

New Zealand Law Society

SUBMISSION ON THE AQUACULTURE LEGISLATION AMENDMENT BILL (NO 3)

1. The New Zealand Law Society (Society) welcomes the opportunity to submit on the Aquaculture Legislation Amendment Bill (No 3) (Bill). The submission relates both to the clarity of the Bill's drafting and whether it achieves the intended outcome, and to concerns the Society has about the appropriateness of truncating or overriding normal judicial processes or Resource Management Act processes to achieve the objectives of the Bill.

PART 1: AMENDMENTS TO AQUACULTURE REFORM (REPEALS AND TRANSITIONAL PROVISIONS) ACT 2004

Clause 13 – New section 25A, Assessment of effect on fishing of applications pending at commencement of Act

2. New section 25A governs the processing of existing applications to which section 25(1) applies. Section 25A(12) provides that any person wishing to seek judicial review of the decision of the Chief Executive of the Ministry of Fisheries (Chief Executive) made under section 25A, must do so "*within 15 working days after the decision*".
3. The Society considers that legislation imposing such a short time limit on the bringing of judicial review proceedings is unreasonable and is not consistent with the rules of natural justice. Judicial review proceedings are legally complex and often rely on information retrieved from government departments or Ministers by way of an Official Information Act 1982 (OIA) request. Departments and Ministers have 20 working days to make a decision on a request under section 15 of the OIA. Furthermore there can be no certainty that all potentially affected parties would receive the decision in this timeframe, let alone be in a position to respond to it. The Society considers that new section 25A needs to be amended to provide either a realistic timeframe within which to bring judicial review proceedings or, more properly, no time limit at all, allowing the usual principle of delay to count against a remedy.

Recommendation

4. New section 25A should be amended to remove the express timeframe in which to bring judicial review proceedings or at least to provide a more realistic timeframe (such as the three-month timeframe currently provided for in section 186J of the Fisheries Act 1996).

Clause 20 – New section 44, Effect of aquaculture decision in relation to interim aquaculture management area

5. Interim Aquaculture Management Areas (AMAs) are areas that have been declared to be such, by way of an Order in Council, where prior to the commencement of the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 (Reform Act), the regional coastal plan or proposed regional coastal plan required consent for aquaculture activities in that particular area, and where certain other tests were met. Two interim AMAs were declared (in Tasman and Waikato).
6. The Bill will remove the requirement for AMAs, and aquaculture decisions on the two interim AMAs will be concluded under the Reform Act.
7. The Society understands that the rationale for this is that the interim AMAs are at an advanced stage in the process towards an aquaculture decision. A number of interested parties would be unfairly disadvantaged if the extensive work undertaken so far were to be made redundant by their repeal.
8. The Chief Executive will still be required to make an aquaculture decision, whether that is a decision that the interim AMA will not have “an undue adverse effect” (a determination), or a decision that there will be “an undue adverse effect” (a reservation).
9. At present, section 44 of the Reform Act requires that the regional council must amend the regional coastal plan to make provision for the aquaculture decision. Once the plan is amended, the interim AMA becomes an AMA.
10. Clause 20 substitutes section 44 of the Reform Act relating to aquaculture decisions on interim AMAs. In particular, the new section 44(2)(a) requires the Chief Executive to publish a notice in the *Gazette* “... that describes and defines the area that the determination relates to as an aquaculture area”. There is also reference to *Gazetted* aquaculture areas in new section 44N (introduced by clause 21).
11. The Society supports the retention of interim AMAs under the Bill, given the extensive work that has been undertaken in their creation. The Society considers, however, that there is a lack of clarity concerning the relationship between AMAs under a regional plan pursuant to the Resource Management Act 1991 (RMA) and a *Gazetted* aquaculture area under the Reform Act. In particular:

- (a) There is no definition of what is an “aquaculture area” under the Reform Act and whether this differs from the definition of an AMA under that legislation.
- (b) It is unclear why an “aquaculture area” needs to be Gazetted if the regulatory provisions governing activities within the “aquaculture area” are set out under the respective regional plans.
- (c) All the provisions governing AMAs under the RMA are to be repealed. This means that there is now no clear statutory guidance over matters such as allocation of space within an “aquaculture area” (other than the provisions relating to allocation of authorisations to the trustee under Clause 21 of the Bill (see below)). Presumably it is anticipated that allocation will be provided for under the regional coastal plan pursuant to new section 165E, but this is not specified.

