1)(b), the ownership of minerals other than:
        (i) Minerals within the meaning of section 10 of the Crown Minerals Act 1991; or
        (ii) Pounamu to which section 3 of the Ngāi Tahu (Pounamu Vesting) Act 1997 applies (see section 82); and
    (g) The right to create a planning document (see sections 84 to 91).

70. With respect to the RMA permission right, a customary marine title group may permit or withhold permission for an activity in a customary marine title area at any time before the consent would otherwise commence under section 116 of the RMA. A resource consent must not commence without that permission. There is no right of appeal against a decision of a customary marine title group, nor of objection. Note that the right does not apply with respect to accommodated activities.

71. With respect to the planning document, under clause 84, a customary marine title group has a right to have a planning document. The purpose of the planning document is to set out the objectives and policies of the group in respect of its customary marine title area, including objectives and policies that, in accordance with tikanga, relate to:

    (a) The sustainable management of the natural and physical resources of the customary marine title area of the group; and
    (b) The protection of the cultural identity and historic heritage of the group.

72. A planning document must not include matters that cannot be regulated by, amongst other things, a local authority, under both the Local Government Act 2002 and the Resource Management Act 1991. The planning document must be lodged with any agency whose jurisdiction is relevant to the contents of the planning document. It must also be lodged and registered with the chief executive (the Secretary for Justice). Once the planning document has been lodged with a local authority, the local authority must take the planning document into account when exercising its decision-making functions in accordance with any of the following provisions of the Local Government Act 2002:

    (a) Section 77(1) (which relates to the decision-making process of a local authority).
    (b) Section 78 (which requires community views to be taken into account in the decision-making process).
    (c) Section 81 (which provides for Māori to contribute to the decision-making processes of the local authority).
    (d) Section 82(2) (which requires the local authority to provide processes for consulting Māori).

THE OBJECTIVES

73. The Council needs to determine whether it wants to make a submission on the Marine and Coastal Area Bill and the terms of that submission.

THE OPTIONS

74. There are two options. These are to make a submission or not make a submission on the Bill.

THE PREFERRED OPTION

75. The preferred option is to make a submission on the Bill. The Council has participated in the Foreshore and Seabed consultation process since 2004. There are a number of aspects of the Bill that affect local authorities and the Council should take the opportunity to make its view known. A draft submission is attached.