



## **SUBMISSION ON THE REVIEW OF THE FORESHORE AND SEABED ACT 2004**

**TO:** The Ministry of Justice

### **Submission on behalf of the Resource Management Law Association of New Zealand Inc**

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#### **Introduction**

- 1 This Submission is made by the Resource Management Law Association of New Zealand Inc (**RMLA**).
- 2 The RMLA is concerned to promote within New Zealand:
  - a An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework
  - b Excellence in resource management policy and practice
  - c Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes
- 3 The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives and others. Currently the Association has some 1,100 plus members. Within such an organisation there are inevitably a divergent range of interests in views of members.
- 4 While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the proposed regulations. It should also be noted that a number of members may be providing their own individual feedback and those may represent quite different approaches to the views expressed here.
- 5 For these reasons, this submission does not seek to advance any particular policy position in relation to the proposed regulations, but rather is kept at a reasonably high level and is made with a view to ensure that the proposed legislation:

- a is consistent with the general framework of existing laws and policies of relevance, and the Resource Management Act 1991 ("RMA");
- b is practicable and workable; and
- c will assist in promoting best practice.

#### SUBMISSION

- 6 The RMLA's responses to the Ministry's questions are set out in the attached submission form. The responses constitute a commentary rather than a specific view for the reasons set out above.
- 7 If there is any further opportunity to do so, the RMLA wishes to be heard in support of this submission.



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Signature of Joan Forret on behalf of the Resource Management Law Association

Date: 30 May 2010

Address for Service: RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041

Telephone: (9) 626-6068 or 027 272 3960

Email: karol.helmink@xtra.co.nz

Contact Person: Karol Helmink

## Submission form

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### Have your say

The government welcomes your feedback on this consultation document, particularly on the specific questions set out in this submission form. This submission form can also be downloaded from [www.justice.govt.nz](http://www.justice.govt.nz). The direct link to this information is: [www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004](http://www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004).

Submissions are due by **5.00pm on Friday 30 April 2010**. Late submissions will not be considered.

To make a submission fill in the submission form or write your submission in a separate document and either:

- send your submission as an attached document by email to [foreshoreseabedreview@justice.govt.nz](mailto:foreshoreseabedreview@justice.govt.nz); or
- mail a hard copy to the following address:

FreePost Authority number 224164  
Foreshore and Seabed Review  
Ministry of Justice  
c/- PO BOX 180  
WELLINGTON 6140

### All submissions will be publicly available.

The Ministry of Justice will publicly release your submission, a summary of submissions and a list of names of submitters on its website: [www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004](http://www.justice.govt.nz/policy-and-consultation/reviewing-the-foreshore-and-seabed-act-2004).

### Your name will be made publicly available as part of your submission when it is released.

Your contact details will be removed from your submission before it is posted on the website, recorded in the summary of submissions or released under the Official Information Act 1982 (OIA).

If you do **not** wish your name in your submission to be released, please clearly state this in your submission or tick the option below:

- I request that my name be removed from my submission before it is released and that it is recorded as 'anonymous' in the summary of submissions.

If there is particular information in your submission that you wish to remain confidential, please clearly indicate this and explain your reasons for wanting the information kept confidential.

The Ministry is subject to the OIA and copies of submissions sent to the Ministry will normally be released in response to an OIA request from a member of the public. If your submission is subject to an OIA request, the Ministry will consider your confidentiality request in accordance with the grounds for withholding information outlined in the OIA. You can view a copy of the OIA on the New Zealand Legislation website: [www.legislation.govt.nz](http://www.legislation.govt.nz).

The Privacy Act 1993 governs how the Ministry collects, holds, uses and discloses personal information about you which is contained in your submission. You have the right to access and correct this personal information.

*I am responding as (please tick one):*

An individual

Name

Email

Address

or

On behalf of a group or organisation

Name of group or organisation: Resource Management Law Association of New Zealand Incorporated ("RMLA")

Email joan.forret@harkness.co.nz / karol.helmink@xtra.co.nz

Address RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041

*1. Should the Foreshore and Seabed Act 2004 be repealed?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

It is the RMLA's concern that whatever legislation governs the ownership, access and management of the foreshore and seabed, such legislation should be fair, workable and consistent with the principles of sustainable management as are set out in the Resource Management Act 1991 ("RMA").

