REPORT 1
(1215/11/IM)

SUBMISSION ON THE MARINE AND COASTAL AREA (TAKUTAI MOANA) BILL

1. Purpose of Report

To approve a Wellington City Council Submission on the Marine and Coastal Area (Takutai Moana) Bill (the Bill) attached in draft form as Appendix One.

2. Executive Summary

The Maori Affairs Committee has invited submissions on the Bill. The closing date for submissions is 19 November 2010.

The Bill repeals the Foreshore and Seabed Act 2004 and replaces it with a similar comprehensive regime and legislative framework for the foreshore and seabed/marine and coastal area. A synopsis of the Bill is attached as Appendix One. It is proposed that a submission is made to address the key issues that have a particular impact on the Council as opposed to local authorities generally. A draft submission is attached as Appendix Two. This submission has been prepared in consultation with Wellington Waterfront Limited ('WWL').

Local Government New Zealand ('LGNZ') will also be making a submission that focuses predominantly on three potential impacts of the legislation:

- The possible impact of *protected customary rights* and *customary marine title*
- The possible implications for regional councils of new planning documents set out by customary marine title groups (under clause 84)
- The potential impact on land or infrastructure (particularly unformed roads) owned by local authorities in the coastal and marine areas.

3. Recommendations

Officers recommended that Council:

1. *Receive the information.*

2. *Agree to the draft submission on the Marine and Coastal Area (Takutai Moana) Bill, attached as Appendix Two, subject to any amendments agreed to by the Council.*

3. *Agree to delegate to the Mayor and Chief Executive the authority to make minor drafting changes and changes resulting from decisions made by Council, before forwarding the submission to the Maori Affairs Committee on 19 November 2010.*

4. *Note that the Mayor and the Chief Executive (or his delegate) will appear before the Select Committee in support of the Council's submission.*

4. Background

The Bill was introduced by the government to repeal the Foreshore and Seabed Act 2004 and, to some extent, restore the customary interests extinguished by that Act. This follows the significant opposition to the 2004 Act when it was enacted and ongoing criticism of that Act since then.

A summary of the general policy objectives of the Bill is contained in Appendix One and the full text of the Bill is available at:
http://www.legislation.govt.nz/bill/government/2010/0201/latest/versions.aspx

5. Discussion

5.1 General approach

It is proposed that a submission is made to address the Council's interest in the Wellington Waterfront. It is not proposed that Council enter into the debate on wider policy issues such as the merits of having new legislation to govern the common marine and coastal area. Submissions to the Maori Affairs Committee are due on 19 November 2010.

5.2 Waterfront / Lambton Harbour land

The primary issue for Wellington City Council is the potential impact on the Wellington Waterfront as it includes some areas of foreshore and seabed/marine and coastal area - principally in the Queens Wharf area (and Outer-T in particular) and the Overseas Passenger terminal.

Titles for the Wellington Waterfront area are held on trust for Council by WWL; a 100% Council Controlled Organisation. This means that the relevant titles fit the definition of '*specified freehold land*' and are, therefore, not '*common marine and coastal area*'.

The proposed Council submission seeks specific provision to confirm that the areas of the Wellington Waterfront within the marine and coastal area (i.e. seaward side of mean high water springs):

- fit within the definition of 'specified freehold land', and therefore do not become common marine and coastal area; and
- remain subject to the Wellington Harbour Board and Wellington City Council Vesting and Empowering Act 1987 ('Empowering Act').

For over two decades the Crown has repeatedly recognised that the Wellington Waterfront is unique in terms of its relationship with Wellington City and is deserving of a specific management regime. The purpose of this regime allows for the ongoing development of the Wellington Waterfront for the benefit of all Wellington City residents and visitors.

Under the current Waterfront Framework, revenue from leases and licences from areas within the Wellington Waterfront (including within the marine and coastal area/foreshore and seabed) are crucial for funding the development of the Wellington Waterfront project as a whole. Previous experience with the Foreshore and Seabed Act 2004 showed that legislation of this type has the potential to create uncertainty and/or create delays in the financing of waterfront development.

Wellington City Council would like the Bill to preserve the legal status quo. To achieve this, the Bill will need to be amended to specifically recognise that the Empowering Act prevails over the Bill. In addition to this, the draft submission seeks that the Bill results in greater legal certainty than Council enjoyed under the Foreshore and Seabed Act 2004.

6. Conclusion

The Marine and Coastal Area Bill has been analysed to assess its impact on Council activities.

The draft submission, attached as Appendix Two, focuses on the Council's interest on the Wellington Waterfront and priority for the Bill to preserve the status quo.

