New Zealand Law Society
Te Kāhui Ture o Aotearoa

Hauraki Gulf / Tīkapa Moana Marine Protection Bill

31/10/2023

Submission on Hauraki Gulf / Tīkapa Moana Marine Protection Bill

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Hauraki Gulf / Tīkapa Moana Marine Protection Bill (**Bill**), which seeks to "address environmental decline in the Hauraki Gulf / Tīkapa Moana due to human activities".[1]

1.2 This submission, prepared with input from the Law Society's Environmental Law Committee,[2] makes various recommendations to improve the clarity of the Bill.

1.3 The Law Society does not wish to be heard in relation to this submission.

2 Definition of "bottom longlining" (clause 5)

2.1 The proposed definition of "bottom longlining" in the Bill refers to the use of a line "to which a hook or hooks … are attached".[3] This definition is inconsistent with the definitions used in the Fisheries (Electronic Monitoring on Vessels) Regulations 2017,[4] and the Fisheries (Seabird Mitigation Measures—Bottom Longlines) Circular (No. 2) 2021,[5] both of which refer to the use of a line to which "7 or more hooks" are attached.

2.2 In omitting the reference to number of hooks, the definition in the Bill will capture any type of weighted line, including a single hook on a weighted line (that is not a handline). This would not be generally understood as being included in the definition of long line. We suggest amending the definition of "bottom longlining" so it is consistent with the definitions used in the Fisheries (Electronic Monitoring on Vessels) Regulations and the Fisheries (Seabird Mitigation Measures—Bottom Longlines) Circular.

3 Definition of "potting" (clause 5)

3.1 The definition of "potting" in the Bill appears to be modelled on the definition in the Fisheries (Amateur Fishing) Regulations 2013 (i.e., the use of any pot or any other device that is capable of catching, holding, or storing rock lobsters).[6] However, the Bill extends the definition to the catching, holding, or storing of *all fish and aquatic life*. As a result, the use of a net to catch fish will likely come within the proposed definition of "potting" in the Bill. We query whether this is in fact the intention of the Bill, and suggest amending this clause to provide more clarity.

4 Meaning of "non-commercial purposes" (clause 20)

4.1 Clause 20 of the Bill provides that a person may only remove sand, shingle, shells, or other natural material from a seafloor protection area or high protection area for "non-

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1 Explanatory Note of the Bill.

2 See the Law Society's website for more information about this committee: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/environmental-law-committee/.

3 Clause 5(a).

4 See regulation 3.

5 See clause 3.

6 See regulation 9.

commercial purposes". The Bill does not define, nor provide any guidance on what constitutes a "non-commercial purpose" in relation to this clause. We note clause 41 contains a definition of "commercial purpose", but that definition is specific to that particular clause.[7] We therefore suggest including a definition of "non-commercial purposes" within clause 5 of the Bill. In crafting this definition, it is also important to note our comments below, regarding the definition of "commercial purpose" in clause 41(5).

5 <u>Activities to which prohibitions do not apply (clause 21)</u>

5.1 The Bill expressly prohibits aquaculture activities in seafloor protection areas (clause 14) and in high protection areas (clause 18). However, clause 21(a) provides that the prohibitions in clauses 14, 15, and 18 do not apply to various specified activities, including "any activity for which resource consent has been granted under the Resource Management Act 1991 at the time this Act commences, until the expiration of that consent".

5.2 This appears to create quite a substantial exception. It is not apparent from the Regulatory Impact Statement that the significance of this exclusion, and whether it may undermine the Bill's prohibitions, has been assessed. We invite the Select Committee to consider whether this is the intended effect.

6 <u>General powers of rangers (clause 37)</u>

6.1 Clause 37 empowers rangers to respond to situations where they believe a person is committing, has committed, or is about to commit, an offence against this legislation. Clause 37(1)(b) provides that a ranger may require such persons to provide various particulars including their email address, as well as evidence of those particulars. This raises several concerns:

(a) It is unclear why an email address would be required in such circumstances. The Bill does not purport to authorise service of documents by email, for example. Particulars are normally required for identification purposes, and this clause already empowers rangers to request a person's full name, date of birth, and address, which are sufficient for the purposes of identifying the individual concerned, and serving on them any charges that might be laid against them.

(b) This power goes beyond the particulars an enforcement officer can normally require under other comparable legislation. For example:

(i) Section 203 of the Fisheries Act 1996 only empowers a fishery officer to request a person's full legal name, any other name by which the person is commonly known, and the person's date of birth, actual place of residence, and occupation.

