

Fisheries (International Fishing and Other Matters) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

14 May 2024

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Fisheries (International Fishing and Other Matters) Amendment Bill (**Bill**).
- 1.2 The Law Society agrees that the Fisheries Act 1996 (**Act**) requires updating to ensure Aotearoa New Zealand continues to meet its international obligations regarding illegal, unreported, and unregulated (**IUU**) fishing.
- 1.3 This submission has been prepared with assistance from the Law Society's Environmental Law Committee.¹
- 1.4 The Law Society does not wish to be heard in relation to this submission.

2 International fishing permits – clause 29

- 2.1 Clause 29 of the Bill replaces section 113H of the Act with clauses 113H, 113HA, and 113HB. Clause 113H provides that the Chief Executive may issue an 'international fishing permit' for either or both of the high seas or a national fisheries jurisdiction (or exclusive economic zone (**EEZ**)) of a foreign country. Clauses 113HA and 113HB set out the criteria that must be met before the Chief Executive may issue an international fishing permit under section 113H.
- 2.2 The clause appears intended to give effect to New Zealand's international legal obligations to exercise effective control over New Zealand fishing vessels to ensure they comply with the relevant local laws when fishing in the EEZ of another country. However, this is not clear from the drafting of the Bill, the explanatory note to the Bill, or the Regulatory Impact Statement.
- 2.3 Proceeding on the assumption that the clause is intended to achieve the purpose outlined in the preceding paragraph, the relevant legal context is as follows:
 - (a) A coastal state has the power to control and regulate fishing in its EEZ.
 - (b) Article 62(4) of the United Nations Law of the Seas (**UNCLOS**) requires the nationals of a foreign state fishing in the EEZ of another state to comply with the laws and regulations of the coastal state.
 - (c) Article 94(1) UNCLOS requires a state to exercise effective jurisdiction and control over ships flying its flag. The International Tribunal for the Law of the Sea has confirmed that this includes responsibility to ensure that ships comply with local law when fishing in the EEZ of another state.²

¹ More information on the Law Society's law reform committees and sections can be found here: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/environmental-law-committee/>.

² For more information see: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf

- (d) Requiring New Zealand vessels to meet certain requirements and obtain a permit before they fish in the EEZ of another state is one possible mechanism for exercising such effective control.
- 2.4 The clause as drafted does not refer to the need to *also* obtain authorisation from the coastal state's government to fish in its EEZ. This may cause confusion regarding the proper authority to fish in the coastal state's EEZ.
- 2.5 It should be clear that a permit given under clause 113H(b) would be additional to, not a replacement for, the coastal state's authorisation.
- 2.6 To avoid doubt and confusion, the Law Society suggests that the Bill should make this point clear by either:
- (a) Amending clause 113H to clarify that for the avoidance of doubt a permit issued under 113H(b) does not remove the need to obtain authorisation to fish from the relevant coastal State; or
 - (b) Amending clause 113HB to require that the Chief Executive must be satisfied that an applicant has the appropriate authorisation to fish from the relevant coastal State before issuing an international fishing permit under 113H(b).
- 2.7 The Law Society prefers the second option.

3 Taking or transporting from a foreign jurisdiction – clause 24

- 3.1 Clause 24 repeals section 113A and replaces it with clause 113DAAA which states:

113DAAA All fishing within foreign jurisdiction to be in accordance with local law

