Office of Treaty Settlements
Te Tari Whakatau Take e pā ana ki te Tiriti o Waitangi
PART OF THE MINISTRY OF JUSTICE

MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011

PROVISIONS FOR PROTECTING CUSTOMARY INTERESTS

Information for local government

INTRODUCTION

This paper provides information for local government practitioners on the protection of customary interests under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).

Three types of customary interests are recognised within the common marine and coastal area under the Act:

- Participation in conservation processes (sections 47 – 50).
- Protected customary rights (sections 51 – 57).
- Customary marine title (sections 58 – 93).

This paper focuses on protected customary rights (PCRs) and customary marine title (CMT) and the obligations associated with these. The right to participate in conservation processes is covered only briefly since it relates to applications and proposals under legislation administered by the Department of Conservation (DOC), and does not impose obligations on local government.

PCRs and CMT each mean some additional resource consent, planning and monitoring obligations for local government. These obligations primarily fall with regional councils.

All applications for PCRs and CMT must be filed no later than six years after the commencement of the Act (sections 95(2) and 100(2)). This provides local authorities with certainty over the extent of applications within their areas and their responsibilities.

A number of consequential amendments have been made to the Resource Management Act 1991 (RMA) to reflect the obligations arising from the Act. In some cases the obligations are provided in full in the RMA; while in others the RMA refers readers to detailed provisions in the Act.

PROTECTED CUSTOMARY RIGHTS

What is a PCR?

PCRs are activities, uses and practices that meet the tests in section 51 of the Act, and are recognised by a PCR order or agreement (refer to final section of this paper).

Section 51 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 by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and
c) is not extinguished as a matter of law.

A PCR cannot be recognised in relation to:

- an activity regulated under the Fisheries Act 1996 (section 51(2)(a));
- a commercial aquaculture activity (within the meaning of section 4 of the Māori Commercial Aquaculture Claims Settlement Act 2004) (section 51(2)(b));
- any commercial Māori fishing right or interest, being a right or interest declared by section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to be settled (section 51(2)(c)(i));
- any non-commercial Māori fishing right or interest, being a right or interest subject to the declarations in section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (section 51(2)(c)(ii));
- an activity that relates to wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act (section 51(2)(d)(i));
- an activity that relates to marine mammals within the meaning of the Marine Mammals Protection Act 1978 (section 51(2)(d)(ii)); or
- an activity based on a spiritual or cultural association unless manifested in a physical activity or use related to a natural or physical resource (within the meaning of section 2(1) of the RMA (section 51(2)(e)).

Examples of PCRs might include the launching of waka, the removal of material such as sand, shingle, pumice, mud and hāngi stones, non-commercial aquaculture, and non-commercial customary fishing for species that are not subject to a Treaty of Waitangi settlement such as whitebait.

The Act does not provide a PCR group with the ability to exclude the public from the area covered by a PCR order or agreement.

How is a PCR protected?

The full scope and effect of a PCR is set out in the Act. A PCR is protected in three key ways:

- through there being no requirement for the holder to gain any necessary resource consent in order to continue the activity (section 52(1));
- through a prohibition on the grant of resource consents for certain activities that would have more than a minor adverse effect on the exercise of the PCR, unless

the PCR group gives its written approval for the proposed activity (section 55(2)); and
- through a prohibition on plans and proposed plans from including rules that describe an activity as a permitted activity if the activity will, or is likely to, have an adverse effect that is more than minor on a PCR (section 85A RMA).

A PCR group is not required to pay coastal occupation charges (section 52(2)(a)). PCR groups are also not required to pay royalties for sand and shingle extraction under regulation 9 of the Resource Management (Transitional, Fees, Rents, and Royalties) Regulations 1991 (or any future regulations made under the RMA) (section 52(2)(b)). Such royalties are collected by regional councils on behalf of the Crown.

Conditions applying to the exercise of a PCR and responsibility for compliance and enforcement

The resource consent and charging exemptions are dependent on a PCR being exercised in accordance with:

- tikanga (relevant elements may be noted on the PCR order or agreement) (section 52(3)(a));
- subpart 2 of Part 3 of the Act (section 52(3)(b));
- the order or agreement under which it is recognised (section 52(3)(c)); and
- any controls imposed on the activity by the Minister of Conservation (section 52(3)(d)).

