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OCEANS POLICY

MARINE CULTURAL HERITAGE

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Introduction

1 One of the strongest themes of the public consultation during Stage One of the Oceans Policy was the strong connection of New Zealanders with the oceans. This connection is expressed in many ways, and New Zealanders have a strong desire to maintain this connection.

2 An important means for maintaining this connection is through the protection of marine cultural heritage sites and values. This paper examines the extent to which existing laws provide effective protection for marine cultural heritage sites and values.

Desired outcomes for marine cultural heritage

3 A key outcome for Oceans Policy should be the recognition and protection of marine cultural heritage sites and values.

Current management of marine cultural heritage

4 Obligations for cultural heritage protection set out in international and national law are described below.

International context

5 Three key international instruments are:

- the ICOMOS Charter for the Protection and Management of Archaeological Heritage (1990)[1]
- the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage (1996)
- the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001)[2]: which seeks to "improve the effectiveness of measures at national and international levels for the preservation in place, or if necessary for scientific or protective purposes, the careful removal of underwater cultural heritage".

6 These documents provide that marine historical and cultural heritage shall be recorded, protected and preserved, and in particular that investigation and activities shall avoid unnecessary disturbance of human remains or venerated sites. They establish international standards of best practice in relation to underwater heritage that can help guide New Zealand's domestic activities.

7 New Zealand has not yet ratified the UNESCO Convention. If it does decide to ratify the Convention, domestic law will need to be aligned with it.

[1] ICOMOS is the International Council on Monuments and Sites, a non-government agency that acts as UNESCO's principal adviser on heritage issues. The ICOMOS Charters are not legally-binding.
[2] UNESCO is the United Nations Educational, Scientific and Cultural Organisation.

Domestic law

8 Domestic law on the management of cultural heritage is mainly contained in the Resource Management Act 1991 and the Historic Places Act 1993. Other relevant provisions are contained in the Antiquities Act 1975, Te Ture Whenua Maori Act 1993 and the Fisheries Act 1996.

Resource Management Act 1991

9 The purpose of the Resource Management Act is to promote the sustainable management of natural and physical resources. The Act applies within the territorial sea, and defines natural and physical resources as including land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures.

10 Section 6 of the Act sets out matters of national importance that regional councils and territorial authorities must recognise and provide for in managing the use, development and protection of natural and physical resources. These include recognising and providing for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites and other wāhi tapu and taonga. Section 7 of the Act sets out matters which decision makers must "have particular regard" to, which include the recognition and protection of the heritage values of sites, buildings places and areas.

11 The Resource Management Amendment Bill (No 2) proposes to elevate historic heritage to the status of a matter of national importance. This would mean that regional and district plans must recognise and provide for the protection of historic heritage from inappropriate subdivision, use and development.

Rules in plans

12 Under the Act, regional councils have responsibility for managing activities that have adverse effects on the coastal marine area. They are required to prepare regional coastal plans (which must not be inconsistent with the New Zealand Coastal Policy Statement) that set out environmental outcomes, objectives, issues and policies for implementing their coastal management responsibilities under the Act.

13 In their regional coastal plans, regional councils can set out rules relating to management of the coastal marine area – including in relation to protection of marine cultural heritage. These rules are set in consultation with the community. Any activity in the coastal marine area must be authorised by a rule in a regional coastal plan.[3] Anyone wanting to carry out an activity in the coastal marine area that contravenes a rule in a regional coastal plan must seek a resource consent from their regional council.

14 Territorial authorities manage the effects of activities on land. These activities can impact on the marine environment. Territorial authorities give effect to their responsibilities through district plans (which must not be inconsistent with regional

[3] Note that this is the opposite presumption than operates on land, where any activity is allowed so long as it does not contravene a rule in a plan.

coastal plans or the NZCPS and again, are prepared with community consultation), but their district plans only apply above the mark of mean high water springs (MHWS)[4]. This means that district plans provide no protection to heritage sites in the coastal marine area.

