Westlaw NZ Delivery Summary

Request made on: Monday, 15 September, 2014 at 17:11 NZST
Content Type: Westlaw AU
Delivery selection: Selected Documents
Number of documents delivered: 13

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The Marine and Coastal Area (Takutai Moana) Act 2011: The Commons, Customary Rights and the Marine and Coastal Area

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MC1 Introduction
MC2 Background to the MCAA
MC3 Purpose of the MCAA
MC4 Common marine and coastal area
MC5 What does the MCAA do?
MC6 Customary interests
   MC6.01 Participation rights (ss 47-50)
   MC6.02 Protected customary rights
   MC6.03 Customary marine title
MC7 Process of recognition
   MC7.01 Recognition agreements
   MC7.02 Order of High Court
MC8 Impact of the MCAA on coastal planning and development
   MC8.01 Protected customary rights areas
   MC8.02 Customary marine title areas
MC9 Reclamations
MC10 Conclusion
MC11 References
MC12 Author curriculum vitae
MC1 Introduction


Part 1 of the MCAA outlines its purpose. It defines key terms such as the common marine and coastal area ("CMCA"). It also repeals the FSA and restores the customary interests extinguished by that Act.

Part 2 outlines the various interests in the CMCA and provides for:

- The special status of the area as an area that cannot be owned;
- Certain ownership to continue (for example structures, minerals); and
- The protection of existing interests (for example resource consents).

It outlines public rights in the CMCA. It preserves or, in some cases, extends the public rights to access, fishing and navigation, and provides a new regime for reclamations.

Part 3 of the MCAA sets out the legal rights and interests which give expression to customary interests in the CMCA. It also:

- Provides for affected iwi, hapu and whanau to participate in certain conservation processes;
- Sets out the test for and rights associated with protected customary rights;
- Sets out detailed procedures relating to resource consents in a protected customary rights area and controls on protected customary rights; and
- Sets out the tests for rights associated with customary marine title.

Part 4 sets out procedures relating to the recognition of customary interests via agreement and court order and other administrative details. It also:

- Provides the procedure for recognition of customary interests;
- Provides for the marine and coastal area register;
- Provides for regulations and other miscellaneous matters; and
- Outlines the consequential amendments to other legislation.
MC2 Background to the MCAA

The MCAA represents the culmination of many years of debate and law reform. The debate essentially began in 2003 when the Court of Appeal in the decision of Ngati Apa v Attorney-General [2003] 3 NZLR 643, found that the Maori Land Court had jurisdiction to determine claims of customary ownership of the foreshore and seabed. This decision was contrary to government policy and legislation which had been based on the understanding that Maori customary title to the foreshore and seabed had been extinguished. The Government’s response to the Ngati Apa decision was to enact the FSA in order to clarify the status of public access and ownership. The FSA removed the ability of Maori to seek recognition of their customary title and vested the beneficial ownership of the foreshore and seabed in the Crown, but allowed existing freehold title to remain.

The FSA was highly controversial and led to the creation of the Maori Party in July 2004. Following the 2008 general election, the National Party agreed to review the FSA in their Relationship and Confidence and Supply Agreement with the Maori Party (and two other minor parties). This review was undertaken to determine whether the FSA balanced all the interests in the foreshore and seabed fairly. An independent Ministerial Review Panel undertook a nationwide consultation process and concluded in June 2009 that the FSA:

* Failed to balance the interests of all New Zealanders in the foreshore and seabed;

* Was discriminatory and unfair; and

* Should be repealed.

Two public consultation processes were conducted over the course of 2009-2010:

* Ministerial review panel process (March-July 2009); and

* Government consultation process (March-April 2010).

These consultation processes resulted in the MCAA. The MCAA is essentially a reframing rather than a complete overhaul of the FSA. The overall scheme remains unchanged. It is important to note, however, that the introductory provisions of the MCAA strike a very different note from the FSA. The preamble to the MCAA refers to the Court of Appeal’s decision in Agatii Apa; to the Waitangi Tribunal 2004 Report; and to the criticism made of the FSA by both the United Nations Special Rapporteur and the 2009 panel. The preamble also seeks to codify the common law concerning Maori customary rights and acknowledges the need to recognise and provide for public interests in the foreshore and seabed.
MC3 Purpose of the MCAA

The purpose of the MCAA is to protect the legitimate interests of all New Zealanders in the marine and coastal area, including recognizing customary interests and the mana tuku iho exercised by iwi, hapu and whanau as tangata whenua (s 10). The MCAA is an attempt to acknowledge Te Tiriti o Waitangi, which the FSA did not.

