

What next for the Foreshore and Seabed Act?

The Government's review of the Foreshore and Seabed Act 2004 has examined some thorny issues, involving ownership of the foreshore and seabed - Crown or Maori - and what happens to public access?

The review is part of the confidence and supply agreement the Government brokered with the Maori Party. The Act has been scrutinised by a Ministerial Review Panel, consisting of Justice Eddie Durie of the High Court (chair), Mr Richard Boast and Ms Hana O'Regan who have recommended the repeal of the controversial Foreshore and Seabed Act.

The Foreshore and Seabed Act established a comprehensive framework for recognising rights and interests in the foreshore and seabed, replacing previous common law rights and interests in those areas. It did not deal with the Fisheries Act or aquaculture. The Act was a response by the then Labour Government to the Court of Appeal decision in *Attorney-General v Ngati Apa*, which recognised the possibility of preferential rights, held by Maori.

In *Attorney-General v Ngati Apa*, the Court of Appeal overturned an earlier decision of the High Court to declare foreshore and seabed land in the Marlborough Sounds as Maori customary land. The application was opposed by several parties, including the Attorney-General, who relied on previous Court of Appeal case law.



Essentially, the Review Panel looked at whether the Act effectively recognises and provides for customary or aboriginal title and public interest (including Maori, local government and business) in the coastal marine area. It also looked at what options were available to the Government, apart from enacting the Foreshore and Seabed Act, to deal with the findings in *Attorney-General v Ngati Apa*.

The Ministerial Review Panel is clearly of the view that the Act must be repealed. The report concludes that the Act severely discriminated against Maori. The Review Panel has proposed a new Act "based on the Treaty of Waitangi principle of providing for both Maori and Pakeha world views: it would provide that hapu and iwi, and the general public, both have interests in the coastal marine area, that both interests must be respected and provided for but that both must be limited by that which is necessary to accommodate the other".

The Review Panel has left open how customary and public interests should be apportioned, but

clearly states that the issues are not just legal and should not be left to the Courts. The two alternative proposals set out in the report include the establishment of a national body to oversee the coastal marine area and to develop specific proposals by which the matter can be progressed after further consultation. Secondly, the continuation of regional negotiations between the Crown and hapu and iwi. Both proposals recognise that settlements must accommodate customary use, customary authority and ownership of the seabed.

The Panel recommended any replacement Act should acknowledge that customary rights in an area belong to hapu and iwi with traditional interests in the area, not to all Maori; and that the public's right of general access is not a right of free access but of reasonable access.

It is expected that the report will promote further dialogue before a suitable design is settled and final decisions are made, but the repeal of the Foreshore and Seabed Act is looking likely. What will replace it is the real question.

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WHAT'S IN A NAME?

Vigilant readers will notice a subtle change at the head of our newsletter - "Environmental Law". We think the description better reflects our diverse expertise which extends to wider environmental, local government and regulatory issues. These include the Local Government Act, Building Act, Biosecurity Act, Hazardous Substances and New Organisms Act, Soil Conservation and Rivers Control Act and Maritime Transport Act.

If there are any issues you would like more information on, please call us.



Changes could benefit farmers

Farmers may well see benefits filtering down to them if the changes to the Resource Management (Simplifying and Streamlining) Bill go ahead.

What the Government hopes the Bill will achieve, as the name suggests, is to reduce delays, costs and uncertainty that have made the RMA unpopular with farmers.

Achieving this would be good news indeed for farmers, who have to deal with the RMA to get water permits, dispose of dairy effluent, build new tracks or construct culverts and stock crossings. The Bill tries to make all of this simpler, cheaper and quicker.

Take for example, the notification issue. Under the present version of the RMA, the starting point is that all applications are notified, giving anyone and everyone the opportunity to put their oar in and force matters to an expensive and possibly time consuming hearing. Currently it is for the applicant to show that notification is not needed by proving that effects are minor and written consents have been obtained. The proposed changes will reverse that and reserve notification only for applications where effects are shown to



be more than minor. So a council processing an application to build a culvert will no longer have to assume that it will be publicly notified, but will need to find evidence of potential harm that is more than minor, ie adverse effects like flooding or changing the flow of the river, before they can notify. If this change has the desired effect, it will result in more applications being non-notified, which is generally cheaper and quicker.

There is also a bit of other tinkering around the edges of the process for getting consents, like requiring reasons to be provided for further information requests. At the moment, those requests, which stop the process until the applicant provides more details, can be fired off by the Council at any stage of the process without any reasons being given. Hopefully, this step will cause the Council to think twice before

interrupting the process in this way.

The Bill is also set to provide a shorter path for big projects of national importance, like large scale irrigation schemes, to get approvals.

In the area of appeals, the Government's changes will make it harder for submitters whose opposition failed at the Council hearing, to drag things out needlessly before the Environment Court if their case has no merit. The Government has already increased the Environment Court appeal filing fee from \$55 to \$500. Coupled with this, the Bill intends to bring back the possibility of making appellants pay a substantial amount of money as security for costs before they can proceed with what may be a dubious appeal. Those two measures alone are likely to weed out a lot of questionable appeals.