Regional councils are responsible under section 35(2)(e) RMA for monitoring compliance. If, for example, a PCR order or agreement is being exercised more frequently or over a larger area than is specified in the order or agreement, and the non-complying elements are of a type that would need resource consent, then the offence and enforcement provisions in the RMA may apply.

Commercialisation of PCR

A PCR group may derive a commercial benefit from carrying out a PCR (section 52(4)(b)) such as through selling sand and shingle, with the exceptions that:

- a non-commercial aquaculture activity recognised as a PCR cannot subsequently change to being a commercial enterprise. This is because customary interests in commercial aquaculture were settled under the Māori Commercial Aquaculture Claims Settlement Act 2004; and
- a non-commercial fisheries activity that was not settled under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (and is eligible to be a PCR under section 51(2) of the Act), cannot be commercialised as all commercial fisheries claims have been settled. Whitebait is the key known species in this category but there may be others.

Delegation and transfer of rights

A PCR group may delegate or transfer the rights in accordance with tikanga to a person identified in a PCR order or agreement (section 52(4)(a)). This recognises that the delegation or transfer of rights was occurring before 1840 and has occurred since.

Effect of PCRs on resource consent applications

A consent authority must not grant a resource consent for any activity (including a controlled activity) to be carried out wholly or in part in a PCR area if the activity will, or is likely to, have adverse effects that are more than minor on the exercise of a PCR unless:

- the PCR group gives its written approval (section 55(2)(a)); or
- the activity is exempted (sections 55(2)(b) and 55(3)).

This requirement applies only to resource consent applications lodged on or after the date a PCR is legally recognised and not to those resource consent applications already in train (section 55(1)).

An approval given by a PCR group is not able to be revoked (clause 2(4), Part 1 Schedule 1).

Matters to be considered when determining applications for resource consents in a PCR area

Part 1 of the First Schedule to the Act sets out matters relevant to determining applications for resource consent for activities to be carried out in a PCR area. Clause 1 specifies certain matters that a consent authority must consider in determining whether a proposed activity will, or is likely to, have an adverse effect on the exercise of a PCR. Those matters are:

a) the effects of the proposed activity on a PCR; and
b) the area that the proposed activity would have in common with the relevant PCR area; and
c) the degree to which the proposed activity must be carried out to the exclusion of other activities; and
d) the degree to which the exercise of a PCR must be carried out to the exclusion of other activities; and
e) whether an alternative location or method would avoid, remedy, or mitigate any adverse effects of the proposed activity on the exercise of the PCR; and
f) whether any conditions could be included in a resource consent for the proposed activity that would avoid, remedy, or mitigate any adverse effects of the proposed activity on the exercise of the PCR.

Clause 1A of Schedule 4 RMA provides that an assessment of effects on the environment forming part of a resource consent application in a PCR area must include a description of possible alternative locations or methods for the exercise of the proposed activity if it will, or is likely to, have adverse effects that are more than minor on the exercise of the PCR. This does not apply if the PCR group has given its approval.

A PCR area does not, however, affect the grant of:

- coastal permits to allow existing aquaculture to continue (regardless of whether there is a change in species or method of farming but provided the total area and location of the farm does not change) (section 55(3)(a));
- resource consents for emergency activities (section 55(3)(b));

- resource consents for an existing "accommodated infrastructure" (defined below) if any adverse effects of the proposed activity on the exercise of the PCR will be, or are likely to be, the same or similar in character, intensity, and scale as those that existed before the application for the resource consent was lodged or, if more than minor, are temporary in nature (section 55(3)(c)); or
- resource consents for future prospecting, exploration, and mining for petroleum operations or mining (but the consent authority must have particular regard to the nature of the PCR when considering such applications) (sections 55(3)(d) and 55(4)).

"Accommodated infrastructure" is defined in section 63 of the Act. It means existing infrastructure (including structures and associated operations) that is lawfully established and owned, operated or carried out by the Crown or one of a list of agencies, including a local authority or a council-controlled organisation. The infrastructure must be reasonably necessary to either the national social or economic well-being, or the social or economic well-being of the region in which the infrastructure is located.