Whanau, hapu or iwi groups have until March 2017 to seek customary marine title. This can be done through specific negotiations with the Crown or through an application to the High Court.

The MCAA makes it more tempting for iwi and hapu to seek territorial use rights and slightly easier for them to establish these rights.
MC4 Common marine and coastal area

The MCAA creates the key concept in the marine and coastal area of the “common marine and coastal area”. This was called the “marine and coastal area” in the FSA. The CMCA encompasses all of the “marine and coastal area” which is not conservation land, a reserve, national park or privately-held land.

“Marine and coastal area” is defined in s 9 as meaning:

“… the area that is bounded,—

*(i)* on the landward side, by the line of mean high-water springs; and

*(ii)* on the seaward side, by the outer limits of the territorial sea; and

*(b)* includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and

*(c)* includes the airspace above, and the water space (but not the water) above, the areas described in paragraphs (a) and (b); and

*(d)* includes the subsoil, bedrock, and other matter under the areas described in paragraphs (a) and (b).”

This definition was essentially the same as that used for the “foreshore and seabed” in the FSA. That is, the marine and coastal area is: the “wet” part of the beach that is covered by the ebb and flow of the tide (but does not include the dry part of the beach); the area between the line of mean high water springs and the outer limits of the territorial sea (12 nautical miles from shore); the air space and water space above the land; and the subsoil, bedrock and other matter under the land.

The Crown does not own the CMCA, nor is it capable of being owned by anyone else (s 11). The passing of the MCAA has the automatic effect of divesting the Crown and every local authority of ownership interests in the CMCA (and local authorities may apply to the Minister for redress for losing title to any such land).
MC5 What does the MCAA do?

The MCAA restores customary interests in land which were extinguished by the FSA and confirms that any application for the recognition of customary interests must be considered and determined as if the FSA had not been enacted (s 6). This restoration of Court access is granted on the basis that:

* Any claims to the CMCA must be pursued in the High Court (and not, for instance, the Maori Land Court); and

* The High Court’s jurisdiction to consider such claims – whether under the Treaty of Waitangi, the common law, or on any other ground – is replaced fully by the statutory rights granted by the MCAA (s 98).

The MCAA guarantees free public access to the CMCA, but it does not affect private titles to land. The public access guarantees are to:

* Free rights to land access to, including the right to engage in recreational activities on, the CMCA (s 26); and

* Rights of navigation within the CMCA (s 27).

There is potential for rights of access and recreation to be confused with navigation rights, as navigation, recreation and access are undefined. Recreation and access rights are confined to the CMCA, whereas navigation rights extend throughout the marine coastal area. The difference between a ship temporarily moored to load/unload passengers for recreational activities (access right) and a ship temporarily moored to load/unload cargo, crew, equipment and passengers (navigation right) may be difficult to distinguish.

The CMCA also guarantees the continued exercise of fishing rights held under any other enactment (s 28), such as quota allocation under the Fisheries Act 1996. Section 79(2) provides that while wahi tapu conditions may affect the exercise of fishing rights, they must not do so to the extent that such conditions prevent fishers from taking their lawful entitlement under fisheries legislation.

The CMCA also provides for the following:

* Section 21 has the effect that anyone with a proprietary interest in land in the CMCA (for example, a lease, licence or easement, but not a resource consent) can continue to rely on this interest, including any right of renewal or extension;

* Section 18 saves proprietary interests in structures in or over the CMCA;

* Section 20 confirms that the MCAA has no effect on those exercising resource consents which were granted before the MCAA’s commencement, or the carrying on of any lawful activities which do not require consents.

