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Te Kāhui Ture o Aotearoa

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Fisheries New Zealand
Wellington

By email: FMsubmissions@mpi.govt.nz

Re: Proposed technical amendments to fisheries regulations

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the *Proposed technical amendments to fisheries regulations* consultation paper (**Consultation Paper**).

1.2 This submission has been prepared with the assistance of the Law Society's Environmental Law Committee. The key issues considered in this submission relate to the proposals to create infringement offences and remove consultation requirements relating to licence conditions.

2 General observations

2.1 The Consultation Paper is titled "Proposed *technical* amendments to fisheries regulations". Technical proposals are described as "proposals that would have little or no impact on stakeholders."[1] It is understood that these types of technical amendments generally encompass matters such as fixing obvious mistakes.

2.2 However, the majority of the proposed amendments relate to proposals which would:

(a) Result in increased obligations or impose additional restrictions on stakeholders;

(b) Make regulatory amendments to enable stakeholders to innovate or provide increased flexibility; or

(c) Result in changes to offences and penalties.

2.3 These proposals can have a significant impact on the way amateur and commercial fishers and Licenced Fish Receivers (**LFRs**) operate, and they cannot be categorised as being "technical" in nature.

2.4 Seeking feedback under a consultation document labelled "proposed technical amendments" risks failing to alert stakeholders to the real nature of the reforms proposed in the Consultation Paper and the information that is sought from stakeholders. This could have an impact on the amount and the quality of information provided by stakeholders, and consequently, the value of the public consultation process. We therefore encourage officials

[1] Consultation Paper at paragraph 13.

to engage in further consultation if it is apparent that stakeholders have not fully considered the impacts of these proposals.

3 The use of infringement offences

3.1 The Consultation Paper includes a number of proposals which seek to "enhance the offences and penalties regime by making greater use of infringement offence provisions."[2] These proposals are described as being "consistent with the broader objective of a more graduated offences and penalties regime."[3] The Paper also suggests that the infringement offence regime would enhance the ability of the Ministry of Primary Industries (**MPI**) to operate the VADE compliance model,[4] by creating incentives for voluntary compliance and providing further options for Fisheries Compliance to undertake directed compliance.

Potential 'net-widening' effect

3.2 Researchers have cautioned that extensive infringement regimes could have a 'net-widening' effect,[5] for example, because notices are issued when they should not be issued, or when a warning or caution is more appropriate.[6] This phenomenon has been attributed to the cost, ease and efficiency of the infringement system, which encourage its growth.[7]

3.3 It has been observed that instead of diverting people away from the criminal justice system, the use of infringement offences has seen a growing number of people enter it, albeit at the lower end of the scale.[8] A similar effect could be expected here. The proposed infringement regime should therefore be developed with this 'net-widening' effect in mind.

Cumulative effect of multiple infringement offences

3.4 The proposed infringement offence regime seeks to allow enforcement officers to have access to alternatives to prosecution where prosecution is not proportionate to the scale of the offending.[9] The ability to issue infringement notices for breaches of relevant regulations is considered to be a more administratively efficient method of encouraging compliance.[10]

3.5 In light of these objectives, special consideration should be given to the context of fisheries operations and the potential cumulative effect on individuals who may be issued multiple infringement notices, for example, as a result of applying incorrect processes or repeating the same mistake.

3.6 If, for example, an individual omits a certain type of information from a record, that omission may be found in in every instance of that document being produced by that individual. Each individual omission would be a separate infringement offence, particularly where the offence relates to a failure to keep records or a failure to include all required information. In

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2 Consultation Paper, paragraph 7.
3 Above n 2.
4 VADE is an acronym for voluntary, assisted, directed, enforced.
5 David Wilson "Instant Fines: Instant Justice? The Use of Infringement Offence Notices in New Zealand" (2001) Social Policy Journal of New Zealand: Issue 17 (available here: www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj17/17-pages72-81.pdf).
6 New South Wales Law Reform Commission "Penalty notices" (February 2012) at [0.5].
7 Above n 5.
8 Above n 5.
9 Consultation Paper, paragraphs 65, 72, 156, 171, 177 and 332.
10 Consultation Paper, paragraph 65.

such circumstances, the total fines payable may be much higher than the total fine that would be imposed by a court at sentencing.