2. *The government proposes the following approach to ownership of the foreshore and seabed:*

- the 2004 Act would be repealed and Crown ownership removed;
- customary title extinguished by the 2004 Act would be restored;
- no one owns, or can own the foreshore and seabed (except land in existing private titles);
- instead of identifying an owner of the foreshore and seabed, legislation would specify roles and responsibilities;
- customary interests of hapū/iwi would be tested and, if proven, recognised through awards; and
- the Crown and local government would continue to have regulatory responsibility (subject to awards recognising customary interests).

*Do you support this approach?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

It is important that the roles and responsibilities are clearly defined if there is no legal ownership.

The transitional provisions will need to address those areas of land that are currently "between" ownership. For example, land previously owned by local authorities that has not yet formally transferred to Crown ownership by way of a change to the certificate of title.

In addition, there will be reclaimed land that was reclaimed prior to the Foreshore and Seabed Act 2004 ("FSA") being enacted for which title has yet to vest. Crown and local authority will need to be clearly defined, particularly with respect to offshore islands and for commercial activities being undertaken within areas presently encompassed by the FSA.

3. *The government suggests the name 'public domain/takiwā iwi whānui' for its proposed new approach. Do you agree with the name, or do you suggest another name for the area?*

Please give the reasons for your response.

Yes, I agree with the name 'public domain/takiwā iwi whānui'

No, I don't agree with the name 'public domain/takiwā iwi whānui'

I suggest another name for the area:

I/We have no view or preference

**Comment:**

Any use of the term "public domain" will need to clearly distinguish between the public domain contemplated in the context of foreshore and seabed from that referred to in many areas as Reserves Act land administered by territorial authorities.

Does the term "takiwa iwi whanui" translate to mean "public domain"?

There will be current leases, easements and other property rights whereby the Crown is the owner of the land involved. The legislation needs to clarify how those rights will be affected by a change in ownership to public domain.

4. *Do you think coastal hapū/iwi should be able to negotiate with the Crown for recognition of their customary interests?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

In order that any process of negotiation for customary interests retains public confidence the process must be transparent and the criteria for determining whether an applicant hapu/iwi qualifies must be clear and unambiguous. There are many examples of hapu/iwi interests that are not consistent regarding rights over particular land and/or resource.

It is also likely that there will be non-Maori interests with particular views as to the validity or otherwise of hapu/iwi interests that could be asserted from time to time.

If coastal hapu/iwi were able to negotiate directly with the Crown to the exclusion of other interests, there is a risk that commercial interests of those hapu/iwi could drive negotiations to unfairly disadvantage others.

The principles of the RMA that are important to the RMLA include public participation, consultation and sustainable management. It is appropriate that those principles are retained in any process that will confirm customary interests or customary title. Thus there should be clear mechanisms for dispute resolution.

What framework applies for identifying claimants?

5. *If customary interests are recognised through negotiation, should the awards be negotiated, or should the awards be the same as those the government proposes to set out in legislation?*

Please give the reasons for your response.

Awards should be negotiated

Awards should be as proposed to be set out in legislation

I/We have no view or preference

Comment:

It is not consistent with transparent and open government to have privately negotiated interests translated into privately negotiated awards. That is particularly so where such interests and awards will have a significant impact on the foreshore and seabed/public domain.

Those interests could also have a significant impact on the continuation of commercial interests that have been consented through the process set out in the RMA.

6. *Do you think coastal hapū/iwi should be able to claim recognition*

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*of their customary interests through the courts?*

Please give the reasons for your response.

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Yes  No

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I/We have no view or preference

**Comment:**

Whether coastal hapu/iwi are able to seek recognition of their customary interests through the courts or through some other process set out in the legislation, that recognition is consistent with the protections set out in Section 6 of the RMA and the recognition provided for by Sections 7 and 8.



*7. Should the Māori Land Court hear and determine claims?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

The Maori Land Court is a specialist court with the background and experience necessary to determine complex and disputed claims as to customary interests.

The Environment Court is also a specialist court and its history has shown that such an institution can successfully determine complex matters relating to the management of natural and physical resources. As a specialist court, the Environment Court's decisions are infrequently overturned by the High Court on appeal. That history may be useful in determining the appropriate legal framework for the proposed legislation.