15 Although the Act provides opportunity for protection of marine cultural heritage through rules in plans, there has been little uptake to date. Regional coastal plans have contained few provisions giving effect to cultural heritage aspects of the Act (including under section 6). For instance, very few regional coastal plans contain plan provisions that identify archaeological sites or sites of historic or cultural heritage, or include rules that control adverse effects upon them.

16 As noted above, district plans provide even less protection, as they can only apply to the mark of mean high water springs (MHWS).

Resource consents

17 Consent authorities must consider any adverse effects on historic heritage values when considering applications for resource consents affecting such values or sites.[5] Consent authorities must have regard to Part II of the Act (which sets out the purpose and principles), including sections 6 and 7 (matters of national and other importance), and the contents of any relevant plan or policy.

Heritage orders

18 The Act provides for heritage orders, but because they work through district plans (and not regional coastal plans), they only apply above MHWS and therefore provide no protection for marine cultural heritage.

Water conservation orders

19 Water conservation orders apply to rivers, lakes and wetlands, and can be used to preserve the natural state of outstanding water bodies[6]. They have limited application below the mark of MHWS, except for wetlands.

Historic Places Act 1993

Heritage covenants

20 A heritage covenant is a voluntary agreement between the Historic Places Trust and the owner or lessee of land. The covenant can include any terms that the parties agree and can be registered against the title of the land. Voluntary covenants attach to land titles. Because land in the coastal marine area is held by the Crown, land titles do not exist below MHWS. As there are few blue water titles in private ownership, this tool would rarely be used.

[4] The average of high water heights occurring at the time of spring tides.
[5] Section 104 RMA.
[6] Section 199 RMA. Outstanding characteristics can be protected for recreational, historical, spiritual or cultural purposes.

Historic Places Trust register

21 The Historic Places Trust maintains a register of historic places/areas and wāhi tapu/areas to inform owners and the public, and to assist protection under the Resource Management Act.

22 Registration does not provide any direct statutory protection, but is an advocacy tool to inform owners and local authorities about the heritage significance of a heritage place. Any protection for registered heritage places is through rules and provisions in regional coastal and district plans.

23 Anyone, including the HPT, can propose that a place or area be registered, but needs to support their proposal with information that demonstrates that the proposal meets the statutory requirements for registration. Registration is declaratory only as it relies on recognition by local authorities in planning documents to be effective.

24 The HPT recently carried out a preliminary search of the register to assess entries below MHWS. They found that the register currently includes the following sites protected under the Historic Places Act: two reefs registered as wāhi tapu areas, two wrecks registered as historic places, and sixteen wharves, jetties, breakwaters or seawalls registered as historic places.

Archaeological sites

25 The Historic Places Act provides a consenting regime whereby any person wanting to modify, damage, destroy or investigate an archaeological site is required to obtain authority from the Historic Places Trust to do so. This mechanism does not provide permanent protection. It applies to wrecks and other archaeological sites of human activity which occurred before 1900.

26 There is a wide range of archaeological sites in the marine environment, including sites associated with events of importance in New Zealand history, and submerged sites and structures, wreck-sites and wreckage and their archaeological and natural context..

27 Examples of historically and culturally iconic coastal and marine sites of national importance for all New Zealanders are:

- the Abel Tasman anchorage near Separation Point in Golden Bay
- the Captain Cook anchorages around Cook Cove in Queen Charlotte Sound
- the Captain Cook anchorages in Dusky Sound, Fiordland
- the wreck c. 1792 of the Endeavour at Facile Harbour, associated with very early sealing and shipbuilding activity.

28 There is also a mechanism in the Historic Places Act to gazette post-1900 sites as archaeological sites, however this has very seldom been used.

Antiquities Act 1975

29 This Act protects any chattel more than 60 years old of national, historical, scientific or artistic importance, including wrecks. Antiquities are subject to export restrictions but are not protected in situ.

