SCOTTISH LAW COMMISSION
**Discussion Paper No 113**

# Discussion Paper on Law of the Foreshore and Seabed

**April 2001**

**This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission**

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**The Commission would be grateful if comments on this discussion paper were submitted by 31 July 2001.** Comments may be made on all or any of the matters raised in the paper. All correspondence should be addressed to:

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NOTES

1. Copies of comments received may be (i) referred to in any later report on this subject, (ii) made available to any interested party on request, and (iii) summarised on our website, unless consultees indicate that all or part of their response is confidential. Such confidentiality will of course be strictly respected.

2. For those wishing further copies of this paper for the purpose of commenting on it, the paper may be downloaded from our website at www.scotlawcom.gov.uk, or purchased from The Stationery Office Bookshops.

[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

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# Part 1 Introduction

**Our Remit**

1.1 In late 1999 we received a reference[1] from the Deputy First Minister and Minister for Justice, Mr Jim Wallace QC MP MSP, in the following terms:

> "Taking account of the land reform action plan, to consider the existing law of the foreshore and seabed, and to advise on possible reforms with a view to improving clarity and consistency.".

1.2 We have been requested by the Scottish Executive to report on the reference by 31 December 2002.

1.3 The terms of our reference require us to approach our review of the law of the foreshore and seabed as an integral part of the land reform action plan.[2] Accordingly it is appropriate that we set out briefly the background to the action plan as it relates to the present review.

1.4 On 30 October 1997 the Secretary of State established the Land Reform Policy Group with the following remit:

> "To identify and assess proposals for land reform in rural Scotland, taking account of their cost, legislative and administrative implications and their likely impact on social and economic development of rural communities and on the natural heritage".

1.5 The Land Reform Policy Group (LRPG) considered a number of wide-ranging matters relating to land use and tenure in Scotland. At an early stage the LRPG recognised that such a comprehensive review of land tenure should include a detailed consideration of the law of the foreshore. In their first consultation paper the LRPG stated:

> "A more specific issue relates to the foreshore. Sometimes this is owned by the Crown, sometime by private landowners. If a landowner has a title which covers the foreshore, this carries the right to control how others use it. However the landowner's rights are subject to public rights over the foreshore, particularly in connection with navigation and fishing. The Group recognises that it would be a serious step to reduce or remove an owner's right to preserve the interest associated with the landholding.".[3]

1.6 The matter was put out to public consultation in February 1998 and respondents were specifically asked:

> "Could a strengthening of public rights over the foreshore be justified?".[4]

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[1] Under the Law Commissions Act 1965, s 3(1)(e).
[2] LRPG, *Recommendations for Action*.
[3] LRPG, *Identifying the Problems*, para 6.11.
[4] LRPG, *Identifying the Problems*, para 9.1.

1.7 The responses to the first consultation paper were analysed and a more detailed proposal for a pattern of land ownership promoting sustainable development was published in September 1998.[5] The key aims of this vision were stated as:

- "increased diversity in the way land is owned and used, as the best way of dealing with damage to the local community or environment which can result from monopoly ownership, and of encouraging the fullest possible exploitation of rural development opportunities; and

- increased community involvement in the way land is owned and used, so as to ensure that local people are not excluded from decisions which affect their lives and the lives of their communities.".[6]

1.8 The Group noted that respondents to the first consultation paper had expressed the following views:

- "there was no support for the creation of new public rights for the Crown: this was regarded as undemocratic, old fashioned and possibly very expensive; some respondents believed it would amount to nationalisation by the backdoor;

- the majority of respondents did not favour legislation to strengthen public rights over the foreshore, but there was support for more consultation at local level to resolve disagreement; some respondents suggested that disputes which could not be resolved should be referred to the Lands Tribunal or a similar body; another suggestion was that there should be a code to govern access to and use of the foreshore.".[7]

Such views were consistent with the LRPG proposals for the key features of their programme of law reform:

- "outdated and unfair feudal arrangements swept away;

- conditionality of land ownership where appropriate to reflect modern circumstances;

- a more constructive approach to problem cases, including those relating to the foreshore and the seabed.".[8]

In order to deliver their intended vision of law reform the LRPG proposed that we be invited to undertake a comprehensive review of the law of the foreshore and seabed. Accordingly, in due course, the reference was submitted to us. In order that our review should consider those matters which are of concern to the public, we were given access to all written responses to the LRPG proposals.

[5] LRPG, *Identifying the Solutions*.
[6] LRPG, *Identifying the Solutions*, para 3.2.
[7] LRPG, *Identifying the Solutions*, para 5.1.
[8] LRPG, *Identifying the Solutions*, para 5.2.

1.9 Throughout their proposals the LRPG recognised that the problems which have arisen in relation to the foreshore and seabed involve difficult and sometimes sensitive issues.[9] The review specifically recognised that the Crown Estate Commissioners (CEC) are a "key player" in relation to the use, management and development of the foreshore.[10] It is estimated that around 50% of the Scottish foreshore is owned and managed by the CEC.[11] From the outset, the LRPG have taken the view that the role of the CEC, their interaction with and duties to the public and their accountability to the Scottish Parliament should fall within the scope of the LRPG's review and the general programme of land reform.[12]

1.10 Clearly some aspects of such a programme of reform will involve major policy in addition to technical legal issues. It is important to stress, as we have done elsewhere,[13] that our role in the process of land reform is restricted by more than the terms of our reference. We are a non-political advisory body acting under statutory powers and are therefore the subject of statutory restraints under the Law Commissions Act 1965. Our primary function under that Act is to keep the law of Scotland under review:

> "with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law".[14]

1.11 This background influences how we may discharge the terms of our reference. Our statutory function is of a technical nature. It is not therefore within our remit to consider or make recommendations on more wide-ranging aspects of land reform which may be considered politically controversial. Accordingly, where such matters arise in the course of our review of the law contained in this discussion paper, we shall decline to make any recommendations but shall refer the matter to the Scottish Executive to consider the various policy options open to them.

**The Land Reform (Scotland) Bill**

1.12 As noted above, our review is part of the Scottish Executive's wider programme of land reform. On 22 February 2001 the Executive published their draft Land Reform Bill for public consultation.[15] While it is anticipated that the Bill will be subject to significant change during the consultation period,[16] our discussion paper takes into account the statutory access rights proposed in the Bill, in so far as these are relevant to the law of the seabed and foreshore. As will be seen, these are far reaching and have influenced not only the questions for consideration but also our proposals. At the outset, it will therefore be useful to outline briefly the salient features of access rights proposed in the draft Bill.

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[9] See LRPG, *Identifying the Problems*, para 6.11; LRPG, *Identifying the Solutions*, para 5.1.
[10] LRPG, *Identifying the Problems*, paras 3.7-3.8.
[11] Crown Estate Commissioners Annual Report 2000, p 83.
[12] Note however that following devolution, "the management (in accordance with any enactment regulating the use of land) of the Crown Estate" is reserved – Scotland Act 1998, Sch 5, para 2(3). Property belonging to Her Majesty in right of the Crown is devolved – Sch 5, para 3(1).
[13] See Scot Law Com No 168, para 1.2.
[14] The Law Commissions Act 1965, s 3(1).
[15] Scottish Executive *Land Reform, the draft Bill, Consultation Paper*. Available at www.scotland.gov.uk/consultations/landreform/lrdb-00.asp.
[16] Which ends on 18 May 2001.

1.13 Under Part 1 of the Bill everyone is given access rights.[17] These statutory access rights are (a) the right to be on land for recreational purposes[18] and (b) the right to cross land.[19] Land includes inland waters and the foreshore, but not the sea or public rivers.[20] The Bill provides a sophisticated regime for the suspension, regulation and enforcement of access rights.[21] Moreover, the sheriff court has jurisdiction to determine the existence and extent of access rights.[22]

1.14 The Bill makes no attempt to define recreational purposes. On the other hand, it does list conduct which is excluded from access rights. For our purposes the most important exclusions are as follows:[23]

(a) angling;
(b) killing, taking, or wilfully harming or disturbing any creature or taking, damaging or wilfully disturbing any place used by such creature for living in, sleeping, breeding or refuge;
(c) threatening, abusing or insulting (whether by words or behaviour) the owner of the land or anyone else lawfully present there;
(d) lighting a fire or doing anything likely to cause damage by fire;
(e) taking away anything in or on the land;
(f) damaging the land or anything on or in it;
(g) wilfully interfering with any drains, ditches, fences, gates or other means of land or land-use management;
(h) depositing or leaving rubbish or litter;
(i) having charge of a dog or other animal which is not under proper control;
(j) bathing in non-tidal water in contravention of a notice of prohibition displayed with the approval of the local authority;
(k) in respect of canals, swimming, diving, sailing and wind surfing;
(l) any conduct specified -

(i) by a local authority in an order under section 10 below; or
(ii) in relevant byelaws,

as prohibited conduct or as conduct which has the same effect in relation to access rights as conduct within paragraph (a) to (k) above.

1.15 The existence or exercise of access rights is declared not to diminish or displace any public rights under the guardianship of the Crown in relation to the foreshore.[24] What this means is that in relation to the foreshore the public will enjoy both the statutory access rights and common law public rights. Where the public rights are more extensive than access rights, the former will prevail.[25] The co-existence of these two separate systems and the

[17] S 1(1).
[18] S 1(a) Being on land for recreational purposes is a reference to going into, passing over and remaining on it for those purposes and then leaving it or any combination of those: s 1(3)(a).
[19] S 1(2)(b) It will be noticed that the right to cross land is not restricted to recreational purposes. Crossing land is a reference to going into it, passing over it and leaving it all for the purpose of getting from one place outside the land to another such place.
[20] S 39. On the definition of inland waters and foreshore see beyond paras 2.9 and 2.17.
[21] Part 1 Chapters 4 and 5.
[22] S 29.
[23] S 5(4).
[24] S 3(3).
[25] For further discussion see beyond paras 4.22-4.23, 4.40-4.45.

different methods of regulating the respective rights are likely to be a source of confusion and difficulty. To the extent that the common law rights exercisable on the foreshore prevail over the statutory scheme, the general legislative purpose of the Bill may be frustrated. The essential differences between the two types of right, the resulting difficulties and our proposals for their resolution are set out later in our paper as we consider the existing common law in detail.[26]

**Acknowledgements**

1.16 We are grateful to the members of our Advisory Group[27] who have read and commented on drafts of this discussion paper, and to the following persons and organisations[28] who have provided us with useful information as to the practical operation of the law in this area or assisted with the translation of comparative text.

[26] See in particular paras 4.40-4.43 beyond.

[27] Ian Abercrombie QC, Sheriff V Canavan, Mr Martin Corbett, Registers of Scotland, Professor Alan Page, Professor Robert Rennie.

[28] Messrs Anderson & Goodlad, Solicitors, Martyn Cox, Scottish Coastal Forum, The Crofters Commission, Michael Cunliffe, Crown Estate Office, Miss Ruth Dukes LLB (Hons), Bob Farrington, Scottish Natural Heritage, Simon Gomm, Ordnance Survey, Sheila Harvey, Crown Estate Office, Legal Secretariat to the Lord Advocate, Nick Magyar, Ministry of Defence Legal Advisors, John Mayhew, National Trust for Scotland, Alan S Menzies, Crown Estate Solicitor, Scotland, The Norwegian Ministry of Justice, Commander John Page RN, Messrs J & R A Robertson WS, The United Kingdom Hydrographic Office, Staff of the Scottish Executive Rural Affairs Department, George Stevenson and John Burns, Highlands and Islands Airports Limited, Dr W Turrell, Scottish Executive Marine Laboratory, Jim White FRICS, Defence Estates, David Whitehead, Director, British Ports Association and Messrs Wright Johnston & Mackenzie, Solicitors. We would also like to thank the Harbour Authorities and Local Authorities noted in Appendix 3 who responded to our requests for information on various matters.

# Part 2 Definitions

**The Seabed – territorial waters**

2.1 As we shall see in Part 3, it is now accepted that the Crown is the full owner of the seabed, save where this has been alienated by Crown grant. For the purposes of our review of the law of the seabed, we propose to restrict our consideration of the seabed to that part which belongs to the Crown. In this section we shall examine the extent to which the seabed is owned by the Crown.

2.2 While the issue has never been expressly decided[29] it has been assumed by the Scottish courts that the Crown owns the seabed under the territorial seas:

> "The whole weight of the authorities is in favour of the view that the Crown has a proprietary right in the solum of the seabed in the whole territorial waters of the UK".[30]

2.3 Territorial waters now extend 12 international nautical miles from the baselines from which they are measured.[31]

2.4 The constitutional changes resulting from devolution have an impact on Crown jurisdiction over territorial waters. In terms of the Scotland Act 1998, the legislative competence of the Scottish Parliament is subject *inter alia* to a territorial limit, namely:

> "so much of the internal waters and territorial sea of the United Kingdom as are adjacent to Scotland.".[32]

The Scottish Adjacent Waters Boundaries Order 1999[33] defines the limits of such internal waters for this purpose.[34]

2.5 The seabed *inter fauces terrae*, (ie between the jaws of the land) for example, sea lochs, is included within the definition of territorial waters.[35]

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[29] See generally Marsden, *The Marginal Seabed.*

[30] *Shetland Salmon Farmers Association* v *Crown Estate Commissioners* 1991 SLT 166 *per* Lord McCluskey at 186. See also *Officers of State* v *Smith* (1846) 8D 711 ("I know nothing which I should think might be predicated with greater safety, or that less requires formal proof, than that the bed of the British seas belongs in property to the British Crown…" *per* Lord Cockburn at 723); *Lord Advocate* v *Clyde Navigation Trs* (1891) 19R 174; *Lord Advocate* v *Wemyss* (1899) 2F (HL) 1 ("I see no reason to doubt that, by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast to the three mile limit, and also the minerals beneath are vested in the Crown" *per* Lord Watson at 8-9).

[31] Territorial Sea Act 1987, s 1(1)(a).

[32] Scotland Act 1998, s 29 and s 126(1).

[33] SI 1999/1126.

[34] Art 3. Waters which are to be treated as sea within British fishery limits adjacent to Scotland are also defined in Art 4.

[35] *Lord Advocate* v *Clyde Navigation Trs* (1891) 19R 174 (Loch Long).

**Question for consideration**

2.6 Given that there is no express statutory authority on the matter, we would welcome views on the following question:

> **1. In the interests of clarity and consistency, should there be a statutory statement that the Crown (in the absence of grant or prescription) owns the seabed under territorial waters and *inter fauces terrae* (*ie* between the jaws of the land)?**

**The seabed – public rivers**[36]

2.7 The alveus (ie the bed) of a public river has historically also been treated in the same way as the seabed of territorial waters and is *prima facie* within Crown ownership. We must therefore consider the legal definition of a public river. Until the late 18th century, the criterion of a public river was whether or not it was navigable.[37] If it was navigable, it was to be treated in the same way as the sea. In other words, the Crown had a proprietary interest in the alveus subject to the public's rights to use the river, which, of course, the Crown was obliged to protect:

> "While the right of the Crown to the alveus of all navigable rivers is acknowledged by the law of Scotland, I see nothing in our institutional writers which says that that right is not in the Crown as proprietor….. The Crown must act as conservator of the public interest. But I see no authority for saying that the Crown is not absolute proprietor of the alveus.".[38]

2.8 In *Colquhoun's Trustees* v *Orr Ewing & Co*[39] the test was changed, thereby bringing Scots law into line with English law. A public river became a river which was tidal. The Crown owned the alveus of a river in so far as it was tidal: thereafter the river became private, even although navigable, and the alveus was owned by the riparian owner(s). The effect of this decision was to reduce drastically the extent of public rivers and consequently those on which public rights could be exercised. It should be emphasised that there are many rivers which remain navigable while no longer tidal. However, even where a river is no longer tidal and therefore private, the public may retain the right of navigation for as long as it is navigable.[40] On the other hand, as we shall see,[41] the public's right to fish for "white fish"[42] exists only in respect of the sea and public rivers.[43]

2.9 Under the Land Reform (Scotland) Bill it is proposed that the public should have access rights to and on inland waters. "Inland waters" means any inland, non-tidal loch,

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[36] In this context we are concerned with rivers, the bed of which is owned by the Crown. Public rights of navigation can exist in relation to private rivers (*ie* where the riverbed is owned privately).
[37] This was the view taken by the Institutional writers: see, for example, Erskine II. 6. 17; Bell *Principles* S 648. On the meaning of navigability see para 4.15 *infra*.
[38] *Lord Advocate* v *Clyde Trs* (1849) 11D 391 *per* the Lord President (Boyle) at 396. *Cf* Lord Jeffrey at 403: "My leaning, however, is rather to the view that it is a trust for public use, and not a private and patrimonial right in the Sovereign".
[39] (1877) 4R 344; (1877) 4R (HL) 116.
[40] *Wills' Trs* v *Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30.
[41] Para 4.2 beyond.
[42] *Ie* floating fish other than salmon.
[43] *Lennox* v *Keith* 1993 GWD 30 -1913.

non- tidal river, lake or reservoir, whether natural or artificial and whether navigable or not, and includes the bed and shores or banks thereof.[44]

**Tidality – the problem of definition**

2.10 Tidality has been accepted as the legal criterion for determining whether a river is public or private for the past 130 years. However, there is no settled method for establishing at which point a river ceases to be tidal and therefore private.[45]

2.11 A legal criterion which is of considerable practical importance and yet for which there is no agreed method of evaluation is of little utility. The need to establish a workable means of evaluating the criterion has been identified by several sources. The Salmon and Freshwater Fisheries Inspectorate requires to be able to identify at which point the public right to fish for white fish ends. The Keeper of the Registers of Scotland, when establishing the extent of private property, requires to establish with a degree of certainty at which point Crown ownership ends and private ownership begins.

2.12 There would appear to be two alternative approaches which could be adopted. A scientific method could be employed to determine at which point a river ceases to be tidal through the evaluation of some technical criterion. While this may have the benefit of scientific accuracy, our investigations have shown that such a scientific test would not be readily ascertainable and there may be considerable technical debate as to the appropriate test.[46] Officials, landowners and the general public would be no better informed as to the actual boundary unless such a test had been commissioned in respect of a particular area and the results published.

2.13 Given the difficulties with the scientific approach we prefer to move towards a less refined but workable solution which could be readily published and understood by the public at large.

2.14 The system of registration of title is approaching coverage of the whole of Scotland. The ordnance survey map assumes an important role in the representation and definition of property rights within that system. It would therefore seem appropriate that the ordnance survey map be promoted as the basis for establishing whether or not a river is tidal. The ordnance survey map records the limit of high and low water mark of ordinary spring tides and it has the advantage of being readily available to the general public. A statutory legal

[44] Land Reform (Scotland) Bill, s 39.

[45] It has been held that a river is not tidal merely because the tide affects the level of fresh water flowing into the sea from the river: "…. the raising of the fresh water by the operation of the obstructing tide is not of itself a sufficient test to show when the public right in the river ends": *Bowie v Marquis of Ailsa* (1887) 14R 649 *per* the Lord Justice Clerk (Moncrieff) at 667. The presence of salt water appears to be important. Professor Gordon has suggested that a river should be regarded as tidal to the extent of the high-water mark of ordinary spring tides: Gordon, *Scottish Land Law* para 7-05.

[46] There are at least three different characteristics which can indicate that a stretch of inland water is tidal, *viz* salinity, oscillatory sea level and oscillatory current. However, the situation is one of constant variability. The penetration of the tidal signal into a river varies depending on, *eg* river runoff (rainfall), local and remote winds, storm surges, atmospheric pressure, coastal tidal amplitude, long term sea level rise or long term land sinking. Coastal tidal amplitudes vary not only over the spring/neap cycle (over about 28 days) but also over longer periods, *eg* the nodal cycle produces very high and low tides every 19 years. As a result, based on oceanographic definitions, a stretch of water might exhibit tidal-like characteristics once a year or once every 19 years : source – Scottish Executive Marine Laboratory.

presumption could indicate that where such tides are represented on the ordnance survey map, a river remains tidal and therefore subject to public rights.

2.15 If the presumption were to be rebuttable, we are thrown back to the difficulty of evaluating what scientific evidence can be used to demonstrate that a particular stretch of water exhibits tidal characteristics. Therefore a rebuttable presumption would not solve the technical difficulties.

2.16 The Ordnance Survey carries out revision of tidelines as part of its constant programme of updating the National Topographic Database ("NTD"). Their revision policy has recently been reviewed. From 2001, tidelines will be revised as part of an integrated revision policy. This will involve systematic photography covering the whole country no less frequently than every ten years. The photographic evidence will identify changes to land extent which can be expected to affect tidelines. Those so affected will be surveyed and the changes incorporated into the NTD within 12 months. Tideline changes resulting from construction works or natural catastrophes will be incorporated within 12 months of the completion of the development or the occurrence. Information from third parties will be welcomed and where appropriate acted upon.[47] The accuracy of the NTD, and accordingly the ordnance survey map is therefore being continually updated. Errors or changes to the position on the ground can be investigated by the Ordnance Survey. In the light of this and given the technical difficulties referred to above, we do not consider that a statutory presumption of tidality need be rebuttable. In order to maintain a workable method of identifying whether a stretch of water is tidal, our preference is for the current ordnance survey map to be definitive.

**Questions for consideration**

2.17 We would welcome responses to the following questions:

**2. (a) Should there be a statutory definition of the meaning of tidality as the legal criterion for a public river?**

**(b) If so, should that definition be that where the ordnance survey map indicates the presence of the high and low water marks of ordinary spring tides, a river is tidal and therefore public?**

**Summary**

2.18 For the purposes of this discussion paper, the seabed is defined as the solum of the seabed of the territorial waters of the United Kingdom adjacent to Scotland including the seabed *inter fauces terrae* and the alveus of public rivers.

**The foreshore**

2.19 Unlike the questions which apply to the definition of the seabed, the definition of the foreshore is clearly settled in Scots law. The foreshore is the area of the shore between the high and low water mark of ordinary spring tides.[48] The shore must be regularly

[47] See Ordnance Survey *Information Paper* 5/2000 available on www.ordnancesurvey.gov.uk .
[48] *Fisherrow Harbour Commissioners v Musselburgh Real Estate Co Ltd* (1903) 5F 387 *per* Lord Low at 393-4.

covered by the tides.[49] Although the precise determination of tides is complex,[50] there appears to have been little difficulty in practice in identifying the foreshore. However, given our proposal for a statutory definition of tidality,[51] it is logical to propose that there be a presumption that the physical extent of the foreshore is represented between the high and low watermark on the ordnance survey map.

2.20 It should be noted that in contrast with some other jurisdictions,[52] in Scotland the beach and sand dunes above high water mark are not included within and are not subject to the particular legal rules which apply to the foreshore.

2.21 In Spain, the public coastal domain is widely defined in the Coastal Act 1988.[53] It includes "the costal zone or area between the low and high watermarks of listed spring tides"[54] and "beaches or areas where free and unattached materials are deposited, such as sand, gravel, pebbles, including rocks, sediment and dunes, with or without vegetation, formed by the actions of the sea or the sea wind, or other natural or artificial causes".[55]

2.22 Some Canadian provincial statutes relating to coastal and marine protection extend their jurisdiction inland beyond the foreshore. For example, in Nova Scotia, the Beaches and Foreshores Act 1989 covers both beach and foreshore.

2.23 In Germany, the public has rights over the beach, subject to certain restrictions.[56]

2.24 While the law in Scotland is quite clear, the public may not understand the limitations on the extent of the foreshore, in particular the exclusion of the "beach".[57] As we shall see in Part 4, the principal importance of the definition of the foreshore is to identify the area upon which the public may exercise their public rights. This definition will be of less importance in the light of the Land Reform (Scotland) Bill. The beach and sand dunes above high water will constitute land for the purposes of the Bill and the public will therefore enjoy access rights on these areas for the purpose of recreation.[58]

**Question for consideration**

2.25 We would welcome responses to the following question:

> **3. Should there be a statutory statement that the foreshore is the land between the high and low water marks of ordinary spring tides and that the current ordnance survey map is definitive as to the level of such water marks?**

[49] *Aiken's Trs* v *Caledonian Ry and Lord Advocate* (1904) 6F 465 (pastures, "sea greens", occasionally covered by the tide do not constitute foreshore).
[50] See, generally, Aurrocoechea and Pethick, *The Coastline: its Physical and Legal Definition*.
[51] See para 2.16.
[52] *Eg* France, Germany and Spain – see appendix 2.
[53] Ley de Costas, Ley 22/1988 of 28 July 1988.
[54] Art 3(1)(a), 1988 Act.
[55] Art 3(1)(b).
[56] For further details see appendix 2.
[57] Source - Crown Estate Commissioners.
[58] It should be noted that this will not include a right to take anything from the beach or to light a fire there: Land Reform (Scotland) Bill, s 5(4).

# Part 3 Crown Interest

## Introduction

3.1 While the Crown plays a central role in Scots - and British - constitutional law, it is a concept which defies simple definition.[59] It has been observed that, "The main reason for this is that the monarchical structure of our system of government has frustrated any attempt systematically to unravel the 'public' from the 'private' aspects of the Sovereign's responsibilities.".[60] Put another way, British constitutional lawyers have failed to develop the notion of the State, "as an abstract entity above and distinct from both government and governed."[61]

## Ownership

3.2 This failure contributes to the confusion inherent in the nature of the Crown's ownership of the seabed and foreshore. At the outset, we should make clear that we are not concerned with the private estates of the sovereign *ie* property owned by the sovereign in her personal capacity as an individual.[62] The Crown, however, owns the seabed and foreshore in a representative or public capacity as head of state. But what does this mean?

3.3 The theoretical basis of the Crown's rights in respect of the seabed and foreshore has changed over the centuries. For many years it was argued that the Crown owned both the seabed and the foreshore as a consequence of its sovereignty. This view was reinforced by feudal theory.[63] Under the feudal system, all land at one time belonged to the Crown and still so belonged in so far as not feued out. However, the courts have now emphasised that the Crown's ownership of the seabed and foreshore is not dependent on feudal law but simply derives from the prerogative.[64] Given that it is a prerogative right, it might be thought that the purpose of the Crown's ownership was to enable it to vindicate the public's interests in the sea and foreshore. And, indeed, there is authority to that effect. Late into the nineteenth century, it could still be argued that the Crown's rights over the seabed and foreshore were part of the *regalia majora*, *ie* quasi-proprietorial rights which could not be alienated by the Crown.[65] Alternatively, it was said that the Crown held both the seabed and foreshore simply as trustee or fiduciary for the benefit of the public.[66]

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[59] On the difficulties see, generally, Mitchell *Constitutional Law,* Ch 9; Sunkin and Payne, *The Nature of the Crown*; *M v Home Office* [1994] 1AC 377.

[60] M Loughlin, "The State, the Crown and the Law" in Sunkin and Payne, *The Nature of the Crown* 33.

[61] Shennan, *The Origins of the Modern European State 1450-1725* (1974) 114.

[62] In Scots property law, the distinction between the property owned by the sovereign in a personal capacity and owned by the sovereign in a representative capacity as head of state is well recognised: Stair II, iv, 2 and 52; Craig 1, xvii, 1. The matter is now governed by statute: the Crown Private Estates Act 1862, ss 1 and 4; Conveyancing (Scotland) Act 1874, s 60. S 60 of the 1874 Act will be repealed by s 76(2) and Sch 13 of the Abolition of Feudal Tenure etc (Scotland) Act 2000.

[63] See, for example, *Parker v Lord Advocate* (1902) 4F 698 *per* the Lord President (Kinross) at 709-10.

[64] *Smith v Lerwick Harbour Trs* (1903) 5F 680; *Shetland Salmon Farmers Assoc v Crown Estate Commissioners* 1991 SLT 166.

[65] See, for example, *Agnew v Lord Advocate* (1873) 11M 309 *per* the Lord Justice Clerk (Moncrieff) at 322: "It is settled in this country that the sea itself below low-water mark, with the soil which it constantly covers is, as a general rule, *extra commercium*. It is one of the *regalia majora* as far as the national dominion extends, and is not capable in general of becoming the property of an individual, but is held in trust by the Crown for the community.".

[66] Erskine II 1.6; *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174 *per* the Lord Ordinary (Kyllachy) at 178.

3.4 The predominant modern theory is that the Crown has a proprietary right in the *solum* of the seabed and foreshore. While this derives from the prerogative, it amounts to full ownership of the property.[67] It is a patrimonial right: "It is not a right held by the Crown in trust for the public.".[68] In other words, the ownership of the seabed and foreshore is **not** part of the *regalia majora*: it is held by the Crown for its own patrimonial benefit. However, while the Crown has full ownership, it is recognised that its proprietary rights cannot be exercised in a way which would prejudice the interests of the public in the sea (including the seabed) and the foreshore.

**Ability to transfer or lease**

3.5 Because the Crown has full ownership of the seabed and foreshore, it can alienate the property. In other words the Crown can grant a real right in the seabed or foreshore to a third party *eg* the lease of minerals under the sea or the lease of part of the seabed for fish farming.[69] But, in theory at least, it cannot alienate the property in such a way as to prejudice the public's uses in respect of it.[70] Indeed, the Crown retains an inalienable right and duty to protect the public's rights in this situation.

3.6 The Crown can lease the minerals below the seabed.[71] However, the exploitation of the seabed of the territorial waters and continental shelf for gas and petroleum is regulated by statute.[72] The Crown can make a specific grant or lease of the exclusive right to fish for salmon in territorial waters, opposite particular lands.[73] It appears that it can also make a specific grant or lease in respect of mussels and oysters - arguably because these become attached to the seabed.[74] The Crown also enters into leases of the seabed to enable the grantee to farm fish.[75] Licences have been granted for moorings which are fixed on the

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[67] *Officers of State v Smith* (1846) 8D 711 *per* the Lord Justice Clerk (Hope) at 716 and Lord Cockburn at 723. But *cf* the approach in the House of Lords: "the soil of the sea is presumed to belong to the Crown by virtue of the prerogative" (1849) 6 Bell's App 487 *per* Lord Campbell at 500.

[68] *Duchess of Sutherland v James Watson* (1867) 6M 199 *per* Lord Neaves at 212 ff.

[69] *Shetland Salmon Farmers Assoc v Clyde Navigation Trs* 1991 SLT 166.

[70] *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174 ("It is true, of course, that the powers of proprietary right [in the Crown] are modified by certain public uses which the community are entitled to enjoy, but these are restrictions solely in the interests of the whole public" *per* the Lord Justice Clerk (MacDonald) at 182); *Lord Advocate* v *Wemyss* (1899) 2F (HL) 1 ("but I do not think that the Crown could, without the sanction of the Legislature, lawfully convey any right or interest in it [the solum] which, if exercised by the grantee, might possibly disturb the solum or in any way interfere with the uses of navigation, or with any right in the public" *per* Lord Watson at 8-9); *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC 156 ("Indeed, the obligation of the Crown is to vindicate these public rights. The Crown may not, accordingly, exercise its patrimonial rights in such a way as will interfere with the enjoyment of these public rights" *per* the Lord President (Emslie) at 169).

[71] See, for example, *Cunninghame v Assessor for Ayrshire* (1895) 22R 596; *Lord Advocate v Glengarnock Iron and Steel Co* (1908) 15 SLT 769, 1909 1 SLT 15.

[72] Continental Shelf Act 1964; Petroleum Act 1998. Rights in unworked coal reserves *prima facie* vest in the British Coal Authority: Coal Industry Act 1994. See also appendix 1, para 16.

[73] *Gammell v Commissioners of Woods and Forests & Lord Advocate* (1859) 3 Mac 919; *Johnston v Morrison* 1962 SLT 322.

[74] *Duke of Portland v Gray* (1832) 11S 14; *Duchess of Sutherland v James Watson* (1867) 6M 199; *Parker v Lord Advocate* (1904) 6F (HL) 37 ("Whatsoever doubts may have been entertained or different opinions expressed in former times, it must now be taken to be established by a series of authorities extending from at least the beginning of the last century that mussel scalps and mussel fishings may be a competent subject of grant by the Crown" *per* Lord Davey at 37-38). It may be because they do not attach themselves to the seabed that the right to fish for lobsters, albeit shellfish, is not a separate tenement: *Duke of Portland v Gray* (1832) 11S 14.

[75] *Muss Shellfish Ltd v Golden Sea Produce Ltd* 1992 SLT 703 (mussels); *Walford v Crown Estate Commissioners* 1988 SLT 377, 1989 SLT 86 (salmon). Fish farming enjoys a statutory exemption from rating: Valuation and Rating (Scotland) Act 1956 s 7A (added by the Local Government, Planning and Land Act 1980, s 32). Previous attempts to have fish farms excluded had failed: *Rennie v Lothian Regional Assessor; Strathclyde Region Assessor v Isle of Jura Fish Farm* 1981 SLT (Notes) 121.

seabed.[76] The Crown can licence or lease the seabed for the construction of general works.[77] Nevertheless, no grant from the Crown can derogate from the public's rights to use the sea and the grantee cannot make any claim or demand which interferes with these rights.[78]

3.7 Where the foreshore has been disponed or feued, the grantee enjoys full ownership. Subject to any reservation, he is therefore entitled to minerals under the shore.[79] He can also gather property which has attached by accession.[80] Other traditional uses include taking sea ware,[81] in particular kelp,[82] pasturing cattle and removing sand.[83] The proprietor of the foreshore must not, of course, interfere with the public's rights.[84]

3.8 To summarise. The Crown is now regarded as having full ownership of the seabed and foreshore. This is considered to be a right which derives from the prerogative rather than from the feudal system. The Crown's proprietary rights are qualified by the public's rights to use the sea and foreshore, which rights the Crown is obliged to respect.[85]

**Management**

3.9 The management of the Crown Estate, including the seabed and foreshore, is the responsibility of the Crown Estate Commissioners. Commissioners are charged "on behalf of the Crown with the function of managing and turning to account land and other property".[86] The Commissioners are therefore obliged to use their powers to enhance the value of the Crown Estate. They have no statutory duty to protect the public's rights to use the seabed and foreshore. While, in practice, leases from the Crown Estate Commissioners of the seabed and foreshore expressly stipulate that the property is leased subject to public

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[76] *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1976 SC 61, 1979 SC 156; *Ford Yacht Ltd v Assessor for Fife* 1976 SC 201.

[77] *Strathclyde Assessor v the Scottish Sports Council* 1983 SC 1; *Shetland Salmon Farmers Association v Crown Estate Commissioners* 1991 SLT 166. Any real burden constituted in favour of the Crown will continue to be enforceable as a maritime burden when the feudal system is abolished: Abolition of Feudal Tenure etc (Scotland) Act 2000, s 56.

[78] *Gann v Free Fishers of Whitestable* (1865) 11 HLC 192. In this English case one strand of reasoning was that the granter had not provided any consideration for charging the plaintiff for anchoring its vessel as it already had a public right to do so.

[79] *Lord Advocate v Glengarnock Iron and Steel Co* (1908) 15 SLT 769, 1090 1 SLT 15.

[80] For example cockle-shells: *Secretary of State for Scotland v Inverness-shire Assessor* 1948 SC 334.

[81] *Paterson v Marquis of Ailsa* (1846) 8D 752.

[82] *Mags of Culross v Earl of Dundonald* (1769) Mor 12810.

[83] *Lord Advocate & Clyde Trs v Lord Blantyre* (1879) 6R (HL) 72. See also *Innes* v *Rev Alex Downie* (1807) Hume 552. The right to remove sand is sometimes taken away by statute: *Musselburgh Real Estate v Mags of Musselburgh* (1905) 7F (HL) 113.

[84] *Hogart v Fyfe* (1870) 9M 127 ("Even if the petitioner had a title which gave him an absolute right to the foreshore, that would not give him a right to exclude the public from the shore so long as it remained a shore"; *per* Lord Neaves at 129); *Lord Advocate & Clyde Trs v Lord Blantyre* (1879) 6R 72.

[85] *Lord Saltoun v Park* (1857) 20D 89 ("His Lordship's right to the sea shore under his grant is necessarily burdened with the prerogative of the crown, as trustee for such rights of the public as can be exercised without interfering with the right of that proprietor" *per* the Lord Justice Clerk (Hope) at 92); *Nicol v Blaikie* (1859) 22D 335 (alienee has exclusive beneficial use "subject only to the public and preferable public uses, for securing which the property *ex hypothesi* remains vested in the Crown" *per* the Lord Justice Clerk (Inglis) at 342); *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192 ("If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right …" *per* Westbury LC at 207-208); *Smith v Lerwick Harbour Trs* (1903) 5F 680 (Even if a grantee owns the foreshore, he cannot interfere with public uses "the protection of which is an unalienable right of the Crown" *per* Lord Kinnear at 691); *Burnet v Barclay* 1955 JC 34 *per* the Lord Justice Clerk (Thomson) at 39.

