

Regulatory Impact Statement

PROPOSED REGULATIONS UNDER THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 RELATING TO ABANDONED COASTAL STRUCTURES

AGENCY DISCLOSURE STATEMENT

This regulatory impact statement (RIS) was prepared by the Office of Treaty Settlements (OTS).

It provides an analysis of options considered in the development of policy for regulations under section 118(1)(g) of the Marine and Coastal Area (Takutai Moana) Act 2011 (**the Act**). The regulations will set out the steps that regional councils will take when undertaking inquiries into potentially abandoned coastal structures. Section 19 of the Act provides that abandoned structures in the common marine and coastal area (**CMCA**)¹ are vested in the Crown. A structure is 'abandoned' if an inquiry, undertaken by a regional council in accordance with regulations made under section 118 of the Act, has failed to find the owner.

In developing the proposed policy, the objective was to ensure inquiries are sufficiently comprehensive to find an owner where it is practicable to find one (to limit the burden on the Crown), while ensuring that the process is not unduly onerous and costly to regional councils.

Analysis and the content of the regulation policy was constrained by:

- the abandoned structure regime provisions in section 19 of the Act; and
- the scope of the regulation making provisions in section 118 of the Act.

Development of the proposed policy was a matter of judgement on how best to meet the policy objective informed by discussion with relevant agencies and feedback from regional councils and from the Department of Conservation (**DOC**), as Crown manager, on draft policy.

Kevin Kelly, Deputy Secretary Treaty and Director of the Office of Treaty Settlements

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Date -----

¹ The marine and coastal area other than freehold land, certain conservation land and the bed of Te Whaanga Lagoon in the Chatham Islands.

Background

1. Abandoned structures in the common marine and coastal area (**CMCA**) can pose risks to public health and safety, hinder access, occupy space that could be used by higher value activities and have adverse effects on water quality, marine life, and amenity values. Such structures include wharves, jetties, slipways, sea-walls, marine farms, power poles, fence posts, and culverts.
2. Section 19(1) of the Marine and Coastal Area (Takutai Moana) Act 2011 (**the Act**) provides that abandoned structures in the CMCA are vested in the Crown. This was a response to concerns about the lack of clarity as to where responsibility lies for structures when the owner is unknown or cannot be found – particularly under the no-ownership regime for land in the CMCA.
3. Vesting in the Crown ensures someone can be made responsible for dealing with any health and safety issues and significant adverse environmental effects being caused or threatened by abandoned structures. The Department of Conservation (**DOC**) will be responsible for managing abandoned structures on behalf of the Crown.
4. Section 19(2) provides that a structure is legally ‘abandoned’ if an inquiry, undertaken by a regional council in accordance with regulations made under section 118(1)(g) of the Act, has failed to find the owner. Section 118(1)(g) provides that regulations have the purpose of “prescribing the steps that a regional council must or may take in undertaking an inquiry under section 19(2)”.
5. The Act provides an inquiry is mandatory when two criteria are met: the ownership of a structure is uncertain and there is no current resource consent. Provided these criteria are met an inquiry is required; irrespective of whether a structure is causing a problem or not. The Act imposes no obligation on councils to survey their regions to identify structures that meet the criteria for an inquiry.
6. The Crown becomes the owner of a structure immediately upon completion of the council inquiry if that inquiry fails to find the owner (i.e. without any further process beyond a report on the inquiry being provided to DOC).
7. The Crown’s liabilities as the new owner are limited (section 19(5)). The Crown is not liable:
 - a. for breaches committed in respect of, or adverse effects attributable to, the structure before the Crown became the owner; and
 - b. to comply with any requirement that does not relate to health or safety or a significant adverse effect on the environment.
8. In the course of undertaking the analysis, the Office of Treaty Settlements (**OTS**) and DOC visited the six regional/unitary councils having the greatest number of abandoned structures (Northland, Auckland, Waikato, Bay of Plenty, Marlborough and Tasman) to determine their current approach and assess the liabilities likely to flow to the Crown. The majority favoured continuing existing council-led programmes, which generally remove structures or are successful in finding existing or new owners, rather than directing council resources to inquiries. Exceptions related to a few larger structures that are difficult or complex to deal with or expensive to remove or repair.

Status quo and problem definition

9. To give effect to the provisions in the Act regulations must be made. Regulations set out the process that a regional council will follow when undertaking an inquiry. There are no non-regulatory alternatives for bringing section 19 of the Act into operation. Maintenance of the status quo would mean:
- less certainty that risks to health and safety and significant environmental issues arising from abandoned structures would be addressed; and
 - regional council expectations (as a result of a significant level of consultation) would not be met.
10. The challenge is to prescribe steps in regulations that:
- assist regional councils to locate any extant owners so as to ensure their property rights are protected and they take responsibility for their structures;
 - provide a degree of certainty to regional councils as to the steps to be taken and the point at which investigations are considered exhausted and vesting in the Crown follows if no owner has been found;
 - provide the Crown with confidence that all reasonable efforts will be made to find the owner of a structure and thereby avoid the Crown taking on the burden of ownership; and
 - enable councils to manage their resources and expenditure, and avoid unwarranted costs in fulfilling their inquiry role.