It is important to note that s 20 does not extend to cover pre-existing applications for resource consent. Nevertheless, applications for resource consents lodged prior to recognition of a protected customary right or a customary marine title are protected by ss 55(1) and 64(1). This is consistent with s 7 of the Interpretation Act 1999, which provides that “[a]n enactment does not have retrospective effect”. See Official Assignee v Petricevic [2011] 1 NZLR 467 (HC) at [31]–[40]; and Re Auckland City Council EnvC A127/05, 4 August 2005 at [17]–[19].
Section 55(3) further provides that the existence of a protected customary right does not affect certain grants of rights under the RMA. In particular, the existence of a protected customary right does not affect the grant of a coastal permit to enable existing aquaculture activities or existing nationally or regionally significant infrastructure (and associated operations under s 63). However, while s 55(3)(d) provides that the existence of a protected customary right does not limit or otherwise affect the grant of a resource consent for specific infrastructure activities (prospecting, exploration or mining), s 55(4) states that the consent authority must have particular regard to the nature of the protected customary right when considering an application for these activities.
MC6 Customary interests

The MCAA establishes three levels of protection for Maori customary interests – participation rights, protected customary rights and customary marine title.

MC6.01 Participation rights (ss 47-50)

A decision-maker must have particular regard to the views of affected iwi, hapu or whanau when considering certain conservation related applications or proposals in the CMCA (s 49). Affected iwi, hapu and whanau are those which exercise kaitiakitanga, which is defined as “exercise of guardianship or stewardship by the tangata whenua of an area in accordance with tikanga” (s 47).

The relevant applications or processes cover matters such as marine reserves, marine mammal sanctuaries, conservation protected areas, concessions, marine mammal standings and commercial watching permits (s 47(3)).

MC6.02 Protected customary rights

The MCAA provides for “protected customary rights”, which are activities, uses and practices that have been exercised since 1840, that continue to be exercised in a particular area of the CMCA in accordance with tikanga (whether in the same way or in an evolved manner), and that have not been extinguished as a matter of law (s 51).

Under s 55 a consent authority cannot grant a resource consent for an activity in a protected customary rights area (including controlled activities) once protected customary rights have been recognised, if the activity will have, or is likely to have, more than a minor adverse effect on the exercise of protected customary rights, unless the protected customary rights group gives its written approval or the activity is one of a list of exempted activities. However, the existence of a protected customary right does not limit or affect the grant of a resource consent relating to specific activities, such as existing aquaculture and certain infrastructure (s 55(3)).

Maori groups with protected customary rights do not need a resource consent under the RMA to carry out these rights despite any prohibition, restriction or imposition that would otherwise apply under ss 12 to 17 of that Act, provided that they act in accordance with Maori custom and any applicable ministerial controls (s 52).

Sections 12 to 17 of the RMA set out certain duties and restrictions with respect to the use of the land, the coastal marine area, beds of lakes and rivers, water, and the discharge of contaminants into the environment. The exemption from ss 12 to 17 of the RMA means that regional council planning documents will not apply to the exercise of customary rights. This is a significant privilege, and is not matched by any equivalent entitlement in respect of the use of Maori freehold land where situated on dry land.

Holders of protected customary rights can delegate or transfer such rights in accordance with tikanga, and derive commercial benefits from such rights, including in commercial aquaculture (ss 52, 53). They do not, however, have title over the land (s 54), and cannot exclude the public. This is because the recognition of customary rights relates primarily to an activity and not an area of marine and coastal space.
Under s 56(1) of the MCAA, if the Minister of Conservation determines that the exercise of a protected customary right under a protected customary rights order or agreement has, or is likely to have, a significant adverse effect on the environment, the Minister can impose controls (including terms, conditions, or restrictions) on the exercise of the right.

Any person can apply to the Minister of Conservation for controls to be imposed (s 56(2)). If the Minister is satisfied that the application raises reasonable concerns that the exercise of a protected customary right has, or is likely to have, a significant adverse effect on the environment, the Minister must serve a notice (stating his or her intention to consider imposing controls) on the protected customary rights group, the relevant local authorities, and the applicant (s 56(3)).

Part 2 of Schedule 1 provides a process for imposing controls on the exercise of protected customary rights. The Schedule sets out the relevant matters for consideration by the Minister, timing and notice requirements, the requirements for the assessment and reporting of adverse effects, and review procedures.