Recommendation

- 12. The Society considers that more statutory guidance and clarity is needed concerning the manner in which AMAs are intended to function pursuant to the Reform Act and the RMA.

Clause 21 – New heading and sections 44A to 44N inserted

- 13. Clause 21 inserts new sections 44A to 44N into the Reform Act to provide for the allocation of settlement space in accordance with the Maori Commercial Aquaculture Claims Settlement Act 2004.
- 14. Sections 44B to 44L provide a process for allocation to Te Ohu Kai Moana Trustee Limited (the trustee), a company established in accordance with section 33 of the Maori Fisheries Act 2004, of authorisations in respect of 20% of any space in an interim AMA in respect of which the Chief Executive has made a determination or a reservation relating to commercial fishing for stocks subject to the quota management system.
- 15. The regional council’s decisions on these processes may be appealed to the Environment Court.
- 16. The Society acknowledges that new ss 44B to 44L by and large reflect ss 9 to 18 of the Maori Commercial Aquaculture Claims Settlement Act 2004. Nevertheless, the Society questions whether the relevant local authorities are the appropriate entities to make decisions concerning the allocation of space under that Act, and whether the Bill’s provisions give appropriate guidance to them.

17. The new provisions do not indicate how the regional councils are to go about making these significant and appealable decisions. There is no provision for the interested parties to lodge submissions or evidence with the regional council, or for there to be a hearing prior to the decision, although those matters would need to be provided for as a matter of natural justice. Regional councils are unlikely to have staff employed who are in a position to determine whether the allocated space is representative of the whole space, or of an economic size. Nor does there appear to be provision for the appointment of an appropriately qualified commissioner to make these decisions. Further, there does not seem to be any provision for regional councils to recover the costs of these decision-making processes from the interested parties.

Recommendation

18. The Society considers that the Bill needs to provide more detailed statutory guidance regarding regional council decision-making, to address the concerns noted above.

PART 2: AMENDMENTS TO FISHERIES ACT 1996

Clause 38 – Judicial Review of Aquaculture Decision

19. The concern raised in paragraphs 2 – 4 above, in relation to clause 13, also arises in relation to clause 38, regarding the period in which judicial review proceedings of an aquaculture decision can be commenced. Previously a three-month timeframe was allowed, but clause 38 reduces that to 15 working days.

Recommendation

20. As a minimum, the timeframe for commencing judicial review proceeding should remain at three months, but preferably, not be specified at all.

PART 4: AMENDMENTS TO RESOURCE MANAGEMENT ACT 1991

Clause 73 – When rules in proposed plans and changes have legal effect

21. Clause 73 amends section 86B, which is the section that governs when rules in proposed plans and changes have legal effect. Section 86B(3)(e) currently provides that a rule in a proposed plan has immediate legal effect if the rule provides for or relates to an AMA. As amended by clause 73(1), s 86B(3) would only give immediate effect to rules which provide "... for an alteration to any rule that immediately before the commencement of section 73 of the

Aquaculture Legislation Amendment Act (No 3) 2010 authorised, as a permitted activity, any part of an aquaculture activity in the coastal marine area”.

22. The Society considers that the drafting of this clause is rather obscure. It is unlikely that a new rule in a proposed plan change would provide for an alteration to another rule already in existence. It would be more likely for the existing rule to simply be changed by the proposed plan change. That appears to be the legislative intent of this clause, but it is not clear.

