

blue energy : taking the plunge

15 March 2007

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The Coastal Occupancy Regime Under the RMA

- Current Issues and Alternatives

A presentation to the
Awatea Conference by
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This paper will address:

- The current regime for coastal occupancy under the RMA.
- Its merits and its problems.
- Overseas occupancy regimes.
- Some suggestions about legislative changes.

The Current Regime

- Section 12 RMA restricts activities in the CMA.
- It is a “one stop shop” – both “use” activities and occupation are covered by a coastal permit unless the land in the CMA is vested in a body other than the Crown.
- Section 12(1) prohibits any structure on the foreshore or seabed unless expressly allowed by a rule in regional coastal plan or proposed plan, or a resource consent.
- Section 12(2) prohibits occupancy of the CMA vested in the Crown or regional council unless expressly allowed by a rule in regional coastal plan or proposed plan or a resource consent.

The Current Regime cont

- Occupancy is defined in section 2 as meaning the activity of occupying any part of the coastal marine area –
 - Where that occupation is **reasonably necessary** for another activity; and
 - Where it is to the exclusion of **all or any class of persons** who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and
 - For a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, **a lease or licence to occupy that part of the coastal marine area would be necessary** to give effect to the exclusion of other persons whether in a physical or legal sense

The Current Regime cont

- The statutory policy of restricting occupation of the CMA is reinforced by section 122(5) which provides that except as the coastal permit expressly provides otherwise, and that it is reasonably necessary to achieve the purposes of the coastal permit:
 - a coastal permit is not to be regarded as authorising occupancy to the exclusion of all or any class of persons; and
 - conferring the same rights as a tenant or licensee of the land.

The Current Regime cont

- These statutory provisions as interpreted by Court decisions can be summarised as follows:
 - There is a presumption against structures in, on, under or over the foreshore and seabed unless expressly authorised by a rule in a regional coastal plan (and any proposed one) or by a resource consent;
 - There is a similar presumption against the occupation of any part of the coastal marine vested in the Crown or a regional council;
 - The grant of a coastal permit does not authorise **exclusive** rights of occupancy except to the extent that the permit expressly provides otherwise;
 - A coastal permit may expressly exclude “all or any class of persons” from the area subject to the permit;
 - The grant of a right of occupancy under a coastal permit is **not** (consistently with the general law) equivalent to ownership.

The Current Regime cont

- Priority in terms of occupancy is determined (in summary) by the notifiable date of the coastal permit application. It is not possible for an individual to “reserve” space while carrying out investigations/trials (except by obtaining a coastal permit).
- New section 124B (not in force) confers a restricted priority right to the holder of a coastal permit due for renewal.
- Part 7A of the RMA establishes a new regime whereby regional coastal plans can include provisions to manage competition for the occupation of open space (see section 165D), and to offer authorisations to apply for coastal permits. This enables a tender process and other allocative mechanism.

Benefits and Problems

- The current regime is a “one stop shop” and there is no need to seek separate “use” and occupancy rights.
- The “right” to occupy is generally more circumscribed than that provided by a conventional lease or licence.
- There is a maximum term of 35 years with no guarantee of renewal (there are some limited priority rights upon renewal).
- There is no provision for “reserving” space (apart from Part 7A) in advance of applying for a new coastal permit.
- Whilst a coastal permit can be transferred, environmental compliance and the coastal occupancy right are tied together.
- Priority to occupation through the coastal permit process depends on complex case law.
- There is no certainty that regional councils will amend their regional coastal plans to include allocative mechanisms.

Overseas Occupancy Regimes

- In the UK, tidal/wave generation requires a variety of consents/approvals, but the Energy Act 2004 creates a “Renewable Energy Zone” on the UK continental shelf up to 200nm and the rights to licence the generation of renewable energy is vested in the Crown estate.
- There is a split regime between “use” and “occupancy” approvals. There is a specific funding/permitting regime for a “demonstration phase”.
- Long term occupancy is subject to a competitive process from the Crown estate.

Overseas Occupancy Regimes

- In Australia, the control of activities in the marine environment is split between:
 - the State/Territory Governments for the first 3nm;
 - the Commonwealth from 3nm to 12nm.
- State/Territory legislative provisions differ considerably, both in terms of authorising use and occupancy.
- However in general terms, rights of use and occupancy are split. In NSW, development fees for occupancy are based on market valuations.

Overseas Occupancy Regimes cont

- Federal jurisdiction is also complex but there is a permit regime with the fee based on a percentage of the cost of the installation not exceeding \$60,000.

Overseas Occupancy Regimes cont

- In America there is also a split between Federal and State jurisdictions (3nm/12nm). Under the US Code Title 18, a preliminary permit can be obtained for up to 3 years. It does not authorise construction but maintains priority of application (guaranteed first to file status) while a site is being studied and preparation is undertaken for a long term licence.
- Long term licences are subject to compliance with a variety of Federal legislation.
- As an example of a State jurisdiction, California has a leasing regime with fees regulated by statute with fixed minimum deposits.

Legislative Change

- The RMA regime has many advantages over overseas regimes in terms of avoiding multiple consenting processes, and complexity of procedure.
- By overseas standards, the annual occupancy costs are low, but transaction costs to obtain disputed coastal permits can be high.
- It is not possible in NZ for individuals to “reserve” occupancy rights pending investigations/trials to establish feasibility. It is of course possible to apply for short term consents, but priority to seek renewal is circumscribed.
- A coastal permit is a less certain “right” to that compared to some overseas regimes which confer a definite property right.

Legislative Change cont

- It is better to build on the existing RMA regime rather than revert to a “piecemeal” consenting process.
- Possible reforms include:
 - A separate investigative regime for wave/tidal projects (and others) providing priority in seeking long term consents.
 - A more certain regime for renewals of coastal permits.
 - Enhancing the nature of occupancy rights for commercial activities in the CMA.
 - Fees?
 - Making it mandatory for regional councils under Part 7A to consider exercising their powers to address competition for space in the coastal marine area.

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