Protected customary rights are essentially a form of use right. In simple terms they convey upon the holder a right to use resources located in a particular area. The “right to use” is the right to enjoy the benefits of real property or personal property, whether the owner of the right has ownership of title or not.

**MC6.03 Customary marine title**

Under the MCAA an applicant group may seek recognition of customary marine title for a specified area if the group can prove it holds the area in accordance with tikanga, and has either exclusively used and occupied the area from 1840 to the present day without substantial interruption, or received the area through a customary transfer (s 58). The terms “exclusively used and occupied” and “substantial interruption” are not defined under the MCAA.

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

It is understood that this test has been principally based on the decision of the Supreme Court of Canada in Delgamuukw v British Columbia[1997] 3 SCR 1010. In that decision the Supreme Court made the following findings:

- **Occupation (at [154]):**
  
  “I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained.”

- **Exclusive use and occupation (at [155], [156]):**
  
  “The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right.”…“However, as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by ‘the intention and capacity to retain exclusive control’…”

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

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

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

The Delgamuukw decision does not discount the possibility of shared exclusive occupation. In particular, the Supreme Court observed, at [158], that:

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

Certain matters may be taken into account in determining whether customary marine title exists (s 59). These are:

* Ownership of land abutting all or part of the specified area; and

* The exercise of non-commercial customary fishing rights in the specified area.

Customary marine title is a different sort of title from fee simple title. It comes from a common law concept which recognises property rights of indigenous people that have continued since or before acquisition of Crown sovereignty to the present day. Customary marine title is inalienable – the land cannot be sold (s 60). Furthermore, customary marine title cannot be converted to freehold title. It recognises the relationship that has existed, and will continue to exist, between iwi, hapu and whanau, and the CMCA. Customary marine titles are also subject to the right of public access.

Customary marine title provides the strongest form of rights recognition under the MCAA and confers a range of rights to the holder. Once granted, the holders of a customary marine title in specific parts of the CMCA will include the following rights:

* The right to permit (or withhold permission for) activities requiring a resource consent in the area covered by the title (other than accommodated activities listed in the Act). These are called “RMA permission right” under the MCAA (ss 66-70);

* The right to permit (or withhold permission for) certain conservation processes (eg establishing a marine reserve). These are called “conservation permission right” under the MCAA (ss 71-75);

* Input into the New Zealand Coastal Policy Statement and applications for marine mammal watching permits (ss 76, 77);

* The ability to prohibit or restrict access to wahi tapu within their customary marine title area (ss 78-81);

* Prima facie ownership of taonga tuturu (historical artefacts) found in the customary marine title area (s 82);

* The ownership of non-nationalised minerals within the customary marine title area (ss 83, 84);

* The right to prepare a planning document setting out the objectives and policies for their customary marine title area which would be recognised and provided for by the relevant regional council in relation to resource management issues (ss 85-93). A planning document can also extend outside a customary marine title area and must be taken into account in those areas.

Once granted, customary marine title areas will be subject to the right of free public access with the exception of specified wahi tapu
that require protection (s 26). Wardens appointed by the customary title group are empowered under s 80(2)(d) to warn a person that they should leave a wahi tapu area. A person who intentionally breaches a wahi tapu condition is liable on summary conviction to a fine of up to $5,000 under s 81(2).

Customary marine title is also subject to the public rights of fishing and navigation (ss 27, 28). The public right of navigation is subject to wahi tapu that require protection. Section 79(2) provides that while wahi tapu conditions may affect the exercise of fishing rights, they must not do so to the extent that such conditions substantially reduce lawful entitlements under fishers and fisheries legislation. Existing resource consents and other legal interests continue until the end of their term (ss 20, 21).

The MCAA sets out certain exclusions from the effect of customary marine title (ss 63-65). These exclusions (called “accommodated activities” and “deemed accommodated activities”) can be carried out within a customary marine title area without being subject to a permission right. Some examples are certain infrastructure and associated operations, activities under existing resource consents, the management of reserves and sanctuaries, emergency activities, scientific research or monitoring, and activities under new resource consents for existing aquaculture.

Customary marine title groups are entitled under s 60(2)(a) to exercise the rights conferred under a customary marine title in order to derive commercial benefit. The holder of a customary marine title would presumably also apply for the lesser entitlements of a protected customary right. Together these rights could provide their holders with a significant level of autonomy over the use and development of resources within the CMCA.