All this is balanced by some of the changes around enforcement. A farmer whose irrigator stalls and causes ponding now sees his maximum fine go from \$200,000 to \$300,000. If he runs his farm as a company, the maximum fine becomes \$600,000. These increases apply to all RMA prosecutions including irrigators who don't stick to low flow cut-offs or those who do works in riverbeds without consent. The Government clearly wants to make it cheaper to toe the line than to pay a fine.

RECENT PROJECTS

CHRISTCHURCH

- Acting for the Hurunui Water Project (seeking to develop a 40,000ha irrigation scheme from the Hurunui River) and Mainpower New Zealand Ltd on the Hurunui Water Conservation Order hearing.
- Acting on behalf of Ravensdown Fertiliser Co-operative in relation to Contact Energy's proposal to develop a wind farm on Waikato's west coast.
- Representing a client in relation to the development of the north west Belfast re-zoning and the associated implementation of Christchurch's western bypass.
- Acting for a proposed development at Lake Ohau.
- Acting in RMA prosecution proceedings in the roles of both prosecution and defence.
- Advising on resource consent applications and renewals for several gravel extraction sites in North Canterbury.
- Acting on an appeal filed with the Environment Court in relation to a private plan change to rezone part of Christchurch's

inner city from residential to business.

- Obtained a successful outcome in relation to variation 29 of the Selwyn District Plan, which related to permitted activities within the rural zone, on behalf of Lincoln University, AgResearch and Plant & Food.
- Advising clients in relation to strategic irrigation proposals in Canterbury.
- Representing farmers in the Upper Waitaki catchment in relation to applications to take water for irrigation purposes.
- Representing West Coast Regional Council and Grey District Council in TrustPower Arnold River Power Scheme appeals.
- Acting for a Regional Council in relation to wetland issues in their plan.
- Continuing to advise Canterbury A&P regarding Southern Motorway notice of requirement.

NELSON

- Representing Saxmere Company Ltd in litigation at the Supreme Court.
- Acting for Wakatu Incorporation in the development of a large aquaculture centre in Nelson.

- Successfully obtaining resource consent to operate a restaurant within a residential zone in Hanmer Springs.
- Representing New Zealand Energy Ltd in relation to a resource consent application for the proposed Matiri Hydro Electricity Scheme.
- Preparing submissions on the Building Sustainable Urban Communities discussion document.
- Acting for clients in relation to water permit issues in Marlborough.
- Presenting submissions to the Tasman District Council on Plan Change 10 (Richmond West) on behalf of local industry.
- Advising applicants and affected parties on several South Island based irrigation and hydro electricity generation schemes.
- Representing applicants for subdivision in coastal areas.
- Acting for the Department of Conservation in relation to a proposed wind farm by Taharoa C Block Incorporation.

Big plans signalled for aquaculture industry



Earmarked as a potential billion dollar export earner by the National Party months before coming into government, the aquaculture industry is under the spotlight.

The Government has been upfront in its intention to include aquaculture in its review of the Resource Management Act, describing the industry as "just not working", and held back by a regulatory regime.

Few significant Aquaculture Management Areas have been created, where marine farming did not already exist, since 2001 when a moratorium was placed on new applications for aquaculture space. In 2004 reforms saw aquaculture management put under the control of regional councils as part of the RMA. Environment Minister Nick Smith says the current RMA process is holding back aquaculture business and "depriving the economy of much-needed sustainable growth".

As New Zealand's fastest growing seafood sector and accounting for 15 per cent of New Zealand's seafood exports by revenue, the aquaculture industry is becoming increasingly important to New Zealand. Its aim is to become a \$1 billion-a-year industry by the year 2025 and an economic growth boost is expected, following an announcement early this year of a \$600,000 contestable fund to encourage innovative market development projects.

The contestable fund forms part of the National Government's programme for partnering with industry, and will be administered on a dollar-for-dollar match basis made available to eligible companies for approved projects.

In addition to the funding for market development

projects, the first phase of the new Government's reform of the RMA was released in February. Aquaculture is set to form part of the phase two reviews which will be set up by the Environmental Protection Authority to deal with reforms relating to aquaculture, fresh water, urban design and infrastructure/Public Works Act.

It is not yet clear what the exact RMA-related aquaculture reforms will be, as announcements continue to be made but the likely changes aim to:

- Improve the legislative framework to ensure certainty for investors so the industry reaches its potential.
- Allow aquaculture research to be considered outside Aquaculture Management Areas.
- Allow farmers to change the species farmed in an area (where two species are broadly similar) without an arduous bureaucratic process.
- Reduce the bureaucracy and cost to applicants who undertake a private plan change to create an Aquaculture Management Area.
- Remove the veto of the Conservation Minister over restricted coastal activities.
- Continue to support research and development for aquaculture.