Te Ture Whenua Māori Act 1993

30 Te Ture Whenua Māori Act allows for Maori reservations to be put in place for communal purposes. It is unclear whether the Act could be applied to the protection of marine cultural heritage, as the definition of "land" under the Act is currently being tested in the courts. Maori freehold land or any general land may be set apart as a reservation for cultural, historical, scenic, wāhi tapu or other purposes, which then becomes communal land. The reservation may be held for the common use and benefit of the people of New Zealand.

Fisheries Act 1996

31 The Fisheries Act provides for mataitai reserves, taiapure local fisheries and "section 186" temporary closures. These tools are for the protection of customary fishing, which in some cases may be its own form of cultural heritage. Taiapure can also be used to protect spiritual/cultural values. Complex procedural and consultation requirements may be a barrier to greater use of these tools.

Reserves Act 1977

32 Tools under this Act are designed for protection of land-based sites, and therefore cannot be used to protect marine cultural heritage.

Marine Reserves Act

33 This Act is currently being reviewed, but the Amendment Bill now before the Select Committee does not specifically provide for marine reserves for cultural heritage purposes (although marine cultural heritage values and sites may be protected indirectly through reserves established to meet other purposes of the Act).

Problems with management of marine cultural heritage

34 Three main issues arise in relation to management of marine cultural heritage, and limit the achievement of stated goals and outcomes for these:

- Inadequate research and information on where sites are located
- Lack of national guidance on the prioritisation and appropriate resourcing of marine cultural heritage protection in relation to other marine issues
- Inadequate uptake of protection tools currently available, and the limited range of tools available in the marine environment compared to on land.

Research and information

35 Insufficient research has been carried out to identify where marine cultural heritage sites are, and this is a major limitation on effective protection. Local authorities need better access to information on sites of cultural heritage value so that they can better reflect cultural heritage values in their plans. Other management agencies and groups also need better information so that they can make effective use of protection mechanisms available under legislation.

34 Most marine cultural heritage sites have not yet been identified. For example, of the more than 2000 known shipwrecks, only 150 have been located. It takes significant investment to locate sites, and it can be particularly difficult to locate wāhi tapu, as this often involves accessing culturally sensitive information. There is a wide range of sites of national significance in addition to the sites of wrecks and wāhi tapu. Heritage inventories need to be prepared to address the lack of knowledge of sites of cultural and historic heritage value in the marine environment.

37 The Historic Places Trust's Register includes historic places, historic areas, wāhi tapu and wāhi tapu areas that have been identified and assessed as having historical or cultural heritage value in relation to the provisions of the Historic Places Act. To date the focus has been mainly on land-based sites and heritage places. The register of sites is not a definitive list of all heritage places, and is particularly deficient in the areas of Maori heritage and marine cultural heritage. The Trust is undertaking work that confirms and updates the documentation of historic resources already listed in the register, however at this stage information on sites in the coastal marine environment is not up to date or comprehensive.

National guidance

38 Management agencies have received insufficient national guidance on the importance of marine cultural heritage in relation to other priorities. Insufficient priority and funding has been afforded to marine cultural heritage protection at national and local levels, with the result that desired outcomes have not been met.

39 The Resource Management Act Amendment Bill (No. 2) proposes to make historic heritage a matter of national importance. This will mean that local authorities will have to recognise and provide for historic heritage in their planning processes. However, there are problems with the tools available for councils to give effect to this recognition (see the discussion under the 'protection tools' heading).

40 Few regional coastal plans identify any sites of cultural heritage value, and none prohibit activities within those sites that may have adverse effects upon them. Few regional councils have carried out research or prepared heritage inventories and as a result marine cultural heritage is not adequately recognised or protected through provisions in regional coastal plans.

41 Any new mechanism to provide increased national protection will also need to be underpinned by:

- expansion and maintenance of the Historic Places Register to ensure that it comprises a comprehensive schedule of New Zealand's marine heritage

- research on unlocated sites
- efforts of local authorities and other groups to identify sites of cultural and historic heritage, and include rules in regional coastal plans that protect significant sites.

