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FOREIGN CHARTER VESSEL REVIEW – CONSEQUENTIAL AMENDMENTS TO FISHERIES REGULATIONS

Introduction

1. Te Ohu Kaimoana (Te Ohu) welcomes the opportunity to make a submission on the amendments proposed to the Fisheries Regulations. Te Ohu was established under s.33 of the Maori Fisheries Act 2004 and has a key role in the Maori Fisheries Settlement. Te Ohu is the corporate trustee of the Te Ohu Kai Moana Trust. The purpose of Te Ohu Kai Moana Trust is to advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing, and fisheries-related activities, in order to:
 - ultimately benefit the members of iwi and Māori generally
 - further the agreements made in the Deed of Settlement and to assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi
 - contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement.

In carrying out its role, Te Ohu works with iwi organisations who have received, or who will receive settlement assets under both the Aquaculture and Fisheries Settlements. We also work actively with the wider seafood industry (both fisheries and aquaculture) and participate in industry organisations to protect the interests of iwi and Māori as the beneficiaries of the settlements.

2. Given the potential consequences of the changes being made to the management of foreign charter vessels for iwi interests in commercial fisheries, Te Ohu has assisted in providing technical advice to the Iwi Leaders Group appointed by the Iwi Chairs Forum to engage with Ministers on the implementation of the Government's decisions to require the re-flagging of foreign charter vessels. Our objective in participating in such a process has been to support iwi to ensure that the government's decisions are implemented in a manner that deals with the actual problems addressed through the review of foreign charter vessels, while not undermining

the ability of iwi to profitably harvest their ACE for stocks currently harvested by foreign charter vessels.

3. These comments build on feedback provided earlier in the process, and reflect on the submissions we and others have made on the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill and the draft Risk Assessment framework.

The context: The wider policy and related draft legislation

The direction of the amended Bill, the Draft Risk Assessment Policy and the proposed regulatory changes should form a seamless package of measures that target foreign owned fishing vessels.

4. As you will be aware, Te Ohu has made submissions on both the Fisheries (Foreign Charter Vessels and Other Matters) Bill and the Draft Risk Assessment Policy. As far as the Bill is concerned, we submitted that it was too broad in its application to the whole New Zealand fleet – particularly in relation to the changes it proposed to the registration process, as well as the level of discretion the Chief Executive would have in making decisions about registration, suspension and cancellation. We are pleased that the Select Committee has recommended changes to the Bill that narrow the scope of the new registration provisions (including consideration of additional matters such as employment and vessel safety) along with suspension powers. We also welcome the expanded process to enable vessel operators to appeal suspension decisions.
5. The Select Committee report sets out the Green Party minority view which says that:

“an opportunity was lost by the bill’s observer program emphasis being reduced to a FCV focus....” (p6).

While it was apparent that it was the intention of the Committee to reduce the focus to foreign owned vessels, it seems odd to us that the Bill has not been amended to clarify that the additional functions of observers (i.e. those that extend beyond fisheries matters) apply only to foreign owned vessels. Thus Clause 20 appears inconsistent in its scope with changes to the earlier parts of the Bill, in that it allows the chief executive to place an observer on any vessel to, amongst other things, collect information on employment and other non-fisheries related matters (s223(1)(b) and (c) and s223 (3)). Clearly it is logical to limit the placement of observers with these additional functions to foreign owned vessels – as this is the problem originally identified.

6. Even if the version of the Bill reported back by the Select Committee becomes law – and it is entirely possible, or even likely, that Parliament will make further amendments – s223(1)(b) and (c) and s223(3) will appear in the Act, despite having no apparent connection to its over-arching purpose, as expressed in s8, nor any of its other substantive provisions. Taking a ‘purposive’ approach that the Courts would employ in interpreting s223, we would say it is best understood as meaning that “any vessel” refers only to a medium to high risk foreign owned vessel, as is this is the only category of vessel in respect of which of the Ministry (and Minister) has is empowered to act on information .

7. On the Draft Risk Assessment Policy, we noted that it was intended to support the implementation of the Bill – particularly the registration provisions. We are aware that neither the Iwi Leaders Group nor ourselves have been advised about any changes that will be made to the draft policy to bring it into line with the changes recommended by the Select Committee. We can only assume (and we also recommend) that the policy will be redrafted in line with these changes.
8. As far as the proposed changes to regulations are concerned, the same comments about their scope apply. We recommend that the consultation paper be redrafted to reflect the changes that have been made to the Bill. To the extent that the Ministry wishes to persevere with policy and regulatory changes that impact on all New Zealand-owned vessels, the need for, and intent of, those changes should be the subject of broad consultation with those operators and quota owners. Our more specific comments on the detailed proposals should be read subject to this recommendation.

Specific proposals

Recovery of observer costs for medium and high risk domestic vessels

9. This proposal is intended to address the problem that: “the government is currently able to direct charge FCV operators for observer placement on medium to high risk FCVs. The problem is that under the existing regulatory framework, MPI is unable to direct charge operators of other medium and high risk vessels, i.e. New Zealand owned vessels” (p2). The paper sets out two options:
 - retain the status quo
 - amend the regulations to enable direct charging in a wider range of circumstances (preferred by MPI).
10. The problem as stated is clearly inconsistent with the intent of the recommendations made by the Select Committee on the Bill. The need for this kind of action has not been identified during the policy process – a message that was clearly heard by the Select Committee. For instance there has been no wider consultation with the inshore sector – or indeed any issues identified with domestic vessels that should require this additional power.
11. Te Ohu Kaimoana opposes Option 2, which would broaden the current direct charging regime to all vessels without any clear justification, on the grounds set out above in respect of s223 and its purported extension to New Zealand-owned vessels.
12. Given the Select Committee’s proposed change to the scope of the Bill to focus on foreign owned vessels, we would expect the parties who can be charged to remain aligned with Option 1, the status quo, given that it supports and is consistent with the narrow scope of the revised Bill reported back to Parliament. We recognise it may need a slight wording change to cover “foreign owned” rather than “foreign charter vessels”.
13. Taking the proposals back to basic principles however, we note comments from Seafood New Zealand that the existing regulation that enables direct charging is unlawful in light of the fact that there is no empowering provision for direct charging in the Fisheries Act. This question needs to be clearly addressed.