[86] Crown Estate Act 1961, s 1(1). It should be noted that the powers and duties of the Crown Estate Commissioners are reserved matters: paras 1 and 2(3) of Sch 5 to the Scotland Act 1998. The 1961 Act also applies in England and Northern Ireland.

rights, it is not the function of the Commissioners to assist the public in exercising such rights.

3.10 Moreover, transactions entered into by the Commissioners enjoy apparent immunity in respect of their management:

> "The validity of transactions entered into by the Commissioners shall not be called in question on any suggestion of their not having acted in accordance with the provisions of this Act regulating the exercise of their powers, or of having otherwise acted in excess of their authority, nor shall any person dealing with the Commissioners be concerned to inquire as to the extent of their authority or the observance of any restriction on the exercise of their powers.".[87]

3.11 In *Walford* v *Crown Estate Commissioners,*[88] the Lord Ordinary (Clyde) held that the first part of the provision should be read literally. Given its ordinary meaning, it was of wide, general application. Accordingly, the immunity was not restricted to the parties to a particular transaction. It also prevented third parties questioning the validity of any transaction of the Commissioners. Modern developments in administrative law suggest that the statute should not be read so as to exclude the possibility of judicial review of any action of the Commissioners: but the matter is far from clear.[89]

**Accountability**

3.12 As we have seen,[90] although the Crown has full ownership of the seabed and foreshore, its proprietary rights should not be exercised in a way which would prejudice the interests of the public in the sea (including the seabed) and the foreshore. Put another way, the Crown's proprietary rights are qualified by the public's rights to use the sea and foreshore. Indeed, there is some authority that the Crown retains an inalienable right and duty to protect these public rights.[91] In this respect at least the Crown can still be described as a trustee or fiduciary for the public's use.

3.13 Moreover, where the Crown has feued parts of the seabed or foreshore, real burdens restricting the use of the foreshore or seabed may have been imposed in the feudal grant. Such real burdens can be enforced on behalf of the public by the Crown. Such burdens, known as maritime burdens, will still be enforceable by the Crown after the feudal system has been abolished.[92]

3.14 Thus the Crown has title to sue when the public rights in relation to the seabed and foreshore are infringed. An action can be brought by the Lord Advocate.[93] While these powers subsist, they have rarely, if ever, been used in recent times.

3.15 In addition, a member of the public can assert the public's rights in the seabed and foreshore in an *actio popularis.*[94]

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[87] Crown Estate Act 1961, s 1(5).
[88] 1988 SLT 377 at 379.
[89] *Anisminic Ltd v Foreign Compensation Commission* 1969, 2AC 147: see generally Clyde and Edwards, *Judicial Review,* O'Neill, *Judicial Review – A Practitioner's Guide* and Craig, *Administrative Law*.
[90] Paras 3.2-3.4 *supra*.
[91] *Smith v Lerwick Harbour Trs* (1903) 5F 680 *per* Lord Kinnear at 691. *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* at 1979 SC 156 *per* the Lord President (Emslie) at 178.
[92] Abolition of Feudal Tenure etc (Scotland) Act 2000, s 56.
[93] See for example *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174; *Lord Advocate v Wemyss* (1899) 2F (HL) 1.

3.16 As the means of exploiting the seabed (and the foreshore) have developed, the Crown's role as trustee for the public's rights appears to have yielded in importance to the economic value of its proprietary interests.[95] In short, there is at least a theoretical conflict of interest between the Crown as beneficial owner and its role as guardian of the public's rights to use the sea, seabed and foreshore. This difficulty has been obscured by the assumption - arising, in part at least, from a failure to analyse the nature of the concepts - that the Crown will always act in the best interests of the public.[96] The courts have been able to avoid a direct confrontation[97] of these competing interests by taking a narrow view of the public's rights to use the sea, seabed and foreshore. While it could be contended that this is an almost inevitable consequence of the Crown's beneficial proprietary interests in the seabed and foreshore, it is doubtful whether it is consonant with a more community based conception of the enjoyment and use of such property. Moreover, there is authority that the exercise of the Crown's powers is not subject to judicial review.[98] We seek views on whether it should be made clear that the Crown's decision whether or not to pursue an action in relation to the enforcement of public rights should be subject to judicial review.[99]

3.17 The potential immunity of the Crown Estate Commissioners has already been discussed.

3.18 The issue arises whether the public rights in the seabed and foreshore are sufficiently protected by the current law. In particular, we seek guidance on whether decisions of the Crown Estate Commissioners, in so far as they may be inconsistent with the Crown's duties to protect the public's rights to use the sea, seabed and foreshore should be subject to judicial review. However, before a review can succeed, the Commissioners must have exceeded their powers or made a totally unreasonable decision: genuine disagreement as to the merits of a decision is not enough. Thus, even if judicial review was competent, it would be likely to affect few, if any, of the Commissioners' decisions.

3.19 In contrast to the public rights in the seabed and foreshore, the Land Reform (Scotland) Bill expressly provides that a sheriff has jurisdiction to determine the existence and extent of access rights in relation to specific land.[100] Moreover, it will also be possible to challenge a local authority's orders regulating access rights.[101] The procedure is to be by summary application. Compared with judicial review, the proceedings before the sheriff should be simple and relatively inexpensive.

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[94] See, for example, *Colquhoun's Trs v Orr Ewing & Co* (1877) 4R 344; revsd (1877) 4R (HL) 116; *Walford v David* 1989 SLT 876.

[95] *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174 *per* Lord Young at 183.

[96] But see the judgment of Lord Murray in *Shetland Salmon Farmers Association v Crown Estate Commissioners* 1991 SLT 166 especially at 182.

[97] See, for example, *Shetland Salmon Farmers Assoc v Crown Estate Commissioners* 1991 SLT 166.

[98] *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174. ("The Crown must use the property in the public interest. But that is not a matter for us. If the department of Government which is charged with the administration of the Crown's duties in this matter uses this property in a manner detrimental to the public interest, or fails to use it in the interest of the public, there is a remedy but it is not to be found here. The Government must be called to account, and it can be most sharply and effectually called to account elsewhere" *per* Lord Young at 183.)

[99] However, see also our proposal for reform of the way in which public rights are held - paras 4.40-4.45. Our proposals would result in the abolition of the Crown's role as protector of public rights. It would therefore no longer be one of the Lord Advocate's functions.

[100] S 29(1)(a).

[101] S 29(1)(b). The local authority has power to make such orders under s 10 of the Bill.

**Nature of the rights**

3.20 A further difference between the public rights and access rights lies in the way in which the right is held. As we have seen, the public rights are not enjoyed directly by the public. They are held by the Crown for the public benefit and the Crown is charged with their protection. It will be remembered that an individual can attempt to enforce public rights in an *actio popularis*.[102] However, the Land Reform (Scotland) Bill creates access rights which are held directly by the public. The public can therefore establish the extent of their rights and enforce them themselves.

3.21 There may be benefits in retaining some form of public role in the protection and enforcement of the public rights. To expect a member of the public to fund litigation via an *actio popularis* to challenge an infringement of public rights is unrealistic. There is therefore perhaps a legitimate expectation that the Crown should undertake such action at the public request, at least in relation to significant cases.[103]

3.22 However, a less expensive and quicker forum for resolution of disputes could be provided, enabling individual members of the public or representatives of community interests, particularly local authorities, to obtain a ruling in respect of the existence and extent of their public rights without having to involve the Crown. As we have seen, this option is incorporated in the Land Reform (Scotland) Bill in relation to access rights.[104] In part 4, we discuss further the nature of public rights and whether they should be put on a statutory footing. However, even if the nature of public rights remains unchanged, we would welcome views on whether persons should be able to enforce these rights directly by way of summary application. This procedure would be additional to the citizen's right to seek a declarator at common law in the sheriff court and Court of Session.

**Questions for consideration**

3.23 We would welcome views on the following questions:

**4. (a) Should it be made clear that decisions of the Crown in the exercise of its rights (whether patrimonial or those held in trust for the public) in relation to the seabed and foreshore are subject to judicial review?**

**(b) In so far as any transaction of the Crown Estate Commissioners is prejudicial to public rights in relation to the seabed and foreshore, should it be subject to judicial review?**

**(c) Should the sheriff have jurisdiction to determine the existence and extent of public rights in the seabed and foreshore by summary application in addition to the existing jurisdiction to make a declarator in the same way as it is envisaged he shall have in respect of access rights?**

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[102] See para 3.15.

[103] *Eg* recent proposals for the development of retail units in Helensburgh on land which had been reclaimed from the foreshore prompted a concerned resident to seek a remedy through his MSP and ultimately from the Lord Advocate.

[104] See para 3.19. The specific jurisdiction is however narrowly framed comprising a declaration (i) that "the land specified in the application is or, as the case may be, is not land in respect of which access rights are exercisable" or (ii) in relation to local authority exemption orders - s 29 Land Reform (Scotland) Bill.

# Part 4 Public Rights

**Introduction**

4.1 As we have seen in Part 3, the Crown and any grantee from the Crown are obliged to respect the public rights to use the sea, seabed and foreshore. Indeed, the Crown, albeit the owner of the seabed and foreshore, is under a duty to assert these rights on behalf of the public.[105] In addition, a member of the public may assert the rights in an *actio popularis*.[106] In this section, we explore the nature and extent of these public rights.

**Fishing/Shellfish**

4.2 The public has the right to fish for white fish in the sea and tidal lochs and rivers.[107] In *McDouall v Lord Advocate*, Cairns LC opined:[108]

> "Beyond all doubt the law in Scotland is that white fishing in the sea round the whole coast of Scotland is perfectly free, and not only is it perfectly free, but there is a title on the part of the subjects to use the shore for the purpose of conducting white fishing in a proper mode.".[109]

There is also a public right to gather shellfish on the seabed and foreshore.[110] As Lord Deas explained,[111]

> "Wherever food for human beings is to be found on the shore any man may take it, provided in doing so he does not trespass on private property, or interfere with anything granted or prescribed by another".

4.3 However, the public right to gather shellfish has been restricted by legislation. The Scottish Ministers have the power to grant by order a statutory right of exclusive fisheries for shellfish including oysters, mussels, cockles and lobsters, over any portion of the foreshore or bed of the sea.[112] Furthermore, it is now settled that the Crown can grant to a

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[105] *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC 156 *per* the Lord President (Emslie) at 169. For the nature of the Crown's rights in respect of the seabed and foreshore, see above Part 3.

[106] See, *eg, Colquhoun's Trs v Orr Ewing & Co* (1877) 4R 344; revsd (1877) 4R (HL) 116; *Walford v David* 1989 SLT 876.

[107] There are many statutory controls on the operation of sea fishing, in particular as a result of European Directives and Regulations. See *Stair Memorial Encyclopaedia,* vol 11, paras 169ff, and the Sea Fish (Conservation) Act 1967.

[108] (1875) 2R (HL) 49 at 55. See also *Duchess of Sutherland v James Watson* (1867) 6M 199 concerning "rights to catch fish that float over the fundus or solum" *per* Lord Neaves at 212-213.

[109] This means that the Crown cannot grant a private individual an exclusive right of white fishing in the sea or tidal lochs and rivers. This was not always the case. The Institutional writers considered that the Crown could do so: see, for example, Stair II, iii, 69 and 76; Erskine II, 6, 6. However the public's right was reinforced by statute: the Fisheries Act 1705 (c 48) and the Fisheries (Scotland) Act 1756 (c 23). By the nineteenth century, the common law had recognised the public right: *Hall v Whillis* (1852) 14D 324 *per* the Lord Justice Clerk (Hope) at 328. See Reid, *Property* para 521.

[110] Including the alveus and foreshore of tidal lochs and rivers.

[111] *Duke of Argyll v James Robertson* (1859) 22 D 261 at 265.

[112] Sea Fisheries (Shellfish) Act 1967 s 1(1). Where the foreshore is owned by the Crown, s 1(4) provides that permission of the Crown Estate Commissioners is required before any such order can be made. For a recent

private individual an exclusive right to gather native oysters and mussels:[113] accordingly, the public has no right to gather these shellfish.[114]

4.4 Activities on the foreshore, ancillary to the right of fishing, are allowed. Under the White Herring Fisheries Act 1771,[115] persons involved in herring fisheries may use "any waste or uncultivated land" up to 100 yards from the high-water mark for purposes incidental to their trade.[116]

4.5 White fish are all floating fish except salmon.[117]

> "The public have no right at common law to fish for salmon. The right is in the Crown. It is not like the right to white fishings held by the Crown for the public benefit of the lieges…"[118]

The right to fish for salmon vests in the Crown which can grant to private individuals the exclusive right to fish for salmon[119] in the sea[120] as well as lochs and rivers.[121]

4.6 It should be emphasised that the public right to fish and gather shellfish only applies to the sea, tidal lochs and public (tidal) rivers. Moreover, the public right cannot be exercised unless the public has lawful access to the fishings.[122]

4.7 The public has no right to fish for white fish or gather shellfish in private (non-tidal) rivers. The right to fish belongs exclusively to the riparian owner(s).[123] There is little difficulty when the public does not have access to a private river:

> "In the ordinary case it would be impossible for a stranger to fish for trout [white fish] against the will of the riparian proprietor without committing a trespass, and so the estate of the riparian proprietor in the channel of the stream and the adjacent bank carries with it a virtually exclusive right to the fishing.".[124]

But should the riparian owners retain an exclusive right to fish when the public can obtain lawful access to a river or loch? This could arise when a public road or public right of way

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example of the exercise of the power see The Broadford Bay and Loch Ainort, Isle of Skye, Scallops Several Fishery Order 1998, s 1, SI 1998 No 2638.

[113] *Ie* this right is probably a separate tenement like the right to fish for salmon: *Agnew v Stranraer Magistrates* (1822) 2S 42 (NE 36).

[114] *Parker v Lord Advocate* (1902) 4F 698, affd (1904) 6 F (HL) 37; K G C Reid *Stair Memorial Encyclopaedia* Vol 18 paras 331ff.

[115] Repealed in part by the Sea Fisheries Act 1868, s 71.

[116] *Stair Memorial Encyclopaedia* vol 11 para 120; *Scott v Gray* (1887) 15R 27; *Campbeltown Shipbuilding Co* v *Robertson* (1898) 25R 922.

[117] Reid, *Property* para 521.

[118] *Anderson v Anderson* (1868) 6M 117 *per* the Lord Justice Clerk (Patton) at 119.

[119] The right to fish for salmon is a separate tenement *ie* it can be held separately from the ownership of the river or adjacent dry land: *Anderson v Anderson* (1868) 6M 117.

[120] *Gemmell v Commissioners of Woods and Forests & Lord Advocate* (1859) 3 Macq 419; *Johnston v Morrison* 1962 SLT 322.

[121] The Crown's exclusive right to fish for salmon applies in private (non-tidal) as well as public rivers: the right to fish for salmon is not a part and pertinent of the riparian owners of a private river.

[122] For a discussion of the right of access to fish see beyond paras 4.36.

[123] *Ferguson v Shirreff* (1844) 6D 1363; *Bowie v Marquis of Ailsa* (1887) 14R 649; *Grant v Henry* (1894) 21R 358; *Lennox v Keith* 1993 GWD 30-1913.

[124] *Grant v Henry* (1894) 21R 358 *per* Lord McLaren at 366. See also *Bowie v Marquis of Ailsa* (1887) 14R 649.

passes the edge of the loch or river.[125] There could also be lawful access by boat when the river or loch is navigable, although non-tidal and therefore private.[126]

4.8 The Scottish courts have consistently held that lawful access to a private river or loch does not give the public a right to fish.[127] Nor can such a right be acquired from the fact that members of the public have fished in the river from time immemorial, *viz* more than 40 years:

> "It is not possible for members of the community, having no title, to establish a right to fish by any usage of fishing for however long a period as against a proprietor having a title to the land over which a stream flows.".[128]

The law was succinctly expressed by the Lord Ordinary (Pitman) in *Johnstone v Gilchrist:*[129]

> "There is no such thing as a public right of fishing in freshwater [private] lochs or rivers - that is to say a right exercisable by any member of the public as such. A right of access does not give such a right, nor can such a right be acquired by prescriptive possession.".[130]

4.9 Under the Land Reform (Scotland) Bill, access rights are created in relation to inland waters. These include private non-tidal lochs and rivers, their beds, banks and shores.[131] However, it should be noted that access rights do not include a right to fish in such rivers or lochs.[132]

4.10 Where there is a potential conflict between the public right of fishing and the public right of navigation, the right of navigation prevails.[133] Moreover, the public right of fishing will yield to the private right to fish for salmon: "as a general rule the right of white fishing must be so used as not to interfere with or injure the right of salmon fishing".[134]

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[125] *Fergusson v Shirreff* (1844) 6D 1363. But the line or rod must not be cast over a strip of the riparian land howsoever narrow. That would constitute trespass: see *ibid per* Lord Cockburn at 1373-4.

[126] *Grant v Henry* (1894) 21R 358. On the private-public dichotomy, see above, Part 2. On the criteria for the right of navigation, see beyond para 4.12.

[127] *Fergusson v Shirreff* (1844) 6D 1363; *Bowie v Marquis of Ailsa* (1887) 14R 649.

[128] *Arthur v Aird* 1907 SC 1170 *per* the Lord Justice Clerk (Macdonald) at 1172. See also *Grant v Henry* (1894) 21R 358.

[129] 1934 SLT 271 at 273.

[130] Where fishing has in fact taken place it is deemed to be by tolerance on the part of the riparian landowner rather than as of right by the fishers. "And then, where, I pray, is the privilege of these fishers, who have no connexion with the land except for passage by a footpath through it? It seems to me, with all deference to the followers of the gentle science, to be much of an imagination arising from the universal tolerance which they meet with in Scotland, as long as no matter of right is attempted to be asserted": *Fergusson v Shirreff* (1844) 6 D 1363 *per* Lord Moncrieff at 1372.

[131] Land Reform (Scotland) Bill, ss 1(2)(a) and 39.

[132] S 5(4)(a), (b) and (c).

[133] Bell *Principles* ss 645-646.

[134] *Gilbertson v MacKenzie* (1878) 5R 610 *per* the Lord Justice Clerk (Moncrieff) at 621. See also *Mackenzie v Murray* (1881) 9R 186; *Duke of Buccleuch v Smith* 1911 SC 409; *Earl of Mansfield v Parker* 1914 SC 997 ("… it may be that, in such a conflict of rights, the heritable right of salmon fishing would be held the paramount right as against the public right of white fishing" *per* Lord Guthrie at 1014).

**Navigation**

4.11 The public has a right of navigation on the sea and public (tidal) lochs and rivers.[135] The right is basically one of passage from A to B.[136] It does not give the public the right to sail over "every square inch" of the surface of the sea.[137] Thus, for example, the seabed can be used for fish farming provided it does not amount to a material interference with the right of passage: the fact that this use of the seabed is a nuisance or inconvenience is not enough to constitute material interference.[138] The public right of navigation will prevail over a use of the sea or solum that is a hazard or danger to vessels.[139]

4.12 The public may have a right of navigation on private (non-tidal) lochs and rivers. That a river is in fact navigable is not sufficient to establish the right. In addition, it must be shown that the river has been used by the public for the purposes of navigation from time immemorial. In *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd*[140] the House of Lords took the view[141] that:

> "it is not now possible, as a matter of law, for a public right of navigation, hitherto unsuspected, to be successfully asserted in a non-tidal river that has not been used for some form of navigation from time immemorial".[142]

If mere navigability were enough, "it would certainly lead to a vast extension of the rights of the public, and corresponding diminution of private rights beyond what is generally supposed.".[143]

4.13 Similarly, there is no right of navigation on a private (non-tidal) loch unless it is in fact navigable and has been "immemorially used for public purposes".[144] Unless a public road or public right of way leads to the loch, or a navigable river runs into it, the public may have difficulty having access to the loch. As a consequence, the immemorial user criterion will be difficult to satisfy. Even if it is, the public's exercise of the right of navigation in the loch will be inhibited if there is no lawful access to the water.[145]

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[135] *Colquhoun v Duke of Montrose* (1793) Mor 12827 ("Every heritor, through whose lands a public river runs has a right to all ordinary uses of it, but the channel is *juris publici*" at 12829). It is presumed that the sea and tidal rivers are navigable: if they are not - or become - non-navigable, the public right cannot be exercised.

[136] *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC 156. There is, for example, no right to deposit rubbish in the sea: *Lord Advocate v Clyde Navigation Trs* (1891) 19R 174.

[137] *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC156 *per* the Lord President (Emslie) at 178; *Walford v David* 1989 SLT 876 ("while the public right of navigation on the sea is very wide it does not give the public the right to sail over every square inch of its surface" *per* the Lord Ordinary (Cowie) at 877).

[138] *Walford v David* 1989 SLT 876.

[139] *Ibid.*

[140] 1976 SC (HL) 30.

[141] Lord Dilhorne dissenting.

[142] 1976 SC (HL) 11 *per* Lord Fraser at 165.

[143] *Ibid per* Lord Wilberforce at 125. This double-test "gives riparian heritors an opportunity to challenge new types of user at their inception: "*per* Lord Hailsham at 147. Lord Hailsham was glad to endorse the double-test because it prevented "riparian heritors of all kinds, and not merely the owners of valuable salmon fishing rights being vulnerable to new and unpredictable public rights emerging from time to time with changes of social habit and marine technology": *ibid*.

[144] *Macdonell v Caledonian Canal Commissioners* (1830) 8S 881 *per* the Lord Justice Clerk (Boyle) at 885. Perhaps, unsurprisingly, a right of navigation was thought to exist from time immemorial on Loch Ness, Loch Lochy and Loch Lomond. See *ibid per* Lord Cringletie at 886.

[145] *Leith-Buchanan v Hogg* 1931 SC 204 ("… if in truth the road does not reach the water's edge, but a strip, more or less wide, of the complainer's property intervenes, we are brought back to the old difficulty, and the averment discloses no relevant ground to support any private or public right to make use of the complainer's land" *per* the Lord President (Clyde) at 213).

4.14 As a matter of law immemorial user, *ie* user for at least 40 years, is a necessary criterion for the establishment of navigability. In effect, this can prevent private rivers and lochs which are factually navigable from being subject to the public right of navigation. It should be remembered that navigability *per se* was the criterion for a public river in classical Scots law.[146] Moreover, it is not clear that before *Wills' Trustees*[147] immemorial user was required.[148] It would appear that the criterion of immemorial user was applied in that case to protect the interests of riparian proprietors.

4.15 For the purpose of establishing user, the core meaning of navigation is passage by boat on water.[149] That said, it is no longer restricted to transport from A to B but includes use of the water for pleasure.[150] Navigation must be given its normal meaning, *viz* sailing. It does not include:

> "operations which would be more like acrobatic feats than navigation, or operations that resulted in a substantial proportion of the vessels or the floated objects being so damaged before they reach their destination as to be unmarketable. Nor do I consider that it would include new types of craft that may some day be invented.".[151]

While a river is navigable even although the vessel is being punted using a pole, it is not navigable if the vessel has to be propelled by wading in the river.[152]

4.16 The public right of navigation includes rights which are ancillary and necessary to the core idea of a right of passage. The emphasis is on the movement of the vessel rather than her being at rest.[153] It is accepted, however, that there is a right to drop anchor or tie up to temporary or fixed moorings while in the course of a voyage:[154]

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[146] See para 2.7.

[147] *Wills' Trs v Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30.

[148] Note, for example, this passage from *Macdonell v Caledonian Canal Commissioners* (1830) 8S 881: "…the public cannot be denied the right of navigation, which is inseparable from a navigable water as the primary purpose of it, and from which no man can be excluded, unless he can be excluded from access to it. If, however, he has access, then everyone entitled to access is entitled to use such navigable waters for the purpose of navigation" *per* Lord Cringletie at 888. The need for immemorial user was raised in *Colquhoun's Trs v Orr Ewing* (1877) 4R 344. But as late as 1931, the Lord President (Clyde) doubted "if it has ever been settled whether the public character of the non tidal part of a navigable river depends (1) on the fact of navigability, or (2) on prescriptive possession by the public. What makes the difficulty is that actual use for navigation is probably the best evidence of the fact of navigability": *Leith-Buchanan v Hogg* 1931 SC 204 at 211. For discussion see Reid, *Property* para 523.

[149] *Campbell's Trs v Sweeney* 1911 SC 1319.

[150] *Wills' Trs v Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30 ("There is no authority which suggests that a public navigable river may not be used by the public for the purposes of exercise and recreation as well as transport and commerce so long as it is not used emulously "*per* Lord Salmon at 153). It is interesting to note that it is the river's use for pleasure that must not rival or compete with its use for business.

[151] *Ibid per* Lord Fraser at 169. In Lord Wilberforce's view, "the establishment of a public right of passage does not open the door to every kind of user which physical prowess or exorbitant technology may make possible": *ibid* at 124.

[152] *Scammell v Scottish Sports Council* 1983 SLT 462.

[153] *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC 156.

[154] *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192 ("… right to soil of the *fundus maris* … is undoubtedly subject to the rights of all subjects to pass in their vessels in the ordinary and usual course of navigation, and to take the ground there, or to anchor there at their pleasure, *free from toll*, unless the toll is imposed in respect of some other advantage conferred upon them, or at least on the public" *per* Lord Wensleydale at 213-214). (Italics added).

"It may be assumed that the right to moor or drop anchor is one of the incidents of the right to navigate a public river.[155] But that right is essentially one of passage, not dissimilar to the public right of user of a highway; and I apprehend that the subordinate privilege of anchorage or mooring can only be exercised as a reasonable incident in the course of such passage or navigation.".[156]

4.17 On the other hand, laying fixed moorings on the seabed is not an ancillary right. Usually the purpose of the fixed mooring is to provide anchorage at the end of a voyage; in addition, it involves the possession of the seabed whether the ship is there or not. Consequently, it has been held not to be an incident of navigation.[157]

4.18 In these circumstances, the Crown Estate Commissioners charge for the right to use the seabed for the purposes of providing fixed moorings for permanent anchorage.[158] Where there has been a Crown grant of port and ferry, the grantee can charge reasonable dues[159] for the maintenance of the harbour:[160] but the grant will usually not include the seabed of the harbour. Similarly, where the harbour is regulated by Act of Parliament, the land and seabed can only be used for purposes authorised by the statute.[161] The harbour authority will therefore have no right to use the seabed for fixed moorings unless expressly authorised by the legislation to do so. In the absence of such authority, the right to lease - and charge for - fixed moorings will remain with the Crown.[162]

4.19 The right of navigation includes the use of the foreshore[163] for ancillary purposes *viz*:

"casting anchors, disboarding of goods, taking in of ballast, or water rising in fountains there, drying of mats, erecting of tents and the like".[164]

It also includes the right to embark and disembark from the foreshore:[165] but it does not include access to the foreshore across private land.

4.20 At common law, there is no right of access over private land to a private navigable river or loch for the purpose of embarkation or disembarkation.[166] Once lawfully on the water, the banks of a private loch or river can be used for purposes incidental to the public right of navigation as can the alveus.[167] So, for example, there is a right to moor or drop anchor during a voyage.[168] But there is no right permanently to occupy the alveus or banks

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[155] *A fortiori* the sea.
[156] *Campbell's Trs v Sweeney* 1911 SC 1319 *per* Lord Dundas at 1324.
[157] *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1979 SC 156.
[158] Fixed moorings are treated as heritable property for the purpose of rates: *Forth Yacht Ltd v Assessor for Fife* 1976 SC 201.
[159] *Macpherson v Mackenzie* (1881) 8R 706; *Leith-Buchanan v Hogg* 1931 SC 204 *per* the Lord President (Clyde) at 212-213.
[160] See Reid *Property*, paras 334 ff.
[161] See, for example, *Milne Home v Allan* (1868) 6M 189.
[162] For a more detailed discussion of the law of the foreshore and seabed in relation to harbours and moorings see beyond Pt 7.
[163] At common law ground above the high water mark is not included: *Hoyle v McCunn* (1858) 21D 96.
[164] Stair II, i, 5.
[165] *Earl of Stair v Austin* (1880) 8R 183 ("…. It is manifest that the inhabitants of this village upon the seashore are entitled to put to sea in boats and to come back again" *per* Lord Young at 187).
[166] *Leith-Buchanan v Hogg* 1931 SC 204.
[167] Both of which are owned by the riparian proprietor(s).
[168] *Scammell v Scottish Sports Council* 1983 SLT 462. ("… it appears from these authorities that some limited use of the banks and the alveus may be an incident of the right of navigation" *per* the Lord Ordinary (McDonald) at 466.) See also *Carron Co v Ogilvie* (1806) 5 Pat 61 (banks used as tracking paths).

for beaching or mooring boats.[169] The public right of navigation does not include the right, for example, to have a picnic on the banks of a river.[170]

4.21 We have already discussed material interference with the right of navigation on the sea and tidal lochs and rivers.[171] In non-tidal but navigable rivers and lochs, the riparian owner(s) are entitled to construct operations on the river banks and alveus provided there is no actual interference with the public's use of the water for navigation.[172]

4.22 Under the Land Reform (Scotland) Bill, access rights will exist in relation to inland waters, *viz* non-tidal (*ie* private) rivers and lochs.[173] Where such rivers and lochs are in fact navigable, access rights will include a right of navigation for recreational purposes as well as passage from A to B.[174] Unlike the public right of navigation, there will be no need to establish immemorial user. However, any boat must not be mechanically propelled.[175] Access rights will also include the right to swim in the inland waters.[176] The banks will be available for recreation as well as purposes incidental to the statutory right of navigation.[177] Access rights do not apply to tidal (*ie* public) rivers and lochs nor the sea.

4.23 To summarise:

(i) in relation to the sea and public rivers, the public right of navigation will exist if the waters are in fact navigable;

(ii) in relation to inland waters, a statutory right of navigation will exist (although it will not be enforceable unless the waters are in fact navigable);

(iii) in relation to inland waters, a statutory right of navigation and a public right of navigation may co-exist if the waters are in fact navigable and the public right has been established by immemorial user.

4.24 Under section 11(1) of the Land Reform (Scotland) Bill, a local authority will have powers to make byelaws in respect of access rights.[178] Such byelaws cannot interfere with the exercise of the public right of navigation.[179] On the other hand, under section 12, a local authority is given additional powers to make byelaws in respect of inland waters.[180] The

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[169] *Campbell's Trs v Sweeney* 1911 SC 1319; *Leith-Buchanan v Hogg* 1931 SC 204.
[170] *Scammell v Scottish Sports Council* 1983 SLT 462.
[171] Above para 4.10.
[172] *Orr Ewing v Colquhoun's Estate* (1877) 4R (HL) 116. *Cf Robertson v Foote & Co* (1878) 6R 1290.
[173] Land Reform (Scotland) Bill s 39.
[174] *Ibid* s 1. This right of navigation does not apply to canals: s 5(4)(k).
[175] S 5(3). Compare the public right of navigation.
[176] Unless bathing would be in contravention of a notice of prohibition displayed with the approval of a local authority: s 5(4)(j). Also, the right to bathe does not apply to canals: s 5(4)(k).
[177] *Cf* the public right of navigation, above para 4.19.
[178] "The local authority may, in relation to land in respect of which access rights are exercisable, make byelaws for the preservation of order, the prevention of damage and for securing that (a) persons exercising those rights do so; and (b) the owners of the land use and manage it and otherwise act within the rights of ownership, so that each of those is relieved of undue interference by any other with those respective rights"; s 11(1).
[179] S 11(2).
[180] "The local authority may, for the purposes of preventing nuisance or danger at, or preserving or improving the amenity of, or conserving the natural beauty of inland waters, make byelaws to (a) regulate the exercise of access rights in relation to; (b) facilitate the proper enjoyment of access rights over; (c) regulate or prohibit any activity by way of trade or business with, or in the expectation of personal reward from, members of the public on; (d) regulate the use of boats on; (e) regulate the exercise of sporting and recreational activities on such waters"; s 12(1).

powers under section 12 appear not to be restricted to the regulation of access rights. Therefore they could be used to regulate any public right of navigation that has been established on private lochs or rivers. It seems to us that in relation to inland waters, the potential co-existence of both a public right of navigation and a statutory right of navigation, and the different criteria used to establish whether either type of right exists, will be a cause of confusion not only to local authorities attempting to regulate the respective rights but also to members of the public attempting to exercise them. This could also be important if a person is thought to be acting in excess of access rights for the purposes of sections 15[181] and 16 of the Bill.[182] It would appear that these provisions would be inapplicable if he was validly exercising his public right.[183]

**Recreation**

4.25 As we have seen, the foreshore can be used by the public in the exercise of the public right to fish and gather shellfish[184] and the right of navigation.[185] There is also a public right to use the foreshore for recreation. The existence of such a right is well supported by authority:[186]

> " ….I do not think it can now be disputed that, in appropriate cases, a practice of resort by the public to the shore for purposes of recreation must be regarded as an

[181] "(1) If a police constable or an authorised officer of the local authority has reasonable grounds for believing that a person who has entered land or who the constable or officer has such grounds for believing is about to or intends to enter land (a) has persistently contravened the Access Code; or (b) has, in purported exercise of access rights, done anything which, by virtue of section 5 above, exceeds these rights or is so doing, or is about to or intends so to do any such thing, then the constable or officer may require that person to leave or, as the case may be, not to enter the land. (2) A person who (a) fails to comply with a requirement of a constable under subsection (1) above; (b) fails to comply with a requirement of an authorised officer of a local authority under subsection (1) above when required by a constable to do so, is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 1 on the standard scale".

[182] "(1) The local authority may make an exclusion order in respect of any person who they reasonably believe has persistently (a) contravened the Access Code; or (b) in purported exercise of access rights, done anything which, by virtue of section 5 above, exceeds those rights, and will continue to do so. (2) The effect of an exclusion order is to disentitle the person in respect of whom it is made from exercising access rights in relation to such land as is specified in the order and in relation to any such activities as may be so specified. (3) An exclusion order takes effect on the date specified in it, being not less than 14 days from the date on which it was made. (4) The local authority shall give the person in respect of whom an exclusion order is made notice of the making of the order, its effect and the reasons why it was made and of his right under subsection (5) below to make representation. (5) That person may make written or oral representations to the local authority. (6) On representations being so made, the local authority shall, if the order has by then taken effect, suspend it, shall consider the representations and confirm or revoke the order. (7) An exclusion order has effect for such period, not exceeding one year, as is specified in it. (8) The local authority may, at any time, reduce that period or revoke the order."

[183] If, for example, A was sailing a mechanically propelled vessel which would be in excess of his access rights but not the public right of navigation.

[184] Above, para 4.1-4.10. At common law ancillary rights in respect of fishing did not extend beyond the high water mark: *Hoyle v McCunn* (1858) 21D 96.

[185] Above para 4.11.

[186] *Officers of State v Smith* (1846) 8D 711 ("the common use by the subjects for the purpose either of passage from port to port, or of mere enjoyment and healthful exercise" *per* the Lord Justice Clerk (Hope) at 719); *Duncan v Lees*. (1870) 9M 855 ("… it appears to me that if the public resort to a particular place on the seashore for the purpose of pleasure and recreation, that may even in itself be sufficient to constitute that part of the seashore a public place for the terminus to a footpath "*per* the Lord President (Inglis) at 857); *Buchanan & Geils v Lord Advocate* (1882) 9 R 1218; *Keiller v Mags of Dundee* (1886) 14R 191; *Burnet v Barday* 1955 JC 34 ("There appears also to be a somewhat uncertainly defined right to use the foreshore for recreation" *per* the Lord Justice Clerk (Thomson) at 39); *McLeod v McLeod* 1982 SCCR 130 ("I was satisfied by the foregoing Scottish authorites that, whatever the earliest position in our law, by the beginning of this century it was clearly recognised that there was a right of recreation in the public use of the foreshore" *per* Sh Poole at 132). *Cf Dyce v Hay* (1852) 1 Macq 305 (HL).

exercise of one of those minor public rights with which the title of the Crown is charged.".[187]

The extent of the right is not clear. It appears to include walking and running,[188] having a picnic or barbecue, sunbathing and swimming.[189] While it does not include the right to put up a hut on the shore,[190] it does include the right to shoot wild fowl.[191] The sale of refreshments on the beach is outwith the scope of the public right.[192]

4.26 Any attempt to provide a precise definition of the public uses of the foreshore has been described as "hazardous".[193] Furthermore, there may be Human Rights implications with regard to foreshore that is privately owned.[194] However, in other jurisdictions, such a legal definition has been introduced. For example in Spain, public rights over the public coastal domain have been codified[195] and in Germany there exist statutory rights over certain stretches of the beach.[196] But where positive rights have been introduced in these countries, they often apply only to designated areas, thus negating the idea of a universal public right.