*8. Should the High Court hear and determine claims?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

The High Court has no specialist expertise in this area. However, as a Court of general jurisdiction it deals with a broad range of issues. The judicial process before the High Court may be more formal, expensive, and lengthy. The High Court does however, bring a very rigorous analysis to legal and evidential issues before it. It may be useful for an intermediary judicial structure if the High Court were to co-opt members from the Maori Land Court for determining any such claims.

*9. Should the applicant alone be responsible in court for proving a test for customary interests is met?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

It is not clear what would be the role of the Crown, if any, in proceedings to determine a claim for customary interests.

Litigation is generally adversarial so that an applicant's claim can be tested in a legal forum and against the evidential and legal tests that apply in common law or as provided by the relevant legislation.

Departure from the adversarial model to a more inquisitorial approach would represent a significant shift and requires careful consideration.

There is the potential that unmeritorious claims could be successful if they are not tested through legal submission, opposing evidence, and cross-examination, and particularly if they are not open to submission from third parties.

If the concept of a public domain is adopted, it is unclear what body will represent the public domain if there is a claim for a customary interest that could limit the public's use or access to an area or resource.

10. *Should the applicant and the Crown share the responsibility in court for proving a test for customary interests is met?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

Any test for customary interests should also encompass the opportunity for third parties to be heard. Those third parties could be:

- \* Other hapu/iwi;
- \* Regional and territorial authorities;
- \* Owners of contiguous land;
- \* Environmental groups;
- \* Coastal permit holders; and
- \* Non-Maori interests, including those with an interest in the subject land greater than the public generally.

11. *Should any new legislation set out the tests and awards or should these be left to the courts to develop?*

Please give the reasons for your response.

Legislation should set out the tests and awards

The courts should be left to develop the tests and awards

I/We have no view or preference

Comment:

It is the court's role to interpret and develop tests in the light of the relevant legislation. That work should be guided by the legislation itself. However, the scope and application of the tests is likely to be developed through the courts. Thus, there is likely to be a combination of legislative and judicial influence that will guide the development of any tests for customary interests and awards.

12. *Do you agree that any new legislation should recognise two types of customary interests (non-territorial and territorial)?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

**Comment:**

Some interests will be more tangible than others and will be linked to a specific relationship with land. It may be administratively useful for there to be different types of customary interests. Conversely, provided the interests and their scope are sufficiently identified, it may be possible to identify those interests using only one term.

The proposal does not make it clear whether non-Maori customary interests can continue to be recognised.

The FSA provides for non-Maori to apply to the High Court for customary rights order. The review is unclear regarding the continued ability for non-Maori to apply.

The RMLA is unaware of any present applications for customary rights orders pursuant to Section 68 FSA. If any such orders have been granted, what continued rights will those holders have?

If there are presently applications that have yet to be determined, there will need to be transitional provisions that clarify the process and the scope of such rights.

13. *Do you agree with each of the elements of the test for determining non-territorial interests proposed by the government?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

The test appears to be exclusive to Maori customary interests. If customary rights orders contemplated by Section 68 FSA are to be continued, the test needs to explicitly provide for such applications.

Is the test intended to be consistent with the interpretation of "ancestral lands" as has been interpreted by the Environment Court when developing the jurisprudence around Section 6(e) of the RMA?

The test could helpfully include a requirement that the applicant demonstrates the authority to make the application on behalf of the relevant group.

It is unclear whether there may be overlapping rights in respect of the same customary use. For example, in circumstances where a particular iwi group has been conquered but not exterminated during pre-European land-based disputes in an area. Representatives of each group could continue to hold an ancestral connection with an area and carry out customary activities or practices either independently of or in co-operation with each other and under different tikanga.

14. *Do you agree with each of the elements of the test for determining territorial interests proposed by the government?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

Is it intended that shared exclusivity between coastal hapu/iwi and third parties will not be allowed for?

It is unclear whether the list of matters to be taken into account will form a hierarchy for consideration.

The test primarily focuses on activities rather than a specific connection to the land. It is unclear how the test for customary title will differ in fact from the test for customary interests as both rely on tikanga and the activities that are carried out in a particular area.

What is intended to constitute "substantial" interruption? This term could give rise to inconsistency between applicants for customary title.

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15. *Do you agree that the awards to recognise proven customary interests should be a combination of property rights and input to environmental management processes?*

Please give the reasons for your response.

