



Local Government New Zealand
te pūtahi matakokiri

Submission to
Ministry of Justice

In the matter of
Foreshore and Seabed Act Review

From *Local Government New Zealand*

30 April 2010

Table of Contents

Table of Contents	2
Introduction	3
General support	3
Role of local government	3
Alignment of customary interests with Local Government Act and Resource Management Act.....	4
Ownership of structures and land	7
Relevant matters not included in the consultation document.....	8
Integrated coastal management.....	9
Council role in negotiations and cost implications.....	9
Conclusion	10

Introduction

1. *Local Government New Zealand (LGNZ)* appreciates the opportunity to submit on the Government's proposals for reform of the Foreshore and Seabed Act (the Act). This review is of significant interest and implication to local government.
2. *LGNZ* makes this submission on behalf of the National Council, representing the interests of all local authorities of New Zealand. It is the only organisation that can speak on behalf of local government in New Zealand.
3. This submission was prepared following feedback from local authorities. We sought input from all local authorities and received feedback from many. The submission is informed by our earlier submission to the Ministerial Review Panel and discussion with the Panel. The submission is also informed by the legal research we commissioned from Royden Somerville (March 2009 which you already have) and by local authority experiences in Foreshore and Seabed Act negotiations and in similar Treaty settlement negotiations and settlements.
4. Many councils are making individual submissions. The *LGNZ* submission in no way derogates from those submissions. Many councils have expressed disappointment in the short consultation period. This is an issue of policy, democracy and governance relevant to local government, and yet timeframes have not allowed many councils to discuss the review with elected members.
5. The submission has been endorsed under delegated authority by:
 - Lawrence Yule, as the President of the National Council
 - Kerry Prendergast, as the Vice-President of the National Council
 - John Cronin, as the Treaty Issues portfolio holder of the National Council.
6. *LGNZ* would be pleased to meet with Ministry representatives and the Minister for further discussion on any of the points raised in this submission.

General support

7. Local government generally supports the intent of the review to achieve an equitable balance of the interests of all New Zealanders in the foreshore and seabed. The determination and recognition of Maori customary rights are primarily questions for resolution between the Crown and Maori. For that reason, this submission does not address that substantive policy issue, but is focused on the issues of direct consequence to local authorities in the exercise of their responsibilities under the Local Government Act 2002 (LGA), the Resource Management Act 1991 (RMA) and other relevant legislation.
8. Our primary submission is to seek a framework in the Act that provides for workable implementation, to ensure any agreements are enduring for iwi, central government, local government and communities.

Role of local government

9. The purpose of local government comes from Part 2 of the LGA. The principles of the Act emphasise communities, openness and accountability. Local authorities make democratic decisions on behalf of communities. The public plays an important role in local decision-making and this should not be marginalised by legislation over-riding the LGA or RMA.

10. The constitutional role of local government is significant and central to the public law system in the LGA and RMA. Agreements reached under other legislation such as the Foreshore and Seabed Act must be compatible with the LGA and RMA and not compromise the purpose and role of local government under those Acts. All connections between legislation must be clear and workable. All roles and responsibilities must also be very clear to avoid unmet expectations, dispute or (ultimately) liability issues.
11. In providing that no one owns the foreshore and seabed, it is proposed that it be declared as a "*public domain*". This is a new concept and one that could have implications for other public or common resources. Local government, and regional councils in particular, have a significant role in managing the commons on behalf of local and national communities, for example water, air and the coastal marine area. Introducing a new concept of ownership or non-ownership must be carefully considered in its implications for management and future governance of all common natural resources. As you are aware, there are particular parallels in water and foreshore and seabed in relation to Maori rights and status of public resources.
12. Local authorities' interests in the Act and its review arise in respect of a number of functions:
 - a. As *community advocates* (seeking equitable balance of all interests including public access and customary interests)
 - b. As *regulators* (seeking to maintain responsibilities but not add new, costly, uncertain responsibilities eg under RMA)
 - c. As *owners* of land and structures (seeking to maintain interests in that land/structure)
 - d. As users and providers of *resources and infrastructure* (seeking to retain control of critical community resources and infrastructure).

Alignment of customary interests with Local Government Act and Resource Management Act

Connection between legislation

13. Councils administer the LGA and RMA which are particularly relevant for the management of natural resources including the foreshore and seabed. Any new agreements, process or arrangements established under other Acts must have clear and workable connections with these existing laws and must not leave any room for uncertainty or ambiguity.
14. Where customary rights or title are awarded, this will impact on the ability of councils to continue their responsibilities under the LGA and RMA. In particular customary rights/title can override current policy making, rule setting and resource consent decision-making responsibilities of local government. Existing roles of local government may be compromised, public interest through community governance marginalised, and awards may not be compatible with the LGA and RMA.
15. Despite any other law, councils are still required to comply with their obligations under the LGA and RMA. Overall, we are concerned that the proposals in the consultation document would create uncertainty and ambiguity in how they work in with existing law and process, and in many cases awards can override recognised and adopted local community planning frameworks.