(ii) Under section 114(3)(b) of the Land Transport Act 1998, an enforcement officer can only require a driver of a vehicle that is stopped under that Act to provide their full name, full address, date of birth, occupation, and telephone number.

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[7] Clause 41(5).

(iii) Similarly, section 10 of the Search and Surveillance Act 2012 only empowers a constable exercising the stopping power under section 9 of that Act to request a person's name, address, other contact details, and date of birth.

(c) Not all persons will have an email address. Even where a person has an email address, it may be difficult to provide any supporting evidence.

6.2 The power to request a person's email address may therefore be inconsistent with individuals' rights under the Privacy Act 2020, and Information Privacy Principle 1, which provides that personal information must not be collected by an agency unless it is necessary for a lawful purpose connected with a function or an activity of the agency.[8] We therefore suggest removing the requirement in clause 37 to provide email addresses.

7 Definition of "commercial purpose" (clause 41)

7.1 Clause 41(1) states that a person who undertakes any activity prohibited under clauses 14, 15 or 18 commits an offence. Clause 41(5) further states that person may commit such an offence "for a commercial purpose" if:

(a) the offence was committed for the purpose of commercial gain or reward; or

(b) they are in possession of a number of fish that exceeds by at least 3 times the amateur individual daily limit (emphasis added).

7.2 This proposed scheme is inconsistent with the Fisheries (Amateur Fishing) Regulations 2013, which deems the possession of a number of fish that exceeds by at least 3 times the daily limit to be a "serious non-commercial offence", rather than a commercial offence. To avoid inconsistencies between the two regimes, we suggest amending clause 41(5) to require both subsections (a) and (b) to be satisfied in order to establish a commercial purpose.

8 Disposal of seized property (clause 57)

8.1 Clause 39(3) of the Bill empowers rangers to seize any property they believe, on reasonable grounds, is being or has been used in the commission of an offence, or is evidence of the commission of an offence.

8.2 Clause 57 allows the Director-General to dispose of such seized property, irrespective of whether the owner is subsequently prosecuted and/or convicted of an offence. The Director-General is only required to give the owner notice of the Crown's intention to dispose of the property, in order to give the owner the opportunity to lodge an appeal against the disposal.

8.3 Where no charges are laid, there is no justifiable reason to dispose of a person's property other than to the owner. In such circumstances, the default position should be to require the Director-General to return the property to the owner. We therefore recommend amending clause 57 to reflect this default position.

8.4 Where perishable property has been seized and sold, the proceeds of such sale should be returned to the owner of that perishable property, or retained pending the outcome of any charges laid. Only property that remains forfeit to the Crown on conviction pursuant to

[8] Privacy Act 2020, s 22.

clause 58 and after all applications for relief under clause 61 have been heard, should be disposed of by the Crown in whatever manner it sees fit.

8.5 We also note that the procedure for appeal against notice of the Crown's intention to dispose of the property[9] seized under the Act is not specified (in particular, which body would hear the appeal is unclear).

9 Decision of court on application (clause 63)

9.1 The Bill imports the property forfeiture regime from the Fisheries Act 1996. However, it includes an additional provision that is not present in the Fisheries Act 1996, which we consider is contains an arbitrary standard and inappropriately constrains judicial discretion.

9.2 Clause 63 provides:

> *(1) The court may make an order or orders providing relief (in whole or in part) from the effect of forfeiture on any of the interests determined under section 62(3).*
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> *(2) However –*
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> (a) *the court may make an order under subsection (1) only if it is necessary to avoid manifest injustice; and*
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> (b) *if the owner of the forfeited property is the person who committed the offence in respect of which the property was forfeited, any order made under subsection (1) must not, together with any other order made under subsection (1) with respect to the same property, allow less than 40% of the forfeited property's value to remain forfeited to the Crown.*

9.3 The application of this provision raises significant issues due to the range in value of the property, and particularly vessels, that might operate in and around the protected areas. The value of such property might range from a few hundred dollars to over $10 million.

9.4 Under clause 63, a Judge would have no discretion to determine an appropriate level of value to remain forfeit. This unreasonably fetters the Judge's discretion to determine "manifest injustice" in the circumstances of the case, taking into account the mandatory considerations set out at clause 62.