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

Customary marine title enables a degree of ownership to be recognised in respect of parts of the CMCA. The provisions under the MCAA for recognition of customary marine title are not as restrictive as the tests that were provided for under the FSA. It is possible that significantly greater areas of the CMCA will have customary marine title recognised under the MCAA than the equivalent territorial customary right formerly available under the FSA.
MC7 Process of recognition

Protected customary rights and customary marine title may be recognised by:

* A recognition agreement negotiated with the Crown (ss 95-97); or
* A recognition order granted by the High Court (ss 98-113).

MC7.01 Recognition agreements

In order to negotiate a recognition agreement, the applicant group must give notice to the relevant Minister within six years of the commencement of the MCAA (s 95). This does not mean agreement and court processes must be completed within this time, only that applications must have been filed with the court, or an intention to negotiate signalled with the Crown by 1 April 2017.

In assessing the application, the Crown must be satisfied that the statutory tests for protected customary rights and customary marine title are met before entering into an agreement (s 95(4)). A recognition agreement relating to protected customary rights must be made by Order in Council (s 96(1)(a)). A recognition agreement relating to customary marine title must be made by an Act of Parliament (s 96(1)(b)).

Public consultation or input is not provided for in relation to recognition agreements. Copies of the agreements must however be provided to various parties including local authorities that are affected by the agreement and persons who are considered to be directly affected by the agreement (s 97).

MC7.02 Order of High Court

The High Court’s powers to hear and determine any common law or treaty claim relating to the CMCA is “replaced fully by the jurisdiction of the Court under this Act” (s 98(4)). Section 106 sets out a burden of proof standard, which does not cross-refer to the statutory tests in ss 51 and 59 of the Act, but restates them using slightly different language. There is a statutory presumption that a customary interest has not been extinguished, which may prove to be of importance in future cases.

Applications for court orders must be served on the relevant local authorities (and the local authorities responsible for adjacent areas of the CMCA), the Solicitor-General, and any other person the Court considers is directly affected (s 102).

The applicant group applying for a recognition order must also give public notice of the application no later than 20 working days after filing the application (s 103). Any interested person may appear and be heard in Court on an application for a recognition order (s 104).

Once approved by the Court, recognition orders must be gazetted and a copy must be provided to a number of persons, including the relevant local authorities (and the local authorities responsible for adjacent areas of the CMCA), and any other person the Court directs (s 110).
A decision of the High Court can be appealed to the Court of Appeal on a matter of law or fact (s 112). Because decisions of the Court of Appeal can themselves be appealed to the Supreme Court (see Supreme Court Act 2003, s 7), this is where difficult decisions are likely to end up.
MC8 Impact of the MCAA on coastal planning and development

CONTENTS

MC8.01 Protected customary rights areas
MC8.02 Customary marine title areas

MC8.01 Protected customary rights areas

The existence of a customary interest restricts the granting of resource consents that would affect the exercise of those interests. Under s 55 a consent authority cannot grant a resource consent in an area affected by protected customary rights, for activities that will, or are likely to, have adverse effects that are more than minor on the exercise of a protected customary right, unless the relevant customary rights group has given its written approval, or the s 55(3) exceptions apply. Exceptions include existing aquaculture activities, emergency activities, and existing accommodated infrastructure.

Marine users will need to be aware of the potential for customary rights to be granted over areas where they are proposing to locate new structures when the effects of the proposals will be more than minor. Where this is the case, written approval from the customary rights group will be required.

Section 52(1) provides that a protected customary right may be exercised under a protected customary rights order or agreement "without a resource consent, despite any prohibition, restriction or imposition that would otherwise apply in ss 12 to 17 of the Resource Management Act 1991". This means that regional councils are not able to exercise their abatement, enforcement or prosecution powers under the RMA. However, the Minister of Conservation is empowered under s 56 to impose controls on the exercise of the customary right if it is likely to have a significant adverse effect on the environment. Section 56 is a watering down of regional council powers in respect of compliance and enforcement under the RMA. Furthermore, it could lead to a greater increase in the scale of adverse effects than would otherwise be permitted under the RMA.