Contact Officer: Brian O'Sullivan *(Senior Advisor, Policy and Planning)*

Supporting Information

1. Strategic Fit / Strategic Outcome

This paper relates to legislation that, potentially, has an impact on Council operations for the Waterfront area.

2. LTCCP/Annual Plan reference and long term financial impact

Not applicable

3. Treaty of Waitangi considerations

The proposed Council submission focuses on the local impacts, particularly those affecting the Waterfront/Lambton Harbour area.

4. Decision-Making

A decision to approve making a submission on the Bill is not considered to be significant and Council can proceed based on the information and analysis in this report.

5. Consultation

- **General Consultation**

It is considered that, in the circumstances, consultation is not necessary for Council to give adequate consideration to community views

- **Consultation with Maori**

The submission has been discussed with the Port Nicholson Block Settlement Trust

6. **Legal Implications**

Legal advice has been obtained and the submission has been reviewed by the General Counsel.

7. **Consistency with existing policy**

The submission supports the current Council approach.

APPENDIX ONE

MARINE AND COASTAL AREA LEGISLATIVE FRAMEWORK AND SYNOPSIS

The Marine and Coastal Area (Takutai Moana) Bill (the **Bill**) repeals the Foreshore and Seabed Act 2004 (the **2004 Act**) and restores the customary interests extinguished by that Act. It recognises, through the protection of public rights of access, navigation, and fishing, the importance of the common marine and coastal area for its intrinsic worth for the benefit, use, and enjoyment of all New Zealanders. The Bill recognises the *mana tuku iho* of *iwi* and *hapū*, as *tangata whenua*, over the foreshore and seabed of New Zealand, and it contributes to the continuing exercise of that *mana* by giving legal recognition, protection, and expression to the customary interests of Māori in the area.

The proposals in the Bill follow the significant opposition to the 2004 Act when it was enacted, and ongoing criticism of that Act since that time. As a result, the Government agreed to review the 2004 Act. An independent review of the 2004 Act was completed in June 2009. The review panel, after consulting with the public, recommended repealing the 2004 Act and engaging with Māori and the public on their respective rights and interests in the foreshore and seabed. Subsequently, the Government carried out public consultation and stakeholder engagement on the 2004 Act and its preferred option for a replacement regime that would equitably balance all interests in the foreshore and seabed. The proposals in the Bill reflect the outcome of the independent review and the subsequent consultation process and aim to establish a workable and durable framework.

New model for the foreshore and seabed: the common marine and coastal area

The foreshore and seabed is the area from the high-water mark at mean high-water spring tides extending seawards for 12 nautical miles (the territorial sea). This area includes the subsoil and the waterspace and airspace above this area (but not the air or water itself).

Under the 2004 Act, the public foreshore and seabed (excepting private titles) was vested in the Crown as a way to provide certainty and clarity about rights and responsibilities in the area. The Crown ownership model, however, also had the effect of extinguishing any uninvestigated Māori customary title (a common law concept that allows for the continuation of indigenous systems of law and rights) to the foreshore and seabed. The model had a discriminatory effect on Māori customary interests as compared with other interests in the foreshore and seabed.

The Bill recognises that an ownership model is not the only way to protect the range of interests exercised in the area. It removes Crown ownership of the public foreshore and seabed by repealing the 2004 Act, stating that this area (known as the common marine and coastal area) is not owned, and cannot be owned, by any person. The Bill replaces Crown ownership with a model that recognises that the common marine and coastal area is an area in which all New

Zealanders have interests, aside from the small portion that is already privately owned.

Protection of the interests of all New Zealanders

New Zealanders have a broad range of recreational, commercial, conservation, and customary interests in the common marine and coastal area. The Bill protects these interests by providing more certainty about roles and responsibilities.

Access, fishing, and navigation

The Bill explicitly continues rights of public access in, on, over, and across the common marine and coastal area. It also provides that nothing in the Bill affects existing commercial, recreational, and customary fishing rights and it preserves rights of navigation in the area. These rights of public access, fishing, and navigation are subject only to restrictions authorised by legislation.

Management of the common marine and coastal area

The Bill states that the Minister of Conservation is responsible for managing the common marine and coastal area. This role does not override the roles and responsibilities of other Ministers, local authorities, or other people who are specified in the Bill or other legislation.

Local authorities

The Bill provides that any part of the marine and coastal area owned by a local authority will form part of the common marine and coastal area, divesting local authorities of those areas. The Bill provides that local authorities can apply to the Minister of Conservation for compensation for these divested areas and sets out the criteria that are applicable to these applications.