4.27 It has sometimes been argued that the right to use the foreshore does not arise until there is evidence of immemorial user, *ie* use by the public for at least 40 years.[197] However, the more modern view is that evidence of user is not required to establish the public right.[198]

4.28 Under the Land Reform (Scotland) Bill, access rights will exist in respect of the foreshore.[199] There will therefore be a statutory right to use the foreshore for recreational purposes and for passing from A to B.[200] The statutory right of access cannot diminish or replace the public rights in respect of the foreshore.[201] While the extent of the public rights is uncertain, it would appear that they may be wider than statutory access rights. For example, in relation to the foreshore, the public rights include the right to fish for whitefish[202] and collect shellfish,[203] while statutory access rights do not include such rights.[204] While it may be within the public right to light a fire on the foreshore, this is excluded from statutory access rights.[205] This could be important if a person is thought to be acting in excess of access

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[187] *Marquis of Bute v McKirdy & McMillan* 1937 SC 93 *per* Lord Moncreiff at 131.
[188] *Officers of State v Smith* (1846) 8D 711.
[189] Perhaps because it is obvious, there is no Scottish authority for the existence of a public right to swim in the sea.
[190] *Mather v Alexander* 1920 SC 139. But a temporary shelter may be ancillary to the rights to fish and navigate.
[191] *Hope v Bennewith* (1904) 6F 1004.
[192] *Marquis of Ailsa v Monteforte* 1937 SC 805. See beyond, para 4.32.
[193] *Nicol v Blaikie* (1859) 22D 335 *per* the Lord Ordinary (Kinloch) at 340.
[194] That is, it might involve a contravention of Article 1 of the First Protocol, ECHR: the interference with proprietary rights can be justified in the public interest, otherwise compensation must be provided.
[195] Art 31(1) Ley de Costas, Ley 22/1988 of 28 July 1988 (The Coastal Act), provides generally the right to use the public coastal domain for common uses and those compatible with the natural characteristics of the area. Specific rights include walking, bathing, navigation, embarking and disembarking, and running aground, along with fishing, picking plants and collecting shellfish. See Appendix 2, para 203.
[196] According to §38 para.1 of the LPflg (Landschaftspflegegesetz - Maintenance of the Countryside Law) this includes the right to walk, ride, swim, and place baskets, dry nets, store fishing boats and build sandcastles on the beach. See Appendix 2, para 119.
[197] See, for example, *Hope v Bennewith* (1904) 6F 1004 *per* the Lord Justice Clerk (Macdonald) at 1013.
[198] *Marquis of Bute v McKirdy & McMillan* 1937 SC 93 *per* Lord Fleming at 123-124.
[199] S 39.
[200] S 1(2)(a) and (b).
[201] S 3(3).
[202] Above paras 4.2ff.
[203] *Ibid.*
[204] S 5(4)(a), (b) and (c).
[205] S 5(4)(d).

rights for the purposes of sections 15 and 16.[206] It would appear that these provisions would be inapplicable if he was validly exercising his public rights. The position is even more complex where the public right and access right are in similar terms. There is undoubtedly a substantial overlap between the two sets of rights. As the public right remains undiminished and not displaced by the access right, it must continue to be exerciseable without challenge under sections 15 and 16 which relate purely to access rights.

4.29 Further, local authorities can regulate access rights in respect of the foreshore.[207] These powers do not extend to the public rights.[208]

4.30 Once again, we can see how the Bill's proposal for the co-existence of public rights and statutory access rights may be a source of confusion for local authorities, police and members of the public. We would go further and say that the legislative purpose of sections 15 and 16 of the Bill is rendered ineffective to the extent that the public rights and access rights overlap.

**Other rights**

4.31 Although the extent of the public right of recreation remains unclear, certain other rights are excluded. There is no public right to wreck and ware,[209] nor is there a public right to pasture animals on seagreens.[210]

**Commercial use**

4.32 At common law, the commercial use of the foreshore by members of the public is prohibited where it interferes with proprietary rights.[211] A local authority may also make byelaws under the Civic Government (Scotland) Act 1982 to regulate or prohibit any trade or business activity carried on by a member of the public on the foreshore.[212] Before introducing such a byelaw, the local authority must give notice to the proprietors and other persons having an interest in the foreshore.[213]

**Protection of public rights**

4.33 In theory at least, the Crown is obliged to protect public rights over the foreshore and seabed. The role of guardian of the public rights is undertaken by the Lord Advocate.[214]

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[206] See above para 4.24.
[207] See especially Land Reform (Scotland) Bill ss 8, 10 and 11.
[208] Public rights can however be subject to regulation under existing statutes: see beyond Pt 5 and Appendix 1.
[209] That is, to gather seaweed. See *Paterson v Marquis of Ailsa* (1846) 8D 752. For further consideration of the servitude of seaware and rights of crofters to gather seaware see Pt 6.
[210] *Aitken's Trs v Caledonian Railway Company and the Lord Advocate* (1904) 6F 465 ("It has never been held that such greens are subject to the public uses to which the foreshore is subject" *per* the Lord Justice Clerk (MacDonald) at 468).
[211] In *Marquis of Ailsa v Monteforte* 1937 SC 805 the court granted interdict against the defender from selling refreshments on the foreshore.
[212] S 121(1). The byelaw must be necessary for preventing nuisance or danger at, or preserving or improving the amenity of, or conserving the natural beauty of, the seashore. The Act defines the "seashore" as including the land between the low and high watermark of ordinary spring tides: s 123. See beyond Appendix 1.
[213] S 121(5). Furthermore under s.121(11) the byelaw must protect and maintain any public rights under the guardianship of the Crown to use the foreshore.
[214] See para 3.14.

However, the power to protect public rights in individual cases has rarely, if ever, been used in modern times.[215]

**Access**

4.34 While the public rights on the foreshore exist, they cannot be exercised unless there is access to the foreshore.[216] At common law, there is no right to pass over private property in order to reach the shore. The foreshore must be accessible by a public road or from the sea. There can, however, be a public right of way. Before a public right of way arises, it must connect at least two public places.[217] It is generally thought that foreshore used for recreation is a public place for this purpose.[218]

4.35 A public right of way can only be constituted if there has been use by the public for a continuous period of twenty years.[219] The use has to be as of right and not attributable to the tolerance of the landowner.[220] Even if the foreshore is regarded as a public place, the absence of the appropriate use by the public over the prescriptive period will prevent a public right of way arising.[221] This once again raises the problem of whether the public has sufficient access to the foreshore in order to exercise their public rights in relation to fishing, navigation and the foreshore itself.

4.36 In terms of fishing, no difficulty arises from use of a boat, as the public has a right of navigation. Again, the public has the right to use the foreshore for fishing.[222] The public must however, be able to reach the foreshore without trespassing on private land. Put another way, the right to fish may be inhibited if the public does not have lawful access to the foreshore.[223] Similarly, if a loch or river is tidal, it may be possible to fish from a boat, but access to the foreshore is still desirable. If the river or loch is tidal but not navigable, while the public has a right to fish there, they cannot fish from a boat: therefore, the right to fish is of little, if any, value if the public cannot reach the foreshore without trespassing on private land. This should be contrasted with the right to fish for salmon. Here the grantee has access to the fishings over private land,[224] albeit that it is:

> "restricted not merely to access which is least prejudicial to the riparian owner, but also to access which is necessary for the beneficial enjoyment of the fishings.".[225]

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[215] For a fuller discussion of the potential conflict of interest between the Crown as beneficial owner and guardian of the public rights, see para 3.16*ff*.

[216] *Buchanan & Geils v Lord Advocate* (1882) 9R 1218 ("Such appropriation is always subject to certain uses on the part of the public, at least *when the shore is accessible* to the public" *per* Lord Shand at 1234 (Italics added)).

[217] *Jenkins v Murray* (1866) 4M 1046.

[218] *Marquis of Bute v McKirdy & McMillan* 1937 SC 93 *per* the Lord President (Normand) at 117; *Richardson v Cromarty Petroleum Co Ltd* 1982 SLT 237. *Cf Darrie v Home Drummond* (1865) 3M 496; *Duncan v Lees* (1870) 9M 274 ("a mere employment for recreation will not suffice to make a public way, the legal object of which is transit, not amusement" *per* Lord Kinloch at 279), (1871) 9M 855.

[219] Prescription and Limitation (Scotland) Act 1973 s 3(3).

[220] *Mackintosh v Moir* (1871) 9M 574 *per* Lord Deas at 576.

[221] For an example of a successful claim, see *Marquis of Bute v McKirdy & McMillan* 1937 SC 93.

[222] Stair II i, 5; *Berry v Wilson* (1841) 4D 139; *McDouall v Lord Advocate* (1875) 2R (HL) 49.

[223] See, for example, *Hall v Willis* (1852) 14D 324. The court held that the public had a right to gather limpets from the rocks on the foreshore "always assuming that they are able to reach the shore in a legal way" *per* the Lord Justice Clerk (Hope) at 328; "they (the defenders) getting there lawfully - for that must always be assumed" *per* Lord Cockburn at 328. See also *Arthur v Aird* 1907 SC 1170 ("No one has any right to trespass on the lands of another for the purpose of fishing" *per* the Lord Justice Clerk (Macdonald) at 1172).

[224] *Lord Advocate v Sharp* (1878) 6R 108.

[225] *Middletweed Ltd v Murray* 1989 SLT 11 *per* the Lord Ordinary (Davidson) at 14.

Generally, the grantee is restricted to pedestrian access as the test is determined by what is necessary to enable a person of average strength and mobility to reach the fishings.[226]

4.37 In several jurisdictions, public access to the foreshore is safeguarded through established servitudes. In France, public access to the foreshore over private land has been established by way of two servitudes. A three metre wide pedestrian servitude of passage exists over private properties that border the length of public coasts.[227] Furthermore the "servitude de passage de pietons, transversale au rivage"[228]allows the public to cross private lands to access the coast where there are existing paths and tracks.[229] Similarly in Spain the "servitude of thoroughfare", a six metre strip measured inland from the landward boundary of the public coastal domain, provides public pedestrian passage to all of the foreshore.[230]

4.38 An alternative method of preserving access to the coast and inland waters can be found in the concept of the "Queen's Chain" in New Zealand. This is a strip of land of up to 20 metres in width at the edge of rivers, lakes and the sea owned by the Crown or a local authority, measured from the high water mark of spring tides which reserves a public right of access to these areas.[231]

4.39 The difficulty of obtaining access to the foreshore and inland waters is addressed in the Land Reform (Scotland) Bill by including within access rights the right to cross land.[232] Thus A will be able to cross over land owned by B in order to reach the foreshore or inland waters without the necessity of establishing a public right of way over B's land. Any uncertainty over whether the foreshore is treated as a public place for the purpose of establishing a public right of way will therefore no longer be of practical significance.

**Public rights and access rights**

4.40 We have explained the nature and extent of the public rights to use the sea, seabed and foreshore. The juridical nature of these rights is controversial and their extent remains uncertain. The Crown's role as guardian of the public rights is no longer effective. We have also considered the statutory access rights which are proposed in the Land Reform (Scotland) Bill and have shown that these rights may overlap and co-exist with public rights in relation to inland waters and the foreshore. Given that the Bill contains a sophisticated regime for the suspension, regulation and enforcement of access rights, this is likely to result in confusion for local authorities, police and members of the public. The retention of the public rights defeats in part the legislative purpose of the Bill in relation to the foreshore and inland waters.

4.41 Such a complex and confusing system of rights does not appear to us to be sensible. We would therefore not support the enactment of the provisions contained in the Land Reform (Scotland) Bill as they stand. There appear to us to be three options:-

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[226] *Ibid.*
[227] Art L160-6 of the Code de l'Urbanisme (Town Planning Code).
[228] Translated literally, this means the "servitude of pedestrian access to (cross to) the shore".
[229] Art 5 Coastal Act 1986, inserting Art 160-1 into the Town Planning Code.
[230] Art 27, Coastal Act 1988.
[231] The concept originated from the time of Queen Victoria who instructed the reservation of land to the public along the margins of the sea coast or navigable streams. There is however, no public right to cross private lands to reach the Chain. It must therefore abut a public way for the public to obtain access to the chain itself from the landward side.
[232] S 1(1)(b). For the definition of "land" see s 39. There are however certain restrictions - see s 4.

- remove the foreshore from the definition of "land" in the Bill and retain the common law public rights;
- abolish the public rights and replace them with the statutory scheme; or
- abolish the public rights and replace them with the statutory scheme, amended to retain the full extent of the common law rights.

4.42 The advantage of the first option would be to retain the full extent of the common law rights as they presently exist. The rights would not be subject to regulation or curtailment under the Bill. Access rights would be exercisable in order to reach the foreshore, but once there the rights being exercised would change to the common law rights. However, as we have seen, the extent of the common law rights is not clear. The public also has no simple means of establishing the extent of their rights, nor of preventing any infringement of them. The role of enforcement lies primarily with the Crown, which may also have a patrimonial interest in the foreshore and its use. An obvious difficulty is that this option is confined to the foreshore and does not deal with private rivers.

4.43 The second option would place the public rights on a statutory footing. The rights would then be held directly by the public and independent of the Crown's interest. The extent of the rights would be clarified by making clear what conduct was not included within the right. This would remove much of the uncertainty and misunderstanding surrounding the content of the public rights. However, without modification of the limitations on and regulation of access rights contained in the Bill, the public rights exercisable on the foreshore would be altered significantly. For example, as we have mentioned above,[233] some of the exclusions contained in section 5 (4) currently fall within the limits of the public rights.[234] As these rights are exercised at present without significant objection from owners or occupiers of the foreshore, we see no reason why they should be restricted.

4.44 The third option is to place the public rights on a statutory footing, while preserving their present extent. This appears to us to offer the best solution. The Land Reform (Scotland) Bill provides an opportunity to do so. We would include in the proposed statutory access rights such of the public rights as are presently exerciseable but which are currently excluded from the Bill namely (i) the right to fish for white fish in the sea and public rivers; (ii) the right to navigate on the sea and public rivers as well as inland waters; and the right to use the foreshore for specific purposes for example, to fish for white fish, to take shellfish other than mussels and oysters, to light a fire and to swim in the sea. We would also welcome views on whether the former public rights should be subject to the proposed regulatory scheme for access rights. In this context, the power of a landowner to suspend the exercise of public rights while he is carrying out any lawful activity which is likely to be interfered with during the exercise of access rights should be noted.[235] Importantly, if public rights were subject to the statutory regime, members of the public could use the sheriff courts to determine and enforce their rights.

**Questions for consideration**

4.45 We would welcome views on the following:

[233] See para 4.28.
[234] Eg lighting a fire (s5(4)(c)), fishing (see s 5(4)(a)), picking certain shellfish (s 5(4)(e)).
[235] S 9(1), (4).

**5. (a) Should the public rights in respect of the sea, seabed and foreshore be put on a statutory basis and the common law rights abolished?**

**(b) If so, should they be subject to regulation similar to that proposed for statutory access rights in the Land Reform (Scotland) Bill?**

**(c) If not, should there nevertheless be a statutory non-exhaustive definition of public rights of recreation and what should that definition be?**

**(d) Should the sheriff have jurisdiction to determine the existence and extent of public rights?**

**Extinction of public rights**

4.46 We shall now consider some important issues relating to the extinction of public rights. While these matters would be rendered academic if our arguments in paragraph 4.44 were accepted, nevertheless we make suggestions for useful reforms in the event that our views do not prevail.

4.47 It has been suggested[236] that save for physical impossibility, *eg* the silting up of a river, it is unlikely that public rights can be otherwise extinguished.

4.48 However, it is also claimed that public rights may be treated as extinguished by implication in terms of statute.[237]

4.49 *Obiter dicta* in *Smith v Lerwick Harbour Trustees*[238] also suggest that where land no longer falls within the high and low water marks of ordinary spring tides, it is no longer subject to the public rights, albeit that the change in character of the land has been carried out by human intervention rather than natural event. The current legal position is therefore not entirely clear.

4.50 Once a non-tidal loch or river has been held to be navigable,[239] on the principle that navigable waters are *inter regalia* it does not cease to be navigable as a result of non-user for 20 years *ie* the long negative prescription does not apply.[240] However, for this to be correct, public rights must fall within the list of imprescriptible rights given in the Prescription and Limitation (Scotland) Act 1973 Schedule 3.[241]

4.51 The physical boundaries of the foreshore, being the high and low water marks, may change and therefore the extent of the foreshore may alter from time to time. However, the physical character and use of the foreshore may also change. For example, in Helensburgh and Tobermory land reclaimed from the foreshore and the sea has been developed into car

[236] Reid, *Property*, para 517.
[237] See reclamation works carried out on the foreshore with Crown consent *eg* under the Helensburgh Pier and Harbour Act 1846 (9 & 10 Vict.) c.xvi. The public rights over the reclaimed foreshore are considered extinguished by virtue of the statutory authority – source Legal Secretariat to the Lord Advocate.
[238] 1903 5F 680 *per* the Lord President (Kinross) at p 689; *Haggart v Fyfe* (1870) 9M 127 "Even if the petitioner had a title which gave him an absolute right to the foreshore, that would not give him a right to exclude the public from the shore so long as it remained a shore" *per* Lord Neaves at 129.
[239] Above paras 4.12*ff*.
[240] *Wills' Trs v Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30 *per* Lord Wilberforce at 126.
[241] It is yet to be shown that this is the case, as pointed out in Reid, *Property*, para 517, note 1.

parks. It is not clear what status the public rights have in these circumstances. Are public rights over the foreshore imprescriptible in terms of Schedule 3 to the Prescription and Limitation (Scotland) Act 1973? Alternatively, do the public rights fly off to the extent that their exercise is no longer consistent with the use of the former foreshore?

4.52 Public rights do not fall within the jurisdiction of the Lands Tribunal for Scotland in respect of the variation and discharge of land obligations, being enforceable by the public generically and not by an individual with an interest in other land to which they relate.[242] We have not recommended any change to the position in our *Report on Real Burdens*.[243]

4.53 The public have the opportunity through the planning process to prevent any redevelopment requiring planning permission. Should a failure to object result in the loss of public rights in so far as they are inconsistent with the permitted use of the former foreshore?

**Questions for consideration**

4.54 We would welcome views on the following:

**6. (a) Should Schedule 3 of the Prescription and Limitation (Scotland) Act 1973 be amended to include public rights as imprescriptible rights?**

**(b) If the answer to (a) is in the affirmative, does this apply equally to public rights which are tacit and those (if any) which are acquired by immemorial user?**

**(c) Should public rights over the foreshore be extinguished where the nature of the foreshore changes?**

**(d) If the answer to (c) is in the affirmative, should this occur by itself or be achieved by application to the Lands Tribunal for Scotland or some other body?**

[242] Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2).
[243] Scot Law Com No 181, paras 6.26-6.43.

# Part 5 Restriction of the public rights

**Introduction**

5.1 In Part 4 we have discussed the extent of public rights in respect of the foreshore and seabed. While such rights are clearly of benefit to the public, in certain circumstances the public's exercise of such rights may be considered subordinate to a more important public purpose. This Part is not intended to be an exhaustive consideration of statutory restrictions. We have been asked by the Scottish Executive to consider two specific means by which the exercise of the public rights may be restricted, *viz* in the interests of the defence of the realm and civil aviation. In each case, Parliament has empowered a regulatory body to restrict the exercise of the public's rights under byelaws.

**For military purposes**

5.2 The statutory provisions concerning the power to make byelaws for military purposes are complex. Under section 14(1) of the Military Lands Act 1892, the Secretary of State for Defence has the power to impose byelaws regulating the use of land held for a military purpose.[244] Originally, the land to which this power applied covered "any land belonging to a Secretary of State or to a volunteer corps"[245] which had been "appropriated by or with the consent of a Secretary of State for any military purpose".[246] By virtue of the Military Lands Act 1900,[247] the definition of "land" was extended to include the bed of the sea or any tidal water. The Secretary of State may make byelaws regulating the use of such land and to secure the public against danger arising from that use. To this end, the Secretary of State has additional powers to prohibit all intrusion on the land and all obstruction of such use. Byelaws made under section 14(1) may not take away or prejudice the effect of any "right of common".[248] There is no restriction on the effect of such byelaws on public rights over the foreshore and seabed in Scotland.

5.3 The Military Lands Act 1900 provides that where it is competent to regulate the use of land under the 1892 Act, byelaws can be made in relation to any sea or tidal water that abuts such land or where rifle or artillery practice is or can be carried on, over any sea, tidal water or shore from such land.[249] Where any public right[250] is to be adversely affected by the imposition of such a byelaw, the consent of the Secretary of State for the Environment Transport and the Regions is required.[251] The Secretary of State may give such consent

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[244] "military purpose" is defined under s 23 of the Military Lands Act 1892 as including "rifle or artillery practice, the building and enlarging of barracks and camps, the erection of butts, targets, batteries and other accommodation, the storing of arms, military drill, and any other purpose connected with military matters approved by the Secretary of State".

[245] S 14(1). S 14(2) provides that such land can also be regulated when being used by the public where the public is entitled to use the land when it is not being used for a military purpose.

[246] *Ibid.*

[247] S 3.

[248] A term of English law only meaning the right to share the profits or produce of land with the landowner or other users. For further details see Sparkes, *A New Land Law*, pp 669-674.

[249] S 2(2).

[250] Under section 2(4) a public right is defined as "any right of navigation, anchoring, grounding, fishing, bathing, walking or recreation".

[251] Originally the power to consent to any byelaw which would injuriously affect any public right was vested in the Board of Trade, which at that time was charged with the management of the foreshore. The management of

where he is satisfied, after advertisement and the consideration of objections,[252] that the restriction is necessary for the safety of the public or the exigencies of the military purpose.[253] The consent of the Crown Estate Commissioners is required for the introduction of a byelaw affecting the sea, tidal water or shore owned by the Crown and under their management.

5.4 The Land Powers (Defence) Act 1958 widens the definition of land which can be the subject of byelaws under the 1900 Act. Where necessary or expedient for regulating the use of the land or securing the public against danger, byelaws can regulate the sea, tidal water or shore even where it does not border land used for a defence purpose.[254]

5.5 Byelaws made under the statutory powers currently exist in relation to both military and non-military land in Scotland. [255] We understand that such regulations affect *inter alia* the foreshore and seabed adjacent to HM Naval Bases at Faslane and Rosyth.[256]

**Summary**

5.6 In summary, byelaws can be made by the Ministry of Defence[257] in relation to the following areas of land:

(i) land (including the seabed or tidal water) held for a military purpose;[258]

(ii) any sea or tidal water abutting land held for a military purpose;[259]

(iii) any sea or tidal water over which rifle or artillery practice is or can be carried on from abutting land;[260]

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Crown foreshore was ultimately transferred on 1 April 1950 to the Crown Estate Commissioners from the Minister of Transport (to whom it had subsequently devolved); Coast Protection Act 1947 ss 37,38; Crown Foreshore (Date of Transfer) Order 1950, SI 1950/1537. However the functions of the Minister of Transport under the 1900 Act were transferred to the Board of Trade; Transfer of Functions (Shipping and Construction of Ships) Order 1965, SI 1965/145 art 2 & Sch 1. The shipping functions of the Board of Trade were subsequently exercised by the Secretary of State for Trade & Industry (subsequently the Secretary of State for Trade); Secretary of State for Trade & Industry Order 1970 SI 1970/1537, arts 2(1), 7(4), Transfer of Functions (Trade and Industry) Order 1983 SI 1983/1127, art 2(4), Secretary of State (New Departments) Order 1974 SI 1974/692; whose shipping functions (including any functions relating to "harbours, docks, tidal waters……") were transferred to the Secretary of State for Transport by art 2(3) of the 1983 Order. The functions of the Secretary of State for Transport were transferred to the Secretary of State for the Environment, Transport and the Regions by art 3(1) of the Secretary of State for the Environment, Transport and the Regions Order 1997 SI 1997/2971.

[252] See s 2(2), Military Lands Act 1900.

[253] S 2(2)(b). Furthermore the Secretary of State may consent only to the extent that the restriction is reasonable under all the circumstances of the case.

[254] Under s 25(1) of the Act, "defence purposes" include "any purpose of any of Her Majesty's naval, military or air forces".

[255] In Scotland there are currently 36 sets of byelaws made by the Ministry of Defence regulating the foreshore and seabed for military purposes. Figures provided by Defence Estates (an agency of the Ministry of Defence which manages its estate) show that 836 hectares of Ministry of Defence owned foreshore and 862 hectares of foreshore not owned by the Ministry of Defence are subject to byelaw restrictions. In relation to the seabed, 2 hectares owned by the MoD and 54,181 hectares not owned by the Ministry are subject to byelaw restrictions. In terms of foreshore and seabed leased by the Ministry of Defence, 142 and 4 hectares respectively have restrictions in place. There are no byelaw restrictions on 1,059 hectares of Ministry of Defence owned land, nor on 37 hectares of leased land. (All figures rounded to the nearest hectare.)

[256] Source - Defence Estates.

[257] Scotland Act 1998, ss 29, 30, Sch 5, Part I, para 9(1)(a)-(b).

[258] Military Lands Act 1892, s 14(1).

[259] Military Lands Act 1900, s 2(2).

[260] *Ibid*.

(iv) any sea, tidal water or shore not abutting land used for a defence purpose where it is necessary or expedient for regulating the use of same or securing the public against danger.[261]

**An anomaly**

5.7 One anomaly which can be seen from the above is that in relation to byelaws made under the 1900 or 1958 Acts, consent is required on behalf of the public, where the public rights are to be prejudiced. Such consent may only be given where it is necessary in all the circumstances to do so. However, under the 1892 Act, such consent is not required and the necessity test need not be satisfied. It is therefore conceivable that byelaws could be made under section 14(1) of the 1892 Act in relation to foreshore held for a military purpose and that there would be no requirement to obtain consent to an infringement of the public rights.

5.8 It can be argued that the powers to make byelaws under the Military Lands Acts 1892 and 1900 require to be considered together, and that therefore the provisions for obtaining consent on behalf of the public would apply equally to the powers under both Acts. Nevertheless the position may stand in need of clarification.

5.9 Moreover if the purpose of requiring consent under the 1900 Act is to protect the public's interests, should it not be the consent of the Lord Advocate (one of whose functions is the protection of the public rights,)[262] that should be obtained if the public rights will be infringed as a consequence of military byelaws?

5.10 The powers to make byelaws for military purposes were created over a century ago, primarily for the protection of the public from the danger inherent in ammunition testing and firing practice. In modern times it could be argued that the mischief in respect of which such powers are exercised has changed. It might be thought that the current policy behind the making of such byelaws places more emphasis on national security rather than immediate physical danger to the public. It could therefore be argued that the statutory provisions contained in the Military Lands Acts no longer serve the needs of the military or the expectations of the general public with regard to consultation and publication. However, we note that the defence of the realm and the naval, military or air forces of the Crown are reserved matters[263] and that the legislation extends to the whole of the United Kingdom. Accordingly, while we believe that this anomaly merits further attention we have decided not to consult on this issue in this paper, considering it more appropriate for inclusion in a United Kingdom wide review.

**Civil aviation - introduction**

5.11 The statutory provisions controlling the operation of airports for civil aviation under byelaws are found in the Airports Act 1986. The statutory powers previously exercised by the Secretary of State were transferred to the Scottish Ministers with effect from 1 July 1999.[264]

[261] Lands Power (Defence) Act 1958, s 25(1).
[262] See para 3.14 *infra*.
[263] Scotland Act 1998, ss 29, 30 Sch 5 Part I para 9(1)(a)-(b).
[264] Scotland Act 1998 s 53 and Sch 5 Part II E4 – exceptions.
[264] S 64(3).

**Power to make byelaws**

5.12 Where an airport in Scotland is designated for the purpose by an order made by the Scottish Ministers (or previously the Secretary of State) or is managed by the Scottish Ministers, the airport operator (whether the Scottish Ministers or some other person) may make byelaws regulating "the use and operation of the airport and the conduct of all persons within the airport".[265] The Scottish Ministers retain the power to revoke byelaws in certain circumstances.[266]

5.13 In addition to the general purpose of the byelaws as stated in section 63(1), section 63(2) contains specific examples of the matters which may be regulated by byelaws under this section.[267] Of particular interest to our consideration of the foreshore are byelaws securing the safety of persons using the airport, preventing danger to the public[268] and prohibiting or restricting access to any part of the airport.[269]

5.14 Where the Scottish Ministers intend to make such byelaws, they require to take appropriate steps to give the public notice of the proposed byelaws and to give an opportunity for public representations to be heard and considered before the byelaws are made.[270] Special procedural restrictions apply to byelaws proposed by an airport operator other than the Scottish Ministers.[271] These include a requirement to advertise the proposed byelaws in local newspapers and to provide a period of one month within which representations on the content of the byelaws may be made. There is no provision similar to that under the Military Lands Acts requiring specific consent to the infringement of the public's rights to the foreshore. Presumably this is because byelaws under the 1986 Act must be either made or confirmed by the legislature whether or not there is any proposed infringement of the public's rights.

5.15 It should also be noted that there are few instances of the foreshore being included within the boundaries of airports. In Scotland there is only one example of which we are aware of the foreshore being used for the landing and departure of aircraft.[272] There are other examples where airport infrastructure (other than runway) are located on the foreshore.[273]

5.16 There are existing statutory provisions requiring public consultation prior to the introduction of byelaws regulating the use of areas of the foreshore which may comprise part of an airport. In the absence of evidence that such consultation does not safeguard the public's interest in the foreshore, we do not propose to make any recommendations for reform.

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[265] 1986 Act s 63(1). Byelaws made by the Scottish Ministers are made by Statutory Instrument; s 63(7). Byelaws made by another person do not have effect until confirmed by the Scottish Ministers; s 63(5). The following Scottish airports are designated for this purpose :– Aberdeen, Benbecula, Edinburgh, Glasgow, Inverness, Islay, Kirkwall, Prestwick, Stornoway, Sumburgh, Tiree and Wick (Airport Byelaws (Designation) Order 1987 SI 1987/380); Dundee (Airport Byelaws (Designation) (No 2) Order 1987 SI 1987/2246); Barra Traigh Mhor (Airport Byelaws (Designation) Order 1995 SI 1995/2474) and Campbeltown (Airport Byelaws (Designation) Order 1996 SI 1996/2617).

[266] S 64(3).

[267] S 63(2)(a)–(k).

[268] S 63(2)(a).

[269] S 63(2)(f).

[270] S 63(6).

[271] S 63 (5) and sch 3.

[272] Barra Traigh Mhor. No byelaws have been made in relation to Barra Airport under s 63.

[273] There are landing lights mounted on the foreshore at Stornoway airport.

# Part 6 Crofting and Udal Land

**Crofting – an introduction**

6.1 In carrying out our research we had access to the relevant responses to the Scottish Executive Land Reform Policy Group consultation papers. Several consultees mentioned rights of access to the foreshore and rights to make use of the foreshore that are not generally accepted as public rights.

6.2 We have considered the rights held by the public at large over the foreshore in Part 4. However it appears that there is a common view that crofters may be able to claim additional rights beyond the general public rights, as a consequence of their status. We have been asked to consider whether crofting tenure does in fact carry with it any special rights in relation to the foreshore. Here we are considering the situation where the foreshore is not included in the croft itself.[274]

6.3 The definition of a croft given in the Crofters (Scotland) Act 1993[275] ("the 1993 Act") is such as to include any holding defined as a croft in any of the previous crofting statutes.[276] A croft is therefore a small agricultural holding the rent of which does not exceed 50 pounds yearly or the area of which does not exceed 50 acres, and is held from year to year by a tenant who resides on or within 2 miles of the holding and who by himself or with his family and with or without hired labour cultivates the holding.

6.4 The nature of crofting is such that a right to gather seaweed, traditionally for manuring purposes, and to use the foreshore for the landing, drying and repair of boats and nets can be very important. It is primarily with these rights together with rights of access to the foreshore, that respondents were concerned.

6.5 Crofting tenure was substantially created in 1886 following the Report of the Napier Commission in 1884.[277] The Crofters Holdings (Scotland) Act 1886 ("the 1886 Act") provided for security of tenure for crofters, payment of a fair rent and payment of compensation for any permanent improvements made by the crofter or any member of his family on quitting the tenancy.

**The history of gathering seaweed**

6.6 During the Parliamentary debate on the passage of the 1886 Act the question of rights to seaweed was raised.[278] The importance of the right to use seaweed for fertiliser was stressed. In addition, kelping was a source of income for some crofters who sold it

[274] In cases where the foreshore was included, the crofter could exercise all the rights of the owner, to the extent that these were included within the grant.
[275] A consolidation of previous legislation.
[276] S 3 Crofters (Scotland) Act 1993 and see also the Crofters Holding (Scotland) Act 1886, the Small Landholders (Scotland) Act 1911, the Crofters (Scotland) Act 1955, the Crofters (Scotland) Act 1961 and the Crofting Reform (Scotland) Act 1976.
[277] 1884 Report and Minutes of Evidence C3980, London: HMSO.
[278] Hansard 1886 304 April 6 925-941.

commercially to the iodine industry. It was recognised that as a result the right to use seaweed was a frequent cause of disputes. It was proposed that the Land Commission[279] would be empowered to regulate existing rights in relation to seaware. The regulation of the collection of seaweed was something that could be regarded as a pertinent to the crofting tenancy and was therefore not included among the statutory terms of tenancy. It was recognised that property in the seaweed was held by the owner of the land neighbouring the foreshore only if he could demonstrate his right through express grant or immemorial possession. Otherwise it would belong to the Crown. Once the Crofters Act 1886 came into force, it was envisaged that crofters' existing rights to collect seaweed would become pertinents of their crofting leases and their tenure protected. The value of the protected rights would be taken into account in the rent proposed by the Land Commission. However, it was accepted that a crofter could acquire rights to gather seaweed from his landlord only by way of a grant under his lease, and that such a right could not be acquired through prescription or any other method in the absence of such a grant.

6.7 Thus it was not thought that crofters had additional rights over the foreshore by virtue of their particular status, but rather that any additional rights arose as a pertinent of their particular leases. Once the crofting tenure itself was made secure, any rights granted under the lease also became protected.[280] We should therefore stress that such rights do not accrue to crofters generally either under the Crofting Acts or the common law. A good example of such a crofting pertinent, though not in relation to the foreshore, can be found in *Mackay v. Pickles*.[281] Here part of the common grazings of the crofting community was resumed and sold. The crofters had used this land for grazing sheep, laying up and repairing boats, drying nets and other activities associated with fishing. The Land Court held that these rights could not be defeated by the sale of the land. However, this did not detract from the fact that the land in question was private property and could be used only for these purposes by these particular fishermen as pertinents of their crofts, rather than the land being in any kind of shared ownership or subject to any other rights.

6.8 It should be noted that while cottars[282] may also enjoy similar rights in terms of their grant, they do not benefit from the same security of tenure as crofters and thus their enjoyment of any pertinent right is not secure.

**Regulation of crofting pertinents**

6.9 Collection of seaweed is the main example of a right which may be held by crofters over the foreshore that is not held by the general public. Two sections of the 1993 Act permit the regulation of the exercise of this right.

6.10 Section 48(1)(c) of the 1993 Act imposes a duty on grazings committees to make and administer common grazings regulations with respect to the use and management of the

[279] The predecessor of the Crofters Commission.
[280] *Macdonald v. Macdougall* (1896) 23 R 941 in which crofters were entitled to proof as to whether the right to collect seaweed had been included in their rent; *Little v. Trs of Countess of Sutherland* 1979 SLCR App 18 in which it was held that once a right of access (as distinguished from a right of way) existed it could not be taken away.
[281] 1977 SLCR App 42.
[282] A cottar is defined in s 28(4) of the 1955 Act as "the occupier of a dwellinghouse situated in the crofting counties with or without land who pays no rent, or the tenant from year to year of a dwellinghouse situated as aforesaid who resides therein and who pays therefor an annual rent not exceeding six pounds, whether with or without garden ground but without arable or pasture land".

common grazings. Section 49 of the 1993 Act details the matters in respect of which the grazings committee shall make regulations. Section 48(2) states:

> "Without prejudice to the generality of the power conferred on a grazings committee by section 48(1)(c) of this Act, common grazings regulations shall make provision with respect to the following matters –
>
> (f) where appropriate, the cutting of peats and the collection of seaweed".

This duty to regulate is only applicable to the collection of seaweed from the foreshore where this relates to common grazings.[283] Common grazings regulations cannot regulate the use of seaweed by crofters in relation to their individual crofts. The duty also only applies "where appropriate". This statutory duty to regulate the collection of seaweed does not affect the nature of the right itself, or how that right may be constituted.

6.11 The 1993 Act empowers the Crofters Commission to regulate the use of seaweed in certain circumstances. Section 52 states:

> "(9) The Commission may draw up a scheme regulating use by crofters on the same estate of peat bogs, or of seaweed for the reasonable purposes of their crofts, or of heather or grass used for thatching purposes, and the charge for all or any of these may be included in the rents fixed for the crofts.".

6.12 Section 52 contains a mixture of miscellaneous provisions concerning common grazings and related matters. It appears that subsection (9) is not restricted to common grazings in its application. Rather it is concerned with the situation where a number of crofters enjoy rights over the same area of foreshore (or peat bog as the case may be). Again, the statutory provisions provide a means by which existing shared pertinent rights may be regulated. They do not provide a basis for extending such rights to those crofters who are not entitled to them in terms of their leases.[284]

6.13 The Land Court has a general jurisdiction over all matters arising under the 1993 Act.[285] However, the Land Court does not have a power to grant a pertinent, only to confirm that it exists and if necessary to take account of it in consideration of the rent.[286]

6.14 In summary, any rights enjoyed by crofters in relation to the foreshore are rights arising under their individual tenancies.[287] Such rights are not statutory, nor are they common law rights available to crofters generally as a result of their status. Several of the land reform consultation responses would suggest that the public do not understand the current legal position. A number of recent cases illustrate the difficulties which can then arise.

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[283] "common grazings" are not defined under the Act.

[284] The power under s 52 has not been exercised by the present Crofters Commission since its creation in 1955. The Crofters' Commission is of the view that the present demand for seaweed is not such that regulatory schemes are required.

[285] Whether law or fact: Scottish Land Court Act 1993, s 1(6).

[286] *Campbell v. Trs of 10th Duke of Argyll* 1960 SLCR App 71.

[287] Either by express grant from the landlord or as an implied term of their lease by long user.

**Commercial use**

6.15 In the light of the LRPG consultation responses, we considered whether in the interests of consistency, all crofters should be given a general pertinential right of gathering seaweed on the foreshore. However we foresee a number of difficulties with such a proposal. The foreshore and the right to gather seaweed will be owned either by a private landowner or by the Crown. Any extension of the pertinential rights could therefore be at the expense of private rights of ownership. Accordingly, compensation may be payable in respect of any interference with these rights. While the landowner could be compensated through an increase in rental, where the foreshore remained held by the Crown, the Crown would have no direct relationship with the crofter and so would require to be compensated separately. Also problems could arise where the crofter purchased his croft. How would he retain his right? It would not, for example, qualify as a servitude. Furthermore, not all crofts are adjacent to the foreshore. Would inland crofts also qualify for such a right?

6.16 It should also be noted that in the Land Reform (Scotland) Bill, access rights do not extend to "taking away anything in or on the land".[288] So far as we are aware significant problems do not arise at present. We have been unable to formulate strong arguments in favour of extending more beneficial rights to crofters, however, we welcome consultees' views on the matter.

6.17 The current debate on land reform has raised the question whether crofters should be entitled to exploit the pertinents of their crofts for commercial benefit. Crofters in North Uist have been charged by the local landlord for collecting seaweed which the crofters then sold to an alginate company. This case has proved controversial.[289] While the right to gather seaweed must be granted or acquired as a pertinent of the croft, it may be unusual for the terms of the grant to stipulate the limit of the seaweed that may be used, or the purpose for which it may be gathered. Unless the Crofters Commission (or where the rights relate to the common grazings, the common grazings committee) has exercised its statutory powers of regulation, there may be no clear limit on the amount of seaweed that may be gathered. It may therefore be possible to argue that the right to collect seaweed extends to commercial exploitation.

6.18 We would not support such an argument for the following reason. A servitude to take, for example, peat can be exercised only for the use of the dominant tenement. It could therefore be argued that a right which is a pertinent of a croft should be similarly limited. Pertinents by nature are to be used for the benefit of the land in question. This view is supported by section 52 of the 1993 Act which restricts the use permitted under Commission schemes regulating use of seaweed to the "reasonable purposes of the crofts". Given the apparent lack of clarity we consider that it would be of benefit to set out clearly that in the absence of express wording to the contrary, a pertinent right to gather seaweed extends only to that required for the purpose of the croft.

6.19 Another recent case which provoked controversy involved fish farmers on Skye.[290] Local crofters who also held fish farming licenses were being charged by the private landowner for taking their fish across the foreshore. There is a public right to land fish on

[288] Land Reform (Scotland) Bill, s 5(4)(e).
[289] See *eg Scotland on Sunday* 19 April 1998 "Crofters angry as earl levies feudal tax on seaweed"; *The Sunday Telegraph* 19 April 1998 "Crofters labour under the burden of seaweed tax".
[290] Information supplied by the Scottish Executive Rural Affairs Department.

the foreshore and this cannot be affected by the fact the foreshore is in private ownership. Since the public right to fish includes the right to fish for commercial purposes, it might be thought that the public right to land fish would include fish caught for commercial gain. However, in this case, the fish were farmed, *ie* they were not "caught" as an exercise of the public right but were owned by the fish farmer. It is not clear whether the public right to land fish would include fish that were privately owned. The question is answered (to some extent) in the Land Reform (Scotland) Bill. Access rights include the right to cross land. [291] The transport of goods over land is not prohibited by section 5, although the use of a mechanically propelled vehicle is. [292] Goods would therefore have to be carried by hand to fall within the statutory access right.

6.20 In *Earl of Stair v Austin*[293] it was held that the holder of a barony title which included the foreshore had no right to exclude commercial shellfishing boats from a harbour created by the title holder on the foreshore. This can be contrasted with the view of GWS Barry WS expressed in the *Stair Memorial Encyclopaedia* that:

> "where the foreshore used for access purposes [to the fish farm] is not in the ownership of the Crown the consent of the owner (if not the operator or adjoining landowner) will also be required.".[294]

**Servitude of wreck and ware**

6.21 The servitude of wreck and ware has been recognised for several centuries. The servitude comprises a right in favour of the dominant tenement to gather seaweed and other sea produce from the servient tenement comprising the foreshore.[295] The extent of the right is restricted to the quantity of produce necessary for domestic purposes. The proprietor of the dominant tenement can not therefore extract seaware for commercial gain.[296]

**Additional rights not servitudes**

6.22 It is clear that any additional rights claimed by crofters either of access to the foreshore or of use once there cannot be servitude rights. For a servitude to exist there must be a dominant and a servient property held in separate ownership.[297] In the case of a croft with pertinents, often the same person, *ie* the croft owner, owns both the croft land and the land over which a right is claimed. In these circumstances there is only one tenement and thus there can be no servitude right.[298] Nevertheless, the croft owner could have a servitude right over the foreshore when it is owned by another proprietor or the Crown. In these circumstances, the crofter will only be able to enjoy the servitude rights if granted the right by the croft owner. Accordingly the crofter's right to use the servitude arises from his lease or another agreement with the croft owner. If the crofter bought his croft under the

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[291] S 1(2)(b).
[292] S 5(3).
[293] *Earl of Stair v Austin* (1880) 8R 183.
[294] *Stair Memorial Encyclopaedia* Vol 11 para 61.
[295] *Fullarton v Adamton & Monkton* (1697) Mor 13524; *Earl of Morton v Covingtree* (1760) Mor 13528.
[296] *McTaggart v McDouall* (1897) 5M 534 at 547, *per* Lord Balfour; *Agnew v Lord Advocate* (1873) 11M 309 at 333 *per* Lord Neaves.
[297] Reid, *Property*, para 443.
[298] *McKechnie v. McDiarmid and Others* 1919 SLCR App 49 in which it was held that a right of access was not a servitude but rather an "incident of the subjects let" which "can be looked on as a pertinent of the croft".

provisions of the Crofting Reform (Scotland) Act 1976, it would be then possible for him to acquire directly a servitude of collecting seaware.[299]

**Conclusion**

6.23 Crofters may have rights to undertake activities on the foreshore in addition to the general public rights. Where these rights arise, they do so as a pertinent of the individual crofting lease rather than as a result of the common law of the foreshore or the statutory law of crofting. The rights are restricted to those rights either explicitly granted in the tenancy agreement or impliedly incorporated in the grant from long usage. We see no justification for extending to crofters a general statutory right to gather seaweed. Some crofters seem to be unclear as to whether these rights can be exercised beyond what is required in connection with the operation of the croft. This has been a cause of dispute for many years. We propose that it should be clarified that pertinent rights to gather seaweed are restricted to the extent required for the use of the croft.

**Questions for consideration**

6.24 We would welcome responses to the following question:

**7. (a) Do you agree that there are no significant grounds for the creation of a general statutory right to gather seaweed in favour of crofters?**

**(b) Do you agree that any pertinential right to gather seaweed should be restricted to what is required for the purposes of the croft, and that in the interests of clarity there should be a statutory statement to this effect?**

**Udal Law – an introduction**

6.25 Another area of public interest which was reflected in the LRPG consultation concerns the law relating to the foreshore and seabed in Orkney and Shetland, where the residual system of landholding is udal. Again, we have been asked by the Scottish Executive to include the consideration of this matter within our remit. We therefore now turn to consider whether there are any issues which are peculiar to udal land which are relevant to the current review of the law of the foreshore and seabed.[300]

6.26 A brief account of the historical background to the annexation of Orkney and Shetland and the development of the system of law applied in the islands is appropriate.[301] As early as the seventh or eighth century AD, Orkney and Shetland had been colonised by emigrants from Norway. In 872 the Islands were incorporated into Greater Scandanavia and Norwegian domination continued for a further six hundred years. Norse law brought with it an allodial system of landholding and related rights – udal tenure. The significant difference between udal land and feudal tenure was that land was owned outright and the King was not paramount superior or ultimate owner of all land.

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[299] Reid, *Property*, paras 318, 526.

[300] This is not intended to be an exhaustive treatise on udal land law and is restricted to those aspects which impact on the law of the foreshore and seabed. For a full discussion see *Stair Memorial Encyclopaedia* Vol 24, paras 307-329.

[301] See *Stair Memorial Encyclopaedia* Vol 24 at paras 302 – 306, 326; W Howarth The Salmon, the Crown Estate and Udal Law 1988 J.R. 91 at p 99.

6.27 In 1468-9 Orkney and Shetland were pledged to James III of Scotland in security for the dowry of Queen Margaret. Norse law continued to be applied in the Islands following their pledge to Scotland. The Parliament of Scotland recognised in 1567 that the Islands had their own system of law which ought to be respected.[302] Gradually, however, Scots law became of increasing significance. At times the two laws were used in combination, with unscrupulous persons using aspects of each as suited their particular circumstances. This led to an Act of the Privy Council of 1611 purporting to abolish the "foreign" laws of Orkney and Shetland.[303] However, the Act is not generally regarded as having done so, given the continued retention of the udal system of landholding.

6.28 It has been argued that the current status and extent of udal law in Orkney and Shetland is debatable, there being two differing judicial views on the matter.[304] On the one hand that of Lord Lee*:*

> "the whole system of law in Shetland is different from the common law of Scotland except in so far as it has been assimilated by legislative enactment or gradual adoption.".[305]

And on the other hand, the modern judicial view of Lord Hunter*:*

> "Lord Lee's *dictum* is only valid if one bears in mind that the exceptions far outweigh the rule in quantity and importance … it is probably more accurate to say that the ordinary statute and municipal law of Scotland operates, except in so far as there is some speciality still extant in Orkney and Shetland which modifies it.".[306]

It would appear that very few aspects of udal law are now recognised by the courts as having any effect.[307] The principal of these is udal land law.

**Udal law of the foreshore**

6.29 The leading case of *Smith v Lerwick Harbour Trustees*[308] concerned competing feudal and udal titles. The pursuer held a udal title which included the foreshore. The Crown had granted a foreshore title to the defenders which they claimed was valid founding on the Crown's sovereignty or *jus coronae*. The Lord Ordinary (Kincairney) stated that in terms of feudal theory all Crown rights seemed to be excluded but the Crown's prerogative rights were not:

> "that the *jus coronae* extends over the whole lands of the kingdom, udal as well as feudal, and would support a right to lands in Orkney and Shetland to which no other right could be produced.".[309]

However, as the pursuer in this case had a udal title, the *jus coronae* did not prevail. In the Inner House, Lord Kinnear distinguished between the Crown's interest as protector of the

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[302] APS iii, 41 – articles to this effect were presented to the Parliament but the Parliament's pronouncement thereon is not universally regarded as having amounted to an Act of the Parliament – see *Stair Memorial Encyclopaedia*, vol 24 at para 304.
[303] *Register of the Privy Council of Scotland 1545-1689* (1st Series) ix, pp 181-182.
[304] By Jane Ryder in *Stair Memorial Encyclopaedia*, Vol 24, para 304..
[305] *Bruce v Smith* (1890) 17R 1000 at 1014.
[306] *Lord Advocate v Aberdeen University and Budge* 1963 SC 533 at 540, 1962 SLT 413 at 415.
[307] See Lord Patrick in *Lord Advocate v Aberdeen University and Budge* at page 556.
[308] *Smith v Lerwick Harbour Trs* (1903) 5F 680, 10 SLT 742.
[309] At page 684.

public rights over the foreshore and the Crown's property rights in the foreshore. As regards the public rights, the Crown's interest in relation to the foreshore in Shetland and that of the rest of Scotland was no different. It followed that the Crown still retained:

> "a supreme title over it for protecting all the rights and purposes of navigation great or small, and possibly also for protecting such other public uses as may be established by long possession.". [310]

In relation to the Crown's property rights, he took the view that:

> "If the *solum* [of the Shetland Isles] as a whole is not originally the property of the Crown, I know of no authority, and can see no reason, for holding that part of it which is called the foreshore is Crown property." .[311]

6.30 Accordingly, where a udal title includes the foreshore, the Crown has no proprietary rights in the foreshore. It is common for udal titles to extend "from the lowest of the ebb to the highest of the hill"[312] and therefore to include the foreshore within the grant. The Crown still has an interest in the foreshore, but only as protector of the public rights.

6.31 This can be contrasted with the Crown's position in the case of two competing feudal titles. In *Lerwick Harbour Trustees v Moar*,[313] the defender held a feudal title which did not extend to the foreshore although the land was *ex adverso* the foreshore as in *Smith*. The Sheriff-substitute took the view that since there was no pre-existing udal title, the Crown had acquired rights to the foreshore by way of the prerogative under the doctrine that ownerless property belongs to the Crown. It could therefore competently grant a feu disposition of the foreshore to the pursuers and the defender's non-udal title could not defeat the purchasers' rights acquired from the Crown. We would welcome consultees' views on whether the legal status of competing titles to the foreshore is at present sufficiently clear, or whether statutory clarification would be helpful.

6.32 It has been suggested that a udal title to the foreshore may carry with it certain important ancillary rights.[314] The nature and extent of these rights are not clear. Some examples are recorded in the Islands' ancient records as having been exercised by foreshore proprietors under udal titles.[315] However, to ascribe different rights to udal foreshore proprietors would not merely result in them having different rights from those on mainland Scotland. Within the islands themselves, proprietors' rights would differ depending on whether they held the foreshore under a udal title or a Crown grant.

6.33 The Land Registration (Scotland) Act 1979 provides that, once Orkney and Shetland become operational areas,[316] a grantee of a udal title will only obtain a real right on registration.[317] At present a real right can be obtained by possession without recording a deed in the Sasine Register. Where an applicant's claim to the foreshore appears

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[310] Lord Kinnear in *Smith* v *Lerwick Harbour Trs* (quoting Lord Moncrieff in *Officers of State v Smith (1846)* 8D 711) at page 692.
[311] *Per* Lord Kinnear at p 692.
[312] See Lord Kinnear in *Smith* at page 693.
[313] 1951 SLT (Sh Ct) 46.
[314] *Stair Memorial Encyclopaedia* vol 24, para 314.
[315] These include bait within the ebb and hunting seal. *Ibid*. It has also been suggested examples from Norway and Iceland could be considered. For the modern position in Norway, see Appendix 2.
[316] Currently scheduled for 1 April 2003: *Registration of Title Practice Book*, 6.86.
[317] Land Registration (Scotland) Act 1979, s 3(3). Transfer of an interest held on udal tenure induces first registration: 1979 Act, s 2(1)(a)(v).

challengeable, the Keeper is required to notify the Crown Estate Commissioners.[318] The extent of udal ownership of the foreshore and its interaction with the Crown's interest in land in the Shetland and Orkney Islands may therefore acquire greater significance once the Counties become operational. By requiring registration of udal titles, the 1979 Act takes a step towards assimilating udal titles with feudal ones. Our preliminary view is therefore that in the absence of persuasive modern authority for the existence of a different system of pertinent rights, we do not propose that separate ancillary pertinent rights be recognised under udal law. However, we would like to hear consultees' views on this point, particularly in the light of their practical experience.

**Questions for consideration**

6.34 We would therefore welcome views on the following question:

**8. (a) In the interests of clarity and consistency, should legislation make clear that a pre-existing udal title to the foreshore in Orkney and Shetland would defeat a subsequent grant of the property by the Crown?**

**(b) Do you agree with our proposal that separate ancillary pertinent rights should not be recognised under udal law?**

**Udal law of the seabed**

6.35 The economic importance of fish farming in the waters off Shetland caused a special case to be brought before the Court of Session,[319] *viz Shetland Salmon Farmers and the Trustees of the Port and Harbour of Lerwick v Crown Estate Commissioners.*[320] The Shetland Salmon Farmers and the Port Trustees were in dispute with the Crown Estate Commissioners as to whether the consent of the Commissioners was required in respect of operations carried out on, or affecting, the seabed around Shetland. Three questions were posed. Was the ownership, occupation and management of the seabed off Shetland governed by udal law? Did the Crown have a right of property in the seabed? Could the Farmers and the Trustees carry out operations on the seabed without a grant or licence from the Commissioners?

6.36 The court held that the Crown had a right of property in the seabed. This did not derive from the Crown's position as ultimate feudal superior. Instead, it derived from the prerogative and vested in the Crown in terms of the prerogative. The basis of this property right is either the prerogative itself, or as the property belonged to no-one, stems from the doctrine that ownerless property belongs to the Crown. Question 2 was therefore answered in the affirmative and question 3 in the negative.[321] No evidence could be presented in debate on the ownership of the seabed under udal law and it was decided that the first question must be answered in the negative rather than simply ignored. As a result, unlike the position in relation to the foreshore, if a udal title to seabed below low water mark were produced, this would not take precedence over the rights of the Crown or its grantee.

6.37 This decision has been controversial. It has been suggested that it is inappropriate to ascribe to the Crown the ownership of the seabed around land which has its own distinct system of landholding under which the Crown is not recognised as ultimate landowner. [322]

[318] Land Registration (Scotland) Act 1979, s 14.
[319] For a discussion of the background to the case see Howarth *op cit*.
[320] 1990 SCLR 484, 1991 SLT 166.
[321] Although Lord Murray dissented to the extent that this implied that the Crown could alienate the seabed.
[322] See Professor Gordon's commentary: 1990 SCLR 512-513 at page 513.

It has also been argued that in terms of udal law, the seabed accedes to the shore.[323] The Crown's interest as defender of public rights in the seabed would have been sufficient to safeguard the public interest. It would not therefore have been necessary for the Crown to establish a patrimonial interest in the seabed to answer the question at issue before the court.

6.38 If udal law does apply to the seabed, then on the basis of *Smith v Lerwick Harbour Trustees*[324] it could be argued that *Shetland Salmon Farmers* is wrongly decided in so far as udal titles to the seabed exist. However, we query whether this question is of significant practical importance given that it is unlikely that any such titles can be produced.

[323] *Ibid.*
[324] (1903) 5F 680, 10 SLT 742.

# Part 7 Harbours

## Introduction

7.1 As we have seen,[325] the theoretical basis of the Crown's interest in the seabed and foreshore has changed over the centuries. It is now accepted that the Crown has full ownership of the seabed and can alienate the seabed to third parties.[326] But until well into the nineteenth century,[327] the predominant view was that the seabed was part of the *regalia majora* and consequently could not be alienated.[328] This is important when considering the law on harbours and the problems which have recently arisen between harbour authorities and the Crown Estate Commissioners. [329]

## Ownership of the seabed

7.2 The right of port and harbour has long been regarded as one of the *regalia minora*. Consequently, it can be alienated by the Crown to a third party. This could be done when the Crown granted land to royal burghs in a barony. However, in the vast majority of cases, the right of harbour was granted by statute.

7.3 The grantee of a Crown grant has the exclusive right to establish a harbour for use by the general public and can levy harbour dues which must be used to maintain the harbour.[330] Like salmon fishings, the right of port and harbour is an example of an incorporeal separate tenement. The right can therefore be enjoyed separately from the ownership of the land and seabed which constitute the port or harbour. Put another way, the grant of port and harbour does not *per se* convey the ownership of the land and seabed which make up the harbour. Indeed, when the ownership of the seabed was considered to be inalienable by the Crown, it would follow - at least as a matter of theory - that the ownership of the seabed could not be conveyed in a grant of port and harbour. Even where the grantee was given authority to build a harbour on the seabed, there would still be no grant of the ownership of the seabed.[331]

7.4 It is now settled that the Crown can alienate the seabed, subject to the public's rights.[332] However, since the Harbours Docks and Piers Act 1847, statutes establishing harbours invariably contain a savings clause, reserving the Crown's ownership of the

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[325] Above para 3.3ff

[326] *Shetland Salmon Farmers Associated v Clyde Navigation Trs* 1991 SLT 166.

[327] The crucial decision is *Lord Advocate v the Trs of the Clyde Navigation* (1891) 19R 174.

[328] *Agnew v Lord Advocate* (1873) 11M 309.

[329] For examples see correspondence in the *Argyllshire Advertiser* 18 & 25 February 2000, 10 March 2000 and 14 April 2000; *Stornoway Gazette* March 2000 " Crown Estate a 'protection racket' claims Harbour Commission chief"; *Fishing News* 24 March 2000 "Bid to buy Crown Estate assets"; *The Herald* 3 February 2000 "Crown demands Tarbert Harbour rent".

[330] See generally Reid, *Property* paras 335 ff; Gordon, *Scottish Land Law* 10-04ff.

[331] *Trs of the Harbour of Scrabster v James Sinclair* (1864) 2M 884 the statutory power given to the trustees to acquire land for the formation of a harbour, 'did not make them *ipso facto*, *domini* of the *solum* of what was to form the area of the harbour': (*per* Lord Curriehill at 888). On the other hand, Craig suggested that the structures which constitute the harbour, for example, a pier, are owned by the grantees of the right of port and harbour even though the structures have acceded to land, the seabed, which is owned by the Crown: *Ius Feudale* i.15.15. *Sed quaere?*

[332] *Lord Advocate v The Trs of the Clyde Navigation* (1891) 19R 174; *Shetland Salmon Farmers Association v Crown Estate Commissioners* 1991 SLT 166.

seabed. In other words, it is clear that the statute merely confers a right of port and harbour and does not dispone the seabed to the grantee. If the harbour authorities wish to use the seabed, they must approach the Crown Estate Commissioners who will usually be prepared to lease part of the seabed to them. And, of course, the Commissioners will charge rent for the lease of the seabed.

7.5 Where land has been disposed by the Crown for the purpose of providing a harbour, it is submitted that *prima facie* the seabed of the harbour is not included. This is because the right of port and harbour *per se* is a separate tenement. Where the deed is ambiguous, it is thought that there is a rebuttable presumption against the seabed being included.[333] Ultimately it will be a matter of construction of the deed or statute to determine whether ownership of the seabed was conveyed to the grantee. In the absence of an express grant of the seabed to the harbour authorities, instances will be rare.[334]

7.6 Given the technical, if not obscure, nature of this area of the law, it is not surprising that it has given rise to some degree of dissatisfaction. In particular, harbour authorities who believed they owned the seabed of the harbour have been upset to discover that this is not the case and that they must lease the seabed from the Crown Estate Commissioners.

7.7 The law in Scotland is settled that the ownership of the seabed does not pass with a grant of port and harbour. Unless there has been a separate disposition or lease of the seabed, harbour authorities have no proprietary rights in relation to the seabed of the harbour. Nevertheless, it is clear that harbour authorities are sometimes unaware of the limitations of their rights in relation to the ownership of the seabed of the harbour.

**Question for consideration**

7.8 We would welcome responses to the following question:

**9. In the interests of clarity and consistency, should there be a statutory statement that in the absence of an express statement to the contrary, the grant of a right of port and harbour does not include a conveyance of the seabed of the harbour?**

**Moorings**

7.9 As we have seen,[335] laying fixed moorings on the seabed has been held not to be an incident of the public right of navigation.[336] Therefore before fixed moorings can be laid, consent must be obtained from the owner of the seabed. *Prima facie* this will be the Crown. The Crown Estate Commissioners will charge for a licence to lay fixed moorings. Where the Crown Estate Commissioners have leased part of the seabed to a harbour authority, it is the lessee's consent that will be required. In these circumstances, the harbour authority will charge for use of the fixed moorings. Again, while the law is settled, it appears that it is unpopular with some harbour authorities and many mariners.

[333] Particularly in relation to old deeds, often in Latin.
[334] There is, however, at least one case known to us when the Crown Estate Commissioners have conceded that ownership of the seabed had been granted to harbour trustees.
[335] Paras 4.16-4.18 *supra*.
[336] *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* 1976 SC 156.

# Part 8 Property - Conveyancing Problems

**Introduction**

8.1 In this part, we consider three issues of practical significance where the current law is uncertain and should be clarified.

**Reclamation**

8.2 Where a person owns foreshore, the question has arisen whether the proprietor is entitled to any land which is subsequently reclaimed from the sea. When the increase in the land occurs as a result of alluvion,[337] it would appear that it accedes to the existing foreshore, *ie* the proprietor of the foreshore gains the land which has emerged from the sea:

> "In my opinion the boundary follows the sea. If the sea gains on the land, the proprietor bounded by the sea is so much the loser. If the sea recedes, he is so much the gainer.".[338]

8.3 Where the sea has receded, the loser is the Crown, which owned the seabed that has now been reclaimed. The reclaimed land belongs to the owner of the foreshore. The rationale was given by Lord Deas:[339]

> "I do not think, according to any view that ever has been taken of the law of Scotland, that ground *gradually* gained from the sea shore by alluvion can be claimed by the Crown when the Crown has parted with the whole property upon the shore.".[340]

8.4 Alluvion presupposes the gradual or imperceptible addition to the foreshore. If the change is the result of a violent alteration involving the detachment and redeposit of a distinct body of land, this is avulsion and the land does not accede, its ownership being unaffected by the physical alteration.[341] Accordingly, where land is reclaimed from the sea by deliberate human action (*opus manufactum*) this would appear to be avulsion and not alluvion. It should therefore follow that when land has been deliberately reclaimed from the sea, ownership should not be affected, *ie* the ownership of the reclaimed land should remain with the Crown.

8.5 Nevertheless, it has been suggested that alluvion operates even in relation to land reclaimed by deliberate action.[342] However, the authorities relied upon are not unambiguous.[343] Indeed, it has been held that upon the deliberate reclamation of land from a

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[337] *Ie* where dry land increases by the imperceptible addition of soil or the gradual retreat of the water.
[338] *Lockhart* v *Mags of North Berwick* (1902) 5F 136 *per* Lord Trayner at 144. See also *Mags of Culross v Geddes* (1809) Hume 553; *Todd v Clyde Trs* (1840) 2D 357.
[339] *Hunter v Lord Advocate* (1869) 7M 899 at 915.
[340] Italics added.
[341] For discussion, see *Stirling* v *Bartlett* 1993 SLT 763.
[342] Reid, *Property* para 593.
[343] In *Smart v Magistrates of Dundee* (1796) 3 Pat 606, the pursuer failed to obtain title to the reclaimed land: the Lord Ordinary's (Monbodo) dictum that a proprietor is entitled to land reclaimed *opus manufactum* is obiter. *Campbell v Brown* 18th Nov 1813 FC was a dispute between coterminous feuars as to the ownership of reclaimed land. The Crown was not involved. Similarly, the right of the Crown to claim such land was left open in *Magistrates of Montrose v Commercial Bank of Scotland* (1886) 13R 947.

tidal river the reclaimed land did not accede to the land of the riparian proprietors.[344] In *Smith* v *Lerwick Harbour Trustees,*[345] Lord Kinnear maintained that the Crown did not automatically lose title to land which had formerly been the foreshore because it had been reclaimed *opere manufacto*. The most he would concede was that, "If the proprietor of the adjoining land encloses a part of the foreshore and converts it into dry ground that will no doubt be a very distinct assertion of a right and it will go to establish a claim of property if he has possessed for sufficient time upon an *ex facie* sufficient title.".[346]

8.6 This area of law is uncertain. We think it is desirable to clarify the position. It would be more consistent with the established doctrines of alluvion and avulsion that an owner should not automatically lose his ownership of the seabed, foreshore or the alveus of non-tidal rivers if it is reclaimed and attached to neighbouring land. This is of particular economic importance given the increase in reclamation projects.

**Question for consideration**

8.7 We would welcome responses to the following question:

**10. In the interests of clarity and consistency, should there be a statutory rule that ownership of land should not be affected by deliberate reclamation?**

**Standard rules of construction of deeds**

8.8 As we have seen[347] the Crown's property in the foreshore can be alienated, subject to the public's rights of use. The ownership of the foreshore is not carried automatically by a grant of lands which lie adjacent to the sea,[348] but if the title is sufficiently wide to include the foreshore it may be acquired by prescriptive possession.

8.9 The grant may expressly state that the foreshore is included. However, even if the foreshore is not mentioned, it may be included within the boundaries of the grant. If there is nothing else in the description to indicate the contrary, where a property is described as being bounded by the "sea" or (tidal) "river" or "lowest ebb", the boundary will be the low water mark of ordinary spring tides and the foreshore will be included.[349] Conversely, if the seaward boundary is described as the "full sea" or "sea flood" or "flood mark", then the boundary is the high water mark of ordinary spring tides and the foreshore is excluded.[350] Where the subjects are described as being bounded on the seaward side by the "beach", the "sea beach" or the "seashore", there has been doubt whether or not the foreshore is included.[351] Although contrary to the usual rule that the boundary feature lies outside the property being described, it has been contended that the foreshore should be included.[352] If in addition to the words "sea beach" or "sea shore" there are words which indicate another

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[344] *Todd v Clyde Trs* (1840) 2D 357; *Lord Advocate* v *Clyde Trs* (1849) 11D 391.
[345] (1903) 5F 680.
[346] *Ibid* at 691.
[347] Above paras 3.5ff.
[348] Even the grant of a barony title to lands next to the sea does not automatically grant the foreshore: *Agnew* v *Lord Advocate* (1873) 11M 309; *Lord Advocate and Clyde Navigation Trs v Lord Blantyre* (1879) 6R (HL) 72; *Mather* v *Alexander* 1926 SC 139. *Cf Lord Advocate* v *Weymss* (1899) 2F (HL) 1 *per* Lord Watson at 9.
[349] *Luss Magistrates v Earl of Dundonald* (1769) Mor 12810; *Young v N B Railway* (1887) 14R (HL) 53; *Smith v Lerwick Harbour Trs* (1903) 5F 680.
[350] *Berry v Holden* (1840) 3D 205; *Magistrates of St Monance v Mackie* (1845) 7D 582.
[351] *Magistrates of Musselburgh v Musselburgh Real Estate Co Ltd* (1904) 7F 308 (The Court was equally divided on the point).
[352] Reid, *Property* para 315.

physical marker, for example, a wall or a delineation on a plan and the latter exclude the foreshore, the foreshore may well be excluded.[353]

8.10 These rules of construction can appear arbitrary. It might therefore be thought that it would be valuable to enact a consistent system of rules of construction to apply to the seaboard boundary of lands. However there are difficulties with such a proposal. In practice, such rules would be pointless unless they had retrospective effect. This might impact on existing property rights raising human rights issues, in particular, Article 1 of Protocol 1 of the European Convention on Human Rights. It would also have far-reaching consequences for titles already registered in the Land Register without exclusion of indemnity. We can foresee technical difficulties with the drafting of any such rules and our investigations have not shown a pressing need for such reform. We would however welcome consultees views on this point.

**Question for consideration**

8.11 We would therefore welcome consultees' views on the following question:

> **11. In the interests of clarity and consistency, do you consider it would be helpful and practical to define statutory rules of construction to apply to the seaboard boundary of lands?**

**Land Register**

8.12 As we have seen, where the boundary of land includes the foreshore, it may physically alter as a result of alluvion. This creates a difficulty for the system of land registration which is based on mapping of boundaries which are then guaranteed. Where the boundary has changed as a result of alluvion, rectification would appear to be the appropriate remedy.[354] It is also thought that the Keeper should expressly exclude indemnity in relation to changes in the boundary caused by alluvion.

8.13 However, reform of this difficult subject would be better considered as part of our review of the Land Registration (Scotland) Act 1979 within our Sixth Programme of Law Reform.[355] Accordingly we do not propose to discuss this matter further as part of this review.

[353] *Luss Estates Co v BP Oil Grangemouth Refinery Ltd* 1987 SLT 201.
[354] See R Rennie "Alluvio in the Land Register: Shifting Sands and the Thin Red Line" 1996 SLT (News) 41; *Registration of Title Practice Book* 260-3.
[355] Scot Law Com No 176, paras 2.13-2.17.

# Part 9 Summary of Questions

**Definitions**

1. In the interests of clarity and consistency, should there be a statutory statement that the Crown (in the absence of grant or prescription) owns the seabed under territorial waters and *inter fauces terrae* (*ie* between the jaws of the land)?

(Paragraph 2.6)

2. (a) Should there be a statutory definition of the meaning of tidality as the legal criterion for a public river?

(b) If so, should that definition be that where the ordnance survey map indicates the presence of the high and low water mark of ordinary spring tides, a river is tidal and therefore public?

(Paragraph 2.17)

3. Should there be a statutory statement that the foreshore is the land between the high and low water marks of ordinary spring tides and that the current ordnance survey map is definitive as to the level of such water marks?

(Paragraph 2.25)

**Crown Interest**

4. (a) Should it be made clear that decisions of the Crown in the exercise of its rights (whether patrimonial or those held in trust for the public) in relation to the seabed and foreshore are subject to judicial review?

(b) In so far as any transaction of the Crown Estate Commissioners is prejudicial to public rights in relation to the seabed and foreshore, should it be subject to judicial review?

(c) Should the sheriff have jurisdiction to determine the existence and extent of public rights in the seabed and foreshore by summary application in addition to the existing jurisdiction to make a declarator in the same way as it is envisaged he shall have in respect of access rights?

(Paragraph 3.23)

**Public Rights**

5. (a) Should the public rights in respect of the sea, seabed and foreshore be put on a statutory basis and the common law rights abolished?

(b) If so, should they be subject to regulation similar to that proposed for statutory access rights in the Land Reform (Scotland) Bill?

(c) If not, should there nevertheless be a statutory non-exhaustive definition of public rights of recreation and what should that definition be?

(d) Should the sheriff have jurisdiction to determine the existence and extent of public rights?

(Paragraph 4.45)

6. (a) Should Schedule 3 of the Prescription and Limitation (Scotland) Act 1973 be amended to include public rights as imprescriptible rights?

(b) If the answer to (a) is in the affirmative, does this apply equally to public rights which are tacit and those (if any) which are acquired by immemorial user?

(c) Should public rights over the foreshore be extinguished where the nature of the foreshore changes?

(d) If the answer to (c) is in the affirmative, should this occur by itself or be achieved by application to the Lands Tribunal for Scotland or some other body?

(Paragraph 4.54)

**Crofting and Udal Land**

7. (a) Do you agree that there are no significant grounds for the creation of a general statutory right to gather seaweed in favour of crofters?

(b) Do you agree that any pertinential right to gather seaweed should be restricted to what is required for the purposes of the croft and that in the interests of clarity there should be a statutory statement to this effect?

(Paragraph 6.24)

8. (a) In the interests of clarity and consistency, should legislation make clear that a pre-existing udal title to the foreshore in Orkney and Shetland would defeat a subsequent grant of the property by the Crown?

(b) Do you agree with our proposal that separate ancillary pertinent rights should not be recognised under udal law?

(Paragraph 6.34)

**Harbours**

9. In the interests of clarity and consistency, should there be a statutory statement that in the absence of an express statement to the contrary, the grant of a right of port and harbour does not include a conveyance of the seabed of the harbour?

(Paragraph 7.8)

**Property – Conveyancing Problems**

10. In the interests of clarity and consistency, should there be a statutory rule that ownership of land should not be affected by deliberate reclamation?