Objective

11. The outcome sought is a set of steps that achieve an appropriate balance between ensuring:
- the inquiry process is sufficiently comprehensive to give the Crown confidence that all reasonable steps have been taken to try and find the owners (both to protect owners' property rights and minimise the burden on the Crown); and
 - the process is practical and workable, and not unduly onerous and costly to regional councils.

Options analysis

12. In identifying a policy approach that would meet the objective four key questions were addressed:

What degree of obligation should apply to the steps?

13. Three options were considered relating to the level of obligation that should attach to the steps in the regulations:
- a. all mandatory;
 - b. councils able to exercise discretion as to which steps are relevant; or
 - c. a mixture of mandatory and discretionary.
14. A list comprised exclusively of mandatory steps was rejected as it was likely to impose unnecessary costs on councils and be unduly onerous. This is because the steps that are appropriate and reasonable depend on the circumstances for each inquiry. For

example, if the identity of the owner is known, then it is only a matter of trying to ascertain their whereabouts. That would involve searching phone directories, electoral rolls, etc. If the identity is not known, lines of inquiry must first be pursued to establish the owner's identity before the options of searching phone directories, electoral rolls etc. become available.

15. It is also desirable that councils have the ability to elect lines of inquiry that are likely to most efficiently provide the information needed. For example if bankruptcy is suspected, inquiries made to the official assignee may deliver the required information with few, if any, other steps needed.
16. It was not appropriate, however, for all steps to be discretionary. Some of the proposed steps relate to administrative matters or interaction with DOC rather than investigation into a structure *per se*. These include the requirements relating to maintaining records, and consulting with and reporting to DOC. Such obligations should apply consistently to all inquiries and are thus proposed to be mandatory.
17. Accordingly, it is proposed the regulations comprise a small number of mandatory steps along with a menu of steps. A council is required to undertake those steps from the menu that it reasonably considers are relevant in a particular case.

In light of the mandatory obligation on councils to undertake inquiries if criteria are met how best can resource demands on councils be managed?

18. In early consultation, regional councils and Local Government New Zealand expressed concern about the potential cost of inquiries - particularly for councils that have already surveyed coastal structures in their regions and are aware of hundreds meeting the criteria. Councils considered it should be possible to choose not to proceed with an inquiry if:
 - a structure neither has, nor poses risks of having, adverse effects to health and safety or significant effects on the environment (e.g. old fence posts, power poles and culverts); and
 - the benefits to be gained from Crown ownership are outweighed by the costs of an inquiry.
19. The Act is clear that inquiries are mandatory if statutory criteria are met. However, it would not be practicable or affordable for councils to commence inquiries at once for all structures meeting the criteria. It is proposed that the regulations explicitly state that councils may decide when to commence an inquiry and may give priority to structures which have, or pose risks of, adverse effects. This will make it clear that councils can spread costs over a number of years.
20. More recent discussion with council staff suggests concerns about the criteria in the Act have lessened – at least for the near term. Visits to six regional councils known to have issues with abandoned structures (Northland, Auckland, Waikato, Bay of Plenty, Marlborough, Tasman)² provided a more accurate picture than gained earlier of the number of inquiries likely to occur in the foreseeable future. Most councils indicated they preferred to continue existing council-led programmes (which generally either remove structures or are successful in finding existing or new owners) rather than directing

² These represent 6 of the 17 regional and unitary councils. Remaining councils have mostly dealt with known abandoned structures or have predominantly exposed coastlines with few coastal structures.

resources to inquiries under the Act. Exceptions relate to a few larger structures where it is difficult to find someone to take responsibility or the structures are expensive to remove and Crown ownership is seen as being of benefit to the community.

21. Councils' preferences may have been influenced by the limited Crown liability under the new regime and lack of certainty of Crown action to repair or remove a structure unless it is causing health, safety or significant adverse environmental effects.

Will the Crown have the ability to influence the quality of investigations?

22. Since abandoned structures will be managed by DOC on behalf of the Crown, DOC has a strong interest in ensuring all reasonable steps have been taken to find the owner.
23. Draft policy included a step whereby DOC could decide not to accept a report from a council (on an inquiry that failed to find the owner) and direct the council to carry out additional investigation. This was challenged in a submission from the New Zealand Law Society. It considered such a provision to be *ultra vires* since the empowering provision in section 118 contemplates the regulations specifying distinct steps. It does not appear to contemplate the Crown having the power to direct that additional steps be taken in particular situations. This submission was accepted by OTS. Instead it is proposed that before a regional council completes an inquiry, it must consult with DOC and take into account any information and advice from DOC. This could include:
 - information about the identity or the whereabouts of the owner of the structure; and
 - advice on additional steps the regional council could take to establish the identity or the whereabouts of the owner of the structure.
24. The requirement for councils to "take into account" advice relating to potential further investigative steps does not impose an absolute obligation on councils to undertake those steps. However, case law suggests a council must actively turn its mind to whether further steps are desirable and be able to show that it has done so.
25. It is anticipated that DOC and councils will work cooperatively on the issue of abandoned structures and that DOC will be consulted early on. In most cases this will eliminate the need for DOC to recommend further investigation at a late stage in the process.