3.7 It is currently common practice for all entities involved in a fishing operation to be charged for offences which are detected and prosecuted by MPI. In such cases, the charges generally relate to the same fish and essentially the same offending. These offences are usually dealt with by the court at sentencing by applying the principle of totality, which requires the courts to consider the overall effect of the sentences when determining the appropriate level of fine.[11] The principle has been considered in the context of fisheries offences, where the court has held:[12]

> "… in a case involving this number of offences and convictions, it is, of course, very important that the sentencing Court should have regard to the totality of the offending and also to the totality and the effect of the penalty imposed. In other words, it is not only a matter of fixing an amount per offence, but at the end one has to stand back, consider the total effect of the sentencing and have regard to whether in the final result that achieves broad fairness".

3.8 While infringement regimes are administratively efficient, infringement penalties are usually fixed and cannot be similarly adjusted to fit the circumstances of the case or the offender. Without appropriate checks or balances, there is potential for multiple infringement notices to be issued to one party, or for multiple events which relate to essentially the same error. This could ultimately result in incurring a financial penalty that is equivalent to, or higher than, a penalty that would be awarded if the offender was prosecuted. Such an outcome would not be consistent with the purpose of the proposed regime, which is to create a penalty regime for offences where prosecution is not appropriate to the scale of the offending.

3.9 This cumulative effect could be mitigated by placing a limit on the maximum number of infringement notices that can be issued in certain circumstances. Section 255A of the Fisheries Act 1996 (**Act**) should also be reviewed for consistency and applicability if the nature, scope, and variety of infringement offences is to be widened.

4 Proposal to remove consultation requirements relating to licence conditions

4.1 Regulations 6(3) and 6(4) of the Fisheries (Licensed Fish Receivers) Regulations 1997 (**LFR Regulations**) require the chief executive to consult with the applicant for, or holder of, a fish receiver's licence regarding any conditions that are to be imposed on the license. The Consultation Paper proposes to revoke this requirement and replace it with a requirement for the chief executive to give written notice.

Comparison with other legislation

4.2 The Consultation Paper notes that the current requirement for the chief executive to consult before imposing or amending conditions on a licence differs from other legislation, which

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11 *Terry v MOF* HC Napier, CRI-2009-441-27, 21 September 2009, Potter J at [15] and [16].

12 *Denver Videotronics Ltd v CIR* [1986] 8 NZTC 5163, 9 TRNZ 528 as applied in *MAF v Chang* [1991] DCR 429. Although decided in 1991, *MAF v Chang* is still referred to by the prosecution and by defence counsel in sentencing for fisheries matters.

simply require the decision-maker to give written notice of any conditions that are imposed or revoked. For example:[13]

(a) Section 92(2) of Act, which relates to fishing permits, provides for the chief executive to add, amend, or revoke conditions on a fishing permit by written notice.

(b) Section 97(5) of the Act relates to special permits and, again, provides for the chief executive to add, amend, or revoke conditions by notice in writing to the special permit holder.

4.3 However, it is important to note that the processes, context, and subject matter involved in issuing these permits are different to that involved in issuing an LFR licence:

(a) Fishing permits are issued as of right.[14] There are no grounds for refusal (other than the very limited grounds associated with non-payment of deemed values or suspension of a permit) and the nature and types of conditions that can be imposed on these permits are clearly defined in the Act.

(b) Special permits essentially enable the permit-holder permission to operate 'outside the rules' for a particular approved purpose. Therefore, lengthy consultation processes will generally take place with the applicant and other stakeholders when the application is being assessed. Section 97(2) of the Act also requires the chief executive to "consult with such persons and organisations as the chief executive considers are representative of those classes of persons having interests that would be affected if the special permit were issued." It is therefore not quite accurate to suggest that conditions on a special permit are issued without consultation.

