New Zealand Law Society
Te Kāhui Ture o Aotearoa

Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Bill

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

14 June 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Bill (**Bill**).

1.2 For the reasons set out below, the Law Society recommends the Bill does not proceed.

1.3 In the event the Bill is to proceed, this submission sets out recommendations to address some of the key issues with the Bill.

1.4 This submission has been prepared with assistance from the Law Society's Environmental Law Committee and Climate Change Law Committee.[1]

1.5 The Law Society **wishes to be heard**.

2 Background

2.1 The Bill aims to reduce the regulatory burden for the approximately 1,200 existing marine farms by providing a blanket extension to the coastal permits required to operate a marine farm in New Zealand, by up to twenty years but not beyond 2050. The blanket extension does not require an application by the consent holder which means that there is no 'process' to undergo and no ability for any parties to be heard or submit on the extension.

2.2 The Departmental Disclosure Statement (**DDS**) identifies that approximately 300 current consents are due to expire by the end of 2024, and a further 150 consents are due to expire by 2030.

2.3 The Bill also provides a bespoke 'optional' mechanism for consent authorities (councils) to review the conditions of the extended consent. That review is limited to better promotion of the sustainable management of natural and physical resources related to the marine farm.

2.4 The review of consent conditions is a one-off review that:

(a) Is optional for councils;

(b) Must be initiated within 24 months of the extension;

(c) Can only proceed with the concurrence of the Director-General of the Ministry of Primary Industries (which is an agreement at the start of the review that the review can proceed with an agreed scope);

(d) Is not cost-recoverable;

(e) Allows for notification to iwi organisations (with ability to make a submission); and

(f) Limits appeal rights and the right to be heard on the review outcomes to the consent holder and any party who was notified of the review and made a submission.

2.5 As well, there is a prohibition on the council holding a hearing associated with any review.

[1] More information on the Law Society's Law Reform Committees can be found here: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/

3 Key concerns

3.1 The Law Society's primary concern with the Bill is that it undermines a fundamental principle of the Resource Management Act (**RMA**), pursuant to which each of the affected consents has been granted.

3.2 Land use consents aside, resource consents have an expiry period. The assessment of environmental impact (amongst other matters) undertaken at the time of the original application is in respect of the impact that the consent will have during the term for which consent is granted. That assessment does not consider impact beyond the term of the consent.

3.3 Accordingly, there is deliberately no process by which to 'extend' the term of a consent (see s 127(1)(b) of the RMA). An application must be made to renew the consent, and that application will reflect the original application in the sense that a new assessment of impact is undertaken. Additional matters, such as the value of the consent holder's investment, are taken into account.

3.4 As drafted, the Bill proposes to override this fundamental principle.

Use of bespoke framework to override existing provisions

3.5 The bespoke framework proposed for the review of a marine farm's consent conditions is a significant limitation on the already existing framework.

3.6 The Legislation Design and Advisory Committee (**LDAC**) has cautioned against legislating bespoke solutions to award resource consents or other outcomes for planning-related matters, in preference to the relevant applicant making applications under existing legislation.[2] The LDAC believes the public interest is usually best served by legislation which sets general rules and processes, as such rules and processes provide the most predictability and clarity to those to whom they apply, and to the wider community affected.[3]

3.7 As the LDAC notes:[4]

> Enacting bespoke legislation which supersedes general rules and processes carries a number of risks:
>
> (a) Bespoke legislation can increase the complexity in the law, which increases the risk of error and unintended consequences and makes it more difficult for the public to know what law applies to their situation.
>
> (b) Legislating for particular circumstances risks undermining democratic values and the legitimacy of Parliament and, in some cases, may be seen as biasing the system towards interests that are well-funded or well-connected and able to lobby for their interests.
>
> (c) Too many bespoke solutions may undermine the confidence and certainty in the general system, and may incrementally shift the overall balancing of rights and responsibilities under that general system.

2 Legislation Design and Advisory Committee *Annual Report of the Legislation Design and Advisory Committee for the year ended 30 June 2018* (2018) at pages 10-12.

3 Legislation Design and Advisory Committee *Annual Report of the Legislation Design and Advisory Committee for the year ended 30 June 2018* (2018) at page 11.

4 Legislation Design and Advisory Committee *Annual Report of the Legislation Design and Advisory Committee for the year ended 30 June 2018* (2018) at page 11.

3.8 We agree there should be a strong underlying public policy rationale, and exceptional circumstances which justify bespoke legislation solutions.[5] This is particularly important where the bespoke legislation seeks to bypass or limit existing consultation requirements, participatory rights in consenting processes, and appeal rights (as proposed in the Bill).

3.9 Further, regional councils and territorial authorities have already made local community-agreed plans that provide for aquaculture through the regional coastal planning process.[6] As such plans are reviewed and updated every ten years, the automatic extension will mean no assessment occurs in the context of any updated coastal plan.

3.10 The imposition of the bespoke framework for the limited review of consent conditions, without adequate public consultation or engagement, will likely be viewed as an overreach into local decision-making. The Bill introduces changes that are inconsistent with these local planning frameworks and processes for reviewing and extending consents, and the RIS notes that the councils consulted oppose the Bill and prefer the status quo.[7]

Use of urgency and limited consultation

3.11 The Law Society supports legislative procedures which promote democracy and transparency by allowing select committees and the public to give proper consideration to legislation passed by the House. While urgency can be, in certain circumstances, necessary and justified, we are concerned about the use of urgency and the limited consultation timeframes for scrutiny of this bill.

3.12 The purpose of the use of urgency in relation to this Bill relates to the expiration at the end of this year of marine consents held by 300 current marine farms. This is not unexpected; indeed, it is an outcome intended by the RMA and known long before now. As the RIS identifies, there are alternative options that could have provided for a shortened extension to some consents, enabling further policy work and full consultation. Such an approach may have made the use of urgency less objectionable. In addition, there is already provision under the legislation to enable existing consent holders to continue to operate while their new (replacement) application is being determined, and therefore it is unclear what the prejudice would be to consent holders in the interim.[8]

3.13 The Regulatory Impact Statement (**RIS**) highlights the lack of time available to undertake a full and informed consultation process due to the use of urgency and subsequent shortened timeframes for feedback.[9] In particular, Treaty partners and environmental non-governmental organisations noted that the consultation process was inadequate. The DDS indicates that affected stakeholders, including iwi, were given a one-week period to provide feedback on the proposals included in this Bill.[10]

3.14 The Law Society agrees with these observations and notes that all organisations involved in the limited pre-Bill consultation, apart from industry, were opposed to the Bill and concerned about

5 Legislation Design and Advisory Committee *Annual Report of the Legislation Design and Advisory Committee for the year ended 30 June 2018* (2018) at page 12.
6 RMA, Schedule 1.
7 RIS at paras 31 – 33.
8 RMA, s 124.
9 RIS at 2 and 4.
10 DDS at 3.6.

the length of time the extensions would allow as well as the lack of review provisions in a changing world.

Effect on Treaty settlements

3.15 The RIS identifies that the proposals in the Bill impinge upon existing Treaty settlements and may not reflect broader Crown responsibilities regarding Crown-Māori relationships including by limiting the ability of Māori to act as kaitiaki of the marine and coastal environment.[11]

3.16 The Bill does not include any provisions relating to Treaty settlements that have statutory areas overlapping with marine farms, or statutory and local government processes that require involvement of relevant iwi in consenting and regional planning processes.

3.17 The Law Society recommends that the Bill be amended to include provisions ensuring the relevant Treaty settlement agreements are taken into consideration. Consideration should be given to requiring review under proposed new section 165ZFHL, where there is an affected Treaty settlement or other obligation to consult iwi. As currently drafted, those affected parties will only be notified and able to be heard, if a council decides to undertake a review (and the Director-General agrees to that).

4 Review of consent conditions

Adequacy of the conditions over the extended life of the consent

4.1 The Bill appears to roll over existing consent conditions for the period of extension for 20 years. Feedback from iwi and councils both noted concerns with the current consent conditions not being fit for purpose until 2050. Notably the existing conditions were drafted on an assumption that the consent would expire at this point in time.

4.2 The Law Society is concerned that the existing consent conditions may therefore in some cases not fully address the environmental effects of the activity over the extended twenty-year timeframe. The Bill lacks a process for reviewing and updating these conditions outside of the limited one-off review process that must be undertaken within 24 months of the extension being granted.

4.3 We note that the DDS provides that the bespoke review process in the Bill does not remove the existing default review mechanisms under the Resource Management Act 1991 (**RMA**).[12] However, this provision will only assist where existing consents already contain review provisions. Given the age of many of the existing consents, and because decision-makers would have been expecting the consents to expire, that may not be the case. We query whether the one-off review process is intended to include a bolstering of review conditions in line with section 128 of the RMA and recommend that clarification of this point is included in the Bill.

4.4 For clarity, the Law Society recommends the Select Committee consider including the section 128 review process as a condition that may be amended by the bespoke review mechanism in the Bill, even if this was not originally intended.