Submissions to the Aquaculture Amendment Bill (No 2) 2008 closed in early February and we keenly await the changes.

Warning for dairy farmers

Dairy farmers whose effluent disposal systems aren't up to scratch can expect to feel more pain in their pockets in resource management prosecutions.

This follows a tougher approach to sentencing recently signalled by Judge Jane Borthwick who fined a Kowhitirangi dairy farmer \$50,000 - for a single offence of pumping dairy shed effluent into a drain that discharges into the Hokitika River on the West Coast.

By way of comparison, a recent overflow of effluent from an irrigator to a drain also discharging to the Hokitika River had attracted a fine of \$20,000.

Judge Borthwick indicated that a basic starting point of \$55,000 was necessary, as previous fines just did not seem to be a deterrent. She also said that the deliberate nature of the raw effluent discharge made the offending more serious than other cases. The farmer had been very fortunate that he had not been charged with a continuing offence, Judge Borthwick said.

The inference is clearly that continuing discharges would have led to an even higher fine.

Judge Borthwick went on to give the farmer a considerable reduction in fine because of his early guilty plea, but then reversed most of this on the basis of his financial position and his attempts to blame his employee, ending up a mere \$5000 below the starting point.

Hopefully not many farmers will deliberately dispose of their effluent into rivers. If they do, they can expect to be dealt with severely by the Courts. Aside from this, Judge Borthwick's comments on the need for higher fines that are real deterrents, as well as her willingness to increase fines due to the financial position of defendants and their blame-shifting attempts, should be noted.

It is likely that those whose carelessness leads to illegal discharges, who think they can wear a fine or who try to shift the blame, are just as likely to feel the sting of higher fines. If they allow discharges to continue for some time, Judge Borthwick's comments are a clear warning that very high fines will result.

** Our associate, Hans van der Wal, was the prosecuting solicitor in both cases.*



What is a public building?

Commercial building owners could be forgiven for feeling confused by the vague rules surrounding the Code Completion Certificate.

The 2004 Building Act has made it critical for owners of new and recently renovated commercial buildings to know whether their building is considered to be for a public use under that Act. That question will determine whether moving in before the Code Completion Certificate (CCC) has been issued is an offence or not.

While the whole thrust of the Building Act is that buildings have to comply with the Building Code and the CCC is the means by which this is definitively ensured, there is no general criminal prohibition against using a building before a certificate has been issued. There are two notable exceptions in that it is an offence to:

- Transfer new homes to the new owner without CCC, and
- Use a public use commercial building before the issue of CCC.

It is the second that causes the problems, as the Building Act is more than a little fuzzy as to what is meant by a public use. All it says is that the building:

- Must effectively meet the definition of a building;
- Must be totally or partially open to or intended to be used by members of the public;
- Can even be subject to an entry charge, or have the public excluded from time to time.

Who the public is and what constitutes a use by them are left undefined, yet everything depends on the meaning of these terms. Some councils take a very wide view and see employees of the building's

owner or occupier as members of the public. On that view, even construction workers might be seen to be members of the public, which would make it illegal for them to use the building while completing it - making a nonsense of the section.

On the other hand, a very narrow interpretation could also be taken, based on the intent and use of the building being truly for members of the public.

The fact that both interpretations are available creates a problem.

Perhaps the answer lies in the degree of control that can be exercised by the owner/occupier of the building over those intended to have access to it. For example, the control that an owner/occupier would have over its employees or contractors would put it in a far better position to manage employees' or contractors' exposure to the risks of an uncertified building.

In the end, that approach could provide answers, but it relies on a case-by-case analysis of each scenario, effectively requiring building owners or councils to seek legal advice on individual cases to make sure they do not fall foul of the law.

Unless a definition of public use is inserted into the Building Act, the current unsatisfactory uncertainty is set to continue until some unsuspecting new building owner is selected as the unfortunate target for a test case, which will force the Courts to make a determination. Who knows what the result will be or whether it will be what Parliament actually intended.

Environmental team grows

Duncan Cotterill's environmental law team continues to grow.

In Nelson we welcome Sally Gepp and Katie Edmunds to the fold.

Sally, a senior solicitor, was raised in Nelson and has a double degree in law and chemistry. For the past two years she has worked with a boutique firm in London, and previously for a Wellington practice, focusing on insurance litigation and construction law.

"My partner and I returned to New Zealand with our new baby, and we were both very committed to establishing ourselves in Nelson, as we both love the place and I have family here."

Katie graduated from the University of Canterbury in 2008 with a double degree in law and arts.

"Duncan Cotterill's Nelson Office offered the chance to work for a large law firm in a smaller city setting. Nelson as a city offered a great climate, accessibility to the Abel Tasman, Marlborough Sounds, and Nelson Lakes areas. It also has a great culture of arts, local markets, and events."

In Christchurch, we're delighted to welcome back Sarah Watson (formerly Thornton) as an associate. Sarah Day has also joined our environmental law team in the Garden City.

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THE ENVIRONMENTAL TEAM

								
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