Existing interests

The Bill states that resource consents in the common marine and coastal area that were in existence immediately before the commencement of the Bill are not limited or affected by the Bill. Existing leases, licences, and permits will run their course until expiry. Coastal permits will be available for the recognition of these interests after expiry.
The Crown retains ownership of petroleum, gold, silver, and uranium.

Structures

The Bill provides that, while there is no owner of the common marine and coastal area, existing ownership of structures and roads in the area will continue. New structures can be privately owned. Structures that have been abandoned will vest in the Crown so that it can ensure that health and safety laws are complied with.

Reclaimed land

To encourage development, the Bill provides that land reclaimed from the common marine and coastal area will vest in the Crown and the reclaimer of the land can apply to the responsible Minister for a fee simple title or other interest in the land (for example, a leasehold or coastal permit). Anyone who plans to sell a fee simple title in reclaimed land will be required, first, to offer it to the

Crown. If the Crown decides not to acquire the reclaimed land, the seller will then be required to offer it to any iwi and hapū that exercise customary authority in the area. Once these rights of refusal have been exhausted, the owner of the reclamation will be able to sell it to any third party. Current applicants for an interest in a reclamation can choose whether the regime under the Resource Management Act 1991 or the Bill will apply to them. The Bill also simplifies the legislation applying to reclamations in the common marine and coastal area.

Recognition of Māori customary interests in the common marine and coastal area

The Bill recognises the traditional importance of the common marine and coastal area to Māori by restoring customary interests that were extinguished by the 2004 Act, and providing for the legal recognition, protection, and expression of customary interests in 3 ways.

- **Mana tuku iho**

First, the mana tuku iho of iwi and hapū is explicitly recognised in the Bill. This provision was developed in response to submissions during the consultation processes for a clear and simple recognition of tupuna (ancestral) connection to the foreshore and seabed. The mana tuku iho provision is an acknowledgement of the mana-based relationship of iwi and hapū to the marine and coastal area in their rohe. The Bill allows iwi and hapū to take part in the statutory conservation processes within their relevant common marine and coastal area. These processes include the establishment of marine reserves and conservation areas and the management of stranded marine mammals.

- **Protected customary rights**

Secondly, the Bill sets out a process by which customary rights (such as launching waka and gathering hāngi stones) that were exercised in 1840 and continue to be exercised today in accordance with tikanga can be given legal effect, and the future exercise of such rights can be protected. Like many other activities in the common marine and coastal area, these customary rights are not exclusionary and do not stop others from legitimately carrying out activities.

- **Customary marine title**

Finally, the Bill provides for the right to seek customary marine title to a specific part of the common marine and coastal area if an area has been used and occupied by a group according to tikanga and to the exclusion of others without substantial interruption from 1840 to the present day. Customary marine title recognises the longstanding and continuing connection between a group and a specific part of the common marine and coastal area. The Bill provides for the legal recognition, protection, and expression of this ongoing connection between a group and a place. A customary marine title also provides an interest in land, but that land cannot be sold or otherwise disposed of. A customary marine title group can derive commercial benefit from customary marine title, and may transfer or delegate its rights in accordance with tikanga. A customary marine title will have the following associated rights in respect of the title area, subject to certain exclusions:

- the right to give or withhold permission for applications under the Resource Management Act 1991:
- the right to give or withhold permission for specified conservation activities:
- the right to participate in certain conservation decisions:
- the protection of wāhi tapu or wāhi tapu areas within the title area:
- the presumption of ownership of newly formed taonga tūturu:
- the ownership of minerals (other than petroleum, gold, silver, and uranium):
- the right to create a planning document for the customary marine title area that imposes obligations on local authorities.

Public access is guaranteed to areas in customary marine title except where wāhi tapu and wāhi tapu areas, such as burial caves, require protection and to which access can be restricted.

The Bill provides that protected customary rights and customary marine title can be recognised in 2 ways—by application to the High Court or by agreement with the Crown given effect through Order in Council. The tests for recognition of customary marine title are the same whether title is sought through the courts or through direct negotiation with the Crown.
The Bill also requires a marine and coastal area register to be set up to record all orders made by the High Court and agreements with the Crown granting protected customary rights and customary marine titles.

