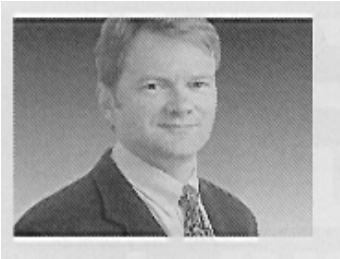

HEY YOU – GET OFF MY JETTY or alternatively THE PUBLIC's ACCESS TO PRIVATE JETTIES

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The right of public access to our coastal marine environment is a highly charged issue in New Zealand. Many Kiwis view open access to the coast and coastal waters as a birthright of all New Zealanders. On land adjoining the waterways there is the much-discussed (and somewhat mythical) Queens chain purportedly giving access to a strip of land adjoining the sea.

Freedom to use the coastal waters is also important and is enshrined in statute. Section 6 of the Resource Management Act 1999 requires all persons exercising powers and functions under the Act to recognise that the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers is a matter of national importance.

Also ss122(5) of the same Act provides that no coastal permit (which is the seagoing version of a resource consent) gives authority for the holder to occupy a coastal marine area which is Crown or Regional Council land to the exclusion of the public unless that exclusion is provided for expressly in the coastal permit or is reasonably necessary to achieve the purpose of the coastal permit.

However, the issue of who has the right to access and use structures constructed in coastal waters (particularly jetties, marinas and moorings) has been the subject of some confusion and debate. In this regard a decision of the Court of Appeal from last year is of importance. In Hume v Auckland Regional Council [2002] 3 NZLR 363 the Court was dealing specifically with the right of the public to use a private jetty adjoining public land, but that ruling is of a general relevance to structures in the coastal marine area (ie from the coast out to 12 nautical miles at sea).

Before looking at the particular facts of this case it would pay to review the legal constraints on activities in the coastal marine area by the Resource Management Act. Sections 12 to 15(b) place restrictions on activities in the area. In general, where there is no rule in the Regional Council Plan authorising the activities covered by these sections you cannot carry them out unless you obtain a coastal permit. For current purposes the most important section is s12, which prevents anyone reclaiming, disturbing, depositing in, destroying or disturbing the foreshore or seabed without a permit. It also prevents anyone from erecting, altering or removing any structure on the foreshore or seabed unless this is provided for in the Regional Plan or coastal permit. Subsection 12(2) provides that with regard to land in the coastal marine area owned by the Crown by Regional Council that you may not occupy any part of the coastal marine area unless this is specifically provided for in the Regional Coastal Plan or coastal permit.

Accordingly, if you want to build a jetty you must, in most circumstances, obtain a coastal permit for the structure pursuant to s12(1) and if the jetty, or part thereof, is built on land owned by the Crown or the Regional Council then you also need authority to occupy the area in your coastal permit.

The approach taken to coastal marine areas under the Resource Management Act is materially different to that applying to the use of land. Land may be used in any manner unless the use contravenes a rule in a plan, in which case a resource consent will generally be required. However, the reverse applies in coastal marine areas in that, broadly speaking, nothing can be done unless expressly allowed by rule in a plan or coastal permit.

With regard to the Humes, they obtained a coastal permit authorising them to build a jetty to give them access to their property on Kawau Island. They should also have obtained a condition on the permit authorising them to occupy the land (but this was not

determinative of the issues in dispute). After they built their jetty disagreements arose between the Humes and others about the public's use of their jetty. Eventually the Auckland Regional Council applied to the Environment Court for a declaration to the effect that the Humes were not able to exclude members of the public from using the jetty for the purpose of providing access to, from and along the foreshore. The dispute made its way to the Court of Appeal and after the Court had wrestled with the convoluted wording of the relevant sections the Court came to the conclusion that:

"The public may use the Humes' jetty in a reasonable manner for the purpose of gaining access to, from and along those parts of the coastal marine area which are adjacent to the jetty. In doing so they may not unreasonably impede the Humes' access to and use of the jetty."

The Court noted that in most cases there would not be an express right of exclusion in the coastal permit (this would run against several concepts in the Resource Management Act), but that the owners of coastal structures were protected by the provision in s122(5)(b) which meant that exclusion could be implied if this was reasonably necessary to achieve the purpose of the coastal permit. This flexible wording should be used sensibly. The Court accepted that by implication moorings built pursuant to a coastal permit could be used exclusively by the owner (presumably on the basis that there would be little point in owning the mooring if any member of the public had an equal right to use it.) The same reasoning leading to implied exclusivity could also be applied to commercial areas on wharves and jetties.

By conclusion the Court noted that the price a private jetty owner is required by the Resource Management Act to pay for the rights to construct and use their jetty is that it will be available for public use on a reasonable basis.