Obligations on a PCR group when agreeing to a resource consent application for activities having more than minor effects

If a PCR group gives its consent to an application but the proposed activity would have the effect of preventing, in whole or in part, the exercise of the PCR, the group must provide written acknowledgement of these effects and this must form part of the resource consent application for the proposed activity (clause 2, Part 1 of Schedule 1).

If the proposed activity would permanently cancel a PCR order or agreement in whole or in part, the PCR group must either apply to the High Court to vary or cancel the PCR order or apply to the responsible Minister to vary or cancel the PCR agreement (clause 3, Part 1 of Schedule 1). The decision by the consent authority to grant the resource consent will be of no effect until the order or agreement has been varied or cancelled. If the High Court or responsible Minister declines the application, the resource consent must be treated as if it were declined by the consent authority.

Imposition of controls on a PCR

The Minister of Conservation may, at any time after a PCR has been recognised, impose controls on the exercise of the right if that Minister determines that the exercise of the PCR has, or is likely to have, a significant adverse effect on the environment (section 56(1)). However, any controls imposed must:

- not prevent the exercise of the rights (clause 5(1)(b)(i) of Schedule 1);
- be reasonable and, in the circumstances, not unduly restrictive (clause 5(1)(b)(ii) of Schedule 1); and
- be necessary to avoid, remedy, or mitigate any significant adverse effects of the exercise of the right on the environment (clause 5(1)(b)(iii) of Schedule 1).

Any person, including local authorities, may apply to the Minister of Conservation for controls to be imposed on the exercise of a PCR, stating the reasons for the application (section 56(2)). As noted, a regional council is required under section 35(2)(e) of the RMA to monitor the exercise of a PCR and it would be expected that such monitoring would identify any environmental issues arising from the exercise of a PCR.

If the Minister considers reasonable concerns have been raised and it is appropriate to consider imposing controls, the PCR group, local authorities and the person who applied for the controls, must be notified (section 56(3)).

Part 2 of Schedule 2 of the Act sets out a detailed process for determining whether there is, or is likely to be, a significant adverse effect on the environment.

A council may play a role in this process through:

- applying to the Minister of Conservation for controls to be imposed;
- carrying out an adverse effects assessment at the direction of the Minister of Conservation (a necessary step prior to the Minister making a decision); and
- carrying out an adverse effects assessment at its own initiative (in certain circumstances specified in the Act).

While customary activities, uses and practices recognised as PCRs are not subject to the usual environmental protection provisions of the RMA, the Minister of Conservation's role provides an assurance that any significant adverse environmental effects are able to be addressed.

CUSTOMARY MARINE TITLE

What is CMT?

CMT exists in a particular part of the common marine and coastal area if an applicant group holds the area in accordance with tikanga and has exclusively used and occupied the area from 1840 or from the time of a customary transfer, without substantial interruption (section 58(1)).

CMT provides an interest in land (section 60(1)(a)) but this is not the same as freehold title. The rights associated with customary marine title cannot be alienated or disposed of (section 60(1)(a)) and public access within CMT areas cannot be prohibited or restricted, except in limited and defined circumstances.

The rights that can be exercised by a CMT holder are confined to those prescribed in the Act (section 60(1)(b)).

Section 62 of the Act lists the rights that may be exercised by a CMT group. Of particular relevance to local government are the following rights that may be exercised under a CMT order or agreement on and from the effective date:

- the right to give, or decline to give, permission for activities requiring a resource consent (the RMA permission right (sections 66-70));
- the right to protect wähi tapu and wähi tapu areas (sections 78-81); and
- the right to create a planning document (sections 85-93).

The following covers the obligations on regional councils in relation to the RMA permission right, the protection of wähi tapu areas and associated provisions of relevance. Information for local authorities on the planning document is found in a separate information paper.

Provisions relating to CMT relevant to regional councils

Use or development of a CMT area by a CMT group

A CMT group may use, benefit from, or develop a CMT area (including deriving commercial benefit) by exercising the rights conferred by a CMT order or agreement. However, a CMT group is not exempt from obtaining any relevant resource consent, permit, or approval that may be required under the RMA or any other enactment (section 60(2)(a)).

Consultation requirements following lodgement of a CMT application

An application for CMT has effect from the time it is lodged. If a group has applied for, but not yet been granted, CMT over a particular area, then a resource consent applicant will have to notify the group and seek its views on the consent application prior to lodging the application. These views would be relevant to the development of the assessment of environmental effects in accordance with Schedule 4 of the RMA. The CMT applicant's views may be considered in the Council's decision.