9.5 By way of example, consider a vessel value of $5000, compared to one of $10,000,000. For the same offence the minimum amount remaining forfeit would be $2000 and $4,000,000, respectively. The $4,000,000, represents a disproportionately severe punishment for an offence for which the maximum fine would be no more than $250,000, and a manifestly unjust result.

9.6 It is accepted that where property is of a higher value, a greater amount of value remaining forfeit is justified. However, as currently drafted this provision could result in outcomes that are disproportionate to the seriousness of the offence, and might infringe the right not to be subjected to disproportionately severe treatment or punishment.[10]

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[9] Clause 57(2) of the Bill refers.

[10] Protected under section 9 of the New Zealand Bill of Rights Act 1990.

9.7 The possibility that forfeiture might infringe that right, at least in the context of the Proceeds of Crime Act 1991, was canvassed by the Court of Appeal in *R v Crombie*.[11] There, the Court stated:

> [15] … logic suggests that s 9 of the New Zealand Bill of Rights Act may have a role to play when, post-sentence, the Court is considering whether to forfeit property which was utilised in the underlying offending. Indeed this was recognised by this Court in *Cooksley-Mellish v Solicitor-General* CA209/05 27 March 2006 at [34].
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> [16] … We emphasise that in order to engage in s 9 it will be necessary, in each case, to point to treatment or punishment that is "disproportionately severe": a high threshold. Further, the policy factors in favour of forfeiture of property utilised in the commission of offending are cogent. This is apparent from the judgment of this Court in *R v Lyall* [1997] 2 NZLR 641 at 647:
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> > 'We see nothing excessive in the forfeiture. It is not disproportionately severe treatment or punishment in terms of s 9 of the New Zealand Bill of Rights Act 1990 … The policy of the Act is to strip an offender of his or her interests in the property used to commit the crime. The reason for committing those crimes will ordinarily be immaterial … We have obtained some guidance on this question from the decision of the Court of Appeals for the Ninth Circuit in *United States v Washer* 817 F 2d 1409 (1987) in which it was held that only those forfeitures that in light of all the circumstances are grossly disproportionate to the offence committed are prohibited by the Eighth Amendment's ban on cruel and unusual punishment.'

9.8 The decision in *Solicitor-General v Anaru*[12] may also have some application in so far as the totality of the penalties imposed would amount to a disproportionately severe punishment.

9.9 The observations of the Court of Appeal in both cases appear, in principle, to apply equally in the context of clauses 62 and 63 of the Bill. Where a provision has such a risk of resulting in a disproportionately severe outcome, it should be modified to avoid this.

9.10 Further, case law under the Fisheries Act speaks clearly to the inability to rely on vessel value alone. In *Ministry for Primary Industries v Sealord Group Ltd*,[13] the Court considered an application for relief from forfeiture of a vessel valued at NZ$24 million. The parties agreed that permanent retention of the vessel would create a manifest injustice. The issue before the Court was the methodology to be adopted when setting a redemption fee under s 256(11)(b) of the Fisheries Act. A schedule provided to the Court outlined previous redemption fees imposed, ranging from 2.6 percent to 50 percent of a vessel's value. The Court concluded it would be an oversimplification of the redemption process to simply take a percentage of the vessel's value, and that what is required is an analysis that has regard to all relevant considerations. [14]

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11 CA453/05, 29 June 2006.
12 [2006] NZCA 218.
13 [2020] NZDC 26659.
14 At para [8].

9.11 The Court considered this again in *Sandford v Ministry for Primary Industries*,[15] ultimately imposing a redemption fee at 0.5 percent of the value of the forfeit property. Judge Gilbert concluded that this figure appropriately balanced all the factors that needed to be taken into account, and was a reasonable fee to relieve the manifest injustice that would be associated with forfeiture of the entire property. Judge Gilbert observed that the setting of a redemption fee is a difficult and somewhat arbitrary exercise, which can be shaped in many ways, and a sole focus on the value of the asset is not appropriate. [16]

9.12 Finally, we observe that under the Bill, a court *may* order the forfeiture of property (under the Fisheries Act regime, it is required). The effect of clause 63(b) may be to discourage the court from ordering forfeiture where it appears the arbitrary minimum 40% value would result in a manifestly unjust order, even where some level of forfeiture would otherwise be appropriate.

9.13 To address these issues, the Law Society recommends clause 63(2)(b) be deleted.

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15 [2021] NZDC 24185.
16 At para [49].