(Paragraph 8.7)

11. In the interests of clarity and consistency, do you consider it would be helpful and practical to define statutory rules of construction to apply to the seaboard boundary of lands?

(Paragraph 8.11)

## Appendix 1

# Statutory Controls affecting the Foreshore and Seabed

1. The foreshore and seabed in Scotland are subject to various statutory controls.

2. In general, planning legislation covers the foreshore.[1] However, there are additional statutory provisions regulating the foreshore and seabed, including those relating to the laying of pipelines and cables. The rules governing fish farming, National Parks, and nature reserves are also significant in relation to the foreshore and seabed.

**Planning**

3. The Town and Country Planning (Scotland) Act 1997 regulates in general terms, development over land for which planning permission is usually required.[2] Land is defined under the Act to include that covered by water[3] and development includes the

> "carrying out of building, engineering, mining or other operations on, over, or under land, or the making of any material change in the use of any buildings or other land.".[4]

There are exceptions to this general definition, for example, where certain work is carried out by local authorities or statutory undertakers.[5]

4. Where the foreshore is owned by a private individual, development is regulated in the normal way.[6] However, special rules apply to land owned by the Crown.[7] Where development is undertaken, Crown land is exempt from the enforcement procedures applying to land in general.[8] Furthermore, the consent of the Crown Estate Commissioners is required before certain specified orders can be made.[9]

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[1] Consolidated in the Town and Country Planning (Scotland) Act 1997, see *infra* paras 3 etc.
[2] S 28(1).
[3] S 277. In *Argyll and Bute District Council v Secretary of State for Scotland* 1976 SC 248 it was held that the definition of land included that above the low water mark.
[4] S 26(1).
[5] S 26(2)(c). Statutory undertakers are defined under s 214 of the Act as "persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply of hydraulic power or water, and a relevant airport operator."
[6] See in particular the provisions referred to in note 9, *infra*.
[7] "Crown land" is defined under s 242 of the Act as " land in which there is a Crown interest." A "Crown interest" means "an interest belonging to Her Majesty in right of Crown or belonging to a government department or held in trust for Her Majesty for the purposes of a government department." In our view the Crown's interest in the foreshore falls within the definition of "Crown land" for this purpose. See para 3.4 *supra*.
[8] S 243(1) provides that no enforcement notice will be served under s 127 in respect of development carried out by or on behalf of the Crown after 1 July 1948 on land which was Crown land at the time when the development was carried out.
[9] S 245(2) provides (a) that no order or notice shall be made, issued or served, in relation to Crown land under any of the provisions of ss 71, 72, 125, 127, 129, 140, 145, 160 or 179 or paras 1, 3, 5, and 6 of Sch 8 or any orders or regulations made pursuant to Pt VII, and (b) no interest in Crown land can be acquired compulsorily under Pt VIII of the Act without the consent of the "appropriate authority. " The "appropriate authority" in the case of

5. The Crown Estate Commissioners and the relevant planning authority can make agreements to ensure that the use of Crown land conforms to the development plan of the area and for the purpose of restricting or regulating the development or use of the land.[10]

**Pipe-lines and Cables**[11]

6. The regulation of pipe-lines and cables over the foreshore[12] will differ depending on the type of pipe-line under construction. "Local pipe-lines"[13] are controlled in the same way as local development, with planning permission required under the normal planning system. [14] On the other hand, "cross-country pipe-lines"[15] require authorisation from the Scottish Ministers by means of a pipe-line construction authorisation.[16]

7. If the water through which it is desired to lay a pipe-line is under the jurisdiction of a harbour authority, the consent of that authority must be obtained,[17] and the pipes laid subject to such conditions as may be imposed to ensure that there is no obstruction or danger to navigation.

8. A licence is not required for the laying of pipes and cables on the seabed under the Food and Environment Protection Act 1985, provided the operation is to deposit (but not to dispose of) a cable or cable laying equipment, in the course of cable laying or maintenance.[18]

9. The laying of pipes and cables over the foreshore and on the seabed must not interfere with public rights.[19] No works may be carried out on the foreshore or seabed that may result in obstruction or danger to navigation.[20] Nevertheless, consent may be given to such works in certain circumstances.[21] Moreover, where harbour authorities are undertaking tidal works,

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land belonging to Her Majesty in right of the Crown and forming part of the Crown Estate, means the Crown Estate Commissioners; s 242. Special enforcement procedures will apply where "development is carried out (on Crown land) otherwise than by or on behalf of the Crown at a time when no person is entitled to occupy it by virtue of a private interest"; s 243(2).

[10] S 246(1). Any agreement recorded in the Register of Sasines or registered in the Land Register is enforceable at the instance of the planning authority against any person deriving title to the land from the appropriate authority; s 246(3).

[11] For a detailed explanation of the relevant legislation, see Cusine D and Rowan-Robinson J "Wayleaves" in Rowan-Robinson and McKenzie Skene, *Countryside Law in Scotland*, pp 341-351.

[12] The Pipe-lines Act 1962 applies to the construction of pipes on land. S 66 of the Act defines "land" as including "land covered by water.".

[13] Under s 66(2) of the 1962 Act, local pipelines mean pipelines other than cross-country pipelines. Cross-country pipelines are defined as those whose length exceeds, or is intended to exceed, 16.093 km.

[14] By s 5 of the 1962 Act authorisation for the laying of the pipeline by the Minister is deemed to be the planning permission required under the 1997 Act.

[15] *Ie* those greater than 16.093 km in length; s 66(2) 1962 Act. The stipulated length was previously ten miles, before amendment by the Pipe-lines (Metrication) Regulations 1992 SI 1992/449.

[16] 1962 Act s 1, The Scotland Act (Transfer of Functions to the Scottish Ministers) etc. Order 1999 SI 1999/1750 Sch 1.

[17] 1962 Act s 39.

[18] Food and Environment Protection Act 1985, s 7 and Deposits in the Sea (Exemption) Order 1985 SI 1985/1699.

[19] It is the responsibility of the Crown to protect the public rights. See para 3.14 *supra* for a discussion of the role of the Lord Advocate as defender of the public rights.

[20] Coast Protection Act 1949 s 34 applies to (a) the construction, alteration or improvement of, or works on under or over any part of the seashore lying below the level of mean high water springs, (b) to the deposit of any object or any materials on any such part of the seashore as aforesaid, and (c) the removal of any object or any materials from any part of the seashore lying below the level of mean low water springs.

[21] Subject to such conditions as the Scottish Ministers think fit, having regard to the nature and extent of the obstruction or danger which otherwise would be caused or likely to result; s 34(3), Scotland Act 1998, s 53.

the Scottish Ministers can make regulations disapplying the operation of section 34 of the 1949 Act to such works.[22]

10. Statutory undertakers[23] are subject to different controls. Holders of a licence under the Electricity Act 1989 or the Telecommunications Act 1984 must obtain the agreement of the owners of the land before undertaking certain operations on the land.[24] Failing agreement, a licence holder under the 1989 Act can apply to the Scottish Ministers for the necessary wayleave to undertake the operation,[25] and under the 1984 Act the holder can apply to the court to dispense of the need for agreement.[26] The consent of the Crown Estate Commissioners is required before undertaking work on land in which there is a Crown interest.[27] In order to lay submarine pipe-lines, the consent of the Secretary of State[28] must also be obtained.[29] Moreover, in certain circumstances the Secretary of State for Defence may grant himself the power to lay oil pipe-lines.[30] The construction of other on-shore pipe-lines that begin and end in Scotland requires the permission of the Scottish Ministers.[31]

11. The consents required to lay a pipe or cable therefore depend to some extent upon the body undertaking the operation. In each case, the owner of the land over which the pipe or cable is to be laid is either notified or required to give their consent,[32] but there appears to be no statutory requirement to consider public rights in these circumstances. The interest of the Crown Estate Commissioners in the laying of pipes and cables across the foreshore would appear to be restricted to that of owner.

**Other Statutory Controls**

12. In addition, there are a number of important statutory provisions that regulate or restrict the use of the foreshore and seabed.

13. A local authority may make byelaws that regulate or prohibit any trade or business, the use of vehicles, or the exercise of any sporting or recreational activities on the foreshore.[33] Furthermore, a local authority may execute works to preserve and protect the amenity of the

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[22] Merchant Shipping Act 1988 s 37, Scotland Act, s 53.
[23] As defined under the 1997 Act s 214; see note 5.
[24] Electricity Act 1989 s 10 Schedule 4; Telecommunications Act 1984 Sch 2 para 2.
[25] Electricity Act 1989 Schedule 4 paragraph 6, as amended by The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999 SI 1999/1750.
[26] Telecommunications Act 1984 Sch 2 para 5. Compulsory powers are also available under the Gas Acts 1986 (as amended by the Gas Act 1995) in relation to the supply of gas through pipe-lines. In terms of the laying of sewage and water pipes under the Water (Scotland) Act 1980, where agreement cannot be reached with the landowner, the water authorities must obtain the permission of the court; s 23(1A) 1980 Act, inserted by the Local Government (Scotland) Act 1994 s 109.
[27] Electricity Act 1989 s 63; Telecommunications Act 1984 Sch 2 para 26.
[28] Department of Trade and Industry; The Petroleum Act 1998 (Commencement No 1) Order 1999 SI 1999/161
[29] Petroleum Act 1998 Part III s 14(1).
[30] The Land Powers (Defence) Act 1958 s 14, as amended by the Secretaries of State (Government and Oil Pipe-line and Petroleum Licences) Order 1989 SI 1989/150.
[31] Pipe-lines Act 1962 s 1 as amended by The Scotland Act (Transfer of Functions to the Scottish Ministers etc) Order 1999 SI 1999/1750 and The Scotland Act 1998 (Modification of Functions) Order 1999 SI 1999/1756.
[32] See paras 6 to 10 *supra*.
[33] Civic Government Scotland Act 1982 s 121(1). The Act defines "seashore", as including land between the low and high watermark of ordinary spring tides; s 123. Byelaws can also be made under s 121(3) in relation to the conduct of pleasure boats and other recreational activities on adjacent waters, and under s 121(4) in relation to inland waters for any of the purposes specified in s 121(1) or (3). Adjacent waters and inland waters are also defined under s 123 of the Act.

foreshore.[34] Any person with a proprietorial interest in the foreshore must be informed of the proposal to make byelaws, or to execute works, and be given an opportunity to object.[35] Byelaws and works under these provisions must also protect and maintain the public rights to use the foreshore and adjacent waters.[36]

14. There exist statutory provisions to protect certain property found on the foreshore or seabed. Under the Protection of Wrecks Act 1973, the Secretary of State[37] may designate areas as restricted if satisfied that there is or may be a vessel lying wrecked on the seabed, and that it ought to be protected from unauthorised interference.[38] The restricted area can include the foreshore.[39] In such a designated area a licence will be required to deposit materials, to remove part of the vessel, or to undertake salvage operations.[40] The Secretary of State may also designate areas as prohibited where a vessel is considered to be a danger to life or property.[41] It is an offence to enter a prohibited area without authority granted in writing, whether on the surface or under water.[42]

15. The Protection of Military Remains Act 1986 applies to (a) aircraft which have crashed[43] and (b) designated vessels which have sunk or been stranded[44] whilst in military service. The Secretary of State may designate as a controlled site any area that appears to contain the remains of such an aircraft or vessel.[45] The power to designate land as part of a controlled site is exercisable in relation to Crown land in the same way as other land.[46] A person

[34] 1982 Act s 122. See also para 4.32 *supra.* On contacting all 32 local authorities in Scotland, it was discovered that only five have exercised their power to make byelaws under s 121. Specific byelaws have also been introduced in relation to Loch Lomond by the Loch Lomond Park Authority, a joint committee of the local authorities responsible for planning in the Loch Lomond area. The byelaws tend to have been introduced to prevent people from exploiting the foreshore for commercial gain. For example, Fife Council has prohibited the digging for worms or the removal of shellfish or bait for sale or other commercial purposes; the Fife Council (Civic Government (Scotland) Act 1982) Byelaws prohibiting certain activities on the seashore; para 2.10. There also tend to be provisions to preserve the environment, and to prevent nuisance on the foreshore, in order to enhance existing public rights over the area. These have included, for example, restricting the speed of boats on a loch; the Loch Lomond Registration and Navigation Byelaws 1995.

[35] S 121(5), s 122(2) and (4). Previously, the Act required the consent of all the owners of the affected area, before the byelaw could be passed. However, the Act was amended as a result of the need for greater protection at Loch Lomond where there are numerous lochside proprietors. It was thought that were consent required from all affected proprietors, the introduction of byelaws in relation to the loch would have been impossible. See Mark Poustie, "Bonny Banks no More? Water-Based Recreational Conflict Management on Loch Lomond", 1997 Water Law Nov-Dec.

[36] Ss 121(11) and 122(3). Under s 120, a local authority is also subject, when exercising powers under ss 121 and 122, to the provisions of the Coast Protection Act 1949, the Town and Country Planning Act 1997, and the functions of statutory undertakers and port authorities.

[37] The powers under the Protection of Wrecks Act 1973, s 2, have been reserved under the Scotland Act 1998, Sch 5, E3(2).

[38] S 1(1).

[39] S 1(2)(a) provides that the restricted area "shall be within such distance of the site (where the vessel is located) as is specified in the order, but excluding any area above high water mark of ordinary spring tides." .

[40] S 1(3).

[41] S 2(1). Again the foreshore can be covered in such a designation.

[42] S 2(3).

[43] S 1(1).

[44] S 1(2)(a).

[45] S 1(1)(b).

[46] S 1(7). Under s 9 of the Act, the "sea" is defined as including the seabed and, so far as the tide flows at mean high water springs, any estuary or arm of the sea and the waters of any channel, creek, bay or river. The "seabed" includes any area submerged at mean high water springs. Note that this definition does not follow the accepted definition of the foreshore in Scotland and therefore may not include the whole of what is recognised as foreshore in Scots law.

commits an offence if he participates in any excavation, diving or salvage operation[47] within a controlled site, or damages, moves or removes any remains,[48] unless a licence has been granted by the Secretary of State.[49]

16. The Secretary of State may acquire by agreement or compulsorily any land in Scotland for any purpose relating to the exploration for or exploitation of offshore petroleum.[50] Such purposes can include the acquisition of sites or facilities for the construction or assembly of platforms or other installations, and their use in or under the sea for the exploitation of petroleum.[51] The power to acquire land under the Act only applies to any private interest in Crown land.[52] The Crown's interest in the foreshore, while one of ownership[53], is not a private interest and therefore the foreshore cannot be compulsorily acquired. The right to oil and gas in the territorial sea is vested in the Crown.[54] Licences for the exploration and production of oil and gas are granted under the Petroleum Act 1998.[55]

17. The Environmental Protection Act 1990 regulates the discharge of waste on land.[56] The Act prohibits the deposit or treatment of controlled waste[57] in or on any land unless a waste management licence is in force and the deposit is in accordance with the terms of the licence.[58] The Act also regulates the deposit or treatment of litter[59] on land.[60] An offence is committed where litter is deposited except where authorised by law, or with the consent of the owner of the land.[61] A local authority is also under a duty, so far as is practicable, to keep land clear of litter and refuse. Powers of pollution control previously exercised under the 1990 Act are now exercised under the Pollution Prevention and Control Act 1999.[62]

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[47] S 2(1)(b).
[48] S 2(2)(a).
[49] S 4.
[50] Offshore Petroleum Development (Scotland) Act 1975 s 1(1). This provision was extended by s 26(1) of the Oil and Gas Enterprise Act 1982 to include "the storage of gas, in or under the seabed or the recovery of gas so stored." .
[51] S1(2)(a).
[52] A "private interest" in Crown land means "any interest other than a Crown interest"; s 16(6). A "Crown interest" is defined under s 20 of the Act to include "an interest belonging to Her Majesty in right of the Crown or belonging to a government department or held in trust for Her Majesty for the purposes of a government department.". A private interest in Crown land is therefore an interest owned by the Sovereign in her private capacity.
[53] See para 3.4 *supra*.
[54] S 2 Petroleum Act 1998. The UK also has exclusive right to exploit the natural resources of the UK continental shelf, including oil and gas, under the Continental Shelf Act 1964.
[55] S 3.
[56] "Land" includes that "covered by waters where the land is above the low water mark of ordinary spring tides" *ie* it includes the foreshore; s 29(8).
[57] "Controlled waste" is defined under s 75(4) as "any household, industrial and commercial waste, or any such waste."
[58] S 33(1).
[59] "Litter" is defined under s 87(1) as "any thing whatsoever in such circumstances as to cause or contribute to, or tend to lead to, the defacement by litter of any place to which this section applies."
[60] The definition of "land" applies to any public open space, including local authority land and relevant Crown land. "Relevant Crown land" is that "which is open to the air and is land (but not a highway or in Scotland a public road) to which the public are entitled or permitted to have access with or without payment." See ss 86 and 87.
[61] S 87.
[62] This Act was passed to implement Directive 96/61/EC on Integrated Pollution Prevention and Control. The Secretary of State may make regulations under this Act in conjunction with the powers of the Scottish Ministers, and the Scottish Environment Protection Agency (SEPA).

18. The discharge of waste into the sea and other waters is regulated by the Scottish Environment Protection Agency (SEPA) under the Control of Pollution Act 1974. It is an offence under the Act to discharge

> "any noxious, poisonous or polluting matter into controlled waters"[63]

unless a permit has been obtained from SEPA. Similarly, permits are required for the discharge of trade effluent.[64]

**Fish Farming**

19. The regulation of fish farming also depends on the type of farm involved.[65] In relation to the seabed, the relevant provisions are those governing marine fish farms.[66]

20. A "marine fish farm" is defined as

> "any cage, pontoon, or other structure anchored or moored in marine waters which is used for the purposes of a business of fish farming carried on by the owner, whether or not for profit.".[67]

21. The right to use the seabed lying between low water mark and the limits of the territorial sea is vested in the Crown.[68] Thus, any person who wishes to operate a marine fish farm must apply to the Crown Estate Commissioners for the grant of the right to anchor or moor a cage or pontoon to the seabed.[69] Before granting a lease, the Commissioners publicly advertise the application, and consult relevant authorities and bodies.

22. A lease will be in respect of a defined area of the seabed. The permitted number and size of cages will be specified along with other equipment to be used for the rearing and cultivation of salmon or trout. Salmon cages and other equipment anchored to the seabed must not infringe the public right of navigation.[70]

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[63] S 30F of the 1974 Act, inserted by the Environment Act 1995, Sch 16.

[64] See for example, para 25 *infra*. "Controlled waters" are defined under s 30A to include "relevant territorial waters, coastal waters, inland freshwater and ground water".

[65] A "fish farm" is defined generally under s 10(1) of the Diseases of Fish Act 1937 to include "any pond, stew, fish hatchery, or other place used for keeping, with a view to their sale or their transfer to other waters (including any other fish farm), live fish, live eggs of fish, or foodstuff for fish, and includes any buildings used in connection therewith, and the banks and margins of any water therein." This was applied by s 9(1) of the Freshwater and Salmon Fisheries (Scotland) Act 1976.

[66] For a discussion of inland fish farms, see *infra*. Shellfish farming can be undertaken in either marine or inland waters and is defined as "the cultivation or propagation of shellfish with a view to their sale or to their transfer to other waters or land." Shellfish include crustaceans, and molluscs of any kind, and any brood, ware, half-ware, spat, or spawn of shellfish; s 7(8) Diseases of Fish Act 1983.

[67] Diseases of Fish Act 1983 s 7(3). "Marine waters" are defined under s 7(8) as those "waters, other than inland waters, within the seaward limits of the territorial sea adjacent to Great Britain." See also *Stair Memorial Encyclopaedia*, volume 11, para 57.

[68] See para 3.4 *supra*.

[69] The Scottish Executive has announced a proposal to introduce primary legislation to bring the establishment of marine fish and shellfish farming within the planning regime. This would transfer the power to grant permission for the establishment of fish farms from the Crown Estate Commissioners to planning authorities. See Scottish Executive Press Release of 26 July 2000 *www.scotland.gov.uk/news/2000*.

[70] *Walford v Crown Estate Commissioners* 1988 SLT 377 at 379 *per* Lord Clyde. See also the consent required under s 34(3) of the Coast Protection Act 1949 concerning works likely to obstruct navigation, para 9 *supra*.

23. Buildings constructed above high water mark for use in the operation of a marine fish farm will usually require planning permission.[71] It is also necessary to obtain a grant of (a) a right to the ground on which any such buildings are to be erected and (b) a right of access to the site from the owner of the ground adjoining the sea.[72] Where the foreshore is used for access purposes and it is not owned by the Crown, the consent of the owner is required.

24. A licence may be required to operate marine fish farms if they are established within the jurisdiction of a port or harbour authority under the terms of individual Harbour Acts.[73] All marine fish farms in the coastal waters off the Orkney and Shetland Islands require a work licence from the respective Councils.[74]

25. The operation of marine fish farms is controlled by statute in certain areas, including the control of fish diseases[75] and the registration of fish farming businesses. [76] Furthermore, discharge from a fish farm falls within the definition of "trade effluent" under the Control of Pollution Act 1974[77] and is regulated accordingly.

26. The above regulations apply equally to inland fish farms.[78] However the development, operation or control of inland fish farms and the provision of necessary facilities[79] will be the subject of private agreement between the landowner and the fish farm operator. Where development[80] is undertaken, planning permission will be required.[81]

**National Parks**

27. Under the National Parks (Scotland) Act 2000, the Scottish Ministers can propose an area for designation as a National Park.[82]

28. The National Park Authority (NPA) may make and enforce management rules[83] regulating land within the designated National Park according to the provisions of the Civic

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[71] See the Town and Country Planning (Scotland) Act 1997 s 26, and para 3 *supra*. The Coast Protection Act 1949 s 34 also applies to marine fish farms; see note 20.
[72] *Stair Memorial Enclyclopaedia*, vol 11, para 61.
[73] Coast Protection Act 1949 s 34, and Merchant Shipping Act 1988 s 37.
[74] Orkney County Council Act 1974 and Zetland County Council Act 1974.
[75] Diseases of Fish Act 1983 and SI 1994/1447.
[76] Registration of Fish Farming and Shellfish Farming Businesses Order 1985 SI 1985/1391, Article 3(1), (2) and Sch 1.
[77] 1974 Act, s 105(1).
[78] "Inland fish farm" is defined under s 7(8) of the Diseases of Fish Act 1983 as "any place where inland waters are used for the keeping of live fish with a view to their sale or to their transfer to other waters." "Inland waters" are "waters within Great Britain which do not form part of the sea or of any creek, bay or estuary or of any river as far as the tide flows."
[79] Such as the siting of suitable ground for ponds and fish tanks and an adequate supply of water.
[80] Within the meaning of s 26 of the Town and Country Planning (Scotland) Act 1997.
[81] But see s 26(2)(e) concerning agricultural land.
[82] S 2(1). Such an area is not considered in terms of geographic definitions. Rather it has to be considered under s 2(2) as (a) an area of outstanding national importance because of its natural heritage or the combination of its natural and cultural heritage; (b) an area with a distinctive character and coherent identity; and (c) that designating the area a National Park would meet the special needs of the area and would be the best means of ensuring that the National Park aims are collectively achieved in relation to the area in a co-ordinated way. It seems therefore that a National Park can include areas of seabed and foreshore to the extent that they fall within this definition.
[83] Sch 2, para 10.

Government (Scotland) Act 1982 that apply to local authorities.[84] Under the 1982 Act, a local authority may

> "make rules to be known as management rules, to regulate the use of, and conduct of persons, on land owned, occupied, or managed by the authority or otherwise under their control, and to which the public have access, whether on payment or not.".[85]

In this context, land specifically excludes land below the high water mark of ordinary spring tides.[86] Such management rules cannot therefore, be made in relation to the foreshore.

29. A NPA is empowered to acquire land within the National Park, either by agreement or compulsorily.[87] The power of compulsory acquisition does not apply to Crown land.[88] It does therefore not apply in relation to the foreshore.

30. A NPA has further power to make byelaws applicable to the National Park[89] in order to achieve certain general aims.[90] In particular, byelaws can be introduced to regulate or prohibit the lighting of fires, for the prevention and suppression of nuisances, and to regulate the exercise of recreational activities.[91] *Prima facie* these byelaws do apply to the seabed and foreshore. The Scottish Ministers may however by order modify certain listed provisions of the Act in their application to marine areas,[92] including this power of the NPA to make byelaws.[93] It would appear that the Scottish Ministers can therefore restrict the power of the NPA to make byelaws in relation to marine areas.[94]

**Nature Reserves**

31. Land can be designated under a number of statutory provisions in order to ensure its conservation and protection.

32. It seems that the most common designation is the Site of Special Scientific Interest (SSSI) under the Wildlife and Countryside Act 1981.[95] If the owners or occupiers of land designated as an SSSI wish to carry out certain operations on the land, Scottish Natural

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[84] Ss 112-118 of the 1982 Act.
[85] S 112(1) .
[86] *Ibid*.
[87] Sch 2, para 5. In relation to compulsory acquisition, the agreement of the Scottish Ministers is required.
[88] According to the meaning established under s 242 of the Town and Country Planning (Scotland) Act 1997. See note 7 *supra*.
[89] Including any areas of foreshore and seabed see note 82 *supra*.
[90] Under Sch 2, para 8(1), byelaws can be introduced for (a) protecting the natural and cultural heritage of the National Park; (b) preventing damage to the land and anything in or under it; and (c) securing the public's enjoyment of, and safety in, the National Park.
[91] Sch 2, para 8(2)(a), (c) and (e).
[92] Defined as "areas that include the sea" ; s 31.
[93] The Scottish Ministers can only modify the power of the NPA to make particular byelaws under Sch 2, para 8(2). S 31 of the Act does not allow the Scottish Ministers to restrict the general power of the NPA under Sch 2, para 8(1) to make byelaws.
[94] Subject to an affirmative resolution of the Scottish Parliament under s 34(5) of the Act.
[95] S 28 of the Wildlife and Countryside Act 1981 provides that if SNH are of the opinion that land is of special interest by reason of any of its flora, fauna or geological or physiographical features, it has a duty to notify this to the local authority in whose area the land is situated, the owners and occupiers of the land, the Scottish Ministers, and where the land is situated in a National Park, the National Park Authority.

Heritage (SNH) must be notified.[96] SSSIs can include any land above the low water mark of ordinary spring tides.[97]

33. The Scottish Ministers can make Nature Conservation Orders over SSSIs, in order to restrict third party activities.[98] Such Orders are not often introduced, as SNH can usually reach agreement with the owners of the land.[99] Nevertheless, in 1995, Orders were introduced over SSSIs including foreshore in four locations in the North of Scotland, in order to prevent cockle dredging.[100]

34. The National Parks and Access to the Countryside Act 1949 allows for the designation of national nature reserves (NNRs)[101] by Scottish Natural Heritage (SNH).[102] SNH may make agreements with the owner, occupier or lessee of land that it should be managed within a nature reserve and such an agreement may impose restrictions on the exercise of rights over the land, as may be expedient.[103] Where agreement cannot be reached, land may be acquired compulsorily for the purposes of management as a nature reserve, where SNH considers it expedient in the national interest to do so.[104]

35. Byelaws for the protection of the nature reserve may be made, and may restrict entry to, or movement within, nature reserves of people, vehicles, boats and animals.[105] Such byelaws cannot interfere with the exercise of the rights of the owner, occupier or lessee of land within the nature reserve, or with the exercise of a public right of way. However, there is no statutory protection of the public's rights to the foreshore, nor is there any provision for public consultation prior to the making of such byelaws. For example, a byelaw has been introduced in respect of the NNR over the Sands of Forvie, which prohibits public access to an area of foreshore from 1 April to 31 July each year in order to protect breeding terns.[106] In

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[96] S 28(4) of the 1981 Act provides that each SSSI designation must specify the list of operations which in the opinion of SNH will be likely to cause damage to the flora, fauna or features of the area. Under s 28(5) the owner or occupier of the land must serve written notice on SNH where they wish to carry out such an operation. The operation cannot be carried out for four months from the date of serving of the written notice unless with the consent of SNH; S 28(6).

[97] 1981 Act, s 52(4), applying s 114 of the National Parks and Access to the Countryside Act 1949.

[98] S 29(3) of the 1981 Act provides that no person shall carry out on any land any operation which appears to the Scottish Ministers to be likely to destroy or damage the flora, fauna or geological or physiographical features of the land or which is the subject of an order under this section. As to the procedure to be adopted by the Scottish Ministers before serving orders under s 29; see Sch 11.

[99] See Countryside Act 1968 s 15(2).

[100] Including the Loch Fleet and Dornoch and Cuthill Sands Nature Conservation Order 1995; information supplied by SNH. These Orders have effect as if they were Special Nature Conservation Orders under Art 22 of the Conservation (Natural Habitats) Regulations 1994, SI 1994/2716.

[101] Under s 15 of the Act, a "nature reserve" is defined as "land managed for the purpose of (a) providing suitable conditions and control, special opportunities for the study of, and research into, matters relating to the fauna and flora of Great Britain and the physical conditions in which they live, and for the study of geological and physiographical features of special interest in the area, and/or (b) of preserving flora, fauna or geological or physiographical features of special interest in the area." See also the Wildlife and Countryside Act 1981 s 35. Accordingly, areas of foreshore can be included if they fall within the relevant criteria.

[102] The statutory conservation body established under the Natural Heritage (Scotland) Act 1991; it took over the functions previously exercised by the Nature Conservancy Council under the 1949 Act.

[103] National Parks and Access to the Countryside Act 1949, s 16(1).

[104] S 17(1). It should be noted that all NNRs in Scotland are also designated SSSIs - information obtained from SNH.

[105] S 20(2)(a).

[106] Information obtained from SNH. It should be noted that the National Trust for Scotland also has the power to make byelaws over its land, under the National Trust for Scotland Order Confirmation Act 1935 (and subsequent private Acts), in order *inter alia* to promote the preservation and enjoyment of landscapes of natural beauty. Byelaws have been introduced in relation to the islands of St Kilda. The byelaws apply to the foreshore and

relation to Crown land, management agreements can be reached with the Crown Estate Commissioners, but no land can be acquired, nor can byelaws be introduced, without their consent.[107]

36. Local Nature Reserves (LNRs) can also be introduced by planning authorities within their area, where it appears appropriate in the interests of the community.[108] The provisions applying to NNRs apply equally to LNRs[109] however SNH must be consulted before this power can be exercised.[110]

37. There is a statutory designation that relates specifically to marine areas below the low water mark. Under the Wildlife and Countryside Act 1981 Marine Nature Reserves (MNR) can be introduced to protect marine flora and fauna.[111] There are, as yet, no designated MNRs in Scotland.

38. In addition to nature reserve designations, there are other types of protected sites that can be established.[112] For example, the Conservation (Natural Habitats) Regulations 1994[113] introduce certain European sites[114] on which agreements concerning the management, conservation, restoration or protection of the land involved can be reached.[115]

39. Although there are numerous statutory conservation designations that could affect public rights over the foreshore, in practice, it appears that actual restrictions are very limited.

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provide that no person shall enter any part of the specified islands without the authority of the National Trust; information supplied by the National Trust for Scotland.

[107] Ss 105(4) and (5). As we have seen, see para 3.9 *supra*, the Crown Estate Commissioners perform no function in relation to the protection of the public rights.

[108] S 21 National Parks and Access to the Countryside Act 1949.

[109] There is no statutory requirement for public consultation before designating either an NNR or an LNR.

[110] In March 1999 there were 29 Local Nature Reserves designated in Scotland, according to *Facts and Figures* 1998-99 SNH 1999 - information obtained from Rowan-Robinson, Philp and de la Torre, "The Protection of Habitats" in Rowan-Robinson and McKenzie Skene *Countryside Law in Scotland*, p 216.

[111] A MNR can include "any land covered (continuous or intermittently) by tidal waters or parts of the sea which are landward to the base lines from which the breadth of the territorial sea adjacent to Great Britain is measured or are seaward of those base lines up to a distance of three nautical miles" and "it appears expedient … that the land and waters covering it should be managed for the purpose of (a) conserving marine flora or fauna or geological or physiographical features of special interest in the area; or (b) providing under suitable conditions and control special opportunities for the study of, and research into, matters relating to marine flora and fauna and the physical conditions in which they live, or for the study of geological or physiographical features of special interest in the area"; s 36 1981 Act.

[112] As there are a large number of statutory conservation sites, it is not proposed to examine them here. For a more detailed examination see McKenzie Skene and Robertson "The Coastal Zone" in Rowan-Robinson and McKenzie Skene, *Countryside Law in Scotland*, pp 311-341.

[113] Implementing Council Directive 92/43/EEC on the conservation of natural habitats and fauna and flora, known as the "Habitats Directive".

[114] Such as special areas of conservation, sites of Community importance and priority natural habitat types; Art 10.

[115] Art 16. Existing agreements on such land continue to have effect.

# Appendix 2

## Comparative Law

### Canada

#### Defining the Foreshore and Seabed

1. The common law definitions of foreshore and seabed in Canada generally mimic their English counterparts. The foreshore is the land between the mean high and low water marks.[1] The seabed stretches from the low water mark along the coast and the outer edge of inland waters[2] to the outer limits of the territorial sea.[3]

2. Whilst these definitions are applied in provincial legislation, it is interesting to note that some statutes relating to coastal and marine areas extend such definitions inland beyond the foreshore. For example, in Nova Scotia, protection offered by the Beaches Act 1989[4] defines the term "beach" to include that "area of land lying to the seaward of the mean high water mark and that area of land to landward immediately adjacent thereto to the distance determined by the Governor in Council".[5] Similarly, the Beaches and Foreshores Act 1989 of Nova Scotia couples together the areas of beach and foreshore.[6]

#### Property Rights in the Foreshore and Seabed

3. The common law distinguishes between water formations depending on navigability and tidality. Firstly, with regard to the boundary of land that is adjacent to a non-tidal, non-navigable river or lake, riparian ownership extends to the *ad medium filum acquae* at common law. According to the authorities, this presumption of ownership is not easily overcome.[7]

4. When the body of water is tidal and navigable, title to the foreshore and seabed belongs to the Crown.[8] This title is part of the residual prerogative of the Crown to all ungranted lands as acquired at the time of Confederation, which occurred between 1867 and 1949.[9]

5. With regard to the situation where waters are tidal but non-navigable, or navigable but non-tidal, the applicable rule is not clear. In some cases, tidal waters are rigidly equated with navigable ones; all non-tidal waters being thus subject to the *ad medium filum acquae* rule, regardless of navigability.[10] This is analogous to the English common law approach. The courts have ruled as often, however, that the English approach is not suitable for the waters of North America. In a number of cases it has been held that the beds of navigable rivers

[1] *Holman v Green* (1881) 6 SCR 706 at 708; *A-G Canada v Higbie* [1934] SCR 385.
[2] Inland waters include provincial ports, harbours, bays, gulfs and land-locked seas, straits and rivers.
[3] Defined in Lordon, *Crown Law,* p 241.
[4] The Act relates to the protection and preservation of the beaches of Nova Scotia.
[5] S 3 Beaches Act 1989. The Governor in Council is the agent representative of the Crown.
[6] This Act relates to the foreshore and the beds of rivers and lakes.
[7] *Derro v Dubé,* [1948] OR 52, cited in Bruce Ziff, *Principles of Property Law,* 2nd ed (1996).
[8] *Turnbull v Saunders* (1921) 60 DLR 666 (CA).
[9] The period during which the provinces, as they are known today, were admitted to the Union. The Queen acquired title to such lands at a much earlier date; France ceding to Great Britain all her rights of sovereignty, property and possession over Canada in 1763, and full title to the colonial territory accruing at that date.
[10] The leading pronouncement is found in *Keewatin Power Co. v Kenora (Town)* (1908), 16 OLR 184.

are vested in the Crown, even if they are non-tidal.[11] On this reading of the law, everything turns on navigability, the basic test of which is whether the watercourse can be used as a public highway.[12] According to the case law, this view appears to be the more dominant.[13]

6. Where title to the bed of a navigable river or tidal water is vested in the Crown, it is subject to public rights. Title to the bed can only be passed by an express grant.[14]

7. It seems that the Crown's title to the foreshore and seabed in Canada is one of full beneficial ownership.[15] Consequently, the right of disposing of the land can only be exercised by the Crown, ordinarily under the advice of the Ministers of the Dominion or province.[16] This is supported by the Constitution Act 1867, which gives the Crown in right of province power over "the management and sale of the public lands belonging to the province and of the timber and wood thereon".[17]

8. Whilst the right to beneficial use and proceeds of the foreshore is vested in the Crown, special implications are attached to the ownership of what are essentially public lands.[18] According to La Forest, the Crown's title "is a power of the Dominion or provincial authorities to administer and control for the Dominion or provincial benefit property vested in the Queen.".[19] Thus, a public interest dimension must arguably be taken into account in administering the foreshore and seabed. The case of *Committee for the Commonwealth of Canada v Canada*[20] has been cited as authority, seemingly reflecting the "idea that public property is entrusted with certain unique obligations that this property be administered for the benefit of the citizenry as a whole".[21] In Nova Scotia, a public interest view is confirmed by legislation that dedicates the foreshore and beach in perpetuity "for the benefit, education and enjoyment of present and future generations of Nova Scotians".[22]

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[11] For example see *Barthel v Scotten* (1895), 24 SCR 367; *Trenton (Town) v B.W. Powers & Sons Limited,* [1969] SCR 584.

[12] *R v Nikal* (1996) 133 (DLR) (4th) 658 (SCC); *R v Lewis* (1996) 133 DLR (4th) 700 (SCC).

[13] *Re Provincial Fisheries* (1895) 26 SCR 444; *Flewelling v Johnston* (1921) 59 DLR 419 (CA)*; Kennedy v Husband* [1923] 1 DLR 1069 (BC Co Ct.); *Leamy v R* (1916) 54 SCR 143.

[14] *R v Moss* (1896) 26 SCR 322; *Cunard v R* (1910) 43 SCR 88 where the nature of title to 12 acres of seabed, acquired by grant of the Governor in Council of Nova Scotia in 1868, was discussed. See also *Re Provincial Fisheries* (1895) 26 SCR 444; *Lacoste v Cedar Rapids*, [1928] 2 DLR 1 (PC).

[15] In *Mercer v Attorney General of Ontario*, (1881) 5 S.C.R. 538, *per* Ritchie C.J. at 633, entire "control, management and disposition of the Crown lands" was considered to rest with the Crown. More explicitly, in *St Catherine's Milling and Lumber Company v The Queen* (1888) 14 AC (PC) 46 it was held that wherever public land is described as "the property of" or as "belonging to" the Dominion or a province, "these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or province." The Constitution Act 1867 uses these terms in describing public property as under the control of either the Dominion or a province. See for example ss 92, 107, 108, 109, and 113. The rule in *St Catherine's Milling* was approved in *Saskatchewan Natural Resources Reference,* [1931] SCR 263 at 275, and considered 'binding' and of 'the greatest weight and authority' in *A-G of Canada v Higbie et al,* [1945] SCR 385 at 403.

[16] *St Catherines Milling,* id. , *Ontario Mining Co. v Seybold* [1903] 5 SCR 538 at 633. The latter point concerning the advice of Ministers is controversial in Canada, there being some dispute as to whether the power of disposition with respect to public lands is subject to the control of the legislature. La Forest has observed however, in *Natural Resources and Public Property* (1969) at p 20, that the Crown has from time immemorial had the power to control and manage its land and other property, including the power of disposing of it. There is, according to La Forest, nothing in the Constitution Act 1867 that affects this prerogative right.

[17] S 92(5) Constitution Act 1867.

[18] In *A-G of Ontario v Mercer*, (1882-3), 8 AC 767, at 776, the words 'property belonging to the provinces' in s 117 of the Constitution Act 1867 were interpreted as referring to the public property of the provinces.

[19] La Forest, s*upra* note 16, p 20.

[20] [1991] SCR 139.

[21] Interpretation given by Bruce Ziff, in *Principles of Property Law,* p 336. The case itself involves the exercise of freedom of speech on public lands.

[22] Beaches Act 1989, s 2(1), para 25 *infra.*

**Aboriginal Rights in the Foreshore and Seabed**

9. In 1763, when France ceded to Great Britain all her rights of sovereignty, property and possession over Canada, full title to the territory ceded became vested in the British sovereign. However in some cases, areas were reserved by Royal Proclamation as Indian lands. Today, these areas reserved by proclamation comprise only a portion of the total of lands reserved, as subsequent agreements and instruments have added significantly to Indian tenure.[23]

10. The underlying title to lands reserved for the Indians under proclamation is vested in the Crown for the benefit of the provinces.[24] The provincial title is subject to the usufructuary interest of the Indians thereto.[25] In most of the provinces, however, the Dominion has acquired beneficial interest in the reserved lands by virtue of Dominion-Provincial agreements. These agreements generally transfer to the Dominion the administration and right to sell, lease, or dispose of the reserved lands.

11. A vast part of the lands reserved by the proclamation and agreements have now been surrendered by the Indians in return for compensation and privileges, in particular hunting and fishing rights over the ceded territory. In recognition of these rights, it has been held in numerous cases that aboriginal rights to fish for food and for "ceremonial purposes" override provincial legislation in the area of a reserve.[26]

12. There are additional sources of aboriginal rights over Indian lands such as those expressly secured in treaties and agreements. Furthermore there are those concerning Indian habits and modes of life. An activity must be an element of a practice, custom or tradition 'integral to the distinctive culture of the aboriginal group,[27] if it is to qualify as an aboriginal right.

13. Reserve lands can only be acquired in accordance with the governing statute and not by prescription.[28]

**Management of the Foreshore and Seabed**

14. In Canada, the administration of land vested in the Crown is divided between the Crown in right of Canada and the Crown in right of province.[29] This was confirmed by Lord Herschell in the *Fisheries* case:[30] "The Dominion of Canada was called into existence by the

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[23] We were unable to ascertain the extent of Indian lands reserved by Royal Proclamation.
[24] La Forest, *supra* note 16, p112.
[25] *Attorney-General of Canada v Toth*, (1959) 17 D.L.R. (2d) 273; *R v Sparrow* [1990] 1 SCR 1075. In *Guerin v R* [1984] 2 SCR 335 the court held that "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not … amount to beneficial ownership of the lands, neither is its nature completely exhausted by the concept of personal right."
[26] *R v Sparrow* [1990] 1 SCR 1075.
[27] *R v Van der Peet*, [1996] 2 SCR 507. The court further held in this case that in order to be 'integral', a practice, custom or tradition must be of central significance to the aboriginal society in question. It was claimed that the practices, customs and traditions of the aborigines included as an integral element the exchange of fish for money or goods. This argument was rejected by the court.
[28] Indian Act RSC 1985 ss 18 and 37. *R v Devereux* (1965) 51 DLR (2d) 546.
[29] The Royal authority of the Crown in the right of province is delegated to and vested in the Lieutenant Governor in Council.
[30] [1898] AC 700, at 709.

British North America Act, 1867.[31] Whatever proprietary rights were at the time of passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada."

15. In some provinces, the above rule has been developed by legislation. In Alberta for example, the Public Lands Act 1980 now provides that the title to all "permanent and recurring natural bodies of water" is vested in the Crown unless expressly conveyed.[32] Ontario's reform of the common law is less drastic. There, statute clarifies the uncertainty surrounding title to navigable bodies of water, with title being retained in the Crown for these watercourses.[33]

16. Both the provincial and federal governments therefore regulate the use and management of Canada's foreshore and seabed. The respective powers are set out in the Constitution Act 1867.[34] In general, the Crown in right of Dominion administers properties that are closely associated with matters within the legislative competence of the federal parliament and which have been specifically transferred to the Dominion on this basis. The provincial authorities exercise the majority of rights attached to ownership of the foreshore and seabed.

17. *Public Harbours* Several areas of significance have transferred to the jurisdiction of the Dominion by the Constitution Act 1867. Property in public harbours, lighthouses, piers, public vessels and river and lake improvements are reserved to the Crown in right of Dominion.[35]

18. As a result of the difficulties in proving a harbour to be public on account of its public use, and in order to prove title to the bed and foreshore of a harbour, agreements were entered into between some of the provinces and the federal government. For example, an agreement between British Colombia and Canada in 1924 designated six harbours as public harbours.[36] Furthermore, the ownership of all ungranted foreshores and of all lands under water, with the exception of the Railway belt, was expressly vested in the Province.[37] A similar agreement was entered into between the province of Ontario and the federal government in 1961.[38]

19. The foreshore of a public harbour does not necessarily form part of the public harbour even though it may be provincial Crown property. The foreshore had to have been used for harbour purposes at the time of the union, in order to be considered as part of the public harbour and thus subject to federal legislative authority.[39]

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[31] Now renamed, and throughout this paper referred to as, the Constitution Act 1867. The Constitution Acts of 1867 to 1982 are to be found at http://canada.justice.gc.ca/cgi-bin/folioisa.dll/const_e.nfo/query=*/doc/{t1}.
[32] Public Lands Act RSA 1980, s 3(1).
[33] Beds of Navigable Rivers Act, RSO. 1990. See also Bruce Ziff, *Principles of Property Law.*
[34] The areas of exclusive federal jurisdiction are to be found in sections 91(1A), (2), (10), (12) (13), s108 and the areas of exclusive provincial jurisdiction are derived from sections 92(10), (13) and (16) of the Act.
[35] Constitution Act 1867 s 108, and Sch 3.
[36] And therefore the property of the Crown, in accordance with the Consitution Act 1867, s 108 and Sch 3.
[37] *AG Canada v Higbie* [1945] SCR 385.
[38] Here, the federal government's ownership of the foreshore, beds and ungranted lands within 27 public harbours was confirmed, Lordon, *Crown Law,* p 236.
[39] *Re Dominion Coal Co and Cape Breton (County*) (1963), 40 DLR (2d) 593 (NSSC); Lordon, *Crown Law,* p 235.

20. The bed of a public harbour, including fisheries and the underlying minerals, belong to the Crown in right of Canada. The precious metals, however, are likely to be retained by the province.[40]

21. *Federal Competence* The federal government of Canada has legislative power in the areas of "navigation and shipping".[41] Although a province has the proprietary rights in the water within its boundaries, its rights are nonetheless subject to the paramount jurisdiction of the federal government to conserve and protect the public right to navigation, and to regulate, control and improve navigable waters.

22. Moreover, the Constitution Act 1867 provides the federal government with legislative authority over "seacoast and inland (tidal) fisheries".[42] The regulation of the foreshore and seabed in all provinces is subject to the Canadian Environmental Protection Act 1999 and the Canadian Environmental Assessment Act 1992.

23. The division of powers between the federal and provincial governments with respect to the foreshore and seabed, and in particular the limits of federal jurisdiction, have been defined by the Courts.[43]

24. Several Federal Departments have responsibilities in relation to the exercise of federal competence over the foreshore and seabed. These include the Department of Fisheries and Oceans, the Department of Justice, Environment Canada,[44] and Transport Canada.[45] National Marine Conservation Areas (NMCAs) can also be established under federal legislation.[46] Traditional fishing activities are permitted in NMCAs but are managed in accordance with fisheries management plans established by the Department of Fisheries and Oceans. Transportation, navigation and the operation of pleasure craft in NMCAs are regulated under the Canada Shipping Act 1985 and derivative regulations. Traditional aboriginal and other fishermen's rights of marine access are still recognised in these areas.

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[40] *Holman v Green* (1881) 6 SCR 707, *Re Quebec Fisheries* (1917) 35 D.L.R. 1 (Que CA); Lordon, *Crown Law*, p 235.

[41] Constitution Act 1867 s 91(10). See also the Navigable Waters Protection Act 1985 RSC which requires, *inter alia,* federal Crown approval for the erection of works that may interfere with navigation and provides for the removal of works built without such approval. There is also power to remove wrecks and other obstructions of navigable waters.

[42] Constitution Act 1867 s 91(12). It includes exclusive control over methods and seasons for fishing, and the imposition of licensing charges. Provincial competence with respect to fisheries includes the power to establish the modes of conveying or disposing of the rights to fisheries, and the terms upon which provincially owned fisheries might be granted or leased.

[43] *R v Crown Zellerbach Canada Limited* [1988] 1 SCR 401 concerned federal competence to regulate the dumping of substances in provincial waters. As the regulation did not fall within 'navigation and shipping' or 'sea coast and inland fisheries,' the court was left to consider the "national concerns doctrine" according to which the federal government may regulate with a view to preserving the "federal peace, order, and good government of Canada." The court held that as marine pollution has predominantly extra-provincial characteristics and implications, the matter was clearly of concern to Canada as a whole. It was therefore considered as federal competence under the "national concern doctrine." The case provides an interesting examination of the limits of federal jurisdiction.

[44] This is a government department that enforces federal environmental law.

[45] For further details regarding the specific responsibilities of each Department, see http://www.gc.ca. See also the Oceans Act 1997.

[46] The Oceans Act 1997 gives the Minister of Fisheries and Oceans the power to designate areas for the conservation and protection of marine habitats and resources. NMCAs are established in accordance with the National Marine Conservation Areas Policy, and at present, three have been established, two of which are in tidal waters. For more information see *The Role of the Federal Governments in the Oceans Sector*, Fisheries and Oceans Canada (1997), and http://www.parcscanada.gc.ca/library/PC_Guiding_Principles.

25. *Provincial Competence*[47] In Nova Scotia the provincial authorities administer the public lands of the Crown, unless the land is specifically within federal jurisdiction. This includes the areas of foreshore and seabed owned by the Crown in right of province. The Beaches Act 1989 plays a significant role in the management and use of Nova Scotia's coastal areas. The Act dedicates beaches "in perpetuity for the benefit, education, and enjoyment of present and future generations".[48] It also provides that regulations can be made for the preservation, control and management of recreation on beaches.[49] Most importantly however, the Act extends the definition of the foreshore to include the beach.[50] The Act grants to the Minister of Natural Resources the power, with the consent of the Governor in Council, to acquire land or an interest in land to provide public access to and from a beach and to provide facilities there.[51] Under the Act, special protection is afforded to an area designated as a beach. The Act lists the prohibited activities, which include pursuing a course of conduct that is detrimental to the safety of other beach users or their enjoyment of the beach and its facilities.[52] It is important to note that regulations may be made to exempt any beach from the operation of the Act.[53] In other words, the exercise of the public rights afforded under the Act may be restricted in certain areas.

26. The Beaches and Foreshores Act 1989 also plays an important role in the management of the foreshore in Nova Scotia. It provides that a lease may be granted from the Crown to any person of any ungranted flat, beach or foreshore upon the coast of the province, for the purpose of oyster cultivation and for fish traps and weirs.[54] All revenue received from the issue of grants and for rentals under this Act shall be paid into the consolidated fund of the province as part of the receipts from Crown lands.[55]

27. In British Columbia, the ownership of all ungranted foreshore and lands under water, with the exception of the Railway Belt, vests in the province.[56] The responsibility for the management and control of these lands therefore rests with the province.[57]

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[47] The following section does not detail in full the provincial powers exercised over the foreshore and seabed. It does however, highlight some of the more interesting features of legislation in specific provinces. A summary of the involvement of the coastal provinces in regulating marine areas can be found in *The Role of the Provincial and Territorial Governments in the Oceans Sector*, Fisheries and Oceans Canada (1997). See also http://www.gc.ca/othergov/prov_e.html.

[48] Beaches Act 1989 s 2(1).

[49] Beaches Act 1989 s 13(a).

[50] Under s 3(a) of the Act, a "beach means that area of land on the coastline lying to the seaward of the mean high water mark and that area of land to landward immediately adjacent thereto to the distance determined by the Governor in Council, and includes any lakeshore area declared by the Governor in Council to be a beach". The area covered can be extended under s 4 of the Act, where the Minister of Lands and Forests may, for the effective management of the beaches, enter into agreements with the owner or occupier of adjacent land, to preserve that land so that it complements the beach.

[51] Beaches Act 1989 s 4(6).

[52] S 8(1)(e). See generally s 8. Under s 9, any person who contravenes a provision of the Act commits a criminal offence.

[53] S 13(d).

[54] Beaches and Foreshores Act 1989, ss 5(1) and 6(1).

[55] S 8.

[56] As a result of Dual Orders in Council in 1924. See also *Reference re ownership of the bed of the Strait of Georgia*, where it was decided that the submerged land covered by the waters between the mainland British Columbia and Vancouver Island were part of British Columbia at the time of Confederation and thus were the property of British Columbia.

[57] "As such to stand on a beach, sail in a passage, moor in a bay, build a marina or dock, or raise oysters is subject to provincial laws, just as are activities on land." The British Columbia Ocean Strategy Working Group, in Fisheries and Oceans Canada, *Role of the Provincial and Territorial Governments in the Oceans Sector.*

28. The Land Act 1996 deals with the administration and disposition of Crown land. It prohibits the disposition by Crown grant, of Crown land below the natural boundary of a body of water, except where authorised by the Lieutenant Governor in Council.[58] Furthermore the Act provides that in the disposition of Crown lands adjacent to the foreshore or other waters, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the grant unless there is express provision in the grant to the contrary.[59] It may therefore be assumed that coastal lands are considered to form a special category of Crown land.

29. British Columbia has also introduced legislation designating areas of land[60] as parks or recreation areas. The Park Act 1996 gives the Ministry of Environment, Lands and Parks responsibility over all matters concerning parks and recreation areas, and public and private use and conduct in them.[61]

**Public Rights in the Foreshore and Seabed**

30. The Crown's ownership of the foreshore and seabed, as well as any grantee of the Crown, is subject to public rights.[62]

31. *Access and Recreation* The extent of the rights of access and recreation over the foreshore is not clear.[63] It would appear, nevertheless, that the provinces can control the exercise of these public rights. For example, in Nova Scotia certain areas of land are exempted from the statutory provisions that grant the rights of public access and recreation.[64] Moreover in Prince Edward Island, there is legislation to restrict vehicular access to the foreshore.[65]

32. *Navigation* The existence of the public right of navigation is clear.[66] Crown management of the foreshore and seabed must therefore conserve and protect the public right to navigation.[67]

33. The consent of the federal government must be obtained if any interference with the right of navigation is anticipated. This would apply to any work or object interfering with the navigability of a watercourse, such as the erection of works or operations.[68]

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[58] Land Act 1996 s 18. Under s 1, natural boundary is taken to mean "the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself."

[59] S 55.

[60] Including the foreshore and coastal areas.

[61] Park Act 1996 s 3.

[62] *R v Meyres* (1853), 3 UCCP 305 (C.A.); *Cunard v R* (1910) 43 SCR 88, where it was held that the Crown could not, without legislative sanction, grant the right to place below the low water mark any obstruction which would prevent the full and free exercise of the public rights of navigation; *Leamy v R* (1916) 54 SCR 143, in which it is confirmed with regard to navigable rivers that any express grant of proprietary interest in the bed must remain subject to the paramount right of public use of the navigable waters, a right which cannot be destroyed or abridged. Note the inclusion of navigable rivers which are non-tidal will depend on whether the *ad filum aquae* presumption is applied or not; see para 3.

[63] There was no detailed discussion of these public rights in the books and sources, other than that such rights do exist.

[64] See para 25, note 53.

[65] Environmental Protection Act (consolidated October 2000) s 22.

[66] *Cunard v R* (1910) 43 SCR 88; *Leamy v R* (1916) 54 SCR 143.

[67] In *Reference re Waters and Water Powers* [1929] SCR 200 the question was whether a Crown right was subject to the public right of navigation. The court held that the Crown's title is subject to the public right, except in so far as the Crown possesses by law a superior right to use or grant the use of waters for other purposes, such as for mining, irrigation or industry.

34. *Fishing* The right to fish is an incident of ownership accompanying title to the bed, whether the title is held privately or by the federal or provincial Crown.[69] Thus, in respect of non-tidal waters, the right to fish rests with the riparian owner.[70] In tidal waters, however, the public right to fish takes priority over title to the bed. This position can only be altered by federal legislation.[71] The provinces have power to legislate with respect to non-tidal waters within the legislative jurisdiction of the province.[72]

35. An exception to the public right to fish in tidal waters occurs where fishing in tidal waters requires the use of the bed. The federal government may regulate this type of fishing, but due to the provincial proprietary rights in the soil, provincial permission is required.[73]

**Accretion and Erosion**

36. An accretion to the land, or a permanent recession of the water, will work to the benefit of the owner of the parcel of land to which the area accedes. This applies only to slow and imperceptible action[74] and not to a rapid avulsion. An accretion will be treated as being imperceptible even if the accreted area is composed of soil of a different quality or hue than that previously comprising the accreted land, so that the added area is quite noticeable. It is the progress of accretion that must be imperceptible, not the result.[75] Accretion may even occur as the result of non-natural forces[76] provided that it is not the landowner that has brought about that result.[77] Deliberate reclamation will not add to the land owned by the riparian tenement. In this situation, ownership will remain with the Crown.

37. The same principles are generally applicable should erosion occur. If a bank or high water mark erodes, the lands covered by water are no longer part of the foreshore or riparian lands but will become part of the sea or river bed.

**Conclusion**

38. The definitions of the foreshore and seabed are similar to those of the English common law. Nevertheless, certain provincial legislation affecting coastal areas would appear to extend such definitions so as to include the beach.

39. The Crown's title to the foreshore and seabed appears to be that of full beneficial ownership, although it must be exercised in the public interest.

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[68] See Canada Ports Corporation Act, RSC 1985, Fisheries Act, RSC 1985 and the Navigable Waters Protection Act RSC 1985. See also *Fleming v Spracklin* (1921) 64 DLR 382. Information obtained from Lordon, *Crown Law*.
[69] Lordon, *Crown Law,* p240.
[70] Note this right is severable from title to the bed. Lordon, *Crown Law,* p240.
[71] Pursuant to s 91(12) of the Constitution Act 1867. This section reserves jurisdiction over seacoast and inland fisheries to the Crown in right of Dominion. This federal power does not include any proprietary rights but includes, for instance, the exclusive control over methods and seasons for fishing, and imposition of taxes in the form of licences.
[72] Constitution Act 1867 ss 92(5) and (13).
[73] *AG Canada v AG Quebec*, [1921] 1 AC. 153 (PC).
[74] See *Southern Centre of Theosophy Inc. v State of South Australia,* [1982] A.C. 706, [1982] 1 All ER 283 (PC). This case also applies in relation to accretion in New Zealand.
[75] *Clarke v Edmonton (City),* [1930] SCR 137.
[76] For example, the building of a dam upstream.
[77] *Throop v Cobourg & Peterboro Railway Co* (1856), 5 UCCP 509; *Standly v Perry et al* (1879), 3 SCR 356.

40. The management of the foreshore and seabed is shared between the federal government and the provinces. There are some interesting features of provincial legislation such as in Nova Scotia, where certain coastal areas can be excluded from the provisions of the Beaches Act 1989, which provides rights of recreation and access to the foreshore and beaches.

41. The question of whether a harbour is public is important in determining the ownership of the seabed of the harbour.

42. The Crown's ownership of the foreshore and seabed is subject to public rights.

## England and Wales

### Defining the Foreshore and Seabed

43. At common law, the foreshore lies between the high water mark of medium high tides and the low water mark.[78] The landward limit is the high water mark of ordinary tides, which is the line of the medium tide between the spring and neap tides throughout the year.[79] The seaward limit of the foreshore is usually taken to be the low water mark of such tides.[80]

44. The foreshore has been defined in different ways under statute.[81] Furthermore it has been argued that it includes the whole of the shore that is from time to time exposed by the receding tide.[82] It seems therefore that the definition of the foreshore is not altogether clear.[83]

45. The seabed between low water mark and the limit of territorial sea[84] is within the sovereignty of the Crown. The soil of the bed of all channels, creeks and navigable rivers, bays and estuaries, as far up as the tide flows, is *prima facie* the property of the Crown.[85]

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[78] 49 Halsbury's Laws of England, para 4.

[79] *Government of the State of Penang v Oon* [1971] 3 All ER 1163 at 1170-1171 PC *per* Lord Cross of Chelsea; [1972] AC 425 at 435-436. It is the point on the shore which is, about four days in every week, reached and covered with the tides; *A-G v Chambers* (1854) 4 De GM & G 206; (1854) 43 ER 486 at 489 *per* Alderson B.

[80] *Blundell v Caterall* (1821) 5B & Ald 268, (1821) 106 ER 1191. The seashore, foreshore and sea beach are generally used synonymously but see 49 Halsbury's Laws of England, para 4.

[81] For example, the Limitation Act 1980 s 15(7) Schedule para 11(3) defines the foreshore as "the shore and bed of the sea and of any tidal water, below the line of medium high tide between the spring tides and the neap tides" and under the Salmon and Freshwater Fisheries Act 1975 s 41(1) it includes "the shore and bed of the sea and of every channel, creek, bay and estuary, and navigable river as far up as the tide flows."

[82] *Loose v Castleton* (1978) 41 P and CR 19 at 34 *per* Bridge LJ.

[83] For a discussion of the difficulties of describing the foreshore with certainty, see *Anderson v Alnwick District Council* [1993] 3 All ER 613; [1993] 1 WLR 1156 DC. See also *Tito v Waddell (No.2), Tito v A-G* [1977] 3 All ER 129 where it was argued that all that lies landward of the high water mark and is in apparent continuity with the beach at high water mark will normally form part of the beach, *per* Megarry VC at 263.

[84] The territorial sea of the UK now extends 12 nautical miles from baselines established by Order in Council; Territorial Sea Act s 1(1)(a); paras 2.2-2.3 *supra*.

[85] Opinion appears to be divided as to the Crown's ownership of the seabed. In *R v Keyn* (1876) 2 Ex D 63 at 199 per Cockburn LCJ "Between high and low water mark the property in the soil is in the Crown…Beyond low water mark, the bed of the sea might, I should have thought, be said to be unappropriated, and if capable of being appropriated, would become the property of the first occupier." However, in *Gann v Whitstable Free Fishers* (1865) 11 HL Cas 192 it was held that the bed of all tidal navigable rivers and of all arms of the sea is vested in the Crown for the benefit of the subjects. Furthermore, in *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 at 166 *per* Parker J "…The Crown's ownership of the foreshore is a beneficial ownership. Clearly the bed of the sea, at any rate below low water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership"; see generally 49 Halsbury's Laws of England para 2.

46. Tidal waters are defined as those waters which are subject to the regular ebb and flow of the ordinary highest tides, irrespective of what occurs under unusual circumstances.

**Ownership of the Foreshore and Seabed**

47. Ownership of the foreshore is *prima facie* vested in the Crown[86], unless it has passed by grant or possessory title.[87] The possessory title must be acquired against the Crown; it is not sufficient merely to show a good root of title of 60 years.[88]

48. The Crown owns the seabed,[89] and claims the mines and minerals under the soil within the limits of the territorial sea.[90] If the Crown alienates the seabed, public rights, including those of navigation and fishing, are unaffected. [91] A person can also acquire title by usage and prescription to such part of the seabed, as he may reasonably possess.[92]

**Management of the Foreshore and Seabed**

49. As in Scotland, the Crown Estate Commissioners manage the foreshore and seabed.[93] In addition there are many statutory provisions regulating the use of the foreshore and seabed.[94]

**Harbours**

50. Where the limits of a port or harbour extend over tidal waters the ownership of the bed is presumed to vest in the Crown, in the same way that the foreshore is *prima facie* vested in the Crown.[95] As in Scotland, some harbour authorities own or are lessees of the bed of their harbour under conveyance or lease from the Crown.[96]

**Public Rights in the Foreshore and Seabed**

*Common Law*

51. *Passage*. The public has no right of passing along or across the foreshore, unless in the exercise of the rights of navigation and fishing.[97] Nevertheless, the public may pass across

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[86] Hales De Jure Maris (Hargrave's Law Tracts 14) in 49 Halsbury's Laws of England, para 9, also included are the soil of estuaries and arms of the sea and of tidal rivers, so far as the tide ebbs and flows.
[87] 49 Halsbury's Laws of England, para 9.
[88] *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618 at 631, [1968] 1 All ER 979 at 984 CA per Russell LJ. The "root of title" is the conveyance or document with which ownership commences.
[89] *Supra* note 85.
[90] 49 Halsbury's Laws of England, para 2.
[91] *Gann v Whitsable Free Fishers* (1865) 11 HL Cas 192; *A-G v Wright* [1897] 2 QB 318 CA; *Lord Advocate v Weymss* [1900] AC (HL) 48 at 66.
[92] Hale's De Jure Maris (Hargrave's Law Tracts 31-33) in 49 Halsbury's, Laws of England, para 3.
[93] Crown Estate Act 1961 s 1. For more information concerning the role of the Crown Estate, see paras 3.9-3.11.
[94] The majority of the statutory controls discussed in Appendix 2 extend to the whole of the UK. However, the Town and Country Planning Act 1990 governs development over land; see in particular the special provisions relating to Crown land; ss 293-298. For information concerning the responsibilities of the Environment Agency, established under the Environment Act 1995, see 49 Halsbury's Laws of England paras 159-167. A local authority may also make byelaws regulating the exercise of bathing and navigation on the foreshore and seabed; see further 49 Halsbury's Laws of England para 23.
[95] 49 Halsbury's Laws of England, para 610.
[96] For example the Port of London owns part of the bed of the Thames within its jurisdiction; 49 Halsbury's Laws of England, para 610.
[97] 49 Halsbury's Laws of England, para 18.

the foreshore if there is a lawfully established right of way from one place to another over the foreshore.[98]

52. There is neither a right of general recreation nor a right to wander.[99] There is no general right of loading or unloading goods on the foreshore, or landing or embarking, unless in an emergency.[100]

53. *Bathing*. There is no common law public right to bathe in the sea, or to use the foreshore for the purposes of bathing,[101] even where the foreshore and seabed are Crown property. A right to use the foreshore for bathing may be acquired by custom or prescription by the permanent or temporary inhabitants of a parish or district.[102]

54. *Seaweed and Shellfish.* There is no common law right to enter the foreshore to gather seaweed.[103] Seaweed cast between high and low water mark belongs to the owner of the foreshore, and that below low water mark belongs to the Crown.[104] There may be a public right to gather shellfish from the foreshore in the absence of a private right.[105]

55. *Navigation.* The right of navigation has been described as "a right to pass and repass over the whole width and depth of water (in a navigable waterway), and includes the incidental rights of loading and unloading."[106] The existence and extent of the right depends on whether the waters are tidal or non-tidal.

56. Prima facie the right of navigation exists on all tidal waters where navigation is possible, since the bed of such waters vest in the Crown.[107] The right of navigation constitutes a right to pass and repass for any reasonable purpose including recreation,[108] and the right to remain for a reasonable time.[109] The owner of the foreshore must not interfere with the right of navigation,[110] and every grant of Crown land is without prejudice to the right of navigation.[111]

57. With regard to non-tidal waters, the general rule is that there is no public right of navigation, as the bed of such waters is vested in the riparian owners. Nevertheless, a public right can be established by immemorial usage,[112] Act of Parliament,[113] or by express grant of

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[98] *Ibid*.
[99] *A-G v Antrobus* [1905] 2 Ch 188 at 198; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 479, [1967] 1 All ER 833 at 849. However, a statutory right of access to land has been introduced by the Countryside and Rights of Way Act 2000; see *infra* paras 59-63.
[100] *Blundell v Catterall* (1821) 5 B & Ald 268, (1821) 106 ER 1191. But see the public right of navigation, para 55 *infra*.
[101] *Blundell v Caterall, ibid.*
[102] *Blundell v Caterall ibid*; *Brinkman v Matley* [1904] Ch 313 CA.
[103] *Howe v Stawell* (1833) Alc & N 348; *Mahoney v Neenan and Neenan* [1966] IR 559.
[104] 49 Halsbury's Laws of England, para 33.
[105] *Anderson v Alnwick District Council* [1993] 3 All ER 613 at 623, [1993] 1 WLR 1156 at 1168 DC *per* Evans LJ.
[106] *Tate & Lyle Industries Ltd v GLC* [1983] 2 AC 509 at 537, [1983] 1 All ER 1159 at 1170 HL *per* Lord Templeman.
[107] *Miles v Rose* 918140 5 Taunt 705; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139.
[108] *Wills' Trs v Cairngorm Canoeing and Sailing School* 1976 SLT (HL) 162 at 203 *per* Lord Hailsham of St Marylebone.
[109] *Original Hartlepool Colleries Co.v Gibb* 918770 5 Ch D 713.
[110] *A-G v Johnston* (1819) 2 Wils Ch 87; *R v Lord Grosvenor* 918190 2 Stark 511.
[111] *A-G v Johnston* (1819) *ibid*. For incidental rights of navigation, see 49 Halsbury's Laws of England, para 724.
[112] *Orr Ewing v Colqhoun* (1877) 2 AC 839 HL; *Bourke v Davis* (1889) 44 Ch.D; *Rawson v Peters* (1972) 225 Estates Gazette 89 CA.
[113] *R v Betts* (1850) 16 QB 1022.

the owner of the waters.[114] Where such right is established in non-tidal waters, it must be established in a reasonable manner[115] for reasonable purposes.[116]

58. *Fishing*. There is a public right to fish in tidal waters,[117] and it seems, in the open sea.[118] However, no public right of fishing exists in non-tidal waters.[119]

*Statute*

59. *Countryside and Rights of Way Act 2000*. The Countryside and Rights of Way Act 2000 has introduced a statutory right of access to land in England and Wales. Under the Act, a person is entitled to enter and remain on any access land for the purposes of open-air recreation,[120] provided that the general restrictions on this right are observed.[121] "Access land" is defined to include open country[122] shown on a map in conclusive form,[123] registered common land[124] and land situated more than 600 metres above sea level in any area not covered by a map showing open country.[125] The foreshore and seabed do not therefore, fall within the definition of access land. Nevertheless, the Secretary of State[126] has the power to extend the definition of open country to include coastal land.[127] Under the Act, coastal land means the foreshore and land adjacent to the foreshore, including barriers, dunes or beaches.[128]

60. Whilst the Act does not determine the meaning of "open-air recreation" it does place restrictions on the exercise of the right of access.[129] The Act excludes access by vehicle, the use of vessels or sailboards, and bathing in non-tidal water, camping, the lighting of fires or any act likely to cause a fire, taking any animal other than a dog onto the land, intentionally or recklessly taking, killing, injuring or disturbing any bird, animal or fish, and intentionally removing, damaging or destroying any plant, shrub, tree or root.

61. This right of access may also be restricted or excluded by the owners of the land[130] under certain circumstances.[131] Nevertheless a landowner can only restrict or exclude access to land

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[114] 49 Halsbury's Laws of England, para 742.
[115] *Original Hartlepool*, note 109 *supra.*
[116] *Wills' Trs*, note 108 *supra.*
[117] *Stephens v Snell* [1939] 3 All ER 622 *per* Bennett J.
[118] *Blundell v Caterall* (1821) 5 B & Ald 268 at 294, 106 ER 1190 *per* Holroyd J at 1199-1200; see generally Gray K and S.F, *Elements of Land Law*, 3rd Edition 2001, p.131.
[119] *Pearce v Scotcher* (1882) 9 QBD 167 where it was held that there was no public right of fishing in non-tidal waters, even where they are to some extent navigable.
[120] Countryside and Rights of Way Act 2000, s 2(1). The Countryside Agency is required from time to time to issue and revise a Code of Conduct governing this right of access; s 20.
[121] S 2(b). The general restrictions are listed in Schedule 2 to the Act see *infra*. Furthermore, a person exercising the access right must not break or damage any wall, fence, hedge, stile or gate; s 2 (a).
[122] "Open country" is defined under s 1 of the Act as "land, which (a) appears to the appropriate countryside body to consist wholly or predominantly of mountain, moor, heath or down, and (b) is not, registered common land." However, "mountain, moor, heath or down does not include land which appears to the appropriate countryside body to consist of improved or semi-improved grassland."
[123] S 1(1)(a). The requirements to prepare and publish maps detailing all access land are set out in ss 4 and 5 of the Act.
[124] S 1(1)(b).
[125] S 1(1)(d). The Act also exempts certain land from the access provisions. "Excepted land" is defined under Schedule 1 to include land covered by buildings or the curtilage of such land, land within 20 metres of a dwelling house, land used as a park or garden, land which does not fall within the preceding definitions and is covered by works of a statutory undertaker, and land regulated by byelaws under the Military Lands Acts of 1892 and 1900.
[126] In Wales, the National Assembly for Wales.
[127] S 3.
[128] S 3(3)(a) and (b).
[129] Sch 2, para 1.
[130] Or other person having an interest in the land; s 22(3).

for up to 28 days of a calendar year[132] and never on a public holiday.[133] Restrictions are also permitted for the purposes of land management,[134] nature conservation and heritage preservation,[135]or defence or national security.[136]

62. The introduction of the access right removes the right of landowners to raise an action of trespass against those entering their land without authorisation. Furthermore, a person commits a criminal offence if they place or maintain near access land a notice containing false or misleading information which is likely to deter a member of the public from exercising the access right.[137]

63. An access authority[138] can make byelaws covering access land for the preservation of order, the prevention of damage to the land or anything on it, and for ensuring that those exercising the access rights conduct themselves in an appropriate manner so as not unduly to interfere with the enjoyment of the land by others.[139] Byelaws must not interfere with any public right of way,[140] and the access authority must consult with the Countryside Agency and any local access forum before introducing byelaws.[141]

**Accretion and Alluvion**

64. Accretion is the gradual and imperceptible receding of the sea or inland water,[142] and alluvion means the gradual and imperceptible deposit of matter on the foreshore.[143] Where accretion or alluvion occurs in relation to land above high water mark, the added land belongs to the owner of the dry land to which it is added.[144] Where the added land is between low and high water mark it belongs to the owner of the foreshore.[145]

65. The doctrine of accretion applies equally to Crown and privately owned land,[146] and whether the change occurs by natural or artificial means,[147] provided it is gradual and imperceptible.