How will councils be aware of CMT applications?

Councils will be aware of applications for CMT in two ways:

- Applications to Court for recognition orders will be served on councils and publicly notified (sections 102 and 103).
- The Government will inform local authorities of applications for recognition agreements.

In addition, once the details of CMT applications are confirmed, these are listed on the Ministry of Justice website. It is hoped that relevant council websites will include a link to the Ministry of Justice website, or provide information to prospective resource consent applicants on where to obtain this information.

Operation of the RMA permission right

In CMT areas, most applicants seeking resource consents to carry out activities will need to obtain permission from the CMT group before the activity for which a resource consent is granted can commence (section 67(1)). This requirement does not have retrospective effect. It does not apply to applications for resource consent (whenever granted) that are first accepted by a regional council before a CMT order is sealed or a CMT agreement is brought into effect (section 64(2)(a)). The permission right will apply (with limited exceptions), however, if new consents are sought once existing resource consents expire.

The intent is that CMT holder permission must encompass the full extent of the activities covered by a resource consent, but may not necessarily cover the full term of the resource consent.

If a CMT group gives permission, it must specify:

(a) the activity for which permission is given (section 67(2)(b)(i)); and
(b) the applicant who is to have the benefit of the permission (section 67(2)(b)(ii)); and
(c) the duration of the permission (section 67(2)(b)(iii)).

Activities exempted from the permission right

Activities that are exempt from the requirement to obtain CMT group permission are called "accommodated activities" (section 64). These include:

- "accommodated infrastructure" (as described earlier);
- existing activities authorised by resource consents (that is, consents, whenever granted, if the application was first accepted by the regional council before a CMT order is sealed or a CMT agreement is brought into effect (section 64(2)(a));
- an activity that may be carried out under a resource consent for a minimum impact activity (as defined in section 2(1) of the Crown Minerals Act 1991) relating to petroleum;
- management activities for which a resource consent is required in relation to an existing marine reserve, wildlife sanctuary, marine mammal sanctuary or concession;
- an activity carried out under a coastal permit to permit existing aquaculture activities to continue (regardless of when the application was lodged or whether there is any change in the species farmed or the method of marine farming, provided there is no increase in the area or change in location);
- an emergency activity;
- scientific research or monitoring undertaken or funded by the Crown, any Crown agent, or the Regional Council with statutory functions in the region where the research or monitoring is to take place; and
- a deemed accommodated activity (see below).

The provisions for deemed accommodated activities allow certain activities to be deemed to be accommodated after commencement of the Act because they are in the regional or national interest. Readers are referred to the detailed provisions in section 65 and Schedule 2 of the Act. In brief, the provisions encompass:

- infrastructure that comes within the definition of accommodated infrastructure (refer above) and is essential for national or regional social or economic wellbeing where either the CMT group or the Minister of Land Information has waived the CMT group's permission rights under Part 1 of Schedule 2.
- prospecting, exploration and mining for petroleum where agreement to the activity has been negotiated with the CMT group (or in the absence of agreement an arbitrator has determined the basis on which the activity is to proceed). Refer Part 2 of Schedule 2.
- any activity that is necessary for, or reasonably related to the exercise of an existing privilege under the Crown Minerals Act, where agreement to the activity has been negotiated with the CMT group (or in the absence of agreement, an arbitrator has determined the basis on which the activity is to proceed). Refer Part 2 of Schedule 2.

Do councils play a role in the process to seek CMT group permission?

The process by which a person seeks permission from a CMT group is quite separate from the resource consent process. Aside from a requirement that the CMT group must notify the relevant consent authority of its decision (section 67(2)(a)(ii)), there is no requirement in the Act for councils to participate or be involved in any way. Councils may find it helpful, however, to provide information on the requirements of the Act for those seeking resource consents in CMT areas.