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

MC8.02 Customary marine title areas

Accommodated activities and deemed accommodated activities give some certainty for infrastructure providers and existing consent holders in customary marine title areas. Applicants for new consents, however, are not in the same boat. Where a customary marine title group has applied for, but has not yet been granted customary marine title, a resource consent applicant will have to notify the group and seek the group's views before lodging the application (s 62(3)).

If customary marine title is granted over any area of the CMCA it confers on the holder an RMA permission right (among other rights) which means that the holder of customary marine title has complete discretion as to whether or not to give or decline permission for an activity that requires a resource consent in the title area. Once granted a permission right cannot be revoked. In granting a permission the group must specify the activity permitted, "the applicant who is to have the benefit of the permission" and
the duration of the permission. The permission does not have to be for the same period as the consent, and there do not appear to be any provisions for transfer of a permission once granted. This could pose significant difficulties to a consent holder seeking to transfer a resource consent to another person. Applicants cannot exercise a resource consent until they have obtained a permission right. The customary marine title group has 40 working days within which to grant or decline the application. If there has been no decision within that timeframe the permission is deemed to have been granted for the duration of the consent (s 67).

This “veto right” is a significant new power and permission can be given or declined by a customary marine title group on any grounds. This means that in areas where customary marine title is granted, other marine users will need permission from the customary marine title group before they can exercise any new or renewed resource consent. This will clearly have significant impacts on the operations of other users of parts of the CMCA over which marine title is granted. Customary marine title groups are still required to obtain all necessary resource consents for the use and development of the customary marine title area.

The MCAA also impacts on decision makers. Customary marine title groups have a right to prepare a planning document under s 85 of the MCAA. No consultation, objection or appeal rights apply to customary marine title group planning documents.

The purpose of the customary marine title group 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 can be regulated under other legislation such as sustainable management and protection of cultural identity and historic heritage (s 85(2)). Rule making is retained as the preserve of regional councils. The objectives and policies that can be provided for include those that relate to: sustainable management of the customary marine title area; and protection of cultural identity and historic heritage of the group (s 85(3)). Sections 85(3)(a) and (b) on the face of it, appear to indicate that planning documents are principally intended to address matters of cultural and heritage value.

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

Local authorities “must take the planning document into account” (s 88) in the exercise of certain decision making functions under the Local Government Act 2002. The obligations on regional councils in relation to planning documents include (s 93):

• Attaching the planning document to copies of their relevant regional documents until the regional documents have been altered in accordance with the MCAA;

• Having regard to the customary marine title group planning documents when assessing resource consent applications;

• Recognising and providing for the customary marine title to which the planning document relates in their regional planning documents under the RMA; and

• Taking into account any parts of the CMCA to which the planning document relates other than the customary marine title area in their regional planning documents under the RMA.

Regional councils must initiate a process to determine whether to alter their regional documents (regional policy statements and plans) in order to “recognise and provide for” any matters in the planning document relevant to the customary marine title area, if and to the extent that it would achieve the purpose of the RMA (s 93(6)). In making a determination a regional council must consider the extent to which alterations must be made to its regional documents to “recognise and provide for the matters” in a planning document relevant to the customary marine title. This is a weighty requirement.

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

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

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

If the Minister of Conservation is proposing to prepare or review a New Zealand coastal policy statement under the Resource Management Act 1991, the Minister must seek and consider the views of the customary marine title groups recorded on the register (s 77).
MC9 Reclamations

The MCAA provides for a comprehensive new regime relating to reclamations, reinstating the ability to obtain freehold title, among other interests, in reclaimed land. This is a significant departure from the limited opportunity to seek property rights in reclaimed land under the previous foreshore legislation.