Recommendation

23. The Society recommends that clause 73(1) be amended to ensure that the legislative intent is clear.

Clauses 81 and 82

24. These clauses relate to a new process whereby the making of an aquaculture decision (either a determination or a reservation) by the Chief Executive is linked to and follows on from the process of obtaining a coastal permit for an aquaculture activity from the consent authority.
25. Clauses 81 and 82 insert a new section 116A, which provides for the various outcomes of the Chief Executive’s aquaculture decision-making process. If a determination is made in relation to the permit, that may result in additional conditions being imposed on the permit. If a reservation is made, then the permit may be amended to remove the areas affected by the reservation and cancelled to the extent that it applies to the removed areas.
26. New section 116A does not clearly state when coastal permits for aquaculture activities commence in these various circumstances. Section 116A(2) provides that, where the Chief Executive has made a determination, the consent authority must notify the applicant that the permit commences on the date of notification under section 116A (although it is unclear whether it is notification of the consent authority or notification of the applicant), unless the permit states a later date.
27. New section 116A(3) deals with the situation in which a reservation is made. It seems to be implied that, for the area covered by the coastal permit which has not been the subject of a reservation, the issue of commencement date will be dealt with under section 116A(2), but that is not clear.
28. Where there has been a reservation in relation to commercial fishing, in relation to stocks subject to the quota management system, new section 116A(4) and (5) requires the consent

authority to notify the applicant that the permit will not commence in the area affected by the reservation unless an aquaculture agreement is registered in accordance with section 186ZH of the Fisheries Act 1996. Once such an agreement has been registered, the consent authority must remove the reservation from the permit and notify the applicant that the permit commences in respect of the area previously subject to the reservation on the date of notification, unless the permit states a later date.

29. The Society considers that it would be clearer if section 116A explicitly stated the commencement date of the permit. This is presently the case under section 116, which clearly states the circumstances under which resource consents commence. The issue of notification could be dealt with separately. If it is to stay the date of notification, then it needs to be clear that it is notification of the applicant and it is on the date that the applicant receives the notification.

Recommendation

30. The Society recommends that section 116A more clearly state in what circumstances the permit commences.

Clause 89 – Process if section 149M applies or proposed plan or change not yet prepared

31. Clause 89 amends section 149N(8)(e) and repeals section 149N(9) in parallel with the changes made to section 86B, described above (paragraphs 21 – 23). The same comments as made above apply to these changes.

Recommendation

32. The Society recommends that clause 89 be amended to ensure that the legislative intent is clear.

Clause 90 – New subpart 1 of Part 7A substituted

33. Clause 90 repeals and replaces subpart 1 of Part 7A, which deals with aquaculture management areas and authorisations.
34. New sections 165J to 165O introduce a new procedure, which provides for Ministerial approval of the use, by regional councils, of methods for allocating authorisations. Where it is the regional council's opinion that "... it is desirable, due to actual or anticipated high demand or competing demands for coastal permits for occupation of space in the coastal marine area for the purpose of an activity or activities, that an allocation method be used to allocate authorisations for the space", the regional council may request the Minister of Conservation to

approve allocation (by public tender or another method) of authorisations for space in the coastal marine area (new ss 165J(1)(a) and (2)). The request must be publicly notified.

35. Where a request has been made, no person may apply for a coastal permit to occupy any space that is the subject of the request for the purpose of the activity in the request, while the request is being processed and a decision made.
36. As the clause is drafted, the high or competing demand for coastal permits for occupation need not arise from aquaculture activities in order to enable a request to be made. Rather section 165J(1)(a) provides that if demand arises from “an activity or activities”, the regional council may request the use of an allocation method. The request must state the activities it is proposed the public tender or allocation method will apply to.
37. The Society is concerned that the stay on applications while the request is being processed, provided by new section 165K, only prevents applications for the activity specified in the request being lodged. It would seem that other activities which are proposed to take place in the space specified in the request, and which may be competing for space with the specified activities in that space, may be the subject of an application while a request is being processed.
38. The Minister may approve the request on the terms specified in the request, or approve it on terms that in the Minister’s opinion will better manage the actual or anticipated high demand or competing demands in the space, or decline the request. There is no right of appeal against the Minister’s decision provided for by the legislation, and new section 165L(6) requires any application for judicial review of the Minister’s decision to be lodged within 15 working days of notification of the decision. The same concerns about this timeframe arise, as noted earlier (paragraphs 2 – 4, and 19 – 20).
39. If the Minister approves the method for allocation of authorisations, new section 165O provides that, during the period that the approval is in force, no person may apply for a coastal permit authorising occupation of the space for an activity covered by the approval, unless the person is the holder of an authorisation that relates to that space and activity. However, it appears to remain open for a person to apply for a coastal permit authorising occupation of the space for an activity that is not covered by the approval, whether or not that person holds an authorisation.