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[131] S 22(1). Notice must be given to the "relevant authority", being the Countryside Agency or Countryside Council for Wales, or the National Park Authority; ss 1(2) and 21(5).
[132] S 22(2). Under s 22(7), only four of the days can be at the weekend, and there can be no restrictions on any Saturday between 1 June and 11 August, or any Sunday between 1 June and 30 September.
[133] S 22(6).
[134] S 24.
[135] S 26.
[136] S 28.
[137] S 14.
[138] Defined under s 1(2) as a National Park Authority where the land is situated in a National Park, or in relation to any other land, the local highway authority in whose area the land is situated.
[139] S 17(1).
[140] S 17(4).
[141] S 17(3). It should be noted that access agreements under Part V of the National Parks and Access to the Countryside Act 1949 are no longer to be made, after the commencement of the Act, in relation to land which is open country or registered common land; s 46, 2000 Act.
[142] *R v Lord Yarborough* (1824) 3 B & C 91 at 107; *Government of the State of Penang v Beng Hong Oon* [1972] AC 425 at 434; *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 716, [1982] 1 All ER 283 at 287, PC.
[143] 49 Halsbury's Laws of England para 11.
[144] *R v Lord Yarborough* (1824) 3 B & C 91.
[145] *Ibid*. These presumptions can be rebutted, although this would be difficult, due to the strength of evidence which is required.
[146] *Re Hull and Selby Railway Co* (1839) 5 M & W 327.
[147] *A-G v Chambers, A-G v Rees* (1859) 4 De G & J 55.

66. Where there are sudden alterations to the boundaries of land and water, or where deliberate artificial reclamation takes place, the above presumptions do not apply and there is no change to the ownership of the land.[148]

**Conclusion**

67. The definition of the foreshore in English law seems to be uncertain. This contrasts with the position in Scots law, where the definition is well settled.[149]

68. The Crown's title to the foreshore and seabed appears to be one of beneficial ownership. It cannot prejudice the public rights, even where land is alienated.

69. Public rights over the foreshore and seabed under English law are significantly less extensive than in Scotland.[150] Although a statutory right of access has been introduced in England by way of the Countryside and Rights of Way Act 2000, it does not apply automatically to the foreshore.[151] In contrast the proposed right of access under the Land Reform (Scotland) Bill does apply to the foreshore.[152]

70. Under the Countryside and Rights of Way Act 2000, there does not appear to be a mechanism for enforcing the right of access.[153] In Scotland however, it is proposed that the sheriff court will have jurisdiction to determine the existence and extent of access rights.[154]

71. The legislation in both jurisdictions takes a similar approach to the definition of recreation. Under the Countryside and Rights of Way Act 2000, "open-air recreation" is not defined; instead a list of restrictions on the exercise of the access right has been introduced.[155] Similarly in Scotland, there is a list of activities excluded from the access rights under the Land Reform (Scotland) Bill.[156]

## France

**Defining the Foreshore and Seabed**

72. In French law, there does not appear to be a definition of the foreshore and seabed in terms of watermarks and tides.

73. The principal French legislation regulating public property in the coast[157] does not make reference to the coastal area in these terms. Instead, the Coastal Act 1986 defines the area[158] very broadly to include "the coastline of seas and oceans, sea lochs,[159] interior waters over an

[148] *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 612 PC.
[149] Para 2.19 *supra*.
[150] For a discussion of public rights over the foreshore and seabed in Scotland, see Part 4.
[151] See para 59 *supra.*
[152] Although not the sea and public rivers, para 1.13 *supra*.
[153] Although the law of trespass no longer applies to access land; para 62 *supra*.
[154] Land Reform (Scotland) Bill Clause 29; para 1.13 *supra*.
[155] Countryside and Rights of Way Act 2000 Sch 2 para 1; para 60 *supra*.
[156] Land Reform (Scotland) Bill Clause 5; para 1.14 *supra*.
[157] The law of 3rd January 1986 concerning the development, protection and exploitation of the coastline – hereafter referred to as "The Coastal Act".
[158] Known as *le littoral, les communes littorales* and *le domaine public maritime*. These phrases seem to be used interchangeably to refer to the public coastal domain.
[159] The precise translation of this was "large salty pond". It is presumed that this refers to sea loch.

area of 1000 hectares" and "the coastline of estuaries and deltas which are situated downstream from salty waters, and which are sufficiently close to the coast to affect the ecological and economical balance of the area".

74. No further definition is given. However Article 2 of the Act provides that the list of coastal areas is fixed by order in the State Administrative Court[160] after consultation with the relevant local authorities. Furthermore, under Article 26, the boundaries of the shore are determined by the national government, subject to a public inquiry.

**Property Rights in the Foreshore and Seabed**

75. Property rights in the foreshore and seabed of France are vested in the State. These areas form part of the *domaine public de L'Etat*[161] and are controlled and regulated by the State, or emanations of the State. Administrative law and the administrative courts oversee the process of legal enforcement.

76. Land within the public domain is not in principle capable of alienation, nor can it legally be acquired or abandoned through prescription.[162] Special procedures have to be followed in order to declassify the land as part of the *domaine public* before the State can transfer proprietary rights.[163] Unfortunately, it is not clear the extent to which this declassification might occur in respect of the foreshore and seabed.

77. It has not been possible to discover conclusively the extent of State ownership of the foreshore and seabed. The French government's own figures seem to relate only to public access to the coastline.[164]

78. State ownership of the public coastal area is subject to significant restrictions in relation to the exercise of proprietary rights, by virtue of the importance of the public interest. Support for the public interest view of State ownership is given by Article 1 of the Coastal Act 1986. This provides that "the coastal area in France is a geographical entity that calls for a particular system of development, protection and exploitation," which the Act then goes on to describe. In detailing the policy goals the Act seeks to achieve, the coastal features the Act purports to protect become apparent. These are, generally, the ecological and conservation value of the area and the economical and patrimonial interest in associated activities.[165]

**Management of the Foreshore and Seabed.**

79. Legislation governing the management and use of coastal areas was specifically enacted in the Coastal Act 1986. The growth of tourism, economic development and construction, led

[160] Hereafter referred to as the *Conseil d'Etat*. It is the highest administrative court in France, to which administrative appeals from the tribunals and lower appeal courts are referred. It is also advises the government on various legal matters.
[161] The public domain.
[162] Art L-52 of the State Domain Code (the legislative code covering the public domain) which provides that public property is inalienable and imprescriptible.
[163] See Bell, Boyron and Whittaker, *Principles of French Law* (1998), p 282 and Art 4 of the Public Rivers and Inland Navigation Code concerning the declassification of public rivers and inland waterways.
[164] From the website of the Ministry of Housing, Transport and Infrastructure - http://www.mer.equipment.gouv.fr, it is claimed that out of a coastline of 5,500km, 4719km is accessible to the public in some way. These figures are supported by those in the Report *Assessment of the Coastal Law infra* note 166, p 34.
[165] Coastal Act 1986, Art 1.

to public pressure to act on two levels: firstly, in relation to the protection of the environment and secondly, in relation to planning restrictions.[166]

80. The management and protection of the coastal areas is shared between different levels of government and also involves other public bodies.[167]

**Harbours**

81. The organisation and management of harbours in France is split into three categories.[168]

82. There are seven commercial harbours, known as "autonomous ports", run by the national government. They deal with over 80% of the sea traffic of goods. There are then 23 ports of national interest comprising fishing and commercial ports that are generally run by the Chamber of Commerce and Industry. Finally, there are 532 decentralised ports, of which 304 are commercial and fishing ports and are administered by the regional government.[169] The remaining 228 ports are reserved for yachting and other leisure pursuits, and are managed by the Communes.

83. Since the decentralisation law of 1983, the Communes have gained competence over the creation, development and exploitation of leisure ports and marinas. However, they also have public service obligations in relation to these marinas. They must ensure the continuity of services offered, the equality of all users, the implementation of changes required by law, the keeping of financial and administrative records and the reservation of moorings for passenger pleasure boats. On the other hand they can also charge for mooring, the use of equipment, and the supply of services such as handling and towing.[170]

**Public Rights in the Foreshore**

84. State ownership of the foreshore and seabed is subject to public rights of access and use.

85. *Public Rights of Access* Under the Coastal Act 1986, pedestrian access to the beaches is secured unless justified by reasons of national security and defence or protection of the environment.[171] This unrestricted and free access for the public is described as the "fundamental purpose" of the beach.[172] It is interesting to note that the legislation defines the

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[166] See *Bilan de la loi littoral – Assessment of the Coastal Law*, a report of the Transport, Housing and Infrastructure Minister presented to the French Parliament in February 1999, found at http://www.ladocfrancaise.gouv.fr.

[167] The principle responsibility lies with the Ministère de l'Equipement, des Transports et du Logement (the Ministry of Infrastructure, Transport and Housing). However the Communes (local authorities) and the mayor also have specific functions under the Coastal Act. Furthermore the Conservatoire de l'Espace Littoral et des Rivages Lacustres (the Conservatory of Coastline and Lakeside Areas) is a public body charged with protecting threatened natural sites.

[168] Information from the website of the Ministry of Housing, Transport and Infrastructure, *supra* note 164.

[169] Known as the "Département".

[170] Article 28 of the Coastal Act allows temporary permits for the occupation of the public domain to be granted for the development, organisation and management of mooring zones and light equipment stationing. The holder of this permit is then entitled to charge users of the area for the services provided. The power to grant these permits can be delegated to another organisation whose function is to develop facilities in boating areas. It has been reported that the creation of these mooring and light equipment zones has helped to tackle the demand for an increasing number of boating links. Moreover, as no permanent harbour structure has to be built, they limit the damage done to the environment. However, it seems that the number of permits issued is not as high as it could be under the law, due to the cumbersome and constraining nature of the procedure, and that there continues to be a significant number of illegal moorings. *Assessment of the Coastal Law*, *supra* note 166.

[171] Coastal Act 1986, Article 30.

[172] *Ibid*.

area to be preserved for access and use as a "significant breadth along the length of the coast". It appears that combined considerations of the anticipated use and particular characteristics of the section of coast in question will determine the width of this space.

86. *Access over private property* Rights of access over private properties reinforce the principle of public access to the beaches of France. These are established by way of two servitudes. First, public access to the coast is facilitated by the existence of a three-metre wide pedestrian servitude of passage upon the private properties that border the length of public coasts.[173] This servitude was established by the "law of 31 December 1976",[174] although the origins of the track are ancient and were used as a matter of custom from well before this date. Second, the Coastal Act 1986 reinforces these rights across private properties by instituting a further servitude of "*passage de pietons transversale au rivage*".[175] Translated literally, this means "the servitude of access on foot to cross to the coast," therefore the servitude allows the public to cross private lands in order to access the coast. These rights of way only exist, however, in respect of "existing paths and tracks that are collectively used".[176] The servitude aims to connect public roads and the seashore (or footpaths of access beside it), in the absence of a public way situated less than 500m away which permits access to the shore.

87. Paths and tracks open to the public must be signposted and marked as such.[177] Public opinion has been favourable with regards to these measures which are considered responsible for the opening up of natural sites that were previously difficult to access.

88. Both servitudes across private property are for use exclusively by pedestrians. Suspension of the servitude is apparently rare[178] but under Article L160-7 of the Town Planning Act, the owner of the burdened property is in either case entitled to compensation where he or she suffers direct, material and certain loss as a result of the establishment of the servitude.

89. With regards to the beaches and dunes themselves, the passage and parking of motor vehicles, other than rescue vehicles, is also forbidden unless special authorisation is obtained.[179]

90. The *Ministiere de l'Equipement* has expressed the need to be vigilant in policing the use of these paths in order to ensure overuse does not unnecessarily risk disturbing the delicate environmental balance of the area. Also, such paths do not exist for all the beaches of France; about 1,000 km of French coastline apparently remains inaccessible.[180]

91. *Other Public Rights* Public rights to fishing and navigation in the sea and foreshore area exist.[181]

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[173] Article L160-6 of the Town Planning Act.
[174] This law has been codified in the above provision.
[175] Article 5, inserting Article 160-1 into the Town Planning Act.
[176] Something of an awkward translation, but quite literally what it says. It is assumed that it refers to customary paths of some sort.
[177] Article 28(2).
[178] Note 166, *supra*.
[179] Article 30.
[180] Note 164, *supra*.
[181] Note 164, *supra*.

92. *Fishing* The rights to fishing may be exercised either on foot or by boat, as part of the right to navigation.[182] If fishing takes place on foot on the coast of the sea, without resort to a boat or other floating vehicle, lines held manually are not subject to any administrative formalities or provisions. The use of nets, however, will require authorisation from the maritime authorities.[183]

93. Local restrictions on fishing rights do exist and are implemented from region to region for the security of beach users and to avoid excessive destruction of species, and flora and fauna. For example, the use of motor vehicles or instruments may be restricted, and in some areas the collecting of shellfish or particular species such as oysters is forbidden. These restrictions are local and will vary according to coast and zones.[184]

94. The practice of deep-sea fishing is also subject to certain restrictions. The individual must be aged at least 16, have civil liability insurance and have reached a standard agreement with the Maritime Affairs Department. Where any type of fishing is undertaken as a leisure pursuit, any fish caught cannot be sold.

95. *Navigation* Whilst the existence of the right of navigation was clear from the information provided by the government, the source of this right was not discovered. The Coastal Act does not deal specifically with public rights other than those relating to access.
The right of navigation is subject to any rules or charges implemented by the Communes, who have competence over leisure ports.[185]

**Conclusion**

96. Whilst ownership of the public coastal domain is vested in the State, it must be exercised in the public interest. This position appears to have been enshrined in the Coastal Act, the principal legislation in this area.

97. The responsibility of managing, protecting and developing the coastline is shared between different layers of government, with the enforcement of measures a matter for the administrative courts.

98. Public rights of access to the coastline appear to have been codified in the Coastal Act. Moreover as a result of Article 30 of the Act,[186] a right to use the beach for recreational purposes could be implied. However, the legal source of ancillary rights such as those concerned with navigation and fishing is less clear.

[182] Note 164, *supra*, *Les Loisirs* section.
[183] A permit must be obtained from the Maritime Affairs Department.
[184] Further information can be obtained from La Direction du Transport Maritime, des Ports et du Littoral. (The Maritime Affairs Department).
[185] See para 80, note 167.
[186] Which describes unrestricted and free public access as "the fundamental purpose of the beach".

## Germany

### Introduction: which law?

99. Perhaps because the coastline in Germany is relatively short, little appears to have been written on the law of the foreshore in that country.[187] Compiling a clear statement of the law is problematic for three reasons. First, there is no one statute which governs this area of law, although there are a number which govern parts of it. Secondly, the borderline between federal and state jurisdiction is, at times, not altogether clear. Thirdly, the matter is further complicated by possible survivals from Germanic law, for example the *Jütische Low* and the *Sachsenspiegel,* which were in force right up until the passing of the BGB, and may, in certain circumstances, still be valid law.

100. There are five Federal States which have coastlines: Niedersachsen, Schleswig Holstein, Mecklenburg Vorpommern and the two city States of Bremen and Hamburg.

101. Water law, including the law relating to coastal seawater, is a matter of state rather than federal law, federal jurisdiction in this matter being restricted to the enactment of skeleton provisions.[188] The principal federal Act here is the Water Resource Management Act – *Wasserhaushaltsgesetz* (WHG).[189] However, being designed to regulate the maintenance of the ecological balance of the water, the Act is of only secondary interest to us. The Federal Waterways Act – *Bundeswasserstraßengesetz* (WaStrG)[190] – is also of relevance in this area. It regulates the construction and destruction of federal waterways[191] and rights of navigation along them.

### Defining the Foreshore

102. Because there is no statute dealing with the law of the foreshore specifically, there is no statutory definition of the foreshore *per se* in German law. There are, however, definitions of beaches, *Vorland*,[192] dykes, harbours and mudflats of which the foreshore is variously made up.

103. *Beach* There is no private law definition of the term "beach". In accordance with the German law principle of *unity of the legal order*, and, further, bearing in mind that a legal definition of the beach will most often be needed in situations in which public law is relevant, it would seem fair to use the public law definition of the term "beach" for most purposes. The Dyke and Coastal Regulation - *Deich-und Küstenverordnung (DKVO),* contains such a definition. Beaches are therein defined as a strip of coastal land lying in that area of land which can be affected by the impetus of the waves, consisting of sand, gravel, detritus, debris and other similar material, which is bordered seawards by the shoreline and

[187] A search of the law library in the Albert-Ludwigs-Universität in Freiburg revealed very little material and only one recent textbook on the subject, namely *Deutsches Küstenrecht* by Sönke Petersen. Most of what follows is taken from that book. Note that it was written in 1989 ie before German Reunification.

[188] Article 75 para. 1, Grundgesetz: "Der Bund hat das Recht, unter den Voraussetzungen der Artikel 72 Rahmenvorschriften für die Gesetzgebung der Länder zu erlassen über … die Bodenverteilung, die Raumordnung und den Wasserhaushalt … ". See also §65 EGBGB.

[189] 1996 BGBl. I s 1695.

[190] 1998 BGBl. I s 3294.

[191] Which are defined in §1 to include both internal waterways and sea waterways. The latter are, "the water surfaces between the coastline at middle high tide … and the seaward limits of the coastal seawater", but excluding harbours and beaches (§1(2)).

[192] Area of foreshore between a dyke and the water. See further below.

landwards by the edge of an area covered by plant growth, the foot of an embankment, the foot of the dunes, the foot of a seawall or the foot of a dyke.

104. *Vorland.* Vorland is described in the DKVO as the plant covered land between the seawards-facing side of a dyke and the shore line.

105. *Dyke* Dykes are described in the WHG and DKVO as artificial, rampart-like banks of earth with stable embankments, erected in order to protect the land against floods, be it from sea-tides or from the flowing-away of source or ground water.

106. *Harbour* Harbours are defined in the WaStrG as an area in or at the water, which, by reason either of the formation of the shoreline or of construction, offer water traffic the opportunity to cast anchor sheltered from the weather and the tides, to change course, to load and to unload.

107. *Mudflats* Mudflats are the shallow area by the inflow of the tide which gets gradually covered as the tide comes in and dries up as the tide goes back out. They are characterised by the branching drainage trenches cut into the ground by the ebb and flow of the water.

**Ownership of the Foreshore and Seabed**

108. *Seawater, seabed and mud flats.* Seawater, apart from coastal water, and the seabed are owned by the Federal Republic. Coastal water is owned in part by the Federal Republic,[193] and in part by the Federal States.[194] Mudflats are owned by the Federal Republic.[195]

109. *Beaches* According to the majority of academic opinion, beaches in Germany are the property of the State and are not capable of private ownership. There is authority for this view in the form of a 1965 decision of the *Bundesgerichtshof*.[196] Note, however, that while this case is often cited by proponents of the majority opinion, it is, strictly speaking, only valid authority for that part of Germany which corresponds to the old province of Prussia. This is because the decision was made according to provisions of the Prussian *Allgemeines Landrecht* (ALR).

110. The basis of the decision is as follows. §21 of the ALR provides that beaches are, "the common property of the State", and accordingly, following §80, "under common law, property of the State". "Beach" is not defined within the ALR, but is thought to encompass, at the very least, the land between the point reached by the middle high tide and that reached by the highest tide of the year, as evinced by the boundary of the grasses and by the dune formation. The State's ownership of beaches is not ownership in the sense of the BGB; ownership of beaches is qualitatively different from private ownership. Moreover, the former precludes the latter. The sea within the boundaries of the territorial waters, the beaches and the harbours are all subject to the sovereign jurisdiction of the State and property and other rights of private persons are precluded, at least to the extent that they are not exceptionally permitted by the State. Accordingly, the foreshore is, in general, not capable of registration in the Land Register.

[193] According to §89, para. 1, GG, the Federal State is owner of the *Reichswasserstraße* – imperial waterways – which may run through the coastal waters.
[194] §74 GG together with §65 EGBGB.
[195] As part of the Bundeswasserstraßen.
[196] BGH, Urt. v. 31.5.1965, BGHZ 44, 27.

111. A second view is that beaches *are* capable of private ownership. A return to first principles would seem to support this line of thinking. Beaches appear to fall within the definition of "thing" – *Sache* – found in §90 BGB. That being the case, their ownership will be regulated in the usual way by §§903ff BGB. Moreover, to argue otherwise would be to suggest that the compilers of the BGB, in seeking to create an all encompassing code, somehow forgot to make provision for ownership of the beaches. Certainly, beaches are not expressly excepted from the rules of (transfer of) ownership contained in the BGB. However, to the extent that the matter of ownership of the beaches is reserved to the Federal State legislatures, the provisions of the BGB will be of only secondary importance (see §65 EGBGB).[197]

112. Perhaps the best solution is to take a wholly pragmatic view of the matter: in fact, it is not uncommon to find stretches of the foreshore recorded in the Land Register as being in the private ownership of individuals and *Gemeinden* – local authorities.[198] In such cases, §891 BGB will act to raise the presumption that such individuals and local authorities do in fact own the relevant parts of the foreshore. On that basis we may perhaps conclude, albeit tentatively, that beaches *are* capable of private ownership.[199] Even if this is true, it should be remembered that any rights which the public enjoy in the foreshore will survive a transfer of ownership into private hands.[200]

113. *Vorland* Following the delimitation of federal and state legislative competence in §74 BGB, it would appear that the *Vorland* is capable of private ownership under the general provisions of the BGB. It could be argued, however, in light of the reservation for matters concerning water law contained in §65 EGBGB, that this is an area where the Federal States have at least partial jurisdiction.

114. *Dykes* Dykes belong for the most part to the Federal State in which they are situated.[201] In some exceptional cases, they belong to other public bodies.

115. *Harbours* That German harbours are capable of private ownership is not doubted. Such ownership is regulated by the general provisions of the BGB.

**Ownership by possession?**

116. Positive prescription is regulated by §900 BGB. The conditions are basically registration in the Land Register followed by thirty years' peaceful possession. Whether or not positive prescription can apply to the foreshore or the seabed depends, of course, on whether or not these are regarded as capable of private ownership.

117. Thus, there is authority for the fact that beaches cannot be acquired by positive prescription[202] although like the issue of whether or not beaches can be privately owned, this matter does not appear to have been finally settled either way.[203]

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[197] Ie the *Einführungsgesetz zum Bürgerlichen Gesetzbuch*. This law determines the relationship, status and conflict of the rules of the BGB to other laws.
[198] Petersen 504. Note that under §3 GBO, pieces of land belonging to the Federal Republic, or to the Federal States, or to the *Gemeinden*, as well as stretches of water and public pathways do not have to be registered in the Land Register.
[199] This is the conclusion that Petersen reaches (469) at least in relation to Schleswig-Holstein.
[200] Petersen 504.
[201] §58a, para. 2, LWG.
[202] *OLG Kiel*, Urt.v. 8.11.1904, SchlHA 1905, 33 (95); *LG Kiel*, Beschl.v. 7.2.1986, 3 T 141/83, AU S 4.
[203] Petersen 507.

118. Ownership of harbours can be acquired by positive prescription under §900 or §927, paragraph 2, BGB.[204] The public nature of a harbour, and the entitlement of the public to put it to use, will not be affected by its coming into private ownership in this way.

**Public Rights in the Sea and Foreshore**

119. *Beaches* According to §38, para. 1 of the Maintenance of the Countryside Law - *Landschaftspfleggegestz* (LPflG), everyone has the right, at his own risk, to use the beach. This provision puts into legislation what was already accepted as common law. Included within this right of use is the right to walk, ride, swim, land, place baskets, dry nets, store fishing boats and build sand castles on the beach. Sand, stones and detritus may be taken from the beach in small amounts. The position regarding appropriation of amber is less clear.

120. This general right of use does not pertain to (every part of) every beach in Germany. Certain stretches may be shut off from the public by the *Gemeinden* in the interest of the protection of nature, or in order to create areas for relaxation. [205] In areas reserved for swimming, the right to ride and to build sand castles can be restricted.[206] *Gemeinden* also have the right to restrict the right of use for various other reasons.[207] Note, however, that the exercise of the general right of use is not affected just because the beach is in private ownership. Nor may the owner of the beach charge money from the public for use of his beach.

121. The public right to use beaches does not entail an ancillary right of enforcement of the primary right by an individual against the relevant local authority. It has been argued, however, that a basis for such a right of enforcement can be found within the *Grundgesetz*.[208]

122. *Fishing Rights*[209] Fishing is a matter which falls to be regulated by the Federal States rather than by the Federal Republic. There are a number of rules which are common to all of the States, and which may be reproduced here.

123. In general, the identity of those with a right to fish will vary according to the type of water in question.

124. With regard to areas of water other than the sea, the law dictates that the owner of the water will have the exclusive right to fish in it. In the case of rivers, the owner will be the state, or some other public body, and in all other cases, the owner or owners of any land which borders the body of water will own it in corresponding proportions. Lease of the right to fish is perfectly competent. Where in respect of any small body of water there exists a large number of people with fishing rights, a local authority "fishing area" may be established. The relevant *Gemeinde* will be responsible for the administration of the fishing area.

125. Fishing in the open sea is governed by European and international law.[210]

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[204] Ibid 502.
[205] §38, para 3 and §16, para 4 of the LPflG.
[206] *Ibid*.
[207] §39, para 1 of the LPflG.
[208] §1, para 1, §2, paras.1 and 2, §3, para. 1 and §20 para 1 GG. See further Petersen 339.
[209] Taken mainly from Bauer and Stürner 322-323.
[210] See para 4.2, note 107.

126. Every German national has, by virtue of the right of common-usage - *Gemeingebrauch* - the right to engage in inshore fishing within German territorial waters.

127. *Navigation* Everyone has the right of navigation on all federal waterways, although this right may be restricted where the water flows through a nature reserve or national park.[211] Federal waterways are defined in §1 of the WaStrG to include both internal waterways and sea waterways. The latter are, "the water surfaces between the coastline at middle high tide … and the seaward limits of the coastal seawater" (§1(2)).

**Accretion and Erosion**

128. The general rule regarding the increase of an area of water where this is the result of natural causes, is that the law follows the facts. Thus it is provided in the State Water Law - Landeswassergesetz (LWG) that Federal State ownership of coastal waters is delimited in the first instance by the present position of the shore line: if the shoreline moves landwards, the property of the relevant State increases automatically. Similarly, where land neighbouring a federal waterway becomes covered with water, that water will become part of the federal waterway and will be owned by the Federal Republic. Provided that such extension of an area of water is a result of natural causes, the former owner of the land which is now covered by water will not be owed compensation.[212]

129. Where, as the result of natural causes, an area of dry land is increased because of the addition of soil or retreat of the water, that land will come into the ownership of the owner of neighbouring land, but only if:

(i) the land is physically joined to the neighbouring land at middle hightide;
(ii) three years have passed; *and*
(iii) during the three years, plants have grown on that land.[213]

130. The position with regard to deposits of sand leading to an increase in the size of a beach, in situations where the LWG does not regulate the matter, is slightly more complicated. Theoretically, the matter should fall to be regulated by the relevant Germanic law,[214] but no provision would appear to have been made therein. If we accept that beaches are not capable of private ownership, then the situation is as follows: the newly created piece of beach will come out of the ownership of the original owner and from that moment on will be ownerless. As ownerless land, it will fall to the Federal Republic.[215] The opposite belief, that beaches are capable of private ownership, would suggest that any such pieces of beach would come into the ownership of the relevant Federal State.[216]

131. Artificially engineered increases in areas of dry land or of water because of the addition of soil or retreat of the water are regulated in general by Federal State law. Thus the LWG provides that where a waterbed belonging to a Federal State is increased in size by artificial means, the resulting area of water will belong to the relevant Federal State.[217]

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[211] §5 WaStrG.
[212] Where such extension is a result of deliberate human action, the former owner of the land which is now covered by water will be owed compensation by the individual who caused the extension.
[213] §7, para 1 LWG.
[214] Petersen 521.
[215] §928, para 2 BGB.
[216] Petersen 521.
[217] §§3 and 8 LWG.

Where, however, an area of *land* is artificially increased, there is no consequent change in ownership.[218]

132. Where the size of a federal waterway is artificially increased or decreased, any resulting changes in ownership are regulated by the WaStrG. The Act provides that where a federal waterway is increased in size, the resulting area of water will belong to the Federal Republic.[219] However, where a Federal State uses a federal waterway[220] in such a way that land is reclaimed as a result, that land will become the property of the Federal State in question, rather than of the Federal Republic.[221]

**Management of the Coastal Environment**

133. This is a complicated area of the law, encompassing parts of environmental law, water law and the law of national parks and nature reserves, amongst other things. Responsibility for the coastal environment is shared between public bodies such as the *Wasserverbaende*[222] and *Bodenverbände*,[223] the *Gemeinden*, the Federal States and the Federal Republic. Again, the boundaries between the jurisdiction of the Federal Republic and that of the Federal States are not always clearly defined. What follows is intended only as an overview.

134. *Local authority regulation* As was mentioned above,[224] the *Gemeinden* have the power to restrict the public's right to use the beaches and, further, to lock off stretches of the beach in the interests of the protection of nature.[225]

135. *Coastal Seawater* The *Wasserhaushaltsgesetz* is a Federal Act designed to regulate the maintenance of the ecological balance of the water. It is a skeleton Act which prescribes certain limitations within which the individual Federal States must legislate. With regard to coastal water, it regulates the bringing in and introduction of substances to the water and the cleaning of the water. [226] Under §19 of the Act, the States are empowered to create water reserves insofar as such creation would be in the public interest. Under §22, the States are empowered to fine individuals who unsettle the ecological balance of the water.

136. *National Parks and Nature Reserves* National Parks are legally defined, large areas of land, which

i) are to be protected as wholes;
ii) in the main, fulfil the requirements of a nature reserve;
iii) are not at all, or only slightly influenced by man; *and*
iv) are intended predominantly for the conservation of a wide range of animal and plant types.[227]

[218] Petersen 527.
[219] §3 WaStrG.
[220] As it is empowered to do, provided that the purpose of the use is to serve the public interest in some way - WaStrG, §1(3).
[221] WaStrG, §1(3).
[222] Federal State Water Authorities.
[223] Federal State Land Authorities.
[224] At para 5.2.
[225] §§38 and 39 LPflG.
[226] §32a and b.
[227] §14, para 1 BNatSchG.

National parks are regulated by the provisions of the LPflG and the Nature Protectiehaw-Bundernaturschutz-gesetz (BnatSchG).

137. In 1985, the mudflats of Schleswig-Holstein were declared a national park. The protection and administration of that national park is regulated by the *Gesetz zum Schutze des schleswig-holsteinischen Wattenmeeres*.

138. Nature reserves are legally defined areas of land in (parts of) which nature and the countryside are protected:

i) in order to conserve animal and plant types;
ii) for scientific, natural historical or geographical reasons; *or*
iii) because of the rarity, special characteristics or outstanding beauty of the land in question.[228]

Nature reserves are regulated by the LPflG and BNatSchG.

**Conclusion**

139. The legal position with regard to ownership of the foreshore in Germany is not altogether clear. In fact, as opposed to in law, it appears that the majority of the foreshore belongs to local authorities - *Gemeinden* - within the Federal States. The Federal Republic owns the mudflats and a number of harbours. Small stretches of the coastline, for example, yachting harbours, are in the private ownership of individuals, clubs or other organisations. Where this is the case, it appears likely that the land will have been disponed to them by one of the Federal States in the normal way, under the provisions of the BGB.[229]

140. There are extensive statutory public rights of recreation on beaches, whether in public or private ownership. However local authorities have the power to restrict these rights for various purposes.

## New Zealand

**Defining the Foreshore and Seabed**

141. At common law, the foreshore is the land between the high water mark and low water mark.[230] It is well established that the landward limit of the foreshore is the line of medium high tide between the spring and neap tides.[231] The seaward limit of the foreshore was presumed at common law, to be the low water mark of such tides. Nevertheless it could be argued that the limit is in fact the low water mark of spring tides.[232]

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[228] §13 BNatSchG, §16 LPflG.
[229] Source: *Das statistische Bundesamt Deutschland* – Federal Department of Statistics.
[230] 49 Halsbury's Laws of England, para 4.
[231] *Attorney-General v Chambers* (1854) 4 De G M & G 206, followed in *Attorney-General v Findlay* [1919] NZLR 513, where it was held that the phrase "high water mark at ordinary spring tides" used in s 35 of the Crown Grants Act 1908, means the line of medium high tide between the spring and neap tides. See also *Government of the State of Penang v Oon* [1972] AC 425.
[232] Evidence for this is based on statutory provisions governing the baseline of the territorial sea, eg Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 (as amended in 1980, 1985 and 1996), s 2 which defines low tide elevation.

142. In terms of its governing statutes, "seabed" is defined to include the bed and subsoil of marine areas, bounded on the landward side by the low water mark along the coast[233] and on the seaward side by the outer limits of the territorial sea.[234] This echoes the common law position.[235]

143. The foreshore is also included within the definition of the coastal marine area, which is afforded particular statutory protection.[236]

**Ownership of the Foreshore and Seabed**

144. The Crown's title in respect of the foreshore and seabed originates from the doctrine of tenure, which was established in New Zealand in 1840 on the proclamation of British sovereignty. The Crown as "original proprietor" of all land has, by virtue of its sovereignty, an underlying title to the whole of the territory of New Zealand.[237] Title to the foreshore and seabed is thus originally vested in the Crown and consequently valid title may only be acquired by express grant from the Crown or by adverse possession.[238] Today, the Crown retains a dominant interest in almost all New Zealand's foreshore[239] and seabed,[240] as well as tidal and navigable rivers.[241]

145. *Foreshore and Seabed Endowment Revesting Act 1991* The possibility that ownership resides with a party other than the Crown by grant, or by adverse possession, is greatly reduced by the Foreshore and Seabed Endowment Revesting Act 1991. This Act provides that areas of the foreshore or seabed alienated from the Crown and vested in a Harbour Board or local authority are to revert to the Crown as if the land "had never been alienated".[242] In order to safeguard further the foreshore and seabed, the Act was amended in 1994 to declare all foreshore and seabed a special category of Crown land.[243] Foreshore and

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[233] Including the coast of all islands.

[234] Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 s 7. For low water mark see s 31, and for "territorial seas" s 5.

[235] 49 Halsbury's Law of England, para 2.

[236] Resource Management Act 1991 (as amended) s 2; the "coastal marine area" is defined as "the foreshore, seabed and coastal water, and the airspace above the water, (a) of which the seaward boundary is the outer limits of the territorial sea and (b) of which the landward boundary is the line of mean high water springs." Under s12 there are certain restrictions on the use of the coastal marine area.

[237] *Te Ruananguanui o Te Ika Wehnua Inc Society v Attorney General* [1994] 2 NZLR 20 at 23 (CA) *per* Cooke P.

[238] For further details as to the requirements of acquisition of private title to the foreshore through adverse possession see *Powell v McFarlane* (1977) 38P and CR 452 *per* Slade J at 470-471; *McDonnel v Gibblin* (1904) 23 NZLR 660 *per* Cooper J at 662; *Tong v Car Reconditioners Ltd* (1965) 1 NZCPR 587; *Cotton v Keogh* [1996] 3 NZLR 1; Limitation Act 1950 (as amended) s 7 and Lands Transfer Act 1952 (as amended).

[239] *Attorney-General v Emerson* [1981] AC 649 at 655 (HL) *per* Lord Herschell, *Raven v Keane* [1920] GLR 168; *Re the Ninety Mile Beach* [1963] NZLR 461.

[240] Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 s 7 which states that the seabed and subsoil of submarine areas "shall be deemed to be and always have been vested in the Crown."

[241] A tidal river is part of the internal waters of New Zealand as defined in the 1977 Act, s 4. The bed and subsoil of the tidal river are therefore vested in the Crown by s 7 of that Act or by the Foreshore and Seabed Endowment Revesting Act 1991, ss 4 and 5.

[242] Foreshore and Seabed Endowment Revesting Act 1991 s 5(b). Revesting will occur automatically in most circumstances unless the foreshore or seabed falls into a category of land specified in s 4(2). This section applies to land sold or disposed of for valuable consideration by the harbour board or authority, land subject to an agreement to that effect, land that no longer constitutes 'tidal lands', or land that is comprised or described in certain specified certificates of title. In these cases revesting is not automatic.

[243] Foreshore and Seabed Endowment Revesting Act 1991 s 9A, as inserted by s 2 of the Foreshore and Seabed Endowment Revesting Amendment Act 1994.

seabed can now only be sold or disposed of by special Act of Parliament or in accordance with provisions in the Resource Management Act 1991.[244]

146. It is interesting to examine the policy considerations behind the Act. During the Bill's parliamentary progress a number of reasons was advanced to support its proposed objectives. Firstly, the Bill was directed to the rationalisation of the position with regard to landholding of the coast. Over the 150 years preceding the Act, the allocation of the foreshore and seabed to many different harbour boards, for specific purposes, substantially fragmented ownership of the land, thus acting as an impediment to development and conservation. Furthermore, the application of disjointed legislative controls, the dissolution of many of the harbour boards, the absence of up-to-date records and a general lack of careful consideration with regard to port development, contributed to the desire to rationalise title.[245] Secondly, the government considered that the foreshore and seabed formed a category of land with high conservation and public use values. As a result it was held to be more appropriate in the national interest that the foreshore and seabed be held by the Crown in preference to multiple ownership of various public bodies with competing concerns and connections.[246]

147. *Maori Customary Title* It can be argued that the Crown's prima facie interest in the foreshore and seabed is encumbered by Maori customary title, where Maori interest in the land can be shown to have originally existed.[247]

148. Maori customary title is founded in the Treaty of Waitangi 1840, by which the Maori ceded the right to govern to the Crown in exchange for the protection of Maori rights. It is part of the law of New Zealand to the extent that it is incorporated into statute.[248] The Crown is not however, legally answerable for any breach of the Treaty as its provisions are not legally enforceable.

149. The Treaty of Waitangi Act 1975 has to a certain extent ameliorated this 'gap' in enforcement. The Act established the Waitangi Tribunal to oversee claims relating to the principles of the Treaty. If the Crown fails to fulfil its obligations under the Treaty, it is answerable to the extent that the Tribunal may inquire into its actions and make an unfavourable recommendation.[249] Whilst the interpretations of the Tribunal are influential, they are not legally binding in court.[250]

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[244] See Resource Management Act 1991 s 9A(2).

[245] The Resource Management Act 1991 also provides a unified system of land management.

[246] The policy was not however, free from controversy. For more information see the Hansard debates, dated 19 October 1989, 26 September 1991, 1 October 1991, and 8 October 1991 - http://rangi.knowledge-basket.co.nz/hansard/.

[247] *Te Runanganui o Te Ika Whenua inc Society v A-G* [1994] 2 NZLR 20, where it was held that in the absence of special circumstances displacing the principle, the Crown's radical title is subject to existing native rights.

[248] A number of statutes relating to the marine environment incorporate references to the principles of the Treaty and to the values and traditional relationships of Maori with natural places and resources. For example, the Conservation Act 1987 s 4 provides that "it shall so be interpreted to give effect to the principles of the Treaty of Waitangi", the Resource Management Act 1991 s 8 requires that decision-makers and managers "take into account the principles of the Treaty of Waitangi", and s 6(e) recognises the "relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wähi tapu, and other taonga." The New Zealand Coastal Policy Statement 1994, prepared under the Resource Management Act 1991, recognises that "tanguta whenua are the kaitaki of the coastal environment."

[249] Treaty of Waitangi Act 1975 s 6.

[250] It should be noted that the Tribunal can now refer a case to the Maori Appellate Court or Maori Land Court whose decision is binding on the Tribunal. Treaty of Waitangi Act 1975 s 6A.

150. Recently, several examples of conflict between Maori and Crown title to the foreshore and seabed have arisen in the courts. These claims are based on the principle of pre-existing customary ownership; to the effect that Maori title to the foreshore was never extinguished and therefore should override competing interests.[251]

**Management of the Foreshore and Seabed**

151. It would seem that the Crown must exercise its ownership of the foreshore and seabed in the public interest.[252]

152. Responsibility for the administration of the foreshore and seabed rests primarily with the Department of Conservation. It would appear that the Department exercises ownership functions and responsibilities in relation to these areas.[253]

153. The Department of Conservation also manages marine reserves, which can include any part of the foreshore, seabed or tidal rivers.[254] Marine reserves can be subject to regulations for the keeping of order in any reserve, to exclude the public from any specified part or parts of the reserve, or to impose conditions on which the public may remain within the reserve, or have access to or be excluded from the reserve.[255] It appears that such regulations can restrict public rights of access and navigation over the foreshore and seabed.[256] Furthermore, no fishing is permitted in a marine reserve except where authorised.[257]

154. Regional Councils ordinarily manage the coastal marine area on behalf of the Crown. They are responsible for policies to achieve integrated management of the natural and physical resources of their region, and the occupation of lands of the Crown or lands vested in the Regional Council that are foreshore or seabed.[258]

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[251] See *Re Marlborough Sounds* 22/12/97 Judge Hingston, Maori Land Court, concerning the claim of the Maori tribe Te Tau Ihu with respect to the foreshore and seabed of the Marlborough Sounds. Furthermore, a claim was made to the riverbed of the Whanganui River, see Waitangi Tribunal 1999: The Whanganui River Report, Wai-167, Wellington.

[252] Under the Foreshore and Seabed Endownment Revesting Act 1991, the functions, duties and powers of the Crown are to be undertaken subject to the condition that management is directed to "protect, as far as practicable, the natural and historic resources of the land", s 9A. The Resource Management Act 1991 also attaches a strong environmental and public interest to any exercise of Crown powers in relation to the foreshore and seabed. It is the principal mechanism providing for public interest in the management of natural areas on private land. Restrictions are therefore placed on the management and use of the 'coastal marine area'; s 12.

[253] The Foreshore and Seabed Endowment Revesting Act 1991 s 9A(3)(a) provides that, subject to the restrictions imposed in the Resource Management Act 1991, the Minister shall have and may exercise all the functions, duties and powers that the Crown has as owner of the land (inserted by s 2 of the Foreshore and Seabed Endowment Revesting Amendment Act 1994). For more information concerning the role of the Department of Conservation in the management of the foreshore and seabed see the Department of Conservation website: http://www.doc.govt.nz/cons/marine.

[254] Under the Marine Reserves Act 1971 s 2, a marine reserve "area" can include any part of "(a) the seabed vertically below an area the surface of (i) the territorial sea of New Zealand; or (ii) the internal waters of New Zealand, (b) the foreshore of the coast of New Zealand; and includes any water at any material time upon or vertically above it."

[255] Conservation Law Reform Act 1990 s 60(b) to (e), amending the Marine Reserves Act 1971 s 13.

[256] S 23 of the Marine Reserves Act 1971 (amended by s 59 of the Conservation Law Reform Act 1990) provides that subject to regulations made under the Act, "any right of access to or on the foreshore within a marine reserve, or any right of navigation (other than anchorage) through or across any water at any material time shall remain unaffected." For further details regarding public rights over the foreshore and seabed see *infra* paras 156-162.

[257] Conservation Law Reform Act 1990 s 50.

[258] Resource Management Act 1991 s 30.

155. They are also required to prepare Regional Coastal Policy Statements.[259] Regional Coastal Plans are also formulated.[260] The Regional Coastal Plan, lists those coastal activities that are "restricted."[261] A permit must be obtained from the Regional Council before such an activity can be undertaken. The Plan must also contain a statement as to whether charges for the occupation of the coastal marine area are to be imposed.[262] If charges are to be imposed, any money received by the regional council must be used only for the purpose of promoting the sustainable management of the coastal marine area.[263]

**Public Rights in the Foreshore and Seabed**

156. *Common Law* The extent of public rights over the foreshore was considered in *Crawford v Lecren*.[264] The court recognised public rights of navigation, fishing and gathering shell or other fish whose natural habitat is between the high and low water marks.[265] These rights were held to include the right to carry out ancillary acts as are essential to the "free and safe exercise of these rights," although beyond a right of way over the shore, their actual content was not dwelled upon.[266] These rights were termed "natural rights" by the court, in respect of which it was said the Crown's possession of "tidal lands" was held in trust for the subject.

157. *Statutory rights*. There is no statutory statement in relation to the extent of public rights over the foreshore and seabed. Nevertheless, there appear to be certain statutory rights. The Resource Management Act 1991 provides that any person may take, use, damn, divert or discharge into any water, river, lake or coastal marine area to which the Crown has a right, title or interest, providing such usage does not contravene the provisions of the Act.[267] Moreover a person may use or occupy any land and any related part of the coastal marine area[268] without obtaining the consent of the Crown, provided the occupation does not contravene the Act or regulations made pursuant thereto.[269]

158. The Conservation Act 1987 grants to the Department of Conservation a number of functions in relation to fishing. The Department is required for instance, to preserve so far as is practical all indigenous freshwater fisheries and protect recreational freshwater fisheries and freshwater fish habitats.[270] There is also a duty incumbent on the Department to foster the use of any natural or historic resources for recreation and to allow their use for tourism.[271]

**The Queen's Chain**[272]

159. Public access to the foreshore is preserved through the concept of the "Queen's Chain".[273] This is a strip of land up to 20 metres in width at the edge of rivers, lakes and the

[259] Resource Management Act 1991 s 59.
[260] *Ibid* s 63.
[261] *Ibid* s 117.
[262] Resource Management Act 1997 s 12 inserting s 64A into the Resource Management Act 1991.
[263] *Ibid* s 64A(5).
[264] (1868) NZLA 117.
[265] *Ibid* 121.
[266] Although the central finding of the case was that there is no common law right to load and unload goods on the foreshore; *ibid* 130.
[267] Resource Management Act 1991 s 354(2).
[268] Again in which the Crown has a right, title or interest.
[269] Resource Management Act 1991 s 354(3), as amended by the Resource Management Amendment Act 1993.
[270] Conservation Act 1987 s 6(ab), inserted by s 4 of the Conservation Law Reform Act 1990.
[271] Provided that the use of the natural or historic resource is not incompatible with conservation aims.
[272] For further details see http://www.publicaccessnewzealand.org.

sea owned by the Crown or a local authority. Measured from the high water mark of spring tides it reserves a public right of access to these areas. There is however, no public right to cross private lands to reach the Chain. It must abut a public way to allow access to the foreshore.[274]

160. Successive administrations have displayed varying degrees of willingness to observe the original intentions of the Queen's Chain. This has therefore affected the universal enforcement of public access to the foreshore owned by the Crown or a local authority.

161. The concept of the Queen's Chain is implemented by statute. Under the Conservation Act 1987, where land is sold or otherwise disposed of for conservation purposes, a marginal strip is reserved, enabling public access to and public recreational use of the adjacent waters.[275] The Minister of Conservation may appoint adjoining landowners, or a more suitable person, as a manager of a marginal strip.[276] The manager, when appointed, is required to comply with any requirements or restrictions to maintain access to and recreational use of the strip. He is also required to manage the land in a manner that 'best serves' public purposes and enables public access. [277]

162. Under the Resource Management Act 1991 esplanade strips are established on the subdivision of land,[278] in order to enable public access to or along the sea, river or lake and to enable public recreational use of the esplanade reserve and adjacent waters, where such use is compatible with conservation values.[279] Discretion as to the creation of esplanade reserves rests with the regional or district council. The local authority may be required to provide compensation for the creation of a reserve or strip.[280]

**Accretion and Erosion**

163. When accretion occurs, the new land created belongs to the owner of the land to which it is added.[281] Provided that the change is gradual and imperceptible, this doctrine will apply,

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[273] A chain is an imperial measure of length equal to 66 feet or 22 yards, which is approximately equal to 20 metres.

[274] The origins of the concept are found in Queen Victoria's instructions in 1840 to reserve land in public ownership along the margins of the seacoast or navigable streams.

[275] Under s 24(1) of the Conservation Act 1987 "there shall be deemed to be reserved from the sale or other disposition of any land by the Crown a strip of land 20 metres wide extending along and abutting the landward margin of (a) the foreshore…". It should be noted however, that s 24A grants to the Minister of Conservation the power to reduce the width of the marginal strip to not less than three metres if satisfied that its value (in terms of s 24C) will not be diminished.

[276] Conservation Act 1987 s 24H.

[277] Detailed provisions relating to the management of marginal strips can be found in Part IV of the Conservation Act 1987.

[278] S 230(1) of the Resource Management Act 1991 provides that "A strip of land not less than 20 metres in width along the mark of mean high water springs of the sea, and along the bank of any river, and along the margin of any lake, (a) shall be set aside from any land being subdivided as an esplanade reserve, (b) shall vest in and be administered by the territorial authority".

[279] Resource Management Act 1991 s 229.

[280] *Ibid* ss 237E-G

[281] "Where these changes are gradual and imperceptible…the law considers the title to the land as applicable to the land as it may be so changed from time to time" *per* Lord Wilberforce in *Southern Centre of Theosophy Inc v State of South Australia ibid*, 287; "When the physical river-bed shifts by natural and imperceptible process, the boundary shifts accordingly, and the freeholds in the bed and in the riparian lands shrink, or expand as the case may be. The title to the bed will follow the movements of the bed…" *per* Adams J in *Attorney-General and Hutt River Board v Leighton ibid* 785.

regardless of whether the change is caused by natural or artificial means.[282] The only exception to this rule is where the change is a result of deliberate reclamation.[283] Where erosion occurs, the owners of the parcels of land which are being eroded lose those parts of their land which have been washed away.[284]

164. Where avulsion occurs, as a result of an earthquake[285] or flood[286] the above doctrines do not apply and there is no change to the ownership of the land. The same principle also applies to deliberate reclamation.[287]

165. Where accretions result from harbour works, there is a saving of rights in respect of the Crown and Harbour Boards.[288] When works are executed on any tidal land or on the seabed, the accretion to any such waters immediately adjacent to the works shall continue to be vested in the Crown. This is the case even if the change is gradual and imperceptible.

**Enforcement**

166. In terms of enforcement, the most significant characteristic of the New Zealand arrangements is the Environment Court. It replaced the Planning Tribunal,[289] and seems to consider mainly public interest questions.[290]

167. The court has jurisdiction over various enactments including the Resource Management Act 1991.[291] Therefore decisions with regard to the occupation of the foreshore, the contents of regional plans, and in general applications regarding land use are heard by the Environment Court.

168. The Court has the power to make enforcement notices[292] and to intervene in development projects, including those on the coast.[293] The Court can also request an inquiry in relation to the granting of consent for a restricted coastal activity.[294] It has not however, been possible to ascertain how successful the court has been in enforcing public rights.

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[282] "Except in cases where a substantial and recognisable change in the boundary has suddenly taken place (to which the doctrine of accretion does not apply), it is manifestly convenient to continue to regard the boundary between land and water as being where it is from day to day or year to year." *per* Lord Wilberforce, *Southern Centre of Theosophy*, *ibid* at 287.

[283] "…provided that the change is not the direct result of deliberate reclamation, for a landowner is not entitled to accretions brought about by works done expressly for the purpose of reclaiming land" *per* Lord Wilberforce, *ibid* 287.

[284] "…if the sea gradually covered the land so granted, the Crown would be the gainer of the land" *per* Alderson B *ibid* 141.

[285] *Pearce v Boulton*, *Boulton v The King* (1902) 21 NZLR 464 (CA).

[286] For example, where a flooding river suddenly breaks its banks and carves out a new course for itself; *Duncan v Aongatete Quarry Ltd* (1959) 1 NZCPR 558 464 (CA).

[287] See para 163.

[288] Harbours Act 1950 s 168.

[289] Resource Management Amendment Act 1996 s 6.

[290] See http://www.courts.govt.nz/courts/environment_court.html. The following issues arise in proceedings before the court; Maori cultural issues and relationships with ancestral land, the physical environment including the coast, lakes and rivers, and issues involving the intervention of the Crown,for example, developments in the coastal environment and regional planning.

[291] Indeed Part XI of the Resource Management Act 1991 as amended sets out the constitution, procedure and powers of the court.

[292] That is, to declare the legal status of environmental activities; Resource Management Act 1991 s 314.

[293] See s 322 Resource Management Act 1991 concerning the Court's power to serve abatement notices.

[294] The Environment Court can undertake to investigate the matter and report to the Minister of Conservation with its recommendation. The Minister will however, take the final decision, taking the recommendation into account.

### Conclusion

169. It would appear that the Crown's ownership of the foreshore and seabed must be exercised in the public interest

170. There are several distinctive features in relation to ownership of the foreshore and seabed in New Zealand. For example the Foreshore and Seabed Endowment Revesting Act 1991 revested in the Crown ownership of the majority of foreshore and seabed that had previously been alienated. Furthermore the Crown's title to the foreshore and seabed is subject to any pre-existing Maori interest in the land.

171. In relation to public rights, the concept of the Queen's Chain appears to be an important method of securing public access to the foreshore.

172. Finally in terms of enforcement, the Environment Court is considered to specialise in the enforcement of public interest provisions relating to the foreshore and seabed.

## Norway

### Introduction

173. It was not possible to obtain much information concerning the law of the foreshore and seabed in Norway, due to a lack of suitable translation facilities. Nevertheless a helpful response was received from the Norwegian Royal Ministry of Justice and Police, which briefly outlines the position in Norway.

### Ownership of the Foreshore and Seabed

174. The Ministry advised that the majority of the foreshore is in private ownership, although private rights are still subject to certain public rights.[295]

175. There are more extensive private rights over the foreshore and seabed in Norway, although these are still subject to certain public rights. The extent of property rights seems to have been determined according to the development of case law.

176. It is interesting to note that the owner of the land adjacent to the foreshore also has ordinary ownership rights to the foreshore and to a limited extent to the sea and seabed just outside the foreshore down to a limit of two metres below low watermark.[296] The owner also has separate ownership rights outside this limit, including for example the right of navigation over the sea to access his or her land, and certain fishing rights. The rules governing the exercise of these rights are established by use, tradition and local custom, and can therefore vary from one place to another.

[295] See *infra*.

[296] The Ministry of Justice stated that this rule applies to "the owner of the land down to the foreshore". Letter of 28th September 2000 from The Royal Ministry of Justice and the Police.

**Public Rights**

177. *Right of Access* Public rights appear to be statutory in basis. The principal Act in this area is the Outdoor Recreation Act.[297] The purpose of the Act is defined to include the safeguarding of the public right of access to and passage through the countryside and the right to spend time there.[298] The Act allows a right of access to and passage through uncultivated land[299] at all times of the year, provided that consideration and due care is shown.[300] The public is also entitled to access to and passage through cultivated land[301] during the winter.[302] This right of access does not apply to farmyards or plots around houses and cabins, fenced gardens or parks or other areas fenced in for special purposes and where public access in the winter would unduly hinder the owner or user.

178. The Ministry has stated that the public right of access is for the most part respected, although there have been cases of conflict between owners of cottages beside the coast and members of the public desiring access to the foreshore in front of the cottage.[303] There is also a provision in the Act conferring on the owner of land the power to expel from the land any person who acts inconsiderately and without due care, or who causes damage to the property. [304]

179. It is interesting to note that the relevant local authority[305] can restrict this statutory right of access. The Act provides that a local authority may introduce rules of conduct in order to regulate access to an area where there are a large number of visitors.[306] Moreover, the owner of land may, with the consent of the local authority, charge the public a reasonable fee for access to an outdoor recreation area.[307]

180. *Navigation* There is also a public right of navigation under the Act to the effect that any person is entitled to free passage on the sea by boat.[308] The temporary landing of boats in uncultivated areas is also permitted, but in order to moor boats in a quay or jetty, the owner's consent is required.[309] Other mooring devices may be permitted, provided they do not unduly hinder the owner or user.[310]

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[297] Act of 28 June 1957 No. 16 Relating to Outdoor Recreation, enclosed with the letter from the Ministry of Justice; see note 296.
[298] Outdoor Recreation Act § 1.
[299] Uncultivated land is defined as "land that is not tilled and that is not considered to be equivalent to cultivated land". Cultivated land means "farmyards, plots around houses and cabins, tilled fields, hay meadows, cultivated pasture, young plantations and similar areas where public access would unduly hinder the owner or user". Small uncultivated plots of land lying in tilled land or hay meadows or fenced together with such areas are also considered to be equivalent to cultivated land. The same applies to areas set aside for industrial or other special purposes where public access would unduly hinder the owner, user or other; Outdoor Recreation Act § 1a. In the event of disagreement or doubt as to the status of land as cultivated or uncultivated, the local authority has the power to regulate; § 20.
[300] Outdoor Recreation Act § 2.
[301] For the definition of cultivated land see note 299 *supra.*
[302] Under the Outdoor Recreation Act § 3 there is no public access to, or passage through cultivated land between 30 April and 14 October.
[303] Letter from the Ministry of Justice, *supra* note 296.
[304] Outdoor Recreation Act § 11.
[305] Known in Norway as the "municipality".
[306] Such rules can be introduced in particular for the purposes of maintaining peace and order, protecting plant and animal life and to promote health measures and sanitary conditions. Outdoor Recreation Act § 15.
[307] Outdoor Recreation Act § 14. The fee must not be out of proportion to the measures the owner or user has carried out in the area for the benefit of the public.
[308] § 6 *ibid*. This section also grants free passage on "ice-covered areas of the sea".
[309] § 7 *ibid*.
[310] *Ibid.*

181. *Bathing and other rights* Furthermore the public has a right to bathe in the sea, provided it takes place at a reasonable distance from the any dwellinghouse, and that other users are not unduly hindered or inconvenienced.[311] The Act also distinguishes between cultivated and uncultivated areas in terms of activities such as camping and having picnics.[312] In uncultivated areas, activities such as these are permitted provided they do not unduly hinder or inconvenience others, whereas on cultivated land such activities are not permitted without the consent of the owner or user.

**Enforcement**

182. Another interesting feature of the Norwegian system relates to the protection of public rights. The Outdoor Recreation Act grants to local authorities the power to safeguard the public interest in outdoor recreation matters.[313] This includes the right to bring appropriate action on behalf of the public.[314]

**Conclusion**

183. It would seem that the statutory public rights over the foreshore and seabed are fairly extensive, although a local authority in designated areas can restrict them.

184. The public rights appear to be safeguarded by local authorities, who have the right to raise actions in the public interest.

## Spain

**Defining the Foreshore and Seabed**

185. In Spanish law, the area covering the foreshore and seabed forms part of the public domain, receiving particular forms of protection as a result of this status.[315]

186. The principal legislation governing the public coastal domain[316] is the Coastal Act 1988[317], which has as its aims, the designation, protection, utilisation and policing of the public coastal domain and in particular the seashore.[318]

187. The public coastal domain is very widely defined under Articles 3,4 and 5 of the Act. Under Article 3 it includes "the coastal zone or area between the low and high water mark of listed spring tides"[319] and notably, "beaches or areas where free and unattached materials are

[311] Outdoor Recreation Act § 8.
[312] § 9 *ibid*.
[313] Outdoor Recreation Act § 22.
[314] *Ibid.*
[315] Article 132(2) of the Constitution, (the supreme source of Spanish law) provides that "the public state domain shall be determined by law and in any case shall include the coastal zone, beaches, the territorial sea, the natural resources of the economic zone, and the continental shelf".
[316] el dominio público marítimo-terrestre.
[317] Ley de Costas, Ley 22/1988 of 28 July 1988, hereafter referred to as the Coastal Act, or the Act.
[318] Art 1, Coastal Act.
[319] The exact translation of Art 3(1)(a) reads "The seashore and banks of rivers which includes: the coastal zone or area between the low water mark of listed spring tides and the limit up to the maximum level of the waves in the greatest known storms, or when greater, the high water mark of spring tides. This area extends to the banks of rivers to the point where the effect of the tides becomes noticeable."

deposited, such as sand, gravel, pebbles, including rocks, sediment and dunes, with or without vegetation, formed by the actions of the sea or the sea wind, or other natural or artificial causes.".[320] In accordance with the Constitution,[321] Article 3 further provides that the public coastal domain includes "the territorial sea and inland waterways, with their beds and subsoil" and "the continental shelf".[322]

188. Article 4 also defines, as belonging to the public coastal domain, such incidental land as for example, that which is used for "access to the seashore for the deposit of materials", "land gained from the sea as a direct or indirect consequence of works or drainage", and "land encroached upon to form part of the seabed for whatever reason".[323]

189. The boundaries of the public coastal domain are determined by the State Administration,[324] which has power to make appropriate demarcations.[325] There is a special "demarcation procedure" under the Act, to be undertaken when land is to be designated as part of the public coastal domain.[326] The relevant Autonomous Community and town council must be consulted, as well as neighbouring proprietors and other "interested parties". It appears that, in relation to a piece of land, an approved designation will override any declaration of title in the Property Register.[327]

**Property Rights in the Foreshore and Seabed**

190. As in France, property rights in the foreshore and seabed of Spain are vested in the State. As they form part of the public coastal domain, these areas are regulated by the State at different levels.[328] The process of legal enforcement is in the first instance undertaken by the Administration.[329]

191. In accordance with the Constitution, property within the public coastal domain, as defined by law, is in principle inalienable, incapable of acquisition or abandonment through prescription, and incapable of legal seizure.[330] There appear to be exceptions to the above principles, to the extent that it is possible to acquire rights to exploit and use property within the public coastal domain, in accordance with the provisions and procedures of the Coastal Act.[331]

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[320] Art 3(1)(b). The Preamble states that the Act, in defining the scope of the public coastal domain, has returned to the origins of the Spanish tradition, as expressed in Roman law, and reaffirms the qualification of the sea and its shore as community heritage.
[321] *Supra* note 315.
[322] Art 3(2) and (3) respectively, although these provisions state that these areas are regulated by their own specific legislation.
[323] Art 4(1), (2) and (3) respectively. Art 5 refers to islands in the territorial sea, rivers and inland waterways, except where they are the property of private individuals or public bodies.
[324] That is, the State Level of government, as opposed to the Autonomous Communities, or local authorities.
[325] Art 11 provides that the State shall make designations in accordance with Arts 3-5 of the Act, which concern the definition of land contained within the public coastal domain.
[326] Art 12.
[327] Art 13, Coastal Act. However, this Article also provides the title holder with a judicial appeal mechanism.
[328] See *infra*.
[329] Art 94(3) of the Coastal Act provides that where the Administration considers that a criminal offence has been committed, it will notify the Finance Ministry, who then consider the matter. Should a criminal sanction be imposed, it will exclude the imposition of the administrative sanction.
[330] Art 7, Coastal Act. The Spanish term is "inembargable". I translated this to mean incapable of seizure in the context of any legal proceedings.
[331] Art 8.

192. The State must exercise its proprietary rights in accordance with the aims of the Coastal Act. Article 1 states the fundamental aims of the Act to be the "designation, protection, utilisation, and policing of the public coastal domain and in particular the seashore.". Article 2 then describes certain specific purposes to be pursued by the State Administration, including the requirements to "designate the public coastal domain and ensure its integration and adequate conservation, guarantee public use of the sea, of its shore and the rest of the public coastal domain, to regulate the rational use of property with respect for the surrounding landscape, environment and heritage, and to maintain a suitable level of water and seashore quality.".

193. Furthermore the Preamble to the Coastal Act states that its purpose is to develop in the same way the principles established in Article 45 of the Constitution, concerning the protection of the environment and the need for adequate enforcement mechanisms.[332]

**Management of the Foreshore and Seabed**

194. Powers and responsibilities in relation to the management and protection of the public coastal domain are divided between different levels of government in Spain, and are set out in the Coastal Act.[333]

195. The powers of the State Administration are set out under Articles 110-112 of the Act.[334] State powers are exercised primarily through the Ministry of the Environment,[335] however, the Ministry for Public Works[336] exercises responsibilities in relation to State-controlled harbours.

196. The competence of the Autonomous Communities in relation to the coastline will depend largely on the provisions of their own particular founding statutes.[337]

197. The powers of local authorities are established in the legislation of the Autonomous Communities, but can include the maintenance of beaches and public bathing places.

198. The Act also emphasises the importance of inter-administrative relations. Article 116 provides that those public administrative bodies exercising competence over the public coastal domain must co-ordinate, collaborate and provide information to other public bodies exercising such functions.

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[332] Art 45(2) of The Constitution provides that "public authorities shall ensure the rational use of all natural resources with the purpose of protecting and improving quality of life and protecting and restoring the environment". Art 45(3) then provides that "for those that violate the provisions of the foregoing paragraph, penal or administrative sanctions, as applicable, will be established".

[333] Spain could be considered a "union state", comprising the following levels of government - the central government (or State), the Autonomous Communities, the Provinces, and the local authorities. The Autonomous Communities each have individual founding statutes, and enjoy varying degrees of power. The Provinces have no formal powers as such; they simply consist of a grouping of local authorities.

[334] When detailing State powers and responsibilities, the Act refers to "la Administración del Estado". I have translated this as the "State Administration". They include the management of the public coastal domain, including the granting of permits and concessions, and overseeing the fulfilment of conditions under such permits. The State also has responsibility in relation to waste discharge, human safety in bathing areas and maritime safety.

[335] Ministerio del Medio Ambiente.

[336] Ministerio de Fomento.

[337] Art 114.

**Public Rights in the Foreshore**

199. State ownership of the foreshore is subject to public rights of access and use.

200. *Public Rights of Access* The right of access to the public coastal domain is established primarily by way of two servitudes. Both servitudes are imprescriptible.[338]

201. Article 27 of the Act establishes the servitude of thoroughfare or passage,[339] which provides rights of access to the beach.[340] It covers a strip of 6 metres, measured inland, starting from the inland boundary of the public coastal domain. This area must be left free and clear at all times for public pedestrian passage and patrol and rescue vehicles, except in specially protected areas. The strip can be extended up to 20 metres in areas of difficult or dangerous thoroughfare,[341] and only in exceptional circumstances can the strip be occupied to carry out work on the public coastal domain, such as the construction of a promenade or esplanade. In such circumstances the servitude shall be replaced by another under similar conditions, in the form stipulated by the State Administration.[342]

*202.* Article 28 of the Act defines in broad terms, land that can be subject to the servitude of access to the sea. It covers land adjacent to and continuing on from the public coastal domain, for the length and width that is required to ensure free and public access to the sea, and according to the natural characteristics of the area.[343] All means of access must be signposted and open for public use from one end to the other[344] and in no case will works or equipment be allowed where they interrupt access to the sea unless, in the judgement of the State Administration, an alternative solution, guaranteeing effective access is proposed.[345]

203. *Other Public Rights* A substantial number of rights on the public coastal domain itself are codified under Article 31(1) of the Act. It provides that the use of the public coastal domain, and in any case of the sea and its shore is free, public and gratuitous for common uses and those compatible with the natural characteristics of the area. This includes walking, being in the area[346], bathing, navigation, embarking and disembarking, running aground, fishing, picking plants and shellfish and other similar things that do not require works or equipment of any kind.

204. Uses of the public coastal domain that are particularly intense or dangerous, or where commercial activities are pursued, can only take place where a permit has been obtained, or where land has been reserved or assigned according to the provisions of the Act.[347]

205. It appears that the regulation of fishing by boat might fall within the competence of the Autonomous Communities; the Catalan legislation for instance stipulates that a licence

[338] Art 21.
[339] El servidumbre de tránsito.
[340] The servitudes apply on private properties as well as land owned by the State. Art 21(1) states that "land adjacent to the public coastal domain will be subject to the limitations and servitudes contained in the Act".
[341] Art 27(2).
[342] Art 27(3). The servitude of thoroughfare or passage appears to be similar to the 'Queens Chain' in New Zealand, which provides public access and use over a 20-metre strip of land measured inland from the high water mark of spring tides. However, it only applies to land owned by the Crown or a local authority. Paras 159-162 *supra*.
[343] Art 28(1).
[344] Art 28(2).
[345] Art 28(4).
[346] Translation of the verb 'estar' = to be. This could imply a right of general recreation.
[347] Article 31(2).

should be obtained for all fishing activities.[348] It also appears that restrictions can be placed on recreational sea fishing, with permits issued either from the State Administration, or from the Executive Council of the Autonomous Community. Notwithstanding the provisions of Article 31(1) of the Act, the Department of Agriculture, Livestock and Fisheries may regulate shellfish activities and the procedures for collection of shellfish and may establish exclusive areas for shellfish activities.

206. With regard to navigation, we were unable to locate information additional to the general right under Article 31. It appears that navigation generally is the responsibility of the Ministry for Public Works.[349]

**Planning and Use Restrictions**

207. The Coastal Act also establishes restrictions over the use of property in the public coastal domain.[350]

208. For example, in the servitude of protection zone[351] covering a 100-metre area of land from the inland boundary of the seashore, certain types of construction and development can be prohibited.[352] Furthermore a public inquiry must usually follow an application to carry out works on the public coastal domain.[353]

209. Authorisation can also be granted, under Article 53, to town councils for the development of seasonal services on beaches, subject to conditions established by the State Administration. Any of these permits can be unilaterally revoked at any time by the State Administration, without the right to compensation arising, if conditions are contravened, they produce damage in the public domain, impede its use for activities of major public interest, or impair the public use.[354]

**Enforcement**

210. A series of offences has been established, classified according to gravity, in order to enforce effectively the rules and provisions of the Act.

211. Serious offences[355] include the unauthorised carrying out of work on the public coastal domain or construction in the servitude of protection zone, the obstruction of public access to the sea, or over the servitude of thoroughfare, the alteration of designated boundaries in the public coastal domain, and any actions that produce irreparable harm to, or render difficult restoration of, the public coastal domain.[356]

212. Offences of a less serious character[357] include those not covered under the definition of a serious offence, and in addition, those foreseen under Article 90. These consist of *inter alia*,

[348] Information obtained from the Catalan government's website - http://www.gencat.es/mediamb/eng.
[349] http://www.mfom.es.
[350] Art 20 Coastal Act.
[351] Art 23.
[352] Arts 25 and 26.
[353] Art 42.
[354] Art 55.
[355] Las infracciones graves.
[356] As laid out in Art 91(2) of the Coastal Act.
[357] Las infracciones or faltas leves.

the non-fulfilment of obligations in relation to servitudes and unauthorised advertising or the promotion of activities in servitude zones or the public coastal domain.

213. The offences are punishable primarily by way of fines imposed by the Administration.[358]

214. The Coastal Act also grants to the competent Administration the power to suspend unauthorised works in the process of being undertaken.[359]

**Conclusions**

215. The public coastal domain is very broadly defined under the Coastal Act, and interestingly, includes the beach.

216. Whilst ownership is vested in the State, it is exercised in the public interest. The principal aims of the Coastal Act appear to be the protection of the natural environment and the guarantee of free and public access to the public coastal domain.

217. The management of the public coastal domain is shared between different levels of government, and the enforcement of the regulations contained in the Coastal Act is undertaken through administrative law structures.

218. The Coastal Act attaches importance to public rights of access and recreation, and establishes important restrictions in relation to planning and construction on the public coastal domain.

[358] Art 95 also requires the offender to replace property and restore the area to its former state. Where the situation created by the commission of the offence is corrected, this will be considered a mitigating circumstance, allowing the amount of the fine to be halved; Art 97(3).
[359] Art 103.

# Appendix 3

## HARBOUR AND LOCAL AUTHORITIES WHO ASSISTED WITH OUR RESEARCH

### HARBOUR AUTHORITIES

Campbeltown Port Authority
Clydeport plc
Cromarty Harbour Trustees
Gardenstown Harbour Trustees
Foster Yeoman Limited
Lerwick Port Authority
Montrose Port Authority
The National Trust for Scotland
Peterhead Harbour
Tarbert (Loch Fyne) Harbour Authority
Scrabster Harbour Trust
Stornoway Pier and Harbour Commission

### LOCAL AUTHORITIES

Aberdeen City Council
Aberdeenshire Council
Angus Council
Argyll and Bute Council
Clackmannanshire Council
Dumfries and Galloway Council
East Ayrshire Council
East Dunbartonshire Council
East Lothian Council
East Renfrewshire Council
City of Edinburgh Council
Falkirk Council
Fife Council
Glasgow City Council
Highland Council
Inverclyde Council
Midlothian Council
Moray Council
North Ayrshire Council
North Lanarkshire Council
Perth and Kinross Council
Ornkey Islands Council
Renfrewshire Council
Shetland Islands Council
South Ayrshire Council
South Lanarkshire Council
Stirling Council
West Dunbartonshire Council
West Lothian Council
Western Isles Council

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