Process followed by applicants to gain a CMT group's permission

The following sets out the procedural steps to be followed by a person seeking permission from a CMT group to carry out an activity which is not an accommodated activity:

- Permission must be requested by notice to the CMT group at any time before a resource consent commences (section 67(1)).
- The CMT group must notify in writing its decision on a request for permission to the applicant and the relevant consent authority and, if permission is given, specify the activity which is permitted, the person to whom permission applies, and the duration of the permission (section 67(2)).
- The CMT group's decision must be given not later than 40 working days after the CMT group receives notice from the applicant that resource consent has been granted (section 67(3)).
- If the 40 working day requirement is not met, the CMT group is treated as having given permission for the same term as the resource consent (section 67(4)).
- There is no right of appeal or objection under ss 357 and 357A of the RMA to a decision to give or decline permission (section 68(2)).

Do councils have a role in monitoring and enforcing compliance if CMT permission is granted?

As noted, councils will not be involved in the transactions between a resource consent applicant and CMT group covered by section 67.

Further, councils do not have any statutory responsibilities to monitor compliance with the RMA permission right provisions. As such, councils are not legally required to check that CMT group permission has been obtained before a resource consent commences.

Penalties apply under the Act to any resource consent holder who exercises a resource consent without the applicable CMT permission (section 69).

Role of councils in respect of wähi tapu and wähi tapu areas

CMT provides the ability to protect wähi tapu or wähi tapu areas through prohibitions or restrictions on public access. Any such constraints on access are dependent, however, on a CMT group providing evidence to establish its connection with the area in accordance with tikanga and that prohibitions or restrictions on access are necessary to protect the area (section 78(2)).

The Act enhances protection that can already be provided under the RMA and Historic Places Act 1993.

Restrictions or prohibitions on access cannot be imposed in an ad hoc manner. They must be attached as conditions to a CMT order or agreement with reasons (sections 78(3) and 79(1)(b)). The conditions must set out the location of boundaries of the wähi tapu area (section 79(1)(a)) and any exemptions for specified individuals to carry out a PCR in the area (section 79(1)(c)).

Local authorities do not have a statutory role to enforce compliance with wähi tapu conditions. However section 81 of the Act provides that a local authority with statutory functions in a wähi tapu area must, in consultation with the CMT group, take appropriate action to encourage compliance with any wähi tapu conditions.

PARTICIPATION IN CONSERVATION PROCESSES

Part 3, Sub-part 1 of the Act provides for enhanced participation by "affected iwi, hapū and whänau" in processes run by DOC for considering certain applications and proposals under legislation it administers.

"Affected iwi, hapū and whänau" are defined as those that exercise kaitiakitanga in a part of the common marine and coastal area where a conservation process is being considered (section 47(1)). "Kaitiakitanga" is defined to have the same meaning as is given in the RMA.

Participation is enhanced through:

- a requirement on the Director-General of DOC to notify and seek the views of those affected iwi, hapū or whänau (including in cases where submissions from the public are not required) (section 48); and
- an obligation on the decision-maker to "have particular regard to" the views of those iwi, hapū and whänau whom the Director-General accepts or determines are affected iwi, hapū or whänau (section 49).

In addition, there is an obligation on a marine mammals officer to have particular regard to the views of any affected iwi, hapū or whänau when making a decision about managing a stranded marine mammal (section 50). However, when making such a decision, the marine mammals officer must ensure that the welfare of the marine mammal and public safety are the primary considerations.

RECOGNITION AND REGISTRATION OF PROTECTED CUSTOMARY RIGHTS AND CUSTOMARY MARINE TITLE

Iwi, hāpu and whānau can either apply to have their customary interests recognised through a High Court order, or an agreement with the Crown. In the latter case, PCRs are brought into effect by Order in Council (section 96(1)(a)) and CMT by Act of Parliament (section 96(1)(b)).

Land Information New Zealand is required to maintain a comprehensive register of all Court orders and agreements, including information or links to those orders and agreements subject to enactment (see sections 114-117). This register will also record variations or cancellations, and whether an order or agreement has been delegated or

transferred. In the case of a delegation, the right remains with the original holder. In the case of a transfer, the recipient becomes the new right holder.

Councils will be able to access the register online and request paper copies (section 116). This will assist councils to meet an obligation under section 35(5)(jb) of the RMA to maintain records of every PCR order or agreement in its region. There may be a fee for the provision of paper copies.

Disclaimer

Although every effort has been made to ensure that this guidance document is as accurate as possible, the Ministry of Justice will not be held responsible for any action arising out of its use. Direct reference should be made to the Marine and Coastal Area (Takutai Moana) Act 2011 and expert advice should be sought if necessary.