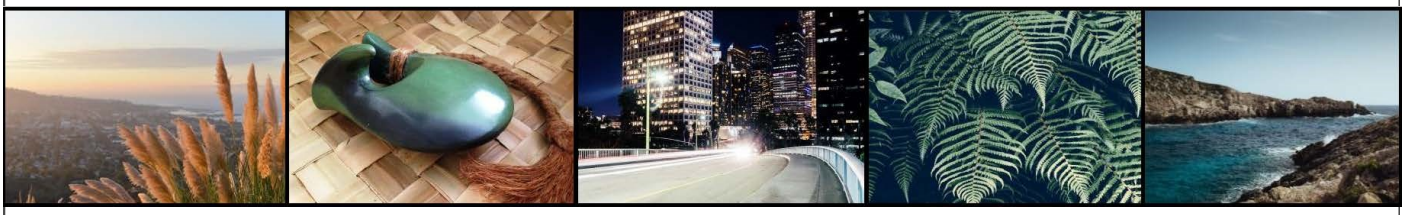


AHM News

INTRODUCTION

Where has this year gone?! In a fast-paced 2021 we have seen a number of government policies be announced, further case law developments, and substantial moves towards replacement of the Resource Management Act 1991 (**RMA**). In this newsletter we outline some of the latest government policies, we take a first look at the exposure draft of the Natural and Built Environments Act, and provide a summary of the first substantive decision on an application for customary marine title and rights under the Marine and Coastal Area (Takutai Moana) Act 2011.

GOVERNMENT POLICY STATEMENT ON HOUSING AND URBAN DEVELOPMENT

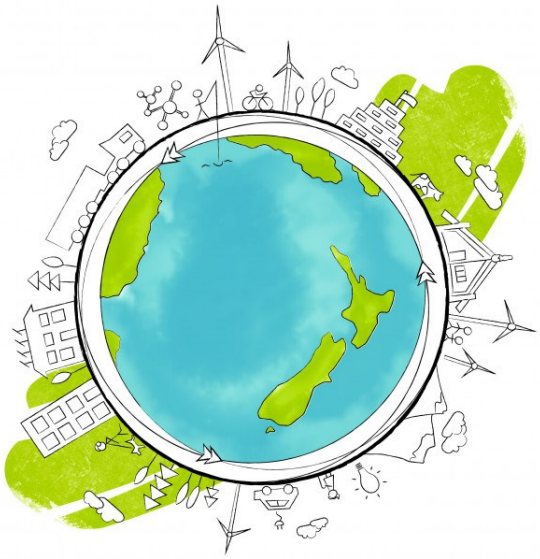
The Ministry of Housing and Urban Development has led the development of the recently released Government Policy Statement on Housing and Urban Development (**GPS-HUD**). The GPS-HUD is intended to communicate the Government's longer term (multi-decade) vision and the change the Government considers is necessary in the housing and urban development sector. The discussion document includes a vision, outcomes, focus areas, actions and ways of working to shape housing and urban development over the next 30 years.

The GPS-HUD has four main outcomes that it seeks to achieve: thriving communities, wellbeing through housing, partnering for Māori housing and urban solutions, and an adaptive and responsive system. To achieve this, the GPS-HUD has six focus areas:

- Provide homes to meet people's needs;
- Ensure that more affordable houses are being built;
- Support resilient, sustainable, inclusive and prosperous communities;
- Invest in Māori-driven housing and urban solutions;
- Prevent and reduce homelessness; and
- Re-establish housing's primary role as a home rather than a financial asset.

While all laudable aims, the discussion document is light on the details, particularly as to how the Government intends to achieve the goals and outcomes and perhaps more importantly measure its progress in that regard. The discussion document is available to read and invites the public to have their say on the GPS-HUD by 30 July 2021.

CLIMATE CHANGE COMMISSIONS REPORT ON A LOW EMISSIONS FUTURE FOR AOTEAROA



The Climate Change Commission released its final advice to the Government on its first of three emissions budgets and how Aotearoa can cut its emissions and become carbon neutral by 2050. The Commission's advice is divided into three parts, being:

- the steps required to progressively reduce New Zealand's emissions through its first three emissions budgets,
- direction on the policies and strategies needed in the Government's emissions reduction plan, and
- advice on the Nationally Determined Contribution and the eventual reduction in biogenic methane.