4.4 In contrast, the conditions that may be imposed on an LFR licence encompass a wide spectrum of methods and processes and dictate how an LFR should structure its operations. Such conditions could have various unintended effects if they are to be imposed without any consultation, as discussed below.

Impacts on business operations

4.5 The proposal would allow the imposition of conditions, without consultation, on established LFR operations at any time, and not just at the time of application for a licence. Such changes could have an adverse impact on a business's operations and the ultimate viability of that business. For example, the proposal would allow the chief executive to impose a condition that the LFR could no longer receive a particular species of fish. Should an LFR's operations be founded on receiving that species, its removal could mean the end of that business.

4.6 It is suggested there are some circumstances where the requirement to consult appears to be unnecessary. As an example, the Consultation Paper suggests it should be straightforward to impose conditions, without consultation, to restrict or prohibit the involvement of someone who has been convicted of fisheries-related offences.[15] We do not agree. In such circumstances, it would be appropriate to consult the applicant regarding any steps taken to

13 Consultation Paper, paragraph 120.

14 Section 91 Act requires the Chief executive to issue an appropriate fishing permit in the approved form to every person who applies for a permit.

15 Consultation Paper, paragraph 124.

mitigate the risks associated with a convicted individual's involvement. This is particularly important in the context of Fisheries Act convictions which are strict liability offences which can arise without there being any intent whatsoever to offend.

4.7 Natural justice requires a chance for applicants to be heard on such matters, and removing this right is, in our view, a substantive amendment to the current regime.

Changes to avoid the potential risk of judicial challenges

4.8 The Consultation Paper notes that retaining the requirement to consult is an administrative requirement that, if not adhered to correctly, would place MPI at potential risk of judicial challenges.[16]

4.9 We do not support a proposal where the desired outcome of that proposal is to avoid judicial challenges if current statutory processes are not adhered to. Recourse to the courts is an important aspect of the rule of law. It should not be dispensed with simply for the purpose of speeding up administrative processes, or to avoid a remedy that would normally be available to applicants if the agency has not adhered to statutory requirements in carrying out its statutory functions.

4.10 Whilst it is correct that the proposal would not, in itself, create any additional obligations for LFRs (as the conditions can currently be imposed with consultation) it represents the removal of an important process around the imposition of restrictive conditions, and revokes an important right to be consulted on matters directly affecting the operation of LFRs.

Other factors which hinder the administration of the LFR Regulations

4.11 The Consultation Paper suggests that conditions are used infrequently because the requirement to consult hinders the administration of the regulations.[17] However, the Paper fails to consider whether this could be due to other factors which are not canvassed in the Paper (such a lack of processes and systems for managing LFR licences or a lack of institutional knowledge regarding the application of regulation 6).

4.12 We therefore invite officials to consider retaining the requirement to consult, perhaps by following a simple consultation process which outlines the proposed condition and gives applicants the opportunity to comment or provide further information that is relevant to that proposed condition. Such a process would not be unduly onerous.

5 Lack of offence provisions for failure to comply with conditions

5.1 Although the LFR regulations enable conditions to be imposed, the Consultation Paper notes that there are currently no offence provisions for failure to comply with those conditions. This proposition is not wholly correct, as section 228 of the Act provides for the following offence:

> *"Every person commits an offence who contravenes, or fails to comply with any condition or requirement imposed by the chief executive in respect of any consent,*

16 Consultation Paper, paragraph 130.

17 Consultation Paper, paragraph 123.

approval, authority, permission, or certificate issued or granted under this Act (other than a requirement to pay a sum of money).”

5.2 Every person convicted of an offence against this provision of this Act is liable to a fine not exceeding $100,000.

5.3 Therefore, an offence provision does exist. This suggests it is not the absence of an offence provision that has hindered the use of conditions. Nevertheless, the creation of a specific offence within the LFR Regulations may improve visibility and accessibility of the relevant rules for all stakeholders.

Nāku noa, nā

Herman Visagie
Vice-President