APPENDIX TWO

DRAFT SUBMISSION

SUBMISSION ON THE MARINE AND COASTAL AREA BILL

FROM: WELLINGTON CITY COUNCIL

19 November 2010

INTRODUCTION

Wellington City Council welcomes the opportunity to make a submission on the Marine and Coastal Area (Takutai Moana) Bill. Local Government New Zealand ('LGNZ') has made a submission on behalf of all local authorities. The LGNZ submission deals predominantly with potential implications of the Bill on processes under the Resource Management Act 1991. Council generally supports LGNZ's submission and the overall theme of that submission which seeks clarification on elements of the proposed new legislation.

The Council's submission focuses on an issue of particular relevance to Wellington City; specifically the preservation of Council's existing rights and interests in the foreshore and seabed/marine and coastal areas held by Wellington Waterfront Limited ('WWL').

WELLINGTON WATERFRONT

The Council has a unique interest in the area known as the Wellington Waterfront, which includes areas of foreshore and seabed. The legal framework for managing and making the most of the Wellington Waterfront, as a whole, is of utmost importance to Council.

The titles within the Wellington Waterfront are held by WWL on trust for the Council. WWL is a 100% council-controlled organisation. The Wellington Waterfront titles include areas of foreshore and seabed.

Under the Foreshore and Seabed Act 2004, WWL held titles within the marine and coastal area are subject to a 'specified freehold interest' and, as a consequence, continue to be held on Council's behalf by WWL.

The benefit of the Council (through WWL) retaining these titles alongside the other 'land based titles' has been repeatedly recognised by the Crown, starting with the Wellington Harbour Board and Wellington City Council Vesting and Empowering Act 1987 (**1987 Empowering Act**). This local Act established the 'Lambton Harbour Development Area' (now known as the Wellington Waterfront) and enabled the comprehensive development of the Wellington Waterfront.

In Council's view the policy considerations which led to the establishment of the current regime for the Wellington Waterfront remain just as strong today, and its continuing existence is key to the success of the Wellington Waterfront and

Council's ability to progress the Waterfront Framework (the Council's policy document and vision for the Wellington Waterfront[1]).

At the very least Council seeks that the Bill preserves the legal status quo. To achieve this, the Bill will need to be amended so it specifically recognises that the Empowering Act prevails over the Bill. In addition to this, the Council seeks that the Bill results in greater legal certainty/clarity for the Waterfront land than under the Foreshore and Seabed Act 2004.

RELIEF SOUGHT:

Council's key objective is to ensure that the existing rights and interests associated with the marine and coastal area/foreshore and seabed held by WWL are preserved by the Bill. This means ensuring that:

a. the marine and coastal area/foreshore and seabed areas held by WWL fit within the definition of 'specified freehold land', and therefore do not become common marine and coastal area.

***Relief sought**: Council seeks that the Bill's current drafting of 'specified freehold land' and associated definition of local authority does not change.*

b. the Bill is clear that, in the event of any inconsistency, the 1987 Empowering Act will prevail. This is to make sure that the existing and well understood basis upon which the WWL land is managed can continue.

***Relief sought**: Council seeks an amendment to the Bill so that it includes a provision equivalent to section 102(3) of the Foreshore and Seabed Act 2004.*

In respect of (b), the most effective outcome for Wellington City Council would be for the Bill to remove any doubt about the status of the WWL land. This rationale was supported during the preparation of the Foreshore and Seabed Act 2004 by the specific inclusion of section 102(3) as follows:

102: Relationship between local Acts and this Act

(1) To avoid doubt, if a provision of a local Act is inconsistent with a provision of this Act, the provision of this Act prevails.
(2) To avoid doubt, subsection (1) prevails over the provisions of any local Act that permits land reclaimed from the sea by accretion by the action of the sea to be vested in any person or body.
(3) Neither subsection (1) nor section 17(4) to (9) applies to the Wellington Harbour Board and Wellington City Council Vesting and Empowering Act 1987.

Finally, the Council seeks that the Bill is used as an opportunity to provide greater certainty than the current position and the Council would welcome the opportunity to work with officials in this regard.

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[1] http://www.wellington.govt.nz/plans/policies/waterfront/pdfs/framework.pdf

APPENDIX TWO

CONCLUSION

Council's primary submission is that the legislation to replace the Foreshore and Seabed Act 2004 should maintain the Council's position and recognise and provide for the unique circumstances of the Wellington Waterfront. This will enable the Council and WWL to manage and develop the Wellington Waterfront for the benefit of all New Zealanders who live in and visit Wellington City.

It is noted that the review of the Foreshore and Seabed Act 2004 has the potential to create uncertainty and inefficiency for the future management and development of the Wellington Waterfront. The Council seeks a comprehensive and enduring solution so that such uncertainty does not arise under the new Act.

Council would like to appear before the Maori Affairs Committee in support of this submission.