For vesting applications made after the enactment of the MCAA, s 35(1) enables a developer of reclaimed land to apply to the Minister of Land Information for the grant to the developer of an interest in that reclaimed land. Section 36 sets out matters that the Minister must take into account in determining what interest in the reclaimed land should be granted. These include:

- The minimum interest that is reasonably necessary to allow the purpose of the grant to be achieved;
- The public interest in the reclaimed land;
- The extent to which the public is benefiting, or is to benefit, from the use or proposed use of the reclaimed land;
- Any conditions or restrictions imposed on the resource consent authorising the reclamation;
- Whether any historical claims have been made under the Treaty of Waitangi Act 1975 in respect of the reclaimed land or whether there are any pending applications for Maori customary interests under the MCAA;
- The cultural value of the reclaimed land and surrounding area to tangata whenua;
- The financial value of the reclaimed land to the Crown;
- The natural or historic values associated with the reclaimed land;
- The potential public access, amenity, and recreational values of the reclaimed land; and
- Any special circumstances of the applicant, including the amount of investment made in respect of the reclaimed land.

Section 37 establishes the presumption that certain applicants, including port companies and port operators, are to be granted a freehold interest in reclaimed land. This reverses the presumption previously applying under the RMA that a freehold interest should not be granted in respect of reclaimed land unless special circumstances apply.

The MCAA has also introduced a new regime in respect of the rights of first refusal in favour of the Crown and then iwi. Where a freehold interest in a reclamation is granted, the land may only be disposed of in accordance with s 45 unless the disposition is to another company within a group of companies or between related companies. Section 45 requires an owner who wishes to dispose of an interest in a reclamation to firstly make an offer to the Crown. If the Crown does not wish to purchase the land, an offer must then be made to all iwi and hapu within the area. Current freehold title in existing reclamation is unaffected by this new regime.
MC10 Conclusion

The rights over the coastal and marine area have been debated in New Zealand for many years. The FSA was seen as failing to balance the interests of all New Zealand in the foreshore and seabed. The MCAA has attempted to redress that imbalance.

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

The MCAA effectively creates two parallel but separate sets of laws governing resource use and development in customary marine title areas. One set is applicable by customary marine title groups, while another would be applicable to anybody else wishing to undertake an activity in a customary marine title area. The statutory regime under the MCAA provides an alternative approach to that of Maori freehold land outside the CMCA. It is considered hard to justify the application of local authority powers and functions in respect of Maori freehold land above mean high water springs but not within the CMCA. It will be interesting to see whether the acquisition of new property rights and planning powers will result in positive outcomes for coastal management.
MC11 References


MC12 Author curriculum vitae

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Robert is a director of North South Environmental Law (“NSEL”), a specialist environmental, natural resources and public law firm. He was awarded a doctoral scholarship in marine planning at the Ghent School of Public International Law, Belgium, in 2005.

Robert prepared legal advice for Local Government New Zealand (“LGNZ”) on the implications of Marine and Coastal Area Bill 2010 for the administration of the coastal marine area by regional councils under the Resource Management Act 1991. The legal advice was circulated to the chief executives of all regional councils and formed the basis of submissions by LGNZ and a number of regional councils on the proposed Bill. The legal advice was tabled before the Maori Affairs Select Committee and led to amendments to the Bill.

Other relevant projects include appearing as legal counsel in the International Law for the Sea Tribunal’s historic advisory opinion on deep sea mining in the High Seas; advising Northland Regional Council on the Ninety Mile Beach Treaty settlement; advising the Pacific Secretariat on the European Union funded deep sea minerals project which aims to establish a regulatory framework for 15 Pacific Island States; advising the Environmental Protection Authority on the administration and implementation of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011; and advising businesses and iwi statutory authorities on legal issues connected to the MV RENA oil spill.

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Katia is a director of NSEL. She specialises in environmental, local government and public law. She worked in the environmental law teams at Bell Gully, Simpson Grierson and Chen Palmer before becoming a founding director of NSEL.

Katia has advised central government, local authorities, corporates and iwi in all major areas of environmental and local government law. She specialises in environmental planning and approval, dispute resolution, due diligence, auditing and related strategic advice.

Katia assisted with the NSEL’s provision of legal advice to LGNZ on the implications of the Marine and Coastal Area Bill 2010 for the administration of the coastal marine area by regional councils under the Resource Management Act 1991.
Other relevant projects include advising LGNZ on the interface between Treaty Settlement Claims, the Resource Management Act, and the Local Government Act, and preparing LGNZ’s submission to the Select Committee on the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill 2008. The Bill was subsequently withdrawn as a result of discussions between Katia and officials from the Ministry of Justice.

A trained LEADR mediator, Katia is also a fluent French speaker.

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