16. Local government understands the necessity and importance in having meaningful relationships with iwi. This is at the core of local governance. However, this can be made more difficult when new roles or processes create ambiguity or conflict with core roles under the LGA and RMA. Any lack of clarity about different roles or processes does not provide the foundation for enduring relationships between iwi and local authorities.

Separate regime for managing customary activities

17. The awarding of customary rights (for specified activities) will give the iwi with those awards the ability to override some RMA requirements as those activities would be excluded from RMA requirements. It would also limit the ability to grant consent for new activities that may affect the ability to undertake that customary activity, even though those activities may be provided for in a statutory plan. The consultation document focuses on protecting these activities under the RMA. It is not clear how these rights will work in with other regulation for example bylaws regulating use of the foreshore or regulating navigation and safety.
18. The proposed separate regime for dealing with potential adverse effects of recognised customary activities on the environment appears to be less stringent than the standard RMA regime. While the Minister may be able to impose controls if an activity has significant adverse effects on the environment, it is not clear how the controls of these customary activities will be managed and by whom. Nor is it clear if the Minister's consideration will include reference to relevant planning documents for the area. To treat customary activities differently in terms of New Zealand's environmental protection legislation for other activities is contrary to consistent findings of the Court that ownership and property rights are not, of themselves, relevant under the RMA. We are concerned to ensure that the integrity of the RMA is maintained to all.
19. The consultation document proposes that customary rights would provide the ability to prohibit public access to waahi tapu areas. It is not clear who would manage and enforce such exclusions. Exactly how this regime would work needs careful consideration. Local authorities are not willing to take on this role.
20. It would be appropriate for the Foreshore and Seabed Act itself to define the nature and content of the rights that could be awarded by customary rights, rather than relying on individual decisions of the courts. It should then be possible to bring those customary activities within the ordinary framework of the RMA.
21. We note that with the proposed tests for awards of customary rights it is probable that there will be significant areas of claim/award and overlapping awards. We are concerned at the potential for complexity in managing this situation.

Right of veto

22. The awarding of customary title (territorial rights) will provide iwi the right of veto over anything requiring a coastal permit. This will create ambiguity in the alignment between Foreshore and Seabed rights and existing law. For example, customary title could provide a right of veto over coastal permit resource consents that are controlled activities. However, under the current RMA requirements, a council cannot decline resource consent for a controlled

activity. This creates significant uncertainty and ambiguity that will need to be clarified. We expect that amendments to the RMA will be necessary for the coastal permit regime.

23. We are concerned that this right of veto could inhibit essential public works. For example, the holder of a customary title could prevent a local authority from repairing or strengthening existing seawalls or existing roading structures in the foreshore and seabed area.
24. We believe there is a significant difference between a private property right on dry freehold land, and a territorial right over public foreshore and seabed where there are other parties with interests that must be taken into account. In the case of activities and consents, there will need to be some means for balancing the interests of the holder of a customary interest against the public interest. For example, public interest may require an activity to take place even if it affects a customary activity or title.
25. The consultation document refers to a customary title holder having the “right to permit” activities. It is unclear if this means iwi will issue “permits” in some formalised system recognised in law (and charge for that) or will give approval in some other way.

Iwi planning documents

26. Customary rights or title will give status to planning documents prepared by iwi. These documents need to be taken into account in decisions made by local authorities under the RMA or LGA. In the case of customary title, a planning document prepared by iwi has a higher status and must be recognised and provided for in policy and consent decisions made by the council. It is not clear if it is intended that an iwi planning document can direct other agencies, such as local authorities, to do certain things. The experience of local authorities with iwi management plans is that they often conflict with statutory policies or rules. Clarity on the status of iwi planning documents is critical.
27. Although an iwi planning document has to be in accordance with the purpose and principles of the RMA, it does not go through a public process and is not able to be challenged (compared with the normal policy and plan process). Public consultation processes are a foundation of both the LGA and the RMA. This is based upon a principle embedded in both statutes that decisions affecting communities are best made informed by a participative process. This means local governance is based on active community participation in decision making. This process gives weight to the documents produced. While iwi planning documents are developed using different processes, they are given considerable weight in RMA and LGA decisions.
28. Local authorities acknowledge and endorse engaging with Maori in the preparation of RMA/LGA planning documents. The preparation of iwi management plans or planning documents by iwi is also endorsed as a proactive and meaningful way of identifying key planning issues and objectives for the iwi and setting out means of managing those issues. We are concerned however, about elevating the status of these documents separately from the recognised planning framework under the RMA/LGA. Public participation could be compromised and we are concerned that communities will not understand that current governance arrangements and the ability to influence local decision making will be compromised.