The report includes a number of recommendations for how transport, agriculture, energy, and forestry sectors could cut emissions. The Commission also recommends that the Government supports workers to transition from high emissions sectors to low emissions sectors.

The Commission says it has approached the issues with a mind to ensuring its recommendations are ambitious but achievable. The Commission's report has attracted a wide range of comments ranging from those who consider not enough is being done, to those who say the Commission's recommendations will impose cost on those least likely to be able to afford it. Minister for Climate Change, James Shaw, has responded with details of what the Government has already done to work towards a low emissions economy, such as financing the transition to a low emission economy and incentivising low emission vehicles. Minister Shaw said that the Government will publish its Emissions Reduction Plan before the end of 2021 to show that it is up to the challenge set by the Commission's report.

RMA REPLACEMENT: RELEASE OF DRAFT NATURAL AND BUILT ENVIRONMENTS BILL

On 29 June 2021, the Government announced the release of an exposure draft of the Natural and Built Environments Bill (**NBA**). This is the primary bill with which the Government plans to replace the RMA. It is set to provide a mandatory set of national policies and standards to support the environmental limits and outcomes specified in the new legislative suite.

The purpose of the exposure draft is to seek comment on the drafting of the NBA by 4 August 2021. A second opportunity for consultation on the full NBA bill will occur in early 2022 as part of the Parliamentary Select Committee process.

The other two bills which will replace certain aspects of the RMA are the Strategic Planning Bill and the Climate Change Adaptation Act. The Government is planning to introduce and consult on both of these bills before the end of its current term (2023).

THREE WATERS REFORM UPDATE

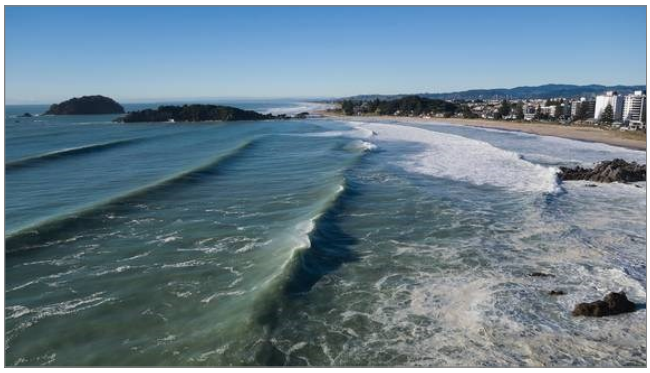
The Three Waters reform has had a significant update with the Government announcing a proposal to establish four publicly-owned entities to take responsibility of drinking water, wastewater and stormwater infrastructure across New Zealand.

The Government has proposed that four large water entities would create an affordable system that ensures secure delivery of safe drinking water and resilient wastewater and stormwater systems.

The announcement included the proposed boundaries of the four water providers, further details on the proposed water services entities, including governance arrangements, the role of iwi, and how they would be regulated.

The Government has also committed to continue to work with the sector, iwi, and industry on some of the details to give these transformational reforms the best chance of success. Further announcements are expected in the coming weeks, including a three waters reform support package for councils and their communities.

RE EDWARDS (TE WHAKATOHEA (NO. 2)) [2021] NZHC 1025



This High Court decision is the first substantive decision to be released on marine title and customary right applications under the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA Act**). In this case, the applicants (Whakatōhea iwi) sought orders for customary marine title and protected customary rights in the takutai moana area between Maratōtara in the west and Tarakeha in the east, out to the 12 nautical mile limit.

This case is significant because it is the first to deal with overlapping claims under the MACA Act. The decision provides guidance for applicants and interested parties on the legal interpretation and approach of the MACA ACT, and the types of activities for which customary rights applications may be considered.