Protection tools

42 There are opportunities for protection under existing legislation – particularly through the use of rules in regional coastal plans. More effective use of these has been constrained by the two problems outlined above: lack of national guidance and information. It has been further compounded by:

- the limited range of tools available for protecting sites and values below MHWS, compared to those available on land
- constraints on input by advocates charged with proposing, supporting, and helping to enforce rules in regional coastal plans to work effectively.

43 This lack of protection becomes particularly important in the case of sites of national significance. For the purposes of this paper, sites of national significance in the marine environment are those identifiable seascapes which can be said to contribute to the national identity of New Zealand. Some of these are equally relevant to Maori and Pakeha, such as sites related to the first interactions of Maori and Pakeha in New Zealand. There are only a limited number of these sites, and they are confined to discrete areas. Examples are:

- the site of Abel Tasman's anchorage in 1642, off Wainui Inlet, Golden Bay
- Toka a Taiau, Gisborne – the site of the first recorded formal meeting of Maori and Pakeha in 1769
- Ship Cove, a favourite landing site of Captain Cook
- Burning of the Boyd, Whangaroa Harbour, in 1810
- the site of the sinking of the Rainbow Warrior in 1985.

44 These sites are largely in the same state as when they became historically important. They are, therefore, very susceptible to encroachment by modern developments that would impair their historical character. For example, a marine faming venture in Ship Cove would materially alter the Cove's visual character so that it would not longer be in its historical state. Current tools are not adequately designed to stop this from occurring.

45 Local authorities can protect land-based cultural heritage with tools provided in the Reserves Act 1977, but there is no comparable mechanism for the marine environment. The Reserves Act provides for the declaration of historic reserves on land to protect "in perpetuity such places, objects, and natural features, and such things … as are of historic, archaeological, cultural, educational, and other special interest".

46 Registration under the Historic Places Act is primarily a tool for the recognition of cultural heritage value and does not itself provide protection. The register is declaratory only, and a lack of resources within the Historic Places Trust may limit its comprehensiveness.

47 Although the Historic Places Act is the main statute for management of impacts on archaeological sites, it does not provide protection for other heritage places except through voluntary covenants. Voluntary covenants attach to land titles, and land titles do not exist below MHWS, so this tool has no effect in relation to marine cultural heritage. The Antiquities Act 1975 only provides protection (from export) for wrecks or material recovered from wrecks more than 60 years old found in territorial waters.

48 Finally, rules in regional coastal plans only apply within the territorial sea. This means that there is an even more limited range of tools available for protecting marine cultural heritage sites and values beyond the 12-nautical mile limit than are available in the coastal marine area.

Conclusions

49 There is inadequate provision under existing mechanisms for the protection of marine cultural heritage. The main reasons for this are:

- Inadequate research and information on where sites are located
- Lack of national guidance on the prioritisation and appropriate resourcing of marine cultural heritage protection in relation to other marine issues
- Inadequate uptake of protection tools currently available, and the limited range of tools available in the marine environment compared to on land.

50 These problems are illustrated by:

- inadequate provision in regional coastal plans for identifying and managing heritage values through the resource consent process. Very few regional coastal plans contain plan provisions that identify archaeological sites or sites of historic or cultural heritage, or include rules that control adverse effects upon them
- the lack of any protection tool (outside the RMA planning process) for heritage sites of national significance
- tools such as heritage orders can only be incorporated into district plans, which, by definition, only apply above MHWS, and water conservation orders only have relevant application to wetlands
- the main statute for the protection of cultural heritage, the Historic Places Act, only applies to the marine environment in relation to archaeological sites and wrecks, and provides a consenting regime whereby any person wanting to modify, damage, destroy or investigate an archaeological site is required to obtain authority from the Historic Places Trust to do so. This mechanism does not provide permanent protection.

- archaeological sites are not always adequately protected, as applications may be made to damage or modify them
- the registration of sites with the Historic Places Trust has declaratory effect only.

51 These issues need to be considered to achieve desired outcomes for marine cultural heritage.