Direct recovery of observer costs in a wider range of situations

14. As the consultation paper says, the problem is that the Crown is not able to fully recover the costs of observer coverage, including payment of observer costs associated with delays in the vessel leaving port (p3). The number of days that can be charged for, delays in the departure of vessels and the costs incurred to MPI (and then potentially recovered from quota owners) is the only additional situation explored in the paper.
15. The current power to direct charge is limited to actual days that the observer is supervising the fishing activities on the vessel. It is noted that the problem of delays is infrequent but that when it does occur significant costs are incurred. It is not clear from the paper where across the fleet this has been a problem, for instance in the deep-water fleet or the inshore.
16. We assume that this additional power would only be applied in respect of medium to high risk vessels – as a subset of the power to direct charge in the first instance. As set out above – no case has been made for these provisions to be applied across the domestic fleet. If problems with delays in leaving port are associated with certain classes of New Zealand vessel, we consider they should be worked through with the relevant groupings of operators. We agree with Seafood New Zealand’s comment that MPI observer services should work closely with the operators involved to improve performance rates. This could easily be done outside the scope of these regulations which – as we propose – should apply only to medium and high risk foreign owned vessels.

Enable fairer recovery of observer costs

17. The problem stated in the consultation paper is “that a uniform direct charging rate for observer coverage on medium and high risk vessels is not appropriate in all circumstances. The existing prescribed approach to direct charging means that the benefits of greater efficiencies and lower observer costs are not being fully delivered back to industry” (p4). In addition: “if it is agreed that the regulations are amended to enable direct charging for New Zealand-owned vessels, a wider range of vessel operators will be charged the above rate for medium to high risk FCVs (quoted as \$571.65 per day). MPI considers that given the application of the provision to a wider range of vessels, the rate may not be appropriate in all cases”.
18. MPI notes that the cost of observer coverage differs between inshore, highly migratory and deepwater fisheries. Costs of observer coverage in the inshore are generally higher than the deepwater, with the highly migratory sector falling somewhere in between.
19. Consistent with what we have outlined earlier, the focus of the “problem” is foreign owned vessels. We are not aware that any foreign owned vessels are operating in the inshore fleet. However some foreign owned vessels are operating as part of the highly migratory species fleet, although it is our understanding that these vessels vary greatly in their size and range. However, all of those that are foreign owned and over 46m and therefore can only operate outside the 12 mile limit. Clearly the charges will need to be considered in light of the types of vessels being charged, not just the fishery in which they are operating.
20. Subject to clarification that the proposal is focussed on direct charging of medium to high risk foreign-owned vessels – option 3 seems the most flexible, subject to a comprehensive consultation process whenever the fees are proposed and reviewed.

Enable cost recovery for new observer functions

21. The proposed new functions are clearly intended to be included in those that should be able to be carried out by observers. However the issue at hand is when and to whom they will apply, and who should pay.
22. We have already proposed that the new functions should only apply to medium to high risk foreign owned vessels – as signalled by the changes to the registration process and that matters that can be considered in assessing risk. The case for these functions to be applied as part of the routine work of observers across the whole fleet needs to be made. It hasn't been to date.
23. The policy underpinning the Bill is about FCVs – and allegations re employment and safety on those vessels. We oppose the application of these new functions on the wider fleet through the cost recovery process.
24. Clearly there is a case for quota owners to be charged for observer service relating to fisheries management and the particular stocks for which they own quota. However there has been no conversation with the wider fleet or quota owners about the risks associated with vessel safety or employment on domestic owned vessels. Until a case is made through a targeted conversation with the relevant parties, we consider the proposed regulations should provide only for these functions to be applied to medium and high risk foreign owned vessels, and direct charged accordingly.

Policy change as a result of consequential amendments to regulations – restrictions on squid jiggers in the territorial sea

25. The consultation paper states that from 1 May 2016, foreign-owned vessels will operate under exactly the same laws and conditions as other vessels, so there is no reason for the regulations to contain rules for vessels based on ownership. Regulation 29 of the regulations limits the use of foreign-owned squid jiggers in the territorial sea and in a certain area outside Tasman Bay. New Zealand-owned squid jiggers over 46m in length are able to fish in these areas. MPI states that as the status quo would unintentionally remove the restriction for squid jiggers greater than 46m in length from fishing in the territorial sea.
26. It is not clear to us why foreign-owned squid jiggers, but not New Zealand owned squid jiggers are restricted from fishing within the territorial sea or why enabling foreign-owned vessels to fish within the territorial sea would be a problem – particularly if they are:
 - subject to full New Zealand law
 - subject to additional scrutiny under the Bill, including a risk assessment process, when making application for vessel registration.

We assume the if there is a risk identified that needs to be managed – and that risk is greater within the territorial sea – then the chief executive could make it a condition that the vessel only operate outside the territorial sea.

27. We consider that this proposal, along with others contained in this paper, should be reconsidered in light of the changes being made to the Bill – which do distinguish vessels based on ownership.
28. Please contact Kirsty Woods (kirsty.woods@teohu.maori.nz) if you have any questions about this submission.