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Yes  No

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I/We have no view or preference

**Comment:**

It is important that all people in groups with a particular interest in an area within the foreshore and seabed should have input into environmental management processes whether they are the holders of property rights or have customary or other interests.

16. Do you agree with each of the elements of the awards for non-territorial interests proposed by the government?

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

The legislation needs to be clear about the scope for customary interests awards because of the potential for award holders to obtain a commercial benefit from what is otherwise public domain to the exclusion of others and potentially to the disadvantage of others.

It is not clear how the area for which customary interests may be recognised will be defined through the awards. Customary interests are, by definition, less tangible than territorial interests. It may be difficult to identify the precise area over which customary interests apply.

The definition of foreshore and seabed includes all land between Mean High Water Springs and the outer limits of the territorial sea. It is unclear whether, and to what extent, any customary interest will extend seaward from the foreshore.

The proposed awards have implications for existing coastal permit holders seeking a renewal of their permit. In particular, marine farming, mineral exploration and marinas are all examples of activities that represent significant capital investment which will all require renewals of coastal permits. The future planning status of consented activities within an area of customary interest is unclear.

It is unclear whether the provision for rahui, for example, in respect of a drowning, could apply to areas that are subject to existing commercial activities that are consented through the coastal permit process.

The proposal contemplates that iwi planning documents will be prepared in accordance with Part 2 of the RMA. It is not clear whether preparation of those documents will be open to submission from outside an iwi/hapu.

There is also no clarity regarding how representative that document must be and whether there is a requirement for consultation within the iwi/hapu group.

If the planning document is to have status as a local authority planning document (by incorporation) will public involvement in the District Plan process extend to comment and change of that planning document?

Will there be a process for amending/reviewing planning documents to be undertaken concurrently with District/Regional Plan review and/or at the time of any variation to a District or Regional Planning document.

The Review document does not clarify the basis on which the veto right could be exercised. It is implicit that there should be a link between the customary interest being protected and the potential impact from the activity subject to a coastal permit application. It would be useful to require iwi planning documents to contain guidance as to the criteria against which the customary interest award holder would determine how to exercise any rights of veto. In addition, the mechanism for incorporating iwi planning documents into RMA planning documents and the submission/appeal/review processes that would apply needs to be very clear.

17. Do you agree with the customary title award for territorial interests proposed by the government?

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

See comments above in relation to question 16.

There is no clarity about the scope for commercial benefit that could be obtained. A customary title award may give rights over an extensive area from and including the coast. The commercial benefits from such a title could be significant.

The right to permit or veto a coastal permit application could enable coastal hapu/iwi to preferentially endow certain groups with commercial advantage within the foreshore and seabed. That is a greater power than exists for freehold property owners who have control over access to their properties but do not have the right to veto an application for a coastal permit or other resource consent.

There could be issues with identifying the appropriate representative body in terms of obtaining written permission in respect of coastal permit applications.

The proposal has significant implications for the re-consenting of existing coastal permits, particularly where there has been significant capital investment.

The rights of veto proposed for customary title holders are greater than those rights in respect of Section 8 of the RMA as have been determined by the Environment Court. That is, the rights of Maori interests under Section 8 have been found to be less than a veto.

It is a particular concern that any decision of a customary title holder to permit or veto a coastal permit application does not need to be made in compliance with the statutory criteria of the RMA.

The veto right in respect of conservation processes may also be inconsistent with public law obligations in respect of licensing/re-licensing and concessions under the Marine Reserves Act 1991 and Conservation Legislation.

There is no provision for due process, transparency, and natural justice regarding the decision-making process by which a customary title holder makes a decision to give or decline permission for a coastal permit activity.



**18. Do you agree with the government's proposals for the allocation of coastal space? These are:**

- the existing processes for the allocation of space would be retained on the basis that it is the Crown's role to regulate and manage resources in the foreshore and seabed;
- the Crown would continue to delegate the role of allocating space to regional councils; and
- this would be done in conjunction with those coastal hapū/iwi whose customary interests in the area have been recognised.

Please give the reasons for your response.

Yes  No

I/We have no view or preference

**Comment:**

It is unclear how the proposal that the Crown would continue to delegate the role of allocating space to Regional Councils would fit with the veto right of customary interest holders.

See also comments above.

