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**Marine Energy**

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Oceania Room | Te Papa Tongarewa | Wellington

# Wave and Tidal Energy and the Marine and Coastal Area (Takutai Moana) Act 2011

Matanuku Mahuika  
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# Overview

- The impact of the Coastal and Marine Area (Takutai Moana) Act on the marine energy sector will likely be limited
- Where it does impact it will bite when resource consent is being sought
- My aim is to give an overview of the Act, its consequences, the customary rights tests, foreshore and seabed agreements and accommodated matters
- Will then discuss the consequences of the Act on the marine energy sector and provide some thoughts

# Coastal & Marine Area (Takutai Moana) Act 2011

- Came into force on 31 March 2011
- Creates a regime for recognition of Maori customary interests and customary title in foreshore and seabed
- Sets out the process for the recognition of those interests (i.e. through the Courts or agreements negotiated with the Crown)
- Prescribes certain limits that are to apply to those rights once recognised

# Consequences of the Act

- Removes Crown ownership and makes the foreshore and seabed (or “common coastal and marine area”) a “no-ownership” space
- Provides for the continued recognition of customary title, protected customary rights, wahi tapu
- Rebalances the test for customary title by placing the onus on the Crown to prove extinguishment
- Recognises customary title as an interest in land
- Leaves less to negotiated agreements by prescribing the legal rights that will flow from customary title recognition
- Provides for those legal rights to operate within existing legal regimes such as the RMA

# The Test for Recognition

- The thresholds under the Act for establishing customary interests (including customary title) remain high and are intended to apply even in the case of negotiated agreements
- For recognition of customary title it will be necessary to show:
  - Area held in accordance with tikanga
  - Exclusive use and occupation from 1840 to the present without substantial interruption
- For recognition of a protected customary right:
  - Must have been exercised since 1840
  - Continues to be exercised in accordance with tikanga
  - Must not have been extinguished
- Protection of a wahi tapu requires:
  - Evidence of a connection with the area in accordance with tikanga
  - That prohibitions or restrictions are necessary to protect the wahi tapu

# Key Legal Rights Relevant to Marine Energy Sector

- Customary title:
  - Resource Management Act permission right
  - Consultation in relation to NZ Coastal Policy Statement
  - Right to create a planning document with effects on decision-making in resource management, Historic Places Trust, fisheries and conservation matters
- Protected customary rights :
  - A consent authority may not grant a resource consent for an activity that will, or is likely to have, adverse effects that are more than minor on the exercise of a protected customary right
- Wahi tapu:
  - Limits or restricts access to wahi tapu areas
  - Local authorities, in consultation with customary title holder, must take action to enforce compliance with restrictions
  - Up to \$5,000 fine for breaching restrictions

# Foreshore and Seabed Agreements

- Are the alternative to recognition through the Courts
- The only current example of such an agreement is the agreement with Ngati Porou, which was negotiated under the 2004 Act and provides recognition at two levels:
  - Level One : Legal instruments designed to provide general legal recognition and protection of customary interests
  - Level Two: Legal instruments that apply where hapu can prove the existence of customary title
- It is not clear to what extent the framework adopted in the Ngati Porou situation will be applied to new agreements under the new 2011 Act



# Accommodated Matters

- Accommodated matters are set out in section 64 of the Act and are activities that will be unaffected by the existence of customary title
- Relevant to the marine energy sector are:
  - Existing resources consents (including those accepted by a consent authority before effective date)
  - Infrastructure (as defined in RMA)
  - Scientific research
  - Petroleum and mining activities
  - Emergency activities

# Consequences for Marine Energy Developments

- Except in areas where customary title is proven to exist, there will be very little if any change
- In customary title areas the permission right will apply and the agreement of the customary title holder will be required before a consent can be granted
- Wahi tapu and protected customary activities may also impact upon development proposals, but this impact is likely to be limited to more discrete locations than customary title
- There is also potential for marine energy projects to be accommodated under the Act

# Thoughts for Marine Energy Sector

- The Act does not mean that the entire coastline will suddenly be closed off to development
- The opposite is probably true and development activities will continue, but with an additional dimension that may need to be considered where customary rights have been established
- Notwithstanding the Act Maori will maintain a strong cultural and spiritual associations with coastal areas
- It remains the case that early engagement is best
- Where customary title is proven to exist then engagement with the affected iwi is unavoidable



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