- (1) No New Zealand national, and no person using a ship that is registered under the Ship Registration Act 1992 or that flies the New Zealand flag, may take or transport fish, aquatic life, or seaweed in the national fisheries jurisdiction of a foreign country unless the fish, aquatic life, or seaweed is taken or transported under, and in accordance with, the laws of that jurisdiction.
 - (2) Every person who contravenes subsection (1) commits an offence and is liable to the penalty set out in section 252(3).
 - (3) *See also* section 113D (which relates to permitting and other requirements on the use of a New Zealand ship to take (for sale) or transport fish, etc, in the national fisheries jurisdiction of a foreign country).
- 3.2 The Law Society considers that the current drafting does not meet the intended objectives of the Bill.
- 3.3 To achieve compliance with New Zealand's international fishing obligations, it would be beneficial to re-draft the clause to align with the provisions in the United States' Lacey Act (16 U.S.C. 3372).³
- 3.4 The Lacey Act provision focuses on the prohibition of interstate and international trafficking in protected wildlife and is frequently used by U.S federal prosecutors in respect of foreign wildlife charges. The current drafting of clause 113DAAA is narrower

³ [16 USC 3372: Prohibited acts \(house.gov\)](#)

as it only applies to the taking or transportation of fish, aquatic life or seaweed within “the national fisheries jurisdiction of a foreign country”.

- 3.5 The current drafting does not consider it an offence for a New Zealand vessel to enter a closed area or fail to provide reports or records when fishing in another country's jurisdiction. This does not meet New Zealand's international obligations to improve monitoring and management of IUU fishing.⁴
- 3.6 Section 3372(a)(1) and (2) of the Lacey Act provide an example of how the objectives of the Bill could be better met. These provisions make it unlawful to import, export, transport, sell, receive, acquire or purchase wildlife, fish or plants that have been taken, possessed or transported or sold in violation of a state, federal, foreign or tribal law or regulation.⁵
- 3.7 The Law Society recommends the below amendment (or drafting to this effect), to expand the protection:

...

(1) No New Zealand national, and no person using a ship that is registered under the Ship Registration Act 1992 or that flies the New Zealand flag, may:

- (a) take or transport fish, aquatic life, or seaweed in the national fisheries jurisdiction of a foreign country; or
- (b) import, export, transport, sell, receive, acquire, or purchase that fish, aquatic life, or seaweed taken, possessed, transported or sold in violation of that foreign state's laws.

...

4 [Contravention of international fishing permit - defence - clause 31](#)

- 4.1 Clause 31 amends section 113J to provide a defence to the offence of contravening a condition of an international fishing permit when in another state's EEZ if it was necessary to comply with that country's law.
- 4.2 The Law Society considers it is appropriate to include such a defence, but raises some concern as to the timeframes stipulated within this provision.
- 4.3 Clause 113J(4) requires that defendants must serve a notice in writing on the prosecutor if intending to rely on this defence, within 30 days after the service of the summons. The notice must specify the relevant law of the foreign country and the reasons why the contravention was necessary to comply with the law.
- 4.4 This timeframe is inconsistent with other offences in the Fisheries Act, which usually require that a notice of defence is provided 7 days before the hearing.⁶

⁴ Request for Advisory Opinion submitted by the SRFC, Advisory Opinion No. 21, ITLOS Reports, 2 April 2015.

⁵ For further discussion see Anderson, R. S “The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking” (1995) 16 Pub. Land L. R. 27.

⁶ Fisheries Act 1996, s 241.

- 4.5 The Law Society understands the need for earlier notice in this circumstance, given it will necessarily involve the laws of foreign jurisdictions, and require research. However, we consider that requiring notice within 30 days of service of the summons is unnecessarily restrictive. It would require defence counsel to disclose their defence without proper time to prepare and in a manner that is not tied to the progress of the prosecution.
- 4.6 Further, the timeframe is inadequate for the purposes of seeking further information after initial disclosure, per section 12(2) of the Criminal Disclosure Act 2008, which may be necessary to inform defence counsel whether the defence is applicable in the particular case.
- 4.7 Practitioners have advised us that in practice Fisheries Act violations are considered miscellaneous prosecutions and typically take more than a year to reach the trial stage.
- 4.8 The Law Society recommends the notice period is tied to the progress of the case and assigned to a particular point of the process of prosecution, such as a case review hearing convened in accordance with Subpart 3 of the Criminal Procedure Act 2011.



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