**19. Do you agree with the government's proposals regarding structures? These are:**

- ownership of existing structures will remain with existing owners;
- new structures will be owned by those who own the material in the structures; and
- coastal hapū/iwi whose customary interests have been recognised will have an enhanced role in decision-making processes in relation to new structures (through the planning document described).

Please give the reasons for your response.

Yes  No

I/We have no view or preference

**Comment:**

It is unclear how private ownership of the material in structures will co-exist with a customary interest veto right in terms of occupation at the time of coastal permit renewal. It is not clear whether it is anticipated that a refusal of consent to occupy coastal space will require either the Crown or the customary interest holder to compensate the owner of the structure when those occupation rights are discontinued.

20. *Do you agree with the government's proposals regarding reclamations?*

*These are:*

- existing decision-making processes would continue in respect of reclamations although the nature of the interest granted may change;
- existing applications would continue to be dealt with as though the Crown were the owner of the underlying land; and
- for new applications, local authorities would continue to perform their current role of considering the environmental effects of a proposed reclamation.

Please give the reasons for your response.

Yes  No

I/We have no view or preference

**Comment:**

The RMA provides a process for decision-making regarding reclamations. That process involves delegation of decision-making to Regional Councils with opportunities for participation by the public generally.

A change of ownership to public domain may affect the legal framework for determining leasehold interests in reclaimed land.

In addition, there are situations where easements are the best mechanism for protecting particular structures on reclaimed land that may not fall within a leasehold interest. For example, electricity/services/walkway easements on land that may be vested as Local Body Reserve.

The legislation needs to be clear about whether esplanade reserves may be taken from reclaimed land where there is to be a leasehold interest.

There will need to be transitional provisions to deal with land reclaimed before the FSA for which no property right has yet been determined. In addition, the transitional provisions will need to address applications for property rights under Section 355 of the RMA in respect of land reclaimed after passage of the FSA.

21. *Do you agree with the length of time proposed for the new form of coastal permit for port companies (50 years or more, renewable)?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

**Comment:**

Port companies have a significant financial investment in the foreshore and seabed. The permit time for such activities needs to account for that investment but also the environmental, cultural, social and economic changes that inevitably occur over the duration of the permit.

There should be careful consideration as to whether a customary interest holder could refuse permission for renewal of a coastal permit in respect of a port company.

22. *Do you agree with the government's proposals regarding local authority-owned land? These are:*

- any existing local authority-owned land within the foreshore and seabed would be incorporated into the 'public domain/takiwā iwi whānui'; and
- the Crown would pay compensation for that land (if there is any) to the local authority.

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

The proposals are consistent with the present situation under the FSA.

23. *Do you agree with the government's proposals that any new law on the foreshore and seabed would contain provisions on adverse possession and prescriptive title similar to those in the 2004 Act?*

Please give the reasons for your response.

Yes  No

I/We have no view or preference

Comment:

While the FSA has provisions preventing adverse possession and prescriptive title, there is the opportunity for non-Maori groups to be accorded with customary rights orders. The opportunity to obtain a customary rights order ensures that non-Maori with historic association with the foreshore and seabed are not disadvantaged.

24. *What are your views on leases and licences within the foreshore and seabed in view of the government's proposals?*

Comment:

There are currently various leaseholders and licencees of land within the foreshore and seabed. Those leases and licences must be provided for in the new legislation.

It would be inconsistent to prevent any future leases or licences. There needs to be a mechanism for enabling certain activities that necessarily occur on the foreshore and seabed, for example, marinas, marine farms, wharves, slipways etc to continue with a level of certainty that will justify the corresponding capital investment in those activities.

The legislation needs to contemplate who will be the lessor/licensor if land is to be held as public

domain.

25. *What are your views on coastal occupation charges within the foreshore and seabed in view of the government's proposals?*

Comment:

26. *What are your views on roads within the foreshore and seabed in view of the government's proposals?*

Comment:

There are existing coastal communities (for example, in Raglan) that have dwellings that are serviced by roads or right of ways within the foreshore and seabed. The role of climate change and its effect on sea level rise and coastal erosion may cause increasing areas of existing roads to be within the foreshore and seabed.

Some bridges and all their support structures will also be within the foreshore and seabed, and need to be contemplated and provided for as part of the legislation.

27. *What are your views on local Acts in relation to the foreshore and seabed in view of the government's proposals?*

Comment: