

# The Resource Management (Foreshore and Seabed) Amendment Act 2004

## What It Means For Local Government

### INTRODUCTION

This brochure is designed specifically as a guide for council and resource management practitioners to explain changes to the Resource Management Act 1991 as a result of the Resource Management (Foreshore and Seabed) Amendment Act 2004 and the Foreshore and Seabed Act 2004.

The Resource Management (Foreshore and Seabed) Amendment Act 2004 deals with consequential changes to the Resource Management Act 1991 (RMA), whereas the Foreshore and Seabed Act 2004 relates mainly to the ownership of the public foreshore and seabed, rights of access and navigation, and the recognition of customary rights.

The commencement date for the Resource Management (Foreshore and Seabed) Amendment Act 2004 is split. Most provisions come into force on 17 January 2005, including those relating to the protection of customary rights. Some provisions dealing with changes to subdivision and reclamation processes came into force on 25 November 2004.

The main changes to the RMA - outlined here - relate to plan-making and resource consent processes, and will mean new obligations for local authorities and the Minister of Conservation in relation to:

- customary rights orders granted by the High Court or Maori Land Court, and
- the establishment of foreshore and seabed reserves after a finding of territorial customary rights by the High Court.

A full version of the Resource Management (Foreshore and Seabed) Amendment Act 2004 is available on [www.legislation.govt.nz/](http://www.legislation.govt.nz/)

### What is a customary rights order?

A customary rights order is an order made by either the Maori Land Court or the High Court over an area of the public foreshore and seabed. A customary rights order will recognise a particular activity, use or practice that has been carried out on an area of the public foreshore and seabed since 1840. Each customary rights order will clearly define the type of activity, use or practice, and its scale, extent and frequency. An application for a customary rights order will be assessed against criteria in the Foreshore and Seabed Act 2004. The application will be publicly notified and notice will be served on specified persons, including those local authorities that have responsibility for the relevant part of the public foreshore and seabed.

### What are territorial customary rights?

Any group of New Zealanders who have, since 1840, had exclusive use and occupation of a part of the foreshore and seabed can apply to the High Court for a finding that the group would have had a territorial customary right, but for the vesting of the public foreshore and seabed in the Crown. There are specific criteria set out in the Foreshore and Seabed Act 2004 to help the High Court determine whether to make a territorial customary rights finding. If the High Court makes a finding, the applicant group can ask the High Court to establish a foreshore and seabed reserve over the area or can enter into discussions with Ministers to negotiate some other form of redress.

### HOW DO CUSTOMARY RIGHTS ORDERS AFFECT RMA PROCESSES?

Activities carried out in accordance with customary rights orders are known as *recognised customary activities* under the RMA.

Section 6 of the RMA has been amended to add "*the protection of recognised customary activities*" as a matter of national importance that shall be recognised and provided for when exercising functions and powers under the RMA.

Other relevant amendments are:

- that resource consent is not required for recognised customary activities
- a process for managing the effects of recognised customary activities
- new or amended functions, powers and duties of local authorities
- impact on plan-making processes
- changes to resource consent process.

### Resource consent is not required for recognised customary activities

A new section 17A has been added that allows for recognised customary activities to be carried out without a resource consent, and regardless of rules set out in a plan.

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The exemption for customary rights orders only applies if:

- the activity is carried out within the scale, extent and frequency, specified in the order, and in accordance with any controls imposed by the Minister of Conservation under new section 17B of the RMA, and
- the activity is carried out by a member of the group on whose behalf the order is made or another person authorised by the customary rights order holder.

Recognised customary activities will be subject to national environmental standards or other regulations developed under the RMA but the protection of recognised customary activities will be a matter to be recognised and provided for in developing such standards or regulations.

## How may the effects of recognised customary activities be managed?

The Minister of Conservation, in consultation with the Minister of Maori Affairs and customary rights order holders, can impose controls on recognised customary activities under new section 17B and new Schedule 12 of the RMA where the Minister considers that the activity has, or may have, a significant adverse effect on the environment. The process is triggered by the carrying out of an adverse effects assessment by either:

- the Minister of Conservation, or
- a regional council acting on the direction of the Minister of Conservation or, in the circumstances set out in Schedule 12, on its own initiative.

The criteria for an adverse effects assessment and adverse effects report are contained in the new Schedule 12. Schedule 12 also includes criteria for reviewing the controls imposed on a customary rights order.

## What will this mean for local authorities' functions, powers and duties?

The following changes are made to Part 4 of the RMA:

- regional councils, if requested, are required to supply information on the exercise of any recognised customary activities to the Minister of Conservation (section 28A)
- regional councils must also monitor the exercise of a recognised customary activity in its region under an amended section 35(2)
- regional councils must keep records of every customary rights order within their regions, including those that may overlap with other regions (s35(5))
- enforcement officers may have the added responsibility for determining compliance with any controls imposed on recognised customary activities (s38(3)).

## How will a customary rights order impact on plan-making processes?

New section 85A of the RMA states that a plan cannot describe an activity as permitted if that activity will, or is likely to have a significant adverse effect on a recognised customary activity. Where a customary rights order holder considers that a rule in either a plan or proposed plan would have a significant adverse effect on a recognised customary activity, they are able to:

- make a submission on a proposed plan under clause 6 or 8 (submissions and further submissions) of the First Schedule, or
- request a plan change under the First Schedule, or
- apply directly to the Environment Court for an order to change the plan.

New section 85B sets out criteria for local authorities or the Environment Court to apply when determining whether a rule would significantly adversely affect a recognised customary activity.

Regional councils cannot impose coastal occupation charges on any person carrying out a recognised customary activity.

## How will the resource consent process change?

The Resource Management (Foreshore and Seabed) Amendment Act introduces changes to:

- determining who is adversely affected by an application under section 94
- decision-making under section 104
- the information requirements under the Fourth Schedule.

### *Changes to section 94:*

New section 94B(4) requires that a consent authority must treat the holder of a customary rights order as being adversely affected if the consent authority considers that granting an application may adversely affect the exercise of a recognised customary activity.

Section 94D(4) requires consent authorities to serve notice on a customary rights order holder if the granting of an application may adversely affect the exercise of a recognised customary activity, even if a rule in a plan states that service is not required.

### *Changes to decision-making under section 104*

A customary rights order must also be considered in determining applications for resource consents. New sections 107A to 107D and amended sections 104(3)(c) and 119 of the RMA, provide that a resource consent or coastal permit must not be granted for activities that will, or are likely to have a *significant adverse effect* on a recognised customary activity unless the customary rights order holder grants written approval under section 107C. This includes resource consents for controlled activities. There is an exception for certain infrastructure works and associated operations where:

- such activities are carried out by defined operators, and
- such activities were lawfully established before 17 January 2005, and
- any significant adverse effect of the proposed activity on the recognised customary activity is similar to that which existed before the application was made, or the proposed activity is maintenance and the significant adverse effect is temporary.

Where a customary rights order holder gives their written approval to an application that would effectively suspend or cancel the customary rights order, the customary rights order holder must acknowledge this in writing. Such acknowledgements must form part of the consent application and the resource consent.

Section 107D outlines the process that must apply if the grant of a resource consent would have the effect of cancelling a customary rights order. It requires the holder of the customary rights order to apply to the Maori Land Court or High Court under the Foreshore and Seabed Act 2004 to have the order cancelled, in whole or in part. A decision by a consent authority to grant a resource consent has no effect until the application to the Maori Land Court or High Court has been determined. If an application to cancel the customary rights order to the Maori Land Court or High Court is declined, the resource consent must also be treated as if it were declined by the consent authority.

Amended sections 104(3)(c) and 119 also provide that resource consents must not be granted for activities that would be contrary to a Gazette notice issued under section 26 of the Foreshore and Seabed Act.

### *Changes to the Fourth Schedule*

A new Clause 1A has been inserted which makes it mandatory for an applicant to provide a description of possible alternative locations or methods for a proposal where that proposal may adversely affect a recognised customary activity. The exception is where the written approval from the customary rights order holder has been obtained (as above).

## **How does a consent authority determine whether an activity will significantly adversely affect a customary rights order?**

Specific criteria for determining whether a proposed activity will, or is likely to have a significant adverse effect on a recognised customary activity are provided in section 107A(2).

## **What happens when a customary rights order has been applied for in an area where there is an existing resource consent?**

When considering an application for a customary rights order, the relevant Court will consider (amongst other criteria) whether the customary activity has continued in a substantially uninterrupted manner. It will be a question of fact in each case as to whether any existing activity authorised by a resource consent has prevented the customary activity. An application for a customary rights order will be publicly notified. People who can demonstrate that they have an interest in the proceeding that is different from that of the general public will be able to be heard by the Court.

## **HOW DO TERRITORIAL CUSTOMARY RIGHTS AFFECT RMA PROCESSES?**

Where the High Court makes a territorial customary rights finding, the applicant group may apply to the High Court to establish a foreshore and seabed reserve over the relevant area. The purpose of such reserves is to acknowledge the exercise of kaitiakitanga by the applicant group, and to enable the area to be held for the common use and benefit of the people of New Zealand.

The establishment of a foreshore and seabed reserve does not affect:

- Crown ownership of the foreshore and seabed
- the statutory rights of access and navigation in the Foreshore and Seabed Act 2004.

Where a group requests the establishment of a foreshore and seabed reserve, the High Court will direct the applicant group, the Crown, and the relevant regional council to agree upon a charter and membership for a board that will administer the reserve.

Board functions would include the preparation, approval and review of a management plan for the reserve. This plan must be prepared in accordance with Part II of the RMA, and must not be inconsistent with the provisions of the New Zealand Coastal Policy Statement, or any relevant national policy statements.

Changes to section 33 of the RMA provide that a board of a foreshore and seabed reserve is a public authority and therefore local authorities may transfer powers to such boards.

A foreshore and seabed reserve management plan has implications for:

- preparing and changing policy statements and plans, and
- the timing of the review of a policy statement or plan.

## **What are the implications of a foreshore and seabed reserve management plan on policy statements and plans?**

Once a management plan has been lodged with the council, local authorities will have the following obligations under the RMA:

- Under amended sections 61, 66 and 74, local authorities must recognise and provide for a foreshore and seabed reserve management plan when preparing or changing any regional policy statements, regional plans or district plans.
- Within six months of the management plan being lodged, the regional council must begin a review of both its regional policy statement and all other plans to determine whether the policy statements or plans need to be changed to recognise and provide for the management plan. If local authorities decide to change their plans to recognise and provide for a management plan, they will need to publicly notify the proposed changes and consider public submissions.
- Where there is disagreement between the regional council and the board of a foreshore and seabed reserve over whether a policy statement or plan needs to be changed, the board can seek a decision from the Environment Court under new section 82A.

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## OTHER CHANGES TO RMA PROCESSES

There are two other main changes to the RMA:

- the vesting of land on subdivision
- the vesting of reclaimed land.

### How has vesting of land changed in relation to subdivision?

Section 237A(1) has been amended so that any part of a subdivided allotment that is within the coastal marine area will vest in the Crown when the land is subdivided. Previously, vesting could only occur when the land was adjacent to an esplanade reserve. The existing provisions for compensation under section 237F remain.

### What are the changes to the vesting of reclaimed land?

Amendments to the RMA prevent the Minister of Conservation granting fee simple title to land reclaimed from the public foreshore and seabed. The Minister of Conservation can grant lesser interests, such as leases, over the reclaimed land. Port companies will have an automatic right of renewal on leases over reclaimed land necessary for port infrastructure, while other holders of leases over reclaimed land, that are due to expire, will have their applications for new leases considered first.

Some transitional arrangements have been put in place to allow the Minister of Conservation to transfer fee simple title in limited circumstances, including where the party already has a coastal permit to reclaim land, or where there is a specific statute or legal agreement concerning the vesting of reclaimed land.

## TRANSITIONAL PROVISIONS

### Resource consents, policy statements, plans, plan changes and plan variations

The Resource Management (Foreshore and Seabed) Amendment Act 2004 includes transitional provisions for any resource consent applications that were lodged, and policy statements, plans, plan changes or plan variations that were publicly notified, before 17 January 2005. These processes are to be completed as if the Resource Management (Foreshore and Seabed) Amendment Act 2004 had not been enacted. The exception is for any submissions, requests or applications made to change a plan under new section 85B(1) of the RMA, which relates to customary rights orders.

### Appeals and objections, subdivisions, declarations, enforcement orders and abatement action

Any appeal or objection lodged before 17 January 2005 must be completed as if the Resource Management (Foreshore and Seabed) Amendment Act 2004 had not been enacted. However, any appeal

lodged after 17 January 2005 must be determined in accordance with the Resource Management (Foreshore and Seabed) Amendment Act 2004.

Where an application for a subdivision consent was lodged before 17 January 2005, the subdivision, including the approval and deposit of a survey plan, must be processed and completed as if the Resource Management (Foreshore and Seabed) Amendment Act 2004 had not been enacted.

Any declaration, enforcement or abatement actions commenced before 17 January 2005 must be completed (inclusive of any appeals) as if the Resource Management (Foreshore and Seabed) Amendment Act 2004 had not been enacted.

### Existing activities not previously requiring coastal permits

Where activities involving the occupation of land, or the removal of sand, shingle, shell or other natural material were lawfully being carried out on land in the coastal marine area that was territorial authority land but as a result of the Foreshore and Seabed Act 2004 is vested in the Crown:

- and such activities were authorised by a territorial authority, the authorisation will be treated as a coastal permit under the same terms and conditions (except any rights of renewal will not apply)
- and such activities were lawfully carried out without an authorisation, section 12(2) of the RMA does not apply until 1 January 2008. This gives the person carrying out the activity three years to apply for a coastal permit.

### Where can I find out more background information about the Foreshore and Seabed Act 2004 and the Resource Management (Foreshore and Seabed) Act 2004?

A copy of the Resource Management (Foreshore and Seabed) Amendment Act 2004 is available at [www.legislation.govt.nz/](http://www.legislation.govt.nz/)

More information on the background to the Foreshore and Seabed Act 2004, Court processes and the criteria for new orders and territorial customary rights is available at [www.justice.govt.nz/foreshore/](http://www.justice.govt.nz/foreshore/)

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