40. The Society considers that section 165O should be amended to prevent coastal permit applications being made for any activity that might compete for coastal space with activities subject to the Minister's approved method of allocation.
41. Under new section 165Z, the Minister of Aquaculture may suspend the receipt of applications for coastal permits authorising aquaculture activities to be undertaken in the coastal marine area, in response to a request by a regional council, and only if the Minister is satisfied that suspension is necessary or desirable because of actual or anticipated high demand or competing demands, and the existing methods are not adequate to deal with that.
42. New section 165ZA empowers the Minister of Aquaculture to direct a consent authority to process and hear together applications for coastal permits authorising aquaculture activities to be undertaken in the coastal marine area. However, the section does not specify any matters about which the Minister must be satisfied prior to making such a direction.

Recommendation

43. The Society recommends that clause 90 should be amended as follows:
 - (a) Section 165K should be amended to prevent coastal permit applications being made for any activity while a request is being processed.
 - (b) Section 165L(6) should be amended to remove the express timeframe in which to bring judicial review proceedings or at least to provide a more realistic timeframe (at least three months).
 - (c) Section 165O should be amended to prevent coastal permit applications being made for any activity that might compete for coastal space with activities subject to the Minister's approved method of allocation.
 - (d) Section 165ZA should be amended to include a set of matters about which a Minister must be satisfied in order to direct a consent authority to process and hear together applications for coastal permits authorising aquaculture activities to be undertaken in the coastal marine area.

Clause 96 – New sections 360A to 360C inserted

44. This clause creates new sections 360A, 360B, and 360C. These sections empower the Governor-General, by Order in Council, to amend provisions in a regional coastal plan that relate to the management of aquaculture activities in the coastal marine area.

45. Any such regulations must be made on the recommendation of the Minister of Aquaculture, after consultation with the Minister of Conservation, the regional council that will be affected, and others with whom the Minister of Aquaculture considers it appropriate to consult. Before making the recommendation, the Minister must be satisfied that:
- (a) the proposed regulations are necessary or desirable for the management of aquaculture development in accordance with the Government’s policy for aquaculture in the coastal marine area;
 - (b) the matters to be addressed are of regional or national significance;
 - (c) the amended plan will continue to give effect to any national policy statement, New Zealand coastal policy statement, and any regional policy statement; and
 - (d) the amended plan will not duplicate or conflict with any national environmental standard (new section 360B).
46. However, there is no requirement for the Minister of Aquaculture to carry out an evaluation under section 32 of the RMA (which requires an evaluation of the appropriateness, efficiency and effectiveness of the proposed plan provisions), prior to making a recommendation. This creates an undesirable inconsistency within the processes under the RMA for creating and changing policies and plans.

Recommendation

47. The Society recommends that the Bill should be amended to include an amendment to section 32(1) of the RMA, inserting a new section 32(1)(e) as follows: “the Minister of Aquaculture, for any recommendation under section 360B(1)”. This would ensure amendments to the regional coastal plan made through this route are developed and evaluated consistently with other plan and policy changes.

Clause 100 and Schedule 2 – Amendments to Tasman regional coastal plan

48. Clause 100 provides that the proposed Tasman regional coastal plan is amended in the manner specified in Schedule 2. That schedule contains extensive and detailed amendments to the proposed plan.
49. It is a very unusual step to amend plans through legislation in this manner. This removes the ability of persons affected by and interested in the plan to have input to the plan-making process (apart from making a submission on this Bill), and also removes any ability to appeal the new provisions of the plan to the Environment Court.

Recommendation

50. The proposed Tasman regional coastal plan should be amended through the normal processes under the RMA or, if a more refined process is considered justified, one that allows for public participation and appeal rights.

Clause 101 and Schedule 3 – Amendments to Waikato regional coastal plan


51. Clause 101 provides that the Waikato regional coastal plan is amended in the manner specified in Schedule 3. That schedule contains extensive and detailed amendments to the plan.
52. As explained above, it is a very unusual step to amend plans through legislation in this manner.

Recommendation

53. The proposed Waikato regional coastal plan should be amended through the normal processes under the RMA or, if a more refined process is considered justified, one that allows for public participation and appeal rights.

Conclusion

54. The Society does not wish to appear in support of its submission. However the Society is willing to meet with the Committee or officials advising it if the Committee considers that would be of assistance.



Jonathan Temm
President
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