29. We assume that a customary right or title award will include adequate resourcing for the iwi or hapu to develop an iwi planning document. Resourcing and allocation of responsibility for the administration and implementation of these documents is also not clear. Local authorities are unlikely to be in a position to resource the development, administration and implementation of these new planning documents. Resourcing must be part of the review package to ensure the proposals can actually be put in place.
30. Councils are required to review their plans to incorporate iwi planning documents at the time of next plan review. We support any requirement to review council planning documents to work in with the normal review timing and process scheduled by the council. This will assist to limit additional costs that occur when councils are required to bring forward plan changes.
31. It may be necessary to “translate” an iwi planning document into an RMA approach in order to incorporate it into an RMA plan. For example vires policies and rules would be required. It is unclear who would be responsible for undertaking this step in order that the iwi planning document can be recognised and provided for. We assume that once the iwi planning document has been incorporated, then the responsibility to administer, monitor and enforce those provisions become the local authority, but prior to incorporating it, the responsibility is with the iwi. Clarity of role and responsibility and consideration of resourcing is again critical.
32. Given the status of the iwi planning document, we question what happens if a local authority proposes to amend a regional coastal plan or district plan to provide for the iwi planning document and the community does not support this change. With the current plan process, the local authority would bear significant litigation cost in defending the iwi planning document through the public process. We do not believe it should be the council’s role to lead (and ratepayers to fund) this debate with the public when the document has largely come about through an agreement between the Crown and the iwi. This further highlights the need to consider appropriate public process in development of the iwi planning document, not after it is completed, and to be absolutely clear on its status at all stages.

Role of regional councils and unitary authorities in allocating space

33. The consultation document proposes that allocation of space in the coastal marine area will continue to be managed by regional councils under the RMA “in conjunction with those coastal hapu/iwi whose customary interests in the area have been recognised”. We assume that the statement in the consultation document also applies to unitary authorities.
34. We support this continued role for regional councils and unitary authorities. Regional councils do work with recognised iwi in their RMA and planning functions. For this to work in practice, roles and responsibilities managing space “in conjunction with” need to be very clear.

Ownership / control of structures and land

35. While the consultation document notes that the operation of existing property rights and existing privately-owned foreshore and seabed will be protected, this principle does not appear to hold for local government. The document states that local authority land acquired in the foreshore and seabed area since 2004 would become part of the public domain. The Crown would pay compensation

for taking this land. There is uncertainty under current law and the effect of the proposals relating to the pre and post 2004 situation is not clear.

36. Local government has significant interests in ports, structures such as wharves, boat ramps, marinas, roading, and foreshore and seabed land. These land and structures may be of critical importance for river or coast flood protection works, or may form substantial parts of waterfront reserve or future urban development areas. We understand there are historic cases where local authorities have retained ownership of land in the foreshore and seabed. These areas have significant history in their ownership and status and in their value as community assets.
37. We strongly endorse the protection of local authority owned/vested land or structures. The review must consider both newly acquired land, and also review local authority land relinquished to the Crown as part of the 2004 review. Land already relinquished should be reviewed as the framework now proposed is different and the basis for taking the land has changed. We are not aware of any evaluation of the nature of newly acquired land. It would be inappropriate and impractical for currently owned land areas to be taken, there is no analysis to support this approach, and there is no policy requirement for local authority owned land/structures to be taken.
38. We note that a new form of coastal permit will apply to port company reclamations. Port companies would be able to obtain a permit that would provide for an interest akin to a leasehold interest in a reclamation for 50 years or more. We do not believe that this will provide adequate certainty or protection or opportunity to critical port infrastructure. Ports involve very long term commitment and freehold vesting of port company reclamations is necessary for this infrastructure of national and regional importance. The viability of New Zealand's ports, and consequently our export sector, is dependant on secure rights to continued use of port land as well as protection of existing port-related activity/space such as navigation channels, breakwaters etc.
39. The current Act creates considerable uncertainty about the legal status of structures within the jurisdiction of local authorities. We seek clarity through this review to ensure that where councils have developed reclamations or structures themselves (or had these vested in them) they continue to retain control and have the ability to own and develop those structures or land. The nature of coastal structures, their use, tenure arrangements, and public vs private control are important matters for this review to address.