11 RIS, Appendix Two.
12 RMA, s 128.

Restrictions on review may not be justified

4.5 The bespoke one-off review mechanism will create additional work for councils who not only have to decide whether to review consent conditions within two years but also make an application for each individual consent to Ministry of Primary Industries to seek the concurrence of the Director-General to do that review.

4.6 The Director-General's concurrence is not a requirement under existing review mechanisms., and the Law Society does not agree that the requirement for the Director-General to agree to the review, and its scope, is necessary. We recommend this requirement is removed. It could instead be replaced with a requirement to notify the Director-General.

4.7 All reviews will be required within the same two-year period and certain councils, such as Marlborough, will bear a much greater burden. Councils cannot recover any costs associated with the review. The consequence may be that councils do not (or cannot) undertake a review where they otherwise would have. The rationale for precluding cost recovery is unclear, and the Law Society recommends it is removed.

4.8 Further, for those consents that do contain a review condition, review under proposed section 165ZFHL will be the only opportunity for a council to consider the conditions of the consent. Some existing consents are already 30 years old, and the Bill will extend them a further 20 years. It could be reasonably expected that a coastal permit over 30 years old, which is proposed to continue for a further 20 years, would be subject to further review than just that provided by section 165ZFHL. Environmental impacts can change markedly over time, and be cumulative, meaning that conditions previously fit-for-purpose are no longer appropriate. The blanket extension applied by the Bill will prevent consideration of this in many cases.

4.9 The Law Society recommends the Select Committee give consideration to including provision for further review within the extended term of the consent, for those consents that cannot be subject to review under section 128 of the RMA.

5 Notification of review and rights of appeal

5.1 Limited notification of review is provided by proposed section 165ZFHL, restricted to iwi authorities, post-settlement governance entities, Ngā Hapū o Ngāti Porou as defined in section 10 of Ngā Rohe Moana o Ngā Hapū Porou Act 2019, iwi and hapū that are party to a Mana Whakahono ā Rohe under this Act, rights and title holders under the Marine and Coastal Area (Takutai Moana) Act 2011, and the permit holder.

5.2 The Bill does not otherwise require the identification and notification of other affected parties, as section 95B(2) and (3) of the RMA requires. The Law Society recommends the Bill is amended to require identification of other affected parties that may need to be notified of the review process.

5.3 These limitations carry through to appeal rights, which are dependent upon a party having been notified. The rights of appeal that the Bill proposes in clauses 165ZFHN and 165ZFHO are limited to the permit holder and notified persons or groups that made a submission regarding the review.

5.4 Proposed new section 165ZFHL(3) provides that a consent authority undertaking a review must not hold a hearing. The reason for this prohibition is unclear. A review of consent conditions under the existing framework allows for a hearing in certain circumstances. Given the impact of

the Bill on the lifespan of the consents, without assessment of likely environmental impact, a hearing may be beneficial (or more efficient) for consent authorities in some circumstances. For example, where evidence on adaptive management is necessary.

6 Term of extensions

6.1 Although proposed new section 165ZFHJ allows for the one-off review (if agreed to by the Director-General) to consider the sustainable management of the natural and physical resources associated with the marine farm, the Bill precludes consideration of the individual activity of each marine farm, whether extending the term by up to twenty years is otherwise justifiable (in consideration of relevant coastal plans implemented by the local authority with community involvement, environmental impacts, climate impacts, cumulative effects, or otherwise), and even whether such a long term is wanted by the consent holder.

6.2 The Law Society recommends inclusion of an option for marine farmers to seek shorter extensions.

6.3 Further, the RIS provides two options (Option A and Option B) for the exclusion of certain consents from the blanket extension.[13] Option A considered the exclusion of marine farms that are already identified as being in inappropriate areas.[14] Option B considered the exclusion of consents granted with a duration of less than twenty years.[15] The Law Society considers that the inclusion of these two options for exclusion from the blanket extension would be welcome additions to the Bill that would somewhat reduce concerns about extending consent durations.[16]

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13 RIS at 14 – 16.

14 An inappropriate area is defined in the NES-MA regulation 6 as: an area of the coastal marine area that, after 1 January 2019, has been identified as inappropriate for existing aquaculture activities in a policy statement or plan or proposed policy statement or plan. This exclusion would affect around 38 farms in the Marlborough region.

15 Section 123A of the RMA provided a minimum application term for a consent is twenty years except in certain circumstances which include: the applicant requested a shorter period, a shorter period is required to ensure that adverse effects on the environment are adequately managed, or where the NES expressly allows for a shorter period. This exclusion would affect less than 10 farms.

16 We note that the RIS identifies that some of the farms identified as inappropriate are currently contested. Where a contested farm successfully challenges the designation as inappropriate the farm should, upon its success, enjoy the benefits of the extended duration of consent.