The Court therefore had to address some matters that were before it for the first time, including:

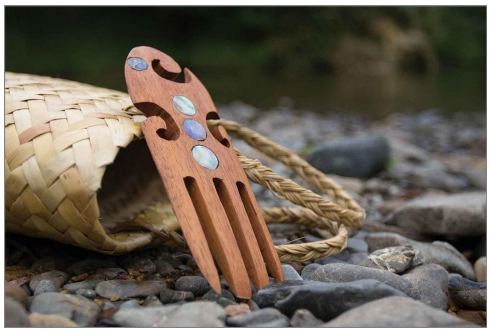
1. the standard and burden of proof;
2. the meaning of the phrase "holds the specified area in accordance with tikanga" in s58(1)(a);
3. the meaning of the terms "exclusively used and occupied" and "without substantial interruption" in s58(1)(b)(i) including whether a concept of "shared exclusivity" may exist under the Act, where to measure the boundary of the takutai moana in relation to rivers and estuaries, and the effect of reclamations on Customary Marine Title (**CMT**) and Protected Customary Rights (**PCR**) claims;
4. questions about what sort of activities can support a grant of PCR under s51;
5. the nature of CMT under s58, including whether a jointly held CMT can be issued; and
6. the correct procedure to follow when there are overlapping claims being advanced in both the Court and pursuant to direct negotiations with the Crown in respect of the same or a similar area.

The Court first found that applicants for recognition orders are required by s98 to prove all of the positive elements set out in ss 51 and 58 but have no obligation to prove that their customary rights have not been extinguished. Rather, it is assumed in the absence of proof to the contrary that customary interests have not been extinguished. This departs from the usual standard of proof in civil proceedings, but the Court made clear that, other than this, the starting point regarding the standard of proof is the civil burden of proof - being on the balance of probabilities.

Assessing whether the land was held "in accordance with tikanga" under s58, the Court held that the critical focus must be on tikanga and the question of whether or not the specified area was held in accordance with the tikanga that has been established rather than on any western or other customary law concepts.

Regarding "exclusive occupation", the concept of "shared exclusivity", taken from Canadian jurisprudence was found to be consistent with the purposes of the MACA Act and could be applied in the circumstances to allow for a single customary marine title order over the claimed coastal marine area shared between the applicants.

The Court then turned to the matter of "substantial interruption" and determined that while certain physical activities allowed under resource consents and certain physical structures could amount to substantial interruption, the granting of a resource consent itself could not. Also, the loss and confiscation of the applicants' land through raupatu did not sever their connection to the coastal marine area.



The Court focused on the three elements required under s58 of the MACA Act when determining whether customary title exists. The applicant group must:

- hold the specified area in accordance with tikanga;
- have exclusive use and occupation; and
- have had the exclusive use and occupation without substantial interruption.

Two pukenga (expert) were appointed under s99 of the Act to advise on tikanga matters in the proceedings, and the tikanga-based elements under the Act. The result of their advice was a report containing a poutarāwhare (described as a 'construct') detailing which applicant groups and interested parties, in their view, held the application area in accordance with tikanga.

In Part IV of the decision the Court further analysed the application of tikanga in the proceedings. The Court acknowledged tikanga as the first law of Aotearoa New Zealand, and the growing intersection between tikanga and the common law. It considered a range of tikanga values put forward by the applicants, particularly the concept of whanaungatanga and the importance of whakapapa (and its interconnectedness), and concluded that through their whakapapa, a number of the applicants had links to the earliest Māori settlement of the eastern Bay of Plenty, and that they had been able to establish their mana in relation to the whenua and coastal marine area.

The Court ultimately adopted the poutarāwhare of the pukenga, holding that those groups identified within the construct had satisfied the test for customary marine title, and finding that customary marine title should be granted in three areas.

The decision culminated in recognition orders being granted by the Court for customary marine title and customary rights being protected in the eastern Bay of Plenty, including three customary marine titles over three separate areas and customary rights being protected for a range of activities. These activities included protected customary rights over activities including the collection of shells, stones and driftwood, carrying out customary practices in the takutai moana such as tangihanga, wānanga and karakia, collection of certain resources for rongoa, and launching of boats and waka.

The exact boundaries of the area subject to customary marine title, and the exact form of the protected customary rights orders, will be determined at a second hearing, currently set down for February 2022. However, that hearing may be placed on hold now that this decision has been appealed to the Court of Appeal by a number of parties.

Questions, comments and further information

If you have any questions, comments or would like any further information on any of the matters in this newsletter, please contact the authors:

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