Relevant matters not included in the consultation document

40. Matters of significant interest to local government that require clarification in the context of the new proposals:
 - a. coastal occupation charges
 - b. roads within the foreshore and seabed area.
41. In relation to coastal occupation charges, there is a need for an effective and workable charging regime to recognise the value in exclusive use of public space and also to recognise local government costs in undertaking coastal management functions, without the ability to rate. We note that one particular uncertainty is charging of ports and legislative clarity is required both in tenure arrangement and appropriate charging arrangement. Another key constraint is the current process for putting a coastal occupation charge regime in place. We

are aware that the recent aquaculture review considered a charging option specific to aquaculture. This foreshore and seabed review is an important opportunity to clarify the coastal occupation regime (tenure and charging) for all activities. We are concerned that the concept of “public domain” may create difficulties in defining who has the right to lease and charge for use of space.

42. In relation to roads there is a need for an effective regime to manage and enforce roading and vehicle matters. It is not possible to separate a formed (or for that matter unformed) road from the land below it or the space above it. As for structures and land discussed in the section above, it is critical that local authorities retain control of formed roads and the ability to manage unformed roads. Roles and responsibilities in relation to the proposals in this review and responsibilities for roading under other legislation need to be very clear. There may be cases where unformed legal roads could be returned to “public domain” but this would need to be assessed case by case. The current process for stopping roads is costly, lengthy and uncertain. An alternative process which ensures no costs fall on ratepayers should be available for returning unformed legal roads no longer required by a council.
43. We request the opportunity to work with the Ministry on these specific issues.

Integrated coastal management

44. There remains considerable separation of various aspects of coastal management eg through RMA, New Zealand Coastal Policy Statement (NZCPS), Exclusive Economic Zone requirements, aquaculture, fisheries, biosecurity, LGA bylaws, navigation and safety. These foreshore and seabed proposals will lead to further layers.
45. Many of these aspects of coastal management are concurrently under review by completely separate government agencies. In particular we note the critical relevance of the review of the NZCPS. The Government has had, but not released, the Board of Inquiry report and recommendations on the NZCPS for some months. Release of the report would inform public understanding and input to broader coastal management including this foreshore and seabed review. Further, we note the reviews of the RMA and LGA are also relevant. Most important is for decisions on the NZCPS, this foreshore and seabed review, and other related reviews to be considered holistically and to be consistent.
46. We are concerned that there remains no oversight in ensuring consistency and an integrated approach to coastal management. We encourage the Government to consider appointing one government agency and one Minister with an oversight or lead role for all aspects of integrated coastal management. A new agency is not required, rather, clarity on who is the lead agency.

Council role in negotiations and cost implications

47. The determination of customary interests either directly with the Crown or through the courts does not involve local government as a party. However, local authorities may be a critical party in implementing new awards or arrangements.
48. We are concerned to ensure that councils are able to observe and advise early and in an ongoing manner to ensure instruments or processes established that rely on councils to implement them do not create unforeseen practical, legal or resourcing difficulties for the local authority or iwi in implementation.

49. Local authorities need a clear role to advise the negotiation process to ensure all relevant issues are considered and that agreements are able to be implemented.
50. We particularly note the potential cost issues for local authorities. For example requirements to review LGA or RMA plans or processes come at a cost to ratepayers but are imposed on local authorities with no supporting resource to carry out the task. Local authorities do not receive assistance from the Government, nor do local authorities collect revenue for their responsibilities in the foreshore and seabed area as there are no rates (or equivalent). We question if it is appropriate for ratepayers to cover this cost, given the agreements are between the Crown and iwi.

Conclusion

51. In conclusion, local government supports a comprehensive review of the Foreshore and Seabed Act. We recognise that the Government is faced with complex issues to respond to.
52. While we do not comment on the substantive merits of the Government's response, we contend that the process to recognise and give effect to customary interests must not compromise the role of local government, or marginalise public interest through community governance. We seek that this review:
 1. adequately acknowledges local government's constitutional framework
 2. integrates and interfaces with clarity with our purpose, role and community planning framework particularly under our core legislation the Local Government Act and the Resource Management Act
 3. recognises the core principles we operate under: democracy, community and public participation in decision making
 4. protects and retains local government interests in ports, structures and land within the foreshore and seabed
 5. gives local government an effective role advising the customary interests process so agreements are practical and the costs are considered.
53. Arrangements created for the foreshore and seabed must be enduring for iwi, for central and local government, and for New Zealand communities. Detailed consideration and clarity on roles and responsibilities is required.
54. *LGNZ* appreciates the opportunity to provide you with our written comments. We are concerned about the short consultation and urge the Government not to hurry the development of effective workable solutions. There is a lot of detail that is not yet clear and we are therefore unable to fully assess the implications or solutions. We would be pleased to be involved in further discussions in working towards a regime that will be effective in achieving its intentions, not create uncertainty or ambiguity in local governance, and is able to be implemented at a practical level.