How many steps should be included in the menu?

26. Under the proposed policy councils will be able to choose which steps they undertake from the menu. However, they have an *obligation* to undertake those steps they reasonably consider are relevant in the particular case. It was important, therefore, that the list itself was reasonable in terms of the total number of steps and the investigation each step required. This was a matter of judgement informed by discussion with relevant agencies (for example, Department of Internal Affairs on the usefulness of births, deaths and marriage records), and feedback from regional councils and from DOC (as Crown manager) on draft policy.
27. The number of steps of potential relevance to an inquiry and the amount of information to be supplied in the report to DOC were both reduced following consultation with regional councils on the draft proposals. For example, the proposed step relating to seeking information (about the owner of the potentially abandoned structure) from any holders of consents for other coastal structures in the vicinity, originally included past consent holders dating from the time that the structure under inquiry was first built. The effort and cost involved in contacting past consent holders was judged too onerous given the limited prospects of obtaining useful information.

Conclusions

28. This RIS has evaluated the approach to be taken in regulations setting out the steps that regional councils will take when undertaking inquiries into potentially abandoned structures. A non-regulatory alternative has not been considered since regulations must be made in order for section 19 to be operational and ensure the benefits of the abandoned structures regime are delivered.
29. It is proposed that when carrying out an investigation councils will be required to choose steps (from a menu provided in the regulations) that are relevant in the circumstances. In addition councils must carry out some steps which are mandatory such as consulting with DOC and reporting in a prescribed format to the Director General of Conservation. Consultation with regional councils has assisted OTS to refine the number of steps and the actions required of councils. If all the relevant proposed steps are taken by a council, we consider an inquiry will be sufficiently comprehensive to find any existing owner while not being overly costly or onerous for councils.
30. The regulation making power in section 118(1)(g) of the Act does not provide for DOC to directly control the quality of inquiries. However, a proposed step whereby councils must consult with DOC and take into account any recommendations for further investigation should adequately protect the Crown's interests.
31. Consultation with the six key councils has revealed that most will undertake very few inquiries early in the new regime - preferring instead to continue council-led programmes which remove structures or find existing or new owners. In some cases this approach is favoured by councils because it will be cheaper than an inquiry (particularly where structures can be removed). In other cases it allows councils to find local owners for abandoned structures which are of value to the local community.
32. The anticipated small number of inquiries are likely to be into structures which are too complex or expensive for councils to deal with themselves, and where Crown ownership is seen as being of benefit to the community.

Consultation

33. OTS has worked closely with DOC and the Crown Law Office on the development of policy for the regulations. Ministry for the Environment (**MFE**), Department of Internal Affairs, Crown Law Office and the Treasury were also consulted. Parliamentary Counsel Office and Department of Prime Minister and Cabinet were informed.
34. A consultation paper was sent in March 2012 to regional councils, coastal district councils, relevant government departments and a range of other potentially interested parties. Sixteen submissions were received, of which 12 were from local authorities, one from Local Government New Zealand, one from the New Zealand Law Society, one from the Department of Internal Affairs and one from a regional council employee in a personal capacity.
35. This was followed by a meeting with Local Government New Zealand and two regional council representatives - one each from the South and North Islands. That meeting discussed the key concerns expressed in submissions and changes and refinements to the policy in response to these. The Options Analysis above details how feedback from consultation was helpful in informing development of the proposed regulations. Local government staff generally indicated that, given the legislative constraints, they were comfortable with the policy as amended.

36. OTS and DOC subsequently visited a sample of regional councils known to have issues with abandoned structures to gain a better understanding of the number of inquiries likely to be held in the next few years and the number, type, and condition of structures likely to vest in the Crown. The purpose of these visits was to gauge potential Crown liabilities under the new regime.

Implementation

37. It is anticipated these regulations will be in place by December 2014. OTS and DOC will develop guidelines for regional councils on the operational implementation of the regulations including advising regional councils of the key DOC staff responsible for liaising with councils and providing guidance on the availability and location of historical records held by central government.

Monitoring, Implementation and Review

38. Implementation of the regulations will be monitored by OTS as part of its monitoring responsibilities for implementation of the Act. DOC will be the key source of information on the workability of the regulations since it will be the Crown agency that councils will have to consult and report to as part of the inquiry process.